United Nations CTOC/COP/2008/18

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

Distr.: General
18 February 2009

Original: English

Fourth session
Vienna, 8-17 October 2008
Agenda item 2 (c)
Review of the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto: expert consultation on international cooperation, with particular emphasis on extradition, mutual legal assistance and international cooperation for the purpose of confiscation, and the establishment and strengthening of central authorities

Meeting of the open-ended working group of Government experts on international cooperation held in Vienna from 8 to 10 October 2008

Report of the Chairperson*

I. Introduction

1. The Conference of the Parties to the United Nations Convention against Transnational Organized Crime (thereafter the Conference) decided pursuant to its decision 3/2 to establish an open-ended working group of government experts on international cooperation as a constant element of the Conference of the Parties.

2. The working group was convened during the fourth session of the Conference of the Parties to discuss the issues of extradition, mutual legal assistance and international cooperation for purposes of confiscation and was chaired by Ms. Marjorie Bonn (Netherlands). The working group held four meetings parallel to the plenary meetings of the Conference of the Parties on 8-10 October 2008.

3. During its four meetings, the working group reviewed the implementation of articles 13, 16 and 18, of the United Nations Convention against Transnational Organized Crime, addressed several practical aspects and experiences in applying these provisions and formulated a number of recommendations for consideration by the Conference at its fourth session. In so doing, the working group decided to

* The present document has not been formally edited.

V.09-80953 (E) 060309 090309

update decision 3/2 and to recommend the adoption by the Conference of a new decision containing a number of measures to further promote the implementation of the provisions on international cooperation of the Convention (decision 4/2). The major aspects of the discussions as summarized by the Chair are reproduced below.

II. Summary of discussions by the Chair

A. Extradition

4. During its first meeting, the working group reviewed article 16 of the Convention relating to extradition in detail and discussed current practices and experiences with the application of this article.

5. In her introductory statement, the Chair noted that article 16 has a considerably broader scope than article 3 of the Convention. Article 16, paragraph 1 allows for extradition under the Convention for offences referred to in article 3, paragraph 1 (a) and (b) (Convention offences and serious offences as defined in article 2 of the Organized Crime Convention) even where the transnational character has not yet been completely established. The mere fact that the subject of the extradition request is located in the territory of the requested State party is sufficient to establish the transnational character of the offence for the purposes of the application of article 16 on extradition. The scope of the article was intentionally broadened by the drafters of the Convention in order to facilitate extradition as much as possible. The working group recognized this, and several delegations expressly confirmed the view of the Chair.

6. The working group extensively discussed the experience of States in the use of the Convention as legal basis for extradition. The distinction was made between "treaty-based" countries, whose legal system requires a treaty to grant extradition, and "non-treaty based" countries, which can grant extradition on the basis of their national law and/or on the basis of reciprocity. Many "treaty-based" countries recognized that their legal system allows, in the absence of a bilateral treaty, for the use of the Convention as the legal basis for extradition. Several countries provided concrete examples of successful requests for extradition based on the Organized Crime Convention, mostly for cases relating to fraud, arms dealing and smuggling of migrants. Other countries emphasized the usefulness of the Convention in cases where States parties have old extradition agreements in place that contain only a limited list of extraditable offences. In such cases, treaty-based countries have the options of applying paragraph 1 of article 16 in lieu of their bilateral treaty or of applying paragraph 3 of article 16, which requires the States parties to deem the offences covered by the Convention as included in their bilateral extradition treaties and so to expand the scope of those treaties to the offences covered by the Organized Crime Convention.

7. Recalling the notification obligation under article 16, paragraph 5 (a), the Chair reminded States parties that make extradition conditional upon the existence of a treaty, to notify the Secretary-General whether they will recognize the Organized Crime Convention as the legal basis for extradition.

8. In addition, the working group considered it useful that States parties that do not require a treaty as a legal basis for extradition also inform the Secretary-General of this. The secretariat indicated that parties, when updating the contact details of their designated authorities, were also invited to provide other relevant information which could include whether or not they require a treaty basis for extradition. In addition, the secretariat informed the group that the questionnaire/checklist on implementation of the Convention included a specific question on that issue.

9. While recognizing the value of the Organized Crime Convention as a legal basis for extradition, some other countries considered that in certain cases it was easier for them to resort to reciprocity than to the Convention.

10. Difficulties were identified in those cases where a requested State party requires a treaty but does not have a bilateral agreement with the requesting State party and does not recognize the Organized Crime Convention as a legal basis for extradition. These countries are not able to fulfil their obligations under article 16 and should consider ways to do so.

11. The working group discussed the issue of extradition of nationals. Common law countries, in general, allow for the extradition of their nationals, while civil law countries are generally more hesitant in extraditing their nationals. The group found, however, that the situation is not always so clear-cut, and there is a differentiated range of practices in place among States to deal with the issue of the extradition of nationals.

12. Some civil law States allow for the extradition of their nationals. This may be subjected to specific limitations such as restricting the countries to which the national may be extradited or restricting the offences for which a national may be extradited. The extradition may also be subjected to specific conditions, such as the return of the national after the prosecution in order to serve his or her sentence at home, which is provided for in article 16, paragraph 11, of the Convention. One country reported that while its national law did not permit the extradition of nationals, exceptions to this rule could be introduced by means of treaties, although this had not yet been done.

13. A discussion emerged as to whether the time at which the nationality was acquired could be of relevance to the practice of non-extradition of nationals. Some countries have provisions that enable the extradition of nationals if the offence was committed before the acquisition of the nationality, in particular where drug offences were involved. There was also a suggestion that the nationality at the time of the decision on the request should be considered instead of the nationality at the time of the offence. This type of flexibility in bilateral agreements could further the extradition of nationals. The group considered that another useful option for States was the introduction of conditions for the acquisition of citizenship that would allow revoking citizenship in those cases where the person had previously committed a crime abroad.

14. Countries that do not extradite their nationals adhere to the principle of *aut dedere aut judicare*. The principle, enshrined in paragraph 10 of article 16, requires that where extradition is refused solely on the ground of nationality, the requested State party will be ready to prosecute the person in his or her own territory. The group recognized that prosecution in lieu of extradition was important but that its application was work-intensive. In general, it will not be enough for the formerly

requesting State party to send a copy of its investigation file; rather, a considerable amount of cooperation between the requesting and requested States will be necessary to prepare the case for a trial in the requested State. Several countries indicated that they would need to collect the evidence themselves to ensure its admissibility at trial and that they would need to seek various forms of mutual legal assistance to gather the evidence in accordance with their national rules. The Chair suggested that States could provide provisions in their national law that would facilitate the assimilation of foreign evidence with nationally gathered evidence and gave an example from her own country. Successful examples of cooperation in the prosecution of nationals were reported among different States. The working group stressed the importance of pursuing the trials and prosecutions of nationals with the same vigour as for domestic cases in order to prevent the creation of safe havens for nationals to commit crimes or the subsequent denial of extradition requests on the basis of a prior prosecution.

15. One State addressed the question of extradition of nationals who have the nationality of the requested State as well as the requesting State. Most States that do not allow for extradition of nationals indicated that they would consider their nationality to prevail over that of the requesting State. However, the legislation of some countries admitted exceptions to this rule in cases where the second nationality was not acquired by birth or where the person sought consented to the extradition.

16. Considerations existed in some countries also with regard to the extradition of foreign residents, in that long-time residents could, under certain conditions, be assimilated to nationals and thus not be extradited. One State indicated that it applied this principle under several conditions, including that the State could exercise jurisdiction over the offences domestically in order to be able to apply the principle of *aut dedere aut judicare*.

17. In the context of paragraph 13, which guarantees the right to a fair trial, the group discussed the cases of extradition requests based on judgements rendered in absentia. In common law countries, this type of decision is extremely rare, whereas in civil law countries a variety of practices exist that can lead to judgements in absentia. The working group found that due to the differences between common law and civil law countries, it will always be of utmost importance that the circumstances of the in absentia judgement are explained carefully to the requested State, and in particular whether the person sought has the right to a retrial or an appeal and what procedures will apply.

18. The working group discussed issues relating to guarantees or assurances given by the requesting State. It was noted that a potential conflict could arise in practice in cases where the competent authority for extradition of the requesting State provides a guarantee to the requested State that can be overruled either by a court or another independent authority in accordance with the national law of the requesting State. The group identified several practices among States to address the issue of guarantees or assurances: some countries agree internally beforehand on certain types of guarantees by involving the authority that will be ultimately responsible; others defer the issue to their highest court to establish the guarantees when requested; some other countries provided only assurances limited to the prosecution services, without affecting the sovereignty of their judiciary power. The chair suggested the inclusion of a rule in the national extradition law that would oblige all

the authorities in the country to adhere to a guarantee given by the competent national authority to the requested State. As a general principle, the group considered that guarantees given by authorized authorities should be considered as valid and trustworthy. Additional internal legislation may be required to ensure that the guarantees provided are in fact followed in the country.

19. The group stressed the importance of paragraph 16 of article 16 containing the obligation to consult between the requesting and requested States before refusing to extradite. Direct consultations were considered extremely useful to better understand the circumstances of the case.

B. Mutual legal assistance

20. During its second and third meetings, the working group reviewed the implementation of the provision on mutual legal assistance (article 18) in detail and discussed current practices and experiences with its application.

21. The working group discussed the broad scope of application of article 18 on mutual legal assistance, allowing States to provide one another the widest mutual legal assistance possible in relation to the Convention offences. For the purposes of mutual legal assistance, the requirement that the offences be transnational in nature (article 3, paragraph 1 (a) and (b)) is satisfied when the requesting State has "reasonable grounds to suspect that the offence is transnational". As stated in paragraph 1 of article 18, these reasonable grounds may in particular be inferred from the fact that "the victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party". The scope was extended by the drafters of the Convention in order to facilitate mutual legal assistance as much as possible, notably in the early stages of the investigation when it is difficult to establish the transnational nature of the offence. Several countries expressly confirmed that their national legislation considered the transnational nature of an offence to be established when the conditions set forth in article 18, paragraph 1, were met. One country required more specific criteria under its national law.

22. The group discussed paragraph 4 of article 18 relating to the provision of spontaneous information. Some countries required this treaty provision in order to be able to provide information spontaneously. Other countries stated that their national law does not require a treaty basis and allows for the provision and receipt of spontaneous information.

23. When providing spontaneous information, the informing State needs to consider whether the data protection would be sufficient in the receiving State and whether the information would be kept confidential if necessary. While paragraph 5 of article 18 provides for rules on these issues, prior consultation between both countries involved was considered useful. Prior consultation would be especially useful in cases in which the receiving State has the death penalty and the informing State has abolished capital punishment.

24. Countries reported having included provisions in their national laws allowing for spontaneous information for specific offences, such as human trafficking, money-laundering or financing of terrorism. One country reported that it included the possibility of spontaneous information in its bilateral cooperation agreements.

The group considered that both approaches are useful additions to article 18 because they would make it clear for judges that spontaneous information can be provided.

25. Paragraph 7 of article 18 allows for the provisions of article 18 to operate as a self-standing and complete mutual legal assistance treaty. This makes it possible for States that are not bound by any cooperation agreement to cooperate without needing to conclude a bilateral agreement. The group acknowledged the comprehensiveness of article 18 and noted that article 18 was a solid basis for cooperation.

26. The group recognized that States that had already concluded arrangements for mutual legal assistance could use these instruments. Even there, however, it could still be advisable to consider the modern set of rules of article 18. The conclusion of bilateral or (sub-)regional agreements that can further detail their cooperation could be advisable where there are very frequent contacts between the States involved.

27. The group addressed issues related to the actual submission of a request for mutual legal assistance. In line with paragraph 14 of article 18, most countries reported that their legislation required requests to be made in writing. Several countries admitted that, for urgent cases, a temporary advance request could be forwarded via e-mail, fax or even via telephone, provided that it was later complemented by a formal written request. The group reminded States that not all requests should be sent via e-mail, since this means of communication is not secure and could involve data security risks.

28. Many countries require that foreign requests are formulated in their official language(s). However, several countries reported that they had indicated in the directory of central authorities that they were prepared to receive requests in other languages. Other countries stated that they can accept a non-official language as a working language for preliminary requests, but that those requests would have to be translated into the official language when the requests were to be executed by their courts.

29. Paragraph 13 of article 18 requires States parties to establish a central authority and to provide the Secretary-General with its details. The group recognized with pleasure that the United Nations Office on Drugs and Crime (UNODC) has established, on the basis of the information so received, an online directory for central authorities designated under articles 16 and 18 of the Convention and article 8 of the Migrants Protocol. The directory can be found at http://www.unodc.org/compauth/en/index.html. The working group considered it crucial that States parties ensure this data is regularly updated.

30. The role of the central authorities designated under paragraph 13 can vary in different countries. In some countries, the central authorities are directly involved in handling the requests, while in others the central authorities do not directly execute or formulate requests but only forward the requests to and from their competent authorities. While recognizing that there are different levels of flexibility in this field, many States thought it would be very useful if central authorities would allow for direct contact between the authorities from whom requests emanate and the authorities who will handle the requests in the requested State. Such direct contact could contribute to the efficient execution of requests and diminish the refusal of requests.

31. Discussions were also held as to whether countries had or were able to have one single central authority, and it was found that existing practices varied considerably among States. The size and capacities of central authorities also showed considerable variation among States: while the central authority was limited to a few persons in some countries, other countries reported having centralized departments with advisors and multilingual experts to assist the authority in the fulfilment of its tasks.

32. The Chair conveyed her opinion that it was important that there should always be a response to a request. Practitioners find it very difficult not to receive responses. While it is preferred that the response be timely and positive, even in cases where the execution of the request will be delayed or denied, a response is of the utmost importance. This opinion was shared by many countries.

33. Countries exchanged experiences of requests executed under their own law but, as provided for in paragraph 17 of article 18, in accordance with (foreign) procedures specified in the request. While recognizing that difficulties existed in some countries, the group stressed the importance of being able to honour a request for specific procedures as much as possible, since this would enhance the admissibility of the evidence gathered in the requested State in the proceedings in the requesting State. Direct contacts and consultations were strongly encouraged in this respect.

34. The group discussed at length the growing importance of applying for confidentiality of the requests, as set out in paragraph 20 of article 18. The group learned that the public accessibility of requests has increased substantially in some States due to technological developments. Several countries reported that their domestic law considered court records as accessible to the public and that they could even be posted on the Internet. At least the United States of America and Canada recommended strongly that countries requiring that their requests be kept confidential should explicitly indicate this and the reasons for the confidentiality in their request. The reasons given for the request for confidentiality are important since they serve as a basis for obtaining “sealing orders” from the courts in order to keep the request confidential.

35. A useful – although resource-intensive – practice of establishing liaison magistrates to assist with the forwarding and execution of requests was discussed. Liaison magistrates act as a liaison between the requesting and requested States by informing the relevant authorities what can and cannot be done. In this regard, the working group acknowledged the practical and useful conclusions and recommendations of the various regional workshops organized by UNODC.

36. The working group discussed the adherence to paragraph 8 of article 18, on bank secrecy. While the analytical report prepared by the Secretariat on the implementation of the Convention reported that a number of countries still considered bank secrecy to be a ground for refusal of assistance, no such experience was reported in the working group.

37. As to the application of the condition of dual criminality as envisaged in paragraph 9 of article 18, many countries stated that their domestic legislation allowed the granting of assistance in the absence of dual criminality as long as the request did not require any intrusive or coercive measures. In practice, States appear to assess dual criminality on the basis of the conduct that was the subject of the

investigation underlying the requests, which is a very positive development. However, some countries stressed that this task was sometimes made difficult due to the poor quality of translations of the law and the description of the conduct, which are crucial in determining the existence of dual criminality. The group recommends that requested States should inform requesting States when they have received poor translations or badly-formulated requests, in order to allow the requesting State to take corrective measures for the future.

38. One country identified a good practice that it had adopted in order to receive comprehensive requests: it established and disseminated a checklist to make sure requests comply with all of its domestic requirements. They also use the same checklist to prepare assistance requests. The group recognized the importance of submitting well-drafted requests and recommended that States make use of the Mutual Legal Assistance Request Writer Tool developed by UNODC as guidance for the preparation of assistance requests. The tool is available at http://www.unodc.org/mla/index.html.

39. The group addressed the grounds for refusal set out in paragraph 21 of article 18. Although a few examples were given, it could not be established by the group whether these grounds for refusal are used and how often this occurs in practice.

40. The Convention provides for detailed rules relating to certain forms of mutual legal assistance, such as the hearing of a detained person as a witness in the requested State (paragraphs 10, 11 and 12 of article 18) and the hearing of other witnesses, experts or other persons in the requested State (paragraph 27 of article 18). In all these cases, the transferred witnesses, experts or other persons are granted immunity from prosecution. The working group heard that difficulties with such immunity can arise in cases where there are multiple cases pending and one judicial authority requests the detention of the person while the other authority had provided a guarantee for his or her immunity. As a matter of principle, the group considered that when guarantees were given by a judicial authority, they have to be respected by all other authorities. If the immunity granted under the treaty did not automatically have precedence over national law, the group considered that it would be worthwhile for States to introduce a provision into their national law clarifying that when such guarantees are given, they must be respected by all other authorities.

41. Paragraph 18 of article 18 provides for the hearing of witnesses and experts via videoconference. The working group recommended discussing all aspects of videoconferences, including those mentioned in paragraphs 41 and 42 of the present report, at the fifth session of the Conference.

42. The working group recognized that the hearing of witnesses by videoconference could be a highly cost- and time-efficient measure that could serve as a useful alternative to the transfer of witnesses as envisaged under paragraph 39 of the present report. The group also recognized that several States parties do not yet provide for this type of cooperation due to either the lack of technical facilities or to substantive legal reasons. In response to the latter, the chair offered as a source of inspiration a detailed provision on the subject in a European Union treaty on mutual assistance. This provision was developed after considerable negotiations and in-depth discussions on the issues of sovereignty and procedural safeguards. Legal issues that may arise with videoconferencing include the determination of the

applicable law, the inviolability of the embassy of the requesting State, the hearing of evidence by a foreign judge on domestic territory and the applicable procedural safeguards.

43. One State reported that it could consider using videoconferences only for the hearing of witnesses by its own judges in the presence of the requesting authority. Some countries had queries about hearing witnesses via a video link, where the witness could go to the embassy of the requesting party in their territory to be heard by the authorities in the requesting country. Several countries mentioned their use of videoconferences internally or with foreign countries for other purposes, such as establishing direct contacts between requesting and requested authorities.

44. The working group addressed also the issues of the use of the evidence gathered via mutual legal assistance as provided for in paragraph 19 of article 18. The working group underlined the importance of observing the rules of paragraph 19, which will protect the rights of individuals and the interests of the investigating and prosecuting authorities in keeping their investigations protected. Requesting States should pay careful attention to the use of the information obtained, especially when the source of the information is sensitive. The disclosure of such information cannot only jeopardize the ongoing criminal proceedings but also future collaborations with the requested State.

45. As to the issue of the costs of mutual legal assistance as provided for in paragraph 28 of article 18, the group recommended that States discuss beforehand how issues of costs and reimbursements will be handled by the requesting State in order to avoid unpleasant situations such as witnesses or experts who travel and may not be reimbursed due to lack of clarity in the request.

C. International cooperation for the purpose of confiscation

46. At its fourth and last meeting, the working group discussed the implementation of the provisions on international cooperation for purposes of confiscation (article 13). During the discussions, countries mainly explained their national legislation in this matter.

47. The chair pointed out the connection between articles 13 and 18 of the Convention that is set forth in paragraph 3 of article 13. Article 13 should be seen as a particularization of article 18, since it provides for rules on cooperation for the purposes of confiscation in addition to the general rules on mutual assistance contained in article 18.

48. In general, countries reported that they did not have problems in the implementation of article 13, although there were difficulties with regard to particular aspects.

49. In one country, the confiscation of immovable property (real estate) is generally governed by the civil courts, while confiscation under the Organized Crime Convention is dealt with by criminal courts. This was seen as an internal problem that should be solved at the national level.

50. Once again the difference between common law and civil law countries was highlighted when discussing conviction-based confiscation and non-conviction-

based confiscation. Some countries from the civil law system stated that they were contemplating the introduction of non-conviction-based confiscation into their systems.

51. Countries expressed their concerns relating to the execution of confiscation orders coming from countries with a different system of confiscation (conviction-based or non-conviction-based). During negotiations of the Organized Crime Convention and the United Nations Convention against Corruption, it was understood that although different systems existed, the countries would do their utmost to overcome the differences and allow for cooperation. The importance of prior consultation among competent authorities in such cases was stressed.

52. Some countries explained different manners of sharing the confiscated assets between the requested and the requesting States and internally in the requested State.

53. One country explained the difficulties it had encountered in confiscating property in cases of intermingled ownership, in particular involving real estate. It highlighted the importance of an adequate registration system for real estate to allow for confiscation.

54. One country emphasized that it had different procedural confiscation systems at the federal and provincial levels.

55. One country explained its pre-judicial scheme of confiscation. While confiscation generally requires a judicial conviction order, in some cases the prosecutor could order the seizure of the property of the arrested person before the final judgement. This order then had to be sent to the governor of the real estate agency to be registered in the public registry. This body could, however, reject the order since it is entitled to register real estate rights and limitations but not confiscation orders.

56. Another country referred to the different terminology and legal concepts employed in its national legislation in comparison to the Organized Crime Convention.

57. Countries also referred to provisional confiscation measures.

58. One country reported that it had encountered problems when third parties file claims regarding the protection of their own rights with respect to the confiscated assets.

59. Various countries commented on the final destination of the confiscated assets. The possible destinations included the sharing of the assets with the requesting State, the sending of the confiscated money to the general purpose account of the treasury, the allocation of the money for special purposes and the disbursement of the money to the prosecutor’s office.

60. Some countries remarked on the importance of the switch of the burden of proof in confiscation cases, stating that the institution of this procedure has led to successful confiscation cases.

61. One country remarked the institution of “extensión del dominio” (extinction of the right of property) as a key legal tool in combating drug cases.

62. The Chair concluded that although some practical experiences were mentioned, it was obvious that the application of the different components of this article, such as the handling of a foreign confiscation order (paragraph 1 (a)), would merit further discussion on the basis of practical experiences. Furthermore, there was an interest in future detailed discussions on the practice of non-conviction-based confiscation.