



UNITED NATIONS  
*Office on Drugs and Crime*



**PRACTICAL GUIDE**  
for competent national authorities  
under article 17 of the United Nations  
Convention against Illicit Traffic  
in Narcotic Drugs and Psychotropic  
Substances of 1988

UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

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**under article 17 of the**  
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**and Psychotropic Substances 1988**



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# **PART ONE**

## **The Competent National Authority**





# I. INTRODUCTION

The present Practical Guide has been prepared pursuant to **Commission on Narcotic Drugs**<sup>1</sup> resolution 44/6 to assist competent national authorities responsible for formulating and/or responding to requests under article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988<sup>2</sup> (the **1988 Convention**).

A series of annexes has been included in the Guide, with the aim of providing step-by-step guidance on practical implementation, legal background and reference material. Among these are a summary of the Guide (annex I), model forms (annexes II, III and IV), a glossary of terminology (annex V) and relevant extracts from the 1988 Convention and its Commentary,<sup>3</sup> as well as from the United Nations Convention on the Law of the Sea of 1982<sup>4</sup> (annexes VI, VII and VIII). In addition, examples of bilateral and multilateral agreements on cooperation in combating illicit drug traffic by sea (annex X), as well as examples of recent judicial decisions (annex XI), have been included as reference material. Annexes X and XI have not been translated.

Under article 17 of the United Nations Convention,<sup>5</sup> parties are required, inter alia, to “cooperate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the **international law of the sea**”. This mandate is consistent with article 108<sup>6</sup> of the United Nations Convention on the Law of the Sea of 1982,<sup>7</sup> which requires States to “cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas

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<sup>1</sup>Terms that appear for the first time in bold are defined in the glossary contained in annex V.

<sup>2</sup>*Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988*, vol. I (United Nations publication, Sales No. E.94.XI.5).

<sup>3</sup>*Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* (United Nations publication, Sales No. E.98.XI.5).

<sup>4</sup>*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3).

<sup>5</sup>The full text of article 17 of the 1988 Convention is reproduced in annex VI.

<sup>6</sup>The full text of article 108 of the Convention on the Law of the Sea is included in annex VIII.

<sup>7</sup>Not all Parties to the 1988 Convention are Parties also to the Convention on the Law of the Sea (1982). Participation in the latter, however, is not required for Parties to fully implement the provisions of article 17 of the 1988 Convention. References to the Convention on the Law of the Sea are included in the Guide as a resource for competent national authorities that may find them useful.

contrary to international conventions". Both Conventions thus recognize the need for effective international cooperation and coordination among States in combating illicit traffic of drugs by sea and obligate parties to take appropriate action.

This need has been repeatedly emphasized by the Commission on Narcotic Drugs and was further stressed by the United Nations General Assembly at its twentieth special session, devoted to countering the world drug problem together, at which resolution S-20/4 C of 10 June 1998 on measures to promote judicial cooperation was adopted. Section VI of that resolution contains specific recommendations to counter illicit traffic of drugs by sea.

Over the last decade, the **United Nations International Drug Control Programme (UNDCP)**<sup>8</sup> has endeavoured to support and foster international cooperation in this respect. The Commission on Narcotic Drugs, by its resolution 9 (XXXVII), requested the Executive Director of the Programme to establish and convene a Working Group on Maritime Cooperation. The Working Group met in Vienna in September 1994 and February 1995 (see E/CN.7/1995/13) and recommended that UNDCP should develop a training guide for law enforcement officers. The recommendation was later endorsed by the Commission in its resolution 8 (XXXVIII) and the Training Guide was prepared and has now been widely disseminated. Relevant extracts from the Guide are reproduced in annex IX for ease of reference.

Subsequent to the publication of the law enforcement Training Guide, UNDCP, in cooperation with interested Governments, convened an informal, open-ended working group on maritime cooperation (Vienna, 5-8 December 2000). Among the objectives of that meeting were to take stock of progress achieved to date, to assess the remaining challenges and to identify further concrete measures to strengthen international cooperation (see UNDCP/2000/MAR.3). In the light of the report of the meeting, the Commission, in its resolution 44/6, requested UNDCP to provide technical assistance and suggested that such assistance might include:

"The development of a user-friendly reference training guide to assist parties making requests and competent authorities who have the responsibility to receive and respond to requests under article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, bearing in mind the need to avoid undue effects on licit trade."

The present Practical Guide has been prepared on the basis of that request.

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<sup>8</sup>Now fully integrated in the United Nations Office on Drugs and Crime (UNODC).

## II. THE 1988 CONVENTION APPROACH TO MARITIME COOPERATION

Because of the physical and technical difficulties inherent in interdiction of illicit maritime trafficking, shipment by sea allows large volumes of drugs to be transported at less risk for the traffickers. Drug traffickers have long resorted to the use of private and commercial vessels. In fact, sea-going craft appear to be the preferred means for illicit traffic in cocaine and are also widely used for cannabis.

Maritime trafficking involves two distinct modus operandi: traffic in containers and traffic inside vessels built and used to hide drugs. In the first case, the owner, captain and crew of the vessel are generally not aware of the trafficking, while in the second case they actively participate in it.

Measures to combat these types of trafficking differ. In the case of vessels carrying containers, most control measures can and must (save in highly exceptional circumstances) be taken in ports, since inspection of cargo and containers at sea is not generally feasible. In the second case, the traffickers may avoid established ports, requiring law enforcement measures to be carried out at sea. In this context, considerations of geography and of law enforcement practicality may result in the need to carry out counter-operations in maritime zones beyond the **territorial sea**.

In spite of the obvious impact of drug smuggling by sea, international law in the past offered few specific provisions to regulate its suppression. Consequently, for the lawful interdiction of drug traffickers at sea beyond the territorial sea, States have been obliged to rely on **hot pursuit** and general criminal law enforcement concepts such as **constructive presence**, which have been codified in article 111 of the Convention on the Law of the Sea and before that in article 23 of the 1958 Geneva Convention on the High Seas.

It was only with the adoption of the 1988 Convention, and in particular article 17 thereof, that real advances were made in providing guidelines for international cooperation in the interdiction of vessels

trafficking outside the territorial sea of a State. The innovative and complex provisions of article 17 are analysed in detail in the **Commentary** to the 1988 Convention, extracts of which are provided in annex VII to this Guide. The following paragraphs present a broad overview of the framework for cooperation that article 17 has put in place.

Article 17 expands upon the obligation under article 108 of the Convention on the Law of the Sea to cooperate, through the establishment of a framework within which third party States suspecting trafficking activity may seek the authorization of the **flag State** to undertake interdiction efforts of its vessels located in maritime zones beyond the territorial sea. Specifically, a framework has been established through which third party States suspecting trafficking activity may seek the authorization of the flag State to undertake interdiction efforts.

Unlike paragraph 2 of article 108 of the Convention on the Law of the Sea, article 17 also foresees that cooperation may be requested with respect to the interdiction of vessels without nationality.<sup>9</sup> Nevertheless, the greater part of article 17 is devoted to setting forth procedures and practices to facilitate law enforcement action by one State against the vessel of another State beyond the limits of the territorial sea. In this respect, paragraphs 3 and 4 contain key provisions:

“3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

“4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter alia:

- (a) Board the vessel;
- (b) Search the vessel;
- (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.”

In this way, a party that suspects that a foreign vessel is engaged in drug trafficking beyond the limits of its territorial sea may request

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<sup>9</sup>It should be noted that the Convention on the Law of the Sea does not provide for a general right to visit, board and inspect a ship without nationality in its article 110.

and obtain the authorization of the flag State to take interdiction action. It should be stressed that any enforcement action against the vessel in question depends on the express prior consent of the flag State, which can be granted subject to conditions, including those relating to responsibility<sup>10</sup> (article 17, para. 6).

Other points to note about the article 17 scheme for the purposes of the present Guide, include the following:

(a) Each party must respond expeditiously to requests for authorization and designate an authority to receive and respond to requests;

(b) When action is authorized, the flag State must be promptly informed of the results;

(c) Enforcement action can only be undertaken by **warships** or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect;

(d) It defines a limited set of situations in which a coastal State has rights beyond its territorial sea. Importantly, as noted above, this includes hot pursuit, as well as the exercise of jurisdiction in the contiguous zone.

However, recourse to the measures provided for in article 17 will not be appropriate under all circumstances. The size of the vessel, the nature of the suspected activity and the practicality of simply conducting a search at the next port of call are among the factors that may speak against making or granting a request for permission to act. Furthermore, in some circumstances, resort to alternative law enforcement strategies, such as **controlled delivery**, may be indicated. It is for such reasons, among others, that article 17 provides a broad and flexible framework for decision-making. In fact, article 17 lays down a system that affords the maximum opportunity for parties to obtain enforcement jurisdiction in respect of specific instances of suspected illicit traffic by sea.

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<sup>10</sup>In this context, responsibility may extend not only to the safety and integrity of persons and property, but also to possible damages to the vessel and/or its legitimate cargo.



### III. ESTABLISHING THE APPROPRIATE DOMESTIC LEGISLATIVE FRAMEWORK

In order to establish terms of reference for action under article 17, parties to the 1988 Convention must, as provided in article 3,<sup>11</sup> adopt domestic legislation identifying specific criminal offences against which it will act under the Convention. Article 3 offers specific examples of criminal activity that must fall within the scope of such legislation.

Once such offences are defined in domestic legislation, article 4 of the 1988 Convention requires parties to take measures to establish jurisdiction where the commission of such offences is observed in its territory or on board a vessel flying its flag at the time the offence is committed.

Article 4, however, is permissive when dealing with the establishment of jurisdiction over vessels flying the flag of another party, leaving whether or not to take action to the discretion of the parties (art. 4, para. 1 (b) (ii)).

Furthermore, article 4 does not touch upon establishing jurisdiction in respect of vessels without nationality or those assimilated to vessels without nationality under international law. Article 110 of the Convention on the Law of the Sea does not address this issue either.

Nevertheless, since 1988, expert opinion has come to accept that an effective legislative scheme should include appropriate assertions of jurisdiction in all three of the above categories. Article 3 of the Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, concluded under the auspices of the Council of Europe in 1995, requires parties to establish jurisdiction in all three instances.

It is strongly recommended that this level of international best practice be achieved by States, despite the absence of a formal legal

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<sup>11</sup>The full text of article 3 of the 1988 Convention is included in annex VI.

obligation either in the 1988 Convention or in the Convention on the Law of the Sea to do so.

As emphasized in the Commentary to the 1988 Convention, the enactment of adequate implementing legislation is essential to the proper functioning of the regime of cooperation provided by article 17.

States conducting such reviews for the first time have often found that they already extend the obligations of their criminal justice systems to ships flying their flag. On the other hand, specific legislative assertions of jurisdiction over offences committed on vessels without nationality or on foreign vessels on the high seas are relatively uncommon and additional legislative action is usually necessary.

Should a review of domestic law reveal inadequacies that can only or would best be met by new legislation, parties may deem it useful to allow for the possibility of entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of article 17 (para. 9). Yet others may even seek to ensure that their domestic law extends to action taken with the consent of a non-party, or otherwise outside the context of the 1988 Convention, as permitted by customary international law. All of these implementation options would be acceptable.

Critical though it is to ensure that the appropriate penal provisions apply to trafficking by sea, other elements must also be considered so that cooperative arrangements can be brought effectively into operation. It is vital, for example, that the law enforcement officers acting on a foreign vessel with the authorization of the flag State are provided with all necessary powers and protections. In principle, they should have at least the same powers and protection as if the offence had occurred on national territory or on a vessel flying the flag of the intervening State. By way of illustration, the UNDCP model drug abuse bill of 2000<sup>12</sup> (under the common law system) addresses, *inter alia*:

- (a) The power to stop, board, divert and detain the vessel;
- (b) The power to search the vessel, its cargo and persons on board and to otherwise obtain information;
- (c) Powers in respect of suspected offences including those of arrest and seizure of evidence;
- (d) The provision of assistance to authorized officials;
- (e) The use of reasonable force;

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<sup>12</sup>The model bill can be found at [www.unodc.org](http://www.unodc.org).

(f) The production of evidence by an official of his or her authority;

(g) Appropriate protection of law enforcement officials from criminal and civil liability;

(h) The extension of associated criminal offences, such as the obstruction of law enforcement officers in the course of their duty, to events taking place on board the vessel.

Care should also be taken to ensure that domestic powers to seize and confiscate drugs, instrumentalities and proceeds, as envisaged in article 5 of the 1988 Convention, also apply in the circumstances of illicit traffic of drugs by sea.

The United Nations Office on Drugs and Crime maintains records of national legislation establishing maritime jurisdiction in drug matters, as provided by Governments. Those charged with reviewing the adequacy of the national legal framework might wish to consult this valuable reference in the discharge of their mandate.





## IV. THE COMPETENT NATIONAL AUTHORITY

### **Establishment of the competent national authority**

#### ***The 1988 Convention***

Paragraph 7 of article 17 of the 1988 Convention requires parties to “respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3”. To that end, each party shall, at the time of accession to the Convention, create or designate an authority or authorities to receive and respond to such requests. It is suggested that the same competent authority should be charged with responsibility for requests for assistance in respect of vessels flying its flag and vessels without nationality, as envisaged in paragraph 2 of article 17. A competent national authority designated under article 17 has a vital role to play in the implementation of maritime law enforcement measures and in fostering cooperation to the fullest extent possible to suppress illicit traffic by sea. In recognition of the pivotal role to be played by competent national authorities, article 17 in its paragraph 7 requires the Secretary-General of the United Nations to notify all parties to the Convention of a State’s designation of such an authority within one month of the fact.

Some States establish their competent national authority through legislation, others through administrative means. Countries that have not yet established such an authority should consider whether legislation is necessary, but should also consider establishing it through administrative means where this would be legally effective.

#### ***Location of the competent national authority***

Concerning the technical terms of reference for competent national authorities, the 1988 Convention provides very limited guidance on issues such as structure, channels of communication or even location of the authority. The Convention also says very little on policy and procedure regarding decision-making on incoming or outgoing requests.

However, experience in different parts of the world does provide enough criteria to set up minimum parameters of best practice.

The 1988 Convention remains silent on, and practice by parties has been inconsistent, when deciding the best location of the competent national authority within government structures. That said, the locations most frequently selected to date have been the Ministry of Justice, the Ministry of Internal Affairs and the Ministry of Foreign Affairs. Others range from customs, coastguard and other operational services, to maritime and port authorities and organs with responsibility for transportation, drugs and even health matters.

While it is for each State to determine the most appropriate venue for its designated authority, there are various factors that warrant consideration in making such a decision. An important initial indication is whether the authority in question will be more likely to act as a requested or a requesting agency. If it can be envisaged that the designated authority will receive requests for authorization to carry out interdiction operations against foreign vessels in maritime zones beyond the territorial sea, there is an obvious need for such an authority to be able to liaise closely with the law enforcement authorities in question.

All States, including landlocked ones, are potential recipients of requests for authorization to board their flag vessels in the context of article 17. In this regard, the following factors, among others, may prove to be relevant in determining the appropriate location for the designated authority:

- (a) Ease of access to the national shipping registry in order to provide confirmation of registry;
- (b) Existence of appropriate communication channels;
- (c) Existence of arrangements for the conduct of government business beyond normal office hours and preferably on a 24-hour, 7-day-a-week basis;
- (d) Ready availability of legal advice (including advice on international law of the sea);
- (e) Availability of foreign language skills;
- (f) Ease of coordination with other relevant governmental agencies and departments.

The establishment of an effective competent national authority need not involve the creation of a large and expensive bureaucracy. Insofar as staffing is concerned, much will depend on the anticipated volume and frequency of requests. In some instances, it may suffice to add this responsibility to an existing office within an established agency

or department. Officials in such offices will, of course, need to be familiar with applicable treaties, domestic law requirements, national policy and procedures to discharge these responsibilities effectively and when required. They will also need to be afforded sufficient time and opportunity to establish and maintain links with other relevant agencies and departments within the national structure that have responsibility for the decision-making process or a practical involvement in the provision of information relevant to the process. Wherever possible, staff should also be encouraged to develop personal contacts with their counterparts in other national authorities especially in those countries most likely, as a matter of practice, to make requests. Opportunities to visit, correspondence, exchanges and telephone contacts all serve to open communication channels and to develop familiarity and mutual trust.

As stressed at an earlier stage of the present Guide, article 17, paragraph 7, requires that the decision to designate an authority be communicated, through the Secretary-General of the United Nations, to all other parties to the Convention. Similarly, it is imperative that appropriate steps are taken to ensure the continued updating of the contact information contained in that designation.

A directory of competent national authorities, including essential contact information (addresses, telephone and facsimile numbers and hours of operation) is maintained and disseminated on a periodic basis by the United Nations Office on Drugs and Crime. The Commission on Narcotic Drugs, in its resolution 43/5, urged parties to regularly review and update that basic but vital information. Failure to do so may seriously undermine efforts to combat illicit traffic by sea.

### ***Foundation in domestic law***

Experience in the implementation of article 17 suggests that it is important to establish a sound foundation in domestic law for the key activities to be carried out by or through the competent national authority. Of particular significance is the express provision of the power to authorize another party to the Convention to take action against vessels flying its flag and the capability to exercise such power. The converse situation is also important, namely, ensuring appropriate handling of the initiation of requests for authorization to take action against foreign vessels and compliance with any conditions and limitations that may have been imposed. Provisions relating to proof of receipt of authorization from the foreign State in question are often included in implementing legislation. A range of other matters may be deserving of attention given the nature and peculiarities of the legal system in question, relevant policy sensitivities and similar matters.

## **The competent national authority in practice**

Under paragraph 7 of article 17, the competent national authority is responsible for responding expeditiously to requests from other parties to determine whether a vessel that is flying its flag is entitled to do so and to requests for authorization to take appropriate measures in regard to that vessel. In most instances, it is highly desirable that the same authority is also charged with formulating and sending out the same type of requests to other parties to the 1988 Convention. Consequently, the technical role of the competent national authority should be that of the designated channel for the receipt and emission of requests relating to article 17. The substantive role of an effective authority is to ensure the speedy and efficient consideration and execution of incoming requests and to oversee the quality and effectiveness of outgoing requests.

In addition to the above functions, the competent national authority is very well placed to facilitate international cooperation through the provision of information and advice to its counterparts in other States. The ability to provide advice on the legal and other requirements and constraints relevant to the making of requests can substantially reduce the problems encountered when requests are in fact received. It is equally important for the competent national authority in States capable of conducting maritime interdiction operations beyond their territorial sea to be able to advise relevant domestic authorities concerning the requirements for authorization requests being submitted to foreign States.

The competent national authority is also responsible for outgoing requests to other States. It should have the capacity to receive requests from relevant domestic authorities and be in a position to assist in transmission to foreign States. This requires that relevant authorities within the State, such as customs, the police and other law enforcement agencies, know of the existence, role and contact particulars for the authority.

### **Receiving requests**

Incoming requests will constitute the primary source of work in most countries, the competent national authority must therefore have the capacity to receive and act upon them. Insofar as these relate to confirmation of registry of vessels, it requires the ability to check this matter as soon as possible. To that end, parties should maintain a register on vessels entitled to fly its flag and the national authority should have constant access to that register. It should be noted that the Convention

on the Law of the Sea under its article 94 in fact requires parties to maintain a register with respect to all ships, except those which are excluded from generally accepted international regulations on account of their small size. As recommended by the Working Group on Maritime Cooperation, parties should make every effort to maintain a register of all ships in order to facilitate the effective exercise of flag State jurisdiction and to computerize detailed data on vessels in their registry in order to facilitate identification (see E/CN.7/1995/13, paras. 1 and 5).

As has been mentioned with some frequency, it is of the utmost importance for effective international cooperation that requests made pursuant to article 17 are responded to as soon as possible. This factor should be a constant point of reference both in the formulation of national policy and in the procedures that govern its implementation. The guidance that follows seeks, among other matters, to ensure that the possibilities for swift action are maximized in practice.

#### *Policy and procedure governing receipt of requests*

Article 17 is broadly silent as to the procedural and general rules that should apply to requests. Consequently, parties are at liberty to decide on a range of matters from the content of such a request to the manner and language in which it should be transmitted. In these circumstances, there is an advantage to harmonization of approach if the goal of effective cooperation is not to be inadvertently frustrated by the emergence of conflicting national practices and expectations.

It was for that reason, among others, that in 1995 the Working Group on Maritime Cooperation suggested a model format to standardize the information that each request should contain, while stressing that the flag State remained at liberty to request additional information. In the view of the Working Group, requests should contain the following information (see E/CN.7/1995/13, para. 3):

- “1. Identification of the requesting party, including the authority issuing the request and the agency charged with taking measures;
2. Vessel description, including name, flag and port of registration and any other information regarding the vessel;
3. Known details concerning voyage and crew;
4. Sighting information and weather report;
5. Reason for request (articulation of the circumstances supporting the intervention);
6. Intended action;

7. Any other relevant information;
8. Action requested by the intervening State (including confirmation of vessel registry and permission to board and search, if applicable), together with any time limits.”

The present Guide has sought to refine and expand upon that approach in the light of State practice. To that end, three model forms have been developed for possible use by competent national authorities. These are a model form of request (see annex II), a model form of response (see annex III) and a model form of report on action taken (see annex IV).

All such important communications should be made in writing. Modern means of telecommunications, such as facsimile and e-mail transmission, may be used. While exclusively oral requests and responses are not foreseen, that is not intended to indicate that all oral communication should be prohibited.

Experience demonstrates that telephone contact between the competent authorities involved can play a vital role. States may find it advantageous to identify an initial point of contact other than the national authority to assist in preliminary transmission of information that will ultimately be used in a formal request. In such circumstances, valuable advice can be provided on the preparation of the request thus reducing further the possibility of problems arising when it is transmitted for formal consideration by the **requested State**. Among the issues that should be taken into account are the need to protect confidential information or sources of operational intelligence that have contributed to the conclusion that there are reasonable grounds to suspect that the vessel in question is engaged in illicit trafficking. Similarly, maintaining a dialogue between the relevant competent national authorities in the period between receipt of and the response to a request can contribute to avoiding misunderstandings and can help to inform operational decision-making in the requesting country. Consequently, internal policy and procedure should permit and facilitate such contacts.

The present Guide does not, however, adopt any position on whether or not States should impose any requirements as to the language in which the request for action will be formulated. Practice to date has placed emphasis on flexibility and practicality in that respect.

As stressed in the official Commentary to the 1988 Convention (see para. 17.33), each State “will also need to have in place a settled policy framework within which to determine whether or not to respond positively to the request and, if so, subject to what conditions”.

Although it is not possible to foresee all relevant circumstances that may arise in practice, the advance identification of constraints on authorizations, the formulation of guidelines governing matters of particular sensitivity and the development of checklists of relevant factors, will all be conducive to swift decision-making.

While the range of factors that could be regarded as relevant is, in theory, unlimited, it is important that a full understanding of the nature and purpose of article 17 supports the policy formulation process. Careful consideration of the text reproduced in annex VII would be of value in that regard.

For instance, while factors such as the location of the vessel at the time the request is made and evidence as to the anticipated destination of the suspected drugs on board may be highly relevant to whether or not authorization is granted, no such requirement is set under article 17.

It would also seem helpful for information on national policy, such as on prerequisites for consent to board and search, to be shared with other competent national authorities. Such information would both assist foreign authorities in the formulation of requests for authorization and help avoid the transmission of requests that could be refused under that national policy.

#### *Decision-making structure*

Critical to the ability of the competent national authority to facilitate international cooperation is its capacity to make the necessary internal decisions on whether to respond in an affirmative or negative manner to a foreign request. Here again, article 17 leaves it to each party to determine the best means for arriving at such a determination.

In this regard, practice has also differed widely. In some instances, the decision lies with the designated official or officials within the competent authority itself, an option with obvious advantages. In other countries, the decision is made after approval from, or prior consultation with, more than one governmental department (including, most frequently, the Ministry of Foreign Affairs and/or the Ministry of Justice). In other cases, a designated minister or ministers provide the final authorization at a high political level.

In selecting the most appropriate procedure, however, States should consider the practical difficulties posed by the various options. In particular, it should be borne in mind that article 17 requests are often highly time-sensitive. Normal office hours, weekends or public holidays

do not apply to the law enforcement agencies charged with suppressing drug trafficking by sea. Consequently, the various options should be assessed, at least in part, against that imperative. The use of highly complex systems involving multiple agencies or departments or procedures that require quick access to ministers, may well not enable swift decision-making.

Whatever system for authorization is decided upon, the competent national authority must have in place clear procedures and guidelines that permit it to act promptly and efficiently. In particular, serious consideration needs to be given to the designation of deputies for those involved in the decision-making process, in order to ensure that there is always someone available to give the necessary authorization or to provide the required input.

#### *Issues of nationality and registry*

It should be noted that the Convention on the Law of the Sea requires a State to fix the conditions that govern the granting of nationality to ships, for the registration of ships in its territory and for the right to fly its flag (article 91). Ships must sail under the flag of one State only (article 92). Ships have the nationality of the State whose flag they are entitled to fly and the term “flag State” generally denotes the State whose nationality a ship has.

The granting of nationality is not a mere administrative formality, but implies acceptance by a State of the responsibility to exercise control over a ship. Article 94 of the Convention on the Law of the Sea sets out the duties of the flag State and specifies, inter alia, that every State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. A State must maintain a register of ships containing the name and particulars of ships flying its flag except those that are excluded from generally accepted international regulations on account of their small size. The Convention does not elaborate on the conditions governing registration. However, one can deduce from articles 91 and 92 that double nationality and therefore double registration is not permitted, except in exceptional cases expressly provided for by international treaties. Guidance regarding the size of fishing vessels excluded from the scope of application of international regulations is provided in the 1993 Protocol to the Torremolinos International Convention for the Safety of Fishing Vessels, which applies to fishing vessels more than 24 metres in length.

Article 17, paragraph 3, of the 1988 Convention expresses the concept of confirmation of the registry of suspected vessels as follows:

“3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.”

The practice of some States is to place considerable emphasis on the competent national authority establishing appropriate links to the national ship registry. In this regard, the national authority should be able to check the registration of the suspect vessels and, to that end, States parties should maintain a registry containing information on vessels flying their flag and, as recommended by the Working Group on Maritime Cooperation in 1995, make every effort to computerize a detailed set of data on vessels in their registry in order to facilitate identification of vessels entitled to fly their flag (E/CN.7/1995/13, para. 5). In addition, it may prove helpful for the national authority to have in place procedures for establishing whether other law enforcement operations are under way in connection with the same vessel.

At present, many national authorities lack online access to their national register of shipping and often find that checking the relevant information, especially outside of normal office hours, is difficult and time-consuming. As a result, registry checks are often a significant cause of delay. Here, however, it is important to remember that the decision as to whether or not to authorize actions by a **requesting State** will depend not only on registration of the vessel in question but also on an assessment of political, legal, economic and other factors.

Indeed, experience demonstrates that the process of checking the registry should, to the extent possible, be separated from the flag State authorization procedures. In instances where the policy decision on whether or not to provide authorization is taken in advance of the completion of the registry check, consideration should be given to the timely intimation of that decision to the requesting country. It is important to note that a practice has emerged of providing authorization on the operational assumption of a positive outcome to the registry check. This is sometimes known as **provisional flag State authorization or presumptive flag State authority** and seems to fit in the context of the Convention on the Law of the Sea, under which the flag State is identified on the basis of the flag the ship is flying and has jurisdiction and control over ships flying its flag.

As explained above, this practice is based on the international law of the sea, namely the rule that the flag the ship flies is the symbol of

its nationality, with registration constituting a procedure by which nationality is conferred on a ship. A vessel that makes a false claim to registry is regarded as a vessel without nationality. This is reflected, in part, by article 92, paragraph 2, of the Convention on the Law of the Sea, which reads as follows:

“2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.”

It follows that if a vessel holds itself out to possess the nationality of the requested State when it is not entitled to do so, it can be properly classified as being without nationality in that sense. This in turn gives rise to certain independent rights of action on the part of other States under the international law of the sea (see the section below on vessels without nationality). In this regard, it should be recalled that, in its resolution 43/5 adopted in March 2000, the Commission on Narcotic Drugs noted the possibility of captains of vessels engaging in such deceptive practices and emphasized this particular rule of the international law of the sea.

A further factor that may be of relevance in this context is that it is not uncommon for States to exempt particular categories of small vessels, such as yachts and other pleasure craft, from the domestic law requirements of registration. It follows that certain vessels other than those listed in the national register may be legally entitled to fly the flag of the requested country and to nationality protection.

In such cases, the only requirement under article 91, paragraph 2, of the Convention on the Law of the Sea would be that the State that has granted the right to fly its flag to a ship must issue the said ship with documents to that effect.<sup>13</sup> Under these circumstances, the inspection of the ship's documents might prove to be the only way to ascertain the validity of a claim to nationality. The presumption of flag State authority giving rise to a provisional authorization may be a useful way of dealing with situations of this kind.

While the granting of permission to board and search on the basis of provisional authorization or presumptive flag State authority can provide a useful means for expediting the authorization process, it does not negate the need for the actual registry check and the subsequent communication of the results to the intervening State. While this is so in all cases, it is of particular importance where permission has been

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<sup>13</sup>This is a specific requirement concerning the **nationality of ships** to which no exemptions are made for yachts and other small vessels.

granted subject to conditions. Upon receipt of the clarification on the registry and related matters it will be clear to the requesting State if such conditions continue to be valid. In instances where the vessel is assimilated in international law to a vessel without nationality, such conditions would cease to be applicable and the intervening State will be free to proceed on the basis of its independent right of action, provided national law permits.

### *Decision-making considerations*

Under paragraph 4 of article 17 of the 1988 Convention:

“... the flag State may authorize the requesting State to, inter alia:

- (a) Board the vessel;
- (b) Search the vessel;
- (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.”

The Convention does not create any obligation to respond favourably to a request and whether or not to do so is therefore a matter to be determined in each particular case by the authorities of the flag State. There is, however, a clear provision in article 17, paragraph 1, to cooperate to the fullest extent possible to suppress illicit traffic by sea.

The requested State is not restricted as to the range of considerations that it may regard as relevant in reaching its decision. Paragraph 5 of article 17 does, however, provide a non-exhaustive list:

“5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.”

### *Responding to requests*

The competent national authority is responsible, directly or indirectly, for the speedy and proper consideration of and response to incoming requests to board and search its flag vessels, and, if appropriate, to take necessary action with respect to the vessel, persons and cargo on board. This may include the formulation of conditions to which any authorization is to be subject. If the power of determination in these vital matters does not rest with the national authority, it should have the responsibility to initiate the necessary decision-making process. If the

authorization to board, search and take action against flag vessels requires the approval of more than one governmental department (for example, the Ministry of Foreign Affairs and the Ministry of Justice), there should be an established procedure for the authority to obtain the necessary approvals in an expeditious manner. One way to do this would be for each ministry involved to establish a focal point. A further important element of this coordination function is to ascertain whether any other law enforcement operation, including a controlled delivery, is already under way in connection with the same vessel.

However it may be organized, an appropriate administrative infrastructure should be established to facilitate the discharge of the responsibilities of the competent national authority in an effective and expeditious manner. Of critical importance is the availability of modern channels of communication such as telephone, facsimile and, whenever possible, e-mail links. In the maritime environment, time is of the essence. Experience has shown that reliance on the slow moving diplomatic channel has proved to be operationally difficult. As the Commentary to article 17, paragraph 7, of the 1988 Convention (para. 17.21) notes:

“The text assumes direct communication with the designated authority rather than any indirect approach such as one made via the diplomatic channel; such direct communication is highly desirable given the urgency of such requests.”

Since the entry into force of the 1988 Convention, various resolutions of the Commission on Narcotic Drugs have emphasized the need for speedy procedures. In its resolution S-20/4 C, the General Assembly recommended that States should review communication channels and procedures between competent authorities to facilitate coordination and cooperation with the objective of ensuring rapid responses and decisions (para. 6 (b)).

Failure to authorize interdiction expeditiously may well result in the loss of the opportunity to take action against drug traffickers at sea. For example, weather conditions might deteriorate, the vessel could reach the territorial sea of a third State, or the traffickers may destroy the illicit cargo and other proof of their involvement in illicit trafficking. Action on the part of the requested State will be needed in a matter of hours rather than days. For this reason, for example, article 7 of the Council of Europe agreement implementing article 17 of the 1988 Convention calls for the decision as to authorization to be communicated “... wherever practicable, within four hours of receipt of the request”. In the associated official explanatory report it is noted that this time limit “... should be regarded as the latest time for communication of the decision in most cases” under the agreement. It follows

from the above that best practice requires that the competent national authority should be in a position to receive and respond to requests on a 24-hour, 7-day-a-week basis.

#### *Favourable reply to requests*

Where a competent authority decides to respond favourably to a request, it is entitled to subject that authorization to conditions to be satisfied by the intervening State. This is explicitly provided for in paragraph 6 of article 17, which states:

“6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.”

The Commentary to article 17 (see para. 17.20) notes that the reference to responsibility in the above provision is meant to encompass responsibility or liability “for damage to the vessel or its cargo or to any third party, or injury to the crew, which may be caused in the course of, or as a result of, the boarding or search of the vessel or the taking of further appropriate action.”

Conditions of other kinds may, of course, also be specified. In practice, conditions have, for instance, included:

- (a) An obligation for the intervening State to consult the flag State before the vessel is taken into the jurisdiction of a third State;
- (b) The imposition of restrictions or standards relating to the resort to the use of force in the action in contemplation;
- (c) The granting of authority without prejudice to the right of the flag State to exercise its jurisdiction over any offences that may have been committed by the owners of the vessel or by those on board.

By way of contrast, in the practice of States the specification of conditions as to cost is relatively infrequent. However, the general principle has developed that the costs of such operations are normally borne by the intervening State. As the Working Group on Maritime Cooperation noted in 1995 (see E/CN.7/1995/13, para. 19): “Unless otherwise agreed, costs related to the boarding exercise should be borne by the intervening State.” This section of the present Guide has been prepared on that basis.

Where conditions reserve to the flag State the right to determine what action may be taken after the results of the boarding and search

of the vessel are known, the authorizing authority should ensure that duly empowered officials are available to provide prompt instructions.

While parties are free to formulate such conditions as they require, it is to be noted that paragraph 6 of article 17 requires that they should be mutually agreed upon. Thus, they should be imposed only to the extent that they are regarded as strictly necessary.

#### *Refusal of requests*

As noted earlier, the flag State is under no legal obligation to comply with a request for authorization to board and search one of its vessels. However, the obligation to “respond expeditiously to a request” also extends to situations in which the outcome of the internal decision-making process is a negative one. Expeditious response to the requesting State of the decision to refuse authorization will permit it to take the necessary steps to discontinue what may be a complex and costly maritime law enforcement operation.

There is no obligation specified in article 17 to provide reasons for any negative decision. However, as the Commentary to the 1988 Convention notes (see para. 17.37) “it would be within the spirit of the Convention to indicate, in appropriate cases, the basis for the decision taken”. For this reason, the model form of response contained in annex III provides the opportunity to furnish information on this matter and parties are urged to make use of this possibility in appropriate cases.

#### *Follow-up*

Pursuant to paragraph 8 of article 17 “A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.”

The prompt provision of meaningful feedback to the competent national authority of the flag State will help to foster and consolidate the spirit of mutual trust and confidence that is critical to effective international cooperation. The swift submission of a follow-up report (a model form for which is contained in annex IV) is even more important when the flag State has reserved the right to formulate final instructions in the light of the outcome of the intervention. As the Working Group on Maritime Cooperation observed in 1995 (see E/CN.7/1995/13, para. 18):

“... the two States should agree on the appropriate measures to be taken, with due regard to the principle of the **exclusive jurisdiction** of the flag State as recognized in international law. The flag State may explicitly waive the exercise of its jurisdiction in

favour of the intervening State, on the basis of evidence gathered during the boarding and search.”

If the flag State decides to exercise its jurisdiction in respect of the vessel and those on board, there will be a continuing need for dialogue with the intervening State. Extensive coordination with other relevant national authorities with responsibility for drug law enforcement, prosecutions and similar matters will be necessary to ensure a seamless handover of jurisdiction and responsibility.

When exclusive flag State jurisdiction is waived in order to permit, inter alia, the commencement of legal proceedings by and under the domestic law of the intervening State, the role of the designated authority of the flag State will normally be less extensive and time-sensitive.

### **Outgoing requests**

#### *The decision to formulate a request*

The competent national authority should ensure that requests for article 17 authorization are only formulated and transmitted in appropriate cases. To that end, arrangements should be in place to subject the circumstances of each case to close scrutiny. The characteristics of the vessel and the nature of the voyage should be taken into consideration. For example, in many instances, action against vessels providing a scheduled passenger service or large vessels involved in commercial trade could be more effectively taken by the authorities in the next port of call. It should also be recalled in this context that under the terms of paragraph 5 of article 17, where action is taken, the parties concerned (including the intervening State) “shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial or legal interests of the flag State or any other interested State”. The use of alternative law enforcement strategies, including controlled delivery, should also be explored.

The officials of the competent national authority also need to be satisfied that all of the relevant treaty requirements have been or will be met. For example, under paragraph 3 of article 17 there must be “reasonable grounds to suspect” that the vessel is engaged in illicit traffic. Similarly, pursuant to paragraph 10, law enforcement action “shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”

Finally, before transmitting a request, the competent national authority should satisfy itself that the range of actions for which

authorization is to be sought are adequately provided for in domestic law (see chapter III above).

#### *Content and transmission of the request*

The request, once formulated, needs to be transmitted to the competent authority of the flag State. It needs to contain sufficient clearly stated information to enable it to be considered and responded to expeditiously. While the contents of such requests are not specified in article 17, the model form reproduced in annex II seeks to reflect best practice.

However, it would be advantageous whenever possible to establish telephone or other similar real-time contact with the designated authority of the requested State in order to ascertain, in advance, whether the proposed request, in form and content, is sufficient and appropriate for that State. Furthermore, an effective competent national authority will not just transmit the request and await a reply. It will maintain, as appropriate, a dialogue with its counterparts in the requested country in order to assist with problems or issues that arise and to monitor progress. As discussed earlier, States may find it advantageous to identify an initial point of contact other than the national authority to assist in preliminary transmission of information that will ultimately be used in a formal request.

#### *Coordination and follow-up*

As noted at an earlier stage of the present Guide, the involvement of the competent national authority does not cease upon the receipt of an authorization from the flag State. Under paragraph 8 of article 17, it must promptly inform the flag State of the results of any action taken. A model form for this purpose is reproduced in annex IV.

At the domestic level, the national authority must be in a position to assess the authorization that has been received and, in particular, the acceptability of any conditions that may have been imposed. It must also be in a position to inform the relevant operational authorities of any such conditions and limitations (with which, under the 1988 Convention, they must comply).

### ***Special considerations: vessels without nationality and own-flag vessels***

#### *Vessels without nationality*

While the vast majority of cases that arise in practice relate to requests to take law enforcement action against the vessels of other parties to

the 1988 Convention, article 17, paragraph 2, also envisages the provision of cooperation in two other circumstances as follows:

“2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.”

It is generally accepted that the above formulation embraces both own-flag vessels, and vessels without nationality or those assimilated to vessels without nationality in international law. In respect of this latter category, each country has certain unilateral rights to take action, consistent with the international law of the sea. Pursuant to article 110 of the United Nations Convention on the Law of the Sea, a warship has the right to board a foreign ship it encounters on the high seas if there is reasonable ground to suspect that, inter alia, the ship is without nationality. In such cases, the warship may proceed to verify the ship's right to fly its flag. To that end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

In this context, article 17 of the 1988 Convention foresees that a State that has reasonable grounds to suspect that a vessel without nationality is engaged in illicit traffic may not itself, for reasons such as geography or law enforcement practicality, be in a position to prevent the vessel's use for that purpose. In such circumstances, it may request the assistance of another party to the Convention. Any such request must use the channels of communication established between article 17 competent national authorities.

The position of a State faced with such a request is set out in the Commentary to article 17 of the 1988 Convention (see para. 17.47), as follows:

“It is for the requested Party alone to determine what actions are appropriate. The obligation of the requested State, however, is to provide assistance within the means available to it and ... it may properly have regard to economic factors, including the expected costs of undertaking any relevant law enforcement action, in making that determination. In certain cases, it may be considered appropriate to make any positive response to a request contingent upon agreement as to the apportionment of such costs.”

### *Own-flag vessels*

Article 17, paragraph 2, also envisages that a flag State may seek the assistance of other parties to the Convention in suppressing the use of one of its own vessels that is reasonably suspected of being engaged in illicit traffic. This provision is based on article 108, paragraph 2 of the Convention on the Law of the Sea, which maintains the principle that only the flag State is entitled to act against a ship flying its flag that is engaged in illicit traffic, except where it requests the assistance of another State. Such requests are not likely to arise with any great frequency.

In most such instances, the request will encompass some or all of the measures provided for in article 17, paragraph 4. However, assistance can also properly be sought for a wide range of other purposes, including, for example, the provision of help in locating the vessel in question, engaging in surveillance of the vessel and the subsequent transfer of surveillance to a government vessel of the flag State, or permitting the presence of enforcement personnel of the flag State on board government vessels of the requested State.

It would be prudent for all such wider requests to be made through the network of article 17 competent national authorities. In formulating and responding to such requests, it will be necessary to bear in mind the following words of clarification contained in the Commentary to the 1988 Convention (see para. 17.44):

“It is implicit in the nature of the process ... that the flag State may subject its request for assistance to such conditions and limitations as it sees fit. The requested party may similarly wish to articulate the conditions upon which it would be prepared to respond positively.”

In this context, international practice is neither fully developed nor entirely uniform. It would therefore be of value for the appropriate national authorities to give advance consideration as to what position to adopt in instances of this kind in relation to such key matters as costs and damages.

### **Possible additional responsibilities**

The period since 1988 has seen the development of an extensive range of agreements and arrangements relating to drug smuggling by sea, a process that is encouraged by paragraph 9 of article 17:

“9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.”

Provision for such cooperation has emerged in regions where maritime trafficking occurs, such as the Caribbean. For instance, more than 20 bilateral agreements have been concluded between the United States of America and countries in the region covering such matters as ship-rider arrangements, ship-boarding, pursuit, entry into the territorial sea to investigate, overflight and relaying orders for aircraft to land. Agreements on joint patrolling have also been signed. Agreements have also been signed between other countries in the region, including European countries having overseas territories in the Caribbean (France, the Netherlands and the United Kingdom of Great Britain and Northern Ireland). Countries in and bordering on the Caribbean have concluded a regional agreement concerning cooperation in suppressing illicit maritime trafficking in narcotic drugs and psychotropic substances in the wider Caribbean basin area.

Whether or not to allocate responsibilities in connection with the operation of such agreements and arrangements to the competent national authority under article 17 of the 1988 Convention is a matter to be determined by each party. Where practicable, one competent authority should have the responsibility for all such agreements or arrangements; it will, however, be necessary to take steps to ensure that the officials operating the system are in a position, in practice, to differentiate between situations governed by the 1988 Convention and those that are regulated under other agreements and arrangements and to operate effectively the procedures and practices relevant to each.



# PART TWO

## Annexes





# ANNEX I

## Summary of the Practical Guide

### Competent national authorities in practice

Operational guidelines for competent national authorities under article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

#### PRACTICAL CONSIDERATIONS

##### Main responsibilities

Competent national authorities are responsible for:

- Ensuring speedy and efficient consideration and response to incoming requests.
- Overseeing the quality and effectiveness of outgoing requests.
- Providing information and advice to counterparts in other States.

##### Basic requirements

Competent national authorities must be:

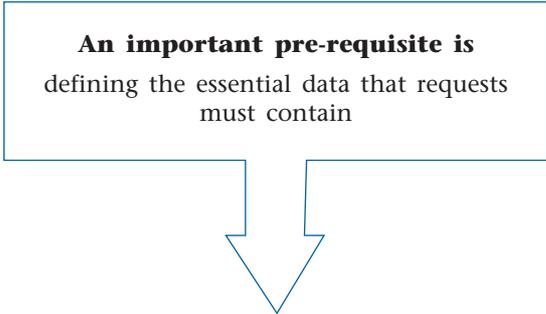
- Capable of processing and responding to requests in a timely and efficient manner.
- Able to communicate and liaise with counterparts in other States and with relevant domestic authorities (customs, police, coast guard, etc.).
- Equipped to provide advice on the legal and other requirements and constraints relevant to the formulation and processing of requests.
- Known to counterparts in other States and relevant domestic authorities in terms of their existence, role and contact particulars.

##### KEY ISSUES

- **Article 17** does not provide rules for the processing of requests. However, experience shows that well-defined and clear national policy and procedures for handling such requests are the best means of ensuring their timely and efficient processing.
- **Ideally**, the same competent national authority will be responsible for both receiving requests from and transmitting requests to other Parties to the 1988 Convention. This, however, is not a requirement under article 17.
- **Usually**, requests involve confirmation of registry of vessels. The competent national authority should therefore have ready access to the national registry of vessels.

## INCOMING REQUESTS

**An important pre-requisite is**  
defining the essential data that requests  
must contain



### For instance

Requests must contain:

- The identity of the requesting party, including the authority issuing the request and the agency charged with taking measures.
- A description of the vessel, including its name, flag and port of registration and any other available information.
- Known details concerning the voyage and crew.
- Location information and weather report.
- Reason for request (explanation of the circumstances supporting the intervention).
- Intended action.
- Any other relevant information.
- Action requested by the intervening State (including confirmation of vessel registry and permission to board and search, if applicable), together with any time limits.

### KEY ISSUES

- **Parties** are free to determine the content of requests, the manner in which they should be transmitted and the language in which they should be formulated. There is, however, an obvious need for harmonizing their approach to avoid having conflicting national practices hamper effective cooperation.
- **Even** when written requests are required, the use of all other available means of communication between competent national authorities has proved to greatly reduce complications that delay handling of requests.

## DECISION-MAKING

**Article 17** leaves it up to parties to decide on the most appropriate procedure to follow when requests are received, including the level at which decision-making will take place. Parties may use different approaches. For instance,

- |   |   |
|---|---|
| Making the competent national authority fully responsible for making the decision and replying accordingly to the request     | <ul style="list-style-type: none"> <li>• No time-consuming consultations with other agencies are necessary</li> <li>• There is no need to locate and communicate with high-ranking officials who might be unavailable</li> <li>• Doubts, questions and the need for additional data can be addressed directly with foreign counterpart</li> </ul> |
| Making consultation with one or more agencies, other than the competent national authorities, necessary to adopt any decision | <ul style="list-style-type: none"> <li>• May allow for better clarification of issues not within the purview of the competent national authority</li> <li>• May significantly delay responding to incoming requests</li> </ul>  |
| Requiring that a minister or other high-ranking official make the decisions required to respond to incoming requests          | <ul style="list-style-type: none"> <li>• May serve to ensure that the required political levels are kept informed of, and assume responsibility for, possibly sensitive developments</li> <li>• May delay responses so seriously as to render action by the requesting State unfeasible</li> </ul>  |

## KEY ISSUES

- **Although** parties are free to decide which approach is more in accordance with domestic conditions, there are obvious advantages to empowering the competent national authority to adopt the relevant decisions.
- **When deciding** on the procedure to be established, parties should seriously consider all practical and legal factors involved and ensure that, once established, the procedure is clear, comprehensive and well known to all concerned.

## ISSUES OF NATIONALITY AND REGISTRY

### United Nations Convention on the Law of the Sea of 1982

#### Main obligations for all parties

All parties to the Convention must:

- Fix the conditions under which they will grant their nationality to ships, register ships in their territory and for the right to fly their flag (article 91).
- Issue ships to which they have granted the right to fly their flag with documents to that effect (article 91).
- Maintain a register of ships containing the names and particulars of ships flying their flag, except those which are excluded on account of their small size (article 94).
- Assume jurisdiction under their internal law over each ship flying their flag and over its master, officers and crew in respect of administrative, technical and social matters concerning ships flying their flag (article 94).

#### Basic principles

- Ships have the nationality of the State whose flag they are entitled to fly (article 91).
- There must be a genuine link between the flag State and the ship (article 91).
- Ships must sail under the flag of one State *only* (article 92).
- Save in exceptional cases,<sup>a</sup> ships are subject to their flag State's exclusive jurisdiction on the high seas (article 92).
- A ship that sails under more than one flag according to convenience, may not claim any of the nationalities in question and may be assimilated to a ship without nationality (article 92).

<sup>a</sup>As defined in the United Nations Convention on the Law of the Sea and/or other international treaties.

## United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

### Main obligations for requested States parties under article 17

Requested States must:

- Cooperate to the fullest extent possible to suppress illicit traffic by sea (paragraph 1).
- Respond expeditiously to requests from other parties to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3 (paragraph 7).
- Designate an authority or, when necessary, authorities to receive and respond to such requests.

### Basic principles

- The competent national authority should be able to check the registration of the suspect vessel.
- The competent national authority should also be able to communicate with and to act as the liaison between the requesting foreign authority and whoever may be responsible for adopting the decision(s) related to the request.

### KEY ISSUES

- **Experience demonstrates** that the registry check process should, to the extent possible, be separated from the flag State authorization mechanism.
- **An increasingly common** practice nowadays consists of providing authorization on the assumption of a positive outcome to the registry check, known by some as provisional flag State authorization. It can also be thought of in terms of presumptive flag State authority.
- **This practice** greatly expedites the authorization process. However, it does not eliminate the need for the actual registry check and the subsequent communication of results to the requesting State.

## DECISION-MAKING CONSIDERATIONS

**Article 17** foresees a number of actions that the flag State may authorize the requesting State to carry out in respect of a vessel suspected of illicit trafficking by sea.

### Examples of actions that may be requested

Paragraph 4

- To board the vessel
- To search the vessel
- To take appropriate action with respect to the vessel, persons and cargo on board, if evidence of involvement in illicit traffic is found

### KEY ISSUES

When considering whether or not to authorize action to be undertaken in respect of a vessel flying its flag, parties should bear in mind that:

- **The above list** is not exhaustive, as the number and type of actions to be submitted for authorization may differ in each case.
- **Neither the list** nor any other part of article 17 creates an obligation to respond favourably to incoming requests. Whether or not to do so is a matter to be determined in each particular case by the authorities of the flag State.
- **The need not** to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of any other State.
- **There is no limit** to the type and number of considerations that States may contemplate when deciding on the authorization of action to be taken against its own vessels and the 1988 Convention does not set any rules in this regard.

## RESPONSE TO REQUESTS

### Requirements for proper processing of requests under article 17

To allow the competent national authority to effectively play the role for which they are designated, States should ensure that some basic regulatory and structural conditions exist, for example:

#### Procedural

- The competent national authority must be responsible, directly or indirectly, for the speedy and proper consideration of and response to requests.
- If the power to decide on such matters does not rest with the national authority, it must at least have the power to initiate the necessary decision-making process.
- If the authorization in question requires the approval of more than one government agency (e.g. two or more ministries), there should be an established procedure for the national authority to obtain the necessary approvals in an expeditious manner.

#### Structural

- The competent national authority must be able to ascertain whether other law enforcement operations, including a controlled delivery, are already under way in connection with the same vessel.
- An adequate administrative infrastructure should be established to facilitate the discharge of the national authority's responsibilities.
- Modern channels of communication such as telephone, facsimile and, whenever possible, e-mail links should be made available.

#### KEY ISSUES

Failure to authorize interdiction in a timely manner may well result in the loss of the opportunity to take action against drug traffickers at sea, for example, because

- **The weather** conditions might deteriorate.
- **The vessel** could reach the territorial sea of a third State.
- **The traffickers** may destroy the illicit cargo and other proof of their crime.

## FAVOURABLE REPLY TO A REQUEST

**Article 17** in no way obliges requested States, when replying favourably to a request, to simply authorize the requesting State to carry out all actions foreseen in its request. On the contrary, paragraph 6 expressly provides for the authorization to be subject to conditions to which the requesting State would have to agree.

### Possible conditions

Conditions imposed may include:

- An obligation for the intervening State to consult the flag State before the vessel is taken into the jurisdiction of a third State.
- The imposition of restrictions, standards or particular obligations relating to the use of force in the action.
- Guaranties for the eventual exercise of the flag State's jurisdiction over offences committed by the owners of the vessel or by those on board.

### KEY ISSUES

- **In practice** the specification of conditions concerning the cost are relatively infrequent.
- **The general principle** has developed that the costs of such operations are normally borne by the intervening State.
- **When the flag State** reserves the right to determine what actions may be taken after the boarding and search of the vessel, it should ensure that duly empowered officials are available to provide timely instructions.
- **While parties are free** to formulate such conditions as they see fit, caution is advisable. Conditions should be imposed only as strictly necessary. For instance, if conditions are unacceptable to the requesting State it may well refrain from intervening.

## REFUSAL OF REQUESTS

**Article 17** does not compel parties to the 1988 Convention to respond favourably to requests. On the contrary, requested States may refuse to authorize any action requested pursuant to article 17 if they deem it the most appropriate course of action under the circumstances. However, some considerations should still be borne in mind by the competent national authority of a requested State when refusing authorization.

### Considerations include:

- The obligation to “respond expeditiously” still applies in case of a negative reply. A timely communication of the decision to refuse authorization will allow the requesting State to discontinue what may be a complex and costly maritime law enforcement operation.
- Although there is no obligation under article 17 to provide reasons for any negative decision, as the Commentary notes “it would be within the spirit of the Convention to indicate, in appropriate cases, the basis for the decision taken.”

## OUTGOING REQUESTS

**Article 17** sets out only one specific requirement, in paragraph 3, in terms of outgoing requests, which is that the requesting State must have reasonable grounds to suspect a vessel of being engaged in illicit drug traffic by sea. However, experience shows that competent national authorities should ensure that requests for article 17 authorization are only formulated and transmitted when appropriate. To that end, a mechanism must exist to subject the circumstances of each case to close scrutiny, taking several considerations into account.

### Considerations include:

- Whether the range of actions for which authorization is to be sought are adequately provided for in its domestic law.
- The characteristics of the vessel and the nature of the voyage.
- Whether action could be more effectively taken by the authorities in the next port of call.
- The possibility of resorting to alternative law enforcement strategies, including controlled delivery.
- Whether or not all relevant treaty requirements have been or will be satisfied.

### KEY ISSUES

Requesting States, when considering the formulation of a request for action under article 17, should bear in mind some basic requirements set by the 1988 Convention in the planning and implementation of law enforcement interventions at sea.

- **The need not to** endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial or legal interests of the flag State or any other interested State.
- **That any action must** be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

## CONTENT AND TRANSMISSION OF THE REQUEST

**Article 17** does not specify the content and transmission modalities of requests, but competent national authorities of requesting States should bear in mind a few important considerations:

- The request needs to contain sufficient, clear information and supporting documentation to enable it to be considered and responded to in a timely fashion.
- It is advisable to establish telephone or other similar real-time contact with the national authority of the requested State, to ascertain as soon as possible whether the proposed request is sufficient and, in form and content, appropriate for that State.
- It is also advisable to maintain a dialogue with counterparts in the requested country in order to assist with problems or issues that arise and to monitor progress.

## COORDINATION AND FOLLOW-UP

**Article 17**, paragraph 8, establishes a clear obligation for parties that have taken action in accordance with article 17 to promptly inform the flag State concerned of the results of that action. Beyond that obligation, intervening States may also bear in mind other considerations for doing so.

### Considerations include:

- At its most basic level, the prompt provision of meaningful feedback to the competent national authority of the flag State will help foster and consolidate mutual trust and confidence, which is critical to effective international cooperation.
- The timely submission of a follow-up report is even more important when the flag State has reserved the right to formulate final instructions in the light of the outcome of the intervention.
- In cases in which the flag State decides to exercise its jurisdiction in respect of the vessel and those on board, there will be a continuing need for dialogue with the intervening State in order to bring about a successful prosecution.

### KEY ISSUES

- At the domestic level, the competent national authority must be in a position to assess the authorization received, in particular the acceptability of any conditions that may have been imposed. It must also be in a position to inform the relevant law enforcement authorities of such conditions and limitations, which are legally binding under the 1988 Convention.

## SPECIAL CONSIDERATIONS—OWN-FLAG VESSELS AND VESSELS WITHOUT NATIONALITY

**Article 17**, in practice, gives rise mostly to requests for action against the vessels of other parties. Nonetheless, both the 1988 Convention and the international law of the sea envisage the provision of cooperation in two other circumstances:

- When the vessel in question is flying the flag of the requesting State (own-flag vessels).
- When the vessel is one without nationality or one assimilated to a vessel without nationality in international law.

### KEY ISSUES

- The possibility of cooperation under these two provisions may be particularly useful when a State with reasonable grounds to suspect its own-flag vessel or a vessel without nationality of being engaged in illicit traffic may not itself, for whatever reason, be in a position to intervene.
- It would be prudent in all these cases for requests to be made through the network of competent national authorities under article 17.
- Assistance can also be sought for other purposes, for example in locating the vessel in question, engaging in surveillance of the vessel or permitting the presence of enforcement personnel of the flag State on board government vessels of the requested State.
- The flag State may subject its request to the conditions and limitations it sees fit. The requested State may similarly wish to set the conditions under which it would provide the assistance requested, including apportionment of costs.
- In respect of vessels without nationality, the United Nations Convention on the Law of the Sea provides certain rights to take action.

## ANNEX II

# Model form of request for authorization under article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988

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***Request for authorization to take specified actions in respect of the vessel: \_\_\_\_\_ pursuant to article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988***

---

1. Date: \_\_\_\_\_ Time of request/transmission: \_\_\_\_\_ (GMT)  
dd/mm/yy
2. From: \_\_\_\_\_ Tel.: \_\_\_\_\_  
(name/title of official)  
\_\_\_\_\_  
(specify competent national authority) Fax: \_\_\_\_\_
3. To: \_\_\_\_\_ Tel.: \_\_\_\_\_  
(name/title of official)  
\_\_\_\_\_  
(specify competent national authority) Fax: \_\_\_\_\_
4. Description of suspect vessel (fill in such information as is available and appropriate):  
Vessel's name: \_\_\_\_\_ Type of vessel: \_\_\_\_\_  
Home port: \_\_\_\_\_ Flying the flag of: \_\_\_\_\_  
Claim to registry:  YES  NO How claimed: \_\_\_\_\_  
\_\_\_\_\_

Other relevant information about the vessel (if any): \_\_\_\_\_

\_\_\_\_\_

5. Location: \_\_\_\_\_

\_\_\_\_\_

6. Other relevant information (if any): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

7. Reason for request: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

8. You are hereby requested to (tick as appropriate):

*Initial actions:*

Confirm nationality and, where appropriate, registry.

Grant authority to stop, board and search the vessel.

Grant authority to take other action (describe): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

*Follow-up actions:*

Grant authority if evidence of illicit traffic is found, to (as appropriate) detain the vessel, evidence and person on board on behalf of [requested State] pending receipt of expeditious disposition instructions.

Grant authority if evidence of illicit traffic is found, to (as appropriate) arrest the persons on board and seize the vessel and evidence to permit the initiation of prosecution and related legal proceedings under the law of [requesting State].

Grant authority to take other action (describe): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

This request is made on the basis that action taken pursuant to any authorization provided will be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

9. The latest time by which a reply will permit such intervention to take place is (complete if applicable)

\_\_\_\_\_ (GMT)

10. Signature of duly authorized official for the purposes of article 17 of the 1988 Convention:

\_\_\_\_\_



- On the basis of our consideration of the issue of nationality (including registry where applicable) you are hereby authorized:

*Initial actions:*

- To stop, board and search the vessel.

Special conditions: \_\_\_\_\_

\_\_\_\_\_

- To take other action (describe) \_\_\_\_\_

\_\_\_\_\_

Special conditions: \_\_\_\_\_

\_\_\_\_\_

*Follow-up actions:*

- If evidence of illicit traffic is found, to (as appropriate) detain the vessel, evidence and persons on board on behalf of [requested State] pending your receipt of expeditious disposition instructions.

- If evidence of illicit traffic is found, to (as appropriate) arrest the persons on board and seize the vessel and evidence to permit the initiation of prosecution and related legal proceedings under [requesting State] law.

- To take other action (describe): \_\_\_\_\_

\_\_\_\_\_

Special conditions: \_\_\_\_\_

\_\_\_\_\_

OR

- Your request is denied (reason): \_\_\_\_\_

\_\_\_\_\_

5. Signature of duly authorized official for the purposes of article 17 of the 1988 Convention:

\_\_\_\_\_



7. General description of purpose of voyage and nature of cargo: \_\_\_\_\_

\_\_\_\_\_

8. Result of action take: \_\_\_\_\_

\_\_\_\_\_

9. Other relevant information (if any): \_\_\_\_\_

\_\_\_\_\_

10. Signature of duly authorized official for the purposes of article 17 of the 1988 Convention:

\_\_\_\_\_

## ANNEX V

### Glossary

<b>1988 Convention</b>	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.
<b>Commission on Narcotic Drugs</b>	A functional commission of the Economic and Social Council established in its resolution 9 (I) of 16 February 1946. The Commission is authorized to consider all matters pertaining to the aims of the international drug control treaties. General Assembly resolution 46/185 of 20 December 1991 expanded the mandate of the Commission to enable it to function as the governing body of UNDCP.
<b>Commentary</b>	The Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, prepared by the Secretary-General of the United Nations pursuant to Economic and Social Council resolution 1993/42 of 27 July 1993. Relevant extracts of the Commentary are included in annex VII to the present Guide.
<b>Competent national authority</b>	Government office/agency designated by a party as responsible to receive and respond to requests under article 17 of the 1988 Convention. It may also be given the power to formulate requests.
<b>Constructive presence</b>	A concept that arises from article 111 of the United Nations Convention on the Law of the Sea in cases of hot pursuit. In this situation, even if the mother ship is in maritime zones beyond the territorial sea, it may constructively be considered as present in the territorial waters if a boat or another craft working as a team and using the pursued ship as a mother ship is in the territorial sea or contiguous zone.
<b>Contiguous zone</b>	See article 33 of the Convention on the Law of the Sea. The contiguous zone can be described as an area contiguous to the territorial sea of a coastal State, in which it may prevent and punish the infringement of its customs, fiscal, immigration and sanitary laws within its territory. It may not extend beyond 24 nautical miles from the baselines used to measure the territorial sea.

<b>Controlled delivery</b>	The technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, precursor chemicals or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences (article 1 (g) of the 1988 Convention).
<b>Exclusive jurisdiction</b>	The exclusive right of the flag State to exercise authority and control in administrative, technical and social matters over ships flying its flag and enforce its national legislation over the vessel, cargo and persons for actions committed on board a ship of its nationality.
<b>Flag State</b>	The State that has granted its nationality and thereby the right to fly its flag to a given ship (article 91, Convention on the Law of the Sea). The article requires that a genuine link exists between the State and the ship.
<b>Hot pursuit</b>	The action undertaken against a foreign ship by a coastal State with good reason to believe that the ship has violated its laws and regulations. It can only be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State. It may only be continued beyond the territorial sea or the contiguous zone if the pursuit has not been interrupted (article 111, Convention on the Law of the Sea). See also constructive presence.
<b>Intervening State</b>	The State carrying out law enforcement activities with respect to a ship suspected of illicit traffic at sea. Most often the intervening State and the requesting State will be the same.
<b>International law of the sea</b>	Area of international law governing ocean space and activities on or relating to the sea, as reflected in large measure in the United Nations Convention on the Law of the Sea of 1982.
<b>Nationality of ships</b>	A ship has the nationality of the State whose flag it is entitled to fly (article 91, Convention on the Law of the Sea).
<b>Provisional flag State authorization</b>	The principle according to which a requested State assumes that a ship flying its flag has its nationality and, accordingly, grants to a requesting State provisional authorization to take action against that ship pursuant to article 17 of the 1988 Convention. It is also sometimes called presumptive flag State authority.
<b>Register</b>	Official register maintained by a State, containing the names and details of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size (article 94, paragraph 2 (a), Convention on the Law of the Sea).

<b>Requested State</b>	State that has received a request under article 17 of the 1988 Convention.
<b>Requesting State</b>	State formulating a request under article 17 of the 1988 Convention. See also intervening State, above.
<b>Territorial sea</b>	See articles 2 to 4 in part II of the Convention on the Law of the Sea. The territorial sea can be described as a belt of water of a defined breadth, but not exceeding 12 nautical miles measured seaward from the baselines, over which a coastal State exercises sovereignty.
<b>Convention on the Law of the Sea</b>	Short form for the United Nations Convention on the Law of the Sea of 1982.
<b>UNDCP</b>	United Nations International Drug Control Programme. Established pursuant to General Assembly resolution 45/179 of 21 December 1990.
<b>Warship</b>	Ship belonging to the armed forces of a State bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the Government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline (article 29, Convention on the Law of the Sea).



## ANNEX VI

# United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Extracts)

### *Article 3*

#### OFFENCES AND SANCTIONS

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

- (a)
  - (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
  - (ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
  - (iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;
  - (iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
  - (v) The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;
- (b)
  - (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
  - (ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;
- (c) Subject to its constitutional principles and the basic concepts of its legal system:
  - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences

- established in accordance with subparagraph *(a)* of this paragraph or from an act of participation in such offence or offences;
- (ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
  - (iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;
  - (iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.
2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.
3. Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.
4. *(a)* Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.
- (b)* The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.
- (c)* Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.
- (d)* The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.
5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious, such as:
- (a)* The involvement in the offence of an organized criminal group to which the offender belongs;
  - (b)* The involvement of the offender in other international organized criminal activities;
  - (c)* The involvement of the offender in other illegal activities facilitated by commission of the offence;
  - (d)* The use of violence or arms by the offender;
  - (e)* The fact that the offender holds a public office and that the offence is connected with the office in question;
  - (f)* The victimization or use of minors;
  - (g)* The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which schoolchildren and students resort for educational, sports and social activities;
  - (h)* Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.

6. The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

7. The Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences.

8. Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice.

9. Each Party shall take appropriate measures, consistent with its legal system, to ensure that a person charged with or convicted of an offence established in accordance with paragraph 1 of this article, who is found within its territory, is present at the necessary criminal proceedings.

10. For the purpose of cooperation among the Parties under this Convention, including, in particular, cooperation under articles 5, 6, 7 and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.

11. Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.

#### **Article 4**

##### JURISDICTION

1. Each Party:

(a) Shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:

- (i) The offence is committed in its territory;
- (ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;

(b) May take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:

- (i) The offence is committed by one of its nationals or by a person who has his habitual residence in its territory;
- (ii) The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article;
- (iii) The offence is one of those established in accordance with article 3, paragraph 1, subparagraph (c) (iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.

2. Each Party:

(a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground:

- (i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or
  - (ii) That the offence has been committed by one of its nationals;
- (b) May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party.
3. This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

### **Article 11**

#### CONTROLLED DELIVERY

1. If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.
2. Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.
3. Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed or replaced in whole or in part.

### **Article 17**

#### ILLICIT TRAFFIC BY SEA

1. The Parties shall cooperate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.
2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.
3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.
4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter alia:
  - (a) Board the vessel;
  - (b) Search the vessel;
  - (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.
6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.
7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.
8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.
9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.
10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.
11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.



## ANNEX VII

# Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988\* (Extracts\*\*)

### Article 3

#### OFFENCES AND SANCTIONS

##### *General comments*

3.1 Article 3 is central to the promotion of the goals of the Convention as set out in the preamble<sup>106</sup> and to the achievement of its primary purpose, stated in article 2, paragraph 1, “to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension.”<sup>107</sup> Towards that end, it requires parties to legislate as necessary to establish a modern code of criminal offences relating to the various aspects of illicit trafficking and to ensure that such illicit activities are dealt with as serious offences by each State’s judiciary and prosecutorial authorities.

3.2 The underlying philosophy embodied in article 3 is that improving the effectiveness of domestic criminal justice systems in relation to drug trafficking is a precondition for enhanced international cooperation. While, however, the decision was taken to deal in article 3, paragraph 2, with offences of possession, purchase and cultivation aimed at personal consumption, it was recognized that for various reasons, including considerations of expense and administrative practicality, the obligations imposed in certain key areas such as extradition (article 6), confiscation (article 5) and mutual legal assistance (article 7) would be restricted to the more serious trafficking offences established in accordance with paragraph 1. As has been pointed out elsewhere: “The article focuses and imposes the greatest international obligations on those offences which have the most international impact.”<sup>108</sup>

3.3 At a practical level it was appreciated that, given the scope and ambition of article 3 and the nature of the obligations imposed, especially in respect of offences, many States wishing to become parties to the Convention would be faced with the need to enact complex implementing legislation in order to be in a position to comply fully with its terms. While it is important to stress that the Convention seeks to establish a common minimum standard for implementation, there is nothing to prevent parties from adopting

\*United Nations publication, Sales No. E.98.XI.5.

\*\*Original footnote numbering has been retained. Some footnotes refer to portions of the Commentary on the 1988 Convention not included in the present extracts.

<sup>106</sup>See above, comments on the preamble.

<sup>107</sup>See also above, comments on article 2, paragraph 1.

<sup>108</sup>“Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 101st Congress, Senate, Exec. Rept. 101-15, p. 26.

stricter measures than those mandated by the text should they think fit to do so,<sup>109</sup> subject always to the requirement that such initiatives are consistent with applicable norms of public international law, in particular norms protecting human rights. Furthermore, it is important not to lose sight of the fact that those involved in trafficking activity frequently breach laws other than those directly related to drugs. As was noted in the 1987 Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control: “The illicit traffic in drugs not only violates national drug laws and international conventions, but may in many cases also involve other antisocial activities, such as organized crime, conspiracy, bribery, corruption and intimidation of public officials, tax evasion, banking law violations, illegal money transfers, criminal violations of import or export regulations, crimes involving firearms, and crimes of violence.”<sup>110</sup> Thus the adequacy of other relevant parts of the criminal justice system may have an important bearing on the effectiveness of drug law enforcement efforts.

***Paragraph 1, introductory part***

- 1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:**

***Commentary***

3.4 The criminalization and punishment of illicit traffic is one of the basic features of the Convention, and action under paragraph 1 is mandatory on all parties.

3.5 The corresponding provisions in the articles of the 1961 Convention, the 1961 Convention as amended, and the 1971 Convention dealing with penal provisions<sup>111</sup> contain the safeguard clause “Subject to its constitutional limitations”. This clause was judged inappropriate in the 1988 Convention, although a similar phrase is used in the particular context of article 3, paragraph 1, subparagraph (c), as the authors of the Convention were anxious to make the present text fully mandatory, allowing parties no loopholes. In the context of the 1961 Convention, the United Nations Secretariat had placed on record the fact that it was not aware of any constitutional limitations which would have the effect of preventing a party to that Convention from implementing the relevant provisions of the Convention,<sup>112</sup> so the safeguard clause was almost certainly unnecessary.

3.6 The obligation of a party is to take the necessary measures to establish certain “criminal offences under its domestic law”. This phrase, which makes no reference to any categorization of offences (for example as “felonies”) which may be found in a particular legal system, was chosen in order to accommodate the various approaches found in domestic laws on illicit traffic and drug offences. Where a distinction is drawn in a particular legal system between criminal offences and regulatory infractions,<sup>113</sup> the Convention refers to the former category.

3.7 The various types of conduct listed in article 3, paragraph 1, are required to be established as criminal offences only “when committed intentionally”; unintentional conduct is not included. It accords with the general principles of criminal law that the element of intention is required to be proved in respect of every factual element of the proscribed conduct. It will not be necessary to prove that the actor knew that the conduct was contrary to law. Proof of the element of intention is the subject of a specific provision in

<sup>109</sup>See below, comments on article 24; see also article 39 of the 1961 Convention and article 23 of the 1971 Convention, both of which adopt a similar approach to this issue.

<sup>110</sup>*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A, para. 223.

<sup>111</sup>1961 Convention, art. 36, para. 1; 1961 Convention as amended, art. 36, para. 1, subpara. (a); 1971 Convention, art. 22, para. 1, subpara. (a).

<sup>112</sup>Commentary on the 1961 Convention, paragraph 13 of the comments on article 36.

<sup>113</sup>For example, the German *Ordnungswidrigkeiten*.

article 3, paragraph 3. It is, of course, open to individual parties to provide in their domestic law that reckless or negligent conduct should be punishable, or indeed to impose strict liability without proof of any fault element.

**Paragraph 1, subparagraph (a), clause (i)**

**(a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;**

**Commentary**

3.8 In paragraph 1, subparagraph (a), clause (i), as in some other parts of article 3,<sup>114</sup> express reference is made to the provisions of the earlier conventions. It was argued by some that the text of the 1988 Convention should in this respect be self-contained and independent of the earlier treaties, a point seen as of special relevance to States which might become parties to the 1988 Convention without ever having been parties to the earlier ones. The majority view, however, favoured an explicit linkage: the earlier conventions, in setting up the international drug control system, provided standards against which the illicit nature of the activities listed in the new convention could be gauged, and a consistent treatment was considered highly desirable.<sup>115</sup> The resulting reference in the text serves to identify the relevant categories of narcotic drugs and psychotropic substances and to distinguish between licit and illicit uses.

3.9 Regarding the description of certain types of conduct as “contrary to the provisions of” the earlier conventions, it should be noted that those conventions, operating necessarily at the level of public international law, do not in themselves prohibit any conduct by an individual or group of individuals. The 1961 Convention requires parties to adopt measures rendering certain types of conduct punishable offences<sup>116</sup> and so could not be a self-executing treaty. As explained by the Legal Adviser to the 1971 Conference, it was in recognition of this fact<sup>117</sup> that the language of the 1971 Convention was even less direct: a party is to treat as a punishable offence “any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention”.<sup>118</sup>

3.10 It seems clear, however, that the reference to the provisions of the earlier conventions was intended to reduce the scope of the otherwise very broad language of the subparagraph. A fair interpretation would seem to be that the types of conduct listed are to be criminalized in the circumstances which would attract the obligations of parties to the earlier conventions. For example, drugs listed in Schedule II of the 1961 Convention are subject to a less demanding regime, which takes account of the existence of a substantial legitimate retail trade in such drugs.<sup>119</sup> It was plainly not intended that article 3 of the 1988 Convention should impose any additional requirement that parties make the offering for sale of such drugs a criminal offence. Similarly, under the 1971 Convention a party may give notice prohibiting the import of certain substances from among those listed in Schedule II, Schedule III or Schedule IV of that Convention, and other parties

<sup>114</sup>Art. 3, para. 1, subpara. (a), clause (ii), and para. 2.

<sup>115</sup>*Official Records*, vol. I ..., document E/CONF.82/3, chap. III, para. 35.

<sup>116</sup>In article 36, paragraph 1, of the 1961 Convention, the relevant types of activity are described as being “contrary to the provisions of this Convention”.

<sup>117</sup>*Official Records of the United Nations Conference on the Adoption of a Protocol on Psychotropic Substances, Vienna, 11 January 1971-21 February 1971*, vol. II (United Nations publication, Sales No. E.73.XI.4), Summary records of the plenary meetings, 12th plenary meeting, para. 10; and Commentary on the 1971 Convention, paragraph 2 of the comments on article 22, paragraph 1, subparagraph (a).

<sup>118</sup>1971 Convention, art. 22, para. 1, subpara. (a).

<sup>119</sup>1961 Convention, art. 2, para. 2, and art. 30, para. 6.

must take measures to ensure that none of the notified substances is exported to the country concerned.<sup>120</sup> It follows that “exportation” of substances in clause (i) must be interpreted by reference to the provision of article 13 of the 1971 Convention.

3.11 In short, the effect of the references to the earlier conventions is to incorporate by reference the regimes applicable to particular categories of narcotic drugs and psychotropic substances. For this purpose, a party to the 1988 Convention, in implementing its obligation to render prescribed conduct a criminal offence, must have regard to the provisions of the earlier conventions even if it is not a party to them.

3.12 The text of paragraph 1, subparagraph (a), clause (i), is closely modelled upon article 36, paragraph 1, of the 1961 Convention. Of the types of activity listed in that provision, “cultivation”, “possession” and “purchase” are dealt with separately, in paragraph 1, subparagraph (a), clauses (ii) and (iii), and paragraph 2. This presentation facilitates the reference, in the case of cultivation, possession and purchase, to the purpose of these activities and to the specific treatment of such offences for the personal consumption referred to in paragraph 2.

3.13 Some of the types of activity listed in clause (i) are defined in the 1961 Convention; it will be convenient to examine each one in turn.

#### *“Production”*

3.14 “Production” is defined in the 1961 Convention<sup>121</sup> as “the separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained”. The definition is specific as to the products and the plants from which they are obtained and it cannot be generalized because in other international instruments, as well as in many national laws and in the pharmaceutical industry, “production” is usually a synonym for “manufacture”. The term “production” is not used in the 1971 Convention.

#### *“Manufacture”*

3.15 “Manufacture” is defined in both the 1961 and 1971 Conventions. The 1961 definition is “all processes, other than production, by which drugs may be obtained and includes refining as well as the transformation of drugs into other drugs”.<sup>122</sup> In the 1971 Convention, “manufacture” means “all processes by which psychotropic substances may be obtained, and includes refining as well as the transformation of psychotropic substances into other psychotropic substances ... [and] also ... the making of preparations other than those made on prescription in pharmacies”.<sup>123</sup> These definitions are fully discussed in the commentaries on the earlier conventions.<sup>124</sup>

#### *“Extraction”*

3.16 The term “extraction” was used in the 1961 Convention without definition. Extraction is the separation and collection of one or more substances from a mixture by whatever means: physical, chemical or a combination thereof.

#### *“Preparation”*

3.17 The 1961 Convention contains a definition of the word “preparation”,<sup>125</sup> but the definition refers to the noun (used in a number of articles of the 1961 Convention)<sup>126</sup>

<sup>120</sup>1971 Convention, art.13.

<sup>121</sup>1961 Convention, art. 1, para. 1, subpara. (t).

<sup>122</sup>1961 Convention, art. 1, para.1, subpara. (n).

<sup>123</sup>1971 Convention, art. 1, subpara. (i). “Preparation” is defined in article 1, subparagraph (f); but see the discussion of that word in paragraphs 3.17 and 3.18 below.

<sup>124</sup>Commentary on the 1961 Convention, comments on article 1, paragraph 1, subparagraph (n); and Commentary on the 1971 Convention, comments on article 1, subparagraph (i).

<sup>125</sup>“A mixture, solid or liquid, containing a drug” (1961 Convention, art. 1, para. 1, subpara. (s)).

<sup>126</sup>For example, article 2, paragraphs 3 and 4.

denoting the result of a process rather than the process itself of preparing something. Accordingly, the definition in the 1961 Convention can be ignored for present purposes.

3.18 “Preparation”, also referred to as “compounding”, denotes the mixing of a given quantity of a drug with one or more other substances (buffers, diluents), subsequently divided into units or packaged for therapeutic or scientific use. This understanding is supported by the sequence of words used: “preparation” comes immediately before “offering” and “offering for sale”.

#### *“Offering” and “Offering for sale”*

3.19 The similarity of the terms “offering” and “offering for sale”, which makes it convenient to examine them together, may be misleading. In the French text no such similarity appears, and *l’offre* can be contrasted with *la mise en vente*.

3.20 “To offer” something is to hold it out, or make it available, so that another may receive it. Although providing a person with narcotic drugs or psychotropic substances as a gift is not expressly mentioned in the subparagraph, the process of making the gift will commonly involve “offering” or, if the donee is given no opportunity to refuse, “delivery”.

3.21 “Offering for sale” includes any displaying of goods or other indication that they are available for purchase. It would seem to include any solicitation, for example the question “Would you be interested in buying X?”.

#### *“Distribution”*

3.22 Although the term “distribution” can be used when anything is shared out between a number of people, a more apt reference may be to the notion of “distributorship”, the commercial role for ensuring that goods pass from manufacturer or importer to wholesaler or retailer. In other words, it refers to the movement of goods through the chain of supply.<sup>127</sup>

#### *“Sale”*

3.23 The word “sale” requires no elaboration. It will be noted, however, that “purchase” is not included in this subparagraph.<sup>128</sup>

#### *“Delivery on any terms whatever”*

3.24 The term “delivery” clearly covers the physical delivery of goods to a person or a destination, and it is immaterial whether this is as a result of a sale, a gift, or an arrangement under which the recipient is to carry or transmit the goods to some other place. In some legal systems the transfer of documents of title relating to goods, or of the keys to storage facilities in which the goods are kept, may amount to the “delivery” of the goods themselves. The inclusion of the words “on any terms whatever” suggests that these extended understandings of delivery may properly be included.

#### *“Brokerage”*

3.25 A “broker” is an agent employed to make bargains or contracts on behalf of another. He or she acts as a middleman, a negotiator or a “fixer”. In some legal systems, the term is limited to persons who are not themselves in possession of the relevant goods: an agent in possession is a “factor” rather than a “broker”. In other legal systems, a broker will be regarded as having participated in the main offence.

<sup>127</sup>Compare the heading of article 30 of the 1961 Convention, “Trade and distribution”.

<sup>128</sup>See below, comments on article 3, paragraph 1, subparagraph (a), clause (iii).

*“Dispatch” and “dispatch in transit”*

3.26 The terms “dispatch” and “dispatch in transit” both cover the activity of sending goods on their way, either to a fixed destination known to the sender or to a carrier who will take the goods to a destination of which the sender may be ignorant.

*“Transport”*

3.27 “Transport” covers carriage by any mode (land, sea or air). It would seem that a contract of carriage is not required; merely gratuitous carriage is within the scope of the paragraph.

*“Importation or exportation”*

3.28 The terms “importation” and “exportation” are not defined in the 1988 Convention, but the words “import” and “export” were defined in the 1961 Convention.<sup>129</sup> There they mean “the physical transfer of drugs from one State to another State, or from one territory to another territory of the same State”, the latter part of the definition referring to territories identified as separate entities for the system of certificates and authorizations under article 31 of the 1961 Convention.

***Paragraph 1, subparagraph (a), clause (ii)***

**(ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;**

***Commentary***

3.29 Subparagraph (a), clause (ii), covers the actual cultivation of the specified plants<sup>130</sup> for the purpose of the production of narcotic drugs. The subject of cultivation for personal consumption was dealt with in article 3, paragraph 2. The reference in the present subparagraph to the provisions of the 1961 Convention and of that Convention as amended is important; under those texts some cultivation is licit. Article 22 of the 1961 Convention enables parties to prohibit the cultivation of the opium poppy, the coca bush or the cannabis plant, but does not require such action in every case. Where cultivation is permitted for licit purposes, a system of controls must be applied.<sup>131</sup> Provision is made under the 1961 Convention for the destruction of illicitly cultivated coca bushes and under the 1961 Convention as amended for the destruction of illicitly cultivated opium poppies and cannabis plants.<sup>132</sup>

***Paragraph 1, subparagraph (a), clause (iii)***

**(iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;**

***Commentary***

3.30 Under subparagraph (a), clause (iii), a party must criminalize the possession of narcotic drugs or psychotropic substances, or their purchase, whether or not the purchaser

<sup>129</sup>1961 Convention, art. 1, para. 1, subpara. (m).

<sup>130</sup>For definitions of “opium poppy”, “coca bush” and “cannabis plant”, see the 1961 Convention, article 1.

<sup>131</sup>See the 1961 Convention, article 23 (opium poppy, as to which see also article 25), article 26 (coca bush and coca leaves, as to which see also article 27) and article 28 (cannabis).

<sup>132</sup>See article 26, paragraph 2, of the 1961 Convention and article 22, paragraph 2, of the 1961 Convention as amended; for a synopsis of the control measures applicable to the opium poppy, the coca bush and the cannabis plant, see article 2, paragraph 7, of the 1961 Convention as amended.

actually takes possession, where the possession or purchase is for the purpose of an activity established as a criminal offence under article 3, paragraph 1, subparagraph (a), clause (i). This provision does not cover possession or purchase for personal consumption, which is dealt with in article 3, paragraph 2.

***Paragraph 1, subparagraph (a), clause (iv)***

- (iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;**

***Commentary***

3.31 The provision in subparagraph (a), clause (iv), requires the creation of criminal offences and forms a counterpart to the regulatory provisions of articles 12 and 13. Article 12 provides that parties must take such measures as they deem appropriate to prevent diversion of substances in Table I and Table II for illicit production or manufacture of narcotic drugs and psychotropic substances. Article 13 deals with trade in and diversion of materials and equipment used in the illicit production of narcotic drugs and psychotropic substances. The present subparagraph makes use of a number of terms, the meaning of which has already been examined.<sup>133</sup> It should be compared with article 3, paragraph 1, subparagraph (c), clause (ii), which deals with the possession of equipment, materials and substances as opposed to their manufacture, transport or distribution. The “possession” provision is subject to the safeguard clause in subparagraph (c), but the establishment of offences of manufacture, transport and distribution is mandatory on all parties.

***Paragraph 1, subparagraph (a), clause (v)***

- (v) The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;**

***Commentary***

3.32 The focus of the present provision is the leadership of drug trafficking groups and it was regarded as being of great importance in efforts to disrupt major trafficking networks. Its value was seen to flow from the potential to reach those at the highest levels of the illicit drug trade. This provision, it should be noted, constitutes a strengthening and expansion of the scope of article 36, paragraph 2, subparagraph (a), clause (ii), of the 1961 Convention, which was confined to financial operations in relation to trafficking and where this obligation was also subject to the operation of a limiting chapeau, namely that it was “subject to the constitutional limitations of a Party, its legal system and domestic law”.<sup>134</sup> A later provision of the Convention, article 3, paragraph 1, subparagraph (c), clause (iv), which is prefaced by a safeguard clause, deals in more general terms with various types of participation in offences, including conspiracy and the facilitation of offences. The present subparagraph makes it mandatory, without any safeguard clause, for parties to create offences covering particular types of conduct, some of which might otherwise be considered to fall within the provision of subparagraph (c), clause (iv).

3.33 “Organization” and “management” are not defined, but are apt to describe the activities of those actors in organized crime who keep themselves well away from direct

<sup>133</sup>For “cultivation”, see paragraph 3.29 above; for “distribution”, see paragraph 3.22 above; for “manufacture”, see paragraph 3.15 above; for “production”, see paragraph 3.14 above; and for “transport”, see paragraph 3.27 above.

<sup>134</sup>See Commentary on the 1961 Convention, comments on article 36, paragraph 2, subparagraph (a), clause (i), and paragraphs 6-8 of the comments on article 36, paragraph 2, subparagraph (a), clause (ii).

involvement in illicit traffic but who direct the activities of subordinates. “Financing” covers the provision of capital needed for illicit operations and would seem to be narrower than the term “financial operations”, used in the 1961 Convention;<sup>135</sup> other types of conduct covered by that latter expression will be dealt with under the money-laundering provisions of article 3, paragraph 1, subparagraph (b).

**Implementation considerations: paragraph 1, subparagraph (a)**

3.34 As was noted above, under paragraph 1, subparagraph (a), each party shall “establish as criminal offences under its domestic law, when committed intentionally”, a fairly comprehensive list of activities that have a major international impact. This subparagraph seeks to reinforce and to supplement the penal measures contained in pre-existing multilateral instruments negotiated under the auspices of the United Nations. Article 36 of the 1961 Convention and of that Convention as amended, and article 22 of the 1971 Convention are particularly relevant in this context. The closeness of the relationship with these instruments is especially evident in the first two subparagraphs, which define the prohibited activities in question by referring to them as being “contrary to the provisions of” the relevant conventions.

3.35 This drafting method ensures that the many States that have become parties to the 1961 Convention as amended and to the 1971 Convention and have effectively implemented them in their domestic legal systems will have in place the basic framework for compliance, including the necessary system to establish which substances are subject to control and for what licit purposes such substances can be manufactured, possessed and transferred. Even for such States, however, it will be necessary to examine closely pre-existing laws in order to ensure full compliance with the obligations contained in subparagraph (a), clauses (i) and (ii). This flows from the fact that those obligations are absolute and, unlike the previous penal provisions, not subject to the limiting effect of safeguard clauses.

3.36 Becoming a party to, and effectively implementing, the 1961 Convention as amended and the 1971 Convention is a highly desirable step for any State about to become or that has become a party to the 1988 Convention. In the present context the task faced by any State that is not a party to all of the other relevant drug control conventions will be a more complex and demanding one. A close examination of the adequacy of existing domestic laws in relation to the classification and regulation of the licit cultivation, production, manufacture and trading of narcotic drugs, psychotropic substances and the chemical substances used in their manufacture will be required. For any State that determines that its current position is inadequate in this regard, appropriate action will have to be taken. For those contemplating major legislative changes, consideration might be given to the drafting of a single national law in respect of these matters.<sup>136</sup>

3.37 In seeking to ascertain the extent to which existing domestic criminal law complies with the requirements of paragraph 1, subparagraph (a), it should be borne in mind that, following previous practice, the obligations are stated with a deliberate degree of generality. Consequently, each party is left with considerable flexibility in determining how best, in the light of its moral, cultural and legal traditions, to secure the required goal. This important factor is further emphasized in paragraph 11.<sup>137</sup> Consequently it is not necessary for relevant domestic criminal laws to make specific mention of each distinct category and element mentioned in paragraph 1, subparagraph (a). What is required is that the criminal law of each party, when taken as a whole, should provide comprehensive coverage. The requirement is for the establishment of criminal offences. Resort to the creation of administrative offences in this context would therefore not satisfy the requirements of the Convention.

<sup>135</sup>1961 Convention, art. 36, para. 2, subpara. (a), clause (ii).

<sup>136</sup>See, for example, United Nations International Drug Control Programme, “Model Law on the Classification and Regulation of the Licit Cultivation, Production, Manufacture and Trading of Narcotic Drugs, Psychotropic Substances and Precursors”, *Model Legislation* (June 1992), vol. I.

<sup>137</sup>See below, comments on article 3, paragraph 11.

3.38 One area in which existing law may well be found wanting is that covered by paragraph 1, subparagraph (a), clause (iv). It will be recalled that this new provision requires the criminalization of the intentional manufacture, transport or distribution of equipment, materials and substances listed in Table I and Table II (substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances) knowing that they are to be used in or for the illicit cultivation, production or manufacture of substances controlled under the 1961 or 1971 Convention. The inclusion here of a specific requirement that the ultimate use of the substances be known in addition to the requirement that the offences be committed intentionally, contained in the preambular wording for subparagraph (a) as a whole, underlines the difficulty of projecting the criminal law into areas in which lawful commercial activity predominates. It is important in developing an appropriate national approach to this subject to note the close relationship with the criminal law measures envisaged in article 3, paragraph 1, subparagraph (c), clause (ii), as well as the regulatory and other measures to be taken by the parties pursuant to the terms of articles 12 and 13.<sup>138</sup>

3.39 A further area that has been the source of difficulty in terms of effective implementation is that covered by subparagraph (a), clause (v), namely the organization, management or financing of any of the serious offences mentioned elsewhere in subparagraph (a).

3.40 In dealing with these matters, some States have been able to rely heavily or exclusively on widely drawn legislative provisions, often in conjunction with the inchoate offence of conspiracy.<sup>139</sup> In other instances, traditional mechanisms of the criminal law have been supplemented or substituted by new legislative strategies designed specifically to attack the financial and managerial dimensions of drug trafficking or organized crime more generally.<sup>140</sup>

#### **Paragraph 1, subparagraph (b)**

- (b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;**
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;**

#### **Commentary**

3.41 The provisions of paragraph 1, subparagraph (b), strike at money-laundering and, like those in subparagraph (a), make the creation of offences mandatory for all parties. Their content and drafting style owe much to the then current legislation of the United States in this area.<sup>141</sup> In all cases covered by these provisions, the offence covers only conduct “committed intentionally”.<sup>142</sup> Subparagraph (b) falls into two parts, the first dealing

<sup>138</sup>See below, comments on articles 12 and 13.

<sup>139</sup>See below, comment on article 3, paragraph 1, subparagraph (c) (see also Italy, Decree No. 309 of 9 October 1990).

<sup>140</sup>United States law has created special criminal offences for such activities. The criminal law categories of the continuing criminal enterprise, 21 USC s.848, and racketeer influenced and corrupt organizations, 18 USC s.1961-1964, have been particularly significant. Article 222.34 of the French Penal Code of 1994 has created a specific criminal offence in this regard.

<sup>141</sup>18 USC 1956-57, subsequently repealed and replaced.

<sup>142</sup>Art. 3, para. 1, introductory paragraph.

specifically with acts of conversion or transfer of property and the second dealing more broadly with steps taken to conceal or disguise the property and rights and interest in it.

3.42 The text is silent on an issue which in the period after 1988 gave some difficulty to legislators. The language, and particularly the reference to “transfer”, can be applied to the person who commits the original (predicate) offence. Some take the view, however, that money-laundering is distinct from the predicate offence and that the money-laundering offence is essentially committed by another person in aid of the predicate offence. The Convention appears not to bind parties to one view of this matter.

3.43 In all cases the offender must have known that the relevant property was derived either from an offence established in accordance with paragraph 1, subparagraph (a) (or from more than one such offence) or from an act of participation in such an offence (or offences). The interpretation of the references to “an act of participation” in an offence or offences is not free from difficulty. The Convention, in paragraph 1, subparagraph (c), clause (iv), of this article, provides for the creation of offences of participation, but that provision is subject to a safeguard clause so that there may be parties under whose law an act of participation is not itself an offence. The text of the present provision, however, refers to “an act” of participation and not to “an offence” of participation. It appears that a party must create the money-laundering offence in the terms of subparagraph (b), whatever limitations may exist within its own legal system on the creation of offences of participation.

3.44 The offender’s knowledge must relate to an offence (the predicate offence) or an act of participation in an offence. The issue of the location of the predicate offence, or the act of participation, does not seem to have been considered in the course of the negotiations. The issue arises where a person makes a transfer of property in one State, knowing that the property was derived from an offence in another State. Examples of greater complexity can be devised, such as where the transfer of property was between two States or where the predicate offence was in one State but there was also an act of participation in another State. There is no territorial limitation expressed in the text of the provision, and it would accord with recent practice if implementing legislation were to reflect the possibility that the predicate offence was located in a State other than the enacting State.

3.45 The offender’s knowledge must be that the property is derived from “any” of the specified offences. This suggests that he need not be shown to have been aware of the precise offence which had been committed. Knowledge that the property was derived from some ill-defined organized crime or racketeering activity would, however, not suffice. It is, of course, open to parties to define money-laundering as broadly as they choose, for example by extending it beyond the cases in which the predicate offence is one of drug trafficking.

3.46 Most modern legislation in this area uses the term “proceeds” to describe property derived, directly or indirectly, from criminal activity. The word “proceeds” is defined in the 1988 Convention in just this sense, as “any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1”.<sup>143</sup> The decision not to make use of the term “proceeds” in article 3, paragraph 1, subparagraph (b), may well have been in error, but it does raise the question whether the reference to property being “derived from” certain offences can be taken to cover property “obtained directly or indirectly” from those offences. On a broad understanding of “derivation” it would seem possible to include also certain cases of “indirect derivation”.

3.47 Subparagraph (b), clause (i), deals with the “conversion or transfer” of property. In the case of a tangible asset, these terms may be used to cover the transfer of the asset to another person in an unchanged state and the conversion of the asset into another form (for example its sale or exchange, so that the property’s value is represented by the money or other asset received). Frequently the property will take the form of money, which may be converted either into another currency or into some other form of property, for

<sup>143</sup>Art.1, subpara. (p); see also comments in paragraphs 1.17-1.18 above.

example by deposit in a bank or the purchase of shares or bonds. It may, in its new form, be transferred, perhaps electronically, to another jurisdiction.

3.48 The “transfer” of property is commonly thought of as the act of the transferor rather than the transferee, the recipient. In the case of the “conversion” of property (for example by exchange), both parties may be regarded as acting. It would seem, however, from the separate treatment of “acquisition” of property that the recipient is not covered by the present provision.

3.49 An act of conversion or transfer must not only be committed intentionally (see paras. 3.7 and 3.41 above) and with the prescribed knowledge (see paras. 3.44 and 3.45 above); the act must also be done for one of two purposes set out in the text. It is clear that those purposes overlap to a considerable extent. One is expressed in terms of the property: the purpose of concealing or disguising the illicit origin of the property. Any conversion or transfer of property may have the effect of concealing or disguising the origins of the property; what is required is that it be done for that purpose, with that motivation. The other purpose is expressed in terms of assisting “any person” (and as the text does not speak of “any other person” it is apt to include the offender himself) to evade the legal consequences of his involvement in the commission of the offence or offences. In many cases, both purposes will be evident: the illicit origins of the property will be disguised so that the chances of its confiscation and the offender’s conviction are reduced.

3.50 Subparagraph (b), clause (ii), is more widely drafted, no element of “purpose” being expressly mentioned although it seems implicit in the language used. It covers any intentional acts, done with knowledge of the illicit derivation of the property, which amount to the concealment or disguise of “the true nature, source, location, disposition, movement, rights with respect to, or ownership of” the property. The “source” of property could include its physical origin (for example, the country from which it was imported) as well as its derivation. Some of the other terms plainly overlap in meaning; the movement of goods will commonly involve their location.

**Implementation considerations: paragraph 1, subparagraph (b)**

3.51 As has been seen, paragraph 1, subparagraph (a), clause (v), of article 3 gives expression to the concept that one of the principal requirements of an effective strategy to counter modern international drug trafficking is the need to provide the law enforcement community with the necessary tools to undermine the financial power of the criminal groups and networks involved. In the late 1980s, a broad consensus emerged within the international community that the criminalization of money-laundering was an essential component of such a strategy. Paragraph 1, subparagraph (b), when viewed in conjunction with paragraph 1, subparagraph (c), clause (i), was designed to satisfy this need, although the term “money-laundering” itself, owing to its relative novelty and problems of translation, was not used in the text. Given the fact that no previous multilateral instrument had dealt with this matter, the concept itself was expressed in some detail.<sup>144</sup> Notwithstanding this fact, parties to the 1988 Convention have considerable flexibility in determining the most appropriate manner through which to satisfy the obligations in question. In practice some have enacted legislation which uses language similar to that found in article 3, paragraph 1, subparagraph (b), while others have found it convenient to use alternative strategies such as the modification of the scope of pre-existing criminal offences. Either approach is acceptable so long as the full range of conduct is criminalized.

3.52 Since the 1988 Convention was formulated, significant advances have been recorded in furthering an understanding of the nature and extent of the money-laundering process and of the threat it poses. In addition, valuable experience has been gained from the practical operation of relevant domestic legislation and from the refinement and further development of countermeasures against money-laundering in a variety of forums.<sup>145</sup> It

<sup>144</sup>See above, comments on article 3, paragraph 1, subparagraph (b).

<sup>145</sup>See W. Gilmore, *Dirty Money: the Evolution of Money Laundering Counter-Measures* (Strasbourg, Council of Europe Press, 1995); and R. Parlour, ed., *Butterworths Guide to Money Laundering Law and Practice* (London, Butterworths, 1995).

may be of particular value, therefore, for those charged with the implementation of this significant provision to familiarize themselves with such developments in order to determine whether or not it would be appropriate to take advantage of the flexibility accorded by article 24 in order to adopt more ambitious measures than those strictly required by the Convention.

3.53 One such issue is the scope to be given to the offence of money-laundering in the implementing legislation. While the obligation contained in paragraph 1, subparagraph (b), is restricted to the criminalization of the laundering of property derived from serious drug trafficking offences, recent years have witnessed the emergence of a trend which favours the extension of the criminal offence beyond the narcotics predicate. Such an approach is, for example, embodied in article 6 of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and encouraged by the fifth of the 40 recommendations adopted by the Financial Action Task Force on Money Laundering in 1990. These international precedents have been increasingly reflected in the content of the criminal law of individual States, some of which have extended the offence on an all-crimes basis while others have elected to do so only in respect of certain specified offences of a serious nature.<sup>146</sup> These domestic and international developments mirror the perception of a number of commentators and law enforcement and other officials that a drug-specific approach brings with it a number of disadvantages. For instance, there may be difficulties in proving that particular proceeds are attributable to drug trafficking activities especially when the persons in question are involved in a broad range of criminal activities.<sup>147</sup>

3.54 A further question to be considered is whether corporations, as distinct from their employees, should be subject to criminal liability for money-laundering. This is a matter on which both the 1988 Convention and the Council of Europe Convention of 1990 remain silent. There has, however, been some discussion of it at an international level. In 1990, the Financial Action Task Force, in the seventh of its recommendations, adopted the view that “where possible” such liability should be imposed.<sup>148</sup> A further useful precedent is to be found in article 14 of the Model Regulations concerning Laundering Offences Connected to Illicit Trafficking and Related Offences, which were approved by the General Assembly of the Organization of American States (OAS) in 1992. The creation of a system of corporate criminal liability helps to resolve a number of difficulties that can arise when money-laundering is pursued through legal persons. For example, complex management structures can render the identification of the person or persons responsible for the commission of the offence difficult or impossible. In such cases the imposition of liability on the legal person may be the only option if the activity in question is not to go unpunished. Similarly a sanction imposed on an institution rather than an individual can act as a catalyst for the reorganization of management and supervisory structures to ensure that similar conduct is deterred.

3.55 Given the widely acknowledged fact that many sophisticated money-laundering operations contain conspicuous transnational features, it is generally regarded as being

<sup>146</sup>For example, as at 28 June 1996, of the 26 member States of the Financial Action Task Force, 25 had legislated to criminalize drug money-laundering and 19 had enacted the offence beyond the drugs predicate (see Financial Action Task Force on Money Laundering, “Annual report, 1995-1996”, Paris, 28 June 1996, p. 11). In the light of this trend and other factors, the Financial Action Task Force, as part of a review of its original 40 recommendations, reformulated its position. The new wording, now contained in recommendation 4, reads: “Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalize money-laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money-laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money-laundering predicate offences” (Financial Action Task Force on Money Laundering, “Annual report, 1995-1996”, Paris, 28 June 1996, annex I, p. 3).

<sup>147</sup>See, for example, “Money-laundering and associated issues: the need for international cooperation” (E/CN.15/1992/4/Add.5) and “Report and recommendations of the International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: A Global Approach” (E/CONF.88/7).

<sup>148</sup>In Iceland, for example, financial institutions are subject to corporate criminal liability for money-laundering (see Financial Action Task Force on Money Laundering, “Annual report, 1994-1995”, Paris, 8 June 1995, p. 9, footnote 3; and *Liability of Enterprises for Offences: Recommendation No. R(88) adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and Explanatory Memorandum* (Strasbourg, Council of Europe, 1990)).

significant for a State to be in a position to prosecute an individual for involvement in such activities even when the underlying criminal activity that generated the proceeds in question took place elsewhere. While the 1988 Convention does not specifically address itself to this issue, it has since become commonplace in international practice to do so. For instance, the definition of money-laundering given in article 1 of the Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering, issued by the Council of Ministers of the European Communities on 10 June 1991, which draws heavily on the approach taken by the 1988 Convention, also provides that money-laundering “shall be regarded as such even when the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in that of a third country”.<sup>149</sup>

3.56 The money-laundering provisions of the 1988 Convention are confined to securing improvements in national criminal law systems with consequential benefits for the scope and effectiveness of international cooperation. They are not addressed to those elements of the strategy designed to counter money-laundering, which embrace a preventive philosophy. This dimension of the wider international strategy is reflected in a number of international and regional precedents, including the Basle Statement of Principles on prevention of criminal use of the banking system for the purpose of money-laundering, issued in December 1988 by the Basle Committee on Banking Regulations and Supervisory Practices, the 1991 European Communities Directive and the 1992 OAS Model Regulations. The utility of enhancing the role of the financial system in an attempt to create an inhospitable and hostile environment for the money-launderers is also central to the programme elaborated by the Financial Action Task Force. While there are a number of important differences in the scope and ambition of these various initiatives, they reveal the emergence of important common principles. They also underline the extent to which a shared belief has evolved that effective efforts to counter money-laundering require the collective will and commitment of the public and private sectors working together. Given these developments, it would be prudent for those responsible for implementing paragraph 1, subparagraph (b), to consider the extent to which this dimension of modern international practice is acceptable in terms of national policy and appropriate to local circumstances.

3.57 At the heart of the preventive strategy there has been a general acknowledgement of the value of requiring institutions brought within its ambit to take appropriate steps to identify their customers<sup>150</sup> and to retain records of both identity and specific categories of transactions for set periods of time.<sup>151</sup> The requirement of customer identification, which is frequently associated with the identification of beneficial owners, gives expression to the belief that the credit, financial or other institution concerned is better placed than law enforcement or other authorities to judge whether a customer or a particular transaction is bona fide.<sup>152</sup> The retention of records is seen as an important complement to the “know your customer” principle in that it ensures that an audit trail exists to assist the authorities in identifying money-launderers and tracing the movement of illicit proceeds with a view to their eventual confiscation.<sup>153</sup>

3.58 A second critical element of this approach is to ensure full cooperation between the institutions concerned and the relevant supervisory bodies<sup>154</sup> and those charged with the responsibility of combating money-laundering operations. This philosophy of cooperation frequently extends to informing the latter, on their own initiative, of any fact which might be an indication of money-laundering. All States wishing to give expression to this approach will have to determine the functions and powers of the

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<sup>149</sup>See also article 3 of OAS Model Regulations concerning Laundering Offences Connected to Illicit Trafficking and Related Offences and article 6, paragraph 2, subparagraph (a), of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 1990).

<sup>150</sup>See, for example, article 3 of the European Communities Directive and article 10 of the OAS Model Regulations.

<sup>151</sup>See, for example, article 4 of the European Communities Directive.

<sup>152</sup>See, for example, J. C. Westerweel and J. L. Hillen, *Measures to Combat Money Laundering in the Netherlands* (The Hague, Ministry of Finance, 1995), p. 4.

<sup>153</sup>See also below, comments on article 5.

<sup>154</sup>See, for example, article 10 of the European Communities Directive.

money-laundering control service that will be authorized to receive such reports. Many States have charged an appropriate law enforcement agency with this task while others have elected to create the national service elsewhere, for example in the ministry of finance. Where the latter practice is followed, those charged with the introduction of this strategy will have to pay particular attention to the establishment of effective links between the reporting service and the relevant national law enforcement authorities. It is common to buttress a system for reporting “suspicious transactions” with a requirement, designed to safeguard the integrity of any subsequent investigation, that the fact that such information has been transmitted to the competent authorities must not be brought to the attention of the customer concerned or to any third party.<sup>155</sup> Frequently, breach of such an obligation attracts criminal sanctions.

3.59 It is appreciated that, in reaching out to and involving credit, financial and other institutions in this way, it is necessary to ensure that they are, in fact, in a position to play this role in a full and effective manner. To this end they are frequently provided with an element of legal immunity from suit for breach of contract or other legal obligations such as those relating to customer confidentiality.<sup>156</sup>

3.60 Some countries have taken the view that the law enforcement efforts to combat money-laundering would be enhanced if the appropriate national authority were in a position to be informed of all large cash transactions taking place within their national territory. To that end a minority of States that have embraced the preventive approach have introduced a system of mandatory and routine reporting of certain transactions above a fixed threshold.<sup>157</sup> No consensus has yet emerged, however, as to the utility and practicality of this approach.<sup>158</sup> More commonly, States have elected to require financial institutions to report suspicious or unusual transactions.

3.61 By way of contrast it has been widely accepted that, if the preventive approach is to be effective, the institutions concerned should establish adequate internal control and communication systems. In addition, it has become a common practice to call upon the institutions concerned to initiate training programmes for their employees in order to make them aware of legal requirements and to help them to recognize transactions that may be related to money-laundering and to instruct them on how best to proceed in such cases.<sup>159</sup>

3.62 Given the highly intrusive nature of this dimension to the growing international effort to combat money-laundering, it would be prudent to ensure, as far as possible, that the strategy adopted is sensitive to the commercial realities of the sectors of the economy that are affected. Consequently, it is highly desirable to engage in dialogue and enter into close cooperation with the economic sectors concerned in order to reduce to a minimum any adverse impact on the conduct of legitimate commercial activities.

3.63 In introducing a comprehensive strategy to counter money-laundering, it is to be anticipated that one consequence will be to increase the attractiveness of less regulated jurisdictions. Criminal money managers may, for example, seek to undertake the initial or placement stage of a money-laundering operation in just such a jurisdiction. Resort to such a strategy of geographical displacement creates, in turn, an element of vulnerability, which can be exploited by law enforcement authorities. A growing number of countries have elected to put in place legal structures which permit action to be taken to interdict certain categories of cross-border cash shipments. Some have imposed mandatory reporting of the export or import (or both) of currency above a stipulated threshold. Failure to comply can result in the imposition of penalties and the forfeiture of the currency. In other jurisdictions the relevant law enforcement authorities have been given the right to seize large sums of cash which are being imported or exported in circumstances that give

<sup>155</sup>See, for example, article 13, paragraph 3, of the OAS Model Regulations.

<sup>156</sup>See, for example, article 8 of the European Communities Directive.

<sup>157</sup>Australia and the United States have adopted this approach.

<sup>158</sup>See, for example, “Financial Action Task Force on Money Laundering: report”, Paris, 7 February 1990, recommendation No. 24.

<sup>159</sup>See, for example, article 11 of the European Communities Directive.

reasonable grounds to believe that the cash represents the proceeds of drug trafficking. Yet others are able to invoke provisions of their exchange control or other similar legislation. In order to limit further the options available to money-launderers, consideration might be given to extending the scope of such measures to include cash-equivalent monetary instruments, precious metals, gems, and other highly liquid valuables.<sup>160</sup>

3.64 Irrespective of the outcome of domestic consideration of the nature and scope of the money-laundering offences to be introduced and related matters, many States will face a significant challenge in securing their effective implementation. The law enforcement community will have to consider the adequacy of traditional training methods in the light of what will be, in many countries, a new mandate.<sup>161</sup> The development and retention of skills in financial investigation, asset management and international cooperation and coordination of money-laundering investigations are among the many issues that will have to be tackled. In doing so some will wish to obtain training and technical assistance elsewhere. Within the United Nations system of organizations, the task of providing coordinated leadership in this area has been given to the United Nations International Drug Control Programme (see General Assembly resolution 45/179). Acting on its own or in conjunction with other organizations, as appropriate, it responds to requests for various forms of assistance, ranging from the organization of awareness training programmes to the dissemination of manuals and other useful working tools prepared for the use of law enforcement officials (see Economic and Social Council resolution 1991/41).<sup>162</sup>

***Paragraph 1, subparagraph (c), introductory part***

**(c) Subject to its constitutional principles and the basic concepts of its legal system:**

***Commentary***

3.65 The obligation of parties to create the offences listed in paragraph 1, subparagraphs (a) and (b), is unqualified, but subparagraph (c) opens with this “safeguard clause”. This particular clause represents a narrowing of a similar clause used in article 36, paragraph 2, of the 1961 Convention, which refers to “the constitutional limitations of a Party, its legal system and domestic law”. That phrase was not easy to interpret and the official commentary suggested that it referred to a State’s basic legal principles and the widely applied concepts of its domestic law.<sup>163</sup> Although some delegations at the Conference expressed dissatisfaction with the new language of the safeguard clause, the text commanded general acceptance.

3.66 The aim of the Conference in including the safeguard clause was to recognize the difficulties some States had with the potential scope of the offences specified in paragraph 1, subparagraph (c). In certain countries, some of these offences, if widely defined, might offend against constitutional guarantees of freedom of expression. It was necessary to go beyond a reference to “constitutional principles” to include a reference to “basic concepts” of the party’s legal system. Those concepts, whether embodied in statute law, judicial decisions or ingrained practice, may be irreconcilable with the approach taken in subparagraph (c) in respect of specific offences. This is particularly the case in respect of

<sup>160</sup>See, for example, Financial Action Task Force on Money Laundering, “Annual report, 1991-1992”, p. 17; and the text of recommendation No. 22 of the Financial Action Task Force on Money Laundering and the interpretative note adopted in respect of the same (Financial Action Task Force on Money Laundering, “Annual report, 1995-1996”, Paris, 28 June 1996, annex 1, p. 6, and annex 2, p. 4).

<sup>161</sup>See below, comments on article 9, paragraph 2.

<sup>162</sup>See also *United Nations Drug Law Enforcement Training Manual: A Guide for Law Enforcement Officials* (Vienna, 1991).

<sup>163</sup>Commentary on the 1961 Convention, paragraph 5 of the comments on article 36, introductory subparagraph to paragraph 2. It should be remembered that constitutional principles and basic concepts can change. The German Government made a declaration to that effect on ratifying the 1988 Convention.

conspiracy and related crimes, which are quite unknown in some systems; where they consist of mere agreement to act rather than action, they may be regarded in some States as offending against a fundamental freedom. In some countries, there is an established practice of prosecutorial discretion, which serves to protect those whose innocent conduct might be judged to fall within the scope of a generally worded offence; where such discretion is not allowed, the definitions of offences may need to be more tightly drawn.

***Paragraph 1, subparagraph (c), clause (i)***

- (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;**

***Commentary***

3.67 Reference is made here to the earlier examination of the knowledge which the offender must be shown to possess (see paragraphs 3.43-3.45 above).

3.68 In the present context, the specified knowledge must exist “at the time of receipt”. There is no offence in the case of a person who receives goods, whether as a gift or for value, and who continues to use those goods having later come to suspect or know that they were derived from drug offences.

3.69 Although the prohibited conduct is defined as including “acquisition”, “possession” and “use”, it is essential (because of the way in which the knowledge element is defined) that the offender should have received the goods; there must be a “receipt”. If acquisition is to be understood, as it seems it must, as referring to taking possession (as opposed to acquiring ownership of or some other interest in the goods), the references to “possession” and “use” may be, strictly speaking, unnecessary. The offence may come to light because the offender is to be found in possession of, or to be using, the goods; but proof that he or she acquired the goods with the relevant knowledge will itself be sufficient to establish an offence.

***Paragraph 1, subparagraph (c), clause (ii)***

- (ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;**

***Commentary***

3.70 As has already been noted (see para. 3.31 above), the criminalization of the manufacture, transport or distribution of the equipment, materials or substances specified in this provision is mandatory under article 3, paragraph 1, subparagraph (a), clause (iv). The mere possession of those things is dealt with in subparagraph (c), with its safeguard clause.

3.71 The acquisition or receipt of goods takes place on a single occasion; possession is a continuing relationship to the goods. It is important, therefore, that in this provision it is not essential that the prescribed knowledge should exist at the moment of first acquisition. Someone who receives equipment innocently, but who later acquires the knowledge that it is intended for use in the production of drugs and remains thereafter in possession of the goods, will commit the offence. In such circumstances, bona fide purchasers of goods may find themselves facing criminal charges; anxiety about such cases was part of the reasoning in support of the safeguard clause in subparagraph (c).

**Paragraph 1, subparagraph (c), clause (iii)**

- (iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;**

**Commentary**

3.72 This widely drawn provision covers a number of different types of activity; it originated in concerns about magazines and films glorifying drug use and promoting a drug culture.<sup>164</sup> Although the English text is not entirely free from ambiguity, it appears that the adverb “publicly” governs both “inciting” and “inducing”. Similar conduct where the public factor is missing might well constitute “counselling” and in some contexts could be subject to criminalization under the terms of paragraph 1, subparagraph (c), clause (iv).

3.73 It is far from clear what the word “publicly” is intended to signify. There may be situations in which the incitement or inducement is addressed to identified persons (though they might be overheard by others); in other cases, as with a radio broadcast or a loudspeaker announcement, the category of hearers is not determined in advance. Another approach would be to ask whether the occasion was a “public” one, distinguishing between a private meeting or gathering and one open to the public. In practice, the word will have to be interpreted in the light both of the particular circumstances of the conduct in question and the analogies to be found in the relevant legal system.

3.74 A much-cited South African definition of an inciter is “one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other’s mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity.”<sup>165</sup> Inducement is that form of incitement which involves the offering of money or money’s worth. The presence of the words “by any means” indicates that the terms are to be broadly interpreted. In some legal systems, it may be appropriate to specify the means of incitement in the relevant legislation.

3.75 The conduct incited or induced is either: (a) the commission of any of the offences established in accordance with article 3; or (b) the illicit use of narcotic drugs or psychotropic substances. Illicit use itself is not required to be criminalized under the Convention, but the conduct of the inciter is.

**Paragraph 1, subparagraph (c), clause (iv)**

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

**Commentary**

3.76 This provision deals with various forms of participation or involvement in criminal activity, specifically the commission of any offence established in accordance with article 3.

3.77 The various ways in which individuals may involve themselves in criminal activity are classified differently in different national legal systems. Apart from the principal offender, there may be secondary parties or accomplices. They may have a degree of actual participation in the criminal activity (for example, by being present); they may provide

<sup>164</sup>Subsequent developments related to use of electronic media, in particular the Internet, to advertise drugs and promote their abuse were not envisaged at the time of the adoption of the Convention, but are covered by the words “by any means”.

<sup>165</sup>J. A. Holmes, *Nkosiwana*, 1966 (4) S.A. 655 at p. 658, A.D.

some degree of assistance (“aiding and abetting” or “facilitating”); they may join in the devising and planning of the crime (in “association” or “conspiracy”); they may encourage its commission or provide technical advice (“counselling” or “facilitating”); they may actually join in an attempt to carry out the prohibited conduct.

3.78 Not only are these forms of involvement the subject of different systems of classification, but there is also disagreement among national legal systems as to the appropriate boundary for criminal liability. One illustration of this is in the field of attempts. Many legal systems draw a distinction (necessarily imprecise) between “acts of mere preparation”, which are not punishable, and “attempts” (where outside interference, independent of the will of the actor, prevents the completion of the offence), which do attract criminal liability. Making inquiries about the price of drugs on the illicit market with the intention of making a purchase if the price is acceptable would be an act of mere preparation rather than an attempt to purchase. Making an unsuccessful offer might be regarded as an attempt.<sup>166</sup> The language of the present provision is fuller than that in the corresponding provision of the 1961 Convention, which includes a reference to “preparatory acts”.<sup>167</sup>

3.79 As has been noted, these variations in approach were felt to require the inclusion of the safeguard clause in the introduction to subparagraph (c), enabling parties to reconcile the aims of the present provision with the particular approach adopted by their own criminal law.

**Implementation considerations: paragraph 1, subparagraph (c)**

3.80 Clauses (i) and (ii) of paragraph 1, subparagraph (c), both complement in important ways earlier obligations contained in article 3, paragraph 1. The former treats an economic aspect of crime that should be covered in any comprehensive scheme to combat money-laundering through the use of criminal justice measures.<sup>168</sup> The latter is intended to complete the comprehensive treatment of efforts to prevent the use of equipment, materials and substances in the illicit production of narcotic drugs and psychotropic substances.<sup>169</sup> In framing appropriate legislation or other measures in this sphere, parties have a wide measure of discretion. For instance, through the use of the authority conferred in article 24, those who so wish can consider extending the coverage of subparagraph (c), clause (i), to include treatment of post-acquisition knowledge.

3.81 Clauses (iii) and (iv) of paragraph 1, subparagraph (c), while dealing with very different areas of concern, do have in common the fact that the qualified obligation on parties extends to any of the offences established in accordance with article 3 and not merely to the relatively more serious illicit trafficking offences enumerated in paragraph 1. It therefore includes offences aimed at personal use falling within the scope of paragraph 2. This is a fact of particular importance for those charged with drafting appropriate legislation to ensure compliance with the requirements of the 1988 Convention.

3.82 Paragraph 1, subparagraph (c), clause (iv), deals with various forms of participation or involvement in illicit trafficking, ranging from conspiracy to facilitation. While national legal systems were found to differ so significantly in relation to these matters as to warrant subjecting the obligation to criminalize them to a “safeguard clause”, law enforcement practice has demonstrated the particular utility of such offences in penetrating complex drug trafficking networks. This assists the prosecution of drug kingpins who rarely come into contact with the actual narcotic drugs and psychotropic substances themselves. Subparagraph (c) thus complements subparagraphs (a), clause (v), and (b), which also focus on efforts to disrupt trafficking organizations.

<sup>166</sup>Commentary on the 1961 Convention, paragraph 2 of the general comments on article 36 and paragraphs 2-4 of the comments on article 36, paragraph 2, subparagraph (a), clause (ii).

<sup>167</sup>1961 Convention, art. 36, para. 2, subpara. (a), clause (ii).

<sup>168</sup>See, for example, “Financial Action Task Force on Money Laundering: report”, Paris, 7 February 1990, sect. II.B; see also Canadian Criminal Code, sect. 354, and French Penal Code, art. 321.1; see also above, comments on article 3, paragraph 1, subparagraph (b).

<sup>169</sup>See above, comments on article 3, paragraph 1, subparagraph (a), clause (iv), and comments on article 12.

3.83 There is a pressing practical need to ensure as comprehensive a coverage of these preparatory acts as possible, given the constitutional principles and basic concepts of the legal system in question. Those responsible for implementation in States which possess the necessary flexibility, in whole or in part, to address these offences, but where familiarity with concepts such as “attempts”<sup>170</sup> or “conspiracy”<sup>171</sup> is not well established, can profitably draw upon the experiences of others where drug-specific approaches to these matters have been adopted.

3.84 All States that are parties to the 1988 Convention must, in any event, treat this issue at least in part. This arises from the nature of the unqualified obligation, contained in paragraph 1, subparagraph (b), to criminalize drug-related money-laundering. The description of that offence uses the wording “or from an act of participation in such offence or offences”. Parties must create the offence of money-laundering in these terms irrespective of the limitations that may exist in their own legal systems on the creation of offences of participation.<sup>172</sup> It may be, of course, that the commission of a money-laundering offence will itself be deemed to be participation in the commission of the predicate offence.

### **Paragraph 2**

- 2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.**

### **Commentary**

3.85 Paragraph 2 deals with the controversial matter of possession, purchase or cultivation for personal consumption. It is necessary to give at this point some account of the position under the earlier conventions to which the paragraph refers.

3.86 Under the 1961 Convention, a party must, “subject to its constitutional limitations”, criminalize the cultivation, possession and purchase of drugs.<sup>173</sup> A number of States have taken the view that “possession” in that paragraph does not include possession for personal consumption; although the issue is usually discussed in the context of “possession”, those States adopt a similar interpretation of the term “cultivation”. Two other provisions of the 1961 Convention are relevant: article 4, paragraph 1, under which parties “shall take such legislative and administrative measures as may be necessary: ... (c) subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the ... use and possession of drugs”; and article 33, under which parties “shall not permit the possession of drugs except under legal authority” (an article which does not, however, require penal sanctions).

3.87 The arguments advanced regarding the position under the 1961 Convention are summarized in the commentary on article 4 of that Convention. The relevant paragraphs, omitting footnotes, are as follows:

“17. The question arises how far and in what way these provisions govern the possession of controlled drugs; do they apply without regard to whether the drugs are held for illegal distribution or only for personal consumption, or do they apply solely to the possession of drugs intended for distribution?”

<sup>170</sup>See, for example, Thailand, Act B.E. 2534, 1991, sect. 7.

<sup>171</sup>See, for example, Italy, Decree No. 309 of 9 October 1990, sect. 74.

<sup>172</sup>See above, comments on article 3, paragraph 1, subparagraph (b).

<sup>173</sup>1961 Convention, art. 36, para. 1.

“18. Article 4, paragraph (c), undoubtedly refers to both kinds of possession; but whether that provision must be implemented by imposing penal sanctions on possession for personal consumption is a question which may be answered differently in different countries. Some Governments seem to hold that they are not bound to punish addicts who illegally possess drugs for their personal use. This view appears to be based on the consideration that the provisions of article 36, which in its paragraph 1 requires parties, subject to their constitutional limitations, to penalize the possession of drugs held contrary to the provisions of the Single Convention, are intended to fight the illicit traffic, and not to require the punishment of addicts not participating in that traffic. Article 45 of the Third Draft, which served as working document of the Plenipotentiary Conference, enumerated in its paragraph 1, subparagraph (a), ‘possession’ among the actions for which punishment would be required. This paragraph is identical with the first part of paragraph 1 of article 36 of the Single Convention, dealing with ‘possession’ as one of the punishable offences. Article 45 of the Third Draft is included in chapter IX, headed ‘Measures against illicit traffickers’. This would appear to support the opinion of those who believe that only possession for distribution, and not that for personal consumption, is a punishable offence under article 36 of the Single Convention. The Draft’s division into chapters was not taken over by the Single Convention, and this was the only reason why the chapter heading just mentioned was deleted, as were all the other chapter headings. Article 36 is still in that part of the Single Convention which deals with the illicit traffic. It is preceded by article 35, entitled ‘Action against the illicit traffic’, and followed by article 37, entitled ‘Seizure and confiscation’.

“19. Parties which do not share this view, and which hold that possession of drugs for personal consumption must be punished under article 36, paragraph 1, may undoubtedly choose not to provide for imprisonment of persons found in such possession, but to impose only minor penalties such as fines or even censure. Possession of a small quantity of drugs for personal consumption may be held not to be a ‘serious’ offence under article 36, paragraph 1, and only a ‘serious’ offence is liable to ‘adequate punishment particularly by imprisonment or other penalties of deprivation of liberty’.

“20. Penalization of the possession of drugs for personal consumption amounts in fact also to a penalization of personal consumption.

“21. It has, on the other hand, been pointed out, particularly by enforcement officers, that the penalization of all unauthorized possession of drugs, including that for personal use, facilitates the prosecution and conviction of traffickers, since it is very difficult to prove the intention for which the drugs are held. If Governments choose not to punish possession for personal consumption or to impose only minor penalties on it, their legislation could very usefully provide for a legal presumption that any quantity exceeding a specified small amount is intended for distribution. It could also be stipulated that this presumption becomes irrebuttable if the amount in the possession of the offender is in excess of certain limits. It may also be remarked that constitutional limitations, which can free a party from all obligation to punish an action mentioned in article 36, paragraph 1, will generally not prevent the penalization of the unauthorized possession of drugs.”<sup>174</sup>

3.88 There is a similar uncertainty as to the effect of the relevant provisions of the 1971 Convention. Article 22, which deals with penal provisions, provides in paragraph 1, subparagraph (a), that “subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention.”

3.89 It has been argued that the effect is not to render possession for personal consumption an offence. Apart from the general consideration, also advanced in respect of the 1961 Convention, that the object was to fight illicit traffic and not to require the punishment of abusers of the controlled substances, it has been suggested that

<sup>174</sup>Commentary on the 1961 Convention, paragraphs 17-21 of the comments on article 4, paragraph 1.

“possession” is not an “action” and is thus not affected by article 22, paragraph 1, subparagraph (a).<sup>175</sup>

3.90 It was against this background that the negotiators of the 1988 Convention tackled the question, and the resulting text reflects compromises on a number of points.

3.91 First, it was agreed to include in article 3, paragraph 2, the safeguard clause referring to constitutional principles and the basic concepts of a party’s legal system.

3.92 Secondly, it was agreed to include the final words requiring the conduct to be “contrary to the provisions of” the earlier conventions. This could be interpreted as enabling the parties to retain the stance that they had adopted regarding the interpretation of those earlier texts.<sup>176</sup> This needs, however, to be balanced by the weight to be given to the express inclusion of the reference to “personal consumption” in the text of paragraph 2. A more consistent reading is that the words “contrary to the provisions” of the earlier conventions incorporate the schedules of controlled substances as well as the distinction under those conventions between licit and illicit consumption.

3.93 Thirdly, the provisions in paragraph 2 were kept separate from those in paragraph 1. The effect is that the references in later provisions of the Convention to the nature of the sanctions to be imposed in respect of offences<sup>177</sup> can readily distinguish offences established in accordance with paragraph 2 from the graver offences created in pursuance of paragraph 1; and the provisions regarding the establishment of extraterritorial jurisdiction,<sup>178</sup> confiscation,<sup>179</sup> extradition<sup>180</sup> and mutual legal assistance<sup>181</sup> are limited to offences created in pursuance of paragraph 1. These latter measures of cooperation, expensive and sometimes cumbersome, were judged inappropriate to the relatively minor but very numerous offences established in accordance with paragraph 2.

### ***Implementation considerations: paragraph 2***

3.94 As noted above, the view that the Convention should not neglect the issue of personal-use offences prevailed and is reflected in article 3, paragraph 2.<sup>182</sup> Although the definition of illicit traffic contained in article 1 extends to such offences in addition to those established in paragraph 1, there are significant differences in the treatment afforded to the former in the framework of the Convention as a whole. In particular, it was recognized that, in the context of international cooperation, considerations of both expense and administrative practicality required a distinction to be drawn between the two categories. In addition, the division of offences into these two categories facilitated a differentiation in the approach to the closely associated issue of sanctions. Thus, article 3, paragraph 4, subparagraph (d), affords parties a somewhat greater degree of latitude in approaching personal-use offences in this context.<sup>183</sup> Either in addition or, importantly, as an alternative to conviction or punishment for offences established in accordance with paragraph 2, it provides for the imposition of measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

<sup>175</sup>Commentary on the 1971 Convention, paragraphs 9-16 of the comments on article 22, paragraph 1, subparagraph (a).

<sup>176</sup>See the statement by the representative of Bolivia (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 24th meeting, para. 65), who stated that if the 1988 Convention were to go beyond that of 1961 in respect of coca leaf cultivation “whole batches of the population would be in jeopardy and the prisons would be full to overflowing”.

<sup>177</sup>Art. 3, para. 4.

<sup>178</sup>Art. 4, paras. 1 and 2.

<sup>179</sup>Art. 5, para. 1.

<sup>180</sup>Art. 6, para. 1.

<sup>181</sup>Art. 7, para. 1.

<sup>182</sup>See also below, paragraph 14.32, regarding the closely associated issue of the elimination of demand for narcotic drugs and psychotropic substances.

<sup>183</sup>A similar approach is adopted in article 3, paragraph 4, subparagraph (c), to the treatment of offences of a minor nature established in accordance with paragraph 1.

3.95 It will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence.<sup>184</sup> Rather, it approaches the issue of non-medical consumption indirectly by referring to the intentional possession, purchase or cultivation of controlled substances for personal consumption. In contrast to the position under the 1961 and 1971 Conventions, however, paragraph 2 clearly requires parties to criminalize such acts unless it would be contrary to the constitutional principles and basic concepts of their legal systems to do so.<sup>185</sup>

3.96 In determining an implementation strategy in respect of the range of offences relating to personal use enumerated in paragraph 2, it may be worth examining the practice followed by many States, in which such offences are distinguished from those of a more serious nature by reference to stipulated threshold requirements in terms, for example, of weight. This could be particularly useful in the context of possession for personal consumption.

### **Paragraph 3**

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

#### **Commentary**

3.97 Offences under article 3 require *mens rea*; that is, the Convention does not require the criminalization of acts of negligence. Proof of knowledge or of *mens rea* can present difficulties, whatever system of evidence is adopted in a particular national legal system; in practice a defendant will commonly deny the requisite degree of knowledge, and the tribunal must be satisfied as to the existence of that knowledge by admissible evidence. A rigorous analysis of “knowledge”, for example, has to address circumstances of “wilful blindness”, where the actor “closes his eyes to the obvious”; cases of *dolus eventualis*, where the offender takes an obvious risk; and circumstances in which any person in the actor’s position would have had the requisite knowledge.

3.98 Paragraph 3 does not attempt an exhaustive examination of such issues. It does, however, make it clear that direct proof in the form, typically, of a confession is not essential. The relevant mental element may be inferred from the circumstances surrounding the alleged offender’s conduct. Differences in national law and practice are not, however, eliminated.

3.99 The paragraph deals with the inferences that may be drawn by the court or other trier of factual issues. It does not address, and so requires no changes in, the evidential procedures adopted in national legal systems. It will be noted that paragraph 3 refers to offences established in accordance with article 3, paragraph 1, and omits reference to paragraph 2 of that article, but triers of fact will commonly draw such inferences in any case where that seems justifiable.

#### **Implementation considerations: paragraph 3**

3.100 Paragraph 3 is permissive rather than mandatory. It is intended to clarify the point that the requisite elements of knowledge, intent or purpose contained in the description of the various offences established in accordance with paragraph 1 may be proved circumstantially; that is, they “may be inferred from objective factual circumstances”. This wording, which has been reproduced verbatim in a number of subsequent international texts and treaty instruments,<sup>186</sup> must be read in conjunction with paragraph 11, which

<sup>184</sup>See articles 4 and 36 of the 1961 Convention and articles 5 and 22 of the 1971 Convention.

<sup>185</sup>See above, comments on article 3, paragraph 2; see also *Report of the International Narcotics Control Board for 1992* (United Nations publication, Sales No. E.93.XI.1), chap. I.

<sup>186</sup>See, for example, article 6, paragraph 2, subparagraph (c), of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 18 November 1990).

provides, inter alia, that nothing contained in article 3 “shall affect the principle that the description of the offences to which it refers and of the legal defences thereto is reserved to the domestic law of a Party”.

3.101 In spite of the flexibility provided by paragraph 3, particular problems have been encountered in practice in satisfying the knowledge requirement in cases of money-laundering. This has, in turn, resulted in various discussions at the international level of alternative ways in which to approach the concept of *mens rea* in this context.<sup>187</sup> For example, the definition of laundering in article 2 of the OAS Model Regulations uses the formula “knows, should have known, or is intentionally ignorant” in its treatment of the substantive offences. Article 6, paragraph 3, subparagraph (a), of the 1990 Council of Europe Convention permits, but does not require, the criminalization of negligent laundering. Such concerns now find expression in the relevant domestic laws of a number of jurisdictions.<sup>188</sup> Consequently those charged with drafting enabling legislation with regard to paragraph 1 may wish to consider the desirability and acceptability of using these or other methods to secure the maximum possible effectiveness of national legislative initiatives.<sup>189</sup> In doing so, it is important to ensure, to the greatest extent possible, that the use of different standards of knowledge does not adversely affect a party’s ability or willingness to seek or receive international cooperation and legal assistance.<sup>190</sup>

**Paragraph 4, subparagraph (a)**

- 4. (a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.**

**Commentary**

3.102 In the 1961 and 1971 Conventions, the corresponding provisions specify that “serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty”.<sup>191</sup> The negotiators of the 1988 Convention were determined to strengthen these provisions, going beyond the earlier texts. The structure of paragraph 4 gives priority to the heavier penalties, in subparagraph (a), and, by way of exception or qualification, allows in subparagraph (c) for lesser penalties in “cases of a minor nature”.

3.103 In paragraph 4, subparagraph (a), sanctions are required which adequately reflect the “grave nature” of the offences specified in article 3, paragraph 1. The list of types of sanctions is intended to be neither exclusive nor necessarily cumulative. These sanctions, singly or in combination, are among those that should be deployed.

3.104 Under “other forms of deprivation of liberty” are included sentences such as “penal servitude” or confinement in a labour camp as provided for under some legal systems. The phrase may also include some non-custodial measures, such as house arrest or curfew, which may be combined with other forms of supervision such as electronic monitoring.<sup>192</sup>

<sup>187</sup>See Financial Action Task Force on Money Laundering, “Report, 1996”, annex, recommendation No. 5.

<sup>188</sup>See, for example, General Civil Penal Code of Norway, sect. 317.

<sup>189</sup>The Australian approach extends to a person who knows “or ought reasonably to know” that the money or property in question was tainted (see Proceeds of Crime Act, 1987, Act No. 87 (1987), 81(3)).

<sup>190</sup>See Financial Action Task Force on Money Laundering, “Report, 1996”, annex, recommendation No. 33, and the interpretative note on this subject contained in annex 2.

<sup>191</sup>1961 Convention, art. 36, para. 1; and 1971 Convention, art. 22, para. 1, subpara. (a).

<sup>192</sup>See also General Assembly resolution 45/110, containing the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

3.105 In some national legal systems and in some circumstances, an offender is deprived of the benefit of the proceeds of crime by the imposition of a fine or other pecuniary penalty rather than by the confiscation of specific assets. The drafting is broad enough to cover these varying arrangements.

**Paragraph 4, subparagraphs (b), (c) and (d)**

- (b) The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration;**
- (c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare;**
- (d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender;**

**Commentary**

3.106 The 1971 Convention and the 1961 Convention as amended by the 1972 Protocol<sup>193</sup> include a provision (in identical terms in the two texts) to the effect that when drug abusers have committed offences under the Convention, the parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers undergo measures of treatment, education, aftercare, rehabilitation or social reintegration. Paragraph 4, subparagraphs (b), (c) and (d), of the 1988 Convention, while drawing on that earlier provision, widen the scope of application to drug offenders in general, whether drug abusers or not. They also introduce distinctions based on the seriousness of the offence committed: for offences of a grave nature under article 3, paragraph 1, measures of treatment, education etc. may be prescribed only in addition to conviction or punishment; for offences of a minor nature under article 3, paragraph 1,<sup>194</sup> and offences aimed at personal consumption under article 3, paragraph 2, such measures may be prescribed as an alternative to conviction or punishment.<sup>195</sup>

3.107 The fact that subparagraphs (b), (c) and (d) do not limit the application of additional or alternative treatment and care measures to drug abusers suggests that such measures may go beyond the context of medical and social problems of drug abusers and may be seen in the wider context of measures for the treatment of offenders in general, designed to reduce the likelihood of their offending again. Drug abusers will, however, in practice naturally constitute the main target group of those measures in the context of drug offences.

3.108 Subparagraphs (b), (c) and (d) refer to “conviction or punishment” as the stages at which additional or alternative measures may be provided for. It should, however, be noted that bridges between the criminal justice system and the treatment system might also be envisaged at other stages of the criminal process, including the prosecution stage (for example, conditional discontinuation of criminal proceedings under condition of attending a treatment programme; treatment order pronounced by a prosecuting magistrate in France) or at the stage of enforcement of a prison sentence (transfer from prison to a treatment institution or therapeutic community in certain circumstances).

<sup>193</sup>1971 Convention, art. 22, para. 1, subpara. (b); and 1961 Convention as amended, art. 36, para. 1, subpara. (b). Note that the provisions regarding alternative measures were introduced into the 1961 Convention by the 1972 Protocol.

<sup>194</sup>Offences which are “particularly serious” having regard to the factors listed in paragraph 5 will, by definition, not fall within the “minor” category.

<sup>195</sup>See the United Nations standards and norms in crime prevention and criminal justice.

3.109 “Treatment” will typically include individual counselling, group counselling or referral to a support group, which may involve outpatient day care, day support, inpatient care or therapeutic community support. A number of treatment facilities may prescribe pharmacological treatment such as methadone maintenance, but treatment referrals are most frequently to drug-free programmes. Further treatment services may include drug education, training in behaviour modification, acupuncture, family therapy, relapse prevention training and the development of coping and interpersonal skills. The ability to remain drug-free may also be fostered by rehabilitation and reintegration programmes, such as the provision of further education, job placement and skill training. Therefore measures of treatment, aftercare, rehabilitation, social reintegration and education will in practice often be linked and overlapping. As an alternative measure, treatment is sometimes made a condition for the avoidance of imprisonment. The aim is to take into account the medical condition of the offender while keeping him or her away from an environment where treatment would be minimal and the opportunity for further drug abuse great. Such measures are therefore not necessarily more lenient than imprisonment or much different in concept from punishment. It should be noted that the use of drug treatment as an alternative to punishment and a condition of avoiding a custodial sentence raises controversial issues: questions of whether compulsory treatment may achieve lasting results or whether some amount of willingness and cooperation from the abuser are essential; the relationship between medical practitioners in charge of treatment and judicial authorities; the combination of care and law enforcement roles; and civil rights issues raised by internment for indefinite periods.

3.110 The term “aftercare” is commonly used by penologists to describe the phase of supervision and counselling which follows discharge (especially conditional or early discharge) from a custodial sentence, as the ex-prisoner readjusts to the conditions of normal society. In the present context, this remains a possible interpretation, but it is equally proper to accept the submission made in the commentaries on the earlier texts that it is a stage “which consists mainly of such psychiatric, psychoanalytical or psychological measures as may be necessary after [the abuser] has been withdrawn from the substances that he abused or, in the case of a maintenance programme,<sup>196</sup> after he has been induced to restrict the intake of such substances as required by the programme”.<sup>197</sup>

3.111 It is suggested that the word “rehabilitation” covers such measures as may be required to make the former abuser physically, vocationally, mentally and otherwise fit for living a normal life as a useful member of society (cure of diseases, physical rehabilitation in case of disability, vocational training, supervision accompanied by advice and encouragement, measures of gradual progress to a normal self-reliant life etc.).

3.112 It is particularly difficult to draw a dividing line between “rehabilitation” and “social reintegration”. It is suggested that the term “rehabilitation” mainly refers to measures intended to improve the personal qualities of the abuser (health, mental stability, moral standards, vocational skills), while the term “social reintegration” includes measures intended to make it possible for the abuser to live in an environment that is more favourable to him or her. The term “social reintegration” may thus cover measures such as providing job placement or transitional housing and perhaps also enabling the former abuser to leave his or her former environment and to move to a social atmosphere less likely to foster drug abuse. A change of environment may also be advisable in order to reduce the harm that the social stigma attached to drug abuse may cause the former abuser. Community service, in the form of an obligation to perform a certain number of hours of unpaid work for the good of the community, may be considered as a valid measure of social reintegration, as well as an educational measure, which can be envisaged for minor offences instead of imprisonment.

3.113 “Education” may refer to general education or to specific teaching regarding the harmful consequences of the abuse of narcotic drugs and psychotropic substances. Such

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<sup>196</sup>That is, programmes under which the abuser’s intake of the relevant substances is reduced to such minimum quantities as are medically justified in the light of his or her personal condition.

<sup>197</sup>Commentary on the 1971 Convention, paragraph 4 of the comments on article 20, paragraph 1; and Commentary on the 1972 Protocol, paragraph 4 of the comments on article 38, paragraph 16.

education may occur during a period of treatment or during imprisonment and may equally be part of a programme of aftercare, rehabilitation or social reintegration.

3.114 The list of additional measures in subparagraphs (b), (c) and (d) is not exclusive. A party is not precluded from ordering whatever measures are judged, in the context of its national legal system, appropriate to the particular circumstances of the offender.

***Paragraph 5, introductory part***

- 5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious, such as:**

***Commentary***

3.115 Although the earlier conventions had made use of the notion of “serious offences”,<sup>198</sup> no attempt was made to identify the aggravating circumstances which pointed to the seriousness of an offence. Paragraph 5 provides such guidance by presenting a non-exhaustive list of relevant factual circumstances. The obligation on parties is to ensure that their courts or other competent authorities (for example, special tribunals used in some States to deal with cases involving drug-related offences) are able to take these circumstances into account in sentencing. Specific legislation will, of course, not be required if the practice of the courts already meets this condition. A party is not required to ensure that the courts or other authorities do in practice avail themselves of this power, nor is there any attempt to state the effect that those circumstances should have on the sanction imposed.

***Paragraph 5, subparagraph (a)***

- (a) The involvement in the offence of an organized criminal group to which the offender belongs;**

***Commentary***

3.116 The important circumstance is that the offence is not committed by an individual acting alone. The text requires not only that the offender should belong to an organized criminal group, but also that the group was actively involved in the offence. As the circumstances listed in paragraph 5 are aggravating circumstances rather than elements in the definition of an offence, it was unnecessary to be more specific regarding the nature of the group’s involvement.

***Paragraph 5, subparagraph (b)***

- (b) The involvement of the offender in other international organized criminal activities;**

***Commentary***

3.117 The focus here is not upon the relationship of an organized criminal group with the offence that has been committed, but rather upon the fact that the offender is involved in other international organized criminal activities. Those activities must have an international dimension. Although they must be “other” activities, this need not exclude other activities related in some way to illicit traffic in narcotic drugs or psychotropic substances. Two examples given in the course of the negotiations were arms smuggling and international terrorism.

<sup>198</sup>1961 Convention, art. 36, para. 1; and 1971 Convention, art. 22, para. 1, subpara. (a).

**Paragraph 5, subparagraph (c)**

- (c) The involvement of the offender in other illegal activities facilitated by commission of the offence;**

**Commentary**

3.118 There are many cases in which the profits derived from illicit traffic or other drug-related offences are used to fund other types of criminal or illegal activities. These may include activities involving gambling or prostitution, which in some legal systems may be regarded as illegal (for example, if not subject to official control or supervision) but not criminal; hence the use of the wider adjective “illegal”.

**Paragraph 5, subparagraph (d)**

- (d) The use of violence or arms by the offender;**

**Commentary**

3.119 Although the text of subparagraph (d) does not spell this out, what is plainly meant is that the offender used violence or arms in the commission of the offence itself. It is submitted that “arms” should be understood in the broadest sense although there is reason to assume the authors originally intended that it refer to firearms. The broader interpretation is also supported by the use of the sole term “*armes*” in the French text (instead of the more specific “*armes à feu*”).

**Paragraph 5, subparagraph (e)**

- (e) The fact that the offender holds a public office and that the offence is connected with the office in question;**

**Commentary**

3.120 No definition is given of “public office”, the scope of which must be ascertained by reference to the concepts used in a State’s national legal system. There must be a connection between the office held and the offence; it is not sufficient that the offender holds a public office (though a court is not precluded from treating that as a material consideration, independently of the guidelines laid down in the Convention). The link will commonly take the form of misuse of the powers or influence of the office, but the text does not specify any particular form of connection.

**Paragraph 5, subparagraph (f)**

- (f) The victimization or use of minors;**

**Commentary**

3.121 The intention of subparagraph (f) is clear, and it will be for parties, by reference to the concepts of their national legal system, to define the category of “minors”. “Use” includes, but is not limited to, exploitation of minors. For example, the use of a minor in the role of a messenger might be sufficient for the subparagraph to apply.

**Paragraph 5, subparagraph (g)**

- (g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;**

**Commentary**

3.122 Subparagraph (g) reflects a number of concerns. One is the fact that drug abuse is a problem in many penal institutions, and this is seen as an obstacle to the rehabilitation

of offenders who may leave prison with problems they did not have at the start of their sentence. The other concern is a wish to give the maximum possible protection to children and other groups especially at risk. For that reason, the subparagraph will be properly invoked when the circumstances are such that children, students or persons attending a social service facility are likely to become involved. There is no reference in the text to the possibility that an offence may be committed close to one of the specified institutions but at a time when the institution is closed and no other persons are present; however, it is difficult to see that such geographical proximity alone would be given much weight. The concept of “immediate vicinity” is, in any case, not clearly defined.

***Paragraph 5, subparagraph (h)***

**(h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.**

***Commentary***

3.123 Many national legal systems expect those imposing penal sanctions to take into account recidivism and other aspects of a convicted person’s record. A notable feature of subparagraph (h) is the express reference to convictions recorded in a foreign country. As there is considerable variation between national legal systems in the way these matters are handled, it was thought essential to include what amounts to an additional safeguard clause in the concluding words of the subparagraph.

***Paragraph 6***

**6. The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.**

***Commentary***

3.124 The origins of what became paragraph 6 lay in a proposal that would require parties to ensure that their prosecution authorities strictly enforced the law on matters covered by article 3. In some States the absence of discretion produces this effect: prosecution is mandatory. Where discretion does exist, the withdrawal of charges, “plea-bargaining” as to the level of the offence or the likely sanction, or other concessions could be secured by improper means, and prosecution authorities might in some States need a measure of protection from the powerful interests associated with organized crime.

3.125 There are, however, some countervailing considerations. Discretion is commonly given to prosecution authorities in order to facilitate a rational prosecution policy and in recognition of an entirely proper concern to identify priorities in the use of resources. There may well be situations in which the promise of reduced penalties may persuade an accused person to provide information implicating others; an accused person who agreed to be a prosecution witness could be of the greatest value in securing effective law enforcement. Concessions to those involved in the lower echelons of organized crime could enable investigative agencies to identify and prosecute those in the higher echelons.

3.126 The final text reflects a compromise between these two positions. Its inclusion in the Convention points to the dangers inherent in too generous a use of prosecutorial discretion and underlines the fact that due regard must be given to the need to deter the commission of offences. The touchstone, however, is the need to secure what the text refers to as “the effectiveness of law enforcement measures” and this enables the considerations summarized in paragraph 3.125 above to be given appropriate weight.

### ***Paragraph 7***

- 7. The Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences.**

#### ***Commentary***

3.127 Paragraphs 4 and 5 are concerned with the sanctions that should be imposed on conviction. In paragraph 7, it is recognized that the sanction initially imposed, where that takes the form of imprisonment or other deprivation of liberty, may be substantially affected by a later decision to permit the early release or parole of the convicted person. Such decisions are common in many States and constitute an integral part of their sentencing practices and policies, though totally prohibited in others. The paragraph exhorts parties to ensure that, where such decisions are to be made within their national legal system, those responsible for making the decision bear in mind the gravity of the relevant offences, and the presence of any of the aggravating circumstances listed in paragraph 5.

### ***Paragraph 8***

- 8. Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice.**

#### ***Commentary***

3.128 Many States have no statute of limitations in criminal cases; in many others, a limitations period is prescribed and applied either universally or with strictly limited exceptions. Paragraph 8 has no relevance to parties without such a statute of limitations; hence the phrase “where appropriate”. Parties that do have a statute of limitations are required to establish a “long” period in respect of offences established in accordance with paragraph 1; the word “long” is not further defined. In addition, they must provide for the period to be extended where the alleged offender has evaded the administration of justice. This latter point was introduced having in mind the case of a suspect who had fled the territory of a party, but in the final text this particular case is subsumed in more general language. The result is not easy to interpret: it appears that some positive act by the alleged offender to “evade” prosecution is required, for a statute of limitations becomes meaningless if the mere non-prosecution of the alleged offender (who thus escapes the administration of justice) becomes a ground for extending the limitation period. It needs to be borne in mind that international conventions establishing human rights norms require that, for criminal procedures to be fair, charges must be pressed without undue delay.

### ***Paragraph 9***

- 9. Each Party shall take appropriate measures, consistent with its legal system, to ensure that a person charged with or convicted of an offence established in accordance with paragraph 1 of this article, who is found within its territory, is present at the necessary criminal proceedings.**

#### ***Commentary***

3.129 An earlier draft of paragraph 9 made particular reference to the grant of bail, drawing attention to the large sums of money commonly available to traffickers. This

material was deleted, but the paragraph is, nonetheless, concerned with just these issues. It does not deal with extradition, the subject of article 6; nor does it preclude trials in absentia where the alleged offender is not “found within [a Party’s] territory” and where such trials are permitted in relevant legal systems. Rather, it is designed, as with the preceding paragraphs, to encourage effective law enforcement. Given the sums of money involved and the international dimension of much drug-related crime, incautious use of pre-trial release could seriously jeopardize effective law enforcement.

### ***Paragraph 10***

- 10. For the purpose of cooperation among the Parties under this Convention, including, in particular, cooperation under articles 5, 6, 7 and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.**

### ***Commentary***

3.130 Paragraph 10 is concerned with the sensitive issue of the political and fiscal offences exception, most familiar in the field of extradition. It is a common feature of State practice that assistance is refused where the offence is characterized as political or fiscal in nature. The categories are not self-defining; for example, an act carried out in a political context (such as an armed uprising) may not be regarded as political if done for a private or personal reason. In the present context, if parties were allowed to categorize offences established in accordance with article 3 as fiscal or political offences or as politically motivated, there would be an obstacle to the provision of the measures of international cooperation provided for in articles 5 (Confiscation), 6 (Extradition), 7 (Mutual legal assistance) and 9 (Other forms of cooperation and training). This listing of modes of cooperation is not exhaustive. The safeguard clause in paragraph 10, which uses the term “constitutional limitations and the fundamental domestic law” rather than “basic concepts of [a] legal system” (a drafting difference which does not appear to affect the meaning), is designed to protect, in particular, constitutionally guaranteed rights requiring refusal of extradition requests. The present provision can be compared with article 6, paragraph 6, which expresses a related notion in the extradition context.

### ***Paragraph 11***

- 11. Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.**

### ***Commentary***

3.131 Paragraph 11 is drawn from article 36, paragraph 4, of the 1961 Convention. It is not intended as an additional safeguard clause. It ensures that no provision in article 3 is considered self-executing. Although it requires parties to create offences, these offences and the sanctions attached to them will be creatures of the national legal system and will use the framework and terminology of that system. This is perhaps of even greater importance in the case of “legal defences”, to which the paragraph also refers.

### ***Implementation considerations: paragraphs 4-11***

3.132 Paragraphs 4-11 of article 3 are, for the most part, designed to ensure that illicit trafficking offences, especially those set out in paragraph 1, are treated with appropriate seriousness by the judiciary and prosecutorial authorities of each party. The drafting style

used for that purpose leaves to the appropriate authorities of each State considerable scope for the exercise of judgement in determining how best to achieve the relevant goals in the light of different legal, moral and cultural traditions. This inherent flexibility is, in turn, extended by the terms of article 24, which permits the taking of stricter or more severe measures than those mandated by the Convention if deemed desirable or necessary for the prevention or suppression of illicit traffic. This may prove to be of value, for example, in considering the list of aggravating factors contained in paragraph 5. Some parties may wish to supplement it to make reference to such matters as the involvement in relevant offences of certain categories of professional persons or employees<sup>199</sup> or to the adulteration of the drugs in question with toxic substances.<sup>200</sup>

3.133 Article 3, paragraph 10, constitutes something of an exception in that it introduces a qualified obligation in relation to matters of both legal substance and political delicacy. It provides that for the purposes of international cooperation under the 1988 Convention “offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated ...”. Insofar as political and politically motivated offences are concerned, it will suffice to point to the concern expressed in the Political Declaration adopted by the General Assembly at its seventeenth special session (General Assembly resolution S-17/2, annex) to the growing link between illicit trafficking and terrorist activities. This provision is intended to restrict the possibility of an individual invoking the protection of the so-called political offence exception in these and other like circumstances.<sup>201</sup> The reference to categorization as a fiscal offence has a somewhat similar purpose. As has been stated elsewhere: “Traditionally several States have not extradited offenders or provided mutual legal assistance for fiscal offences. Thus, by increasing the availability of cooperation in drug money-laundering investigations, this provision is extremely important.”<sup>202</sup>

3.134 There is a further connection between the provision of international cooperation and the subject matter of these paragraphs of article 3 that should also be considered by those responsible for implementation. In some countries the decision has been taken to underline the severity of drug trafficking offences by applying to them the ultimate sanction, namely, the death penalty. Many other States, however, have adopted the position that they will not provide certain forms of international cooperation in cases involving the death penalty. This practice is particularly well established in relation to extradition<sup>203</sup> and may also be applied in other spheres of cooperative activity such as mutual legal assistance. The difficulty, or impossibility, of obtaining the extradition of fugitives or otherwise using established procedures of international cooperation in the administration of justice in such cases should be weighed in the balance when articulating a sanctions policy in this sphere.<sup>204</sup>

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<sup>199</sup>Article 15, paragraph 1, of the OAS Model Regulations reads: “Financial institutions, or their employees, staff, directors, owners or other authorized representatives who, acting as such, participate in illicit traffic or related offences, shall be subject to more severe sanctions.”

<sup>200</sup>In Italy, Decree No. 309 of 9 October 1990, section 80, paragraph 1 (e), provides for penalties to be increased by between one third and one half “if the narcotic and psychotropic substances are adulterated or mixed with others in order to increase the potential hazard”.

<sup>201</sup>For example, article 3, subparagraph (a), of the 1990 Model Treaty on Extradition, adopted by the General Assembly in its resolution 45/116; see also, for example, article 3 of the 1957 European Convention on Extradition.

<sup>202</sup>Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 101st Congress, 1st Session, Senate, Exec. Rept. 101-15, p. 32.

<sup>203</sup>See, for example, article 4, paragraph (d), of the 1990 Model Treaty on Extradition (General Assembly resolution 45/116, annex); see also G. Gilbert, *Aspects of Extradition Law* (London, Martinus Nijhoff, 1991), pp. 99-100.

<sup>204</sup>Also of relevance are resolutions of the General Assembly and Economic and Social Council concerning safeguards relating to capital punishment (General Assembly resolution 2857 (XXVI) and Economic and Social Council resolution 1990/29).

## **Article 4**

### JURISDICTION

#### **General comments**

4.1 Following the general approach adopted in earlier multilateral conventions dealing with crimes of international concern, it was not judged sufficient merely to require States, in article 3, to criminalize drug trafficking activity. Given the uncertainty and controversy surrounding the issue of the limits imposed by rules of customary international law on the right of States to legislate with extraterritorial effect<sup>205</sup> it was felt that it would be appropriate to regulate the issue of prescriptive jurisdiction in a specific treaty provision. This is the function of article 4.

4.2 Article 4, the reach of which is confined to the most serious international drug trafficking offences enumerated in article 3, paragraph 1, establishes two types of jurisdiction: obligatory and discretionary. It is concerned only with the establishment of jurisdiction and does not impose obligations as to its exercise. The latter issue, that of enforcement jurisdiction, is treated elsewhere in the Convention.<sup>206</sup>

4.3 A number of bases of jurisdiction have become well recognized in the doctrine of public international law. They include “territorial” jurisdiction, the principle that a State has jurisdiction over crimes committed on its territory; extended “quasi-territorial” jurisdiction over crimes committed on ships or aircraft registered in the State; and “personal” jurisdiction, typically over a State’s nationals. In the earlier conventions dealing with narcotic drugs and psychotropic substances, there was also provision for the trial of serious offences by a party in whose territory the offender was found, in cases in which extradition was not available.<sup>207</sup> It was against this background that the Conference addressed the issue.

4.4 The recognition of the validity of multiple grounds for the establishment of jurisdiction raises the possibility of the conduct in question being subject to the criminal law of two or more States. This is particularly likely in the area of drug trafficking, which is inherently transnational in nature. While concurrent claims to jurisdiction will inevitably arise within the context of the 1988 Convention, the text does not seek to solve the problem of what priority to give to such competing assertions. Similarly, there is no adequate solution to this matter in the corpus of existing norms of customary international law. Partial coverage is often provided in relation to the principle of *ne bis in idem* (or the prevention or prohibition of double jeopardy), albeit normally in the negative sense of constituting a ground for refusing to grant various forms of legal assistance.<sup>208</sup>

<sup>205</sup>See, for example, M. N. Shaw, *International Law*, 3rd ed. (Cambridge, Grotius Publications, 1991), pp. 400-419.

<sup>206</sup>See, for example, below, comments on article 6, paragraph 9. But see also above, comments on article 3, paragraph 11, in which it is affirmed that nothing contained in article 3 “shall affect the principle ... that such offences shall be prosecuted and punished in conformity” with domestic law.

<sup>207</sup>1961 Convention, art. 36, para. 2, subpara. (a), clause (iv), and 1971 Convention, art. 22, para. 2, subpara. (a), clause (iv).

<sup>208</sup>See, for example, paragraph 10 (4) of the Commonwealth Scheme for the Rendition of Fugitive Offenders (*Commonwealth Schemes of Mutual Assistance in the Administration of Justice* (London, Commonwealth Secretariat, 1991)); and article 3, subparagraph (d), of the 1990 Model Treaty on Extradition, adopted by the General Assembly in its resolution 45/116. Article 16 of the latter deals with the issue of concurrent requests for extradition (see also European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction* (Strasbourg, Council of Europe, 1990), pp. 33-35; and R. S. Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at their Implementation* (Philadelphia, University of Philadelphia Press, 1994), p. 208, footnote 52). A treaty on the application of the principle of *ne bis in idem* has been produced by the Judicial Cooperation Group working under the auspices of the Ministers of Foreign Affairs of Member States of the European Communities.

**Paragraph 1, subparagraph (a)****1. Each Party:**

- (a) Shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:**
- (i) The offence is committed in its territory;**
  - (ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;**

**Commentary**

4.5 Paragraph 1, subparagraph (a), which is mandatory on parties, deals with jurisdiction on a “territorial” or “quasi-territorial” basis. In the practice of States, such jurisdiction is virtually universally established, but it was judged appropriate to include it specifically so that article 4 could contain a comprehensive set of provisions.

4.6 In common with other international treaties and conventions, the text requires jurisdiction to be “established”. It is not necessarily the case that it will always be “exercised”, and the latter word was deliberately omitted from article 4. For example, there may be cases where it is more appropriate for an alleged offender, the major part of whose criminal activities have been carried out in another State, to be extradited to stand trial in that State.

4.7 The text does not attempt to deal with the well-known problem of deciding in which State an offence, elements of which are located in more than one State, should be deemed to have been committed. It will be for each national legal system to determine whether what occurred on its territory satisfies the definition of the relevant offence created by its own law.

4.8 It should be noted that the 1988 Convention does not contain a provision equivalent to that found in article 36, paragraph 2, subparagraph (a), clause (i), of the 1961 Convention, whereby each of the offences mandated by paragraph 1 thereof, if committed in different countries, “shall be considered as a distinct offence”. This provision, which was heavily influenced by the terms of article 4 of the 1936 Convention, is intended “to give to the courts of a country the necessary territorial jurisdiction in cases where they might not otherwise possess it, and in particular to ensure that a country shall have territorial jurisdiction over accessory acts even though the principal acts were not committed in its territory and even though it in general assigns jurisdiction over accessory acts in the courts in whose districts the principal acts were committed.”<sup>209</sup> The provision of the 1961 Convention, as with article 22, paragraph 2, subparagraph (a), clause (i), of the 1971 Convention, which is to like effect, is made subject to a safeguard clause; namely “subject to the constitutional limitations of a Party, its legal system and domestic law”.

4.9 The word “vessel” was preferred in the English text of the 1988 Convention to the word “ship”; there seems to be no significant difference between these terms, even in the context of such vehicles as hovercraft. The expression “flying its flag” is the customary one and is, of course, not to be taken literally; the absence of the flag from its accustomed pole does not extinguish the jurisdiction of the State of registry.<sup>210</sup> In a few national legal systems, however, a ship registered in a State may be permitted, for a limited period, to fly the flag of another State; in such a case, the text gives jurisdiction to the latter State.

4.10 Aircraft are registered in a similar way, but the language of the “flag” is not used. There is a growing number of aircraft owned by a group of airlines established in different

<sup>209</sup>Commentary on the 1961 Convention, paragraph 2 of the comments on article 36, paragraph 2, subparagraph (a) (see also paragraph 4.7, above).

<sup>210</sup>See article 91 of the United Nations Convention on the Law of the Sea (*The Law of the Sea: United Nations Convention on the Law of the Sea* (United Nations publication, Sales No. E.83.V.5)).

countries,<sup>211</sup> but the practice is that each individual aircraft is on the register of only one of the States involved. The Council of the International Civil Aviation Organization, in a controversial resolution,<sup>212</sup> allowed for the establishment of joint or international registration, the effect of which would be to give the aircraft dual or multiple nationality, and for present purposes to give jurisdiction to several States.

4.11 The reference to the time of the offence can be critical in some aviation contexts. Interchange agreements between airlines sometimes provide for the temporary transfer of an aircraft from the register of one State to that of another for a part of an international flight. In such cases, care would need to be taken to identify the actual time of the offence so as to discover the State of registration at that time.

**Implementation considerations: paragraph 1, subparagraph (a)**

4.12 Paragraph 1, subparagraph (a), deals with the mandatory establishment of prescriptive jurisdiction by parties.

4.13 The authority of a State to establish jurisdiction over acts which take place within its own territory is an uncontested norm of public international law of long standing. Indeed, all members of the international community afford the territorial principle of jurisdiction a central position in their legal systems. Thus, compliance with this obligation will be automatic.

4.14 Notwithstanding this fact, many jurisdictions do not always take full advantage of the flexibility of the rule of international law in the drafting of their criminal law statutes. That rule encompasses both the subjective and objective principles of territoriality: that is, where the act was commenced and where it was completed. This flexibility can be particularly valuable in relation to drug trafficking and other transnational offences where the constituent elements of the crime are frequently committed in more than one jurisdiction. In some common-law countries, for example, it has been traditional to assume jurisdiction only when the final element of the offence was committed within national territory.<sup>213</sup> The resulting gap in coverage is not the result of any limitation imposed by international law and could thus be remedied by appropriate legislative action. An obvious focus for consideration is presented by the offences enumerated in article 3, paragraph 1, subparagraph (c), clause (iv), when they are committed in another State.

4.15 It should be recalled that, in addition to its land territory, each coastal State possesses sovereignty over its territorial sea and superjacent airspace by virtue of rules of international law, both customary and conventional.<sup>214</sup> In order to eliminate possible loopholes that could be used by traffickers, and given the practical importance of eliminating trafficking by sea,<sup>215</sup> parties should consider whether existing legislation adequately covers offences committed upon vessels in their territorial sea.<sup>216</sup> Such legislation can, of course, only be enforced against foreign flag vessels in accordance with the international law of the sea.<sup>217</sup>

<sup>211</sup>Examples are the Scandinavian Airlines System and Air Afrique.

<sup>212</sup>International Civil Aviation Organization document 8743-C/978, p. 26.

<sup>213</sup>See, for example, G. Williams, "Venue and the ambit of the criminal law" (Part 3), *Law Quarterly Review*, No. 81, 1965, p. 158.

<sup>214</sup>See, for example, article 2 of the United Nations Convention on the Law of the Sea (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/1221, annex I).

<sup>215</sup>See below, comment on article 17, which does not extend to trafficking activities within the territorial sea.

<sup>216</sup>See, for example, article 113-2 of the French Penal Code. In the United Kingdom of Great Britain and Northern Ireland, reliance is placed primarily on the relevant provisions of the Customs and Excise Management Act, 1979; see also article 6, paragraph 1, subparagraph (b), of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (*International Legal Materials*, No. 207, 1988, p. 676).

<sup>217</sup>See, in particular, article 27 of the United Nations Convention on the Law of the Sea.

4.16 The imposition of the obligation contained in paragraph 1, subparagraph (a), clause (ii), to establish prescriptive jurisdiction over offences committed on board flag vessels and registered aircraft is also uncontroversial at the international level. While an examination of the adequacy of existing law in relation to this matter would be prudent, few countries will be likely to find a pressing need for new legislation in this area.<sup>218</sup> On the other hand, it should be recalled that issues relating to concurrent jurisdiction can arise in this as well as other areas covered by article 4. As the European Committee on Crime Problems of the Council of Europe has noted: “Competing claims to jurisdiction occur in cases where ships are sailing in the territorial waters of another State at the time of the commission of the offence or where aircraft are over or in such territory: there is no evidence of general rules of international law for allocating competence among States, one of whom claims flag jurisdiction”.<sup>219</sup> As was noted above, the 1988 Convention does not seek to resolve the problems flowing from competing assertions of jurisdiction.<sup>220</sup> It is therefore left to be determined by domestic law and policy or to be dealt with in the context of other multilateral and bilateral mechanisms, agreements or arrangements.

**Paragraph 1, subparagraph (b), clause (i)**

**(b) May take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:**

**(i) The offence is committed by one of its nationals or by a person who has his habitual residence in its territory;**

**Commentary**

4.17 It seems clear that each part of paragraph 1, subparagraph (b), creates a separate basis for the optional establishment of jurisdiction.<sup>221</sup>

4.18 Subparagraph (b), clause (i), deals with jurisdiction on the “personal” basis, sometimes referred to as the active personality principle. Unlike subparagraph (a), it is optional rather than mandatory. This reflects the diversity of State practice, many States establishing extraterritorial jurisdiction on the basis of nationality, rather fewer also asserting such jurisdiction in the case of habitual residence, and some making no use of the “personal” basis of jurisdiction.

4.19 No attempt is made to define the concepts of nationality and habitual residence. In cases of dual or multiple nationality, each State of which the alleged offender is a national may establish jurisdiction on that basis. “Habitual residence” is commonly regarded as a purely factual notion. A resolution of the Committee of Ministers of the Council of Europe suggests that “in determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as other facts of a personal or professional nature which point to durable ties between a person and his residence”.<sup>222</sup>

<sup>218</sup>In Australia, just such a review identified a gap in legislative coverage which was subsequently eliminated by section 11 of the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990 (Act No. 97 of 1990).

<sup>219</sup>European Committee on Crime Problems, op. cit., p. 12.

<sup>220</sup>See above, general comments on article 4.

<sup>221</sup>The alternative view, that the requirements of clauses (i), (ii) and (iii) were cumulative so that all had to be met in a single case before a State could take jurisdiction (see *Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 22), cannot be supported; it was not suggested in the discussions of the draft, where each item was examined separately.

<sup>222</sup>Committee of Ministers resolution 72 (1), annex.

**Paragraph 1, subparagraph (b), clause (ii)**

- (ii) The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article;**

**Commentary**

4.20 The second permissive basis for establishment of jurisdiction, contained in paragraph 1, subparagraph (b), clause (ii), relates to the consensual interdiction of a foreign flag vessel while exercising freedom of navigation beyond the territorial sea. This provision is concerned with the situation in which one party seeks the authorization of the flag state of a vessel that is suspected to be involved in illicit traffic in order to take appropriate enforcement measures in regard to that vessel and the persons and cargo on board. It is examined below in the context of illicit traffic by sea, which is the subject of article 17.

**Paragraph 1, subparagraph (b), clause (iii)**

- (iii) The offence is one of those established in accordance with article 3, paragraph 1, subparagraph (c) (iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.**

**Commentary**

4.21 Article 3, paragraph 1, subparagraph (c), clause (iv), deals with participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with that article.

4.22 The case of a conspiracy in a party's territory intended to lead to action in another State, whether or not a party to the Convention, falls within the mandatory jurisdiction referred to under paragraph 1, subparagraph (a), clause (i). The effect of the present provision is to allow States to establish jurisdiction where one of those preparatory offences was committed outside its territory but "with a view to" the commission, within its territory, of an offence established in accordance with article 3, paragraph 1. An example would be a conspiracy formed in one State to effect the distribution of narcotic drugs in another State. The latter State could establish jurisdiction over that conspiracy, whether or not it actually led to the distribution of drugs on its territory. If, however, the agreement between the conspirators had reached a stage at which criminal activity was envisaged in a region embracing several States but the selection of the location of the activity awaited further information, no State within that region could rely on the present provision as a basis for jurisdiction; it could not be shown that what had already taken place was "with a view to" the commission of an offence there.

**Implementation considerations: paragraph 1, subparagraph (b)**

4.23 Paragraph 1, subparagraph (b), enumerates three permissive grounds for establishing prescriptive jurisdiction. The first of these relates to offences committed extra-territorially by nationals and habitual residents. In this case, the legal acceptability of the assumption of jurisdiction on the basis of the nationality of the offender (sometimes known as the active personality principle) is universally acknowledged. Indeed, in some multilateral conventions dealing with crimes of international concern, such an assumption of jurisdiction has been made mandatory.<sup>223</sup>

<sup>223</sup>See, for example, article 6, paragraph 1, subparagraph (c), of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (*International Legal Materials*, No. 27, 1988, p. 676).

4.24 Many States, particularly those with a civil-law tradition, use the nationality principle either as a matter of course or with considerable frequency. In France, for instance, a citizen can be prosecuted for any *crime* and many *délits* committed abroad.<sup>224</sup> Most common-law countries, by way of contrast, have only sparingly applied their criminal laws on the basis of the nationality of the offender. Some may wish, however, in the light of the serious nature of the offences concerned, to consider creating a further exception in relation to offences established in accordance with article 3, paragraph 1. Australia, for example, has taken this step. The Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990<sup>225</sup> was drafted so as to apply “to Australian nationals who, outside Australia, engage in conduct that is dealing in drugs, which is an offence against the law of a foreign country and which would also be an offence against the law in force in a State or Territory if [it] were engaged in by the person in that State or Territory. If the person is subsequently present in Australia he or she is liable to be charged with an offence under this provision.”<sup>226</sup>

4.25 The assumption of jurisdiction on the basis of the habitual residence of an individual rather than on his or her nationality is less firmly established in international practice<sup>227</sup> and less frequently invoked in domestic legislation.<sup>228</sup> Thailand, for example, is among those States which have taken advantage of this option.<sup>229</sup>

4.26 In considering this and other permissive grounds for jurisdiction, attention should be paid to the effect that any such assertion of jurisdiction is likely to have in areas of international cooperation, such as extradition and mutual assistance in criminal matters. For example, in the law and practice of extradition it is not uncommon for cooperation to be excluded where the requested country does not provide for the prosecution of extra-territorial offences in like circumstances.<sup>230</sup> Some jurisdictions, however, have concluded that it is in the interests of justice to be able to surrender fugitives in respect of a broader range of circumstances, such as where the requesting country bases its jurisdiction on the nationality of the offender.<sup>231</sup>

4.27 While the second basis for the establishment of jurisdiction, contained in paragraph 1, subparagraph (b), clause (ii), is framed in permissive terms, there is no doubt that the assumption of prescriptive jurisdiction will in fact be necessary if effective use is to be made of the potential afforded by article 17. This conclusion flows from the fact that there will be little point in boarding and searching a foreign vessel in international waters, which may be crewed exclusively by foreign nationals, unless a prosecution can be entertained in instances where illicit drugs are found.<sup>232</sup> To date, however, relatively few States have enacted legislation of this kind. In some cases, as with Ireland<sup>233</sup> and the United Kingdom of Great Britain and Northern Ireland,<sup>234</sup> the relevant statutory provisions

<sup>224</sup>French Code of Criminal Procedure, art. 689.

<sup>225</sup>Act No. 97 of 1990, s.12.

<sup>226</sup>*Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1989: Explanatory Memorandum* (Canberra, Parliament of the Commonwealth of Australia, House of Representatives, 1989), p. 6.

<sup>227</sup>An alternative formulation restricts this basis for the establishment of prescriptive jurisdiction to stateless persons who are habitual residents (see, for example, article 6, paragraph 2, subparagraph (a), and article 5, paragraph 1, subparagraph (b), of the 1979 International Convention against the Taking of Hostages (General Assembly resolution 34/146, annex)).

<sup>228</sup>But see *Restatement of the Law Third: The Foreign Relations Law of the United States* (St. Paul, Minnesota, American Law Institute Publishers, 1987), vol. 1, pp. 239-240.

<sup>229</sup>See section 5 (1) of the 1991 Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics.

<sup>230</sup>See, for example, article 7, paragraph 2, of the European Convention on Extradition of 1957, reproduced in *Explanatory Report on the European Convention on Extradition* (Strasbourg, Council of Europe, 1985); and article 4, subparagraph (e), of the 1990 Model Treaty on Extradition (General Assembly resolution 45/116, annex).

<sup>231</sup>See, for example, United Kingdom of Great Britain and Northern Ireland, Extradition Act 1989, c.33, s.2.

<sup>232</sup>It is of interest to note that, in article 3, paragraph 2, of the 1995 Council of Europe Agreement on Illicit Traffic by Sea, implementing article 17 of the 1988 Convention (*European Treaty Series*, No. 156), the establishment of such jurisdiction is made mandatory.

<sup>233</sup>Ireland, Criminal Justice (International Cooperation) Act No. 15 of 1994, sects. 34-36.

<sup>234</sup>United Kingdom, Criminal Justice (International Cooperation) Act 1990, c.5, sects. 19-21.

are available for use only in respect of other parties to the 1988 Convention. There may, however, be some merit in considering a formulation not specific to the 1988 Convention,<sup>235</sup> given the fact that international law permits any flag State to waive its exclusive jurisdiction and to consent to enforcement action by another member of the international community against its ships. This would permit the extension of this form of cooperation in respect of States that have yet to become parties to this important international instrument.

4.28 While article 4 treats both the issue of a party's jurisdiction in respect of offences taking place on board its own flag vessels and on those of other parties, it remains silent about the assumption of legislative powers over stateless vessels involved in the international traffic in narcotic drugs and psychotropic substances. The absence of specific treatment of this topic is somewhat curious, given the fact that article 17, paragraph 2, concerns requests for assistance in suppressing the use of such vessels when engaged in illicit trafficking. Subsequent international practice has identified this as a matter requiring attention, given the extent to which stateless vessels have, in fact, been used by trafficking networks.<sup>236</sup> Thus, article 3, paragraph 3, of the 1995 Council of Europe Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, requires each participating State to "take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel which is without nationality, or which is assimilated to a vessel without nationality under international law".

4.29 It is also relevant to recall that article 17 contains a non-derogation provision in paragraph 11, in respect of the exercise of coastal State jurisdiction in accordance with the international law of the sea. It would be prudent, therefore, for those responsible for effective implementation of the 1988 Convention to examine the adequacy of existing law in relation to the exercise of jurisdiction over relevant offences within any contiguous or customs zone, as well as rules of domestic law relating to other independent law of the sea powers including the right of hot pursuit.<sup>237</sup>

4.30 The final discretionary ground for the establishment of extraterritorial prescriptive jurisdiction for which specific treatment is afforded in paragraph 1, subparagraph (b), is the so-called "effects" principle.<sup>238</sup> This principle, which has been the source of some controversy in other contexts, is strictly limited in its application to the offences enumerated in article 3, paragraph 1, subparagraph (c), clause (iv), when committed outside the territory of a party with a view to the commission within that territory of an offence established in accordance with article 3, paragraph 1. While there is therefore a clear nexus between the act complained of and the territory of the State, the effects principle, as expressed in this context, is wider than the territorial principle envisaged in paragraph 1, subparagraph (a), clause (i). This is because, in this instance, the offence is committed outside the State's territory, and there may indeed have been no overt act in the territory of the State. In other words the principle may extend to intended but as yet unrealized effects within State territory.

4.31 For many countries, taking full advantage of the possibilities created by this provision will require legislative action.<sup>239</sup> That being said, the judiciary in certain common-law

<sup>235</sup>This is the position taken in the United States Maritime Law Enforcement Act (see 46 USC 1903).

<sup>236</sup>See recommendation 13 of the Working Group on Maritime Cooperation, endorsed by the Commission on Narcotic Drugs in its resolution 8 (XXXVIII) (*Official Records of the Economic and Social Council, 1995, Supplement No. 9 (E/1995/25)*, chap. XII, sect. A).

<sup>237</sup>The right of hot pursuit can also be used in relation to certain "mother ship" drug smuggling operations. Certain domestic courts have determined that this right also extends to so-called "extended constructive presence operations" (see, for example, *Re Pulos*, *International Law Reports*, vol. 77, No. 587 (Italy); and *R. v. Sumila and Soleyman* (1986), 28 D.L.R. (4th) 450 (Canada)).

<sup>238</sup>See article 4, paragraph 1, subparagraph (b), clause (iii).

<sup>239</sup>See, for example, Thailand, Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, section 5 (2). It reads as follows: "Any person who commits an offence relating to narcotics, despite the fact that an offence is committed outside the Kingdom, shall be punished in the Kingdom, if it appears that: ... (2) the offender is an alien and intends its consequence to occur within the Kingdom or the Thai Government is the injured person".

jurisdictions has, in recent years, adopted a supportive view of the reach of existing common-law rules in this context. In the 1990 case of *Liangsiriprasert v. United States Government and Another*<sup>240</sup> the Judicial Committee of the Privy Council held that “a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justifiable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong”.<sup>241</sup> In the subsequent case of *Regina v. Sansom and Others*,<sup>242</sup> which also concerned an extraterritorial narcotics conspiracy, the English Court of Appeal confirmed the above view of the common-law rule and extended it to the interpretation of statutory provisions.<sup>243</sup>

**Paragraph 2, subparagraph (a)**

**2. Each Party:**

- (a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground:**
- (i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or**
  - (ii) That the offence has been committed by one of its nationals;**

**Commentary**

4.32 Following the general scheme adopted in many other multilateral agreements dealing with crimes of international concern, article 4, paragraph 2, uses the concept of the vicarious administration of justice as expressed in the principle *aut dedere aut judicare*. In essence, this concept requires that when an alleged offender is present in the territory of the party and that State does not extradite the individual concerned, it should have established jurisdiction allowing it to initiate a prosecution.

4.33 The text of paragraph 2 as a whole can be compared with that of article 36, paragraph 2, subparagraph (a), clause (iv), of the 1961 Convention. In the 1961 text, unlike the present provision, there is a safeguard clause referring to the constitutional limitations of a party, its legal system and domestic law. The Commentary on the 1961 Convention, which was published in 1973, contained the suggestion that “in view of the deterioration of the international drug situation since 1961 ..., the Governments concerned may at present find the prosecution of serious offences of illicit traffic committed abroad much less objectionable on grounds of principle than they did then”.<sup>244</sup> That prophetic suggestion is in some measure vindicated in the text of paragraph 2.

4.34 Where the extradition is refused on one of two grounds listed in subparagraph (a), clauses (i) and (ii), action by a party to establish its jurisdiction is mandatory. The grounds listed in subparagraph (a), clause (i), depend upon the territorial principle, with its extension to cover ships and aircraft; in all these cases each party will necessarily have established jurisdiction under paragraph 1, subparagraph (a).

<sup>240</sup>[1990] 2 All E.R., p. 866.

<sup>241</sup>Ibid., p. 878.

<sup>242</sup>[1991] 2 All E.R., p. 145.

<sup>243</sup>Ibid., p. 150.

<sup>244</sup>See also 1961 Convention, article 36, paragraph 3, and Commentary on the 1961 Convention, comments on article 36, paragraph 2, subparagraph (a), clause (iii).

4.35 The situation is not the same in cases covered by subparagraph (a), clause (ii), where the offence has been committed by one of the party's nationals. The text at this point needs to be compared with that of paragraph 1, subparagraph (b), clause (i), which enables but does not require a party to establish jurisdiction in certain cases, including the case in which the offence is committed by one of its nationals. The effect of the present provision is that jurisdiction over offences committed by nationals, which is in general optional, becomes mandatory where extradition is refused on that basis. It will be noted that there is no reference in the present provision to offences committed by a person habitually resident in the territory of a party; any refusal on the ground of the habitual residence of the alleged offender does not fall within the present provision.

**Paragraph 2, subparagraph (b)**

**(b) May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party.**

**Commentary**

4.36 If the grounds upon which extradition is, or would be, refused are other than those stated in subparagraph (a), there is no obligation upon the requested party to establish its own jurisdiction. So, for example, if the extradition of an alleged offender for an offence<sup>245</sup> committed in one State is sought from another State, where the alleged offender is present but of which he or she is not a national, and extradition is refused on the ground of possible racial prejudice,<sup>246</sup> the offender may well escape prosecution, as the requested State is under no duty to establish its own jurisdiction, and indeed the case does not fall within the provisions of paragraphs 1 and 2 dealing with optional grounds for the establishment of jurisdiction. When such optional jurisdiction has been established and an alleged offender is not extradited, article 6, paragraph 9, subparagraph (b), requires that the case be submitted to its "competent authorities for the purpose of prosecution unless otherwise requested by the requesting Party for the purpose of preserving its legitimate jurisdiction".<sup>247</sup>

**Implementation considerations: paragraph 2**

4.37 Article 4, paragraph 2, subparagraph (a), which is framed in mandatory terms, requires a party to establish jurisdiction where extradition is refused either because the offence was committed on its territory or on board one of its vessels or aircraft or because it was committed by one of its nationals.<sup>248</sup> In the latter case, civil-law jurisdictions, unlike those in the common-law tradition, are normally prevented for constitutional, legal or policy reasons from extraditing their own citizens.<sup>249</sup> As noted above, however, the same civil-law countries also tend to make very extensive use of the nationality principle and thus normally have a legal basis for bringing prosecutions against their nationals charged with offences committed abroad. Any State intending to become a party to the 1988 Convention that faces impediments to the extradition of its nationals must therefore ensure that it has invoked the option provided in paragraph 1, subparagraph (b), clause (i), to cover its obligations in such cases.

<sup>245</sup>Ignoring, for this purpose, the possible case of an offence established in accordance with article 3, paragraph 1, subparagraph (c), clause (iv) (see article 4, paragraph 1, subparagraph (b), clause (iii), and paragraphs 4.21-4.22 above).

<sup>246</sup>See article 6, paragraph 6.

<sup>247</sup>See below, comments on article 6, paragraph 9, subparagraph (b).

<sup>248</sup>See below, comments on article 6, paragraph 9, subparagraph (a).

<sup>249</sup>See, for example, article 16, paragraph 2, of the German Basic Law; see also G. Gilbert, *Aspects of Extradition Law* (London, Martinus Nijhoff Publishers, 1991), pp. 95-99.

4.38 Use of the optional provision of article 4, paragraph 2, subparagraph (a), provides a further opportunity to eliminate gaps in the cover afforded to offences established in accordance with article 3, paragraph 1, which might otherwise result in individuals who have committed drug-trafficking offences abroad escaping justice. Among those States that have taken advantage of this opportunity is Australia. In section 12 of the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act of 1990,<sup>250</sup> extraterritorial jurisdiction is established over certain drug offences by a non-Australian who is subsequently present in Australia. Two situations are envisaged: first, where no request for extradition has been received from the country where the offence took place; and secondly, where extradition has been sought but has been refused. As the *Explanatory Memorandum* prepared under the authority of the Commonwealth Attorney-General noted: "Circumstances in which this might occur would be, for example, where the Attorney-General determines that the person should not be surrendered because the requesting country refused to give satisfactory undertakings as to the non-imposition or non-execution of the death penalty."<sup>251</sup>

### **Paragraph 3**

#### **3. This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.**

#### **Commentary**

4.39 The Convention requires or encourages parties to establish jurisdiction in certain types of case. Where a party has established jurisdiction on some basis not included among those referred to in article 4, nothing in the Convention prevents the continued exercise of such jurisdiction.

#### **Implementation considerations: paragraph 3**

4.40 It is important that the final paragraph of article 4 should not be taken to mean that States are to regard themselves as being entirely free to establish any kind of extraterritorial jurisdiction that may have commended itself on policy or practical grounds. The issue of the proper limits of extraterritorial prescriptive jurisdiction is governed by the rules of customary international law and members of the international community have traditionally been sensitive to unreasonable or exorbitant claims to such jurisdiction. If consideration is being given to the use of bases for jurisdiction not specifically authorized elsewhere in article 4, it would be prudent for those responsible for implementation to seek appropriate specialist advice.

<sup>250</sup>Act No. 97 of 1990.

<sup>251</sup>*Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1989: Explanatory Memorandum* (Canberra, Parliament of the Commonwealth of Australia, House of Representatives, 1989), p. 7; see also Thailand, Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, 1991, section 5 (3).

## Article 11

### CONTROLLED DELIVERY

#### *General comments*

11.1 Article 11 of the Convention specifically endorses the investigative technique of controlled delivery at the international level.<sup>496</sup> In article 1, subparagraph (g), controlled delivery is defined as “the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in Table I and Table II annexed to this Convention, or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences established in accordance with article 3, paragraph 1 of the Convention”.<sup>497</sup>

11.2 Article 11 was the first international text to endorse the practice of controlled delivery. The earlier tradition, reflected, for example, in the 1961 Convention,<sup>498</sup> was to emphasize the seizure of drugs, if not positively to require their seizure;<sup>499</sup> the 1988 Convention in that sense departed radically from earlier practice.

11.3 The most obvious attraction of this law enforcement strategy is that it facilitates the identification, arrest and prosecution of the principals, organizers and financiers in the criminal venture in question rather than merely those involved at a lower level. In the words of the 1987 Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, the central purpose of this technique is to bring to justice “the individuals, corporations or other organizations involved in the shipment, transportation, delivery, concealment or receipt of an illicit consignment of controlled substances that might not be detected if the intermediaries or couriers were arrested immediately on identification”.<sup>500</sup> Such action contributes to the general goal of disrupting and dismantling trafficking organizations.

11.4 Increasing use is being made of this valuable procedure in the international context, where it can be used in a variety of circumstances. It is, for example, particularly useful when a shipment of illicit drugs is detected in unaccompanied freight consignments, in unaccompanied baggage, or in the post. Similarly, controlled delivery can be resorted to when the illicit drugs are accompanied by a courier, either when that individual is unaware that the law enforcement authorities have a prior knowledge and interest or when the operation involves the active cooperation of that individual. In the latter case, for example, a courier who has been apprehended may be persuaded, perhaps in exchange for reduced charges or the promise of a lighter sentence, to continue with the delivery of the consignment so that co-conspirators may be identified or further arrests may be made.

11.5 Individual countries may have to consider requests from other parties for different forms of active participation in these operations. These might include a request to permit a detected shipment or consignment to be exported from or imported into their jurisdiction or to transit through it. The definition of “controlled delivery” in article 1,

<sup>496</sup>Since 1988, similar provisions have been included in a number of regional and subregional multilateral instruments (see, for example, article 13, paragraph 2, of the Convention on Narcotic Drugs and Psychotropic Substances, adopted by the South Asian Association for Regional Cooperation in 1990; and article 73 of the 1990 Schengen Convention).

<sup>497</sup>See above, comments on article 1, subparagraph (g).

<sup>498</sup>For example, article 37.

<sup>499</sup>See the discussion on whether article 37 of the 1961 Convention requires parties to have legislation enabling their competent authorities to seize drugs or whether it imposes an obligation to seize (Commentary on the 1961 Convention, paragraph 1 of the comments on article 37). It was the view of the Secretariat that article 37 did not impose an obligation to seize and that controlled delivery was, therefore, compatible with it and with the other relevant articles (see the background paper prepared by the Division of Narcotic Drugs entitled “Controlled delivery in the fight against the illicit drug traffic” (DND.422/2 (3-1) of 18 May 1982).

<sup>500</sup>*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.90.XVII.3), chap. I, sect. A, para. 250.

subparagraph (g), refers to material passing out of, through or into “the territory” of one or more countries, which includes the land territory, the territorial sea and superjacent airspace. It can cover intended transport over land boundaries, by air or by sea. Moreover, in the context of surveillance on the high seas, it was noted in 1995 in the report of the Working Group on Maritime Cooperation that “the technique of controlled delivery usually produces better law enforcement results than does intervention at sea” and it was consequently recommended that, in appropriate circumstances, the technique should be given preference over interdictions conducted pursuant to article 17.<sup>501</sup>

11.6 While the natural focus is on the control of illicit consignments of narcotic drugs and psychotropic substances, the definition contained in article 1, subparagraph (g), also extends to shipments of substances listed in Table I and Table II annexed to the 1988 Convention.<sup>502</sup> The value of the technique in this context has also been demonstrated by international practice.<sup>503</sup> For this reason, the Economic and Social Council, in its resolution 1995/20, requested Governments “to cooperate in controlled deliveries of suspicious shipments in special circumstances if the security of the shipment can be sufficiently ensured, if the quantity and nature of the chemical involved is such that it can be managed feasibly and safely by the competent authorities, and if all States whose cooperation is necessary, including transit States, agree to the controlled delivery”.

### **Paragraph 1**

- 1. If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.**

### **Commentary**

11.7 While some countries grant wide discretion to prosecution authorities, in others it is regarded as fundamentally important that a prosecution be launched whenever there are sufficient grounds for the belief that an offence has been committed within the territory of the State. In those States, the discretion not to prosecute is judged to be one so open to abuse as not to be acceptable. It will be appreciated that States in which a system of mandatory prosecution exists may find it impossible to operate controlled delivery, and the introductory words of paragraph 1 point to this issue.

11.8 In the discussions on article 11, the representative of Mexico emphasized that there was no opposition to the use of controlled delivery where national legislation provided for its use and where the technical means to use it were available; but where the necessary sophisticated police organizations and systems were unavailable, the use of the technique could be counterproductive.<sup>504</sup> Her Government would have preferred the text to make no reference to controlled delivery, and the agreed text was the result of a compromise that did not fully satisfy all participants in the Conference.<sup>505</sup>

<sup>501</sup>Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995 (E/CN.7/1995/13), para. 22. It is essential that the national authority designated pursuant to article 17, paragraph 7, has appropriate lines of communication with its counterparts under article 11 in order to ensure that controlled delivery operations involving its flag vessels are not frustrated by the inadvertent granting of consent for a maritime interdiction to a third party.

<sup>502</sup>See below, comments on article 12.

<sup>503</sup>See, for example, *Chemical Action Task Force: Final Report* (Washington, D.C., June 1991), p. 25.

<sup>504</sup>*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 6th meeting, paras. 18, 19 and 70.

<sup>505</sup>See, for example, the statements by the representatives of Canada and the United Kingdom (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 6th meeting, paras. 22-23 and 36).

11.9 Representatives of other States, having considerable experience regarding the use and advantages of controlled delivery, emphasized the success of the technique in tracing the ringleaders or organizers who directed the work of individual couriers. In the view of those representatives, it was essential that controlled delivery should have a prominent place in the text of the Convention, even if safeguards had to be in place for those parties for whom there were legal or practical difficulties.<sup>506</sup>

11.10 As a result of the discussions, a redrafted version of the earlier text was produced. It was decided to include two phrases designed to meet the legal and practical difficulties that had been identified. The first was the opening phrase “If permitted by the basic principles of their respective domestic legal systems ...”. It was recorded as the opinion of Committee II that that phrase could not be interpreted to mean that controlled delivery operations would require an express provision under national law permitting such operations.

11.11 The second addition was the phrase “within their possibilities”. It was introduced to avoid any party being under an obligation to engage in controlled delivery operations which the party considered itself to be unable to undertake in view of, for example, the technical and organizational circumstances of its police, customs and other services.

11.12 The result is a qualified obligation on parties to take the necessary measures to allow for the appropriate use of controlled delivery at the international level. What is “necessary”, and when the use of the technique is “appropriate”, is a matter of judgement. The text, accordingly, indicates that the operations are to be on the basis of agreements or arrangements mutually consented to.

11.13 This implies an obligation to inform, and obtain the consent of, any other party through the territory of which the consignment is to pass, even if the route taken by the consignment changes unexpectedly. The cooperation of the authorities of every such party may be essential, for practical reasons or to provide secure evidence that the consignment was under continuous control. The newest methods of electronic tagging, however, are a forcible reminder of a difficulty that has always been inherent in the notion of controlled delivery, namely, whether it can be distinguished from mere surveillance and whether a surveillance operation can be carried out without the consent required under article 11.

11.14 It is difficult to give a clear answer to such questions, given the very fact-specific nature of controlled delivery. It is possible to envisage circumstances in which surveillance of a person suspected of being a courier, for example, might (at least initially) not seem to fall within the definition of controlled delivery. Comity and practical considerations both point to the need for maximum disclosure of information to other relevant parties in all such cases. Parties are under an obligation, subject to the various safeguards set out in article 9, paragraph 1, to cooperate with one another in conducting inquiries on the movement of narcotic drugs, psychotropic substances and substances in Table I and Table II,<sup>507</sup> and this will cover cases on the fringes of the concept of controlled delivery.

11.15 The Conference considered a proposal that functions in respect of controlled delivery should be entrusted by each party to a designated national authority, which could enter into the necessary discussions with its counterpart in the other party or parties concerned in a possible operation. This proposal reflected the thinking incorporated in the 1987 Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, in which it was suggested that “in order to ensure that controlled delivery is being effectively co-ordinated at both the national and international levels, States could, if they consider it appropriate, designate an agency or agencies as responsible for such coordination”.<sup>508</sup> The creation of a treaty obligation to this effect would, however, have

<sup>506</sup>*Official Records*, vol. I ..., document E/CONF.82/12, “Article 7” (E/CONF.82/C.2/L.13/Add.6), sect. III, para.13; and *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 8th meeting, paras. 1-20.

<sup>507</sup>See article 9, paragraph 1, subparagraph (b), clause (iii).

<sup>508</sup>*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.90.XVII.3), chap. I, sect. A, para. 251.

led to difficulties in States whose police or customs services were not organized on a centralized basis, and the proposal was not pressed.<sup>509</sup>

11.16 According to paragraph 1, controlled delivery operations are to be undertaken “with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them”. Except for the final clause, the text corresponds to the definition in article 1, subparagraph (g). That clause covers the apprehension of persons involved in illicit traffic; Committee II formally agreed to that interpretation.<sup>510</sup>

### **Paragraph 2**

#### **2. Decisions to use controlled delivery shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned.**

### **Commentary**

11.17 Paragraph 2 draws upon the experience gained by States in setting up controlled delivery operations. It stresses that each case needs to be given individual consideration. Although the first draft of what was to become article 11 referred to the need to use controlled delivery on a case-by-case basis, it also set out in some detail the obligations of the parties and the consequences in terms of exercise of jurisdiction.<sup>511</sup> Those provisions were judged too detailed by the intergovernmental expert group at its second session in October 1987 and were omitted.<sup>512</sup>

11.18 The text does, however, identify two matters in particular (in addition to the obvious operational details) which may need attention. The first of these concerns the financial arrangements, a phrase which may cover a variety of issues. They will include the cost of the operation, bearing in mind not only the resources that need to be deployed but also the needs of each party (for example, for evidence in a particular form). Although there is a link in some cases between controlled delivery and mutual legal assistance, the costs of controlled delivery will not be “ordinary costs” for the purposes of article 7, paragraph 19. “Financial arrangements” will also cover the consequences of any eventual confiscation of the illicit substances (such as measures for their disposal or destruction), which may be postponed and therefore take place in a different State as a result of the decision to resort to controlled delivery. In some States there are established “reward” systems under which enforcement personnel receive special incentive payments, sometimes directly related to the size of a seized consignment; where controlled delivery would effectively prevent the seizure of a consignment, the financial consequences for the personnel concerned may also need to be taken into account. The complexity of these issues makes it desirable that parties have standing arrangements in place wherever possible, as there may be no time for detailed negotiations in an individual case.

11.19 The second matter concerns the exercise of jurisdiction, where again the effect of the controlled delivery operation may create additional bases on which jurisdiction may be founded. For example, the completion of the planned controlled delivery may lead to the commission of offences in a State where no offence would have been committed had the illicit traffic been interrupted at an earlier stage. That State may claim jurisdiction under article 4, paragraph 1, subparagraph (a). It will plainly make for clarity if this possibility is taken into account (if time permits) before any conflicting claims to jurisdiction arise.

<sup>509</sup>*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 6th meeting, *passim*, and 8th meeting, paras. 48-51.

<sup>510</sup>*Ibid.*, 8th meeting, paras. 17 and 18.

<sup>511</sup>*Official Records*, vol. I ..., document E/CN.7/1987/2, sect. II, art. 7, para. 4.

<sup>512</sup>*Ibid.*, document E/CN.7/1988/2 (Part II), sect. II, para. 162.

### **Paragraph 3**

- 3. Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed or replaced in whole or in part.**

#### **Commentary**

11.20 Paragraph 3 was added at the Conference. It reflects the technique that had been promoted by the Customs Cooperation Council (now called the World Customs Organization): controlled delivery effected with the whole or part of the narcotic drugs or psychotropic substances removed, so that, were the operation to fail, there would still be little or no illicit material available to the traffickers.<sup>513</sup>

11.21 There may, of course, be circumstances which make the proposed substitution impracticable. In addition, on this topic, as on many others, national legislation may impose restrictions on what can be done. There may, for example, need to be some narcotic drugs or psychotropic substances left in the consignment, so as to provide evidence of the illicit nature of the consignment when it reaches its intended destination. The removal of some of the consignment may make prosecution difficult, especially in States whose criminal law has no developed concept of criminal conspiracy. For all these reasons, the text allows a variety of techniques to be used and makes none obligatory. Where other material is substituted, replacing the narcotic drug or psychotropic substance, the text imposes no requirements as to what material should be used.<sup>514</sup>

11.22 The text uses the phrase “with the consent of the Parties concerned”, which reflects the case-by-case approach emphasized in paragraph 2. The representative of Belgium noted that he understood that phrase as being without prejudice to independent measures to punish offences on national territory and to maintain public order.<sup>515</sup>

11.23 Although paragraph 3 refers only to the substitution of narcotic drugs and psychotropic substances, arrangements for the substitution of other material for precursors could also be made under that paragraph if the circumstances so required (see paras. 11.35-11.36 below). The definition of controlled delivery under article 1, subparagraph (g), in fact refers to “illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in Table I and Table II ..., or substances substituted for them”.

#### **Implementation considerations: article 11 as a whole**

11.24 Paragraph 1 of article 11 imposes a qualified obligation on States parties to the 1988 Convention to allow for the appropriate use of international controlled delivery (see para. 11.12 above). A more robust approach was not deemed to be appropriate, given the significant constitutional and other legal difficulties faced by a number of jurisdictions in authorizing the use of this type of procedure. In recognition of this fact, parties are obliged to facilitate the use of the technique only if such action is “permitted by the basic principles of their respective domestic legal systems”.<sup>516</sup>

11.25 The basic precondition for effective action in this area is to ensure that controlled delivery operations are appropriately sanctioned by the domestic legal system. This will

<sup>513</sup>*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 6th meeting, para. 23.

<sup>514</sup>In an earlier draft, the words “innocuous substances” were used, but this was judged unsatisfactory, as different legal systems might take different views of what was “innocuous”.

<sup>515</sup>*Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 63.

<sup>516</sup>Art. 11, para. 1

be a particularly pressing matter in States that normally use the legality principle in relation to the exercise of the prosecutorial function.<sup>517</sup> As one commentator has noted, in some such States use of controlled delivery “may actually contravene the obligation of authorities not to condone or tolerate known illegal behaviour”.<sup>518</sup> Resort to legislation expressly enabling competent authorities to resort to controlled delivery among States sharing this legal tradition has been relatively frequent. By way of contrast, States which traditionally afford a substantial measure of discretion to their prosecutorial authorities will be less likely to require the adoption of specific legislation on controlled delivery. In the latter category, New Zealand provides a rare example of a State that has elected from the outset to place the technique on a statutory basis.<sup>519</sup>

11.26 Recent experience demonstrates, however, that any conclusion that enabling legislation is not required should not be reached lightly. For example, in countries where existing law places an unqualified prohibition on the importation of narcotic drugs and psychotropic substances, law enforcement officials, domestic and foreign, cooperating defendants and others involved in giving effect to a controlled delivery operation may find that certain of their actions could be characterized as unlawful. Such a situation places the individuals concerned in an invidious position and may also have an adverse effect in some jurisdictions on the possibility of securing the conviction of the persons who were the target of the operation.<sup>520</sup> In circumstances where the position of domestic law is uncertain, prudence would suggest the desirability of having recourse to legislation to place the matter beyond doubt.

11.27 National legislative practice in this regard varies considerably in terms of its nature, scope and complexity. In some instances, as in New Zealand, the requisite authority is bestowed directly on members of the relevant law enforcement agency. Perhaps more commonly, law enforcement officials must seek authority from a specified third party. In Malta, for example, the consent of a magistrate or of the Attorney General is required.<sup>521</sup> In some instances, it has also been thought appropriate to subject the granting of authorization to specific conditions; in Cape Verde, for example, the law stipulates that the Public Prosecutor’s office may issue a relevant order to the police at the behest of the foreign country of destination only if: “(a) there is detailed knowledge of the probable itinerary of the carriers and adequate identification of them; (b) the competent authorities in the countries of destination and the transit countries can guarantee that the substances are secure against theft or diversion; (c) the competent judicial authorities in the countries of destination or transit undertake to provide, as a matter of urgency, full details of the outcome of the operation and the activities of the perpetrators of the crimes, particularly those carried out in Cape Verde”.<sup>522</sup> In addition to the imposition of conditions, the nature of which will depend upon local circumstances, traditions and other factors, consideration may be given to the coverage of additional matters such as the provision of an appropriate exemption from criminal liability to law enforcement officials when acts are committed for the purposes of authorized controlled delivery operations.<sup>523</sup>

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<sup>517</sup>See, for example, E. Nadelmann, *Cops across Borders: The Internationalization of U.S. Criminal Law Enforcement* (Pennsylvania State University Press, University Park, Pennsylvania, 1993), pp. 237-238.

<sup>518</sup>D. Stewart, “Internationalizing the war on drugs: the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, *Denver Journal of International Law and Policy*, No. 18, 1990, p. 400.

<sup>519</sup>See Misuse of Drugs Amendment Act, 1978, sect. 12 (1).

<sup>520</sup>See, for example, the 19 April 1995 judgement of the High Court of Australia in the case of *Ridgeway v. The Queen*. At the time of writing, new legislation to overcome the difficulties indicated in this instance was under active consideration (see *Crimes Amendment (Controlled Operations) Bill 1995: Explanatory Memorandum* (Canberra, Parliament of the Commonwealth of Australia, House of Representatives, 1995); see also *Regina v. Latif* (1996) 1 All E.R. 353 for a somewhat more typical common-law approach to such matters).

<sup>521</sup>See Dangerous Drugs Ordinance (Amendment) Act 1994, Act. No. VI of 1994, sect. 38 (1).

<sup>522</sup>Law 78/IV/93 of 12 July 1993, art. 33, para. 2.

<sup>523</sup>See French Law 91.1264.

11.28 A further issue of great significance is the scope to be afforded to such legislation. Article 1, subparagraph (g), which provides the definition of controlled delivery for the purposes of the Convention, has as its focus operations involving illicit consignments of drugs and substances listed in Table I and Table II. Since the Convention was concluded, however, it has become evident that controlled delivery can also be used in circumstances which were not contemplated by those involved in the negotiation of the 1988 text, for example, in the investigation of money-laundering offences established in accordance with article 3, paragraph 1, subparagraph (b).<sup>524</sup> In the view of one specialized intergovernmental body, “the controlled delivery of funds known or suspected to be the proceeds of crime is a valid and effective law enforcement technique for obtaining information and evidence, in particular on international money-laundering operations”.<sup>525</sup> Its use may, for example, assist in the identification of all parties involved in the transaction; assets being purchased and sold; companies and institutions which are facilitating the use of tainted funds; and other related transactions. This and other possible relevant applications of the controlled delivery technique, including the delivery of equipment such as tableting machines and laboratory glassware intended for use in the illicit manufacture of controlled substances, are proper subjects for consideration by those charged with ensuring the implementation of article 11 at the domestic level and are certainly within the spirit of the Convention as a whole.

11.29 It is also important that domestic legal rules relevant to other provisions of the Convention should be framed in a manner that is sensitive to the needs of controlled delivery operations. For example, in formulating, pursuant to article 12, paragraph 9, domestic legislation and administrative arrangements to give effect to the obligations for international cooperation in respect of substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances, provision to permit the use of controlled delivery in cases of suspect exports should be included in addition to powers such as seizure or suspension of the transaction. In the area of money-laundering, similar sensitivity is reflected in article 7 of the 1991 Council of Europe Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering, which requires relevant institutions to refrain from carrying out suspicious transactions until they have brought the matter to the attention of the appropriate authorities.<sup>526</sup> It is up to such authorities to give instructions on whether or not to execute the transaction. Where, however, “such a transaction is suspected of giving rise to money-laundering and where to refrain in such a manner is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money-laundering operation, the institutions concerned shall apprise the authorities immediately afterwards”. It is clear from the drafting history of this article that the decision to give it such a flexible character was a direct response to the perceived needs of the law enforcement community, including the facilitation of controlled money-laundering operations.<sup>527</sup>

11.30 It should be stressed that the obligation set out in article 11, paragraph 1, is to make provision for cooperation in international controlled delivery operations in appropriate cases and “on the basis of agreements or arrangements mutually consented to”. The centrality of the concept of consent is further emphasized in the remaining provisions of article 11. Similarly, in article 1, subparagraph (g), a defining feature of controlled delivery is that it is undertaken “with the knowledge and under the supervision” of the competent authority of the relevant parties. Failure to obtain such consent would take the operation outside the purview of article 11. If carried out in the territory of a non-consenting State it would carry the serious risk of being characterized as a violation of article 2, paragraph 3, of the Convention.<sup>528</sup>

<sup>524</sup>See above, comments on article 3, paragraph 1, subparagraph (b).

<sup>525</sup>Financial Action Task Force on Money Laundering, “Annual report, 1995-1996”, Paris, 28 June 1996, annex II, p. 5.

<sup>526</sup>Council Directive 91/308/EEC.

<sup>527</sup>See W. Gilmore, *Dirty Money: The Evolution of Money Laundering Counter-Measures* (Council of Europe Press, Strasbourg, 1995), p. 167.

<sup>528</sup>See above, comments on article 2, paragraph 3.

11.31 In paragraph 1, it is anticipated that such consent will be sought and obtained pursuant to agreements and arrangements mutually consented to. This wording is intended to reflect the need for some flexibility in this area. As has been pointed out elsewhere: “‘Arrangements’ denotes the most informal type of interaction, and can include standard practices mutually applied by the competent authorities of each party in such situations, including cooperation among police officials in controlled deliveries without the need for formal written agreements.”<sup>529</sup> While it is for each party to formulate its own policy on such matters, it should be kept in mind that the opportunity to conduct a controlled delivery operation may arise unexpectedly in an operational environment leaving little time for the conduct of formalities let alone negotiations. For instance, when drugs are detected in the transit baggage of an airline passenger, the decision whether to seize the drugs and arrest the courier or to arrange for a controlled delivery operation will have to be taken on an urgent basis and with very little time in which to act.<sup>530</sup> Indeed, the consent of several States may be necessary. A number of possibilities present themselves for consideration, including the use of administrative arrangements such as memoranda of understanding, the conclusion of bilateral or multilateral agreements, reliance on ad hoc determinations made pursuant to domestic legislative authority, or some combination of the above.<sup>531</sup> While the conclusion of individual agreements or arrangements with all other parties to the 1988 Convention is not a realistic possibility, there may be merit in doing so with States with which it is likely that the technique will be used with sufficient frequency.<sup>532</sup>

11.32 Whether or not requests are considered within the framework of a pre-existing agreement or arrangement or are dealt with on an ad hoc basis, it will be necessary to put in place a policy structure that will permit decisions on a case-by-case basis, as contemplated in paragraph 2, to be taken quickly. This might include the need to be satisfied that the request emanates from a competent authority, that it is in the form required, that the proposed controls are adequate, that the operational objective justifies the proposed action, and similar matters. Such decisions may also “take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned”.<sup>533</sup> This framework must, in turn, be buttressed by appropriate administrative procedures, including designated lines of authority.

11.33 Detailed advanced planning of how to ensure the smooth and effective administration and control of duly approved operations is also necessary. Here, procedures for domestic inter-agency cooperation are vital. For example, difficulties and acute embarrassment can result if a controlled delivery operation undertaken by one authority is inadvertently frustrated by action taken by another authority which was unaware that the operation was in progress. Practice has demonstrated the utility for many countries of designating a centralized agency to facilitate coordination and to prevent confusion, confrontation and risk. In jurisdictions in which such a solution would not be appropriate, the creation of an internal, and possibly institutionalized, coordination mechanism may

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<sup>529</sup>“Report of the United States Delegation to the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 101st Congress, 1st session, Senate, Exec. Rept. 101-15, p. 75.

<sup>530</sup>See, for example, P. D. Cutting, “The technique of controlled delivery as a weapon in dealing with illicit traffic in narcotic drugs and psychotropic substances”, *Bulletin on Narcotics*, vol. XXXV, No. 4 (1983), pp. 20-21.

<sup>531</sup>For a statutory provision sanctioning the conclusion of such agreements and arrangements, see Saint Lucia, 1993 Drugs (Prevention of Misuse) Act, Act No. 8 of 1993, sect. 9.

<sup>532</sup>The Islamic Republic of Iran, Pakistan and Turkey, acting within the context of their Economic Cooperation Organization, have established a Committee on Illicit Traffic and Drug Abuse, the remit of which includes utilizing the technique of controlled delivery.

<sup>533</sup>It is both possible and desirable that the issue of costs be considered in conjunction with that of asset-sharing pursuant to article 5, paragraph 5, subparagraph (b), clause (ii). For a legislative example concerning the exercise of jurisdiction, see Portugal, Decree-Law No. 15/93, article 61, paragraph 2, subparagraph (c); see also “Financial Action Task Force on Money Laundering: report”, Paris, 7 February 1990, recommendation No. 39.

be worthy of serious consideration. Countries whose law enforcement bodies have had little or no prior experience with the use of this investigative tool should institute training programmes, as required by article 9, paragraph 2, subparagraph (h).<sup>534</sup>

11.34 Resort to this investigative technique is not without risk. For instance, the possibility that the operation might run into difficulties and the shipment might be lost is an important factor to consider in determining whether or not to initiate such an operation or to cooperate in it. Even when an operation is in progress, developments of a practical nature may necessitate its termination at an earlier stage than was originally anticipated. Some States, including Portugal, have taken this possibility into account in their enabling legislation. Article 61 (3) of Decree-Law No. 15/93 of Portugal reads as follows: "Even after the authorization mentioned above has been granted, the criminal police shall intervene if there is an appreciable reduction in security margins or if there is an unexpected change of itinerary or any other circumstances that may jeopardize the future seizure of the substances and the arrest of the perpetrators."<sup>535</sup>

11.35 These risks are significantly lessened in a variant of this technique commonly known as "clean controlled delivery". Under this procedure the drugs are removed, in whole or in part, and substances of an innocuous nature are substituted.<sup>536</sup> This option, which is incorporated in paragraph 3, is to be resorted to with the consent of the States concerned. Other factors may also indicate the use of this method in particular circumstances. It may, for example, be necessary for evidentiary or other reasons for a seizure to be effected in the country of origin. Such substitution may in turn, however, affect the viability of intended prosecutions in the country of final destination of the consignment. Resort to it thus requires careful prior consideration.<sup>537</sup> The use of partial as opposed to complete substitution may, however, pose fewer legal difficulties. Consequently this variant appears to be more favoured in practice.<sup>538</sup> In any event, those responsible for implementation of article 11 should examine existing domestic law in order to ascertain whether recourse to legislation would be appropriate in respect of this matter.<sup>539</sup>

11.36 In order to improve the opportunities for substitution, in whole or in part, it is important that substitute materials should be available to law enforcement personnel in those locations where the actual process of substitution is most feasible. Sophisticated materials of similar colour, texture, smell and bulk to narcotic drugs and psychotropic substances have been developed. These are most readily available in the developed States which are often the ultimate destination for the drugs. By way of contrast, the relevant authorities in States where the drugs originated and transited, and where substitution could more easily be effected, may be less likely to have immediate access to such substitute substances. Cooperation pursuant to article 9 would be of obvious value in such cases.

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<sup>534</sup>See above, comments on article 9, paragraph 2, subparagraph (h). Technical assistance may be required, as contemplated in paragraph 3 of the article. Assistance may also be available through the United Nations system and other international bodies. See also, for example, *United Nations Drug Law Enforcement Training Manual*, chap. V.

<sup>535</sup>Article 73, paragraph 3, of the 1990 Schengen Convention also reserves to the territorial State a right to intervene.

<sup>536</sup>See, for example, *Criminal Justice (International Cooperation) Bill: Explanatory Memorandum on the Proposals to Implement the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (London, Home Office, 1990), p. 30. While article 11, paragraph 3, explicitly contemplates the use of this procedure only in connection with illicit drugs, it has obvious applications in other operational contexts, including, inter alia, those involving substances listed in Table I and Table II and bulk cash shipments.

<sup>537</sup>In some instances, it may be possible for the State of intended destination to bring alternative charges based on concepts such as conspiracy. See above, comments on article 3, paragraph 1, subparagraph (c), clause (iv).

<sup>538</sup>See, for example, P. D. Cutting, loc. cit., p. 18.

<sup>539</sup>For the position taken in Portugal, see article 61, paragraph 4, of Decree-Law No. 15/93. It could be useful to combine consideration of this issue with an examination of changes in evidentiary rules and procedures that would be required to make full and effective use of assistance provided pursuant to requests for mutual legal assistance under the terms of article 7.

## Article 17

### ILLICIT TRAFFIC BY SEA

#### General comments

17.1 Article 17 contains highly innovative law enforcement provisions designed to promote international cooperation in the interdiction of vessels engaged in the illicit traffic in drugs by sea. The article is intimately connected with a number of other key provisions of the 1988 Convention. Thus, while its focus is on facilitating the acquisition of enforcement jurisdiction in relation to suspect vessels, the overall effectiveness of the scheme depends on the possession by States of appropriate prescriptive jurisdiction. This is the function of article 4.<sup>707</sup> Furthermore, law enforcement activity in this area is but one aspect of the wider issue of police and customs cooperation to combat and suppress the commission of relevant offences. It should therefore be examined in conjunction with, among others, article 9 (Other forms of cooperation and training).<sup>708</sup>

17.2 Despite the importance of drug smuggling by sea, the earlier conventions on drug trafficking contained no express provisions on the topic.<sup>709</sup> There was some reference to the matter in the 1958 Convention on the Territorial Sea and the Contiguous Zone.<sup>710</sup> By way of contrast, there is no reference to illicit drug trafficking in the 1958 Convention on the High Seas.<sup>711</sup>

17.3 The first substantial provisions applicable beyond the territorial sea are those of article 108 of the 1982 United Nations Convention on the Law of the Sea.<sup>712</sup> That article, entitled “Illicit traffic in narcotic drugs and psychotropic substances”, reads as follows:

“1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.

“2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.”

By virtue of article 58, paragraph 2, of the same Convention, this obligation applies in the exclusive economic zone as well as on the high seas.<sup>713</sup>

17.4 Although opinion was initially against making specific reference to the question of boarding vessels flying foreign flags in any revision of the 1961 Convention,<sup>714</sup> it was the view of the Commission on Narcotic Drugs that a provision should be included in what became the 1988 Convention, and an article on the subject was included in the earliest drafts. The present text is a considerably developed version of the text included in those drafts.

<sup>707</sup>See above, comments on article 4.

<sup>708</sup>See above, comments on article 9.

<sup>709</sup>See W. C. Gilmore, “Drug trafficking by sea”, *Marine Policy*, No. 183, 1991.

<sup>710</sup>Article 19, paragraph 1, subparagraph (d), authorizes the coastal State to exercise criminal jurisdiction on board a foreign ship passing laterally through the territorial sea if such action “is necessary for the suppression of illicit traffic in narcotic drugs”; paragraph 2 of the article leaves unaffected the right of the coastal State to exercise such jurisdiction on board a foreign ship passing through the territorial sea after leaving internal waters.

<sup>711</sup>The 1958 Convention on the High Seas authorizes boarding of a foreign merchant vessel on the high seas only on suspicion of piracy or of the slave trade, or because the vessel is actually of the same nationality but misusing a foreign flag or refuses to show its flag (article 22).

<sup>712</sup>*The Law of the Sea: United Nations Convention on the Law of the Sea* (United Nations publication, Sales No. E.83.V.5).

<sup>713</sup>The paragraph reads: “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part”, namely part V of the convention, entitled “Exclusive economic zone”.

<sup>714</sup>See the report of the Expert Group on the Functioning, Adequacy and Enhancement of the Single Convention on Narcotic Drugs, 1961 (E/CN.7/1983/2/Add.1), para. 4.

### **Paragraph 1**

- 1. The Parties shall cooperate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.**

#### **Commentary**

17.5 The text of paragraph 1 builds on article 108, paragraph 1, of the 1982 Convention on the Law of the Sea (see para. 17.3 above). It imposes an obligation on parties to cooperate in this matter, the importance of which is emphasized by the words “to the fullest extent possible”. The reference to the international law of the sea<sup>715</sup> links the 1988 Convention to the relevant articles of the 1982 Convention on the Law of the Sea in that the relevant rules of the international law of the sea are reflected, in large measure, in the latter convention.

### **Paragraph 2**

- 2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.**

#### **Commentary**

17.6 Paragraph 2 develops the text of article 108, paragraph 2, of the 1982 Convention on the Law of the Sea (see para. 17.3 above) with respect to the assistance that a party may request in suppressing the use of a vessel flying its flag for illicit drug trafficking. In contrast to article 108, the provisions of the present paragraph also apply to ships without nationality.<sup>716</sup> The second sentence qualifies the obligation of requested parties to render such assistance, as the phrase “within the means available to them” recognizes that there may be practical limitations on the ability of some parties to assist as fully as requested (see paras. 17.43-17.46 below).

### **Paragraph 3**

- 3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.**

#### **Commentary**

17.7 The drafting of paragraph 3 proved highly controversial. That was not because of any difficulty with the principle but because of disagreement over the description of the maritime area to which it applied. In the draft before the Conference, the text referred to a vessel “beyond the external limits of the territorial sea of any State”.<sup>717</sup> An earlier

<sup>715</sup>An amendment to include the reference was originally withdrawn (see *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 17th meeting, para. 34), but the words were added again at a later stage as a result of informal discussions.

<sup>716</sup>The 1982 Convention deals with ships without nationality in its article 92 (Status of ships) and article 110 (Right of visit).

<sup>717</sup>See *Official Records*, vol. I ..., document E/CONF.82/12, “Article 12” (E/CONF.82/C.2/L.13/Add.11), sect. I, para. 1, p. 154.

version of the text had used the expression “the high seas as defined in Part VII of the United Nations Convention on the Law of the Sea”.<sup>718</sup>

17.8 The reference to the exercise of “freedom of navigation in accordance with international law” in paragraph 3 and the statement in paragraph 11 that any action taken in accordance with article 17 must “take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea” are the result of a difficult compromise between those States which supported the exercise of enforcement powers beyond the outer limits of the territorial sea and those which claimed that other States did not have the right to take such action in the exclusive economic zone of a coastal State.<sup>719</sup> The discussions that took place during the Conference indicate that there was general agreement that the provisions of the 1982 Convention on the Law of the Sea would constitute the basis for article 17 and that the “international law” referred to in paragraph 3 and the “international law of the sea” referred to in paragraph 11 were that law as reflected in the 1982 Convention.

17.9 Under article 87, paragraph 1, subparagraph (a), and article 58, paragraph 1, of the 1982 Convention on the Law of the Sea, all States, whether coastal or land-locked, enjoy freedom of navigation on the high seas and in the exclusive economic zone. That freedom is subject to the general responsibility imposed on flag States to act in conformity with the 1982 Convention and other rules of international law, to have due regard to the interests of other States on the high seas and to have due regard to the rights and duties of the coastal State in the exclusive economic zone. The rights and duties of the coastal State in the exclusive economic zone are provided for in article 56 of the 1982 Convention.<sup>720</sup>

17.10 The rights and obligations and the exercise of jurisdiction of the coastal State under the 1982 Convention on the Law of the Sea, which are fully protected under article 17, paragraph 11, of the 1988 Convention, include the coastal State’s right to exercise jurisdiction in its contiguous zone in order to prevent and punish infringement of its customs and fiscal laws and regulations,<sup>721</sup> and to exercise the right of hot pursuit.<sup>722</sup>

17.11 In connection with the former right, State practice shows, and the discussions that took place during the Conference generally support, the assumption that illicit traffic in narcotic drugs and psychotropic substances is accepted as constituting an infringement of the customs and fiscal laws and regulations within the territory or territorial sea of a coastal State. Article 33 of the 1982 Convention on the Law of the Sea permits a coastal State to establish a contiguous zone extending to a maximum limit of 24 miles from the baselines from which the breadth of the territorial sea is measured, in which it may exercise the control necessary to prevent infringement of its “customs, fiscal, immigration or sanitary laws and regulations”.

17.12 A number of representatives made statements in the plenary meetings regarding their understanding of the position reached in the negotiations. The United States representative observed<sup>723</sup> that, in his view, paragraph 11 referred to “the limited set of situations in which a coastal State had rights beyond the outer limit of the territorial sea: those involved hot pursuit in the exclusive economic zone and on the high seas and the exercise of contiguous zone jurisdiction”. The paragraph did not imply endorsement of

<sup>718</sup>Ibid., document E/CN.7/1987/2, sect. II (“Article 12”).

<sup>719</sup>See, for example, *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 17th meeting, paras. 7-52; 20th meeting, paras. 1-4; 28th meeting, para. 1; and 29th meeting, paras. 1-128 and annex.

<sup>720</sup>They are, in essence, “sovereign rights” over the natural resources of the zone, and jurisdiction with respect to the establishment of artificial islands, installations and structures, marine scientific research, the protection and preservation of the marine environment, and other rights and duties provided for in the 1982 Convention.

<sup>721</sup>1982 Convention, art. 33.

<sup>722</sup>Ibid., art. 111.

<sup>723</sup>*Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 80.

any broader coastal State claims regarding illicit traffic interdiction in the exclusive economic zone. A statement to similar effect was made by the representative of the Netherlands, supported by the representative of the United Kingdom.<sup>724</sup> The representative of Mauritania observed that it was his understanding that the Convention would be applied “without prejudice to the rights of coastal States in territorial waters and their prerogatives, and in the contiguous zone and the exclusive economic zone under the international law of the sea”.<sup>725</sup> The representatives of India and the Ukrainian Soviet Socialist Republic submitted written observations to the same effect for inclusion in the *Official Records* under a procedure adopted by Committee II.<sup>726</sup>

17.13 In paragraph 3, a party that has reasonable grounds to suspect that the vessel concerned is engaged in illicit traffic is required to approach the flag State, first to confirm the registry of the vessel and secondly to obtain authorization to take appropriate measures. Very little is said regarding the manner in which a request is to be made or the contents of a request; that is in sharp contrast to the detailed provisions in article 7 in the context of mutual legal assistance. There are, however, procedural provisions in paragraph 7, which are considered below, and paragraph 4 is concerned with some “appropriate measures” to be taken.

17.14 In paragraph 3, and indeed in paragraph 4, reference is made to authorization by the flag State. That wording was deliberately chosen to stress the positive nature of the decision which the flag State, in the exercise of its sovereignty, was to take with regard to its vessel. Nothing in the article was intended in any way to affect the rights of the flag State with regard to its vessel and there is no obligation on a flag State to provide the authorization requested; it is entirely within the discretion of that State to decide whether or not to allow another party to act against its vessel.<sup>727</sup>

17.15 In the discussion of paragraph 3, the representative of Canada indicated that it was not the practice of the Canadian Government, when responding to requests of the type to be covered by the paragraph, to grant permission; its practice, instead, was to express no objection to the proposed action. The Government considered that to be consistent with the provisions of the Convention.<sup>728</sup>

#### ***Paragraph 4***

**4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter alia:**

- (a) Board the vessel;**
- (b) Search the vessel;**
- (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.**

#### ***Commentary***

17.16 Paragraph 4 describes action that may be taken. It is related to paragraph 3 insofar as it sets out action that may be authorized under that paragraph, but it also codifies practices that may be authorized in accordance with treaties in force between the relevant parties or in accordance with any agreement or arrangement otherwise reached between them.

<sup>724</sup>Ibid., paras. 81 and 83.

<sup>725</sup>Ibid., para. 84.

<sup>726</sup>Ibid., Summary records of meetings of the Committees of the Whole, Committee II, 29th meeting, annex.

<sup>727</sup>Ibid., 29th meeting, para. 7.

<sup>728</sup>Ibid., 29th meeting, annex.

17.17 The drafting of the paragraph was intended to make clear the disjunctive nature of the various processes which might be taken against the vessel concerned: boarding; search; and, only if evidence of illicit traffic were found, further appropriate action with respect to the vessel, persons and cargo on board.<sup>729</sup> There is no greater specificity in respect of the further appropriate action: a reference to the seizure of the vessel in an earlier draft had deliberately been omitted,<sup>730</sup> but this omission was balanced by the inclusion of the phrase “inter alia”, which indicates that the range of possible actions is not limited to those expressly mentioned.<sup>731</sup>

### **Paragraph 5**

- 5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.**

### **Commentary**

17.18 Paragraph 5 was inserted to ensure that action under paragraphs 3 and 4 did not endanger the vessel concerned, its crew or cargo, or the legal rights or legitimate commercial interests of the flag State or any other interested State. The language is carefully chosen: the parties are to “take due account of” the considerations listed in the text; there is no absolute language, a recognition, for example, that some prejudice to legitimate commercial interests may be inevitable if the onward progress of the vessel is halted or delayed.

### **Paragraph 6**

- 6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.**

### **Commentary**

17.19 It has already been emphasized (see para. 17.14 above) that no party is obliged to grant the authorizations referred to in paragraphs 3 and 4. The additional point is made that, where authorization is granted, it may be subject to conditions; it is not an “all-or-nothing” situation. Although the conditions are to be mutually agreed, the reality is that the flag State can define the terms on which it is prepared to grant the necessary authorization (see paras. 17.35-17.36 below).

17.20 A particular concern lay behind the inclusion of such a provision and it is reflected in the final phrase, the reference to conditions relating to responsibility. The responsibility or liability<sup>732</sup> meant is for damage to the vessel or its cargo or to any third party, or injury to the crew, which may be caused in the course of, or as a result of, the boarding or search of the vessel or the taking of further appropriate action. Whether any responsibility exists in respect of damage suffered by the requested party will be a matter for the law governing any claim; it is not dealt with in the Convention. In this context, the reference to the mutual agreement of conditions may be more meaningful, as jurisdiction and choice of law in respect of any claim could be mutually agreed; this would, however, be appropriately considered in formulating standard practices between pairs of parties and not in the context of a request for immediate authorization.

<sup>729</sup>Ibid., 29th meeting, para. 8.

<sup>730</sup>Ibid.

<sup>731</sup>See below, comments on article 17, paragraph 6.

<sup>732</sup>The word “responsibility” was preferred in order to accommodate the needs of different legal systems.

### ***Paragraph 7***

- 7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.**

### ***Commentary***

17.21 In paragraph 7, parties are required to respond expeditiously to requests made in accordance with paragraphs 3 and 4 and, as one means of securing that expedition, the concept is introduced of an authority designated to respond to requests. A party may “when necessary” designate more than one authority. The Convention text does not encourage this (for in practice it can lead to delays where the request is initially sent to an inappropriate authority) but legal and geographical considerations may make it essential that different authorities be designated in respect of different areas (see paras. 17.28-17.31 below). The text assumes direct communication with the designated authority rather than any indirect approach such as one made via the diplomatic channel; such direct communication is highly desirable given the urgency of such requests.

### ***Paragraph 8***

- 8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.**

### ***Commentary***

17.22 The provision in paragraph 8 underlines the authority of the flag State over actions taking place with respect to its vessels. At a more practical level, it makes for good relations between the relevant authorities that information should be promptly exchanged.

### ***Paragraph 9***

- 9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.**

### ***Commentary***

17.23 Paragraph 9 is one of the exhortatory paragraphs of the Convention, imposing no obligation upon parties save that of giving consideration to certain possibilities. Paragraph 4 makes express reference to the possibility of agreements or arrangements between parties in the context of the authorizations that may be granted under that paragraph. The present provision signals the usefulness of such agreements and arrangements across the whole range of issues covered by this article. They may be bilateral or regional, and may deal with the detailed implementation of the terms of the article (for example, means of communication to ensure expeditious handling of requests) or the enhancement of its effectiveness (for example, by the exchange of relevant information within the spirit of article 9, paragraph 1, of the Convention).

### **Paragraph 10**

**10. Action pursuant to paragraph 4 of this article shall be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.**

#### **Commentary**

17.24 The wording of paragraph 10 is based on that of article 107 and article 111, paragraph 5, of the 1982 Convention on the Law of the Sea. It is designed to restrict the types of ships and aircraft that may properly be used in interdiction operations.

### **Paragraph 11**

**11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.**

#### **Commentary**

17.25 Paragraph 11, a particularly important one, was included as part of the resolution of the long discussions on the drafting of paragraph 3 of the article and has been examined in the commentary on that paragraph (see paras. 17.8-17.10 above).

### **Implementation considerations: article 17 as a whole**

#### *General comments*

17.26 As emphasized above, article 17 of the Convention is a highly innovative law enforcement provision designed to promote international cooperation in the interdiction of vessels engaged in the illicit traffic of drugs by sea. To that end, it formulates various procedures, practices and standards that need to be implemented effectively by parties. Article 17 is, however, essentially a framework provision and, unlike article 7, on mutual legal assistance, is not a self-contained “mini-treaty”.<sup>733</sup> Consequently, those responsible for implementing it will have to address themselves to a broad range of both policy and practical concerns. It must be acknowledged that international practice in this sphere is less fully developed than in many other areas of cooperation dealt with in the 1988 Convention. Guidance in some areas was given in the report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995,<sup>734</sup> which was endorsed by the Commission on Narcotic Drugs in its resolution 8 (XXXVIII).<sup>735</sup> Similarly, there is a small but growing treaty practice in this area of concern which may be worth examining. While much of it is bilateral in nature,<sup>736</sup> it has recently been supplemented by a detailed multilateral instrument, the 1995 Council of Europe Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>737</sup>

<sup>733</sup>See above, comments on article 7.

<sup>734</sup>E/CN.7/1995/13.

<sup>735</sup>See *Official Records of the Economic and Social Council, 1995, Supplement No. 9 (E/1995/29)*, chap. XII, sect. A.

<sup>736</sup>See, for example, the exchange of notes of 13 November 1981 between the Government of the United Kingdom and the Government of the United States concerning cooperation in the suppression of the unlawful importation of narcotic drugs into the United States; and the Treaty between Spain and Italy to combat illicit drug trafficking at sea of 23 March 1990.

<sup>737</sup>For the text of this important Agreement and the associated official Explanatory Report, see Council of Europe document CDPC (94) 22, Addendum of 27 June 1994 (European Treaty Series, No. 156).

17.27 In article 17, law enforcement activity is envisaged as taking place beyond the outer limit of the territorial sea and as being conducted in a manner that is “in accordance with the international law of the sea” (see paras. 17.7-17.9 above). The centrality of this concern with pre-existing norms of the international law of the sea is further reflected in the decision to include the non-derogation provision of paragraph 11. The “international law of the sea” is reflected in the provisions of the 1982 Convention on the Law of the Sea. It is therefore important to ensure that article 17 is implemented in conformity with that Convention. Given the specialized nature of this complex branch of international law, the preparation of a manual of practical guidance may prove useful for those involved in the decision-making process.

*The interdiction of foreign flag vessels*

17.28 As a practical matter, the most common situation in which article 17 applies is when the law enforcement authorities of one State wish to take action against a vessel flying the flag of another party to the 1988 Convention. While not all countries have the technical capability to project their national police power into ocean areas, all are potential recipients of requests for information or authorization from others made in accordance with paragraphs 3 and 4. Consequently, in paragraph 7 each party is required to designate an authority or authorities to receive and respond to such requests.<sup>738</sup> This designation must, in turn, be transmitted to the Secretary-General, who will notify all other participating States. This essential contact information, including addresses, telephone and facsimile numbers, and hours of operation, is published by the United Nations and updated on a periodic basis.<sup>739</sup>

17.29 While it is for each country to determine the appropriate location for its designated national authority and the powers and functions to be entrusted to it, the need for it to be in a position to respond effectively and efficiently to incoming requests is, if anything, even more important than in other areas of international cooperation. This flows from the fact that such requests will emerge in an enforcement context and will relate directly to the often difficult operational environment presented by open ocean areas. Given the fact that law enforcement action against the flag vessels of other parties can, under paragraphs 3 and 4, only be undertaken with the prior authorization of the flag State, the opportunity to take effective measures often may be lost if there are delays in responding to such requests.

17.30 In recognition of this fact, parties to the 1995 Council of Europe Agreement are required “so far as is practicable” to ensure that their designated authorities are in a position to respond to requests for authorization on a 24 hour-a-day, seven-days-a-week basis.<sup>740</sup> Furthermore, they are obligated to “communicate a decision ... as soon as possible and, wherever practicable, within four hours of receipt of the request”.<sup>741</sup> In its report, the Working Group on Maritime Cooperation also emphasized the importance of speedy decision-making and efficient communication in this regard.<sup>742</sup>

17.31 In order to ensure that the designated authority is in a position to respond expeditiously to a request from another party, as required in paragraph 7, it is highly desirable to provide for direct contact between the relevant national authorities (as apparently assumed by the drafters) rather than to use the much more cumbersome diplomatic channel. Thus, the provision of appropriate telephone and facsimile links should be a high priority. In situations where such direct contact is not practicable, parties may wish to consider the use of channels of communication available through Interpol or the World Customs Organization.<sup>743</sup>

<sup>738</sup>This would also include land-locked States that have authorized vessels to fly their flags.

<sup>739</sup>*Competent National Authorities Under the International Drug Control Treaties*, published by the United Nations in the ST/NAR.3 symbol series.

<sup>740</sup>1995 Council of Europe Agreement, art. 17, para. 1.

<sup>741</sup>*Ibid.*, art. 7.

<sup>742</sup>Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 16.

<sup>743</sup>See, for example, the 1995 Council of Europe Agreement, article 18, paragraph 2.

17.32 Pursuant to article 17, paragraphs 3 and 4, the designated authority will be subject to at least two different, but clearly interrelated, types of request. The first will be to confirm the registry (and hence the nationality) of a suspect vessel. To that end, it is essential that each State should maintain a register containing information on vessels authorized to fly its flag and that the same should be readily accessible to the designated authority.<sup>744</sup> It is widely acknowledged, however, that certain countries may require technical assistance in their efforts to upgrade their domestic systems in this regard, in order to ensure that the information is available in a form that will make it possible to respond promptly to requests.

17.33 The second type of request envisaged in these paragraphs is for authorization “to take appropriate measures in regard to that vessel”.<sup>745</sup> Such measures may include, inter alia, boarding and search of the vessel and, where “evidence of involvement in illicit traffic is found”, the taking of “appropriate action with respect to the vessel, persons and cargo on board”.<sup>746</sup> Any such decision, which is in the sole discretion of the requested State, may be made subject to certain conditions.<sup>747</sup> In order to be in a position to respond promptly and consistently to such requests, the requested State will need to be provided with sufficient relevant information on the facts of each case. It will also need to have in place a settled policy framework within which to determine whether or not to respond positively to the request and, if so, subject to what conditions, if any.

17.34 As far as the sufficiency of information is concerned, article 17 is silent as to the procedural and other general rules that are to govern such requests. Consequently, decisions will have to be taken on a range of matters, including the required form of requests, the language or languages in which requests must be formulated and, an issue of particular importance, the types of information each request should contain.<sup>748</sup> In the latter context, the Working Group on Maritime Cooperation<sup>749</sup> has suggested the use of the following standard format for “action requests”:

1. Identification of the requesting party, including the authority issuing the request and the agency charged with taking measures
2. Vessel description, including name, flag and port of registration and any other information regarding the vessel
3. Known details concerning voyage and crew
4. Sighting information and weather report
5. Reason for request (articulation of the circumstances supporting the intervention)
6. Intended action
7. Any other relevant information
8. Action requested by the intervening State (including confirmation of vessel registry and permission to board and search, if applicable), together with any time limits.

It is, of course, open to any party to vary its requirements in this regard, as well as to request additional information in any case.

17.35 As noted above, pursuant to paragraph 6 of article 17, the flag State may subject its authorization to conditions which are to be “mutually agreed” with the requesting State. While specific reference is made to conditions relating to responsibility, it is clear

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<sup>744</sup>Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 1.

<sup>745</sup>Art. 17, para. 3.

<sup>746</sup>Ibid., para. 4, subpara. (c).

<sup>747</sup>See above, comments on article 17, paragraph 6.

<sup>748</sup>See, for example, 1995 Council of Europe Agreement, articles 19, 20 and 21.

<sup>749</sup>Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 3.

that there are no limits to the rights of the flag State in this regard. As a practical matter, however, it is equally apparent that this facility for the protection of the interests of the requested party must be used with caution and moderation if the full potential of article 17 is to be realized. As stated in the official explanatory report on the 1995 Council of Europe Agreement: "If the flag State imposed conditions which were not acceptable to the intervening State, it would refrain from the intervention. The Committee agreed therefore that States should be cautious in using conditions and only make use of them when strictly necessary."<sup>750</sup> When conditions are imposed by the flag State and an intervention based on article 17 subsequently takes place, they are binding on the intervening State. Consequently, failure to comply with these conditions may trigger international responsibility and legal liability.

17.36 State practice in this area reveals a wide variety of issues that have proved to be of importance to individual flag States. In addition to liability for loss, damage or injury resulting from law enforcement operations,<sup>751</sup> these include, inter alia, costs normally borne by the intervening State,<sup>752</sup> restrictions on the use of information or evidence obtained,<sup>753</sup> the treatment of nationals of the flag State,<sup>754</sup> the reservation of rights to object, within a specific timeframe, to the continued exercise of jurisdiction over the vessel or persons on board,<sup>755</sup> and restrictions on the taking of the vessel into the jurisdiction of a third State.<sup>756</sup> It is important, however, that any temptation to impose conditions in order to rearrange the scheme of article 17 should be resisted. If a party concludes that for constitutional, legal or other reasons such a radical revision is required, consideration should be given to the negotiation of bilateral or regional agreements or arrangements under the mandate provided by paragraph 9.<sup>757</sup> This approach is also warranted where it is desired to simplify the 1988 Convention scheme in a significant manner by, for example, providing for a general advance authorization for boarding and related measures.<sup>758</sup>

17.37 Since the grant of authorization to a requesting State is always discretionary, arrangements should be made for the effective and prompt exercise of that discretion. The identification of the appropriate framework for the exercise of this power will have a bearing on the issue of where, within the governmental system, the designated national authority should be located. While article 17 does not require that reasons be given to the requesting State in instances in which a request for authorization is denied,<sup>759</sup> it would be within the spirit of the Convention to indicate, in appropriate cases, the basis for the decision taken. Indeed, some might regard it as appropriate to institute a policy whereby no request would be refused without prior consultation between the relevant designated national authorities.

17.38 Given the fact that authorized operations of the type contemplated here depart from the norm of exclusive flag-State jurisdiction on the high seas, it would be prudent

<sup>750</sup>Explanatory Report on the 1995 Council of Europe Agreement, para. 44.

<sup>751</sup>See above, comments on article 17, paragraph 6.

<sup>752</sup>See, for example, the report of the Working Group on Maritime Cooperation (E/CN.7/1995/13), recommendation 19; see also the 1995 Council of Europe Agreement, article 25, paragraph 1.

<sup>753</sup>See, for example, the 1995 Council of Europe Agreement, articles 23 and 24.

<sup>754</sup>1995 Council of Europe Agreement, art. 8, para. 2.

<sup>755</sup>See, for example, the 1981 exchange of notes between the United Kingdom and the United States, paragraphs 4 and 5.

<sup>756</sup>See, for example, the Explanatory Report on the 1995 Council of Europe Agreement, paragraph 44.

<sup>757</sup>It is arguable, for example, that the complex provisions required to give full effect to the concept of "preferential jurisdiction" for the flag State are best met by resort to bilateral or multi-lateral instruments giving expression to this concept in relation to illicit traffic by sea (see the 1990 Treaty between Italy and Spain and the 1995 Council of Europe Agreement).

<sup>758</sup>The advance "waiver of objection" system used in the 1981 exchange of notes between the United Kingdom and the United States is relevant in this context. The 1991 Treaty between Italy and Spain uses the concept of "agency" in article 5 to achieve a similar result. It should be noted, however, that it does so within a context of preferential jurisdiction for the flag State.

<sup>759</sup>In contrast to the position taken under article 7, paragraph 16, in relation to mutual legal assistance.

for all States to take steps to reduce the possibility of misunderstanding on the part of operators of their flag vessels, and others with a practical interest, as to the nature of the arrangements set out in article 17. This point is clearly emphasized in article 22 of the 1995 Council of Europe Agreement, which reads:

“Each Party shall take such measures as may be necessary to inform the owners and masters of vessels flying their flag that States Parties to this Agreement may be granted the authority to board vessels beyond the territorial sea of any Party for the purposes specified in this Agreement and to inform them in particular of the obligation to comply with instructions given by a boarding party from an intervening State exercising that authority.”

An initiative of this kind may be but one part of a wider scheme to associate those involved in maritime transport in the overall effort to combat illicit drug traffic by sea.<sup>760</sup>

17.39 Article 17 also imposes certain obligations and restrictions on the requesting State. Thus, law enforcement action may, under paragraph 10 and following normal international practice, only be carried out by certain categories of public ships and aircraft. Furthermore, paragraph 8 imposes a requirement of prompt reporting to the flag State of the results of any action taken. Finally, it must take “due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State”.<sup>761</sup>

17.40 In the discharge of their obligations, intervening States will need to ensure that law enforcement personnel receive appropriate training and guidance and that procedures are put in place to secure compliance with accepted international norms. For example, it is essential that arrangements should be introduced to guarantee that in stopping and boarding a vessel, resort to the use of armed force is undertaken only as a last resort and in a manner consistent with relevant rules of customary international law.<sup>762</sup> Similarly, practical arrangements must exist whereby the designated national authority can promptly inform the responsible law enforcement authorities of any conditions and limitations that may have been imposed by the flag State and with which they must comply.

17.41 As stressed in the comments on article 4 (see paras. 4.27-4.29 above), the enactment of adequate implementing legislation is essential to the proper functioning of the regime of cooperation provided by article 17. Of particular relevance is the provision thereby of comprehensive enforcement powers in respect of foreign flag vessels. For example, the First Schedule of the 1994 Irish Criminal Justice Act<sup>763</sup> contains detailed treatment of, among other matters, the power to search and obtain information, powers of arrest and seizure, the use of reasonable force, the production of evidence of authority, the definition of relevant offences, and the provision of appropriate legal protection for the officers involved. Each party should give consideration to its needs in this area and ensure appropriate implementation.

17.42 It is also important for potential intervening States to give advance consideration to the circumstances in which they will normally make use of the facility to request authorization. For example, in the view of the Committee of Experts which drew up the 1995 Council of Europe Agreement, account should be taken of “the reasons militating against action against vessels in scheduled passenger service or larger vessels in commercial trade. Such vessels could often usefully be searched at the next port of call, in particular if the next port of call is located in the territory of a Party to the agreement or to the Vienna Convention”.<sup>764</sup> Furthermore, in some instances the use of alternative cooperative law enforcement strategies may be indicated. It was the view of the Working Group on Maritime Cooperation that, where operational circumstances permit, “preference

<sup>760</sup>See the report of the Working Group on Maritime Cooperation (E/CN.7/1995/13), recommendation 23 for further thoughts on the nature and scope of such a programme.

<sup>761</sup>Art. 17, para. 5.

<sup>762</sup>See, for example, the 1995 Council of Europe Agreement, article 2, paragraph 1, subparagraph (d), and paragraphs 2 and 3.

<sup>763</sup>Act No.15 of 1994.

<sup>764</sup>Explanatory Report on the 1995 Council of Europe Agreement, para. 53.

should be given to the surveillance of vessels and the increased use of controlled delivery in order to target the crime syndicates involved, rather than to boarding operations. In this case measures should be considered to ensure the integrity of the illicit shipment and to prevent its possible diversion or transshipment before the vessel arrives at its planned point of destination.”<sup>765</sup>

### ***Other forms of cooperation***

17.43 While the primary focus of article 17 is to facilitate law enforcement action in relation to illicit drug traffic by sea involving the vessels of other parties, it is not solely concerned with that matter. This fact is underlined by the terms of paragraph 2, which specifically contemplate the provision of assistance to a flag State suppressing the use of one of its own vessels or repressing the use of a stateless vessel for the purpose of such illicit traffic. In neither case, however, is further guidance provided by the text as to the manner in which, or the limits within which, such cooperative activity is to take place. The provision merely indicates that such assistance is to be rendered by parties to the Convention “within the means available to them”. It is for the requested party alone to assess whether or not it possesses the relevant means in each case.

17.44 Insofar as assistance to a flag State is concerned, it can be expected that requests will normally envisage the taking of some or all of the actions contemplated in paragraph 4. Assistance can, however, also be sought for a wide range of other purposes. These might include searching for the suspect vessel, preventing it from unloading or transshipping its cargo, facilitating the presence of the law enforcement officials of the flag State on board the pursuing vessel and like matters. It is implicit in the nature of the process and explicit in article 4, paragraph 2, of the Council of Europe Agreement that the flag State may subject its request for assistance to such conditions and limitations as it sees fit. The requested party may similarly wish to articulate the conditions upon which it would be prepared to respond positively.

17.45 Two issues in particular are worth considering. The first relates to meeting the costs, which may be substantial, of giving effect to the request. As noted above, in normal circumstances, where action is taken at the initiative of the intervening State against a vessel of another party, the costs are generally met by the intervening State. In the special circumstances being considered here, however, international practice is less well established. It was the view of the Working Group on Maritime Cooperation that, in instances of assistance to and at the request of a flag State, it (and not the intervening State) should, save where otherwise agreed, meet the costs involved.<sup>766</sup> A somewhat different solution was formulated within the Council of Europe. Under article 25, paragraph 1, of the 1995 Agreement, the requested State would normally be expected to meet the costs involved. As the explanatory report points out, however, “where substantial or extraordinary costs are involved, it can be assumed that ... the State requesting assistance would be asked to share the burden of the intervention .... In such cases, it would be necessary for the concerned Parties to seek an agreement on the apportionment of the costs. Failing such agreement, the intervention would probably not take place.”<sup>767</sup> Similar considerations apply to action against vessels without nationality undertaken at the request of another party (see para. 17.47 below).

17.46 A second area that may command special attention from some countries in the light of international practice relates to liability for damage. Here the question arises whether the preponderant practice of allocating liability to the intervening State should be resorted to in such circumstances. The Committee of Experts that drew up the Council of Europe Agreement was of the view that a special rule was needed. It is contained in article 26, paragraph 3, of the Agreement and reads as follows: “Liability for any damage

<sup>765</sup>Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 22; see also above, comments on article 11.

<sup>766</sup>Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 19.

<sup>767</sup>Explanatory Report on the 1995 Council of Europe Agreement, para. 89.

resulting from action under Article 4 [assistance to flag States] shall rest with the requesting State, which may seek compensation from the requested State where the damage was a result of negligence or some other fault attributable to that State.”

17.47 In article 17, paragraph 2, requests for assistance are also contemplated to suppress the use of vessels “not displaying a flag or marks of registry” in illicit drug trafficking activity. The decision to refer to such vessels constitutes an explicit acknowledgement of the extent to which vessels without nationality and those assimilated to vessels without nationality under international law are in fact used by those engaged in the illicit drug traffic. In this case, however, there are significant differences compared with the other cooperative situations considered thus far. In particular, each State has, independently of the 1988 Convention, certain rights under article 110 of the 1982 Convention on the Law of the Sea, namely, the right to visit a vessel without nationality, which in accordance with article 92, paragraph 2, also includes a vessel flying the flags of two States, using them according to convenience. Article 110 indicates that the exercise of the right of visit involves boarding (paragraph 1) and inspection (paragraph 2) of a ship. It would accordingly not be warranted to recognize any right on the part of a requesting State to attach conditions or limitations. It is for the requested party alone to determine what actions are appropriate.<sup>768</sup> The obligation of the requested State, however, is to provide assistance within the means available to it and, as noted above, it may properly have regard to economic factors, including the expected costs of undertaking any relevant law enforcement action, in making that determination. In certain cases, it may be considered appropriate to make any positive response to a request contingent upon agreement as to the apportionment of such costs.<sup>769</sup>

17.48 While article 17 deals specifically only with the three categories of assistance examined above, the obligation of cooperation “to the fullest extent possible” is capable of encompassing other forms of valuable international activity relevant to the suppression of illicit traffic by sea. One area that is particularly emphasized in the report of the meeting of the Working Group on Maritime Cooperation relates to facilitating and enhancing the exchange, through appropriate channels, of general information on vessels suspected of involvement in the international drug trade and related matters.<sup>770</sup> In particular, the Working Group recommended that States should identify, to the extent possible, and disseminate in a timely fashion to other States directly or through Interpol, the World Customs Organization, Mar-Info<sup>771</sup> or other organizations or communication networks operating or involved in that field, those indicators that, in their judgement, might assist in the identification of vessels that were involved, or that might soon become involved, in illicit drug trafficking.<sup>772</sup> The importance of a spontaneous exchange of information has been recognized elsewhere. Consequently those charged with the implementation of article 17 should consider what might be the most appropriate method or methods for making a positive contribution in this context.

<sup>768</sup>See, for example, the 1995 Council of Europe Agreement, article 5, paragraph 2.

<sup>769</sup>See, for example, the Explanatory Report on the Council of Europe Agreement, paragraph 89.

<sup>770</sup>“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), annex to recommendations.

<sup>771</sup>Mar-Info is an international customs intelligence exchange system for monitoring maritime traffic in the Atlantic Ocean, the Baltic Sea, the North Sea and the Mediterranean Sea, administered by national customs authorities in France (Mar-Info South) and Germany (Mar-Info North). Mar-Info covers only commercial vessels; a similar surveillance system operated by the same authorities with respect to private pleasure craft or other non-commercial vessels is known as Yacht-Info.

<sup>772</sup>“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 6; see also the 1995 Council of Europe Agreement, article 2, paragraph 5.



## ANNEX VIII

# United Nations Convention on the Law of the Sea of 1982\* (Extracts)

### **Article 91**

#### NATIONALITY OF SHIPS

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

### **Article 92**

#### STATUS OF SHIPS

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.
2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

### **Article 93**

#### SHIPS FLYING THE FLAG OF THE UNITED NATIONS, ITS SPECIALIZED AGENCIES AND THE INTERNATIONAL ATOMIC ENERGY AGENCY

The preceding articles do not prejudice the question of ships employed on the official service of the United Nations, its specialized agencies or the International Atomic Energy Agency, flying the flag of the organization.

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\*See *The Law of the Sea: Official Texts of the United Nations Convention on the Law of the Sea of 10 December 1982 and of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 with Index and Excerpts from the Final Act of the Third United Nations Conference on the Law of the Sea* (United Nations publication, Sales No. E.97.V.10).

**Article 94**

## DUTIES OF THE FLAG STATE

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall:
  - (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
  - (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:
  - (a) the construction, equipment and seaworthiness of ships;
  - (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;
  - (c) The use of signals, the maintenance of communications and the prevention of collisions.
4. Such measures shall include those necessary to ensure:
  - (a) That each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;
  - (b) That each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;
  - (c) That the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.
5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.
6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.
7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

**Article 106**

## LIABILITY FOR SEIZURE WITHOUT ADEQUATE GROUNDS

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

**Article 108**

## ILLICIT TRAFFIC IN NARCOTIC DRUGS OR PSYCHOTROPIC SUBSTANCES

1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.
2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

**Article 110**

## RIGHT OF VISIT

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:
  - (a) the ship is engaged in piracy;
  - (b) the ship is engaged in the slave trade;
  - (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
  - (d) the ship is without nationality; or
  - (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.
2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.
3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.
4. These provisions apply *mutatis mutandis* to military aircraft.
5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

**Article 111**

## RIGHT OF HOT PURSUIT

1. The hot pursuit of a foreign ship may be undertaken 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. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

6. Where hot pursuit is effected by an aircraft:

(a) the provisions of paragraphs 1 to 4 shall apply *mutatis mutandis*;

(b) the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

## ANNEX IX

# Maritime Drug Law Enforcement Training Guide (Extracts)

### CHAPTER 2

#### THE USE OF FORCE AND FIREARMS

##### Introduction

The use of force and firearms by boarding officers is primarily regulated by national law, as well as by a number of international instruments. This section summarizes some of the important principles of international law in relation to the use of force, as well as applicable norms and standards. However, it is essential that you should also be thoroughly familiar with the domestic laws of your country in this regard. (See also chapter XII on “Controlling the crew” and annex IV, “Contraband interdiction boarding skills check list”.)

You should distinguish between situations where:

- You do not need special legal authority to use force, e.g., where you are required to defend yourself or others against a threat of imminent death or serious injury, and
- Legal authority is required to use force, e.g., to stop a vessel which refuses to heave to.

The use of force should be understood as a continuum, ranging from the lowest to the highest level justified in all the circumstances. As a general rule, you should use the least amount of force required.

##### Human dignity

In the performance of your duty you should always respect and protect human dignity.

##### Firearms

###### *Limits to the use of firearms*

You should not use firearms against persons except in the following circumstances and only when less extreme means are insufficient:<sup>1</sup>

- Where national law authorizes the use of firearms.
- To defend yourself or others against the imminent threat of death or serious injury.

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<sup>1</sup>See the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, General Assembly resolution 45/121, 18 December 1990.

- To prevent a particularly serious crime that involves a grave threat to life.
- To arrest a person who is causing a serious threat to life and who is resisting appropriate efforts to stop the threat.
- To prevent the escape of someone who is causing a serious threat to life.

#### *What to do before using firearms*

If you do use firearms against persons in the circumstances set out above, you must:

- Identify yourself as a law enforcement official.
- Give a clear warning of your intent to use firearms.
- Give enough time for the warning to be obeyed unless to do so would:
  - (a) Create a serious risk to you;
  - (b) Create a serious risk of death or serious harm to other persons;
  - (c) Clearly be inappropriate or pointless in the circumstances.

#### *Principles guiding the use of firearms*

Whenever the lawful use of force or firearms is unavoidable, you should:

- Act with restraint and only use the amount of force necessary to achieve a legitimate law enforcement objective.
- Respect human life and cause the minimum amount of injury to people.
- Cause the minimum amount of damage to property.
- As soon as possible, help anyone who is hurt and render medical aid if needed.
- Make a report as soon as possible to a superior officer.

### **Arrest**

#### *Definition*

Arrest may be defined as “the act of apprehending a person for the alleged commission of an offence”.

#### *Making arrests*

You should not make any arrest which is unlawful or unnecessary. You should know the procedures concerning arrest and detention under your national law.

#### *Safety considerations*

Safety should always come first. Remember that it may be dangerous to discharge a weapon due to ricochets, fire risk and unstable floors. Specialized training is required to use weapons safely, subject to national laws.

### **Guidelines for policy makers**

#### *National law*

Governments and law enforcement agencies should adopt and implement rules and regulations on the use of force and firearms by law enforcement officials. These rules

should specify the circumstances under which law enforcement officials are authorized to carry and use firearms, and prescribe the types of firearms and ammunition permitted. The use of force should be limited in accordance with the principle of proportionality relative to the legitimate objectives to be achieved.

#### *Types of weapons*

Different considerations apply to the use of firearms at sea and on land. Therefore different standards should be developed for training officers for their use at sea; e.g. loaded weapons should not be used during training on board vessels.

Law enforcement officials should be equipped with various types of weapons that would allow for a differentiated use of force, including non-lethal incapacitating weapons, in order to reduce the use of deadly or injurious force. They should also be provided with self-defensive and safety equipment such as helmets and bulletproof vests.

#### *Training*

Governments and law enforcement agencies should ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

#### *International instruments*

Some treaties, such as the International Covenant on Civil and Political Rights, impose legally binding obligations on their parties. Others, such as the Geneva Conventions, have the status of customary international law. In contrast, other standards and norms, such as the Code of Conduct for Law Enforcement Officials, provide models of accepted international norms as guides for countries.

Policy makers should take into account the applicable international instruments, including those listed below:

- International Covenant on Civil and Political Rights (adopted by the General Assembly of the United Nations on 16 December 1966; and in force since 23 March 1976).
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the General Assembly on 10 December 1984; and in force since 26 June 1987).
- Standard Minimum Rules for the Treatment of Prisoners (Economic and Social Council resolution 663 (XXIV) of 31 July 1957).
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173 of 9 December 1988).
- Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169 of 17 December 1979).
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, (General Assembly resolution 45/121 of 18 December 1990).



## ANNEX X

### Examples of bilateral and multilateral agreements

- A. Council of Europe Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Strasbourg, 31 January 1995 (English and French).
- B. Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica concerning Cooperation to Suppress Illicit Traffic and related exchange of correspondence (English and Spanish).
- C. Agreement of 20 February 1997 between the Government of Colombia and the Government of the United States of America to Suppress Illicit Traffic by Sea (English and Spanish).
- D. Treaty between the Kingdom of Spain and the Portuguese Republic for the Suppression of Illicit Drug Traffic by Sea (Portuguese and Spanish, translated into English).
- E. Treaty between the Kingdom of Spain and the Italian Republic to Combat Illicit Drug Trafficking at Sea (Italian and Spanish, translated into English).
- F. Agreement concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (English, French and Spanish).

**A. Agreement on Illicit Traffic by Sea, Implementing Article 17  
of the United Nations Convention against Illicit Traffic  
in Narcotic Drugs and Psychotropic Substances**

*Council of Europe, European Treaty Series—No. 156, Strasbourg, 31 January 1995*

*Entry into force: 1 May 2002*

*States parties as at 28 August 2002: Austria, Cyprus, Germany, Hungary,  
Norway, Romania and Slovenia*

The member States of the Council of Europe, having expressed their consent to be bound by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988, hereinafter referred to as "The Vienna Convention",

*Considering* that the aim of the Council of Europe is to achieve a greater unity between its members;

*Convinced* of the need to pursue a common criminal policy aimed at the protection of society;

*Considering* that the fight against serious crime, which has become an increasingly international problem, calls for close cooperation on an international scale;

*Desiring* to increase their cooperation to the fullest possible extent in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea and in full respect of the principle of right of freedom of navigation;

*Considering*, therefore, that article 17 of the Vienna Convention should be supplemented by a regional agreement to carry out, and to enhance the effectiveness of the provisions of that article,

Have agreed as follows:

## CHAPTER I. DEFINITIONS

**Article 1. Definitions**

For the purposes of this Agreement:

(a) “Intervening State” means a State Party which has requested or proposes to request authorization from another Party to take action under this Agreement in relation to a vessel flying the flag or displaying the marks of registry of that other State Party;

(b) “Preferential jurisdiction” means, in relation to a flag State having concurrent jurisdiction over a relevant offence with another State, the right to exercise its jurisdiction on a priority basis, to the exclusion of the exercise of the other State’s jurisdiction over the offence;

(c) “Relevant offence” means any offence of the kind described in article 3, paragraph 1, of the Vienna Convention;

(d) “Vessel” means a ship or any other floating craft of any description, including hovercrafts and submersible crafts.

## CHAPTER II. INTERNATIONAL COOPERATION

**Section 1. General provisions****Article 2. General principles**

1. The Parties shall cooperate to the fullest extent possible to suppress illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea.
2. In the implementation of this Agreement the Parties shall endeavour to ensure that their actions maximize the effectiveness of law enforcement measures against illicit traffic in narcotic drugs and psychotropic substances by sea.
3. Any action taken in pursuance of this Agreement shall take due account of the need not to interfere with or affect the rights and obligations of and the exercise of jurisdiction by coastal States, in accordance with the international law of the sea.
4. Nothing in this Agreement shall be so construed as to infringe the principle of non bis in idem, as applied in national law.
5. The Parties recognize the value of gathering and exchanging information concerning vessels, cargo and facts, whenever they consider that such exchange of information could assist a Party in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea.
6. Nothing in this Agreement affects the immunities of warships and other government vessels operated for non-commercial purposes.

**Article 3. Jurisdiction**

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences when the offence is committed on board a vessel flying its flag.
2. For the purposes of applying this Agreement, each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel flying the flag or displaying the marks of registry or bearing any other indication of nationality of any other Party to this Agreement. Such jurisdiction shall be exercised only in conformity with this Agreement.
3. For the purposes of applying this Agreement, each Party shall take such measures as may be necessary to establish its jurisdiction over the relevant offences committed on board a vessel which is without nationality, or which is assimilated to a vessel without nationality under international law.

4. The flag State has preferential jurisdiction over any relevant offence committed on board its vessel.
5. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or at any later date, by a declaration addressed to the Secretary General of the Council of Europe, inform the other Parties to the agreement of the criteria it intends to apply in respect of the exercise of the jurisdiction established pursuant to paragraph 2 of this article.
6. Any State which does not have in service warships, military aircraft or other government ships or aircraft operated for non-commercial purposes, which would enable it to become an intervening State under this Agreement may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe declare that it will not apply paragraphs 2 and 3 of this article. A State which has made such a declaration is under the obligation to withdraw it when the circumstances justifying the reservation no longer exist.

#### ***Article 4. Assistance to flag States***

1. A Party which has reasonable grounds to suspect that a vessel flying its flag is engaged in or being used for the commission of a relevant offence, may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.
2. In making its request, the flag State may, inter alia, authorize the requested Party, subject to any conditions or limitations which may be imposed, to take some or all of the actions specified in this Agreement.
3. When the requested Party agrees to act upon the authorization of the flag State given to it in accordance with paragraph 2, the provisions of this Agreement in respect of the rights and obligations of the intervening State and the flag State shall, where appropriate and unless otherwise specified, apply to the requested and requesting Party, respectively.

#### ***Article 5. Vessels without nationality***

1. A Party which has reasonable grounds to suspect that a vessel without nationality, or assimilated to a vessel without nationality under international law, is engaged in or being used for the commission of a relevant offence, shall inform such other Parties as appear most closely affected and may request the assistance of any such Party in suppressing its use for that purpose. The Party so requested shall render such assistance within the means available to it.
2. Where a Party, having received information in accordance with paragraph 1, takes action it shall be for that Party to determine what actions are appropriate and to exercise its jurisdiction over any relevant offences which may have been committed by any persons on board the vessel.
3. Any Party which has taken action under this article shall communicate as soon as possible to the Party which has provided information, or made a request for assistance, the results of any action taken in respect of the vessel and any persons on board.

### **Section 2. Authorization procedures**

#### ***Article 6. Basic rules on authorization***

Where the intervening State has reasonable grounds to suspect that a vessel, which is flying the flag or displaying the marks of registry of another Party or bears any other indications of nationality of the vessel, is engaged in or being used for the commission of a relevant offence, the intervening State may request the authorization of the flag State to stop and board the vessel in waters beyond the territorial sea of any Party, and to take some or all of the other actions specified in this Agreement. No such actions may be taken by virtue of this Agreement, without the authorization of the flag State.

### **Article 7. Decision on the request for authorization**

The flag State shall immediately acknowledge receipt of a request for authorization under article 6 and shall communicate a decision thereon as soon as possible and, wherever practicable, within four hours of receipt of the request.

### **Article 8. Conditions**

1. If the flag State grants the request, such authorization may be made subject to conditions or limitations. Such conditions or limitations may, in particular, provide that the flag State's express authorization be given before any specified steps are taken by the intervening State.

2. Each State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by declaration addressed to the Secretary General of the Council of Europe declare that, when acting as an intervening State, it may subject its intervention to the condition that persons having its nationality who are surrendered to the flag State under article 15 and there convicted of a relevant offence, shall have the possibility to be transferred to the intervening State to serve the sentence imposed.

## **Section 3. Rules governing action**

### **Article 9. Authorized actions**

1. Having received the authorization of the flag State, and subject to the conditions or limitations, if any, made under article 8, paragraph 1, the intervening State may take the following actions:

- (i) (a) stop and board the vessel;
- (b) establish effective control of the vessel and over any person thereon;
- (c) take any action provided for in subparagraph (ii) of this article which is considered necessary to establish whether a relevant offence has been committed and to secure any evidence thereof;
- (d) require the vessel and any persons thereon to be taken into the territory of the intervening State and detain the vessel there for the purpose of carrying out further investigations;
- (ii) and, having established effective control of the vessel:
  - (a) search the vessel, anyone on it and anything in it, including its cargo;
  - (b) open or require the opening of any containers, and test or take samples of anything on the vessel;
  - (c) require any person on the vessel to give information concerning himself or anything on the vessel;
  - (d) require the production of documents, books or records relating to the vessel or any persons or objects on it, and make photographs or copies of anything the production of which the competent authorities have the power to require;
  - (e) seize, secure and protect any evidence or material discovered on the vessel.

2. Any action taken under paragraph 1 of this article shall be without prejudice to any right existing under the law of the intervening State of suspected persons not to incriminate themselves.

### **Article 10. Enforcement measures**

1. Where, as a result of action taken under article 9, the intervening State has evidence that a relevant offence has been committed which would be sufficient under its laws to justify its either arresting the persons concerned or detaining the vessel, or both, it may so proceed.

2. The intervening State shall, without delay, notify the flag State of steps taken under paragraph 1 above.
3. The vessel shall not be detained for a period longer than that which is strictly necessary to complete the investigations into relevant offences. Where there are reasonable grounds to suspect that the owners of the vessel are directly involved in a relevant offence, the vessel and its cargo may be further detained on completion of the investigation. Persons not suspected of any relevant offence and objects not required as evidence shall be released.
4. Notwithstanding the provisions of the preceding paragraph, the intervening State and the flag State may agree with a third State, Party to this Agreement, that the vessel may be taken to the territory of that third State and, once the vessel is in that territory, the third State shall be treated for the purposes of this Agreement as an intervening State.

#### **Article 11. Execution of action**

1. Actions taken under articles 9 and 10 shall be governed by the law of the intervening State.
2. Actions under article 9, paragraph 1 (a), (b) and (d), shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.
3. (a) An official of the intervening State may not be prosecuted in the flag State for any act performed in the exercise of his functions. In such a case, the official shall be liable to prosecution in the intervening State as if the elements constituting the offence had been committed within the jurisdiction of that State.  
(b) In any proceedings instituted in the flag State, offences committed against an official of the intervening State with respect to actions carried out under articles 9 and 10 shall be treated as if they had been committed against an official of the flag State.
4. The master of a vessel which has been boarded in accordance with this Agreement shall be entitled to communicate with the authorities of the vessel's flag State as well as with the owners or operators of the vessel for the purpose of notifying them that the vessel has been boarded. However, the authorities of the intervening State may prevent or delay any communication with the owners or operators of the vessel if they have reasonable grounds for believing that such communication would obstruct the investigations into a relevant offence.

#### **Article 12. Operational safeguards**

1. In the application of this Agreement, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and cargo and not to prejudice any commercial or legal interest. In particular, they shall take into account:
  - (a) the dangers involved in boarding a vessel at sea, and give consideration to whether this could be more safely done at the vessel's next port of call;
  - (b) the need to minimize any interference with the legitimate commercial activities of a vessel;
  - (c) the need to avoid unduly detaining or delaying a vessel;
  - (d) the need to restrict the use of force to the minimum necessary to ensure compliance with the instructions of the intervening State.
2. The use of firearms against, or on, the vessel shall be reported as soon as possible to the flag State.
3. The death, or injury, of any person aboard the vessel shall be reported as soon as possible to the flag State. The authorities of the intervening State shall fully cooperate with the authorities of the flag State in any investigation the flag State may hold into any such death or injury.

## **Section 4. Rules governing the exercise of jurisdiction**

### ***Article 13. Evidence of offences***

1. To enable the flag State to decide whether to exercise its preferential jurisdiction in accordance with the provisions of article 14, the intervening State shall without delay transmit to the flag State a summary of the evidence of any offences discovered as a result of action taken pursuant to article 9. The flag State shall acknowledge receipt of the summary forthwith.
2. If the intervening State discovers evidence which leads it to believe that offences outside the scope of this Agreement may have been committed, or that suspect persons not involved in relevant offences are on board the vessel, it shall notify the flag State. Where appropriate, the Parties involved shall consult.
3. The provisions of this Agreement shall be so construed as to permit the intervening State to take measures, including the detention of persons, other than those aimed at the investigation and prosecution of relevant offences, only when:
  - (a) the flag State gives its express consent; or
  - (b) such measures are aimed at the investigation and prosecution of an offence committed after the person has been taken into the territory of the intervening State.

### ***Article 14. Exercise of preferential jurisdiction***

1. A flag State wishing to exercise its preferential jurisdiction shall do so in accordance with the provisions of this article.
2. It shall notify the intervening State to this effect as soon as possible and at the latest within fourteen days from the receipt of the summary of evidence pursuant to article 13. If the flag State fails to do this, it shall be deemed to have waived the exercise of its preferential jurisdiction.
3. Where the flag State has notified the intervening State that it exercises its preferential jurisdiction, the exercise of the jurisdiction of the intervening State shall be suspended, save for the purpose of surrendering persons, vessels, cargoes and evidence in accordance with this Agreement.
4. The flag State shall submit the case forthwith to its competent authorities for the purpose of prosecution.
5. Measures taken by the intervening State against the vessel and persons on board may be deemed to have been taken as part of the procedure of the flag State.

### ***Article 15. Surrender of vessels, cargoes, persons and evidence***

1. Where the flag State has notified the intervening State of its intention to exercise its preferential jurisdiction, and if the flag State so requests, the persons arrested, the vessel, the cargo and the evidence seized shall be surrendered to that State in accordance with the provisions of this Agreement.
2. The request for the surrender of arrested persons shall be supported by, in respect of each person, the original or a certified copy of the warrant of arrest or other order having the same effect, issued by a judicial authority in accordance with the procedure prescribed by the law of the flag State.
3. The Parties shall use their best endeavours to expedite the surrender of persons, vessels, cargoes and evidence.
4. Nothing in this Agreement shall be so construed as to deprive any detained person of his right under the law of the intervening State to have the lawfulness of his detention reviewed by a court of that State, in accordance with procedures established by its national law.
5. Instead of requesting the surrender of the detained persons or of the vessel, the flag State may request their immediate release. Where this request has been made, the intervening State shall release them forthwith.

### **Article 16. Capital punishment**

If any offence for which the flag State decides to exercise its preferential jurisdiction in accordance with article 14 is punishable by death under the law of that State, and if in respect of such an offence the death penalty is not provided by the law of the intervening State or is not normally carried out, the surrender of any person may be refused unless the flag State gives such assurances as the intervening State considers sufficient that the death penalty will not be carried out.

## **Section 5. Procedural and other general rules**

### **Article 17. Competent authorities**

1. Each Party shall designate an authority, which shall be responsible for sending and answering requests under articles 6 and 7 of this Agreement. So far as is practicable, each Party shall make arrangements so that this authority may receive and respond to the requests at any hour of any day or night.
2. The Parties shall furthermore designate a central authority which shall be responsible for the notification of the exercise of preferential jurisdiction under article 14 and for all other communications or notifications under this Agreement.
3. Each Party shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, communicate to the Secretary General of the Council of Europe the names and addresses of the authorities designated in pursuance of this article, together with any other information facilitating communication under this Agreement. Any subsequent change with respect to the name, address or other relevant information concerning such authorities shall likewise be communicated to the Secretary General.

### **Article 18. Communication between designated authorities**

1. The authorities designated under article 17 shall communicate directly with one another.
2. Where, for any reason, direct communication is not practicable, Parties may agree to use the communication channels of ICPO-Interpol or of the Customs Cooperation Council.

### **Article 19. Form of request and languages**

1. All communications under articles 4 to 16 shall be made in writing. Modern means of telecommunications, such as telefax, may be used.
2. Subject to the provisions of paragraph 3 of this article, translations of the requests, other communications and supporting documents shall not be required.
3. At the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, any Party may communicate to the Secretary General of the Council of Europe a declaration that it reserves the right to require that requests, other communications and supporting documents sent to it, be made in or accompanied by a translation into its own language or into one of the official languages of the Council of Europe or into such one of these languages as it shall indicate. It may on that occasion declare its readiness to accept translations in any other language as it may specify. The other Parties may apply the reciprocity rule.

### **Article 20. Authentication and legalization**

Documents transmitted in application of this Agreement shall be exempt from all authentication and legalization formalities.

### **Article 21. Content of request**

A request under article 6 shall specify:

- (a) the authority making the request and the authority carrying out the investigations or proceedings;
- (b) details of the vessel concerned, including, as far as possible, its name, a description of the vessel, any marks of registry or other signs indicating nationality, as well as its location, together with a request for confirmation that the vessel has the nationality of the requested Party;
- (c) details of the suspected offences, together with the grounds for suspicion;
- (d) the action it is proposed to take and an assurance that such action would be taken if the vessel concerned had been flying the flag of the intervening State.

### **Article 22. Information for owners and masters of vessels**

Each Party shall take such measures as may be necessary to inform the owners and masters of vessels flying their flag that States Parties to this Agreement may be granted the authority to board vessels beyond the territorial sea of any Party for the purposes specified in this Agreement and to inform them in particular of the obligation to comply with instructions given by a boarding party from an intervening State exercising that authority.

### **Article 23. Restriction of use**

The flag State may make the authorization referred to in article 6 subject to the condition that the information or evidence obtained will not, without its prior consent, be used or transmitted by the authorities of the intervening State in respect of investigations or proceedings other than those relating to relevant offences.

### **Article 24. Confidentiality**

The Parties concerned shall, if this is not contrary to the basic principles of their national law, keep confidential any evidence and information provided by another Party in pursuance of this Agreement, except to the extent that its disclosure is necessary for the application of the Agreement or for any investigations or proceedings.

## **Section 6. Costs and damages**

### **Article 25. Costs**

1. Unless otherwise agreed by the Parties concerned, the cost of carrying out any action under articles 9 and 10 shall be borne by the intervening State, and the cost of carrying out action under articles 4 and 5 shall normally be borne by the Party which renders assistance.
2. Where the flag State has exercised its preferential jurisdiction in accordance with article 14, the cost of returning the vessel and of transporting suspected persons and evidence shall be borne by it.

### **Article 26. Damages**

1. If, in the process of taking action pursuant to articles 9 and 10 above, any person, whether natural or legal, suffers loss, damage or injury as a result of negligence or some other fault attributable to the intervening State, it shall be liable to pay compensation in respect thereof.
2. Where the action is taken in a manner which is not justified by the terms of this Agreement, the intervening State shall be liable to pay compensation for any resulting loss, damage or injury. The intervening State shall also be liable to pay compensation for any such loss, damage or injury, if the suspicions prove to be unfounded and provided that the vessel boarded, the operator or the crew have not committed any act justifying them.

3. Liability for any damage resulting from action under article 4 shall rest with the requesting State, which may seek compensation from the requested State where the damage was a result of negligence or some other fault attributable to that State.

### CHAPTER III. FINAL PROVISIONS

#### ***Article 27. Signature and entry into force***

1. This Agreement shall be open for signature by the member States of the Council of Europe which have already expressed their consent to be bound by the Vienna Convention. They may express their consent to be bound by this Agreement by:

- (a) signature without reservation as to ratification, acceptance or approval; or
- (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Agreement shall enter into force on the first day of the month following the expiry of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Agreement in accordance with the provisions of paragraph 1.

4. In respect of any signatory State which subsequently expresses its consent to be bound by it, the Agreement shall enter into force on the first day of the month following the expiry of a period of three months after the date of its consent to be bound by the Agreement in accordance with the provisions of paragraph 1.

#### ***Article 28. Accession***

1. After the entry into force of this Agreement, the Committee of Ministers of the Council of Europe, after consulting the Contracting States to the Agreement, may invite any State which is not a member of the Council but which has expressed its consent to be bound by the Vienna Convention to accede to this Agreement, by a decision taken by the majority provided for in article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.

2. In respect of any acceding State, the Agreement shall enter into force on the first day of the month following the expiry of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

#### ***Article 29. Territorial application***

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories in respect of which its consent to be bound to this Agreement shall apply.

2. Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend its consent to be bound by the present Agreement to any other territory specified in the declaration. In respect of such territory the Agreement shall enter into force on the first day of the month following the expiry of a period of three months after the date of receipt of such declaration by the Secretary General.

3. In respect of any territory subject to a declaration under paragraphs 1 and 2 above, authorities may be designated under article 17, paragraphs 1 and 2.

4. Any declaration made under the preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiry of a period of three months after the date of receipt of such notification by the Secretary General.

### ***Article 30. Relationship to other conventions and agreements***

1. This Agreement shall not affect rights and undertakings deriving from the Vienna Convention or from any international multilateral conventions concerning special matters.
2. The Parties to the Agreement may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Agreement, for the purpose of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it and in article 17 of the Vienna Convention.
3. If two or more Parties have already concluded an agreement or treaty in respect of a subject dealt with in this Agreement or have otherwise established their relations in respect of that subject, they may agree to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Agreement, if it facilitates international cooperation.

### ***Article 31. Reservations***

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more of the reservations provided for in article 3, paragraph 6, article 19, paragraph 3 and article 34, paragraph 5. No other reservation may be made.
2. Any State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.
3. A Party which has made a reservation in respect of a provision of this Agreement may not claim the application of that provision by any other Party. It may, however, if its reservation is partial or conditional, claim the application of that provision insofar as it has itself accepted it.

### ***Article 32. Monitoring committee***

1. After the entry into force of the present Agreement, a monitoring committee of experts representing the Parties shall be convened at the request of a Party to the Agreement by the Secretary General of the Council of Europe.
2. The monitoring committee shall review the working of the Agreement and make appropriate suggestions to secure its efficient operation.
3. The monitoring committee may decide its own procedural rules.
4. The monitoring committee may decide to invite States not Parties to the Agreement as well as international organizations or bodies, as appropriate, to its meetings.
5. Each Party shall send every second year a report on the operation of the Agreement to the Secretary General of the Council of Europe in such form and manner as may be decided by the monitoring committee or the European Committee on Crime Problems. The monitoring committee may decide to circulate the information supplied or a report thereon to the Parties and to such international organizations or bodies as it deems appropriate.

### ***Article 33. Amendments***

1. Amendments to this Agreement may be proposed by any Party, and shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe and to every nonmember State which has acceded to or has been invited to accede to the Agreement in accordance with the provisions of article 28.
2. Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems, which shall submit to the Committee of Ministers its opinion on the proposed amendment.

3. The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the European Committee on Crime Problems, and may adopt the amendment.
4. The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.
5. Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the thirtieth day after all the Parties have informed the Secretary General of their acceptance thereof.

#### ***Article 34. Settlement of disputes***

1. The European Committee on Crime Problems of the Council of Europe shall be kept informed of the interpretation and application of this Agreement.
2. In case of a dispute between Parties as to the interpretation or application of this Agreement, the Parties shall seek a settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to the European Committee on Crime Problems, to an arbitral tribunal whose decisions shall be binding upon the Parties, mediation, conciliation or judicial process, as agreed upon by the Parties concerned.
3. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, or on any later date, by a declaration addressed to the Secretary General of the Council of Europe, declare that, in respect of any dispute concerning the interpretation or application of this Agreement, it recognizes as compulsory, without prior agreement, and subject to reciprocity, the submission of the dispute to arbitration in accordance with the procedure set out in the appendix to this Agreement.
4. Any dispute which has not been settled in accordance with paragraphs 2 or 3 of this article shall be referred, at the request of any one of the parties to the dispute, to the International Court of Justice for decision.
5. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it does not consider itself bound by paragraph 4 of this article.
6. Any Party having made a declaration in accordance with paragraphs 3 or 5 of this article may at any time withdraw the declaration by notification to the Secretary General of the Council of Europe.

#### ***Article 35. Denunciation***

1. Any Party may, at any time, denounce this Agreement by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiry of a period of three months after the date of receipt of the notification by the Secretary General.
3. The present Agreement shall, however, continue to remain effective in respect of any actions or proceedings based on applications or requests made during the period of its validity in respect of the denouncing Party.

#### ***Article 36. Notifications***

The Secretary General of the Council of Europe shall notify the member States of the Council, any State which has acceded to this Agreement and the Secretary-General of the United Nations of:

- (a) any signature;
- (b) the deposit of any instrument of ratification, acceptance, approval or accession;
- (c) the name of any authority and any other information communicated pursuant to article 17;

- (d) any reservation made in accordance with article 31, paragraph 1;
- (e) the date of entry into force of this Agreement in accordance with articles 27 and 28;
- (f) any request made under article 32, paragraph 1, and the date of any meeting convened under that paragraph;
- (g) any declaration made under article 3, paragraphs 5 and 6, article 8, paragraph 2, article 19, paragraph 3 and article 34, paragraphs 3 and 5;
- (h) any other act, notification or communication relating to this Agreement.

In witness whereof the undersigned, being duly authorized thereto, have signed this Agreement.

Done at Strasbourg, this 31st day of January 1995, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to any State invited to accede to this Agreement.

### **Appendix**

1. The Party to the dispute requesting arbitration pursuant to article 34, paragraph 3, shall inform the other Party in writing of the claim and of the grounds on which its claim is based.
2. The Parties concerned shall establish an arbitral tribunal.
3. The arbitral tribunal shall consist of three members. Each Party shall nominate an arbitrator. Both Parties shall, by common accord, appoint the presiding arbitrator.
4. Failing such nomination or such appointment by common accord within four months from the date on which the arbitration was requested, the necessary nomination or appointment shall be entrusted to the Secretary General of the Permanent Court of Arbitration.
5. Unless the Parties agree otherwise, the tribunal shall determine its own procedure.
6. Unless otherwise agreed between the Parties, the tribunal shall decide on the basis of the applicable rules of international law or, in the absence of such rules, *ex aequo et bono*.
7. The tribunal shall reach its decision by a majority of votes. Its decision shall be final and binding.

### **B. Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica concerning Cooperation to Suppress Illicit Traffic and related exchange of correspondence**

*(Entry into force: 19 November 1999)*

#### PREAMBLE

The Government of the United States of America and the Government of the Republic of Costa Rica (hereinafter the Parties);

*Bearing in mind* the complex nature of the problem of illicit traffic by sea;

*Having regard* to the urgent need for international cooperation in suppressing illicit traffic by sea, which is recognized in the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol, in the 1971 Convention on Psychotropic Substances, in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter the 1988 Convention), and in the 1982 United Nations Convention on the Law of the Sea;

*Recalling* that the 1988 Convention requires the Parties to consider entering into bilateral agreements to carry out, or to enhance the effectiveness of, its provisions;

*Desiring* to promote greater cooperation between the Parties, and thereby enhance their effectiveness, in combating illicit traffic by sea;

*Conscious* of the fact that, in order to combat drug-related activities effectively and efficiently, the active participation of all States affected is needed, that is, consumer and producer States, States whose territories are used as trans-shipment points for narcotic drugs, and States used to launder the proceeds of drug trafficking;

*Taking into account* that the Government of Costa Rica does not have sufficient technical and material resources to assume an active and forceful role in international counter-narcotics activities;

*Recognizing* that the United States Coast Guard is a law enforcement body within the United States Department of Transportation; and

*Conscious* of the fact that Costa Rica is experiencing increased use of its maritime zones in the Pacific Ocean and Caribbean Sea for the trans-shipment of drugs;

Have agreed as follows:

## I. DEFINITIONS

In this Agreement, it shall be understood that:

1. *Illicit traffic* has the same meaning as in article 1 (*m*) of the 1988 Convention.
2. *Costa Rican waters and airspace* means the territorial sea and internal waters of Costa Rica, including Coco Island and the air space over Costa Rica.
3. *Law enforcement vessels* means ships of the Parties clearly marked and identifiable as being on government non-commercial service and authorized to that effect, including any boat and aircraft embarked on such ships, aboard which law enforcement officials are embarked.
4. *Law enforcement aircraft* means aircraft of the Parties engaged in law enforcement operations or operations in support of law enforcement activities clearly marked and identifiable as being on government non-commercial service and authorized to that effect.
5. *Law enforcement authorities* means for the Government of the Republic of Costa Rica, the Ministry of Public Security, the Maritime Surveillance Service, the Air Surveillance Service, and the Drug Control Police, without prejudice to the powers of the appropriate judicial authorities, and, for the Government of the United States of America, the United States Coast Guard.
6. *Law enforcement officials* means, for the Government of the United States of America, uniformed members of the United States Coast Guard, and for the Government of the Republic of Costa Rica, uniformed members of the Maritime Surveillance Service and the Air Surveillance Service of the Ministry of Public Security and clearly identifiable members of the Drug Control Police of that Ministry.
7. *Ship-rider* means one or more law enforcement officials, including boarding teams, of one Party authorized to embark on a law enforcement vessel of the other Party.
8. *Suspect vessel or aircraft* means a vessel or aircraft used for commercial or private purposes in respect of which there are reasonable grounds to suspect it is involved in illicit traffic.

## II. NATURE AND SCOPE OF AGREEMENT

1. The Parties shall cooperate in combating illicit traffic by sea to the fullest extent possible, consistent with available law enforcement resources and related priorities.
2. The Government of the United States of America shall continue to provide the Government of Costa Rica with available information collected by electronic, air and maritime surveillance means, on the presence of suspect vessels or aircraft in or over Costa Rican waters or airspace, so that the law enforcement authorities of Costa Rica may take appropriate control measures. The Parties undertake to agree on procedures for improving intelligence sharing.

## III. OPERATIONS IN AND OVER NATIONAL WATERS

Operations to suppress illicit traffic in and over the waters of a Party are subject to the authority of that Party.

IV. PROGRAMME FOR LAW ENFORCEMENT OFFICIALS  
ABOARD THE OTHER PARTY'S VESSELS

1. The Parties shall establish a joint law enforcement ship-rider programme between their law enforcement authorities. Each Party may designate a coordinator to organize its programme activities and to notify the other Party of the types of vessels and officials involved in the programme.
2. The Government of Costa Rica may designate qualified law enforcement officials to act as law enforcement ship-riders. The Government of Costa Rica may assign boarding teams to conduct boardings, searches and detentions from United States law enforcement vessels under the flag of Costa Rica of suspect Costa Rican vessels and other suspect vessels located in Costa Rican waters in accordance with paragraph 5, subject to subparagraphs (b) and (c) of paragraph 6. Subject to Costa Rican law, these ship-riders may, in appropriate circumstances:
  - (a) Embark on United States law enforcement vessels;
  - (b) Authorize the pursuit, by the United States law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into Costa Rican waters;
  - (c) Authorize the United States law enforcement vessels on which they are embarked to conduct patrols to suppress illicit traffic in Costa Rican waters; and
  - (d) Enforce the laws of Costa Rica in Costa Rican waters, or seaward therefrom in the exercise of the right of hot pursuit or otherwise in accordance with international law.
3. The Government of the United States of America may designate qualified law enforcement officials to act as law enforcement ship-riders. Subject to United States law, these ship-riders may, in appropriate circumstances:
  - (a) Embark on Costa Rican law enforcement vessels;
  - (b) Advise Costa Rican law enforcement officials in the conduct of boardings of vessels to enforce the laws of Costa Rica;
  - (c) Enforce, seaward of the territorial sea of Costa Rica, the laws of the United States where authorized to do so, in accordance with the principles of international law; and
  - (d) Authorize the Costa Rican vessels on which they are embarked to assist in the enforcement of the laws of the United States seaward of the territorial sea of Costa Rica, in accordance with the principles of international law.
4. The Government of the United States of America shall, whenever feasible, assign as ship-riders persons fluent in Spanish, and to have liaison officials fluent in Spanish on board United States law enforcement vessels on which Costa Rican ship-riders are embarked.
5. When a ship-rider is embarked on the other Party's vessel, and the enforcement action being carried out is pursuant to the ship-rider's authority, any search or seizure of property, any detention of a person, and any use of force pursuant to this Agreement, whether or not involving weapons, shall be carried out by the ship-rider, except as follows:
  - (a) Crewmembers of the other Party's vessel may assist in any such action if expressly requested to do so by the ship-rider and only to the extent and in the manner requested. Such request may only be made, agreed to, and acted upon in accordance with the applicable laws and policies; and
  - (b) Such crewmembers may use force in self-defence, in accordance with the applicable laws and policies.
6. The Government of the United States of America may only conduct operations to suppress illicit traffic in Costa Rican waters and airspace with the permission of the Government of the Republic of Costa Rica in any of the following circumstances:
  - (a) An embarked Costa Rican ship-rider so authorizes;
  - (b) In those exceptional occasions when a suspect vessel, detected seaward of Costa Rican waters, enters Costa Rican waters and no Costa Rican ship-rider is embarked in a United States law enforcement vessel, and no Costa Rican law enforcement vessel is immediately available to investigate, the United States law enforcement vessel may follow the suspect vessel into Costa Rican waters, in order to board the suspect vessel and secure

the scene, while awaiting expeditious instructions from Costa Rican law enforcement authorities and the arrival of Costa Rican law enforcement officials;

(c) In those equally exceptional occasions when a suspect vessel is detected within Costa Rican waters, and no Costa Rican ship-rider is embarked in a United States law enforcement vessel, and no Costa Rican law enforcement vessel is immediately available to investigate, the United States law enforcement vessel may enter Costa Rican waters, in order to board the suspect vessel and secure the scene, while awaiting expeditious instructions from Costa Rican law enforcement authorities and the arrival of Costa Rican law enforcement officials.

The United States shall provide prior notice to the Costa Rican law enforcement authority of action to be taken under subparagraphs (b) and (c) of this paragraph, unless not operationally feasible to do so. In any case, notice of the action shall be provided to the Costa Rican law enforcement authority without delay.

7. Law enforcement vessels of a Party operating with the authorization of the other Party pursuant to section IV of this Agreement shall, during such operations, fly, in the case of the United States of America, the Costa Rican flag, and in the case of Costa Rica, the United States Coast Guard ensign.

8. The Government of Costa Rica shall permit the mooring or stay of law enforcement vessels of the United States of America at national ports, after authorization by the Minister of Public Security, on the occasions and for the time necessary for the proper performance of the operations required under this Agreement.

9. The Government of the Republic of Costa Rica reserves the right to authorize, in accordance with the laws of Costa Rica, other operations to suppress illicit traffic not otherwise foreseen in this Agreement.

10. When aircraft of the Government of the United States of America (hereafter United States aircraft) are operating to suppress illicit traffic or supporting such operations, the Government of the Republic of Costa Rica shall permit those United States aircraft:

(a) To overfly its territory and waters with due regard for the laws and regulations of Costa Rica for the flight and manoeuvre of aircraft, subject to paragraph 11 of this section;

(b) To land and remain in national airports, after receiving authorization from the Minister of Public Security, on the occasions and for the time necessary for proper performance of the operations necessary under this Agreement; and

(c) To transmit orders from competent Costa Rican authorities to suspect aircraft to land in the territory of Costa Rica, subject to the laws of each Party.

11. The Government of the United States of America shall, in the interest of flight safety, observe the following procedures for facilitating flights within Costa Rican airspace by United States aircraft:

(a) In the event of planned law enforcement operations, the United States shall provide reasonable notice and communications frequencies to the appropriate Costa Rican aviation authorities responsible for air traffic control of planned flights by its aircraft over Costa Rican territory or waters;

(b) In the event of unplanned operations, which may include the pursuit of suspect aircraft into Costa Rican airspace pursuant to this Agreement, the Parties shall exchange information concerning the appropriate communications frequencies and other information pertinent to flight safety;

(c) Any aircraft engaged in law enforcement operations or operations in support of law enforcement activities in accordance with this Agreement shall comply with such air navigation and flight safety directions as may be required by Costa Rican aviation authorities, and with any written operating procedures developed for flight operations within its airspace under this Agreement.

## V. OPERATIONS SEAWARD OF THE TERRITORIAL SEA

1. Whenever United States law enforcement officials encounter a suspect vessel flying the Costa Rican flag or claiming to be registered in Costa Rica, located seaward of any State's territorial sea, this Agreement constitutes the authorization of the Government of

the Republic of Costa Rica for the boarding and search of the suspect vessel and the persons found on board by such officials.

2. If evidence of illicit traffic is found, United States law enforcement officials may detain the vessel and persons on board pending expeditious disposition instructions from the Government of the Republic of Costa Rica.

3. Except as expressly provided herein, this Agreement does not apply to or limit boardings of vessels seaward of any State's territorial sea, conducted by either Party in accordance with international law, whether based, *inter alia*, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, the consent of the vessel master, or an authorization from the flag State to take law enforcement action.

#### VI. JURISDICTION OVER DETAINED VESSELS

1. In all cases arising in Costa Rican waters, or concerning Costa Rican flag vessels seaward of any State's territorial sea, the Government of the Republic of Costa Rica shall have the primary right to exercise jurisdiction over a detained vessel, cargo and/or persons on board (including seizure, forfeiture, arrest, and prosecution), provided, however, that the Government of the Republic of Costa Rica may, subject to its Constitution and laws, waive its primary right to exercise jurisdiction and authorize the enforcement of United States law against the vessel, cargo and/or persons on board.

2. Instructions as to the exercise of jurisdiction pursuant to paragraph 1 shall be given without delay.

#### VII. IMPLEMENTATION

1. Operations to suppress illicit traffic pursuant to this Agreement shall be carried out only against suspect vessels and aircraft, including vessels and aircraft without nationality, and vessels assimilated to vessels without nationality.

2. A Party conducting a boarding and search pursuant to this Agreement shall promptly notify the other Party of the results thereof. The relevant Party shall timely report to the other Party, consistent with its laws, on the status of all investigations, prosecutions and judicial proceedings resulting from enforcement action taken pursuant to this Agreement where evidence of illicit traffic was found.

3. Each Party shall ensure that its law enforcement officials, when conducting boardings and searches and air interception activities pursuant to this Agreement, act in accordance with the applicable national laws and policies of that Party and with the applicable international law and accepted international practices.

4. Boardings and searches pursuant to this Agreement shall be carried out by law enforcement officials from law enforcement vessels or aircraft. The boarding and search teams may operate from such ships and aircraft of the Parties, and seaward of the territorial sea of any State, from such ships of other States as may be agreed upon by the Parties. The boarding and search team may carry standard law enforcement small arms.

5. While conducting air intercept activities pursuant to this Agreement, the Parties shall not endanger the lives of persons on board and the safety of civil aircraft.

6. All use of force pursuant to this Agreement shall be in strict accordance with the applicable laws and policies and shall in all cases be the minimum reasonably necessary under the circumstances, except that neither Party shall use force against civil aircraft in flight. Nothing in this Agreement shall impair the exercise of the inherent right of self-defense by law enforcement or other officials of either Party.

7. When carrying out operations pursuant to this Agreement, in accordance with the 1988 Convention, the Parties shall take due account of the possible advantage of conducting boarding and search operations in safer conditions at the closest Costa Rican port to minimize any prejudice to the legitimate commercial activities of the suspect vessel or aircraft, or its flag State or any other interested State; the need not to delay unduly the suspect aircraft or vessel; the need not to endanger the safety of life at sea without endangering the safety of the law enforcement officials or their vessels or aircraft; and the need not to endanger the security of the suspect vessel, aircraft or cargo.

8. To facilitate implementation of this Agreement, each Party shall ensure the other Party is fully informed of its respective applicable laws and policies, particularly those pertaining to the use of force. Each Party shall ensure that all of its law enforcement officials are knowledgeable concerning the applicable laws and policies of both Parties.
9. Assets seized in consequence of any operation undertaken in Costa Rican waters pursuant to this Agreement shall be disposed of in accordance with the laws of Costa Rica. Assets seized in consequence of any operation undertaken seaward of the territorial sea of Costa Rica pursuant to this Agreement shall be disposed of in accordance with the laws of the seizing Party. To the extent permitted by its laws and upon such terms as it deems appropriate, a Party may, in any case, transfer forfeited assets or proceeds of their sale to the other Party. Each transfer generally will reflect the contribution of the other Party to facilitating or effecting the forfeiture of such assets or proceeds.
10. The law enforcement authority of one Party (the first Party) may request, and the law enforcement authority of the other Party may authorize, law enforcement officials of the other Party to provide technical assistance to law enforcement officials of the first Party in their boarding and investigation of suspect vessels located in the territory or waters of the first Party.
11. Any injury to or loss of life of a law enforcement official of a Party shall normally be remedied in accordance with the laws of that Party. Any other claim submitted for damage, injury, death or loss resulting from an operation carried out under this Agreement shall be processed, considered, and if merited, resolved in favour of the claimant by the Party whose officials conducted the operation, in accordance with the domestic law of that Party, and in a manner consistent with international law. If any loss, injury or death is suffered as a result of any action taken by the law enforcement or other officials of one Party in contravention of this Agreement, or any improper or unreasonable action is taken by a Party pursuant thereto, the Parties shall, without prejudice to any other legal rights which may be available, consult at the request of either Party to resolve the matter and decide any questions relating to compensation.
12. Disputes arising from the interpretation or implementation of this Agreement shall be settled by mutual agreement of the Parties.
13. The Parties agree to consult, on at least an annual basis, to evaluate the implementation of this Agreement and to consider enhancing its effectiveness, including the preparation of amendments to this Agreement that take into account increased operational capacity of the Costa Rican law enforcement authorities and officials. In case a difficulty arises concerning the operation of this Agreement, either Party may request consultations with the other Party to resolve the matter.
14. Nothing in this Agreement is intended to alter the rights and privileges due any individual in any legal proceeding.
15. Nothing in this Agreement shall prejudice the position of either Party with regard to the international law of the sea.

#### VIII. ENTRY INTO FORCE AND DURATION

1. This Agreement shall enter into force upon exchange of notes indicating that the necessary internal procedures of each Party have been completed.
2. In the case of Costa Rica, as stipulated in article 121 (5) of the Constitution, the Legislative Assembly and the actual act of approval shall grant permission for the operations described in section IV of this Agreement for a period of 10 years from the time of ratification. One month prior to the expiration of the initial authorization period set forth in the foregoing paragraph, the Legislative Assembly shall indicate, using the procedures set forth in its regulations, whether an extension is granted for a similar period. The same procedure shall apply to subsequent extensions.
3. This Agreement shall be registered with the Secretary-General of the United Nations for purposes of publication in accordance with article 102 of the Charter of the United Nations.
4. This Agreement may be terminated at any time by either Party upon written notification to the other Party through the diplomatic channel. Such termination shall take effect one year from the date of notification.

5. This Agreement shall continue to apply after termination with respect to any administrative or judicial proceedings arising out of actions taken pursuant to this Agreement during the time that it was in force.

In witness whereof, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

Done at San José, Costa Rica, this first day of December of 1998, in duplicate in the English and Spanish languages, each text being equally authentic.

For the Government of the  
United States of America:

*[Signed]*

Thomas J. Dodd

Thomas J. Dodd

Ambassador

Embassy of the

United States of America

For the Government of the  
Republic of Costa Rica:

*[Signed]*

J. F. Lizano

Juan Rafael Lizano Saenz

Minister of Government,

Police and Public Security

Republic of Costa Rica

Signed in the presence of and witnessed by:

*[Signed]*

M. A. Rodriguez

Dr. Manuel Angel Rodriguez Echeverria

President of the Republic of Costa Rica

**Protocol to the Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica concerning Cooperation to Suppress Illicit Traffic**

(Entry into force: 19 November 1999)

The Government of the United States of America and the Government of the Republic of Costa Rica, hereinafter the Parties;

*Recalling* the Agreement between the Government of the United States of America and the Government of the Republic of Costa Rica concerning Cooperation to Suppress Illicit Traffic, signed at San Jose, 1 December 1998, hereinafter the Agreement;

*Noting* the Decision No. 04156-99 of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, given at 2 June 1999, at 4:33 p.m., in which the Chamber concluded that paragraph 2 of section VIII of the Agreement was unconstitutional;

*Desiring* to modify the Agreement so as to rectify it in accordance with the Chamber's decision;

Have agreed as follows:

**Article I**

The paragraph 2 of section VIII of the Agreement shall be amended to read in its entirety as follows:

*"Whenever it may be required by article 121, subparagraph 5, of the Political Constitution of Costa Rica, the Government of Costa Rica shall seek and obtain from the Legislative Assembly its approval for activities described in paragraphs 8 and 10 (b) of section IV of this Agreement."*

**Article II**

This Protocol shall enter into force at the same time and in the same manner as the Agreement.

In witness whereof the undersigned, being duly authorized by their respective Governments, have signed this Protocol.

Done at San José, this second day of July 1999, in duplicate in the English and Spanish languages, each text being equally authentic.

For the Government of the  
United States of America:

*[Signed]*  
Thomas J. Dodd  
Ambassador

For the Government of the  
Republic of Costa Rica:

*[Signed]*  
Roberto Rojas  
Minister for Foreign Affairs

Signed in the presence of and witnessed by:

*[Signed]*  
J. F. Lizano  
Minister of Government, Police and Public Security  
Republic of Costa Rica

### Related correspondence

EMBASSY OF THE  
UNITED STATES OF AMERICA

San Jose, 2 July 1999

Note No. 90

Excellency,

I have the honor to refer to the Agreement between our two Governments concerning Cooperation to Suppress Illicit Traffic, signed at San José on 1 December 1998 (the Agreement), and to the Decision No. 04156-99 of the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, issued on 2 June 1999, at 4:33 p.m., in which the Chamber found sections IV (3), IV (10), and VII (11) of the Agreement are not unconstitutional provided they are interpreted as set forth in the whereas clauses of the Chamber's Decision.

My Government understands:

1. In reference to paragraph 3 of section IV of the Agreement, as well as provided in paragraph 1 of section VI of the Agreement, the Government of the Republic of Costa Rica, in accordance with its Political Constitution and laws, has the primary right to exercise jurisdiction over Costa Rican as well as foreign persons detained on board a vessel that is located within Costa Rican territorial sea and is suspected of being engaged in illicit traffic.
2. The aircraft of the Government of the United States of America to which paragraph 10 of section IV of the Agreement refers are law enforcement aircraft as defined in paragraph 4 of section I of the Agreement; and
3. Paragraph 11 of section VII involves no surrender of Costa Rican criminal jurisdiction.

I would appreciate confirmation by diplomatic note that the Government of the Republic of Costa Rica shares the afore-stated understandings.

Accept, Excellency, the renewed assurances of my highest consideration.

*[Signed]*  
Thomas J. Dodd  
Ambassador

His Excellency  
Roberto Rojas  
Minister for Foreign Affairs  
of the Republic of Costa Rica

In reply, by Diplomatic note no. 821-99 ST-PE dated July 5, 1999, the Foreign Minister, after quoting the Embassy's note no. 90, wrote:

With respect to the above, I have the honour to inform you that the Government of the Republic of Costa Rica shares the understandings enumerated in the note number 90 written above, which express the decision number 04156-99 of the Constitutional Chamber of 2 June, 1999.

*[Signed]*  
Roberto Rojas  
Minister for Foreign Affairs

**C. Agreement of 20 February 1997 between the Government  
of the United States of America and the Government  
of the Republic of Colombia to Suppress Illicit Traffic by Sea**

PREAMBLE

The Government of the United States of America and the Government of the Republic of Colombia (hereinafter “the Parties”);

*Bearing in mind* the complex nature of the problem of illicit traffic by sea;

*Having regard* to the urgent need for international cooperation in suppressing illicit traffic by sea, which is recognized in the 1961 Single Convention on Narcotic Drugs and its 1972 Protocol, in the 1971 Convention on Psychotropic Substances, in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter “the 1988 Convention”), and in international maritime law;

*Recalling* that the 1988 Convention requires the Parties to consider entering into bilateral agreements to carry out, or to enhance the effectiveness of, its provisions;

*Desiring* to promote greater cooperation between the Parties, and thereby enhance their effectiveness, in combating illicit traffic by sea;

*Taking into account* the recommendations of the report of the meetings of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995, and endorsed by the Commission on Narcotic Drugs at its thirty-eighth session, Vienna, 14 to 23 March 1995;

*Recognizing* the respect for sovereignty and principles of international law accepted by the Parties;

*Reaffirming* their commitment to fight effectively against illicit traffic by sea through continued mutual cooperation in technical, economic, and training and equipment matters;

*Recognizing* also the need to strengthen bilateral procedures involving boarding and search of vessels which are suspected of engaging in illicit traffic by sea;

Have agreed as follows:

DEFINITIONS

For the purposes of this Agreement, it shall be understood that:

- (a) “Illicit traffic” has the same meaning as that term is defined in the 1988 Convention, and includes traffic by sea in narcotic drugs, psychotropic substances and precursor and essential chemicals;
- (b) “Law enforcement officials” are: for the Government of the Republic of Colombia, uniformed members of the Colombian Navy; and for the Government of the United States of America, uniformed members of the United States Coast Guard;
- (c) “Law enforcement vessels” are: warships and other ships of the Parties, clearly marked and identifiable as being on government service, including any boat and aircraft embarked on such ships, aboard which law enforcement officials are embarked.

OBJECT AND SCOPE OF THE AGREEMENT

1. The Parties shall cooperate in combating illicit traffic by sea to the fullest extent possible consistent with available resources and the priorities for the use of these resources, through the application of procedures for boarding and search of private or commercial vessels of the nationality of one of the Parties and which meet the conditions set forth in this Agreement.
2. As provided in article 2, paragraph 3 of the 1988 Convention, a Party shall not undertake in the territory of the other Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of the other Party by its domestic law.

## OPERATIONS IN OR OVER NATIONAL WATERS

Operations to suppress illicit traffic in and over waters within which each Party exercises sovereignty in accordance with its domestic law are carried out by the authorities of that Party.

### DETECTION AND MONITORING

1. Each Party recognizes the necessity that the detection and tracking of suspect vessels and aircraft located in its territorial waters and airspace be conducted and maintained by its authorities so that suspect vessels and aircraft can be brought by them under their control.
2. To this end, the Parties undertake to develop procedures and identify and employ technical equipment needed to improve timely communication between their operations centres and the sharing of tactical information, and to identify and employ other assets, so that detection and tracking of suspect vessels and aircraft, located in the territorial waters and airspace of each Party, is conducted and maintained by their authorities and that suspect vessels and aircraft can be brought by them under their control.
3. Each Party recognizes the necessity that the detection and tracking of suspect vessels and aircraft entering or exiting its territorial sea and airspace be conducted and maintained by its authorities so that suspect vessels and aircraft can be brought under their control.
4. To this end, the Parties undertake to develop procedures and identify and employ technical equipment needed to improve timely communication between their operations centers and the sharing of tactical information, and to identify and employ other assets, so that detection and tracking of suspect vessels and aircraft, entering or exiting the territorial sea and airspace of each Party, is conducted and maintained by their authorities and that suspect vessels and aircraft can be brought under their control.

### SCOPE OF APPLICATION

This Agreement regulates the boarding and search of private or commercial vessels of the nationality or registry of one of the Parties, which are found seaward of the territorial sea of any State, and which either of the Parties has reasonable grounds to suspect are involved in illicit traffic.

### IMPLEMENTATION

1. Whenever law enforcement officials of one Party find a vessel meeting the conditions under paragraph 6 claiming registration in the other Party, the competent authority of the former Party may request the competent authority of the other Party to verify the vessel's registry, and in case it is confirmed, its authorization to board and search the vessel.
2. The reply to the request for boarding and search shall be provided by the requested Party to the requesting Party at the earliest possible opportunity and, in each particular case, in conformity with the procedures referred to in paragraph 14. In replying, the requested Party may take into account whether it has a unit available to carry out the boarding and search in a timely and effective manner. If the requested Party has not responded to the request for authorization to board and search within three (3) hours of receipt of the request, it shall be understood that the authorization has been granted. In no case shall it be understood that the authorization refers to the conduct of boardings and searches of vessels of a flag other than of the requested State. If the vessel is not of the flag of the requested Party, the requesting Party may proceed in accordance with international law.
3. For application of the above provisions, the competent authority for Colombia shall be the Ministry of National Defense, through the Colombian Navy Operations Centre, and, for the United States of America, the appropriate United States Coast Guard Operations Center.

4. The boarding and search authorized by the flag State shall be conducted by law enforcement officials embarked in law enforcement vessels. Law enforcement officials of a Party may embark in and conduct boardings and searches from warships, or other ships clearly marked and identifiable as being on government service (including embarked boats and aircraft) of any other State to which the Parties mutually agree, provided that, when they conduct any actions permitted by this Agreement, such ships, boats and aircraft operate under the responsibility, authority and control of law enforcement officials of that Party.
5. Each Party shall ensure that its law enforcement officials, when conducting boardings and searches pursuant to this Agreement, act in accordance with international law, including this Agreement, with its domestic law, and with internationally accepted practices. When conducting a boarding and search, law enforcement officials shall take due account of the need not to endanger the safety of life at sea, the security of the suspect vessel and its cargo, or to prejudice the commercial and legal interests of the flag State or any other interested State. Such officials shall also bear in mind the need to observe norms of courtesy, respect, and consideration for the persons on board the suspect vessel.
6. When conducting boardings and searches in accordance with this Agreement, law enforcement officials shall avoid the use of force in any way, including the use of firearms, except in the exercise of the right of self-defence, and also in the following cases:
  - (a) To compel the suspect vessel to stop when the vessel has ignored the respective Party's standard warnings to stop;
  - (b) To maintain order on board the suspect vessel during the boarding and search or while the vessel is preventively held, when the crew or persons on board resist, impede the boarding and search or try to destroy evidence of illicit traffic or the vessel, or when the vessel attempts to flee during the boarding and search or while the vessel is preventively held.
7. Law enforcement officials of the Party authorized to conduct the boarding and search may carry conventional small arms and will only discharge them when it is not possible to apply less extreme measures. In all cases where the discharge of firearms is required, it will be necessary to have the previous authorization of the flag State except when indirect warning shots are required as a signal for the vessel to stop, or in the exercise of the right of self-defence.
8. Whenever force is used, including the use of firearms, at all times it shall be the minimum reasonably necessary and proportional under the circumstances.
9. Once the operation has been concluded, regardless of the results, the Party which conducted the boarding and search shall immediately submit a detailed report to the other Party of what happened in accordance with the procedures referred to in paragraph 14. At the request of a Party, the other Party shall timely report, consistent with its laws, on the status of all investigations, prosecutions and judicial proceedings resulting from boardings and searches conducted in accordance with this Agreement where evidence of illicit traffic was found. The Parties shall provide each other the assistance provided for in article 7 of the 1988 Convention relating to investigations, prosecutions, and judicial proceedings which result from boardings and searches conducted in accordance with this Agreement where evidence of illicit traffic is found.
10. The authorities designated by each Party shall establish the necessary operational procedures for effective implementation of this Agreement. These procedures may be revised by the designated authorities. The procedures shall be consistent with the terms of this Agreement and may not modify or expand them.
11. Each Party shall, to the extent possible, inform the owners and masters of its private and commercial vessels of the circumstances under which officials may come aboard their vessels pursuant to this Agreement or otherwise in accordance with international law.

#### LAW ENFORCEMENT

1. In those cases where evidence of illicit traffic is found in Colombian flag vessels located outside the internal waters, territorial sea and exclusive economic zone of

Colombia established in accordance with Colombian law, outside the maritime boundaries of Colombia established in treaties signed by Colombia, and seaward of the territorial sea of any other State, the criminal law of the flag State shall apply, except when the domestic law of Colombia provides that the other Party has jurisdiction because it previously initiated criminal action for the same offense. This paragraph shall be implemented in accordance with the procedures referred to in paragraph 14 of this Agreement.

2. In those cases where evidence of illicit traffic is found in United States territory, waters, or airspace, or concerning United States flag vessels seaward of any nation's territorial sea, the Government of the United States shall have the right to exercise jurisdiction over the preventively held vessel, the persons on board and cargo, provided however, that the Government of the United States may, subject to its constitution and laws, authorize the enforcement of Colombian law against the vessel, persons on board and cargo.

3. The Parties, to the extent permitted by their laws and regulations, and taking into consideration agreements in force between them, may share those forfeited assets which result from boardings and searches conducted in accordance with this Agreement where evidence of illicit traffic is found, or the proceeds of their sale.

#### FINAL PROVISIONS

1. Any claim submitted for damage, injury, or loss resulting from an operation carried out under this Agreement shall be processed, considered, and, if merited, resolved in favor of the claimant by the Party whose authorities conducted the operation, in accordance with the domestic law of that Party, and in a manner consistent with international law. Neither Party thereby waives any rights it may have under international law to raise a claim with the other through diplomatic channels.

2. The requested State shall always decide independently on any request for the authorization to board and search vessels of its flag or registry.

3. Situations not provided for by this Agreement will be determined in accordance with international law.

4. Nothing in this Agreement is intended to alter the rights and privileges in any legal proceeding under United States law, and the rights and guarantees in any legal proceeding under Colombian law, due any individual.

5. Nothing in this Agreement is intended to prejudice the position of either Party with regard to the international law of the sea.

6. For the purpose of verifying compliance with this Agreement, the Parties shall meet once a year, and either Party may request consultations when it deems necessary.

7. Disputes arising from the interpretation or implementation of this Agreement shall be settled by mutual agreement of the Parties.

8. This Agreement shall enter into force upon signature by both Parties and be of indefinite duration. However, this Agreement may be terminated by either Party upon written notification through diplomatic channels, such termination to take effect six (6) months from the date of notification. The termination of this Agreement shall not affect the application of the relevant provisions of this Agreement with respect to any administrative proceedings, investigations, prosecutions or judicial proceedings arising out of any boardings and searches conducted pursuant to this Agreement prior to such termination.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

Done at the city of Santafé de Bogotá, in duplicate, on the twentieth day of February 1997, in the English and Spanish languages, each text being equally authentic.

For the Government of the  
United States of America

For the Government of  
the Republic of Colombia

#### **D. Treaty between the Kingdom of Spain and the Portuguese Republic for the Suppression of Illicit Drug Traffic by Sea**

The Kingdom of Spain and the Portuguese Republic,

*Motivated* by a common determination to combat illicit trafficking in narcotic drugs and psychotropic substances,

*Conscious* of the fact that one of the routes used for the distribution of such substances is illicit drug traffic by sea,

*Desiring* to suppress such traffic, while respecting the principle of freedom of navigation,

*Bearing in mind* the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988 (hereinafter referred to as “the Convention”), Agreement No. 156 of the Council of Europe on Illicit Traffic by Sea, Implementing Article 17 of the Convention, done at Strasbourg on 31 January 1995 (hereinafter referred to as “the Agreement”) and the United Nations Convention on the Law of the Sea, of 10 December 1982,

*Have decided* to conclude a bilateral Treaty in conformity with article 17, paragraph 9, of the Convention, and to this end

Have agreed as follows:

##### **Article 1. Definitions**

For the purposes of this Treaty:

(a) “Intervening State” means a State Party which has requested or proposes to request authorization to take measures foreseen in this Treaty in relation to a vessel flying the flag or displaying the marks of registry of another State Party;

(b) “Preferential jurisdiction” means that when two States Parties have concurrent jurisdiction over a relevant offence, the flag State shall have the right to exercise its jurisdiction to the exclusion of the exercise of the other State Party’s jurisdiction;

(c) “Relevant offence” means any of the offences described in article 3, paragraph 1, of the Convention;

(d) “Vessel” means a ship or any other type of seagoing craft, including hovercrafts and submersible crafts.

##### **Article 2. Purpose**

The Contracting Parties shall cooperate to the fullest extent possible in suppressing illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea.

##### **Article 3. Jurisdiction**

1. Each Party shall exercise exclusive jurisdiction over acts committed in its territorial waters, free trade zones or free ports, including any acts initiated or intended to be completed in the other State.

2. In the case of acts committed outside the territorial waters of one of the two States, the flag State of the vessel on board which or by means of which the said acts were committed shall have preferential jurisdiction.

##### **Article 4. Rights of the Parties**

1. Where there are reasonable grounds to suspect the commission of any of the offences referred to in article 1, each Party shall recognize the other Party’s right of representation, whereby the latter’s warships, military aircraft and other ships and aircraft clearly marked and identifiable as being on government service or duly authorized to that effect,

may lawfully intervene in regard to vessels of the other State which are operating outside its territorial waters.

2. In exercising the right of representation referred to in paragraph 1, government ships or aircraft may pursue, stop and board a vessel, examine documents, question persons who are on board the vessel and search the vessel, and, if the suspicions are confirmed, proceed to seize the drug, arrest the persons presumed responsible and lead the vessel to the nearest port or the one most suitable for it to be laid up in case the return of the vessel proves necessary.
3. Nothing in this Treaty shall affect the immunity of warships and other government vessels operated for noncommercial purposes.

#### ***Article 5. Intervention***

1. Where there are reasonable grounds to suspect that a vessel is engaged in illicit traffic, this fact shall be notified to the flag State, which shall respond as promptly as possible, in principle within four hours of receipt of the request, by transmitting all available information regarding the said vessel.
2. If these suspicions on the part of the intervening State are confirmed by this information, that State may intervene on board the vessel in order to take the measures foreseen in article 4.
3. Where intervention is not immediate, the intention to commence intervention shall be notified to the competent authority of the flag State, which shall respond by authorizing or denying that request, as far as possible within four hours of its receipt.
4. If circumstances prevent such prior authorization being obtained in a timely manner, the measures foreseen in article 4 may be taken, the master of the government ship or captain of the government aircraft being required to notify the competent authority of the flag State of his action without delay.

#### ***Article 6. Operational safeguards***

1. All acts performed in application of this Treaty shall take due account of the need not to endanger the safety of persons or the security of the vessel and cargo, and not to prejudice the commercial interests of third parties.
2. The vessel shall be laid up no longer than strictly necessary and shall be returned to the flag State as soon as its presence ceases to be required.
3. Any persons arrested shall be guaranteed the same rights as those enjoyed by national citizens, in particular the right to an interpreter and to legal counsel.
4. The conditions of custody shall be subject to judicial supervision and to the time limits established by the laws of the intervening State.
5. The master of a vessel which has been detained shall be entitled to communicate with his authorities from the same vessel that is the subject of the intervention and immediately after reaching port, and shall also be entitled to communicate with his Consul and receive a visit from the latter.
6. If the intervention was performed without it being confirmed that there were sufficient grounds for its performance, the intervening State may be liable for any damages suffered, unless it intervened at the request of the flag State.

#### ***Article 7. Waiver of jurisdiction***

1. Each State shall have preferential jurisdiction over its vessels, but may waive such jurisdiction in favour of the intervening State.
2. After taking the first measures, the intervening State shall transmit to the flag State a summary of the evidence collected in regard to all relevant offences committed, providing advance notification, if possible, by facsimile; the flag State shall be required to respond within fourteen days as to whether it intends to exercise its jurisdiction or to waive it, and shall be entitled to request additional information if it deems it necessary.

3. If the period specified in the previous paragraph elapses without any decision having been communicated, it shall be presumed that the flag State waives the exercise of its jurisdiction.
4. If the flag State decides to exercise its preferential jurisdiction, the vessel, cargo and evidence shall be returned to that State without delay and the vessel escorted to the boundary of the territorial waters of the intervening State.
5. The surrender of the arrested persons shall not require any formal extradition procedure, a personalized judicial warrant of arrest or other equivalent order in conformity with the fundamental principles of the legal system of each Party being sufficient. The intervening State shall certify the period of detention undergone.
6. Instead of surrender, the flag State may request the immediate release of the arrested persons or of the vessel, in which event the intervening State shall order their release forthwith.
7. The period of custody undergone in one of the States Parties shall be deducted from the penalty imposed by the State which exercised its jurisdiction.

#### ***Article 8. Competent authorities***

1. Without prejudice to the general areas of competence of the Ministries of Foreign Affairs of the two Parties, communications provided for under this Treaty should be channeled, as a general rule, through the respective Ministries of Justice.
2. In cases of particular urgency, the competent authorities of the intervening State may address themselves directly to the Ministry of Justice of the flag State or to the competent authorities designated by that Ministry.
3. The Parties shall designate, through an Exchange of Notes, liaison officers and competent authorities for the purposes of this Treaty.

#### ***Article 9. Subsidiary application of treaty law***

Matters not expressly covered by this Treaty shall be subject to the subsidiary application of the principles set forth in the treaty instruments in effect between the Parties and to the principles set forth in the Agreement.

#### ***Article 10. Settlement of disputes***

1. The Parties agree to settle their disputes as to the interpretation or application of this Treaty, including those relating to compensation for damages, through direct negotiation between their respective Ministries of Justice and of Foreign Affairs.
2. Where it is not possible to reach agreement by the means referred to in the previous paragraph, specific disputed matters of a legal nature shall be submitted to the European Committee on Crime Problems of the Council of Europe and the negotiations shall be resumed in the light of the opinion of that entity.
3. The Parties agree to exclude in their reciprocal relations, within the framework of this Treaty, the competence of the International Court of Justice.

#### ***Article 11. Final provisions***

1. This Treaty is subject to ratification.
2. This Treaty shall enter into force thirty days following the date on which each of the Parties has communicated to the other that the necessary internal procedures for its entry into force have been completed.
3. This Treaty is concluded for an indefinite period and may be denounced at any time by either Party upon written notification through the diplomatic channel, such termination to take effect one hundred and eighty days from the date of receipt of the denunciation.

DONE at \_\_\_\_\_, in duplicate, this \_\_\_\_ day of \_\_\_\_\_, 1998 in the Spanish and Portuguese languages, both texts being equally authentic.

FOR THE KINGDOM OF SPAIN

FOR THE PORTUGUESE REPUBLIC

**E. Treaty between the Kingdom of Spain and the Italian Republic  
to Combat Illicit Drug Trafficking at Sea**

[Original: Spanish]

The Kingdom of Spain and the Italian Republic,

*Concerned* by the growing illicit international traffic in narcotic drugs and psychotropic substances and its impact on rising crime rates in their countries,

*Aware* that the sea is one of the channels of distribution of these substances,

*Desiring* to cooperate by means of a bilateral treaty with the worldwide objective of eradicating this type of traffic, thus complementing the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Geneva Convention on the High Seas of 29 April 1958,

*Have decided* to conclude a treaty to combat illicit trafficking in narcotic drugs and psychotropic substances.

And to this end have agreed as follows:

**Article 1. Definitions**

1. Solely for the purposes of this Treaty:

(a) "Ship" means any seagoing craft or surface vessel that contains or transports goods and/or persons;

(b) "Warship" means any duly authorized ship conforming to the definition in article 8, paragraph 2, of the Geneva Convention on the High Seas of 29 April 1958, the actions of which must be coordinated by the competent national authorities;

2. Solely for the purposes covered by articles 4, 5 and 6, the expressions "flag displayed by the ship" and "under whose flag the ship was sailing" signify not only a ship sailing under the flag of its own State, but also a ship flying no flag but belonging to a natural person or legal entity in one of the Parties.

**Article 2. Offences**

1. Each Contracting Party shall treat as an offence, and punish accordingly, all acts committed on board ships or through the use of any other boat or surface vessel which are not excluded from the scope of this Treaty under the terms of article 3, connected with the possession of narcotic drugs and psychotropic substances, as defined by the international treaties by which the Parties are bound, for the purposes of distribution, transport, storage, sale, manufacture or processing.

2. Attempting to commit an offence, failing to commit an offence for reasons beyond the control of the perpetrator, participation and complicity are likewise punishable.

**Article 3. Ships excluded from the scope of the Treaty**

This Treaty shall apply neither to warships nor to non-commercial public service vessels used by either of the Parties.

**Article 4. Jurisdiction**

1. Each Party shall exercise sole jurisdiction over acts committed in its territorial waters, free zones or free ports, even if the said acts were initiated or terminated in the other State.

2. Should there be a discrepancy with regard to the extent of the territorial waters of each Contracting Party, solely for the purposes of this Treaty the limit of the territorial waters of each Party shall correspond to the maximum limit stipulated by the law of one of the Parties.

3. In the case of acts covered by article 2 committed outside the territorial waters of one of the States, preferential jurisdiction shall be exercised by the State under whose flag the ship was sailing, on board which or by means of which the offence was committed.

#### **Article 5. Right of intervention**

1. Should there be reasonable grounds to suspect that offences covered by article 2 are being committed, each Party recognizes the other's right to intervene as its agent in waters outside its own territorial limits, in respect of ships displaying the flag of the other State. On ships sailing under national flags, police powers granted by the respective legal systems remain valid.

2. In exercising this authority, warships or military aircraft, or any other duly authorized ship or aircraft visibly displaying exterior markings and identifiable as ships or aircraft in the service of the State of one of the Parties, may pursue, arrest and board the ship, check documents, question persons on board, and if reasonable suspicion remains, search the ship, seize drugs and arrest the persons involved and, where appropriate, escort the ship to the nearest suitable port, informing—if possible before, otherwise immediately on arrival—the State under whose flag the ship is sailing.

3. This authority shall be exercised in accordance with the general rules of international law.

4. When action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea or the security of the ship and its cargo, or to damage the commercial and legal interests of the flag State in question, or of any other interested State.

5. In any event, if a Party intervenes without adequate grounds for suspicion, it may be held liable for any loss or damage incurred, unless the intervention was at the request of the State under whose flag the ship was sailing.

6. In the event of the legal action over liability for any loss or damage arising from intervention as described under points 1 and 2 of paragraph 4, or over the extent of compensation, each Party recognizes the jurisdiction of the International Chamber of Commerce in London.

#### **Article 6. Renunciation of jurisdiction**

1. If a Party has carried out any of the measures provided for in article 5, it may request the State under whose flag the ship was sailing to renounce its preferential jurisdiction.

2. The State under whose flag the ship was sailing shall examine the request in good faith and, in arriving at its decision, shall take into consideration, among other criteria, the place of seizure, the conditions under which evidence was obtained, any correlation between proceedings, the nationality of those involved and their place of residence.

3. If the State under whose flag the ship was sailing renounces its preferential jurisdiction, it shall provide the other State with the information and documents in its possession.

4. If it decides to exercise its jurisdiction, the other State shall transfer to it any documents obtained, items to be used in evidence, the persons arrested, and any other element relevant to the case.

5. The decision to exercise jurisdiction must be notified to the requesting Party within 60 days of the date of receipt of the request.

6. The necessary urgent legal measures which custom requires be carried out and the request to renounce the exercise of preferential jurisdiction shall be governed by the legal system of the intervening State.

7. If the deadline provided for in the present article expires without any decision having been notified, jurisdiction will be deemed to have been renounced.

8. In addition to the usual channels of communication, the Parties shall specify which of their central authorities are empowered to forward requests for exercise of jurisdiction.

### **Article 7. Judicial assistance**

1. Judicial assistance shall be provided in accordance with the relevant international treaties by which the Parties are bound.
2. Periods spent in remand on the territory of one of the States Parties shall be deducted from the sentence passed by the State exercising jurisdiction.

### **Article 8. Repeated offences**

1. Verdicts reached by the courts of one of the parties against its own nationals for offences covered by this Treaty, and for any other offence concerning traffic in narcotic drugs or psychotropic substances and those handed down against persons who are in any case subject to the jurisdiction of either Party, shall be taken into consideration by the courts of the other Party when dealing with repeated offences.
2. On request, the Parties shall communicate to each other in good time any verdicts as referred to in the previous paragraph handed down on nationals of the other Party or on any other person convicted of offences in connection with narcotic drugs or psychotropic substances.

### **Article 9. Final provisions**

1. This Treaty shall be ratified and the instruments of ratification shall be exchanged as soon as possible at Madrid.
2. This Treaty shall come into force on the thirtieth day following the exchange of instruments of ratification and shall remain in force for an unlimited period, unless one of the Parties notifies the other Party through the diplomatic channels that it wishes to terminate the Treaty, in which case termination shall take effect six months after the date of receipt of notification.
3. When exchanging instruments of ratification, the Parties shall specify their central authorities as provided for in article 6, paragraph 4.

IN WITNESS WHEREOF, the undersigned, duly authorized by their Governments, have signed this Treaty.

Done at Madrid on 23 March 1990, in duplicate, in Spanish and Italian, both texts being equally authentic.

This Treaty shall enter into force on 7 May 1994, thirty days following the exchange of instruments of ratification, pursuant to article 9, paragraph 2.

The exchange of instruments took place at Madrid on 8 April 1994.

### **F. Agreement concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area**

The Parties to this Agreement,

*Bearing in mind* the complex nature of the problem of illicit maritime drug traffic in the Caribbean area;

*Desiring* to increase their cooperation to the fullest extent in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea in accordance with international law of the sea, respecting freedom of navigation and overflight;

*Recognizing* that the Parties to this Agreement are also Parties to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter "the 1988 Convention");

*Having regard* to the urgent need for international cooperation in suppressing illicit traffic by sea, which is recognized in the 1988 Convention;

*Recalling* that the 1988 Convention requires Parties to consider entering into bilateral or regional agreements or arrangements to carry out, or enhance the effectiveness of the provisions of article 17 of that Convention;

*Recalling further* that some of the Parties have consented to be bound by the 1996 Treaty Establishing the Regional Security System, the 1989 Memorandum of Understanding Regarding Mutual Assistance and Cooperation for the Prevention and Repression of Customs Offences in the Caribbean Zone, which established the Caribbean Customs Law Enforcement Council, and the 1982 United Nations Convention on the Law of the Sea;

*Recognizing* that the nature of illicit traffic urgently requires the Parties to foster regional and subregional cooperation;

*Desiring* to promote greater cooperation among the Parties, and thereby enhance their effectiveness in combating illicit traffic by and over the sea in the Caribbean area, in a manner consistent with the principles of sovereign equality and territorial integrity of States including non-intervention in the domestic affairs of other States;

*Recalling* that the Regional Meeting on Drug Control Coordination and Cooperation in the Caribbean held in Barbados in 1996 recommended the elaboration of a Regional Maritime Agreement;

Have agreed as follows:

## NATURE AND SCOPE OF AGREEMENT

### **Article 1. Definitions**

In this Agreement:

(a) “illicit traffic” has the same meaning as that term is defined in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter “the 1988 Convention”).

(b) “competent national authority” means the authority or authorities designated pursuant to paragraph 7 of article 17 of the 1988 Convention or what has been otherwise notified to the Depositary.

(c) “law enforcement authority” means the competent law enforcement entity or entities identified to the Depositary by each Party which has responsibility for carrying out the maritime or air law enforcement functions of that Party pursuant to this Agreement.

(d) “law enforcement officials” means the uniformed and other clearly identifiable members of the law enforcement authority of each Party.

(e) “law enforcement vessels” means vessels clearly marked and identifiable as being on government service, used for law enforcement purposes and duly authorized to that effect, including any boat and aircraft embarked on such vessels, aboard which law enforcement officials are embarked.

(f) “law enforcement aircraft” means aircraft clearly marked and identifiable as being on government service, used for law enforcement purposes and duly authorized to that effect, aboard which law enforcement officials are embarked.

(g) “aircraft in support of law enforcement operations” means aircraft clearly marked and identifiable as being on government service of one Party, providing assistance to a law enforcement aircraft or vessel of that Party, in a law enforcement operation.

(h) “waters of a Party” means the territorial sea and the archipelagic waters of that Party.

(i) “air space of a Party” means the air space over the territory (continental and insular) and waters of that Party.

(j) “Caribbean area” means the Gulf of Mexico, the Caribbean Sea and the Atlantic Ocean west of longitude 45 degrees West, north of latitude 0 degrees (the Equator) and south of latitude 30 degrees North, with the exception of the territorial sea of States not Party to this Agreement.

(k) “suspect aircraft” means any aircraft in respect of which there are reasonable grounds to suspect that it is engaged in illicit traffic.

(l) “suspect vessel” means any vessel in respect of which there are reasonable grounds to suspect that it is engaged in illicit traffic.

### **Article 2. Objectives**

The Parties shall cooperate to the fullest extent possible in combating illicit maritime and air traffic in and over the waters of the Caribbean area, consistent with available law enforcement resources of the Parties and related priorities, in conformity with the international law of the sea and applicable agreements, with a view to ensuring that suspect vessels and suspect aircraft are detected, identified, continuously monitored, and where evidence of involvement in illicit traffic is found, suspect vessels are detained for appropriate law enforcement action by the responsible law enforcement authorities.

### **Article 3. Regional and subregional cooperation**

1. The Parties shall take the steps necessary within available resources to meet the objectives of this Agreement, including, on a cost-effective basis, the enhancement of regional and subregional institutional capabilities and the coordination and implementation of cooperation.
2. In order to meet the objectives of this Agreement, each Party is encouraged to cooperate closely with the other Parties, consistent with the relevant provisions of the 1988 Convention.
3. The Parties shall cooperate, directly or through competent international, regional or subregional organizations, to assist and support States party to this Agreement in need of such assistance and support, to the extent possible, through programmes of technical cooperation on suppression of illicit traffic. The Parties may undertake, directly or through competent international, regional or subregional organizations, to provide assistance to such States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.
4. In order to enable Parties to better fulfil their obligations under this Agreement, they are encouraged to request and provide operational technical assistance from and to each other.

### **Article 4. Facilitation of cooperation**

1. Each Party is encouraged to accelerate the authorizations for law enforcement vessels and law enforcement aircraft, aircraft in support of law enforcement operations, and law enforcement officials of the other Parties to enter its waters, air space, ports and airports in order to carry out the objectives of this Agreement, in accordance with its provisions.
2. The Parties shall facilitate effective coordination between their law enforcement authorities and promote the exchange of law enforcement officials and other experts, including, where appropriate, the posting of liaison officers.
3. The Parties shall facilitate effective coordination among their civil aviation and law enforcement authorities to enable rapid verification of aircraft registrations and flight plans.
4. The Parties shall assist one another to plan and implement training of law enforcement officials in the conduct of maritime law enforcement operations covered in this Agreement, including combined operations and boarding, searching and detention of vessels.

## MARITIME AND AIR LAW ENFORCEMENT OPERATIONS

### **Article 5. Suspect vessels and suspect aircraft**

Law enforcement operations to suppress illicit traffic pursuant to this Agreement shall be carried out only against suspect vessels and suspect aircraft, including those aircraft and vessels without nationality, and those assimilated to ships without nationality.

### **Article 6. Verification of nationality**

1. For the purpose of this Agreement, a vessel or aircraft has the nationality of the State whose flag it is entitled to fly or in which the vessel or aircraft is registered, in accordance with domestic laws and regulations.
2. Requests for verification of nationality of vessels claiming registration in, or entitlement to fly the flag of one of the Parties, shall be processed through the competent national authority of the flag State Party.
3. Each request should be conveyed orally and later confirmed by written communication, and shall contain, if possible, the name of the vessel, registration number, nationality, homeport, grounds for suspicion, and any other identifying information.
4. Requests for verification of nationality shall be answered expeditiously and all efforts shall be made to provide such answer as soon as possible, but in any event within four (4) hours.
5. If the claimed flag State Party refutes the claim of nationality made by the suspect vessel, then the Party that requested verification may assimilate the suspect vessel to a ship without nationality in accordance with international law.

### **Article 7. National measures with regard to suspect vessels and suspect aircraft**

1. Each Party undertakes to establish the capability at any time to:
  - (a) respond to requests for verification of nationality;
  - (b) authorize the boarding and search of suspect vessels;
  - (c) provide expeditious disposition instructions for vessels detained on its behalf;
  - (d) authorize the entry into its waters and air space of law enforcement vessels and law enforcement aircraft and aircraft in support of law enforcement operations of the other Parties.
2. Each Party shall notify the Depository of the authority or authorities defined in article 1 to whom requests should be directed under paragraph 1 of this article.

### **Article 8. Authority of law enforcement officials**

1. When law enforcement officials are within the waters or territory, or on board a law enforcement vessel or law enforcement aircraft, of another Party, they shall respect the laws and naval and air customs and traditions of the other Party.
2. In order to carry out the objectives of this Agreement, each Party authorizes its designated law enforcement and aviation officials, or its competent national authority if notified to the Depository, to permit the entry of law enforcement vessels, law enforcement aircraft and aircraft in support of law enforcement operations, under this Agreement into its waters and air space.

### **Article 9. Designation and authority of embarked law enforcement officials**

1. Each Party (the designating Party) shall designate qualified law enforcement officials to act as embarked law enforcement officials on vessels of another Party.
2. Each Party may authorize the designated law enforcement officials of another Party to embark on its law enforcement vessel. That authorization may be subject to conditions.
3. Subject to the domestic laws and regulations of the designating Party, when duly authorized, these law enforcement officials may:
  - (a) embark on law enforcement vessels of any of the Parties;
  - (b) enforce the laws of the designating Party to suppress illicit traffic in the waters of the designating Party, or seaward of its territorial sea in the exercise of the right of hot pursuit or otherwise in accordance with international law;

(c) authorize the entry of the law enforcement vessels on which they are embarked into and navigation within the waters of the designating Party;

(d) authorize the law enforcement vessels on which they are embarked to conduct counter-drug patrols in the waters of the designating Party;

(e) authorize law enforcement officials of the vessel on which the law enforcement officials of the designating Party are embarked to assist in the enforcement of the laws of the designating Party to suppress illicit traffic; and

(f) advise and assist law enforcement officials of other Parties in the conduct of boardings of vessels to enforce the laws of those Parties to suppress illicit traffic.

4. When law enforcement officials are embarked on another Party's law enforcement vessel, and the enforcement action being carried out is pursuant to the authority of the law enforcement officials, any search or seizure of property, any detention of a person, and any use of force pursuant to this Agreement, whether or not involving weapons, shall, without prejudice to the general principles of article 11, be carried out by these law enforcement officials. However:

(a) crew members of the other Party's vessel may assist in any such action if expressly requested to do so by the law enforcement officials and only to the extent and in the manner requested. Such a request may only be made, agreed to, and acted upon if the action is consistent with the applicable laws and procedures of both Parties; and

(b) such crew members may use force in accordance with article 22 and their domestic laws and regulations.

5. Each Party shall notify the Depositary of the authority responsible for the designation of embarked law enforcement officials.

6. Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this article.

#### ***Article 10. Boarding and search***

1. Boarding and searches pursuant to this Agreement shall be carried out only by teams of authorized law enforcement officials from law enforcement vessels.

2. Such boarding and search teams may operate from law enforcement vessels and law enforcement aircraft of any of the Parties, and from law enforcement vessels and law enforcement aircraft of other States as agreed among the Parties.

3. Such boarding and search teams may carry arms.

4. A law enforcement vessel of a Party shall clearly indicate when it is operating under the authority of another Party.

### LAW ENFORCEMENT OPERATIONS IN AND OVER TERRITORIAL WATERS

#### ***Article 11. General principles***

1. Law enforcement operations to suppress illicit traffic in and over the waters of a Party are subject to the authority of that Party.

2. No Party shall conduct law enforcement operations to suppress illicit traffic in the waters or airspace of any other Party without the authorization of that other Party, granted pursuant to this Agreement or according to its domestic legal system. A request for such operations shall be decided upon expeditiously. The authorization may be subject to directions and conditions that shall be respected by the Party conducting the operations.

3. Law enforcement operations to suppress illicit traffic in and over the waters of a Party shall be carried out by, or under the direction of, the law enforcement authorities of that Party.

4. Nothing in this Agreement shall be construed as authorizing a law enforcement vessel, or law enforcement aircraft of one Party, independently to patrol within the waters or airspace of any other Party.

**Article 12. Assistance by vessels for suppression of illicit traffic**

1. Subject to paragraph 2 of this article, a law enforcement vessel of a Party may follow a suspect vessel into the waters of another Party and take actions to prevent the escape of the vessel, board the vessel and secure the vessel and persons on board awaiting an expeditious response from the other Party if either:

(a) the Party has received authorization from the authority or authorities of the other Party defined in article 1 and notified pursuant to article 7; or

(b) on notice to the other Party, when no embarked law enforcement official or law enforcement vessel of the other Party is immediately available to investigate. Such notice shall be provided prior to entry into the waters of the other Party, if operationally feasible, or failing this as soon as possible.

2. Parties shall elect either the procedure set forth in paragraph 1 (a) or 1 (b), and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 1 (a).

3. If evidence of illicit traffic is found, the authorizing Party shall be promptly informed of the results of the search. The suspect vessel, cargo and persons on board shall be detained and taken to a designated port within the waters of the authorizing Party unless otherwise directed by that Party.

4. Subject to paragraph 5, a law enforcement vessel of a Party may follow a suspect aircraft into another Party's waters in order to maintain contact with the suspect aircraft if either:

(a) the Party has received authorization from the authority or authorities of the other Party defined in article 1 and notified pursuant to article 7; or

(b) on notice to the other Party, when no embarked law enforcement official or law enforcement vessel or law enforcement aircraft of the other Party is immediately available to maintain contact. Such notice shall be provided prior to entry into the waters of the other Party, if operationally feasible, or failing this as soon as possible.

5. Parties shall elect either the procedure set forth in paragraph 4 (a) or 4 (b), and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 4 (a).

**Article 13. Assistance by aircraft for suppression of illicit traffic**

1. A Party may request aircraft support from other Parties for assistance, including monitoring and surveillance, in suppressing illicit traffic.

2. Any assistance under this article within the air space of the requesting Party shall be conducted in accordance with the laws of the requesting Party and only in the specified areas and to the extent requested and authorized.

3. Prior to the commencement of any assistance, the Party desiring to assist in such activities (the requested Party) may be required to provide reasonable notice, communication frequencies and other information relative to flight safety to the appropriate civil aviation authorities of the requesting Party.

4. The requested Parties shall, in the interest of safe air navigation, observe the following procedures for notifying the appropriate aviation authorities of such overflight activity by participating aircraft:

(a) In the event of planned bilateral or multilateral law enforcement operations, the requested Party shall provide reasonable notice and communications frequencies to the appropriate authorities, including authorities responsible for air traffic control, of each Party of planned flights by participating aircraft in the airspace of that Party.

(b) In the event of unplanned law enforcement operations, which may include the pursuit of suspect aircraft into another Party's airspace, the law enforcement and appropriate civil aviation authorities of the Parties concerned shall exchange information concerning the appropriate communications frequencies and other information pertinent to the safety of air navigation.

(c) Any aircraft engaged in law enforcement operations or activities in support of law enforcement operations shall comply with such air navigation and flight safety directions as may be required by each concerned Party's aviation authorities, in the measure in which it is going across the airspace of those Parties.

5. The requested Parties shall maintain contact with the designated law enforcement officials of the requesting Party and keep them informed of the results of such operations so as to enable them to take such action as they may deem appropriate.

6. Subject to paragraph 7 of this article, the requesting Party shall authorize aircraft of a requested Party, when engaged in law enforcement operations or activities in support of law enforcement operations, to fly over its territory and waters; and, subject to the laws of the authorizing Party and of the requested Party, to relay to suspect aircraft, upon the request of the authorizing Party, orders to comply with the instructions and directions from its air traffic control and law enforcement authority, if either:

(a) authorisation has been granted by the authority or authorities of the Party requesting assistance defined in article 1, notified pursuant to article 7; or

(b) advance authorisation has been granted by the Party requesting assistance.

7. Parties shall elect either the procedure set forth in paragraph 6 (a) or 6 (b), and shall so notify the Depositary of their election. Prior to receipt of notification by the Depositary, Parties shall be deemed to have elected the procedure set forth in paragraph 6 (a).

8. Nothing in this Agreement shall affect the legitimate rights of aircraft engaged in scheduled or charter operations for the carriage of passengers, baggage or cargo or general aviation traffic.

9. Nothing in this Agreement shall be construed as authorizing aircraft of any Party to enter the airspace of any State not party to this Agreement.

10. Nothing in this Agreement shall be construed as authorizing an aircraft of one Party independently to patrol within the airspace of any other Party.

11. While conducting air activities pursuant to this Agreement, the Parties shall not endanger the lives of persons on board or the safety of civil aviation.

#### ***Article 14. Other situations***

1. Nothing in this Agreement shall preclude any Party from otherwise expressly authorizing law enforcement operations by any other Party to suppress illicit traffic in its territory, waters or airspace, or involving vessels or aircraft of its nationality suspected of illicit traffic.

2. Parties are encouraged to apply the relevant provisions of this Agreement whenever evidence of illicit traffic is witnessed by the law enforcement vessels and law enforcement aircraft of the Parties.

#### ***Article 15. Extension to internal waters***

Upon signing, ratification, acceptance or approval of this Agreement, or at any time thereafter, a Party may notify the Depositary that it has extended the application of this Agreement to some or all of its internal waters directly adjacent to its territorial sea or archipelagic waters, as specified by the Party.

### OPERATIONS SEAWARD OF THE TERRITORIAL SEA

#### ***Article 16. Boarding***

1. When law enforcement officials of one Party encounter a suspect vessel claiming the nationality of another Party, located seaward of any State's territorial sea, this Agreement constitutes the authorization by the claimed flag State Party to board and search the suspect vessel, its cargo and question the persons found on board by such officials in order to determine if the vessel is engaged in illicit traffic, except where a Party has notified the Depositary that it will apply the provisions of paragraph 2 or 3 of this article.

2. Upon signing, ratification, acceptance or approval of this Agreement, a Party may notify the Depositary that vessels claiming the nationality of that Party located seaward of any State's territorial sea may only be boarded upon express consent of that Party. This notification will not set aside the obligation of that Party to respond expeditiously to requests from other Parties pursuant to this Agreement, according to its capability. The notification can be withdrawn at any time.
3. Upon signing, ratification, acceptance or approval of this Agreement, or at any time thereafter, a Party may notify the Depositary that Parties shall be deemed to be granted authorization to board a suspect vessel located seaward of the territorial sea of any State that flies its flag or claims its nationality and to search the suspect vessel, its cargo and question the persons found on board in order to determine if the vessel is engaged in illicit traffic, if there is no response or the requested Party can neither confirm nor deny nationality within four (4) hours following receipt of an oral request pursuant to article 6. The notification can be withdrawn at any time.
4. A flag State Party that has notified the Depositary that it shall adhere to paragraph 2 or 3 of this article, having received a request to verify the nationality of a suspect vessel, may authorize the requesting Party to take all necessary actions to prevent the escape of the suspect vessel.
5. When evidence of illicit traffic is found as the result of any boarding conducted pursuant to this article, the law enforcement officials of the boarding Party may detain the vessel, cargo and persons on board pending expeditious disposition instructions from the flag State Party. The boarding Party shall promptly inform the flag State Party of the results of the boarding and search conducted pursuant to this article, in accordance with paragraph 1 of article 26 of this Agreement.
6. Notwithstanding the foregoing paragraphs of this article, law enforcement officials of one Party may board a suspect vessel located seaward of the territorial sea of any State, claiming the nationality of another Party for the purpose of locating and examining the documents of that vessel when:
  - (a) it is not flying the flag of that other Party;
  - (b) it is not displaying any marks of its registration;
  - (c) it is claiming to have no documentation regarding its nationality on board; and
  - (d) there is no other information evidencing nationality.
7. In the case of a boarding conducted pursuant to paragraph 6 of this article, should any documentation or evidence of nationality be found, paragraph 1, 2 or 3 of this article shall apply as appropriate. Where no evidence of nationality is found, the boarding Party may assimilate the vessel to a ship without nationality in accordance with international law.
8. The boarding and search of a suspect vessel in accordance with this article is governed by the laws of the boarding Party.

#### ***Article 17. Other boardings under international law***

Except as expressly provided herein, this Agreement does not apply to or limit boarding of vessels, conducted by any Party in accordance with international law, seaward of any State's territorial sea, whether based, *inter alia*, on the right of visit, the rendering of assistance to persons, vessels, and property in distress or peril, or an authorization from the flag State to take law enforcement action.

### IMPLEMENTATION

#### ***Article 18. Identification of point of contact***

In designating the authorities and officials as defined in article 1 that exercise responsibilities under this Agreement, each Party is encouraged to identify a single point of contact with the capability to receive, process and respond to requests and reports at any time.

**Article 19. Maritime law enforcement cooperation and coordination  
Programmes for the Caribbean area**

1. The Parties shall establish regional and subregional maritime law enforcement cooperation and coordination programmes among their law enforcement authorities. Each Party shall designate a coordinator to organize its participation and to identify the vessels, aircraft and law enforcement officials involved in the programme to the other Parties.
2. The Parties shall endeavour to conduct scheduled bilateral, subregional and regional operations to exercise the rights and obligations under this Agreement.
3. The Parties undertake to assign qualified personnel to regional and subregional coordination centres established for the purpose of coordinating the detection, surveillance and monitoring of vessels and aircraft and interception of vessels engaged in illicit traffic by and over the sea.
4. The Parties are encouraged to develop standard operating procedures for law enforcement operations pursuant to this Agreement and consult, as appropriate, with other Parties with a view to harmonizing such standard operating procedures for the conduct of joint law enforcement operations.

**Article 20. Authority and conduct of law enforcement and other officials**

1. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall take such measures as may be necessary under its domestic law to ensure that foreign law enforcement officials, when conducting actions in its water under this Agreement, are deemed to have like powers to those of its domestic law enforcement officials.
2. Consistent with its legal system, each Party shall take appropriate measures to ensure that its law enforcement officials, and law enforcement officials of other Parties acting on its behalf, are empowered to exercise the authority of law enforcement officials as prescribed in this Agreement.
3. In accordance with the provisions in article 8 and without prejudice to the provisions in article 11, each Party shall ensure that its law enforcement officials, when conducting boardings and searches of vessels, and air activities pursuant to this Agreement, act in accordance with their applicable national laws and procedures and with international law and accepted international practices.
4. In taking such action under this Agreement, each Party shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and cargo, and not to prejudice any commercial or legal interest. In particular, they shall take into account:
  - (a) the dangers involved in boarding a vessel at sea, and give consideration as to whether this could be more safely done in port; and
  - (b) the need to avoid unduly detaining or delaying a vessel.

**Article 21. Assistance by vessels**

1. Each Party may request another Party to make available one or more of its law enforcement vessels to assist the requesting Party effectively to patrol and conduct surveillance with a view to the detection and prevention of illicit traffic by sea and air in the Caribbean area.
2. When responding favourably to a request pursuant to paragraph 1 of this article, each requested Party shall provide to the requesting Party via secure communication channels:
  - (a) the name and description of its law enforcement vessels;
  - (b) the dates at which, and the periods for which, they will be available;
  - (c) the names of the Commanding Officers of the vessels; and
  - (d) any other relevant information.

### **Article 22. Use of force**

1. Force may only be used if no other feasible means of resolving the situation can be applied.
2. Any force used shall be proportional to the objective for which it is employed.
3. All use of force pursuant to this Agreement shall in all cases be the minimum reasonably necessary under the circumstances.
4. A warning shall be issued prior to any use of force except when force is being used in self-defence.
5. In the event that the use of force is authorized and necessary in the waters of a Party, law enforcement officials shall respect the laws of that Party.
6. In the event that the use of force is authorized and necessary during a boarding and search seaward of the territorial sea of any Party, the law enforcement officials shall comply with their domestic laws and procedures and the directions of the flag State.
7. The discharge of firearms against or on a suspect vessel shall be reported as soon as practicable to the flag State Party.
8. Parties shall not use force against civil aircraft in flight.
9. The use of force in reprisal or as punishment is prohibited.
10. Nothing in this Agreement shall impair the exercise of the inherent right of self-defence by law enforcement or other officials of any Party.

### **Article 23. Jurisdiction over offences**

Each Party shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, of the 1988 Convention, when:

- (a) the offence is committed in waters under its sovereignty or where applicable in its contiguous zone;
- (b) the offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;
- (c) the offence is committed on board a vessel without nationality or assimilated to a ship without nationality under international law, which is located seaward of the territorial sea of any State;
- (d) the offence is committed on board a vessel flying the flag or displaying the marks of registry or bearing any other indication of nationality of another Party, which is located seaward of the territorial sea of any State.

### **Article 24. Jurisdiction over detained vessels and persons**

1. In all cases arising in the waters of a Party, or concerning a Party's flag vessels seaward of any State's territorial sea, that Party has jurisdiction over a detained vessel, cargo and persons on board including seizure, forfeiture, arrest, and prosecution. Subject to its Constitution and its laws, the Party in question may consent to the exercise of jurisdiction by another State in accordance with international law and in conformity with any condition set by it.
2. Each Party shall ensure compliance with its notification obligations under the Vienna Convention on Consular Relations.

### **Article 25. Dissemination**

1. To facilitate implementation of this Agreement, each Party shall ensure that the other Parties are fully informed of its respective applicable laws and procedures, particularly those pertaining to the use of force.

2. When engaged in law enforcement operations under this Agreement, the Parties shall ensure that their law enforcement officials are knowledgeable concerning the pertinent operational procedures of other Parties.

**Article 26. Results of enforcement action**

1. A Party conducting a boarding and search pursuant to this Agreement shall promptly inform the other Party of the results thereof.
2. Each Party shall, on a periodic basis and consistent with its laws, inform the other Party on the stage which has been reached of all investigations, prosecutions and judicial proceedings resulting from law enforcement operations taken pursuant to this Agreement where evidence of illicit traffic was found on vessels or aircraft of that other Party. In addition, the Parties shall provide each other with information on results of such prosecutions and judicial proceedings, in accordance with their national legislation.
3. Nothing in this article shall require a Party to disclose details of the investigations, prosecutions and judicial proceedings or the evidence relating thereto; or affect rights or obligations of Parties derived from the 1988 Convention or other international agreements and instruments.

**Article 27. Asset seizure and forfeiture**

1. Assets seized, confiscated or forfeited in consequence of any law enforcement operation undertaken in the waters of a Party pursuant to this Agreement shall be disposed of in accordance with the laws of that Party.
2. Should the flag State Party have consented to the exercise of jurisdiction by another State pursuant to article 24, assets seized, confiscated or forfeited in consequence of any law enforcement operation of any Party pursuant to this Agreement shall be disposed of in accordance with the laws of the boarding Party.
3. To the extent permitted by its laws and upon such terms as it deems appropriate, a Party may, in any case, transfer forfeited property or proceeds of their sale to another Party or intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances.

**Article 28. Claims**

Claims against a Party for damage, injury or loss resulting from law enforcement operations pursuant to this Agreement, including claims against its law enforcement officials, shall be resolved in accordance with international law.

FINAL PROVISIONS

**Article 29. Preservation of rights and privileges**

1. Nothing in this Agreement shall be construed as altering the rights and privileges due to any individual in any legal proceeding.
2. Nothing in this Agreement shall be construed as altering the immunities to which vessels and aircraft are entitled under international law.
3. For the purposes of this Agreement, in no case shall law enforcement vessels or law enforcement aircraft be considered suspect vessels or suspect aircraft.

**Article 30. Effect on claims concerning territory or maritime boundaries**

Nothing in this Agreement shall prejudice the position of any Party under international law, including the law of the sea; nor affect the claims to territory or maritime boundaries of any Party or any third State; nor constitute a precedent from which rights can be derived.

### ***Article 31. Relationship to other agreements***

1. The Parties are encouraged to conclude bilateral or multilateral agreements with one another on the matters dealt with in this Agreement, for the purpose of confirming or supplementing its provisions or strengthening the application of the principles embodied in article 17 of the 1988 Convention.
2. Nothing in this Agreement shall alter or affect in any way the rights and obligations of a Party which arise from agreements in force between it and one or more other Parties on the same subject.

### ***Article 32. Meetings of the parties***

1. There shall be a meeting of the Parties at the end of the second year following the year in which this Agreement enters into force. After this term, subsequent meetings of the Parties shall be held no sooner than ninety (90) days after a request of fifty per cent of the Parties made in conformity with the usual diplomatic practice.
2. Meetings of the Parties shall examine, inter alia, compliance with the Agreement, and adopt, if necessary, measures to enhance its effectiveness, and review measures in the field of regional and subregional cooperation and coordination of future actions.
3. Meetings of the Parties convened pursuant to paragraph 2 of this article shall consider amendments to this Agreement proposed in accordance with article 33.
4. All decisions taken by the meetings of the Parties shall be by consensus.

### ***Article 33. Amendments***

1. Any Party may at any time after entry into force of the Agreement for that Party propose an amendment to this Agreement by providing the text of such a proposal to the Depositary. The Depositary shall promptly circulate any such proposal to all Parties and Signatories.
2. An amendment shall be adopted at a meeting of the Parties by consensus of the Parties therein represented.
3. An amendment shall enter into force thirty days after the Depositary has received instruments of acceptance or approval from all of the Parties.

### ***Article 34. Settlement of disputes***

If there should arise between two or more Parties a question or dispute relating to the interpretation or application of this Agreement, those Parties shall consult together with a view to the settlement of the dispute by negotiation, inquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their choice.

### ***Article 35. Signature***

This Agreement shall be open for signature by any State party to the 1988 Convention that is located in the Caribbean area, or any State that is responsible for the foreign relations of a territory located in the Caribbean area, at San José, Costa Rica, on \_\_\_\_, 2003.

### ***Article 36. Entry into force***

1. States may, in accordance with their national procedures, express their consent to be bound by this Agreement by:
  - (a) signature without reservation as to ratification, acceptance or approval; or
  - (b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. This Agreement shall enter into force 30 days after five States have expressed their consent to be bound in accordance with paragraph 1 of this article.
3. For each State consenting to be bound after the date of entry into force of this Agreement, the Agreement shall enter into force for that State 30 days after the deposit of its instrument expressing its consent to be bound.

#### ***Article 37. Reservations and exceptions***

Subject to its Constitution and laws and in accordance with international law, a Party may make reservations to this Agreement, except when they are incompatible with the object and purpose of the Agreement. No reservations may be made regarding articles 2, 12, 13 and 16.

#### ***Article 38. Declarations and statements***

Article 37 does not preclude a State, when signing, ratifying, accepting or approving this Agreement, from making declarations or statements, however phrased or named, with a view, inter alia, to the harmonization of its laws and regulations with the provisions of this Agreement, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that State.

#### ***Article 39. Territorial application***

This Agreement shall only apply to the Caribbean area, as defined in article 1, paragraph (j).

#### ***Article 40. Suspension***

Parties to this Agreement may temporarily suspend in specified areas under their sovereignty their obligations under this Agreement if such suspension is required for imperative reasons of national security. Such suspension shall take effect only after having been duly published.

#### ***Article 41. Withdrawal***

1. Any Party may withdraw from this Agreement. Withdrawal will take effect twelve months after receipt of the notification of withdrawal by the Depositary.
2. This Agreement shall continue to apply after withdrawal with respect to any administrative or judicial proceedings arising out of actions taken pursuant to this Agreement in respect of the withdrawing Party.

#### ***Article 42. Depositary***

1. The original of this Agreement shall be deposited with the Government of the Republic of Costa Rica, which shall serve as the Depositary.
2. The Depositary shall transmit certified copies of the Agreement to all signatories.
3. The Depositary shall inform all signatories and parties to the Agreement of:
  - (a) all designations of law enforcement authorities pursuant to article 1, paragraph (c).
  - (b) all designations of authorities to whom requests for verification of registration are to be made, and for authorization to enter national waters and air space and board and search, and for disposition instructions, pursuant to articles 6 and 7.
  - (c) all officials designated as being responsible for the designation of embarked law enforcement officials pursuant to article 9, paragraph 5.

- (d) all notification of elections regarding authorization for pursuit or entry into territorial waters and airspace to effect boardings and searches pursuant to article 12.
- (e) all notification of elections regarding authorization for aircraft support pursuant to article 13.
- (f) all declarations of territorial applicability under article 15.
- (g) all notifications of elections not to provide advance authorization for boarding pursuant to article 16, paragraphs 2 and 3.
- (h) all proposals to amend the Agreement made pursuant to article 33.
- (i) all signatures, ratifications, acceptances, and approvals deposited pursuant to article 36.
- (j) the dates of entry into force of the Agreement pursuant to article 36.
- (k) all reservations made pursuant to article 37.
- (l) all declarations made pursuant to article 38.
- (m) all declarations made pursuant to article 40.
- (n) all notifications of withdrawal pursuant to article 41.

4. The Depositary shall register this Agreement with the United Nations pursuant to article 102 of the Charter of the United Nations.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE AT San José, this \_\_\_\_\_ day of \_\_\_\_\_ 2003, in the English, French and Spanish languages, each text being duly authentic.

## ANNEX XI

### Constructive presence, hot pursuit and use of force (Samples of recent judicial guidance)

- A. Use of force: The M/V Saiga (No. 2) case (International Tribunal for the Law of the Sea) (Extracts)
- B. Hot pursuit and constructive presence: Regina v. Rumbaut (Canada) (Extracts)
- C. Hot pursuit and constructive presence: Regina v. Sunila and Solayman (Canada) (Extracts)
- D. Hot pursuit: Regina v. Mills and Others (United Kingdom) (Extracts)

#### A. USE OF FORCE: THE M/V “SAIGA” (NO. 2) CASE (EXTRACTS)

##### The International Tribunal for the Law of the Sea

##### JUDGMENT

In the M/V “SAIGA” (No. 2) case  
*between*  
 Saint Vincent and the Grenadines,  
*and*  
 Guinea

The Tribunal, composed as above, after deliberation, *delivers the following Judgment:*

##### INTRODUCTION

1. On 13 January 1998, the agent of Saint Vincent and the Grenadines filed in the Registry of the Tribunal a request for the prescription of provisional measures in accordance with article 290, paragraph 5, of the United Nations Convention on the Law of the Sea (hereinafter “the Convention”) concerning the arrest and detention of the vessel M/V Saiga (hereinafter “the Saiga”). The request was accompanied by a copy of the notification submitted by Saint Vincent and the Grenadines to the Republic of Guinea on 22 December 1997 (hereinafter “the notification of 22 December 1997”) instituting arbitral proceedings in accordance with annex VII to the Convention in respect of a dispute relating to the Saiga. A certified copy of the request was sent on the same day by the Registrar of the Tribunal to the Minister for Foreign Affairs of Guinea in Conakry and also in care of the Ambassador of Guinea to Germany.
2. On 13 January 1998, the Registrar was notified of the appointment of Mr. Bozo Dabinovic, Commissioner for Maritime Affairs of Saint Vincent and the Grenadines, as agent of Saint Vincent and the Grenadines. On 20 January 1998, the appointment of Mr. Hartmut von Brevern, Attorney at Law, Hamburg, as agent of Guinea, was notified to the Registrar.
3. In accordance with article 24, paragraph 3, of the Statute of the Tribunal (hereinafter “the Statute”), States Parties to the Convention were notified of the request for the prescription of provisional measures by a note verbale from the Registrar dated 20 February 1998. Pursuant to the Agreement on Cooperation and Relationship between the United Nations and the Tribunal, the Registrar notified the Secretary-General of the United Nations of the request on 20 February 1998.
4. By a letter dated 20 February 1998, the agent of Guinea notified the Tribunal of the exchange of letters of the same date (hereinafter “the 1998 Agreement”) constituting an

agreement between Guinea and Saint Vincent and the Grenadines, both of which are parties to the Convention, to transfer the arbitration proceedings, instituted by Saint Vincent and the Grenadines by the notification of 22 December 1997, to the International Tribunal for the Law of the Sea.

#### FACTUAL BACKGROUND

31. The Saiga is an oil tanker. At the time of its arrest on 28 October 1997, it was owned by Tabona Shipping Company Ltd. of Nicosia, Cyprus, and managed by Seascot Ship Management Ltd. of Glasgow, Scotland. The ship was chartered to Lemania Shipping Group Ltd. of Geneva, Switzerland. The Saiga was provisionally registered in Saint Vincent and the Grenadines on 12 March 1997. The master and crew of the ship were all of Ukrainian nationality. There were also three Senegalese nationals who were employed as painters. The Saiga was engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa. The owner of the cargo of gas oil on board was Addax BV of Geneva, Switzerland.

32. Under the command of Captain Orlov, the Saiga left Dakar, Senegal, on 24 October 1997 fully laden with approximately 5,400 metric tons of gas oil. On 27 October 1997, between 0400 and 1400 hours and at a point 10°25'03"N and 15°42'06"W, the Saiga supplied gas oil to three fishing vessels, the *Giuseppe Primo* and the *Kriti*, both flying the flag of Senegal, and the *Eleni S*, flying the flag of Greece. This point was approximately 22 nautical miles from Guinea's island of Alcatraz. All three fishing vessels were licensed by Guinea to fish in its exclusive economic zone. The Saiga then sailed in a southerly direction to supply gas oil to other fishing vessels at a pre-arranged place. Upon instructions from the owner of the cargo in Geneva, it later changed course and sailed towards another location beyond the southern border of the exclusive economic zone of Guinea.

33. At 0800 hours on 28 October 1997, the Saiga, according to its log book, was at a point 09°00'01"N and 14°58'58"W. It had been drifting since 0420 hours while awaiting the arrival of fishing vessels to which it was to supply gas oil. This point was south of the southern limit of the exclusive economic zone of Guinea. At about 0900 hours the Saiga was attacked by a Guinean patrol boat (P35). Officers from that boat and another Guinean patrol boat (P328) subsequently boarded the ship and arrested it. On the same day, the ship and its crew were brought to Conakry, Guinea, where its master was detained. The travel documents of the members of the crew were taken from them by the authorities of Guinea and armed guards were placed on board the ship. On 1 November 1997, two injured persons from the Saiga, Mr. Sergey Klyuyev and Mr. Djibril Niassé, were permitted to leave Conakry for Dakar for medical treatment. Between 10 and 12 November 1997, the cargo of gas oil on board the ship, amounting to 4,941.322 metric tons, was discharged on the orders of the Guinean authorities. Seven members of the crew and two painters left Conakry on 17 November 1997, one crew member left on 14 December 1997 and six on 12 January 1998. The master and six crew members remained in Conakry until the ship was released on 28 February 1998.

34. An account of the circumstances of the arrest of the Saiga was drawn up by Guinean customs authorities in a "Procès-Verbal" bearing the designation "PV29" (hereinafter "PV29"). PV29 contains a statement of the master obtained by interrogation by the Guinean authorities. A document, "*Conclusions présentées au nom de l'Administration des Douanes par le Chef de la Brigade Mobile Nationale des Douanes*" (Conclusions presented in the name of the Customs Administration by the Head of the National Mobile Customs Brigade), issued on 14 November 1997 under the signature of the Chief of the National Mobile Customs Brigade, set out the basis of the action against the master. The criminal charges against the master were specified in a schedule of summons (*cédule de citation*), issued on 10 December 1997 under the authority of the Public Prosecutor (*Procureur de la République*), which additionally named the State of Saint Vincent and the Grenadines as civilly responsible to be summoned (*civilement responsable à citer*). Criminal proceedings were subsequently instituted by the Guinean authorities against the master before the Tribunal of First Instance (*tribunal de première instance*) in Conakry.

35. On 13 November 1997, Saint Vincent and the Grenadines submitted to this Tribunal a request for the prompt release of the Saiga and its crew under article 292 of the Convention. On 4 December 1997, the Tribunal delivered its judgment on the request. The Judgment ordered that Guinea promptly release the Saiga and its crew upon the post-

ing of a reasonable bond or security by Saint Vincent and the Grenadines. The security consisted of the gas oil discharged from the Saiga by the authorities of Guinea plus an amount of \$400,000 to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form.

36. On 17 December 1997, judgment was rendered by the Tribunal of First Instance in Conakry against the master. The Tribunal of First Instance cited, as the basis of the charges against the master, articles 111 and 242 of the Convention, articles 361 and 363 of the Penal Code of Guinea (hereinafter “the Penal Code”), article 40 of the Merchant Marine Code of Guinea (hereinafter the “Merchant Marine Code”), articles 34, 316 and 317 of the Customs Code of Guinea (hereinafter “the Customs Code”) and articles 1 and 8 of Law L/94/007/CTRN of 15 March 1994 concerning the fight against fraud covering the import, purchase and sale of fuel in the Republic of Guinea (hereinafter “Law L/94/007”). The charge against the master was that he had “imported, without declaring it, merchandise that is taxable on entering national Guinean territory, in this case diesel oil, and that he refused to comply with injunctions by agents of the Guinean Navy, thus committing the crimes of contraband, fraud and tax evasion”.

37. The Tribunal of First Instance in Conakry found the master guilty as charged and imposed on him a fine of 15,354,024,040 Guinean francs. It also ordered the confiscation of the vessel and its cargo as a guarantee for payment of the penalty.

38. The master appealed to the Court of Appeal (*cour d'appel*) in Conakry against his conviction by the Tribunal of First Instance. On 3 February 1998, judgment was rendered by the Court of Appeal. The Court of Appeal found the master guilty of the offence of “illegal import, buying and selling of fuel in the Republic of Guinea” which it stated was punishable under Law L/94/007. The Court of Appeal imposed a suspended sentence of six months imprisonment on the master, a fine of 15,354,040,000 Guinean francs and ordered that all fees and expenses be at his expense. It also ordered the confiscation of the cargo and the seizure of the vessel as a guarantee for payment of the fine.

39. On 11 March 1998, the Tribunal delivered the order prescribing provisional measures, referred to in paragraph 8. Prior to the issue of its order, the Tribunal was informed, by a letter dated 4 March 1998 sent on behalf of the agent of Saint Vincent and the Grenadines, that the Saiga had been released from detention and had arrived safely in Dakar, Senegal. According to the deed of release signed by the Guinean authorities and the master, the release was in execution of the Judgment of the Tribunal of 4 December 1997.

#### HOT PURSUIT

139. Saint Vincent and the Grenadines contends that, in arresting the Saiga, Guinea did not lawfully exercise the right of hot pursuit under article 111 of the Convention. It argues that since the Saiga did not violate the laws and regulations of Guinea applicable in accordance with the Convention, there was no legal basis for the arrest. Consequently, the authorities of Guinea did not have “good reason” to believe that the Saiga had committed an offence that justified hot pursuit in accordance with the Convention.

140. Saint Vincent and the Grenadines asserts that, even if the Saiga violated the laws and regulations of Guinea as claimed, its arrest on 28 October 1997 did not satisfy the other conditions for hot pursuit under article 111 of the Convention. It notes that the alleged pursuit was commenced while the ship was well outside the contiguous zone of Guinea. The Saiga was first detected (by radar) in the morning of 28 October 1997 when the ship was either outside the exclusive economic zone of Guinea or about to leave that zone. The arrest took place after the ship had crossed the southern border of the exclusive economic zone of Guinea.

141. Saint Vincent and the Grenadines further asserts that, wherever and whenever the pursuit was commenced, it was interrupted. It also contends that no visual and auditory signals were given to the ship prior to the commencement of the pursuit, as required by article 111 of the Convention.

142. Guinea denies that the pursuit was vitiated by any irregularity and maintains that the officers engaged in the pursuit complied with all the requirements set out in article 111 of the Convention. In some of its assertions, Guinea contends that the pursuit was commenced on 27 October 1997 soon after the authorities of Guinea had information

that the Saiga had committed or was about to commit violations of the customs and contraband laws of Guinea and that the pursuit was continued throughout the period until the ship was spotted and arrested in the morning of 28 October 1997. In other assertions, Guinea contends that the pursuit commenced in the early morning of 28 October 1997 when the Saiga was still in the exclusive economic zone of Guinea. In its assertions, Guinea relies on article 111, paragraph 2, of the Convention.

143. Guinea states that at about 0400 hours on 28 October 1997 the large patrol boat P328 sent out radio messages to the Saiga ordering it to stop and that they were ignored. It also claims that the small patrol boat P35 gave auditory and visual signals to the Saiga when it came within sight and hearing of the ship. The Guinean officers who arrested the ship testified that the patrol boat sounded its siren and switched on its blue revolving light signals.

144. Guinea admits that the arrest took place outside the exclusive economic zone of Guinea. However, it points out that since the place of arrest was not in the territorial sea either of the ship's flag State or of another State, there was no breach of article 111 of the Convention.

145. The relevant provisions of article 111 of the Convention which have been invoked by the parties are as follows:

***“Article 111. “Right of hot pursuit***

“1. The hot pursuit of a foreign ship may be undertaken 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. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

“2. The right of hot pursuit shall apply mutatis mutandis to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

“3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

“4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.”

146. The Tribunal notes that the conditions for the exercise of the right of hot pursuit under article 111 of the Convention are cumulative; each of them has to be satisfied for the pursuit to be legitimate under the Convention. In this case, the Tribunal finds that several of these conditions were not fulfilled.

147. With regard to the pursuit alleged to have commenced on 27 October 1997, the evidence before the Tribunal indicates that, at the time the order for the joint mission of the Customs and Navy of Guinea was issued, the authorities of Guinea, on the basis of information available to them, could have had no more than a suspicion that a tanker had violated the laws of Guinea in the exclusive economic zone. The Tribunal also notes that, in the circumstances, no visual or auditory signals to stop could have been given to the Saiga. Furthermore, the alleged pursuit was interrupted. According to the evidence

given by Guinea, the small patrol boat P35 that was sent out on 26 October 1997 on a northward course to search for the Saiga was recalled when information was received that the Saiga had changed course. This recall constituted a clear interruption of any pursuit, whatever legal basis might have existed for its commencement in the first place.

148. As far as the pursuit alleged to have commenced on 28 October 1998 is concerned, the evidence adduced by Guinea does not support its claim that the necessary auditory or visual signals to stop were given to the Saiga prior to the commencement of the alleged pursuit, as required by article 111, paragraph 4, of the Convention. Although Guinea claims that the small patrol boat (P35) sounded its siren and turned on its blue revolving light signals when it came within visual and hearing range of the Saiga, both the master who was on the bridge at the time and Mr. Niasse who was on the deck, categorically denied that any such signals were given. In any case, any signals given at the time claimed by Guinea cannot be said to have been given at the commencement of the alleged pursuit.

149. The Tribunal has already concluded that no laws or regulations of Guinea applicable in accordance with the Convention were violated by the Saiga. It follows that there was no legal basis for the exercise of the right of hot pursuit by Guinea in this case.

150. For these reasons, the Tribunal finds that Guinea stopped and arrested the Saiga on 28 October 1997 in circumstances which did not justify the exercise of the right of hot pursuit in accordance with the Convention.

151. The Tribunal notes that Guinea, in its pleadings and submissions, suggests that the actions against the Saiga could, at least in part, be justified on the ground that the Saiga supplied gas oil to the fishing vessels in the contiguous zone of the Guinean island of Alcatraz. However, in the course of the oral proceedings, Guinea stated:

“The bunkering operation of the ship in the Guinean contiguous zone is also of no relevance in this context, although it may be relevant to the application of the criminal law. The relevant area here is the customs radius. This is a functional zone established by Guinean customs law within the realm of the contiguous zone and a part of the Guinean exclusive economic zone. One can describe it as a limited customs protection zone based on the principles of customary international law which are included in the exclusive economic zone but which are not a part of the territory of Guinea.”

152. The Tribunal has not based its consideration of the question of the legality of the pursuit of the Saiga on the suggestion of Guinea that a violation of its customs laws occurred in the contiguous zone. The Tribunal would, however, note that its conclusion on this question would have been the same if Guinea had based its action against the Saiga solely on the ground of an infringement of its customs laws in the contiguous zone. For, even in that case, the conditions for the exercise of the right of hot pursuit, as required under article 111 of the Convention, would not have been satisfied for the reasons given in paragraphs 147 and 148.

#### USE OF FORCE

153. Saint Vincent and the Grenadines claims that Guinea used excessive and unreasonable force in stopping and arresting the Saiga. It notes that the Saiga was an unarmed tanker almost fully laden with gas oil, with a maximum speed of 10 knots. It also notes that the authorities of Guinea fired at the ship with live ammunition, using solid shots from large-caliber automatic guns.

154. Guinea denies that the force used in boarding, stopping and arresting the Saiga was either excessive or unreasonable. It contends that the arresting officers had no alternative but to use gunfire because the Saiga refused to stop after repeated radio messages to it to stop and in spite of visual and auditory signals from the patrol boat P35. Guinea maintains that gunfire was used as a last resort, and denies that large-caliber ammunition was used. Guinea places the responsibility for any damage resulting from the use of force on the master and crew of the ship.

155. In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue

of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (S.S. “I’m Alone” case (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609; The Red Crusader case (Commission of Enquiry, Denmark—United Kingdom, 1962), I.L.R., Vol. 35, p. 485). The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Article 22, paragraph 1 (f), of the Agreement states:

1. The inspecting State shall ensure that its duly authorized inspectors:

(f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

157. In the present case, the Tribunal notes that the Saiga was almost fully laden and was low in the water at the time it was approached by the patrol vessel. Its maximum speed was 10 knots. Therefore it could be boarded without much difficulty by the Guinean officers. At one stage in the proceedings Guinea sought to justify the use of gunfire with the claim that the Saiga had attempted to sink the patrol boat. During the hearing, the allegation was modified to the effect that the danger of sinking to the patrol boat was from the wake of the Saiga and not the result of a deliberate attempt by the ship. But whatever the circumstances, there is no excuse for the fact that the officers fired at the ship itself with live ammunition from a fast-moving patrol boat without issuing any of the signals and warnings required by international law and practice.

158. The Guinean officers also used excessive force on board the Saiga. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.

159. For these reasons, the Tribunal finds that Guinea used excessive force and endangered human life before and after boarding the Saiga, and thereby violated the rights of Saint Vincent and the Grenadines under international law.

## **B. HOT PURSUIT AND CONSTRUCTIVE PRESENCE: REGINA v. RUMBAUT (EXTRACTS)**

Decision on *voir dire* held to determine admissibility of evidence seized on board the Cypriot vessel “M. V. Pacifico” on 22 February 1994.

New Brunswick Court of Queen’s Bench

Court File No. B/M/118/97

Judge: Deschenes J.

10 June 1998; 2 July 1998

### *Summary*

At the accused’s trial for conspiracy to import cocaine, the Crown sought to introduce in evidence certain items found aboard a foreign vessel after it was arrested in inter-

national waters and brought to Halifax by the Canadian authorities. The police observed a vessel, conceded by the accused to be empty of drugs when it departed, leaving the Canadian shore and meeting a foreign vessel, registered in Cyprus, just outside Canada's territorial waters. Upon the return of the Canadian vessel to the Nova Scotia shore, 170 bales of cocaine weighing over 5,000 kilograms were seized from it. A Canadian military vessel arrested the foreign vessel in international waters. While the vessel was being escorted to the Nova Scotia shore, Canadian authorities requested authorization from the Director of the Cypriot Department of Merchant Shipping pursuant to the relevant provisions of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 28 I.L.M. 493, to board, search and take appropriate action if evidence of involvement in illicit traffic was found. After the Cypriot Government's consent was given, arrest and search warrants were obtained from Canadian courts.

On a *voir dire* to determine the admissibility of evidence seized from the foreign vessel, held, the evidence was admissible.

Article 17 (3) of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides that a party which has reasonable grounds to suspect that a vessel flying the flag or displaying marks of registry of another party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel. The accused argued that, pursuant to this provision, Canada had no right to order the foreign vessel to stop, nor to board it until it had obtained authorization from the Cypriot Government. Assuming that this provision represented the domestic law of Canada, it could not have any applicability under the circumstances, nor did the words of the provision allow the type of interpretation which the accused sought to place upon it. Prior to boarding the foreign vessel in international waters, the Canadian authorities did not know which flag the vessel was flying although they believed that the vessel had been engaged in illicit traffic. The Canadian authorities could not request confirmation of registry nor authorization from the flag State to take appropriate measures in regard to the intercepted vessel. The Convention in general and article 17 in particular do not and did not prevent Canadian authorities from entering into hot pursuit of the foreign vessel in accordance with the international law of the sea. In fact, article 17, paragraph 11 clearly recognized the continued applicability of the general rules relating to the exercise of criminal jurisdiction at sea under certain circumstances.

The accused also argued that the customary international law of the sea did not authorize any of the actions taken by the Canadian authorities. Neither the Geneva Convention on the High Seas, 1958, 450 U.N.T.S. 11 (Geneva Convention), nor the United Nations Convention on the Law of the Sea, 1982, 21 I.L.M. 1261 (Montego Bay Convention), have been ratified by the Canadian Parliament and are not, as such, part of Canadian domestic law. However, article 23 of the Geneva Convention and article 111 of the Montego Bay Convention as they relate to the issue of extended constructive presence are declaratory of existing customary international law which is part of the Canadian domestic law. Pursuant to the doctrine of constructive presence, a mother or hovering ship is deemed to be inside territorial waters when boats belonging to her are within territorial waters and if they are violating the laws of the State in whose water they are present, such that there is a right of hot pursuit against the mother ship. The doctrine of extended constructive presence arises when the pursued ship is working as a team with another ship which is itself within territorial waters. The pursuit, the arrest, the boarding and subsequent seizure of the items on board the foreign vessel were performed in accordance with the established law of the sea and Canada's domestic laws. Even assuming that the conduct of the Canadian authorities in arresting the foreign vessel in international waters was not authorized by customary international law, the admission in evidence of items seized from it would not constitute an abuse of the process of this court.

### **Judgment**

Deschenes J.: The accused is a Spanish national being tried for conspiracy to import cocaine in Canada. The Crown has moved to introduce in evidence certain items found aboard the Pacifico after it was arrested some 100 nautical miles in international waters and brought to port in Halifax, Nova Scotia, on 2 February 1994. Before proceeding to a

recitation of the factual background, it is necessary to discuss briefly the position of the Attorney General of Canada with respect to certain Conventions and to explain the general position taken by the accused.

Firstly, the position of the Attorney General of Canada is that the two Conventions which are at the centre of the discussion herein namely, the Geneva Convention on the High Seas, 1958, 450 U.N.T.S. 11, and the United Nations Convention on the Law of the Sea, 1982, 21 I.L.M. 1261 (Montego Bay Convention), although not binding upon Cyprus and Canada, are nevertheless declaratory of customary international law and that the actions of the Canadian authorities in this case were fully justified under the rules of customary international law.

Secondly, the accused has taken no issue with many of the technical requirements of the rules relating to hot pursuit in international waters except to argue that, in this case, hot pursuit was simply not allowed by and was contrary to article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, 28 I.L.M. 493, and not justified under customary international law as the *Pacifico*, or one of its boats, never entered Canadian territorial waters.

Thirdly, for the purposes of this *voir dire*, it was agreed that Canada's territorial waters extend 12 miles from its coast and that when the *Pacifico* met with the *Lady Teri-Anne* on 22 February 1994, both vessels were in fact outside Canada's territorial waters.

#### **The contention of both parties and the legal issues with respect to "extended or extensive constructive presence"**

The accused has also argued that the customary international law of the sea did not authorize any of the actions taken by Canadian authorities in this case and that such actions amounted to nothing less than "high-seas kidnapping". He further contended that such unlawful arrest accompanied by threats of the use of force, was so reprehensible in terms of breach of international law that to allow the items seized as a result of such actions to be received as evidence against the accused would amount to an abuse of process. Hence, the accused maintains that the Court must use its supervisory jurisdiction and exclude the evidence sought to be adduced.

Bearing in mind the international conventions previously mentioned, the decisions of Mills, Kirchhoff and Sunila and the cases referred to in those decisions, along with the opinions of experts as derived from the available sources such as text books, I adopt the opinions expressed in Mills and Kirchhoff and find that the 1958 and 1982 Conventions are merely declaratory of the doctrine of extended or extensive constructive presence as part of customary international law of the sea and thus part of Canada's domestic law.

Looking at article 23 and article 111's requirements as they relate to this case, I would conclude that:

1. The hot pursuit was exercised by a military vessel or warship (*Terra Nova*) authorized to that effect. In fact, the accused did not take issue with that fact.
2. The hot pursuit was undertaken by the *Terra Nova* only after the *Terra Nova* had good reasons to believe, after the arrest and boarding of the *Lady Teri-Anne* at the Shelburne wharf by the Royal Canadian Mounted Police (RCMP), that the *Pacifico* had violated the laws of Canada by working as a team with the *Lady Teri-Anne* who was then in Canadian territorial waters with five tons of cocaine which had been unloaded from the *Pacifico* onto the *Lady Teri-Anne*, albeit outside of Canada's territorial waters. Under such circumstances, the *Pacifico* had not only worked as a team with the *Lady Teri-Anne* but had also been used as a mother ship by the *Lady Teri-Anne*. On this point, I would adopt the views expressed by Poulantzas (at p. 250) that the wording covers "other crafts coming usually from the shore and not belonging to the ship" and would also find that the words used do encompass a single pre-arranged unloading of illicit drugs as took place in this case.
3. The pursuit of the *Pacifico* was never interrupted and at no time did the *Pacifico* enter the territorial sea of any other State. The accused did not take issue with such facts.
4. The arrest of the *Pacifico* was only effected after an auditory signal to stop had been given and had been heard by the *Pacifico*. The accused did not take issue with such facts.

The pursuit, the arrest, the boarding and subsequent seizure of the items on board the *Pacifico* was performed in accordance with the established law of the sea and Canada's domestic laws. The allegations by the accused that the process of the Court is being abused by receiving the items seized on board the *Pacifico* are without merit.

I might also add that even if I were in error in my analysis of Canada's obligations under international law, I would not use this Court's supervisory jurisdiction to exclude the evidence on the basis of abuse of process. In the Court's view, even assuming for the purposes of the argument that the conduct of the Canadian authorities in arresting the *Pacifico* in international waters was not authorized by customary international law, the admission in evidence of items seized on board the *Pacifico* would not, in my view, constitute an abuse of the process of this Court. On the contrary, my view is that the conduct of the Canadian authorities in this case was prompted by their belief that their actions were governed by customary international law and all of their actions were designed to avoid or minimize infringements of the freedoms of the high seas.

In my opinion, however, the Court's jurisdiction could be exercised to exclude such evidence if I were of the view that it was appropriate "in order to prevent the Court's process from being enlisted in a proceeding which would damage its integrity" (See *R. v. Light* (1993), 78 C.C.C. (3d) 221 (B.C.C.A.) at p. 245).

In *Regina v. Dunphy* (1996), 140 Nfld. & P.E.I.R. 8 (Nfld. S.C.), the Court refused to admit evidence obtained by Royal Canadian Mounted Police officers who had completed a hot pursuit onto the harbor at St-Pierre de Miquelon, a foreign jurisdiction, and had observed contraband tobacco on board the pursued vessel. The Court concluded that to admit the evidence would be to endorse behavior clearly in breach of international law and comity.

In this case, however, contrary to the facts in *Dunphy*, there is no evidence that even the Cypriot Government contested the arrest of the *Pacifico*, nor was the behavior of the Canadian authorities in clear violation or breach of international obligations.

I would apply the same principles which I applied in *R. v. Rumbaut* [1998] N.B.J. No. 153 (QL) (N.B.Q.B.), 4 May 1998 [reported 125 C.C.C. (3d) 368] and conclude that even assuming that the arrest of the *Pacifico* was in breach of the customary law of the sea, there is no evidence of improper motive or bad faith or of an act so wrong that it violates the conscience of the community such that it would genuinely be unfair and indecent to admit the evidence.

The items seized on the *Pacifico* shall be admitted in evidence. Judgment accordingly.

### **C. HOT PURSUIT AND CONSTRUCTIVE PRESENCE: REGINA v. SUNILA AND SOLAYMAN (EXTRACTS)**

Nova Scotia Supreme Court, Appeal Division

Judges: Clarke C.J.N.S., Hart and Jones J.J.A.

2 January 1986

#### *Summary*

The accused were charged with conspiracy to import a narcotic, importing a narcotic and possession of a narcotic for the purpose of trafficking and sought to quash the charges as a result of their arrest on the high seas by the Royal Canadian Mounted Police (RCMP) with the aid of the Canadian Navy. The evidence indicated that the police had a Canadian vessel under surveillance and that it was observed to rendezvous with the accused's ship in Canadian territorial waters at which time a quantity of narcotics was transferred from the accused's ship to the Canadian vessel. The accused's ship then returned to the high seas. The authorities were aware that the two ships were in communication with each other and therefore delayed arresting the accused's ship until the Canadian vessel had reached port and imported narcotics. The accused's ship was kept under continuous surveillance by military aircraft until she was intercepted by a Canadian naval vessel which had RCMP officers on board. Once the seizure of the Canadian vessel had been made, the accused's ship was boarded and the accused arrested. An application by the accused

to quash the charges on the basis that, inter alia, their rights under ss. 8 and 9 of the Canadian Charter of Rights and Freedoms were violated was dismissed. On appeal by the accused, held, the appeal should be dismissed.

The seizure of the ship and the arrest of the accused was lawful in this case. In the circumstances there was authority under the Narcotic Control Act, R.S.C. 1970, c. N-1, for the seizure of the ship and the crew for having committed an offence within the territorial waters of Canada and under the principles of international law that seizure was properly made after pursuit of the accused's ship onto the high seas. International law has always recognized the right of a State to pursue and arrest a foreign ship on the high seas and to return that ship to its ports to answer charges committed by the ship and her crew within the State's territorial waters. The conduct of the authorities in this case complied with the international law relating to pursuit of ships onto the high seas as codified in the Geneva Convention on the High Seas, 1958. While Canada has not yet ratified that treaty, it does serve as international recognition of the principles affecting the law of the sea. In particular, the circumstances fell within article 23 of the convention in that the accused's ship was acting as a mother ship of the Canadian vessel and the Canadian vessel was within Canadian waters when the pursuit of the accused's ship took place by a naval vessel. While the accused's ship was many miles into the international sea when she was ordered to heave to by the naval vessel, under the circumstances it would have been unreasonable for any communication to have been made with the accused's ship before the destroyer was within range to effectively prevent her escape. The accused's ship had not entered the waters of any other State and the naval vessel had been pursuing her continuously from the time the offence of importation had actually been completed by the Canadian vessel. The arrest of the vessel and its crew was properly conducted and properly brought within the jurisdiction of the Canadian courts. Accordingly, in arresting the ship and the crew there was no breach of any provision of the Canadian Charter of Rights and Freedoms.

Appeal by the accused from a judgment of Glube C.J.T.D., dismissing an application to quash charges of conspiracy to import a narcotic and importing a narcotic and possession of a narcotic for the purposes of trafficking.

### Judgment

Hart J. A.: This is an appeal from the decision of Glube C.J.T.D., dated 8 August 1985, in chambers, whereby she refused to grant a remedy under s. 24 of the Canadian Charter of Rights and Freedoms quashing the outstanding charges against the appellants under the Criminal Code and the Narcotic Control Act, R.S.C. 1970, c. N-1, because of an alleged breach of s. 8 (unreasonable search or seizure) and s. 9 (arbitrary imprisonment) of the Charter and further refused to grant bail to the appellants pending their preliminary hearing. At the time of her decision the preliminary hearing was already under way and subsequently resulted in the committal for trial of the appellants on three charges contrary to the Criminal Code and the Narcotic Control Act:

- (a) Conspiracy to import a narcotic into Canada;
- (b) Importing a narcotic into Canada; and
- (c) Possession of a narcotic for the purpose of trafficking.

Their trial is scheduled to begin 20 January 1986, in the Supreme Court, Trial Division.

The appellants' claim to the right to be released from all charges arose from the fact that they and their ship were arrested on the high seas by the RCMP with the aid of the Canadian Navy and brought back to the province to face the charges against them. They claim the arrest was illegal and the only suitable remedy was to quash the charges against them.

The Attorney General of Canada, on the other hand, claims that the police were justified in pursuing the appellants' ship and making the arrests, since that ship acted as a mother ship which entered Canadian waters and unloaded substantial quantities of narcotics to a smaller vessel, which then proceeded into a port in Nova Scotia and completed the importation of its cargo into Canada.

### Factual background

Normally one nation does not have the right to arrest the ships and citizens of another on the high seas, and a fairly extensive review of the factual situation is therefore necessary to determine whether the actions of the Canadian authorities in this situation were justified.

The RCMP were expecting an attempt to import a large quantity of narcotics into Canada as a result of information received from an informer and had been maintaining surveillance for some time on a motor vessel, the *Lady Sharell*, resting at Liverpool, Nova Scotia.

On 13 May 1985, the *Lady Sharell* left Liverpool with a crew of four members. She headed directly towards a position off Sable Island, Nova Scotia, where she remained under continuous surveillance by military aircraft for approximately 10 days.

While at sea the *Lady Sharell* held a rendezvous with only one vessel, later identified as the *Ernestina*. During this rendezvous 13.4 tons of cannabis resin were transferred from the *Ernestina* to the *Lady Sharell* and 15 \$1,000 Canadian bills were transferred from the *Lady Sharell* to the *Ernestina*. The rendezvous occurred in the territorial sea of Canada off Sable Island under cover of darkness between 10.58 p.m. on 22 May 1985, and 12.15 a.m. on 23 May 1985, a period slightly in excess of one hour. In total the *Ernestina* spent only about five hours within the limits of the territorial sea of Canada.

When the transfer was completed the *Ernestina* headed back onto the high seas, but military aircraft maintained an active and continuous radar surveillance until she was later intercepted by Her Majesty's Canadian Ship (HMCS) *Iroquois*. In the meantime surveillance was maintained upon the *Lady Sharell*, which departed Sable Island after the rendezvous and sailed directly to Lockeport, Nova Scotia, arriving on 24 May 1985, at approximately 6.00 a.m., at which time the police boarded her and seized 13.4 tons of cannabis resin.

While the *Lady Sharell* was en route to Lockeport on 23 May 1985, and the *Ernestina* had re-entered the open seas, the RCMP obtained search warrants to search the *Ernestina*, the *Lady Sharell* and the organization's communication base at Jordan Falls. Arrangements were also made at this time with Maritime Command for the assistance of a naval vessel, HMCS *Iroquois*, to pursue and intercept the *Ernestina*. Visual radar surveillance was continuously maintained but direct contact with either vessel by the police was not considered advisable until the *Lady Sharell* had arrived in port and completed the importation and her cargo had been seized.

On 24 May 1985, while at sea aboard HMCS *Iroquois* in pursuit of the *Ernestina*, Staff Sergeant L. Warren of the RCMP was advised of the seizure of the cannabis resin from the *Lady Sharell* in Lockeport Harbor. HMCS *Iroquois* then made contact with the *Ernestina* and requested her to stop for boarding. Shortly thereafter, at 11.45 a.m., Staff Sergeant L. Warren was the first to board the *Ernestina*.

The primary issue for decision by the chambers judge was whether or not the Canadian authorities were entitled under these circumstances to arrest the *Ernestina* and her crew and return them to Canada to stand trial on the charges alleged against them under the Criminal Code and the Narcotic Control Act. She decided that the police had reasonable and probable cause for believing that the crew members had, shortly before, committed an indictable offence in Canada and that they were justified in pursuing the ship into international waters for the purpose of their arrest. She held that under the international treaties, to which Canada was a party, the action of the police was justified and that there was no breach of the Canadian Charter in the conduct of the operation. The ship was lawfully searched and the appellants were lawfully arrested.

Glube C.J.T.D. went further and held that even if there had been a breach of international law in the arrest of the appellants that they were before Canadian courts and therefore subject to their jurisdiction. As authority for this proposition she referred to *The Ship North v. The King* (1906), 37 S.C.R. 385, and several other authorities. In the result she held that the appellants were validly held in custody in Canada and that the magistrate's subsequent refusal to admit them to bail was justified and that they should therefore remain in custody pending their trial.

The appellants now appeal to this Court on the following grounds:

1. Royal Canadian Mounted Police.
2. That the learned Chambers Judge erred in holding that the Royal Canadian Mounted Police had lawful authority to stop M. V. Ernestina, to search it and its occupants, and seize various articles.
3. That the learned Chambers Judge erred in finding that the Appellants' rights under section 8 of the Canadian Charter of Rights and Freedoms were not infringed or denied.
4. That the learned Chambers Judge erred in holding that the Appellants were lawfully arrested and were not unlawfully in detention.
5. That the learned Chambers Judge erred in holding that the Appellants' rights under section 9 of the Canadian Charter of Rights and Freedoms were not infringed or denied.

The appellants argued that there was no authority to arrest them on the high seas unless the police could bring themselves within the concept of "hot pursuit" and that they had not done so. They said that they were in fact kidnapped by the Canadian authorities and forced against their will to return to a Canadian port to face the charges against them.

Today the international law relating to the pursuit of ships onto the high seas after an offence has been committed within the territorial waters of a State has been codified in an international treaty known as the Geneva Convention on the High Seas, 1958, 450 U.N.T.S. 11. Although Canada was a signatory to this Convention in 1958 and the Convention came into force in 1962, after the required number of countries had signed, Canada has not yet ratified the treaty. It does serve, however, as an international recognition of the principles affecting the law of the sea, and in its preamble states:

"The States Parties to this Convention,

"Desiring to codify the rules of international law relating to the high seas,

"Recognizing that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April, 1958, adopted the following provisions as generally declaratory of established principles of international law,

"Have agreed as follows:"

By article 23 of the Convention, the right of hot pursuit on the high seas is stated as follows:

"1. The hot pursuit of a foreign ship may be undertaken 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. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

"2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

"3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

“4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

“5. Where hot pursuit is effected by an aircraft:

“(a) The provisions of paragraph 1 to 3 of the present article shall apply *mutatis mutandis*;

“(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest on the high seas that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

“6. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities, may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the high seas, if the circumstances rendered this necessary.

“7. Where a ship has been stopped or arrested on the high seas in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.”

I am satisfied that the Ernestina was a mother ship of the Lady Sharell and that the Lady Sharell was within Canadian waters when the pursuit of the Ernestina took place by HMCS Iroquois. It is true that the Ernestina was many miles into the international sea when she was ordered to heave to by the Iroquois, but under the circumstances it would have been unreasonable for any communication to be made with the Ernestina before the destroyer was within range to effectively prevent her escape. The Ernestina had not entered the waters of any other State and the Iroquois had been pursuing her continuously from the time the offence of importation had been actually completed by the Lady Sharell. Under the doctrine of necessity and reasonableness enunciated in *The Ship North* by the Supreme Court of Canada, the arrest of the Ernestina was properly conducted and she and her crew were properly brought within the jurisdiction of the courts of this province. I would hold therefore, as did the Chambers Judge, Chief Justice Glube, that in arresting the Ernestina and her crew there was no breach of any provision of the Canadian Charter of Rights and Freedoms, since an offence had been committed within the territorial waters of Canada and the ship was properly pursued under the principles of international law. It is therefore unnecessary to deal with any of the other issues raised on this appeal.

I should point out that Canada is also a party to the Single Convention on Narcotic Drugs, 1961, 570 U.N.T.S. 557, adopted by a conference of the United Nations, which came into force in 1975 and was accepted by this country in 1976. Honduras is also a party to this Convention. In the Convention by article 35 (c) the parties agree to:

“(c) Co-operate closely with each other and with the competent international organizations of which they are members with a view to maintaining a coordinated campaign against the illicit traffic;

Other provisions of the convention which relate to the matter before the court are found in article 36:

“1. Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties or deprivation of liberty.

“2. Subject to the constitutional limitations of a Party, its legal systems and domestic law,

“(iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given.

“3. The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on questions of jurisdiction.

“4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.”

International approval to the seizure of ships is contained in article 37, which states:

“37. Any drugs, substances and equipment used in or intended for the commission of any of the offences, referred to in article 36, shall be liable to seizure and confiscation.”

Under international law the only party having the right to complain about the seizure of the Ernestina was the Government of Honduras, and the fact that that Government is a party to the Single Convention on Narcotic Drugs, 1961, may very well be the reason why no protest was made to Canada over this incident.

For all of these reasons I would dismiss the appeal.

Appeal dismissed.

#### **D. HOT PURSUIT: REGINA v. MILLS AND OTHERS**

Ruling on jurisdiction and abuse of process issues

##### *Summary*

Six defendants, Seggerman, Janssen, Charlin, Artesan, Baric and Grbac apply to stay these proceedings on the grounds of abuse of process. They are all foreign nationals and were arrested at sea in international waters on the MV Poseidon. I have first to decide whether I have jurisdiction to hear and determine this application; the Crown has argued that no domestic court in the United Kingdom has authority to hear the application or, if that be wrong, the application should have been made to the High Court which has exclusive jurisdiction. I have, however, been invited, whatever my decision on those submissions, to deal with the substantive arguments on the application to stay and to rule on both matters.

The substantive application by these defendants is to stay the proceedings because they were wrongly arrested on the high seas in breach of international law. They argue that, applying the principles contained in the decision of the House of Lords in *Regina v. Horseferry Road Magistrates Court ex-parte Bennet* L1994J 1AC 42, the court should intervene and refuse to countenance behaviour by the executive that threatened either basic human rights or the rule of law, even though the matters complained of would not prevent the defendants having a fair trial.

##### **Judgment**

I have heard evidence over a period of five days, interrupted by the need for me to review decisions made on ex-parte applications by the Crown to withhold disclosure of documents on the grounds of public interest. I start by setting out the facts relating to the issue of abuse of process as they were agreed or as I find them to be.

The fourteen defendants on the indictment are charged with conspiracy to import cannabis into the United Kingdom. The quantities are considerable, over 6 tons with a street value in excess of £24 million. Those drugs were imported by sea from Morocco in a well-organized operation. They were shipped in MV Poseidon, a diving support vessel registered in St. Vincent. The Poseidon is a 200-foot long diving support vessel of 953 registered tons.

## Factual background

### *Phase one*

On 5 November the defendant Maezele, who has pleaded guilty, inspected the Delvan, a British registered fishing trawler of 50 tons, which was lying in Cork Harbour in the Republic of Ireland. It was crewed by undercover customs and police officers. He had been introduced to the Delvan by contacts made by the defendant Mills, who has also pleaded guilty, with another undercover police officer. The Delvan was deemed suitable and set sail from Cork at 1404 on 9 November with a crew of five undercover officers and with Maezele.

A naval task force commanded by Commander Durston, who was one of the witnesses giving evidence before me was deployed in support of the operation being mounted by the Customs and Excise. This force consisted of Her Majesty's Ship (HMS) Avenger, a frigate, and Royal Fleet Auxiliary (RFA) Olna ....

At 2311 on 9 November HMS Avenger established radar contact with the Poseidon which was then at 49°16'N 010°08'W in international waters ....

By 1025 on 10 November the Poseidon and the Delvan had rendezvoused at 50° 00'N 009° 00'W, a position some 100 miles west of the Scillies and 100 miles south of Ireland in international waters. The rendezvous was monitored on radar by HMS Avenger and lasted from 1025 to 1440 when the Delvan opened from the Poseidon. During the rendezvous some 3 tons of cannabis were transferred to the Delvan. The whole cargo could not be transferred because of the weather. At all times during the operation both vessels remained in international waters.

At 1440 Delvan adopted a course of 110° in the general direction of the south coast of the United Kingdom. From 0130 on 11 November the Delvan was monitored by the Customs cutter Seeker which had sailed from Plymouth on 10 November under orders to search for and maintain surveillance on the Delvan. At that time radar contact was made and a few minutes later the Delvan entered United Kingdom territorial waters in which she remained until entering port .... The Delvan entered Littlehampton Harbour and moored at 2100. She unloaded her cargo of drugs and Maezele disembarked. The Delvan left Littlehampton at 2110.

### *Phase two: arrest of mothership is authorized*

That order was received by the task force at 2315.

The Poseidon had proceeded on a course of 210° roughly south west back into the Atlantic from the rendezvous. It was under the continued surveillance of the Avenger which remained some 25 miles astern again out of range of Poseidon .... The course sailed and observations of the position of the Poseidon which are shown on the chart produced to me were not disputed by the defendants, indeed were confirmed by the courses marked on the chart seized from the Poseidon when she was arrested. At the time when the authority to arrest the Poseidon was received she was in international waters and had never entered the territorial waters of any State. I am satisfied that at no time after the transfer operation did the Poseidon have any contact with any other vessel which would have enabled it to trans-ship any cargo or person ....

I heard evidence from both Commander Durston and Mr. Hector about the advance preparations made for the arrest of the Poseidon in anticipation of authority being given. I also heard evidence about the weather conditions. Commander Durston told me that the relative size and construction of the ships in the Naval task force and the Poseidon precluded a boarding direct from one vessel to another. This evidence I unreservedly accept. The risks of damage would have been great in the prevailing weather conditions, the Delvan had herself suffered damage whilst alongside the Poseidon.

Commander Durston told me that he had considered a transfer of the boarding party by boat and he conducted a trial to see if this was feasible. He concluded that it was not and chose the alternative of landing the boarding party from helicopters.

Three helicopters were used for boarding. Commander Durston first attempted to call the Poseidon by name by very high frequency (VHF) radio on channel 16 on two separate occasions commencing at 0733, but received no reply.

I received evidence from Mr. Montalto about the radio equipment carried by Poseidon. VHF radio sets were positioned on either side of the bridge adjacent to the bridge deck doors. They were in working order; they were used by the naval prize party on the voyage back to the United Kingdom after the vessels arrest .... No evidence was given by any of the defendants and I conclude that messages sent on VHF radio could have been heard on the bridge of the Poseidon.

... I find that no boarding took place until after an order to stop had been given. That is wholly consistent with the sequence of five messages sent by the Lynx helicopter to the Poseidon. It was not disputed that all the crew were arrested and later transhipped to the Avenger.

I heard considerable evidence about the negotiations between the Customs and Excise and the Ministry of Defence about the provision of naval assistance in the arrest of the Poseidon. I was also told about the discussion between the lawyers in the two departments about the legal position. I understand that this is the first occasion on which an operation of this nature had been mounted in international waters. I have seen the written advice given by Ms. Bolt of the Customs and Excise solicitors office to Mr. Delahunty. I am satisfied that having received that advice he endeavoured to act within it. He was quite frank in his evidence, he told me that his priority was to let the Delvan land its cargo at a United Kingdom port so that he could seize the drugs and arrest the United Kingdom shore party. It was clear to me that the arrest of the Poseidon was secondary to that aim. That is supported by the reference in the message from the Ministry of Defence sent at 2313 to Phase two. Delahunty believed that the delay between the entry of the Delvan into United Kingdom territorial waters and the order to arrest the Poseidon given at 2313 on 12 November was justified both operationally and in law. It was not argued that he acted in bad faith in delaying the arrest.

Soon after the defendants had first been brought before the magistrates the Crown gave notice to them by letter dated 8 December 1993 that they had been arrested in international waters in exercise of the right of "hot pursuit" contained in international law which is to be found in the Geneva Convention on the High Seas of 1958

### **Hot pursuit**

Bearing those considerations in mind, I have been referred to numerous decisions in foreign jurisdictions and to the writings of a number of authors on the topic of hot pursuit.

One description of "hot pursuit" is to be found in "The International Law of the Sea" by O'Connell:

"Hot pursuit may be defined as the legitimate chase of a foreign vessel on the high seas following a violation of the law of the pursuing State committed by the vessel within the pursuing State's jurisdiction, provided that the chase commences immediately and the vessel evades visit and search within the jurisdiction, and provided that the chase is carried on without interruption onto the high seas."

It is clear that the right has existed for many years and was well established in the nineteenth century. O'Connell suggests that it had a jurisdictional basis stemming from the territorial concept of "fresh pursuit", the right of the sheriff to pursue an offender fleeing out of his county into the jurisdiction of another, with the attendant fiction that, for jurisdictional reasons, an arrest made after pursuit was made at the place where the pursuit commenced.

The Geneva Convention on the High Seas of 1958 codified the right in article 23 in the following terms:

"1. The hot pursuit of a foreign ship may be undertaken 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. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order

should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 24 of the Convention on the Territorial Sea and the Contiguous Zone, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

“2. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

“3. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

“4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.”

It is convenient to deal with hot pursuit in the terms set out in the Convention. Article 23 imposes a number of qualifications upon the exercise of the right and I will deal with each separately.

#### *Offence in territorial waters*

The first precondition to the exercise of the right of hot pursuit is a reasonable belief by the United Kingdom authorities that a violation of the law of the United Kingdom had taken place within its territorial waters. There was clear and, for the purpose of this application, undisputed evidence that the Poseidon had been involved in the transshipment on the high seas to the Delvan of a considerable quantity of drugs and that those drugs had been taken by the Delvan to and unloaded at Littlehampton.

In its original form the right of hot pursuit could be exercised only if the offence itself had taken place in territorial waters. An example of such a situation is to be found in the Canadian decision of *The Ship North v. the King* 1906 37 Canadian SCR in which case the North had been observed fishing within Canadian territorial waters, was chased out into the high sea and there arrested. The arrest was upheld. This is reflected in article 23 (1) that provides that the hot pursuit must commence when the foreign ship or one of its boats is present within territorial waters.

#### *The doctrine of constructive presence*

The era of prohibition in the United States was fruitful for smugglers and for arrests at sea. A practice of boats hovering just outside the three-mile limit grew up, goods being smuggled ashore in the boats of the hovering vessel. The mother or hovering ship is deemed to be inside territorial waters because boats belonging to her are within territorial waters and if they are violating the laws of the State in whose waters they are present there is a right of hot pursuit against the mother ship.

The doctrine was upheld in the 1922 decision of the Massachusetts District Court, *The Grace and Ruby* 283, Federal Reporter 283. In that case goods were smuggled ashore in a boat taken ashore with the assistance of the crew of the foreign vessel. The court held that the act of unloading the contraband was not complete until the goods had been unloaded ashore and the fact the ship remained outside the three-mile limit did not make the seizure illegal.

#### *The doctrine of extended constructive presence*

This arises when the pursued ship is working as a team with another ship—not being one of its boats—which is itself within territorial waters. It is described in article 23 (3) of the Convention in the following words:

“... the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship ....”

This doctrine was first recognized in the 1923 decision of the Federal Circuit Court of Appeals, *The Henry L. Marshall* 292, Federal Reporter 486. The Henry Marshall unloaded its cargo of alcohol outside the three-mile limit into small boats, not part of its equipment, which had come out from the shore and was arrested. The seizure was upheld. The

ship was a British vessel and the United Kingdom Government disputed the seizure, but the position was ultimately regularized by a treaty by which the United Kingdom agreed not to object to searches and seizures carried out within defined situations within the American jurisdiction.

After the ratification of the Geneva Convention in 1962 the doctrine was considered in the Italian Courts in *The Pubs* 1977 International Year Book of International Law at page 587. In that case there had been trans-shipment in international waters of cigarettes to a daughter ship which had come from Italian territorial waters. The daughter ship was pursued to and arrested in territorial waters. It was held that the right of hot pursuit which began immediately on the arrest of the daughter ship was extendible to the mother ship.

The doctrine was further upheld by the Nova Scotia Supreme Court in *Regina v. Sunila and Solayman*. In that case a trans-shipment of 13.4 tons of cannabis resin had taken place within territorial waters and the mother ship had returned to the high seas. She was arrested in international waters after the daughter ship had arrived in port and completed her importation.

All the cases to which I have referred above were cases in which the daughter ship had come from the shore of the pursuing State and returned to those shores. The defendants submit these circumstances were not present in this instant case. The *Delvan*, ship to which the goods were trans-shipped by the *Poseidon*, had departed from Cork in the Irish Republic before the rendezvous in international waters. It then made passage to British territorial waters before landing its cargo at Littlehampton. O'Connell at page 1093 in his commentary on the doctrine says:

"This paragraph [paragraph 3 of article 23] is not, like paragraph 1, operative to establish the rule, but circumstantial as to its application; and it makes pursuit conditional on team work and use of the vessel as a mother ship, which are not conditions unusual in trans-shipment."

The defendants contend that the unity of control which O'Connell has identified as an essential feature of the doctrine is absent when the daughter ship departs from a port in a different jurisdiction to its port of destination and therefore it cannot be said that the *Poseidon* and the *Delvan* were acting together as a team.

The essential element in all the cases to which I have been referred is the transfer of the drugs or other contraband into territorial waters from the mother ship by the daughter ship as part of a pre-arranged plan. I must remind myself that the charges against the defendants are based on conspiracy. That offence will be made out only if the jury accepts that the defendants were part of that conspiracy. In my judgement the location of the port of departure of the mother ship is irrelevant. It is clear to me that the policy consideration behind doctrine is the prevention of the commission of crimes in the territorial waters of the State which exercises the right to hot pursuit. That consideration would be defeated if the point of departure was relevant, mother ships hovering outside territorial waters could never be arrested if the daughter ship departed from a different jurisdiction to her ultimate destination.

### *Immediacy*

The defendants submitted that hot pursuit should have commenced immediately the *Delvan* entered United Kingdom territorial waters at 0130 on 11 November. Article 23 in the Convention is silent on the time at which the pursuit must commence.

Poulantzas in "The Right of Hot Pursuit in International Law" published in 1969 said:

"The right of hot pursuit represents a traditional limitation to the freedom of the high seas and should only be used for exceptional and urgent circumstances which necessitate very quick action on the part of the coastal State. If the period of time between committing an infringement by a foreign vessel and the commencement of the pursuit is not short, then the right of hot pursuit cannot any longer be justified under international law. However, the element of immediacy should not be interpreted *stricto sensu*, but in a broader sense."

Another commentator, Craig Allen, writing in 1989, in "Doctrine of Hot Pursuit" dealt with immediacy in the following terms:

“The term ‘hot pursuit’ suggests that any pursuit must follow closely upon a violation. Immediate commencement of hot pursuit is not an inflexible requirement. Pursuit need not be commenced the moment a violation is detected; however, an unreasonable delay between detection of the violation and commencement of the pursuit will cast doubt on the pursuit’s legitimacy.

Initiation of pursuit may justifiably be delayed for violations involving vessels constructively present within coastal state waters. In constructive presence cases, the violation is complete only when the contact vessel consummates its violation of coastal state law. This may require that the pursuit be delayed a day or more. As long as the contact vessel remains within the coastal state’s waters, however, pursuit of the mother ship may be delayed until the contact vessel’s violation is complete.”

It is necessary to consider also the historic justification for both immediacy and continuity of pursuit. Before the installation in ships of modern tracking devices it was essential that the pursuing vessel maintained contact with the offending ship to be able to demonstrate that it had not arrested an innocent vessel exercising its right to navigate freely on the high seas. Similar considerations applied historically to the exercise on land of the right of “fresh pursuit”, the sheriff’s officers needed to be able to prove that they had arrested the true offender. Those practical considerations do not apply today when modern and accurate tracking devices are available at sea. The undisputed evidence shows that the identity and position of the Poseidon was known at all times to HMS Avenger.

In 1986 the Nova Scotia Supreme court held in *Regina v. Sunila and Solayman* that delay in commencing hot pursuit until after the daughter ship was justified. Hart J. A. said:

“Visual radar surveillance was continuously maintained but direct contact with either vessel by the police was not considered advisable until the Lady Sharrel [the daughter ship] had arrived in port and the offence of importation had been completed.”

After considering the terms of article 23 he went on to say:

“It is true that the Ernestina [the mother ship] was many miles into the international sea when she was ordered to heave to by the Iroquois [the pursuing warship] but under the circumstances it would have been unreasonable for any communication to be made with the Ernestina before the destroyer was in range to effectively prevent her escape.”

The arrest was upheld.

In this instant case the delay in commencing the pursuit of the Poseidon until after the arrival of the Delvan in Littlehampton and the completion of the importation does not, in my judgement, mean that the right of hot pursuit was lost. The decision to delay was made for justifiable reasons and, as the Poseidon had been under effective surveillance since the time of the trans-shipment there was no risk of the arrest of an innocent vessel. The offence in this case is conspiracy to evade the ban on the importation of drugs or to supply drugs. In *Regina v. Wall* 1974 2 All ER 245 it was held that, although in general acts committed abroad could not be the subject of criminal proceedings in England, steps taken abroad were for purpose of the fraudulent evasion and it followed that the defendant in that case was knowingly concerned in the fraudulent evasion of the ban. Similarly the offence of conspiracy was not necessarily complete until the drugs landed in Littlehampton. It was therefore arguable that the right to hot pursuit had not arisen until that time. In my judgement Mr. Delahunty was entitled to delay the issue of order for arrest of the Poseidon until the drugs had been landed in the United Kingdom at 2130.

There followed a delay until first light on 13 November. For the reasons which I have given earlier I am satisfied the commander of the Naval Forces was justified, having regard to all the ambient conditions, sea state and light, to delay the commencement of the hot pursuit until then because the purpose of the pursuit, boarding and arrest was not capable of fulfilment at the earlier time and in those circumstances.

Article 23 (3) provides that there are two conditions precedent to the commencement of hot pursuit:

(a) The presence of the ship pursued or the daughter ship within territorial waters; and

(b) The giving of a visual or auditory signal to stop at a distance which enables it to be seen or heard.

The signal to stop ensures that the offending ship is aware that it has been detected, identified and is being ordered to heave to for boarding. The pursuing vessel is entitled to open fire if its order is not complied with (see *United States v. Striefel* 1982, *American Maritime Cases* 1155). A signal will go some way to prevent unnecessary damage or injury. Having accepted that the delay in commencing the pursuit was justified the delay in sending the signal to stop was also justified.

The defendants argue that a signal sent by radio did not comply with the condition precedent in article 23 (3). The position has not been considered in any decided case and the commentators are divided.

It is clear from Poulantzas at page 204 that both the Hague Codification Conference of 1930 and the Geneva Conference of 1958 accepted that signals by radio should not be regarded as lawful for the commencement of the pursuit. It was thought that this exclusion was justified to prevent abuse from radio signals sent from a considerable distance. He accepted that wireless could be used by the pursuing ship in order to be assured that the auditory or visual signals had been understood.

McDougal and Burke (*The Public Order of the Oceans*, 1987) were of the opinion that the kind of signal given to a suspect directing it to stop and submit to a search seemed unimportant as long as it was followed in good time by the actual appearance of the arresting vessel. They went on to add that what was to be avoided was the imposition of delay, because the signal is given by a craft which is unable within a reasonable period to impose effective control over the violator.

This view was followed by Craig Allen in 1989, he said:

“Most modern publicists agree that enforcing craft should be permitted to give the initial signal by radio, even before the pursuing vessel comes within sight. Where it is clear by the offending vessel’s acknowledgement or otherwise that the vessel received and understood a signal to stop given by radio, such a signal meets the underlying policy goal of providing adequate notice to the vessel.”

The presence of three helicopters hovering close to the *Poseidon* would only have added emphasis to the radio signals sent by the *Lynx* helicopter.

Modern technology has moved on since 1958 and the law must take account of those changes. Mr. Montalto told me that VHF radio is now the standard method of communication between vessels at sea, which are required by international radio regulations to keep a watch on channel 16. I hold that the messages sent by this medium comply with the preconditions of the Convention to the exercise of the right of hot pursuit.

I hold that the *Poseidon* was properly arrested in international waters under the terms of the Geneva Convention and in accordance with the provisions of the international law of the sea.

For these reasons I disallowed the defendants’ application to stay the indictment on the grounds of abuse of process.



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