

Part One

**LEGISLATIVE GUIDE
FOR THE IMPLEMENTATION OF THE
UNITED NATIONS CONVENTION
AGAINST TRANSNATIONAL ORGANIZED CRIME**

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I. Introduction

A. Structure of the legislative guide for the implementation of the United Nations Convention against Transnational Organized Crime

1. The present legislative guide for the implementation of the United Nations Convention against Transnational Organized Crime (the “Organized Crime Convention”; General Assembly resolution 55/25, annex I) consists of three main parts, presenting issues of substantive criminal law relating to the criminalization of various offences (chap. III); procedural issues and legislative amendments to ensure effective criminalization (chap. IV); and legislative and administrative measures to enhance legal assistance and law enforcement and other forms of international cooperation (chap. V).

2. The sequence of chapters and the internal format is presented thematically rather than following the Convention paragraph by paragraph, in order to make the guide easier to use by national drafters, who may need to focus on particular issues or questions. The sections of the guide that cover specific articles of the Convention start by quoting the relevant article or articles of the Convention and are all organized along the same structure, as follows:

1. Introduction
2. Summary of main requirements
3. Mandatory requirements
4. Other measures, including optional issues
5. Information resources

3. At the end of the guide, an annex lists the requirements in accordance with the Convention for States parties to report to the Secretary-General of the United Nations.

4. Particular attention should be paid to the sections giving a summary of main requirements relevant to each article, which provide information on the essential requirements of the article concerned.

B. Structure of the Organized Crime Convention

5. The Organized Crime Convention:

- (a) Defines and standardizes certain terms that are used with different meanings in various countries or circles;
- (b) Requires States to establish specific offences as crimes;
- (c) Requires the introduction of specific control measures, such as protection of victims and witnesses;
- (d) Provides for the forfeiture of the proceeds of crime;
- (e) Promotes international cooperation, for example through extradition, legal assistance and joint investigations;
- (f) Provides for training, research and information-sharing measures;
- (g) Encourages preventive policies and measures;
- (h) Contains technical provisions, such as for signature and ratification.

6. The process by which the requirements of the Convention can be fulfilled will vary from State to State. Monist systems could ratify the Convention and incorporate its provisions into domestic law by official publication, while dualist systems would require implementing legislation.

7. As individuals responsible for preparing legislative drafts examine the priorities and obligations under the Convention, they should bear in mind the guidance presented in the following paragraphs.

8. In establishing their priorities, national legislative drafters should bear in mind that the provisions of the Convention and the Protocols thereto do not all have the same level of obligation. In general, provisions can be grouped into the following three categories:

- (a) Measures that are mandatory (either absolutely or where specified conditions have been met);
- (b) Measures that States parties must consider applying or endeavour to apply;
- (c) Measures that are optional.

9. Whenever the phrase “States are required to” is used, the reference is to a mandatory provision. Otherwise, the language used in the guide is “required to consider”, which means that States are strongly asked seriously to consider adopting a certain measure and to make a genuine effort to see

whether it would be compatible with their legal system. For entirely optional provisions, the guide employs the term “may wish to consider”. Occasionally, States “are required” to choose one or another option (for example, in the case of offences under article 5). In that case, States are free to opt for one or the other or both options.

10. The summary of main requirements presented in each section lists both measures that are mandatory and measures that States parties must consider applying or endeavour to apply. In the analysis that follows, measures that are mandatory are discussed first and measures that States parties must consider applying or endeavour to apply and those which are optional are discussed together.

11. In general, articles of the Convention and the Protocols thereto describe conduct that must be criminalized by domestic law, made punishable by appropriate sanctions and made subject to the various requirements governing extradition, mutual legal assistance and other forms of assistance and cooperation.

12. In several places, the Convention and the Protocols refer to criminalization using “such legislative and other measures as may be necessary”. The reference to “other” measures is not intended to require or permit criminalization without legislation. Such measures are additional to, and presuppose the existence of, legislation (A/55/383/Add.1, para. 9).

13. It is recommended that drafters check for consistency with other offences, definitions and legislative uses before relying on formulations or terminology contained in the Convention. The Convention was drafted for general purposes and is addressed to national Governments. Thus, the level of abstraction is higher than that necessary for domestic legislation. Drafters should therefore be careful not to incorporate parts of the text verbatim, but are encouraged to adopt the spirit and meaning of the various articles. In order to assist in that process, a number of interpretative notes discussed by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime throughout the process of negotiation of the draft Convention will be cited in this guide (A/55/383/Add.1), providing additional context and insight into the intent and concerns of those who negotiated the Convention.

II. Provisions and obligations applicable throughout the United Nations Convention against Transnational Organized Crime

14. Governments need to be aware of a number of general provisions and requirements that may not be evident in reading a particular article of the Organized Crime Convention. These general provisions and requirements must be clearly understood by legislative drafters and policy makers and care must be taken to incorporate them when preparing legislation to implement the specific articles concerned. Otherwise, the implementing measure could be out of compliance with the requirements of the Convention.

15. It should also be noted that these general provisions, which are described below, also apply to offences established in accordance with the Protocols to the Organized Crime Convention (art. 1, para. 3, of each Protocol).

A. Implementation of the Convention

“Article 34

“Implementation of the Convention

“1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

“2. The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

“3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.”

16. The purpose of article 34, paragraph 1, is to prevent new laws that are put in place to implement the Convention from becoming a dead letter, or challenged as unconstitutional, which would hamper both domestic implementation and international cooperation.

17. Implementation may be carried out through new laws or amendments of existing ones. Domestic offences that implement the terms of the Convention, whether based on pre-existing laws or newly established ones, will often correspond to offences under the Convention in name and terms used, but this is not essential. Close conformity is desirable, for example to simplify extradition proceedings, but is not required, as long as the full range of the conduct covered by the Convention is criminalized. Article 11, paragraph 6, states that the principle is that the description of the offences is reserved to the domestic law of a State party (see also chap. III, sect. A.3, Sanctions and deterrence, below). Countries may well have offences that are different in scope (such as two or more domestic crimes covering one crime covered by the Convention), especially where this reflects pre-existing legislation and case law.

18. It must be strongly emphasized that, while offences must involve transnationality and organized criminal groups for the Convention and its international cooperation provisions to apply, neither of these must be made elements of the domestic offence (art. 34, para. 2). An interpretative note (A/55/383/Add.1, para. 59) indicates that the purpose of this paragraph is, without altering the scope of application of the Convention as described in article 3, to indicate unequivocally that the transnational element and the involvement of an organized criminal group are not to be considered elements of those offences for criminalization purposes. The paragraph is intended to indicate to States parties that, when implementing the Convention, they do not have to include in their criminalization of laundering of criminal proceeds (art. 6), corruption (art. 8) or obstruction of justice (art. 23), the elements of transnationality and involvement of an organized criminal group, nor in the criminalization in an organized criminal group (art. 5), the element of transnationality. This provision is furthermore intended to ensure clarity for States parties in connection with their compliance with the criminalization articles of the Convention and is not intended to have any impact on the interpretation of the cooperation articles of the Convention (arts. 16, 18 and 27). In other words, in domestic law, the offences established in accordance with the Convention of participation in

an organized criminal group, corruption, money-laundering and obstruction of justice and the Protocol offences of trafficking in persons, smuggling of migrants and trafficking in firearms must apply equally, regardless of whether the case involves transnational elements or is purely domestic. It should also be noted that if dual-criminality is present, offenders can be extradited for one of the four offences or for a serious crime, even if the offence is not transnational in nature (art. 16, para. 1).

19. The same principle applies to the involvement of organized criminal groups. Authorities will need to establish such involvement to the satisfaction of another State party in order to invoke the obligations for international assistance and extradition, but should not have to prove the involvement of an organized criminal group as an element of a domestic prosecution. Thus, for example, the offences relating to money-laundering or obstruction of justice should apply equally, regardless of whether the offence was committed by an individual or by individuals associated with an organized criminal group and regardless of whether this can be proved or not.

20. This concept is also further described in section C, Scope of application, below.

21. It should be emphasized that the provisions of the Convention and its Protocols set only minimum standards (see also chap. III, sect. A.1, Minimum standards of implementation), which States must meet for the sake of conformity. Provided that the minimum standards are met, States parties are free to exceed those standards and, in several provisions, are expressly encouraged to do so (art. 34, para. 3, and, for example, art. 6, para. 2 (b)).

22. The Convention recognizes that full implementation will require technical cooperation and assistance and that, without full implementation by almost all countries, it will not be an effective instrument. States are encouraged to request such assistance from the United Nations Office on Drugs and Crime.

B. Use of terms

23. Article 2 defines for the purposes of the Convention a number of key terms that are repeated throughout the text. States parties are not required to introduce a legal definition in domestic legislation. The provisions of

article 2 are intended to explain the terms used in a mandatory way in order to define the scope of application and legal effects of the provisions of the Convention.

“Article 2

“Use of terms

“For the purposes of this Convention:

“(a) ‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

“(b) ‘Serious crime’ shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

“(c) ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure;

“(d) ‘Property’ shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

“(e) ‘Proceeds of crime’ shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

“(f) ‘Freezing’ or ‘seizure’ shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

“(g) ‘Confiscation’, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

“(h) ‘Predicate offence’ shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention;

“(i) ‘Controlled delivery’ shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence;

“(j) ‘Regional economic integration organization’ shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it; references to ‘States Parties’ under this Convention shall apply to such organizations within the limits of their competence.”

24. The definitions in article 2 must be clearly understood in order properly to implement the provisions of the Convention in which the defined terms are found. Definitions pertaining only to particular issues, such as money-laundering and confiscation of assets, are generally discussed in the explanation of the article to which they pertain. However, particular attention should be given to the following definitions of terms used more generally throughout the Convention.

25. The Convention defines an “organized criminal group” as a structured group of three or more persons that exists over a period of time, the members of which act in concert aiming at the commission of serious crimes in order to obtain a direct or indirect financial or other material benefit (art. 2, subpara. (a)).

26. The definition of “organized criminal group” does not include groups that do not seek to obtain any “financial or other material benefit”. This would not, in principle, include groups such as some terrorist or insurgent groups, provided that their goals were purely non-material. However, the Convention may still apply to crimes committed by those groups in the event that they commit crimes covered by the Convention (for example, by committing robbery in order to raise financial and material benefits). While the reference to “financial or other material benefit” was intended to exclude groups with purely political or social motives, the term “material benefit” is not limited to financial, monetary or equivalent benefits. The agreed interpretative notes, on which the *travaux préparatoires* will be based, provide that it should be interpreted broadly, to include personal benefits such as sexual gratification. This is to ensure that organizations trafficking in human beings or child pornography for sexual and not monetary reasons are not excluded (A/55/383/Add.1, para. 3).

27. Many provisions of the Convention can be invoked with respect to serious crimes involving an organized criminal group. Serious crime is defined by article 2, subparagraph (b), to mean crimes for which the maximum penalty is at least four years of deprivation of liberty or longer. This

definition does not require a State party to create a definition of serious crime in its penal code. However, it should be noted that if States parties wish to have other offences with an organized criminal group nexus covered by the Convention, that is, in addition to those established under articles 5, 6, 8 and 23, they may wish to ensure that the provided penalties fulfil the conditions of the above definition (see art. 3, subpara. 1 (b)).

28. The term “structured group” is to be used in a broad sense, so as to include groups with a hierarchical or other elaborate structure, as well as non-hierarchical groups where the roles of the members of the group are not formally specified (A/55/383/Add.1, para. 4). Thus, a “structured group” is not necessarily a formal type of organization, with a structure, continuous membership and a definition of the roles and functions of its members. However, it must be more than randomly formed for the immediate commission of an offence (art. 2, subpara. (c)). This standard was adopted in order to avoid the inclusion of crimes committed by groups on an ad hoc basis. Nevertheless, it includes all instances of crimes that involve any element of organized preparation.

C. Scope of application

29. The principal provisions of the Convention governing the scope of application of its provisions are articles 3 and 34.

“Article 3

“Scope of application

“1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:

“(a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and

“(b) Serious crime as defined in article 2 of this Convention;

where the offence is transnational in nature and involves an organized criminal group.

“2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

“(a) It is committed in more than one State;

“(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

“(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

“(d) It is committed in one State but has substantial effects in another State.”

30. Under article 3, the Convention can be invoked for the following types of crime:

(a) Offences established at the domestic level under the requirements of articles 5, 6, 8 and 23 of the Convention (that is, offences relative to participation in an organized criminal group, money-laundering, corruption and obstruction of justice, if they are transnational in nature and involve an organized criminal group (art. 2, subparas. (a) and (b), and art. 3, subpara. 1 (a));

(b) Serious crimes as defined above, if they are transnational in nature and involve an organized criminal group (art. 2, subparas. (a) and (b), and art. 3, para. 1 (b)). What crime is serious varies across time and place, but for the purposes of the Convention it is defined in article 2 to be any offence carrying a maximum penalty of four years deprivation of liberty or more;

(c) The offence is transnational (art. 3, para. 2) if:

- (i) It is committed in more than one State;
- (ii) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- (iii) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- (iv) It is committed in one State but has substantial effects in another State;

(d) Offences established under any of the Protocols to the Organized Crime Convention to which States have become parties (art. 1, paras. 2 and 3, of each Protocol).

31. However, it is critical for legislators and policy makers to be aware that, according to article 3, paragraph 1, these limitations in scope apply only except as otherwise stated in the Convention. As made clear in article 34, paragraph 2 (discussed earlier in the present chapter), the limiting factors of transnationality and involvement of an organized criminal group do not apply to all articles of the Convention. Moreover, the sections

below on articles 16 (Extradition) and 18 (Mutual legal assistance) contain specific provisions that govern their scope of application (see chap. V, sects. A and B) and should be closely reviewed.

D. Protection of sovereignty

32. Lastly, the Convention respects and protects the sovereignty of States parties.

“Article 4

“Protection of sovereignty

“1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

“2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.”

33. Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention. Its provisions are self-explanatory.

34. There are also other provisions that protect national prerogatives and sovereignty set forth elsewhere in the Convention. For example, pursuant to article 11, paragraph 6 (see also chap. III, sect. A.3, Sanctions and deterrence), nothing in the Convention affects the principle that the domestic law of a State party governs:

(a) The description of offences established in accordance with the Convention;

(b) Applicable defences;

(c) Legal principles controlling the lawfulness of conduct;

(d) Prosecution and punishment.

35. Moreover, pursuant to article 11, paragraph 1, it is up to the State party concerned to determine the appropriate sanctions, while considering the gravity of the offence.

III. Substantive criminal law

A. General requirements

36. States parties are required to take certain legislative and administrative steps towards implementing the Organized Crime Convention. They are to take such measures in a manner consistent with the fundamental principles of their domestic law, as stated in article 34, paragraph 1, which provides:

“Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.”

37. Chapter III of this guide addresses the substantive criminal law requirements of the Convention. In essence, States parties must establish a number of offences as crimes in their domestic law, if these do not already exist. States with relevant legislation already in place must ensure that the existing provisions conform to the Convention requirements and amend their laws, if necessary.

38. The substantive criminal law provisions establish participation in an organized criminal group, laundering the proceeds of crime, corruption and obstruction of justice as crimes. Sections B-E of the present chapter address each of these offences, respectively.

39. The activities covered by these offences are vital to the success of sophisticated criminal operations and to the ability of offenders to operate efficiently, to generate substantial profits and to protect themselves as well as their illicit gains from law enforcement authorities. They constitute, therefore, the cornerstone of a global and coordinated effort to counter serious and well-organized criminal markets, enterprises and activities.

40. Several terms that are central to the matters addressed in the present chapter of the guide, such as “organized criminal group”, “structured group”, “serious offence” and “predicate offence”, find their definition in

article 2 of the Convention. The reader should closely examine chapter II, section B, of the present guide on the use of terms with respect to the definition of terms used in these articles.

1. Minimum standards of implementation

41. The Convention introduces minimum standards that have to be met by States parties, but each State party remains free to go beyond them. Article 34, paragraph 3, recognizes that domestic laws adopted by States to prevent and combat transnational organized crime may well be stricter and include more severe sanctions than the provisions that are required in strict accordance with article 34, paragraph 3, of the Convention, which reads as follows:

“Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.”

42. The criminalization of the proscribed conduct must be made through criminal law. Any measures that need to be taken would have to be in addition to the legislation of criminal offences. The only exception to this is when it comes to legal persons, the liability of which can be criminal, civil or administrative, depending on the domestic legal principles (art. 10, para. 2).

43. National drafters should focus on the meaning and spirit of the Convention rather than attempt simply to translate Convention text or include it verbatim in new laws or amendments. The drafting and enforcement of the new offences, including legal defences and other legal principles, are left to the States parties (see art. 11, para. 6). Therefore, they must ensure that the new rules are consistent with their domestic legal tradition, principles and fundamental laws. This avoids the risk of conflicts and uncertainty about the interpretation of the new provisions by courts or judges.

44. The criminal offences mandated by the Convention may apply in conjunction with other provisions of the domestic law of States or law introduced by the Protocols. An effort must therefore be made to ensure that the new criminal offences are consistent with current domestic law.

2. Scope of application

45. In general, the Convention applies when the offences are transnational in nature and involve an organized criminal group (see art. 34, para. 2).

However, as described in more detail in chapter II, section A, of the present guide, it should be emphasized that this does not mean that these elements themselves are to be made elements of the domestic crime. On the contrary, drafters must not include them in the definition of domestic offences, unless expressly required by the Convention or the Protocols thereto. Any requirements of transnationality or organized criminal group involvement would unnecessarily complicate and hamper law enforcement. The only exception to this principle in the Convention is the offence of participation in an organized criminal group, in which case the involvement of an organized criminal group is of course going to be an element of the domestic offence. Even in this case, however, transnationality must not be an element at the domestic level.

3. *Sanctions and deterrence*

“Article 11

“Prosecution, adjudication and sanctions

“1. Each State Party shall make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of this Convention liable to sanctions that take into account the gravity of that offence.

“2. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention 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.

“ . . .

“4. Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.

“ . . .

“6. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.”

46. The severity of the punishment for the offences mandated by the Convention is left to the States parties, but it must take into account the gravity of the offence (art. 11, para. 1). The primacy of national law in this respect is affirmed by article 11, paragraph 6. States must also endeavour to ensure that the grave nature of the offence and the need to deter its commission is taken into account in prosecution, adjudication and correctional practices and decisions.

47. At the same time, since effective deterrence must be pursued through prosecution and punishment, States must encourage those who have participated in organized criminal groups to cooperate with and assist law enforcement authorities (art. 26, para. 1). In order to increase their ability to do so, States parties are required to consider providing the possibility of mitigated punishment for such persons (art. 26, para. 2) or of granting them immunity from prosecution (art. 26, para. 3). This is an option that States may or may not be able to adopt, depending on their fundamental principles (art. 26, para. 3). It is important to note, however, that in jurisdictions where prosecution is mandatory for all offences, such measures may need additional legislation (see also chap. IV, sect. E, Protection of witnesses and victims, for a detailed discussion).

B. Criminalization of participation in a criminal group

“Article 5

“Criminalization of participation in an organized criminal group

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

“(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

“(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

“(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

“a. Criminal activities of the organized criminal group;

“b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

“(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

“2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

“3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.”

1. Introduction

48. The international community has witnessed a rise in the activities of criminal groups, which have brought about significant negative financial and human consequences in virtually all countries. Frequently, people assist organized criminal groups in the planning and execution of serious offences without direct participation in the commission of the criminal act. In response to this problem, many countries have adopted criminal laws proscribing lesser participation in criminal groups.

49. The approaches countries have adopted so far vary depending on historical, political and legal backgrounds. Broadly speaking, the criminalization of participation in organized criminal groups has been achieved in two different ways. Common law countries have used the offence of conspiracy, while civil law jurisdictions have used offences that proscribe an involvement in criminal organizations. Other countries combine such approaches. The Convention does not deal with prohibition of membership in specific organizations.

50. Because criminal groups cross national borders and frequently affect many countries at once, the need to coordinate and harmonize laws is clear. Some initiatives have already been taken in that direction at a regional level, such as the adoption by the Council of the European Union on 21 December 1998 of the Joint Action on making it a criminal offence to participate in a criminal organization in the member States of the European Union. However, this is not merely a regional issue, but one that demands an effective global response.

51. The Convention aims at meeting the need for a global response and at ensuring the effective criminalization of acts of participation in criminal groups. Article 5 of the Convention recognizes the two main approaches to such criminalization that are cited above as equivalent. The two alternative options of article 5, paragraph 1 (a) (i) and paragraph 1 (a) (ii) were thus created to reflect the fact that some countries have conspiracy laws, while others have criminal association (*association de malfaiteurs*) laws. The options allow for effective action against organized criminal groups, without requiring the introduction of either notion—conspiracy or criminal association—in States that do not have the relevant legal concept. Article 5 also covers persons who assist and facilitate serious offences committed by an organized criminal group in other ways.

2. Summary of main requirements

52. In accordance with article 5, paragraph 1, States parties are required to establish the following offences as crimes:

(a) Either or both of the following:

- (i) Agreeing with one or more persons to commit a serious crime for a financial or other material benefit;
- (ii) The conduct of a person who, with knowledge of the aim and general criminal activity of an organized criminal group or its intention to commit the crime, takes an active part in:
 - a. Criminal activities of the organized criminal group; or
 - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of a crime involving an organized criminal group.

53. Under article 5, paragraph 2, States parties must ensure that knowledge, intent and purpose can be established through inference from objective factual circumstances.

54. Paragraph 3 of article 5 provides that States that require the involvement of organized criminal groups for the offence of agreeing to commit a serious crime must:

(a) Ensure that domestic law covers all serious crimes involving organized criminal groups; and

(b) Inform the Secretary-General of the United Nations in that regard.

3. *Mandatory requirements*

(a) *Article 5, paragraph 1 (a)*

55. Under article 5, paragraph 1 (a), States must establish either or both of the offences set forth in its subparagraphs (i) and (ii) as crimes.

56. The first offence is akin to the common law conspiracy model and is set forth in article 5, paragraph 1 (a) (i), as follows:

“Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group.”

57. The requirements of this offence include the intentional agreement with one or more other persons to commit a serious crime for a purpose related directly or indirectly to obtaining a financial or other material benefit. This requirement criminalizes the mere agreement to commit serious crimes for the purpose of obtaining a financial or other material benefit.

58. However, States parties may include as an element of the offence either: (a) an act committed by one of the participants furthering that agreement; or (b) the involvement of an organized criminal group, if these are a requirement of their domestic law.

59. It should be noted that the phrase “a purpose relating directly or indirectly to the obtaining of a financial or other material benefit” should

be interpreted broadly, so that it can cover crimes with tangible but non-monetary objectives, for example when the predominant motivation is sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost sharing among ring members (A/55/383/Add.1, para. 3). Conspiracies with purely non-material objectives, such as ideological goals, are not required to be covered by this offence.

60. The second option is more consistent with the civil law legal tradition and countries with laws that do not recognize conspiracy or do not allow the criminalization of a mere agreement to commit an offence. This option is to criminalize the conduct of a person and is set out in article 5, paragraph 1 (a) (ii), as follows:

“Conduct by a person, who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

“a. Criminal activities of the organized criminal group;

“b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.”

61. These other activities may not constitute crimes, but they perform a supportive function for the group’s criminal activities and goals.

62. Both of the above offences are distinct from any offence addressing the attempt or completion of a criminal activity.

63. For the second type of offence, that is criminal association, the required mental element is general knowledge of the criminal nature of the group or of at least one of its criminal activities or objectives. In the case of participating in criminal activities, the mental element of the activity in question would also apply. For instance, active participation in kidnapping or obstruction of justice would require the mental element for those offences.

64. In the case of taking part in non-criminal but supportive activities, an additional requirement is that of knowledge that such involvement will contribute to the achievement of a criminal aim of the group.

65. Under article 5, paragraph 2, the knowledge, intent, aim, purpose or agreement referred to above may be inferred from objective factual

circumstances. Drafters may wish to consider setting standards and clarifying precisely what would need to be proved.

(b) Article 5, paragraph 1 (b)

66. States parties are also obliged to establish as a crime the offence of organizing, directing, aiding, abetting, facilitating or counselling the commission of a serious crime involving an organized criminal group. This type of offence, inter alia, is intended to ensure the liability of leaders of criminal organizations who give the orders, but do not engage in the commission of the actual crimes themselves.

(c) Article 5, paragraph 2

67. Each State party must have the legal framework to enable the knowledge, intent, aim, purpose or agreement referred to in article 5, paragraph 1, to be inferred from objective factual circumstances. If the evidence laws of a country do not permit such circumstantial evidence to be used to establish such mental state, it must revise its laws to conform to the requirements of this paragraph.

(d) Other general requirements

68. In drafting legislation to implement these criminalization obligations, legislators should bear in mind the following general obligations under the Convention that are particularly relevant to the establishment of criminal offences:

(a) Non-inclusion of transnationality in domestic offences. Transnationality must not be made an element of the domestic offence (art. 34, para. 2);

(b) Criminalization must be through legislative and other measures. The criminal offences must be established by criminal law and not simply by other measures, which would be additional to proscribing legislation (A/55/383/Add.1, para. 9);

(c) The offences must be committed intentionally. The mental element required for each offence is that it be committed intentionally;

(d) The offence should be liable to penalties that take into account the grave nature of the offence. Penalties should be sufficiently severe given the seriousness of the conduct required to be criminalized (art. 11, para. 1);

(e) *The description of the offence is reserved to the domestic law of a State party.* The domestic offence established by a State to implement the criminalization requirements of the Convention need not be described in exactly the same manner as in the Convention, as long as the required conduct is criminalized (art. 11, para. 6);

(f) *Liability of legal persons.* With respect to legal persons, the offences and liability can be criminal, civil or administrative (art. 10, para. 2);

(g) *Statutes of limitation.* The Convention requires that legislators establish a long statute of limitation period for the offence, in particular when alleged offenders are evading justice (art. 11, para. 5);

(h) *Sentence mitigation and immunity.* The Convention encourages States parties to consider mitigating sentences and granting immunity and/or leniency to individuals who decide to cooperate with the authorities (art. 26, paras. 2 and 3). This is optional and dependent on domestic legal principles and traditions. In jurisdictions where prosecution of crimes is mandatory, however, affording immunity from prosecution would require legislation.

69. At the time of signature or deposit, States parties must inform the Secretary-General of the United Nations that their domestic law covers all serious crimes involving organized criminal groups, if their domestic law requires the involvement of organized criminal groups for the offence of agreement to commit a serious crime (art. 5, para. 3). This information should be provided to the United Nations Office on Drugs and Crime.

4. Other measures, including optional issues

70. Aside from the optional elements of requiring an act in furtherance of the agreement or the involvement of an organized criminal group under paragraph 1 (a) (i), article 5 contains no optional provisions.

71. Finally, the Convention requires that States establish as a crime either the first or second offence of article 5, paragraph 1 (a). States may wish to consider the possibility of introducing both offences to cover different types of conduct.

5. Information resources

72. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) *Related provisions and instruments*

Organized Crime Convention

Article 2 (Use of terms)

Article 10 (Liability of legal persons)

Article 11 (Prosecution, adjudication and sanctions)

Article 15 (Jurisdiction)

Article 26 (Measures to enhance cooperation with law enforcement authorities)

Article 31 (Prevention)

Article 34 (Implementation of the Convention)

(b) *Examples of national legislation*

73. States parties to the Organized Crime Convention have dealt with the issue of criminalization of participation in an organized criminal group in various ways. For example, Chile criminalizes even the non-reporting of the activities of a criminal organization to the authorities (with the exception of a member being a relative). New Zealand, on the other hand, does not criminalize membership in a criminal organization, but does criminalize intentional promotion of or furthering its activities.

74. A number of countries have defined specific offences relating to various ways of lending assistance or financial support to a criminal organization, including Colombia, Ecuador, Germany, Uruguay and Venezuela. Some statutes target individuals who provide the organization with weapons or ammunitions (including Colombia, Ecuador, Haiti, Hungary, Paraguay, Uruguay and Venezuela), with the instruments of crime (for example Haiti), with a place to meet (for example Ecuador), or with some other service (for example Ecuador and Paraguay). Helping individuals involved in a criminal organization avoid punishment is sometimes also directly criminalized, for example in Uruguay. In the case of such offences, some exceptions are often created for the benefit of members of the immediate family, a spouse or other relatives (for example in Chile and Venezuela). For several countries (for example Italy and Uruguay) participation in a relatively large organization is considered as an aggravating circumstance.

75. With respect to the question of proof, there is the example of New Zealand, where the law specifies that proof that an individual has been

warned on at least two occasions that a particular gang is a criminal gang is sufficient proof that he/she knew that the gang was a criminal one.

76. States parties preparing legislation in respect of the provisions of article 5 of the Organized Crime Convention may wish to refer for further guidance, inter alia, to the legislation presented below.

Canada

<http://laws.justice.gc.ca/en/c-46/text.html>

Canada's criminal law combines the common law tradition's reliance on conspiracy (s. 465) and similar offences, such as forming an intention in common to carry out an unlawful purpose (s. 21), aiding and abetting (s. 21) and counselling (s. 22) a person to commit a crime, with offences relative to criminal association. The Criminal Code of Canada provides as follows:

467.1

(1) The following definitions apply in this Act.

“Criminal organization” means a group, however organized, that

(a) is composed of three or more persons in or outside Canada; and

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

“Serious offence” means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation.

(2) For the purposes of this section and section 467.11, facilitation of an offence does not require knowledge of a particular offence the commission of which is facilitated, or that an offence actually be committed.

(3) In this section and in sections 467.11 to 467.13, committing an offence means being a party to it or counselling any person to be a party to it.

(4) The Governor in Council may make regulations prescribing offences that are included in the definition “serious offence” in subsection (1).

(S.C. 1997, c. 23, s. 11; 2001, c. 32, s. 27).

467.11

(1) Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence under this or any other Act of Parliament, knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that

(a) the criminal organization actually facilitated or committed an indictable offence;

(b) the participation or contribution of the accused actually enhanced the ability of the criminal organization to facilitate or commit an indictable offence;

(c) the accused knew the specific nature of any indictable offence that may have been facilitated or committed by the criminal organization; or

(d) the accused knew the identity of any of the persons who constitute the criminal organization.

(3) In determining whether an accused participates in or contributes to any activity of a criminal organization, the Court may consider, among other factors, whether the accused

(a) uses a name, word, symbol or other representation that identifies, or is associated with, the criminal organization;

(b) frequently associates with any of the persons who constitute the criminal organization;

(c) receives any benefit from the criminal organization; or

(d) repeatedly engages in activities at the instruction of any of the persons who constitute the criminal organization.

(S.C. 2001, c. 32, s. 27)

467.12

(1) Every person who commits an indictable offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, a criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that the accused knew the identity of any of the persons who constitute the criminal organization.

(S.C. 2001, c. 32, s. 27)

467.13

(1) Every person who is one of the persons who constitute a criminal organization and who knowingly instructs, directly or indirectly, any person to commit an offence under this or any other Act of Parliament for the benefit of, at the direction of, or in association with, the criminal organization is guilty of an indictable offence and liable to imprisonment for life.

(2) In a prosecution for an offence under subsection (1), it is not necessary for the prosecutor to prove that

(a) an offence other than the offence under subsection (1) was actually committed;

(b) the accused instructed a particular person to commit an offence; or

(c) the accused knew the identity of all of the persons who constitute the criminal organization.

(S.C. 2001, c. 32, s. 27)

France

http://www.legifrance.gouv.fr/html/codes_traduits/code_penal_textan.htm

Penal Code

Title V. Participation in a Criminal Association

Article 450-1

(Act No. 2001-420 of 15 May 2001, article 45, Official Journal 16 May 2001; Ordinance no. 2000-916 of 19 September 2000, article 3, Official Journal of 22 September 2000; came into force 1 January 2002)

A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.

Where the offences contemplated are felonies or misdemeanours punished by ten years' imprisonment, participation in a criminal association is punished by ten years' imprisonment and a fine of €150,000.

Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of €75,000.

Italy**Article 416. Association to commit crimes**

When three or more persons associate for the purpose of committing more than one crime, those who promote or constitute or organize the association shall be punished, for that alone, by a term of imprisonment of three to seven years.

For the act of participating in the association alone, the punishment shall be a term of imprisonment of one to five years.

The leaders shall be subject to the same punishment as for the promoters.

If the participants in the association carry out armed raids in the countryside or public roads, the terms of imprisonment shall be of five to fifteen years.

The punishment shall be increased if the participants in the association are ten or more.

Article 416 bis. Mafia-type association

Any person participating in a Mafia-type association, which includes three or more persons, shall be punished by a term of imprisonment of three to six years.

Those promoting, directing or organizing the association shall be punished, for that alone, by a term of imprisonment of 4 to 9 years.

An association is said to be a Mafia-type association when the participants take advantage of the intimidating power of the association ties, and of the resulting conditions of submission and silence (*omertà*), to commit criminal offences, to directly and indirectly acquire management or in whatever way control of economic activities, licenses, authorizations, public contracts and services, or to obtain unlawful profits or advantages for themselves or any other person, or with a view to preventing or limiting the freedom to vote, or getting votes for themselves or other persons, on the occasion of an election.

Should the association be of the armed type, the punishment shall be imprisonment of four to ten years under the circumstances mentioned in paragraph 1, and imprisonment of 5 to 15 years under the circumstances mentioned in paragraph 2.

An association is said to be of the armed type when the participants have firearms or explosives at their disposal, even if hidden or deposited elsewhere, to achieve the objectives of the association.

If the economic activities, whose control the participants in the association aim at achieving or maintaining, are funded, totally or partially, by the price, products or proceeds of criminal offences, the punishment referred to in the above paragraphs shall be increased by one third up to one half.

The sentenced person shall always be liable to confiscation of the things that were used or meant to be used to commit the offence and all things that represent the price, the product or the proceeds of such offence, or the use thereof.

The provisions shall also apply to the Camorra and any other association, whatever their local names are, seeking to achieve objectives which correspond to those of the Mafia-type association, by taking advantage of the intimidating power of the association ties.

Poland

The Penal Code of Poland contains provisions on “aiding and abetting” as follows:

Article 18

§1. Not only the person who has committed a prohibited act himself or together and under arrangement with another person, but also a person who has directed the commission of a prohibited act by another person, or taken advantage of the subordination of another person to him, orders such a person to commit such a prohibited act, shall be liable for perpetration.

§2. Whoever, willing that another person should commit a prohibited act, induces the person to do so, shall be liable for instigating.

§3. Whoever, with an intent that another person should commit a prohibited act, facilitates by his behaviour the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information, shall be liable for aiding and abetting. Furthermore, whoever, acting against a particular legal duty of preventing the prohibited act, facilitates its commission by another person through his omission, shall also be liable for aiding and abetting.”

Article 19

§1. The court shall impose the penalty for instigating, and aiding and abetting within the limits of the sanction provided in law for perpetrating.

§2. In imposing the penalty for aiding and abetting, the court may apply extraordinary mitigation of punishment.

The Penal Code of Poland contains provisions on “criminal groups” as follows:

Article 258

§1. Whoever participates in an organized group or association having for its purpose the commission of offences shall be subject to the penalty of deprivation of liberty for up to 3 years.

§2. If the group or association specified in §1 has the characteristics of an armed organization, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years.

§3. Whoever sets up the group or association specified in §1 or 2 or leads such a group or association shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

Russian Federation

The Criminal Code of the Russian Federation defines a “criminal society” as follows:

Article 35, paragraph 4

A crime shall be deemed to be committed by a criminal society (criminal organization), if it was committed by a cohesive organized group (or organization) created for the commission of grave or especially grave crimes or by the combining of organized groups created for the same purpose.

United States of America

<http://uscode.house.gov/download.htm>

United States Code

Title 18. Crimes and Criminal Procedure

Part 1. Crimes

Chapter 19. Conspiracy

Sec. 371. Conspiracy to commit offence or to defraud the United States

If two or more persons conspire either to commit any offence against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offence, the commission of which is the object of the conspiracy, is a misdemeanour only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanour.

Title 18. Crimes and Criminal Procedure**Part 1. Crimes****Chapter 96. Racketeer Influenced and Corrupt Organizations***Sec. 1962. Prohibited activities*

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Sec. 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law:

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—(A) interest in; (B) security of; (C) claim against; or (D) property or contractual right of any kind affording a source of influence over; any enterprise

which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962. The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offence may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes:

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Other sources of information

1998 Council of Europe Joint Action adopted by the Council on the basis of article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organization in the member States of the European Union.

http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_351/l_35119981229en00010002.pdf

Article 1

Within the meaning of this joint action, a criminal organization shall mean a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities. The offences referred to in the first subparagraph include those mentioned in Article 2 of the Europol Convention and in the Annex thereto and carrying a sentence at least equivalent to that provided for in the first subparagraph.

Article 2

To assist the fight against criminal organizations, each Member State shall undertake, in accordance with the procedure laid down in Article 6, to ensure that one or both of the types of conduct described below are punishable by effective, proportionate and dissuasive criminal penalties:

(a) conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organization or the intention of the organization to commit the offences in question, actively takes part in:

- the organization's criminal activities falling within Article 1, even where that person does not take part in the actual execution of the offences concerned and, subject to the general principles of the criminal law of the Member State concerned, even where the offences concerned are not actually committed,
- the organization's other activities in the further knowledge that his participation will contribute to the achievement of the organization's criminal activities falling within Article 1;

(b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within Article 1, even if that person does not take part in the actual execution of the activity.

C. Criminalization of the laundering of proceeds of crime

“Article 6

“Criminalization of the laundering of proceeds of crime

“1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- “(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- “(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- “(b) Subject to the basic concepts of its legal system:
 - “(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
 - “(ii) Participation in, association with 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. For purposes of implementing or applying paragraph 1 of this article:

“(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

“(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

“(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

“(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

“(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

“(f) 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.”

“Article 7

“Measures to combat money-laundering

“1. Each State Party:

“(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize

requirements for customer identification, record-keeping and the reporting of suspicious transactions;

“(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

“2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

“3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

“4. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.”

1. Introduction

(a) The problem of money-laundering

77. Many activities of international organized criminal groups are directed at the accumulation of wealth through illegal means, such as trafficking in drugs, smuggling and fraud. In order to enjoy the benefits of such activities, these groups must hide the illicit origin of their funds. This is money-laundering, which is technically defined as the concealment or disguise of the illegal origin of the proceeds of crime. As national and international efforts to deprive criminals of their illicit gains have

intensified, organized criminal groups have increasingly sought to convert such gains into apparently legitimate assets. This is done by introducing the proceeds into the financial system, engaging in various transactions intended to obfuscate the origin of and path taken by the money, and thereby integrating the money into the legitimate economy through apparently legitimate transactions.

78. The negative consequences of money-laundering are legion. Despite the absence of precise estimates, it is certain that very sizeable illegal proceeds enter small and large economies. As a consequence, the influence and power of organized criminal groups increases, while the control and integrity of the Government and major public institutions are correspondingly compromised. If left to proliferate unchecked, money-laundering can undermine the integrity of political and judicial systems and the stability of national or international financial sectors. It can also corrupt the operations of legitimate companies and markets, interfere with economic and other policies, distort market conditions and ultimately produce severe systemic risks. For example, even if isolated financial institutions are involved in money-laundering, such activity can undermine the integrity of their functions to the point of collapse, which can lead to a major financial crisis, especially in comparatively small countries.

79. In the context of globalization, criminals take advantage of the ease of capital movement, advances in technology and increases in the mobility of people and commodities, as well as the significant diversity of legal provisions in various jurisdictions. As a result, assets can be transferred very quickly from place to place and, through exploitation of the existing legal asymmetries, appear finally as legitimate assets that are then available to serious offenders and criminal organizations in any part of the world. These assets can be used to finance criminal operations, to reward past crimes and to constitute an incentive for future crimes.

(b) The rationale for articles 6 and 7

80. The problem of money-laundering clearly calls for an international solution. It is essential for countries and regions to try to harmonize their approach, standards and legal systems to this crime, so as to enable themselves to cooperate with one another in controlling the international laundering of criminal proceeds. Jurisdictions with weak or no control mechanisms render the work of money launderers easier. Thus, the Convention seeks to provide a minimum standard for all countries to adhere to as part

of their efforts to control criminal proceeds. The provisions of the Convention addressing the seizure, freezing and confiscation of proceeds are an important related measure (see arts. 12-14).

81. Combating money-laundering is an important part of the fight against transnational organized crime. One of the main motives of international organized criminal groups is material gain. Taking that gain away is crucial. Targeting the profits and finances of criminal groups reduces their incentives to participate in such activities and undermines their criminal operations, growth and expansion. Beyond this, combating money-laundering also helps to preserve the integrity of financial institutions, both formal and informal, and to protect the smooth operation of the international financial system as a whole.

82. The Convention recognizes the close link between organized criminal activities and money-laundering and builds on earlier international initiatives in that regard. Those initiatives addressed the issue through a combination of repressive and preventive measures and the Convention follows the same pattern. With respect to the repression of money-laundering, some 167 States are now party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which requires the criminalization of money-laundering in the context of trafficking in drugs. Many regional and United Nations initiatives have sought to address such problems by focusing on specific criminal offences or geographic areas. As noted in section 3, Mandatory requirements, below, a number of forums have taken initiatives to broaden the obligation to criminalize money-laundering beyond predicate offences. These include the World Ministerial Conference on Organized Transnational Crime in 1994, the twentieth special session of the General Assembly, devoted to countering the world drug problem together, in 1998, the Financial Action Task Force on Money Laundering (FATF), the Asia/Pacific Group on Money Laundering, the Caribbean Financial Action Task Force, the European Union and the Basel Committee on Banking Regulations and Supervisory Practices. A similar effort has been made with respect to the financing of terrorism with the adoption of the International Convention for the Suppression of the Financing of Terrorism (General Assembly resolution 54/109, annex) and Security Council resolution 1373 (2001).

83. Criminalization not only allows national authorities to organize the detection, prosecution and repression of the offence, but also provides the legal basis for international cooperation among police, judicial and administrative authorities, including mutual legal assistance and extradition. As a

consequence of domestic or international initiatives, many countries already have laws on money-laundering. However, many States limit the predicate offences to trafficking in drugs and a few other crimes.

84. The Convention requires an expansion of this list to the widest range of predicate offences, including offences covered by the Convention and its Protocols, a comprehensive range of offences associated with organized criminal groups and all serious crimes (art. 6, para. 2 (a) and (b)).

85. An extremely critical part of money-laundering is placing illicit funds into the financial system. Once that is done, tracing the assets becomes much harder or even impossible. Stopping organized criminal groups from taking that first step and developing the capacity to track the movement of assets is, therefore, crucial. International cooperation and harmonization is again indispensable.

86. For these reasons, article 7 of the Convention introduces additional measures aimed at preventing such activities and at enlisting the assistance of financial institutions and others in preventing the introduction of criminal funds into the financial system, in detecting transactions in the system that may be of criminal origin and in facilitating the tracing of the funds involved in such transactions. Such measures have been recommended by FATF and similar regional bodies. Articles 12-14 concerning the seizure and confiscation of criminal assets are also relevant in this regard.

87. States must adopt and integrate into their financial infrastructure specific measures, such as procedures for financial institutions to know their customers, record-keeping and reporting suspicious transactions to national authorities. These procedures need to be part of a comprehensive regulatory regime that facilitates the required domestic and international cooperative relationships. Many countries have established financial intelligence units to collect, analyse and exchange relevant information efficiently, as needed and in accordance with their laws. States parties are asked to consider the establishment of such units, which entails a more substantial commitment of resources.

88. The Convention calls upon States parties to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering. Since the entry into force in 1990 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, other conventions and initiatives have aimed at fostering international cooperation in combating money-laundering at the

global and regional levels. This includes the establishment of FATF in 1990 and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted in 1990. Recently, the financing of terrorism has become of greater concern and international efforts have been undertaken to criminalize such activities and to prevent the use of financial systems for such purposes. The preventive measures are based on legislation against money-laundering, in particular the International Convention for the Suppression of the Financing of Terrorism, which contains detailed provisions on money-laundering, and the Special Recommendations on Terrorist Financing, adopted by FATF in October 2001.

89. States should review the provisions they already have in place to counter money-laundering in order to ensure compliance with these articles and those dealing with the identification, freezing and confiscation of crime proceeds (arts. 12-14) and international cooperation (arts. 16-19, 26 and 27). States undertaking such a review may wish to use the opportunity to implement the obligations they assume under other regional or international instruments and initiatives currently in place.

2. Summary of main requirements

90. Article 6 requires States parties to establish the following offences as crimes:

(a) Conversion or transfer of proceeds of crime (para. 1 (a) (i));

(b) Concealment or disguise of the nature, source, location, disposition, movement or ownership of proceeds of crime (para. 1 (a) (ii)).

91. Subject to the basic concepts of their domestic systems, States must also criminalize:

(a) Acquisition, possession or use of proceeds of crime (para. 1 (b) (i));

(b) Participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the foregoing (para. 1 (b) (ii)).

92. Under article 6, each State party must also:

(a) Apply these offences to proceeds generated by a wide range of criminal conduct (para. 2 (a)-(c));

(b) Provide a copy of its laws giving effect to this article (and subsequent changes to such laws) to the United Nations (para. 2 (d));

(c) Ensure that knowledge, intent and purpose can be established through inference from objective factual circumstances (para. 2 (f)).

93. Article 7 requires States parties to take additional measures. That is, they must:

(a) Establish a regulatory and supervisory regime for banks and non-bank financial institutions, emphasizing requirements of customer identification, record-keeping and the reporting of suspicious transactions (para. 1 (a));

(b) Ensure that administrative, regulatory, law enforcement and other authorities have the capacity to cooperate and exchange information at both national and international levels (para. 1 (b));

(c) Endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities (para. 4);

(d) Use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering (para. 3).

94. States parties are also required under article 7 to:

(a) Consider implementing feasible measures to detect and monitor the movements of cash and negotiable instruments across their borders, such as reporting requirements for substantial cross-border transfers (para. 2);

(b) Endeavour to develop and promote global, regional, subregional and bilateral cooperation among authorities to combat money-laundering (para. 4).

3. *Mandatory requirements*

95. There are important terms relating to this article. The Convention defines proceeds of crime as “any property derived from or obtained, directly or indirectly, through the commission of an offence” (art. 2, subpara. (e)). Property means all assets, corporeal and incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets (art. 2, subpara. (d)).

96. The terms “laundering of proceeds of crime” and “money-laundering” should be treated as synonymous (A/55/383/Add.1, para. 10).

97. The provisions of each article will be examined in turn below, under the headings of criminalization and preventive measures.

(a) *Criminalization (article 6)*

(i) *The offences*

98. Article 6 of the Organized Crime Convention requires that each State establish the four offences described below relating to money-laundering, in accordance with fundamental principles of its domestic law, when they are committed intentionally.¹

a. *Conversion or transfer of proceeds of crime*

99. The first money-laundering offence is the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action (art. 6, para. 1 (a) (i)). States must take legislative and other measures to establish this offence as a criminal offence.

100. The term “conversion or transfer” includes instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.

101. With respect to the mental elements required, the conversion or transfer must be intentional, the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds and the act or acts must be done for the purpose of either concealing or disguising their criminal origin, for example by helping to prevent their discovery, or helping a person evade criminal liability for the crime that generated the proceeds.

¹Except for the definition of predicate offences, the language used in article 6, paragraph 1, is similar to the language used in the corresponding provisions of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.

102. As with all measures called for by the Convention, these are the minimum requirements, but States are free to adopt more strict or severe measures (art. 34, para. 3).

103. The interpretative notes state that the terms “concealing or disguising” and “concealment or disguise” (used in para. 1 (a) (ii)) should be understood to include preventing the discovery of the illicit origin of property (A/55/383/Add.1, para. 11). This interpretative note applies to the four acts to be criminalized under article 6, paragraphs 1 (a) and (b).

b. Concealment or disguise of proceeds of crime

104. The second money-laundering offence is the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime (art. 6, para. 1 (a) (ii)).

105. The elements of this offence are quite broad, including the concealment or disguise of almost any aspect of or information about property.

106. Here, with respect to the mental elements required, the concealment or disguise must be intentional and the accused must have knowledge that the property constitutes the proceeds of crime at the time of the act. This mental state is less stringent than for the offence set forth in article 6, subparagraph 1 (a) (i). Accordingly, drafters should not require proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin. The interpretative notes specify that concealment of illicit origin should be understood to be covered by article 6, paragraphs 1 (a) and (b). However, drafters should also consider concealment for other purposes, or in cases where no purpose has been established, to be included (A/55/383/Add.1, para. 11).

107. The two money-laundering offences set forth under article 6, paragraph 1 (b), are to be established subject to the basic concepts of the legal system of the State.

c. Acquisition, possession or use of proceeds of crime

108. The third offence is the “acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime” (art. 6, para. 1 (b) (i)). This is the mirror image of the offences under

article 6, paragraph 1 (a) (i) and (ii), in that while those provisions impose liability on the providers of illicit proceeds, this paragraph imposes liability on recipients who acquire, possess or use property.

109. The mental elements are the same as for the offence under article 6, paragraph 1 (a) (ii): there must be an intent to acquire, possess or use, and the accused must have knowledge, at the time this occurred, that the property was the proceeds of crime. No particular purpose for the acts is required.

d. Participation in, association with or conspiracy to commit, attempt to commit, aiding, abetting, facilitating and counselling the commission of any of the foregoing

110. The fourth set of offences involves the “participation in, association with 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” (art. 6, para. 1 (b) (ii)).

111. These terms are not defined in the Convention, allowing for certain flexibility in domestic legislation. States parties should refer to the manner in which such ancillary offences are otherwise structured in their domestic systems and ensure that they apply to the other offences established pursuant to this article.

112. The knowledge, intent or purpose, as required for these offences, may be inferred from objective factual circumstances (art. 6, para. 2 (f)). Drafters could see that their evidentiary provisions enable such inference with respect to the mental state, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven (see also section 4, Other measures, including optional issues, below).

e. Other general requirements

113. States parties must furnish copies of their laws giving effect to article 6 and of any subsequent changes to such laws, or a description thereof, to the Secretary-General of the United Nations (art. 6, para. 2 (d)). Such materials should be provided to the United Nations Office on Drugs and Crime.

114. In drafting legislation to implement these criminalization obligations, legislators should also bear in mind the following general obligations under the Convention that are particularly relevant to the establishment of criminal offences:

(a) *Non-inclusion of transnationality in domestic offences.* Transnationality must not be made an element of the domestic offence (art. 34, para. 2);

(b) *Non-inclusion of “organized criminal group” in domestic offences.* As with transnationality above, the involvement of an organized criminal group must not be made an element of the domestic offence (art. 34, para. 2);

(c) *Criminalization must be through legislative and other measures.* The criminal offences must be established by criminal law and not simply by other measures, which would be additional to the proscribing legislation (A/55/383/Add.1, para. 9);

(d) *The offences must be committed intentionally.* The mental element required for each offence is that it be committed intentionally;

(e) *The offence should be liable to penalties that take into account the grave nature of the offence.* Penalties should be sufficiently severe, given the seriousness of the conduct required to be criminalized (art. 11, para. 1);

(f) *The description of the offence is reserved to the domestic law of a State party.* The domestic offence established by a State to implement the criminalization requirements of the Convention need not be described in exactly the same manner as in the Convention, as long as the required conduct is criminalized (art. 11, para. 6);

(g) *Liability of legal persons.* With respect to legal persons, the offences and liability can be criminal, civil or administrative (art. 10, para. 2);

(h) *Statutes of limitation.* The Convention requires that legislators establish a long statute of limitation period for the offence, in particular when alleged offenders are evading justice (art. 11, para. 5);

(i) *Sentence mitigation and immunity.* The Convention encourages States parties to consider mitigating sentences and granting immunity and/or leniency to individuals who decide to cooperate with the authorities (art. 26, paras. 2 and 3). This is optional and dependent on domestic legal principles and traditions. In jurisdictions where prosecution of crimes is mandatory, however, affording immunity from prosecution would require legislation.

(ii) *Predicate offences*

115. The Convention defines a “predicate offence” as “any offence as a result of which proceeds have been generated that may become the subject of” any of the money-laundering offences established under article 6 (art. 2, subpara. (h)).²

116. Many countries already have laws on money-laundering, but there are many variations in the definition of predicate offences. Some States limit the predicate offences to trafficking in drugs, or to trafficking in drugs and a few other crimes. Other States have an exhaustive list of predicate offences set forth in their legislation. Still other States define predicate offences generically as including all crimes, or all serious crimes, or all crimes subject to a defined penalty threshold.

117. Article 6, paragraph 2 (a), requires that the money-laundering offences be applicable to the “widest range of predicate offences”.³ Paragraph 2 (b) requires that the predicate offences include the offences established in accordance with articles 5, 8 and 23 of the Convention and with article 1, paragraph 3, of each of the Protocols to which States are or are considering becoming parties, as well as all “serious crimes” (art. 6, para. 2 (b); see also art. 2, subpara. (b), for the definition of “serious crimes”).

118. States that limit the application of money-laundering measures to an exhaustive list of predicate offences must amend that list accordingly and, “at a minimum”, include a “comprehensive range of offences associated with organized criminal groups” (art. 6, para. 2 (b)). An interpretative note adds that the words “associated with organized criminal groups” are intended to indicate “criminal activity of the type in which organized criminal groups engage” (A/55/383/Add.1, para. 12).

119. Predicate offences may not be exclusively offences committed in the territory of the State applying the Convention. States must provide for offences committed in other jurisdictions to be included, provided that the

²For purposes of defining money-laundering offences, the assets involved are the “proceeds of crime”. By contrast, the seizure and confiscation provisions apply to “instrumentalities” as well as to proceeds of crime, that is, property used in or destined for use in crime (art. 12, para. 1 (b)).

³Compare with, inter alia, article 6 of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and recommendation 1 of FATF Forty Recommendations.

conduct is a crime where it was committed as well as in the State applying the Convention (art. 6, para. 2 (c)). In other words, this requires dual criminality.⁴

(iii) *Cases where predicate and money-laundering offences cannot apply to the same offender*

120. The constitutions or fundamental legal principles of some States (for example, Sweden) do not permit the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds from that offence. The Convention acknowledges this issue and allows for the non-application of the money-laundering offences to those who committed the predicate offence, but only by countries whose fundamental principles so provide (art. 6, para. 2 (e)).⁵

121. An interpretative note states that, during the negotiation of the Convention, States where prosecution or punishment of the same person for both the predicate offence and the money-laundering offence is not permitted confirmed that they did not refuse extradition, mutual legal assistance or cooperation for purposes of confiscation solely because the request was based on a money-laundering offence the predicate offence of which was committed by the same person (A/55/383/Add.1, para. 13; see also arts. 12, 13, 16 and 18 of the Convention).

(b) *Preventive measures (article 7)*

122. Article 7 sets out a number of measures—some mandatory, some based on best efforts and some optional—that are intended to ensure that States parties have in place a comprehensive legal and administrative regime to deter and detect money-laundering. The overall objective is to provide a comprehensive regime that facilitates the identification of money-laundering activity and promotes information exchange to a range of authorities dedicated to combating money-laundering. Financial

⁴Dual criminality is not required under the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, in which article 6, para. 2 (a), states that “it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party”.

⁵This practice is sometimes called “self-laundering”. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 is silent on this issue. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime allows States parties to provide that the money-laundering offences will not apply to persons who committed the predicate offence (art. 6, para. 2 (b)).

institutions and other designated entities are required to take measures to prevent the introduction of criminal funds into the financial system and to provide the means to identify and trace such funds when they are already in the financial system, as well as to link them to their owners to facilitate apprehension and prosecution.⁶

123. For States that do not currently take part in the work of FATF or related organizations aimed at combating money-laundering, these legislative, regulatory and administrative obligations can be more time-consuming to implement than for States that already have structures to combat money-laundering. For example, the measures required by this article need to be integrated into the general financial infrastructure of each jurisdiction. Therefore, the time required for implementation of these measures will largely depend on the nature and complexity of local financial institutions, as well as the degree to which they are involved in cross-border transactions. In this process, attention should be focused on the specific context and vulnerabilities of each jurisdiction. In States that do not currently have such measures in place, the process of implementation can proceed contemporaneously with ratification, as long as the measures provided for in this article are in place when the Convention enters into force for the State party concerned.

124. Article 7 contains two major mandatory requirements:

(a) To establish a comprehensive domestic regulatory and supervisory regime to deter money-laundering (art. 7, para. 1 (a));

(b) To ensure that agencies involved in combating money-laundering have the ability to cooperate and exchange information at the national and international levels (art. 7, para. 1 (b)).

125. In addition, States are to consider implementing measures to monitor cash movements across their borders (art. 7, para. 2) and to endeavour to develop and promote global, regional and bilateral cooperation among relevant agencies to combat money-laundering (art. 7, para. 4).

126. As stated earlier, the Convention builds on ongoing international initiatives to combat money-laundering. In establishing a domestic regulatory and supervisory regime, States parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral

⁶The requirements under articles 12-14 of the Convention concerning the identification, tracing and confiscation of the proceeds of crime and other crime-related property are also part of the overall preventive measures required to combat money-laundering effectively.

organizations against money-laundering (art. 7, para. 3). An interpretative note states that during the negotiations, the words “relevant initiatives of regional, interregional and multilateral organizations” were understood to refer in particular to the Forty Recommendations of FATF, as revised in 2003, and, in addition, to other existing initiatives or regional, interregional and multilateral organizations against money-laundering, such as the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group, the European Union and the Organization of American States (A/55/383/Add.1, para. 17). Ultimately, States are free to determine the best way to implement this article. However, the development of a relationship with one of the organizations working to combat money-laundering would be important for effective implementation.

127. The mandatory measures will be outlined below under two headings: the establishment of a regulatory regime and the enhancement of internal and international cooperation. The requirement under this article to consider other measures, such as the creation of a financial intelligence unit, will be examined in section 4, Other measures, including optional issues, below.

(i) Establishment of a regulatory regime

128. States are required to establish a domestic regulatory and supervisory regime within their competence in order to deter and detect money-laundering activities (art. 7, para. 1 (a)). This regime must be comprehensive, but the precise nature and particular elements of the regime are left to States, provided that they require at a minimum banks and non-bank financial institutions to ensure:

- (a) Effective customer identification;
- (b) Accurate record-keeping;
- (c) A mechanism for the reporting of suspicious transactions.

129. The interpretative notes contain a number of statements related to measures to combat money-laundering.

a. Institutions subject to the requirements

130. The requirements extend to banks, non-bank financial institutions, that is, insurance companies and securities firms, and where appropriate,

other bodies particularly susceptible to money-laundering (art. 7, para. 1 (a)). The interpretative notes add that other bodies may be understood to include intermediaries, which in some jurisdictions may include stockbroking firms, other securities dealers, currency exchange bureaux or currency brokers.

131. Thus, this regime should apply not only to banking institutions, but also to areas of commerce where high turnover and large volumes make money-laundering likely. Previous experience shows that money-laundering activities have taken place in the real estate sector and in the trade of commodities, such as gold, precious stones and tobacco.

132. In many forums, the list of institutions is being expanded beyond financial institutions to include such businesses and professions. For example, recommendation 12 of the Forty Recommendations extends, when certain conditions are met, the requirements of customer due diligence and record-keeping to casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals and accountants and trust and company service providers. Similar requirements are set forth in Directive 2001/97/EC adopted by the European Parliament and the Council of the European Union on 4 December 2001. More recently, increased attention has been focused on money service businesses and informal value transfer systems, such as *hawala* and *hundi*. In a growing number of jurisdictions, these are also subject to a regulatory regime for the purposes of detecting money-laundering or other offences.⁷

b. Suspicious transactions

133. According to the interpretative notes, suspicious transactions may include unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer's business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general (A/55/383/Add.1, para. 15). The International Convention for the Suppression of the Financing of Terrorism defines suspicious transactions, based on the FATF definition, as all complex, unusually large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose (General Assembly resolution 54/109, annex, art. 18, para. 1 (b) (iii)).

⁷See examples of regulations in Australia, Germany, Hong Kong Special Administrative Region of China, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland and the United States.

134. In implementing article 7, paragraph 3, States may wish to consider some specific elements relative to the measures that the comprehensive regulatory regime must include. The Forty Recommendations are useful in this regard, as are model regulations that have been prepared by the United Nations Office on Drugs and Crime and the Organization of American States (OAS) (see sect. 5, Information resources, below).

c. Customer identification

135. Customer identification entails requirements that holders of accounts in financial institutions and all parties to financial transactions be identified and documented. Records should contain sufficient information to identify all parties and the nature of the transaction, identify specific assets and the amounts or values involved and permit the tracing of the source and destination of all funds or other assets.

d. Record-keeping

136. The requirement for record-keeping means that client and transaction records should be kept for a specified minimum period of time. Under the Forty Recommendations, at least five years is recommended, while for States parties to the International Convention for the Suppression of Financing of Terrorism, retention of records for five years is mandatory.

e. Reporting of suspicious transactions

137. Suspicious transactions that are to be notified to the financial intelligence unit or other designated agency must be defined. Criteria for identifying suspicious transactions should be developed and periodically reviewed in consultation with experts knowledgeable about new methods or networks used by money launderers.

138. The powers to be granted to regulators and staff of the financial intelligence unit to inspect records and to compel the assistance of record keepers in locating the records must also be defined. As some of these records may be covered by confidentiality requirements and banking secrecy laws that prohibit their disclosure, provisions freeing financial institutions from complying with such requirements and laws may be considered. Drafters should also ensure that the inspection and disclosure requirements are written in such a way as to protect financial institutions against

civil and other claims for disclosing client records to regulators and financial intelligence units.

f. General

139. The failure to comply with requirements in respect of money-laundering should be sanctioned by criminal civil or administrative penalties, in accordance with domestic fundamental principles and laws.

140. The implementation of such measures is likely to require legislation. In particular, the requirement that financial institutions must disclose suspicious transactions and the protection of those who make disclosures in good faith will require legislation to override banking secrecy laws.

(ii) Domestic and international cooperation

141. The Organized Crime Convention requires that administrative, regulatory, law enforcement and other domestic authorities in charge of the efforts against money-laundering are able to cooperate at both the national and international level. This includes the exchange of information within the conditions prescribed by their domestic law (art. 7, para. 1 (b)). This must be done without limiting or detracting from, or in the words of the Convention, “without prejudice to”, the requirements generated by article 18 on mutual legal assistance and article 27 on law enforcement cooperation.

142. Furthermore, States are required to endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering (art. 7, para. 4).

143. Towards this objective, the Convention does not mandate but nevertheless requires States to consider the establishment of a financial intelligence unit, which would collect, analyse and disseminate, as appropriate, information related to money-laundering activities (art. 7, para. 1 (b)).

144. In addition, as part of the effort to develop the capacity to provide effective international cooperation, States are required to consider the implementation of measures aimed at monitoring the cross-border movement of cash and other monetary instruments (see art. 7, para. 2).

145. In order for cooperation to be possible, domestic capabilities must be developed for the identification, collection and interpretation of all relevant information. Essentially, the Convention proposes roles for three types of entity that may be part of a strategy to combat money-laundering and could, thus, be considered by States:

(a) Regulatory agencies responsible for the oversight of financial institutions, such as banks or insurance entities, with powers to inspect financial institutions and enforce regulatory requirements through the imposition of regulatory or administrative remedies or sanctions;

(b) Law enforcement agencies responsible for conducting criminal investigations, with investigative powers and powers to arrest and detain suspected offenders and that are subject to judicial or other safeguards;

(c) Financial intelligence units, which are not, however, required under the Organized Crime Convention, whose powers are usually limited to receiving reports of suspicious transactions and activities, analysing them and disseminating information to prosecution agencies, although some such units have wider powers.

146. The authority of each entity to cooperate with national bodies and with other similar agencies in other countries is usually specified in the relevant legislation. If States do have such entities, legislation may be needed to amend existing mandates and the division of labour among these entities, in accordance with each State's constitutional or other principles and the specificities of its financial services sector.

147. Some of these measures may constitute a strong challenge for countries in which the financial sector is not heavily regulated and the necessary legislation and administrative infrastructure may have to be created. It is essential to note, however, that the relevance and utility of these arrangements are not limited to the control of money-laundering, but also to corruption (art. 7). They also strengthen confidence in the financial infrastructure, which is instrumental to sustainable social and economic development.

148. Coordination of efforts and international cooperation is as central to the problem of money-laundering as it is to the other offences covered by the Convention. Beyond the general measures and processes such as extradition, mutual legal assistance and joint investigations (which are covered in more detail in the sections on international cooperation in chapter V, below), the Convention seeks to strengthen such coordination and cooperation.

4. Other measures, including optional issues

149. Two types of measures are outlined below: those designed to monitor movement of funds across borders and those concerning financial intelligence units.

(a) Monitoring cross-border transactions

150. As part of the effort to develop the capacity to provide effective international cooperation, States are required seriously to consider the introduction of measures aimed at monitoring the cross-border movement of cash and other monetary instruments. Article 7 requires States seriously to consider the implementation of feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments (art. 7, para. 2). Generally, structures based on monitoring or surveillance will require legal powers giving inspectors or investigators access to information on cross-border transactions, in particular in cases where criminal behaviour is suspected.

(b) Financial intelligence units

151. Article 7, paragraph 1 (b), requires States parties to consider the establishment of financial intelligence units to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering. Since the 1990s, many States have established such units as part of their regulatory police or other authorities. There is a wide range of structure, responsibilities, functions and departmental affiliation or independence for such units. According to the interpretative notes, the call in article 7, paragraph 1 (b), for the establishment of a financial intelligence unit is intended for cases where such a mechanism does not yet exist (A/55/383/Add.1, para. 16).

152. The Egmont Group (an informal association of financial intelligence units) has defined such units as a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information:

(i) concerning suspected proceeds of crime, or (ii) required by national legislation or regulation, in order to counter money-laundering.”⁸

153. The Convention does not require that a financial intelligence unit be established by law, but legislation may still be required to institute the obligation to report suspicious transactions to such a unit and to protect financial institutions that disclose such information in good faith. In practice, the vast majority of financial intelligence units are established by law. If it is decided to draft such legislation, States may wish to consider including the following elements:

(a) Specification of the institutions that are subject to the obligation to report suspicious transactions and definition of the information to be reported to the unit;

(b) Legislation defining the powers under which the unit can compel the assistance of reporting institutions to follow up on incomplete or inadequate reports;

(c) Authorization for the unit to disseminate information to law enforcement agencies when it has evidence warranting prosecution and authority for the unit to communicate financial intelligence information to foreign agencies, under certain conditions;

(d) Protection of the confidentiality of information received by the unit, establishing limits on the uses to which it may be put and shielding the unit from further disclosure;

(e) Definition of the reporting arrangements for the unit and its relationship with other government agencies, including law enforcement agencies and financial regulators.

154. States may already have money-laundering offences and controls in place that can be expanded or modified to conform to the requirements of articles 6 and 7 relating to money-laundering and those of articles 12-14 relating to confiscation, seizure and disposal of proceeds, if necessary.

155. It is worth noting that actions taken to conform to articles 6 and 7 may also bring States into conformity with other conventions and initiatives, such as Security Council resolution 1373 (2001), the International Convention for the Suppression of the Financing of Terrorism and the FATF eight Special Recommendations on Terrorist Financing.

⁸See the web site of the Egmont Group (<http://egmontgroup.org/>).

156. States may also wish to consider other issues, which are entirely optional, with respect to the mental element of the money-laundering offence.

157. The Convention requires in some jurisdictions *dolus* for the offences established under article 6, that is, that the perpetrator knew that the property concerned was the proceeds of crime. States may extend the definition of this offence to include cases where the perpetrator believed, even if wrongly, that the funds were the proceeds of crime (*dolus eventualis*). Some States, such as Canada, have included such an extension in their law.

158. In some jurisdictions or regional initiatives, the required mental element is that the person knew or should have known. The concept of intentional ignorance or wilful blindness may also be used. Although it is not a requirement, this is particularly effective in money-laundering cases, where legislatures find it possible to adopt such offences.

159. Further information about various options that can be included in laws, regulations and procedures to combat money-laundering can be obtained from the Anti-Money-Laundering Unit of the United Nations Office on Drugs and Crime and the sources cited in section 5 (c), Other sources of information, below.

5. Information resources

(a) Related provisions and instruments

(i) Organized Crime Convention

Article 2 (Use of terms)

Article 11 (Prosecution, adjudication and sanctions)

Article 12 (Confiscation and seizure)

Article 13 (International cooperation for purposes of confiscation)

Article 14 (Disposal of confiscated proceeds of crime or property)

Article 16 (Extradition)

Article 18 (Mutual legal assistance)

Article 27 (Law enforcement cooperation)

Article 34, paragraph 3 (Implementation of the Convention)

(ii) *Protocols to the Organized Crime Convention*

Article 1, paragraphs 2 and 3, of each Protocol

(iii) *Other instruments*

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

United Nations, *Treaty Series*, vol. 1582, No. 27627

http://www.unodc.org/pdf/convention_1988_en.pdf

1990 Convention on Laundering, Search, Seizure and Confiscation of
the Proceeds from Crime

Council of Europe, *European Treaty Series*, No. 141

<http://conventions.coe.int/Treaty/EN/Treaties/Html/141.htm>

1999 International Convention for the Suppression of the Financing of
Terrorism

General Assembly resolution 54/109, annex

[http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/251/28/PDF/
N0025128.pdf?OpenElement](http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/251/28/PDF/N0025128.pdf?OpenElement)

(b) *Examples of national legislation*

160. States parties preparing legislation in respect of the provisions of articles 6 and 7 of the Organized Crime Convention may wish to refer for further guidance, inter alia, to the legislation presented below.

Brazil

***Chapter I. Crimes of money-laundering or concealment of assets,
rights and valuables***

Article 1

To conceal or disguise the true nature, origin, location, disposition, movement, or ownership of assets, rights and valuables that result directly or indirectly from the following crimes:

- I. Illicit trafficking in narcotic substances or similar drugs;
- II. Terrorism;
- III. Smuggling or trafficking in weapons, munitions or materials used for their production;

- IV. Extortion through kidnapping;
- V. Acts against the public administration, including direct or indirect demands of benefits on behalf of oneself or others, as a condition or price for the performance or the omission of any administrative act;
- VI. Acts against the Brazilian financial system;
- VII. Acts committed by a criminal organization.

Sentence: incarceration (1) for a period of 3 (three) to 10 (ten) years and a fine.

Paragraph 1

The same punishment shall apply to anyone who, in order to conceal or disguise the use of the assets, rights and valuables resulting from the crimes set forth in this article:

- I. Converts them into licit assets;
- II. Acquires, receives, exchanges, trades, gives or receives as guarantee, keeps, stores, moves, or transfers any such assets, rights and valuables;
- III. Imports or exports goods at prices that do not correspond to their true value.

Paragraph 2

The same penalty also applies to anyone who:

- I. Through economic or financial activity, makes use of any assets, rights and valuables that he/she knows are derived from the crimes referred to in this article;
- II. Knowingly takes part in any group, association or office set up for the principal or secondary purpose of committing crimes referred to in this Law.

Paragraph 3

Attempts to commit any of the crimes referred to in this Law are punishable in accordance with the provisions set forth in article 14, sole paragraph, of the Criminal Code.

Paragraph 4

The sentence shall be increased by one to two thirds, in any of the instances contemplated in items I to VI of this article when the crime follows a constant pattern or is committed by a criminal organization.

Paragraph 5

In the event that the accused or his/her accomplice freely agrees to cooperate with the authorities by providing information that leads to the detection of a crime

and the identification of those responsible for it, or to the discovery of assets, rights and valuables that were the object of the crime, the sentence may be reduced by one or two thirds. The accused may also be allowed to start serving time in an open system of imprisonment (2). The judge may also decide whether to apply the penalty or substitute it for the restriction of rights.

Canada

<http://laws.justice.gc.ca/en/p-24.501/92769.html>

China

<http://www.imolin.org/lawchina.htm>

Italy

<http://www.imolin.org/lawitaly.htm>

Article 648. Receiving stolen goods

Except in cases of participation in the [predicate] offence, any person acquiring, receiving or concealing money or goods that are the proceeds of a criminal offence, or at all events seeking to allow such money or goods to be acquired, received or concealed, in order to obtain profits for himself/herself or for other persons, shall be liable to imprisonment of two to eight years and to a fine of Lit 1 million to Lit 20 million.

The penalty shall be imprisonment of up to six years and a fine of up to Lit 1 million if the offence is not serious.

The provisions of this article shall also apply when the person committing the offence of which the said money or goods are the proceeds is not indictable or is not liable to punishment, or when the said offence cannot be prosecuted.

Article 648 bis. Money-laundering

Except in cases of participation in the [predicate] offence, any person substituting or transferring money, goods or assets obtained by means of intentional criminal offences, or any person seeking to conceal the fact that the said money, goods or assets are the proceeds of such offences, shall be liable to imprisonment of four to twelve years and to a fine of Lit 2 to Lit 30 million.

The penalty shall be increased when the offence is committed in the course of a professional activity.

The penalty shall be decreased if the money, goods or assets are the proceeds of a criminal offence for which the penalty is imprisonment of up to five years.

The final paragraph of article 648 shall apply.

Article 648 ter. Use of money, goods or assets of unlawful origin

Except in cases of participation in the [predicate] offence and in the cases provided for in articles 648 and 648bis, any person using for economic or financial activities money, goods or assets obtained by means of a criminal offence, shall be liable to imprisonment of four to twelve years and to a fine of Lit 2 to Lit 30 million.

The penalty shall be increased when the offence is committed in the course of a professional activity.

The penalty shall be decreased pursuant to paragraph 2 of article 648.

The final paragraph of article 648 shall apply.

Japan

<http://www.imolin.org/lawjapan.htm>

Latvia***Law on the Prevention of Laundering of Proceeds Derived from Criminal Activity (Law took effect on 1 June 1998.)*****Section I. General provisions****Article 1**

The following terms are used in this Law:

- 1) financial transaction (hereinafter also transaction):
 - a) receiving deposits and other repayable funds;
 - b) lending;
 - c) money transmission services;
 - d) issuing and servicing payment instruments other than cash;
 - e) trading money market instruments (cheques, bills, certificates of deposit);
 - f) foreign exchange, financial contracts and securities for own and customers' accounts;
 - g) trust operations;
 - h) safekeeping and administration of securities, including administration of collective investment funds and pension funds;
 - i) issuing guaranties and other written promises, whereby somebody assumes responsibility to the creditor for a debt of a third party;

- j) safekeeping of valuables;
- k) issuing shares and rendering related services;
- l) consulting customers about financial services;
- m) intermediation in the market of money instruments;
- n) providing information about the settlement of customer liabilities;
- o) insurance;
- p) initiating and maintaining lottery and gambling;
- q) other transactions similar by nature to the above;

2) financial institution: an enterprise (a business venture) registered with the Enterprise Register of the Republic of Latvia, a branch or a representative office established to perform one or several financial transactions referred to in this Law, except receiving of deposits and other repayable funds, or to acquire holdings in the capital of other enterprises (business ventures). For the purposes of this Law, legal or natural persons or their associations whose financial activity includes conducting, counselling and certifying financial transactions, shall also be considered financial institutions;

3) financial resources: cash and payment instruments other than cash, precious metals, and securities as defined in the Republic of Latvia Law on Securities;

4) customer: a legal or natural person or their associations engaged in at least one financial transaction with a credit or financial institution;

5) credit institution: a bank, a savings and loan association or a branch of a foreign bank;

6) list of indicators of unusual transactions: a list of indicators approved by the Cabinet of Ministers whereby a transaction may be designated as laundering of proceeds derived from criminal activity (money-laundering) or an attempt at money-laundering.

Article 2

(1) This Law establishes the responsibilities and rights of financial institutions, credit institutions and their supervisory and control authorities to prevent laundering of proceeds derived from criminal activity. The Law also stipulates the procedure for establishing the Office for Preventing Laundering of Proceeds Derived from Criminal Activity (hereinafter the Control Service) and the Advisory Council, their responsibilities and rights.

(2) This Law shall also apply to other legal or natural persons or their associations whose professional activity includes conducting, counselling and certifying financial transactions.

Article 3

The purpose of this Law is to prevent the possibility to use the Latvian financial system for the laundering of proceeds derived from criminal activity.

Article 4

Proceeds derived from criminal activity are financial resources and other property derived from the following types of criminal activity:

- 1) illegal distribution of poisonous, strongly effective, narcotic or psycho-active substances;
- 2) banditry (gang-related criminal activity);
- 3) smuggling;
- 4) illegal transportation of people across the state border;
- 5) manufacturing or distribution of forged money or securities, or unlawful dealing in securities or cash documents;
- 6) seizing of hostages, kidnapping;
- 7) infringement of copyright and neighbouring rights;
- 8) property crime committed on a large scale or by an organized group;
- 9) unauthorized or unregistered entrepreneurship, reckless bankruptcy, fraud against a credit institution;
- 10) giving and taking of bribes, intermediation in bribery;
- 11) violating regulations on importation, manufacturing or distribution of pornographic material;
- 12) illegal acquisition, storage, use, transfer or destruction of radioactive materials;
- 13) illegal (unauthorized) manufacturing or selling of special devices, weapons, ammunition and explosives;
- 14) illegal excision of and trading in internal organs and tissues from a live or dead human body.

Article 5

Laundering of proceeds derived from criminal activity shall be considered the following activities when committed intentionally to conceal or disguise the criminal provenance of financial resources or other property:

- 1) conversion of financial resources or other property into other valuables, changing their location or title;
- 2) concealing or disguising the true nature, source, location, placement, movement of or title to financial resources or other property;
- 3) acquisition, possession or use of financial resources or other property, with full knowledge, at the time of acquiring title to property or financial resources, that they have been derived from criminal activity;
- 4) assistance in committing deeds referred to in paragraphs 1-3 of this article.

Section II. Customer identification

Article 6

No credit or financial institution shall be entitled to open an account or accept financial resources for safe custody without obtaining the following customer information:

- 1) for a resident:
 - a) if legal person, the name, domicile, registration number and place of registration;
 - b) if natural person, name, surname, identity number;
- 2) for a non-resident, data from the identification certificate issued by the respective foreign country:
 - a) if legal person, the name, domicile, registration number and place of registration;
 - b) if natural person, name, surname, date of issue, number and the issuer of the identification certificate.

Article 7

(1) A credit or financial institution shall also identify a customer in the procedure specified in article 6 in case of any other financial transaction where the volume of a single transaction or several obviously linked transactions totals or exceeds lats 10,000 and the customer has not been identified when opening the account or accepting his/her financial resources for safe custody.

(2) Where the volume of the transaction is not known at the time of its execution, the customer shall be identified as soon as the volume is appraised and it totals or exceeds lats 10,000. Irrespective of the volume of the transaction, a credit or financial institution shall identify the customer whenever the transaction is characterized by at least one of the unusual transaction indicators or there are

other suspicious circumstances indicating that the transaction may be money-laundering or an attempt at money-laundering.

Article 8

Where a credit or financial institution is aware or suspects that transactions referred to in articles 6 and 7 are conducted on behalf of a third party, it shall take reasonable measures to obtain that person's identification.

Article 9

Identification requirements prescribed in this Law shall not apply to the following:

1) financial transactions in which the customer of a credit or financial institution is one of the following:

a) a credit or financial institution that has been granted a licence in the Republic of Latvia;

b) a credit or financial institution that has been granted a licence in a country included in the list of countries specified by the Control Service. The list includes countries where laws on money-laundering pursuant to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 or to European Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money-laundering are in effect;

2) a registered party to a stock exchange that is a member of the *Fédération internationale des bourses de valeurs*, and is established in a European Union member State or another country specified by the Control Service;

3) insurance companies (insurers) where the total periodic premium of the customer during one year does not exceed lats 500 or a single premium does not exceed lats 1,500 irrespective of the amount of the insurance.

Article 10

(1) When identifying a customer pursuant to the procedure set out in article 6, a credit or financial institution shall keep copies of identification certificates for at least five years after the relationship with the customer has ended.

(2) When identifying a customer pursuant to the procedure set out in articles 7 and 8, a credit or financial institution shall keep copies of identification certificates and transaction records for at least five years following the transaction. The term for keeping documents also applies to third-party identity documents referred to in article 8 if such documents have been acquired.

Section III. Reporting unusual and suspicious financial transactions

Article 11

Credit and financial institutions shall be under obligation to:

1) report without delay to the Control Service any financial transaction characterized by at least one of the indicators of unusual transactions. The list of indicators of unusual transactions is laid down by the Control Service, taking into account proposals of the Advisory Council, and it is approved by the Cabinet of Ministers;

2) upon written request of the Control Service, promptly furnish additional information about any reported financial transaction as needed by that Office to properly function under this Law. Officials and employees of credit and financial institutions shall also be under obligation to report to the Control Service any uncovered facts that may not match the list of indicators of unusual transactions but, owing to other circumstances, are suspected to involve money-laundering or attempted money-laundering.

Article 12

The report submitted to the Control Service by a credit or financial institution shall contain, if possible, the following:

- 1) customer identification;
- 2) copy of the customer identification certificate;
- 3) description of the transaction conducted or proposed, including the destination of money and volume of the transaction, and indication of when and where the transaction was conducted or proposed;
- 4) evidence supporting that the transaction is suspicious or may be designated as unusual on the basis of the list of indicators of unusual transactions.

Article 13

Information disclosed in compliance with the requirements of this Law shall be used by the Control Service for the sole purpose of performing its duties as specified by this Law. Any employee of the Control Service who uses this information for purposes other than stated above or divulges it to unauthorized persons shall be subject to criminal prosecution as the Law stipulates.

Article 14

A credit or financial institution, its officials and employees are not entitled to advise the customer or a third party that information about the customer or his/her transaction (transactions) has been reported to the Control Service.

Article 15

Pre-trial investigation on the fact of money-laundering shall not be launched against a person who has reported that fact to the Control Service.

Article 16

Where a report to the Control Service by a credit or financial institution (or official/employee thereof) constitutes compliance with the requirements of this Law, this shall not place the reporting institution or person under any legal or material responsibility whether or not the fact of money-laundering has been proved during the pre-trial investigation or at court and irrespective of the terms of the contract signed between the credit or financial institution and a customer.

Section IV. Refraining from suspicious financial transactions**Article 17**

Credit and financial institutions shall refrain from conducting any transaction that they suspect to involve money-laundering or attempted money-laundering.

Article 18

Where a credit or financial institution cannot refrain from conducting a suspicious transaction or where such refraining may serve as a source of information for persons involved in money-laundering and help them to evade the legal consequences of such activity, the institution shall be entitled to conduct said transaction, reporting it afterwards to the Control Service in accordance with the procedure set out in article 12 hereof.

Article 19

Where a credit or financial institution has refrained from a transaction pursuant to article 17 hereof, this or delaying the transaction shall not place the institution (or official/employee thereof) under any legal or material responsibility, irrespective of the consequences arising from use of the disclosed information.

Section V. Internal control procedures of credit and financial institutions**Article 20**

(1) To comply with the requirements of this Law, credit and financial institutions shall establish internal control procedures and ensure that they are implemented.

(2) Credit and financial institutions shall ensure that their employees know the requirements of this Law. Employees shall be trained to detect indicators of

unusual and suspicious financial transactions and perform tasks specified by internal control procedures.

(3) Credit and financial institutions shall have an obligation to designate a unit or a person (persons) directly responsible for the credit or financial institution's compliance with the requirements of this Law, and for contact with the Control Service. The name of the said unit or person (persons) shall be communicated to the Control Service and to the institution's supervisory and control authorities.

Article 21

(1) Credit and financial institutions, their supervisory and control authorities, the Control Service and officials and employees thereof shall not be entitled to disclose to third parties information about persons or units designated to maintain contact with the Control Service.

(2) The Control Service shall not be entitled to disclose information about persons who have reported unusual or suspicious financial transactions. This restriction shall not apply to cases referred to in article 33 hereof.

Section VI. Responsibilities of supervisory and control authorities of credit and financial institutions

Article 22

Supervisory and control authorities or credit and financial institutions shall be under obligation to notify the Control Service of any facts uncovered during examinations and inspections, if they match the indicators of unusual transactions and have failed to be reported to the Control Service by the credit or financial institution.

Article 23

Supervisory and control authorities of credit and financial institutions shall be entitled to notify the Control Service of any facts uncovered during examinations and inspections even if they do not match the indicators of unusual transactions but may be suspected to involve money-laundering or attempted money-laundering.

Article 24

Supervisory and control authorities and their employees shall not be entitled to inform customers of a credit or financial institution or third parties that the Control Service has been notified in accordance with the procedure stipulated in articles 11, 12, 22 and 23 hereof.

Article 25

Reporting to the Control Service in accordance with the procedure stipulated by this Section shall not constitute disclosing of confidential information and therefore shall not place the supervisory and control authorities (or employees thereof) under any legal and material responsibility whether or not the fact of money-laundering has been proved during the preliminary judicial inquiry or at court.

Article 26

Upon request of the Control Service, supervisory and control authorities of credit and financial institutions shall be under obligation to provide their methodological assistance as needed by that Office to properly function under this Law.

Section VII. Office for Prevention of Laundering of Proceeds Derived from Criminal Activity (the Control Service)**Article 27**

The Office for Prevention of Laundering of Proceeds Derived from Criminal Activity (the Control Service) is a specially established state institution which, in accordance with this Law, exercises control over unusual and suspicious financial transactions, acquires, receives, registers, processes, summarizes, stores, analyses and provides information to bodies conducting preliminary judicial inquiry and to the court, as may be relevant to prevent, detect, investigate or try in court the fact of or an attempt of money-laundering, or any other criminal activity related to money-laundering.

Article 28

(1) The Control Service is a legal person under the oversight of the Republic of Latvia Prosecutor's Office; this oversight is directly exercised by the Prosecutor General and prosecutors with special authorization. By-laws of the Control Service are approved by the General Prosecutor's Council.

(2) The Control Service is financed from the state budget. The organizational structure and the size of the Control Service are determined by the Prosecutor General, taking into account the amount of allocated funds.

(3) The Director of the Control Service carries a four-year term and is appointed and dismissed by the Prosecutor General. The Director may be removed from office only for committing a crime or a deliberate violation of the law; for carrying out his/her professional duties with negligence or in such manner that has resulted in grave consequences; and for disgraceful conduct incompatible with his/her status.

(4) Employees of the Control Service are hired or dismissed by the Director of the Control Service. The salaries of the staff are determined by the Cabinet of Ministers.

(5) The Director and employees of the Control Service must comply with the requirements stipulated by the Law on State Secrets to qualify for special permission to access highly confidential information. Their compliance with these requirements is examined and verified by the Constitutional Defence Bureau.

Article 29

The Control Service is charged with the following responsibilities:

1) to receive, collect, store and analyse reports by credit and financial institutions and other information in order to determine whether it may constitute evidence of money-laundering or attempted money-laundering;

2) to furnish to bodies conducting preliminary judicial inquiry and to the court any information that may be relevant for preventing, detecting, investigating or trying in court a fact of or an attempt at money-laundering, or criminal act related to money-laundering;

3) to analyse the quality of information received and the efficiency of its utilization, and to notify the credit and financial institutions as to the results;

4) to conduct analysis and investigation of means whereby money-laundering or attempted money-laundering has taken place and to improve the methods for preventing and detecting such activities;

5) in accordance with the procedure stipulated by this Law, to cooperate with international institutions engaged in combating money-laundering or attempts at money-laundering.

Article 30

The Control Service shall take the necessary administrative, technical and organizational measures to ensure confidentiality of information and to prevent unauthorized access to, tampering with, disseminating or destroying of information. The procedure for registering, processing, storing and destroying of information reported to the Control Service shall be established by the General Prosecutor's Council, taking into account recommendations of the Advisory Council. Information about financial transactions shall be kept by the Control Service for at least five years.

Article 31

All state institutions shall be under obligation to furnish the Control Service with information pursuant to the procedure established by the Cabinet of Ministers and as needed by that Office to perform its functions.

Section VIII. Cooperation between the Control Service and state institutions

Article 32

Upon its own initiative the Control Service may furnish information to bodies conducting preliminary judicial inquiry or to the court, if such information may lead

to a reasonable assumption that the person in question has committed money-laundering in order to disguise or conceal illegal acquisition of financial resources or other property.

Article 33

If, with consent by the Prosecutor General or prosecutors with special powers, persons authorized to perform investigative field work, bodies conducting pre-trial investigation, or the court have requested information, the Control Service shall furnish it in accordance with the provisions of this Law in cases where penal activity has resulted in at least one of the following:

- 1) a criminal case has been instigated in due course as established by the Code of Criminal Process of the Republic of Latvia, or
- 2) investigative fieldwork has been initiated in due course as set out in article 22 of the Law on Investigative Fieldwork for the criminal activities described in article 4 hereof.

Article 34

Upon the State Revenue Office's request for which the Prosecutor General or prosecutors with special powers have given their consent, the Control Service shall furnish information at its disposal where it is necessary for examining income declarations of state officials pursuant to provisions of the Law on Prevention of Corruption and where there is reasonable suspicion that the person has submitted false information about his/her property or income.

Article 35

- (1) The validity of the request for information shall be the responsibility of the person submitting and of the prosecutor authorizing the request.
- (2) The information given by the Control Service ceases to be confidential when criminal prosecution is brought against the respective person.
- (3) In cases specified in articles 32-34 hereof, the Control Service submits all material to the Prosecutor General or to prosecutors with special powers for transferring them to authorized institutions.

Article 36

- (1) The Control Service shall be entitled to use information at its disposal only for purposes of and according to the procedure established by this Law.
- (2) The information obtained from the Control Service by the Prosecutor General and prosecutors with special powers and material to the oversight function shall not be transferred to investigative institutions or to the court or used for their purposes.

(3) State institutions specified by this Law that have obtained information from the Control Service shall be authorized to use it only for the purpose for which the information was requested. Copying that information, or entering it into databases is forbidden.

Section IX. The Advisory Council of the Control Service

Article 37

To facilitate the work of the Control Service and to coordinate its cooperation with law enforcement bodies as well as credit and financial institutions, an Advisory Council shall be established and charged with the following:

- 1) to coordinate cooperation among state, credit and financial institutions in order to effect the provisions of this Law;
- 2) to develop recommendations to the Control Service regarding the performance of its functions as established in this Law;
- 3) to prepare and submit to the Control Service proposals for amending or supplementing the list of indicators of unusual transaction;
- 4) upon the Prosecutor General's request or on own initiative, to advise him/her as to the performance of the Control Service and to submit proposals on improving the performance of the Control Service.

Article 38

(1) The following shall appoint one representative each to the Advisory Council:

- 1) the Minister of Finance,
- 2) the Minister of the Interior,
- 3) the Minister of Justice,
- 4) the Bank of Latvia,
- 5) the Commission of Securities Market,
- 6) the Association of Commercial Banks,
- 7) the Association of Insurers,
- 8) the Supreme Court.

(2) Meetings of the Advisory Council shall be chaired by the Prosecutor General.

(3) The Director of the Control Service and experts shall be invited to participate at the meetings of the Advisory Council.

(4) Clerical work for the Advisory Council shall be provided by the Control Service.

Section X. International exchange of information

Article 39

(1) The Control Service shall be entitled to exchange freely, on its own initiative or upon request, information with foreign authorized institutions whose responsibilities are similar to those defined in article 27 hereof, but subject to the following conditions:

1) the confidentiality of data shall be ensured and data shall be utilized only for mutually agreed purposes;

2) it shall be guaranteed that the information is used to prevent and detect only those types of criminal activity specified in article 4 hereof.

(2) Information at the Control Service's disposal shall be provided to foreign investigative institutions and courts in due course as established by international agreements on cooperation in criminal cases, through mediation of the Republic of Latvia state institutions specified in those agreements and only in regard to those offences specified in article 4 hereof that are subject to criminal prosecution by Latvian law.

Poland

<http://www.gblld.org/topicresults.aspx?country=29&topic=16>

Romania

<http://www.imolin.org/lawroman.htm>

Russian Federation

<http://www.imolin.org/lawruss.htm>

Sweden

<http://www.imolin.org/lawswede.htm>

United Arab Emirates

<http://www.emirates-banking.com/regulate.htm>

United States

<http://www.fincen.gov/>

(c) *Other sources of information*

161. The International Money Laundering Information Network (IMoLIN) web site (<http://www.imolin.org/map.htm>) developed by the United Nations Office on Drugs and Crime Anti-Money Laundering Unit contains links to various national legislation and to web sites of national financial intelligence units.

162. A list of important recommendations and statements issued by governmental and non-governmental organizations involved in the fight against money-laundering is presented below.

(i) *United Nations*

Security Council resolution 1373 (2001)

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>

Political Declaration adopted by the General Assembly at its twentieth special session

General Assembly resolution S-20/2, annex

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N98/775/09/PDF/N9877509.pdf?OpenElement>

Measures to counter money-laundering adopted by the General Assembly at its twentieth special session

General Assembly resolution S-20/4 D

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N98/775/15/PDF/N9877515.pdf?OpenElement>

Model legislation developed by the United Nations is designed to facilitate the drafting of specially adapted legislative provisions by States wishing to adopt a law against money-laundering or to modernize their legislation in that area. The model legislation incorporates the most relevant provisions developed by national legislation and amends, strengthens or supplements them in a practical way. It also proposes innovative provisions aimed at improving the effectiveness of money-laundering preventive and punitive measures and offers States appropriate legal mechanisms related to international cooperation.

1999 United Nations model legislation on laundering, confiscation and international cooperation in relation to the proceeds of crime (for civil law systems)

<http://www.imolin.org/ml99eng.htm>

2000 United Nations model money-laundering and proceeds of crime bill (for common law systems)

http://www.unodc.org/pdf/lap_money-laundering-proceeds_2000.pdf

2003 United Nations model money-laundering, proceeds of crime and terrorist financing bill (for common law systems)

<http://www.imolin.org/poctf03.htm>

(ii) *Other international organizations*

Statement on Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering

Basel Committee on Banking Supervision of the Bank for International Settlements

<http://www.imolin.org/basle98.pdf>

Customer due diligence for banks

Basel Committee on Banking Supervision of the Bank for International Settlements

<http://www.bis.org/publ/bcbs85.pdf>

19 Aruba Recommendations

Caribbean Financial Action Task Force

<http://www.imolin.org/cfatf19.htm>

Commonwealth model law for the prohibition of money-laundering

<http://www.imolin.org/Comsecml.pdf>

Money-laundering web site of the Council of Europe

http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Combating_economic_crime/Money_laundering/

Web site of the Eastern and Southern Africa Anti-Money Laundering Group

<http://www.esaamlg.org/>

Directive 2001/97/EC of the European Parliament and of the Council of the European Communities of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money-laundering

http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/1_344/1_34420011228en00760081.pdf

Directive 91/308/EEC of the European Council on prevention of the use of the financial system for the purpose of money-laundering
<http://www.imolin.org/eudireng.htm>

The Forty Recommendations (revised in 2003)
Financial Action Task Force on Money Laundering
http://www.fatf-gafi.org/pdf/40Recs-2003_en.pdf

Special Recommendations on Terrorist Financing
Financial Action Task Force on Money Laundering
http://www.fatf-gafi.org/pdf/SRecTF_en.pdf

Anti-money laundering guidance notes for insurance supervisors and insurance entities

International Association of Insurance Supervisors
<http://www.iaisweb.org/02money.pdf>

Manual on the Criminalization of the Offence of Money-laundering (in Spanish only)

Organization of American States
http://www.cicad.oas.org/Lavado_Activos/eng/Main.htm

Model regulations concerning laundering offences connected to illicit trafficking and related offences (amended 1998)

Inter-American Drug Abuse Control Commission of the Organization of American States
http://www.cicad.oas.org/Desarrollo_Juridico/eng/legal-regulations-money.htm

Global Banking Law Database, topic “money laundering and prevention of bank use by criminal elements”

World Bank and International Monetary Fund joint project
<http://www.gbld.org/topicsearch.aspx>

(iii) Governments

Kingston Declaration on Money Laundering
Adopted by ministers and other representatives of Caribbean and Latin American Governments, Kingston, 6 November 1992
<http://www.imolin.org/cfatfdec.htm>

Riga Declaration
Adopted by the Governments of Estonia, Latvia and Lithuania, November 1996
<http://www.imolin.org/riga.htm>

D. Criminalization of and measures against corruption

“Article 8

“Criminalization of corruption

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

“(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

“(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

“2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.

“3. Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.

“4. For the purposes of paragraph 1 of this article and article 9 of this Convention, ‘public official’ shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.”

“Article 9

“Measures against corruption

“1. In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

“2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.”

1. Introduction

163. Organized criminal groups frequently make use of corruption in the course of their operations. Bribery and other acts of corruption are used to create or exploit opportunities and to protect operations from interference from criminal justice systems and other control structures. Corruption reduces risks, increases criminal profits and is less likely to provoke a reaction than other means of influencing the State, such as intimidation or actual violence.

164. The effects of corruption extend well beyond the facilitation of serious crime. The fact that public officials become compromised and act against the public interest undermines the stability of governmental systems in general and public confidence in them. When corruption reaches high levels in the Government, it affects relationships among States and undermines the quality of people’s lives, as it hampers the economic and social advancement of societies.

165. While the political and economic consequences are legion, there are additional effects relative to the fight against serious transnational crime. On the one hand, corruption fuels the demand for illegal markets, such as illegal immigration and trafficking in people and firearms. These issues are addressed by the three Protocols to the Organized Crime Convention. Moreover, corrupt officials facilitate efforts by organized criminal groups to obstruct justice (art. 23), intimidate witnesses and victims and otherwise impede the international cooperative processes the Convention seeks to promote (arts. 24-26), including by possibly refusing to extradite serious transnational criminals (art. 15).

166. No country has been immune to some level of corrupt practices. The international community and the wider public in all societies have been constantly demanding more openness and accountability from the holders of public office. Consequently, many national, regional and international initiatives have focused on various aspects of the problem of corruption in recent years, such as the Council of Europe Criminal Law Convention on

Corruption and the Inter-American Convention against Corruption. These two instruments use similar, but not identical, language to that of article 8 of the Organized Crime Convention. From the Organisation for Economic Cooperation and Development (OECD) and the World Bank to the European Union and non-governmental organizations, virtually every major body has been concerned with this problem (see also sect. 5, Information resources, below).

167. The United Nations has been prominent among international organizations dealing with measures to combat corruption. In 1996, by its resolution 51/191 of 16 December 1996, the General Assembly adopted the Declaration against Corruption and Bribery in International Commercial Transactions. By its resolution 51/59 of 12 December 1996, the Assembly adopted the International Code of Conduct for Public Officials. More recently, by its resolution 56/261 of 31 January 2002, the General Assembly has invited Governments to consider and use, as appropriate, plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, and has published a draft manual on anti-corruption policy. Most importantly, the United Nations Convention against Corruption, the first universal legal instrument against corruption, was adopted by the Assembly in its resolution 58/4 of 31 October 2003.

168. It must be recognized that a significant part of the complex problem of corruption does not necessarily involve organized criminal groups. Nevertheless, the Organized Crime Convention does not leave out this vital component of serious transnational organized crime. While many States are part of the initiatives listed in the preceding paragraph, some may require support to implement the measures that have been agreed. The Organized Crime Convention recognizes that the fight against such serious crime cannot be effective unless all contributors to the global effort take active steps to harmonize their laws and criminalize corrupt practices.

169. Along the lines of other initiatives, the Organized Crime Convention covers three types of corruption offence: what may be called active bribery, which is the giving of bribes, passive bribery, which is the acceptance of bribes, and participation as an accomplice to bribery. In addition to these mandatory offences, States are asked to consider criminalizing other forms of corruption, including bribery of foreign officials, in respect of which drafters of national legislation may wish to consult the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Organized Crime Convention also requires the

introduction of legislative and other measures designed to prevent corrupt practices and enhance detection and accountability.

170. States that are already involved in implementing some of the above-mentioned initiatives may already be in conformity or have relatively little to change in order to implement articles 8 and 9 of the Organized Crime Convention.

2. Summary of main requirements

171. The mandatory offences under article 8 are as follows:

(a) Active bribery, defined as the promise, offering or giving to a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. Legislation is required to implement this provision;

(b) Passive bribery, defined as the solicitation or acceptance by a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. Legislation is also required in this regard;

(c) Participation as an accomplice in either of the above offences.

172. The mandatory measures under article 9 are as follows:

(a) Adoption of legislative or other measures, as appropriate and consistent with the legal system of the State, in order:

- (i) To promote integrity;
- (ii) To prevent, detect and punish corruption of public officials;
- (iii) To ensure effective action by officials;

(b) Endowing anti-corruption authorities with sufficient independence to deter undue influence.

173. States parties are also required to consider establishing corruption of foreign or international public servants, and other forms of corruption, as domestic criminal offences.

3. Mandatory requirements

174. The offences that are mandatory under article 8, paragraph 1, relate only to the promise, offering, giving, solicitation or acceptance of bribes by

domestic public officials and, for some countries, persons providing a public service.

175. The Organized Crime Convention does not create an autonomous definition of “public official”. For the purposes of article 8, paragraph 1, and article 9, the Convention defines public official to mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State party in which the person in question performs that function (art. 8, para. 4). The concept of a person who provides a public service applies to specific legal systems. The reason it is explicitly mentioned in this article is that the negotiators intended to facilitate cooperation among States that have this notion in their legal systems (A/55/383/Add.1, para. 19). The definitions of foreign public officials and international civil servants contained in the United Nations Convention against Corruption are also of interest.

176. The question of bribery involving officials of other countries (“foreign public officials”) and international civil servants is addressed by article 8, paragraph 2, which requires only that States give serious consideration to the introduction of such an offence.

177. The Convention does not cover issues relating to corruption in the private sector.

*(a) Criminalization of active and passive bribery
and participation (article 8)*

178. Article 8, paragraph 1, requires the establishment of two corruption-related offences: active and passive bribery. A third one criminalizing participation in such offences is required under article 8, paragraph 3.

(i) Active bribery

179. The first offence States parties must establish as criminal is the following:

“The promise, offering or giving to a public official (directly or indirectly) of an undue advantage (for the official himself or herself or another person or entity) in order that the official act or refrain from acting in the exercise of his or her official duties;” (art. 8, para. 1 (a))

180. The required elements of this offence are those of promising, offering or actually giving something to a public official. The offence must cover instances where it is not a gift or something tangible that is offered. So, an undue advantage may be something tangible or intangible.

181. The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organization. The undue advantage or bribe must be linked to the official's duties.

182. The required mental element for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties. Since the conduct covers cases of merely offering a bribe, that is, even including cases where it was not accepted and could therefore not have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place.

(ii) *Passive bribery*

183. The second offence States are required to criminalize by law is that of passive bribery:

“The solicitation or acceptance by a public official (directly or indirectly) of an undue advantage (for the official himself or herself or another person or entity) in order that the official act or refrain from acting in the exercise of his or her official duties;” (art. 8, para. 1 (b))

184. This offence is the passive version of the first offence. The required elements are soliciting or accepting the bribe. The link with the influence of official conduct must also be established.

185. As with the previous offence, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly.

186. The mental element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties.

(iii) *Participation as an accomplice in bribery offences*

187. In addition, States parties are required to ensure that participation as an accomplice in any of the required offences is also criminalized. States that already have laws of general application establishing liability for aiding and abetting, participation as an accomplice and similar forms of liability may need only to ensure that these will apply to the new corruption offences.

(b) *Other general requirements*

188. In drafting legislation to implement these criminalization obligations, legislators should bear in mind the following general obligations under the Convention that are particularly relevant to the establishment of criminal offences:

(a) *Non-inclusion of transnationality in domestic offences.* Transnationality must not be made an element of the domestic offence (art. 34, para. 2);

(b) *Non-inclusion of “organized criminal group” in domestic offences.* As with transnationality, above, the involvement of an organized criminal group must not be made an element of the domestic offence (art. 34, para. 2);

(c) *Criminalization must be through legislative and other measures.* The criminal offences must be established by criminal law and not simply by other measures, which would be additional to the proscribing legislation (A/55/383/Add.1, para. 9);

(d) *The offence should be liable to penalties that take into account the grave nature of the offence.* Penalties should be sufficiently severe given the seriousness of the conduct required to be criminalized (art. 11, para. 1);

(e) *The description of the offence is reserved to the domestic law of a State party.* The domestic offence established by a State to implement the criminalization requirements of the Convention need not be described in exactly the same manner as in the Convention, as long as the required conduct is criminalized (art. 11, para. 6);

(f) *Liability of legal persons.* With respect to legal persons, the offences and liability can be criminal, civil or administrative (art. 10, para. 2);

(g) *Statutes of limitation.* The Convention requires that legislators establish a long statute of limitation period for the offence, in particular when alleged offenders are evading justice (art. 11, para. 5);

(h) *Sentence mitigation and immunity.* The Convention encourages States parties to consider mitigating sentences and granting immunity and/or leniency to individuals who decide to cooperate with the authorities (art. 26, paras. 2 and 3). This is optional and dependent on domestic legal principles and traditions. In jurisdictions where prosecution of crimes is mandatory, however, affording immunity from prosecution would require legislation.

(c) *Other mandatory measures against corruption (article 9)*

189. Article 9 contains some general requirements regarding anti-corruption mechanisms that States parties must put in place in order to implement the Convention. The negotiations for the United Nations Convention against Corruption were completed in 2003. It is important to take the obligations under the United Nations Convention against Corruption into account as work to implement the Organized Crime Convention is carried out, as more comprehensive requirements are likely to be included in the former, which States parties will be obligated to implement. The United Nations Office on Drugs and Crime web site on corruption issues can be accessed at <http://www.unodc.org/unodc/corruption.html>.

190. In addition to the legislative and other measures of article 8, States are required to adopt measures designed to promote integrity and to prevent, detect and punish corruption of public officials. To that end, article 9, paragraph 1, mandates that States take legislative, administrative or other effective measures to the extent that this is appropriate and consistent with their legal system.

191. Further, the Convention requires that States take measures to ensure effective action by domestic authorities in the prevention, detection and punishment of corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions (art. 9, para. 2).

192. These requirements are not necessarily legislative in nature and will depend on the traditions, laws and procedures of individual States (see also sect. 4, Other measures, including optional issues, below).

4. Other measures, including optional issues

(a) Optional offences

193. Beyond the three mandatory offences described in section 3, Mandatory requirements, above, the Organized Crime Convention also requires that States consider the establishment of additional offences dealing with corruption of foreign officials or officials of international organizations, as well as other forms of corruption (art. 8, para. 2). According to article 8, paragraph 2, States must consider extending the offences under paragraph 1 of the article to cases that involve any foreign public official or international civil servant. States must also consider criminalizing other forms of corruption, in accordance with their fundamental legal principles and taking into account their historical context. For various options, States may wish to refer to the United Nations Office on Drugs and Crime Anti-Corruption Toolkit (<http://www.unodc.org/pdf/crime/corruption/toolkit/toolkitv5.pdf>) and the United Nations Convention against Corruption.

5. Information resources

194. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) Related provisions and instruments

(i) Organized Crime Convention

Article 6 (Criminalization of the laundering of the proceeds of crime)

Article 7 (Measures to combat money-laundering)

Article 10 (Liability of legal persons)

Article 11 (Prosecution, adjudication and sanctions)

Article 16 (Extradition)

Article 18 (Mutual legal assistance)

Article 23 (Criminalization of obstruction of justice)

Article 24 (Protection of witnesses)

Article 34 (Implementation of the Convention)

(ii) *Other instruments*

1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

Council of Europe, *European Treaty Series*, No. 141
<http://conventions.coe.int/Treaty/en/Treaties/Html/141.htm>

1995 European Union Convention on the Protection of the European Communities' Financial Interests and Protocols Thereto (1996 and 1997)

<http://europa.eu.int/scadplus/leg/en/lvb/l33019.htm>

1996 Inter-American Convention against Corruption
Organization of American States

<http://www.oas.org/juridico/english/Treaties/b-58.html>

1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Organisation for Economic Cooperation and Development, DAFFE/IME/BR(97)20

http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

1998 Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union

Official Journal of the European Communities, C 195, 25 June 1997
<http://europa.eu.int/scadplus/printversion/en/lvb/l33027.htm>

1999 Criminal Law Convention on Corruption

Council of Europe, *European Treaty Series*, No. 173
<http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

1999 Civil Law Convention on Corruption

Council of Europe, *European Treaty Series*, No. 174
<http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>

1999 Economic Community of West African States Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security

http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/ConflictMecha.pdf

2001 Southern African Development Community Protocol against Corruption

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_corruption

2003 Additional Protocol to the Criminal Law Convention on Corruption

Council of Europe, *European Treaty Series*, No. 191

<http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm>

2003 African Union Convention on Preventing and Combating Corruption

http://www.africa-union.org/Official_documents/Treaties%20Conventions%20Protocols/Convention%20on%20Combating%20Corruption.pdf

2003 United Nations Convention against Corruption

General Assembly resolution 58/4

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/453/15/PDF/N0345315.pdf?OpenElement>

(b) Examples of national legislation

Hong Kong Special Administrative Region of China

<http://www.icac.org.hk/eng/main/>

Click on “anti-bribery legislation” link for relevant provisions
Independent Commission Against Corruption

Kenya

http://www.lawafrica.com/Bills/acecb2003/acecb_toc.asp

http://www.lawafrica.com/Bills/poeb2003/poeb_toc.asp

2003 Anti-Corruption and Economic Crimes Bill

2003 Public Officer Ethics Bill

Singapore

Prevention of Corruption Act

Cap. 224. 25/81. Punishment for corruption

5. Any person who shall by himself or by or in conjunction with any other person:

(a) corruptly solicit or receive, or agree to receive for himself, or for any other person; or

(b) corruptly give, promise or offer to any person whether for the benefit of that person or of another person, any gratification as an inducement to or reward for, or otherwise on account of:

- (i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed;
- (ii) or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S\$ 100,000 or to imprisonment for a term not exceeding five years or to both.

United States

<http://uscode.house.gov/download.htm>

*18 U.S.C. §§201-225. Bribery and Graft
Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§78dd-1, et seq.*

(c) Other sources of information

International Code of Conduct for Public Officials
General Assembly resolution 51/59, annex
<http://www.un.org/documents/ga/res/51/a51r059.htm>

United Nations Declaration against Corruption and Bribery in International Commercial Transactions
General Assembly resolution 51/191, annex
<http://www.un.org/documents/ga/res/51/a51r191.htm>

Plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century
General Assembly resolution 56/261, annex
<http://daccess-ods.un.org/TMP/3119396.html>

United Nations Anti-Corruption Toolkit version 5
http://www.unodc.org/unodc/corruption_toolkit.html

Draft United Nations manual on anti-corruption policy
<http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>

Other materials concerning the development of national anti-corruption strategies can be obtained from the United Nations Office on Drugs and Crime, Anti-Corruption Unit
<http://www.undcp.org/corruption.html>

World Bank Anticorruption home page

<http://www1.worldbank.org/publicsector/anticorrupt/>

1998 Council of Europe Joint Action 98/742/JHA adopted by the Council on the basis of article K.3 of the Treaty on European Union, on corruption in the private sector

Official Journal of the European Communities, No. L 358, 31 December 1998

<http://europa.eu.int/scadplus/printversion/en/lvb/l33074.htm>

Twenty Guiding Principles for the Fight Against Corruption

Council of Europe Committee of Ministers resolution (97) 24

<http://cm.coe.int/ta/res/1997/97x24.htm>

1997 Revised Recommendations of the Council of the Organisation for Economic Cooperation and Development on Combating Bribery in International Business Transactions

http://www.oecd.org/document/32/0,2340,en_2649_34855_2048160_1_1_1_1,00.html

Anti-corruption ring online (AnCorR Web)

<http://www1.oecd.org/daf/nocorruptionweb/index.htm>

Utstein Anti-Corruption Resource Centre

<http://www.u4.no/>

E. Criminalization of obstruction of justice

“Article 23

“Criminalization of obstruction of justice

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

“(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;

“(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public officials.”

1. Introduction

195. Organized criminal groups maintain or expand their wealth, power and influence by seeking to undermine systems of justice. No justice can be done if judges, jurors, witnesses or victims are intimidated, threatened or corrupted. No effective national and international cooperation can be hoped for, if such crucial participants in the investigation and law enforcement process are not sufficiently protected to perform their roles and provide their accounts unimpeded. No serious crimes can be detected and punished, if the evidence is prevented from reaching investigators, prosecutors and the court.

196. It is the legitimacy of the whole law enforcement apparatus from the local to the global level that is at stake and needs to be protected against the powerful corruptive influence of organized criminal groups. The Convention itself would be seriously deficient if it did not pay attention to measures ensuring the integrity of the justice process. Innocent people would be wrongfully punished and guilty ones would escape penalty, if the course of justice were subverted by skilful manipulators associated with criminal groups.

197. As mentioned earlier, the Convention addresses primarily crimes that play a facilitative role in the commission of other serious transnational crimes. The profit-generating offences of organized criminal groups are covered essentially by the offences established in accordance with the Protocols and the serious offences that States have defined. It is fitting and necessary, therefore, that article 23 should deal with the problem of obstruction of justice, complementing the provisions addressing the intimately linked problems of corruption, protection of witnesses and victims and international cooperation.

198. Thus, the Convention requires that States parties specifically criminalize the use of inducement, threats or use of force in exchange for interfering with witnesses and officials, whose role would be to produce accurate evidence and testimony.

2. Summary of main requirements

199. Article 23 requires the establishment of the following two criminal offences:

(a) Use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage either to induce false testimony

or to interfere in the giving of testimony or the production of evidence in proceedings in relation to offences covered by the Convention (article 23, subpara. (a));

(b) Use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to offences covered by the Convention (art. 23, subpara. (b)).

3. Mandatory requirements

200. The Convention requires that States establish two criminal offences set out in article 23.

(a) Article 23, subparagraph (a)

201. The first offence relates to efforts to influence potential witnesses and others in a position to provide the authorities with relevant evidence. The obligation is to criminalize the use both of corrupt means, such as bribery, and of coercive means, such as the use or threat of violence: States parties are required to criminalize the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to the commission of offences covered by the Convention (art. 23, subpara. (a)).

202. The use of force, threats and inducements for false testimony can occur at any time before the commencement of the trial, whether formal proceedings are in progress or not. Therefore, the term “proceedings” must be interpreted broadly to cover all official governmental proceedings, including pretrial processes. However, article 23 need not be applied to private proceedings relating to conduct covered by the Convention, such as arbitral proceedings (A/55/383/Add.1, para. 46).

203. States are required to apply the offence to all proceedings related to offences covered by the Convention. This includes three groups of offences: the offences established in accordance with articles 5, 6, 8 and 23 of the Convention; other serious crimes established by the States parties concerned; and the offences established in accordance with any of the three Protocols to which the States parties concerned are also parties.

(b) *Article 23, subparagraph (b)*

204. The second offence States are required to establish is the criminalization of interference with the actions of judicial or law enforcement officials: the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by the Convention (art. 23, subpara. (b)). The bribery element is not included in this paragraph because justice and law enforcement officials are considered to be public officials, the bribery of whom would already be covered by article 8.

205. The term “offences covered by this Convention” has the same meaning as described above in relation to subparagraph (a).

(c) *Other general requirements*

206. In drafting legislation to implement these criminalization obligations, legislators should bear in mind the following general obligations under the Convention that are particularly relevant to the establishment of criminal offences:

(a) *Non-inclusion of transnationality in domestic offences.* Transnationality must not be made an element of the domestic offence (art. 34, para. 2);

(b) *Non-inclusion of “organized criminal group” in domestic offences.* As with transnationality, above, the involvement of an organized criminal group must not be made an element of the domestic offence (art. 34, para. 2);

(c) *Criminalization must be through legislative and other measures.* The criminal offences must be established by criminal law and not simply by other measures, which would be additional to the proscribing legislation (A/55/383/Add.1, para. 9);

(d) *The offences must be committed intentionally.* The mental element required for each offence is that it be committed intentionally and there is no obligation to cover conduct committed with a lesser mental state;

(e) *The offence should be liable to penalties that take into account the grave nature of the offence.* Penalties should be sufficiently severe, given the seriousness of the conduct required to be criminalized (art. 11, para. 1);

(f) *The description of the offence is reserved to the domestic law of a State party.* The domestic offence established by a State to implement the criminalization requirements of the Convention need not be described in exactly the same manner as in the Convention, as long as the required conduct is criminalized (art. 11, para. 6);

(g) *Liability of legal persons.* With respect to legal persons, the offences and liability can be criminal, civil or administrative (art. 10, para. 2);

(h) *Statutes of limitation.* The Convention requires that legislators establish a long statute of limitation period for the offence, in particular when alleged offenders are evading justice (art. 11, para. 5);

(i) *Sentence mitigation and immunity.* The Convention encourages States parties to consider mitigating sentences and granting immunity and/or leniency to those individuals who decide to cooperate with the authorities (art. 26, paras. 2 and 3). This is optional and dependent on domestic legal principles and traditions. In jurisdictions where prosecution of crimes is mandatory, however, affording immunity from prosecution would require legislation.

207. The laws of some States may not cover cases where a person has the right not to give evidence and an undue advantage is provided to that person for the exercise of such right (A/55/383/Add.1, para. 47).

4. Other measures, including optional issues

208. There are no optional provisions in article 23.

5. Information resources

209. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) Related provisions and instruments

Organized Crime Convention

Article 8 (Criminalization of corruption)

Article 9 (Measures against corruption)

Article 11 (Prosecution, adjudication and sanctions)

- Article 16 (Extradition)
- Article 18 (Mutual legal assistance)
- Article 24 (Protection of witnesses)
- Article 25 (Assistance to and protection of victims)
- Article 34 (Implementation of the Convention)

(b) Examples of national legislation

Canada

<http://www.imolin.org/lawcanad.htm>

Criminal Code of Canada

Article 139. Obstructing justice

Article 423. Intimidation

A new offence was recently defined concerning the intimidation of a justice system participant or a journalist, as follows:

423.1

(1) No person shall, without lawful authority, engage in conduct referred to in subsection (2) with the intent to provoke a state of fear in:

(a) a group of persons or the general public in order to impede the administration of criminal justice;

(b) a justice system participant in order to impede him or her in the performance of his or her duties; or

(c) a journalist in order to impede him or her in the transmission to the public of information in relation to a criminal organization.

(2) The conduct referred to in subsection (1) consists of:

(a) using violence against a justice system participant or a journalist or anyone known to either of them or destroying or causing damage to the property of any of those persons;

(b) threatening to engage in conduct described in paragraph (a) in Canada or elsewhere;

(c) persistently or repeatedly following a justice system participant or a journalist or anyone known to either of them, including following that person in a disorderly manner on a highway;

(d) repeatedly communicating with, either directly or indirectly, a justice system participant or a journalist or anyone known to either of them; and

(e) besetting or watching the place where a justice system participant or a journalist or anyone known to either of them resides, works, attends school, carries on business or happens to be.

(3) Every person who contravenes this section is guilty of an indictable offence and is liable to imprisonment for a term of not more than fourteen years.

(S.C. 2001, c. 32, s. 11).

France

Penal Code

Article 434-8 (Ordinance no. 2000-916 of 19 September 2000, article 3, Official Journal of 22 September 2000, entry into force 1 January 2002)

Any threat or any intimidation directed against a judge or prosecutor, a juror or any other member of a court, an arbitrator, an interpreter, an expert or the advocate of a party, with a view to influencing his behaviour in the discharge of his office, is punished by three years' imprisonment and a fine of €45,000.

Article 434-9 (Act no. 2000-595 of 30 June 2000, article 1, Official Journal of 1 July 2000)

The direct or indirect request or acceptance without right of offers, promises, donations, gifts or advantages, by a judge or prosecutor, a juror or any other member of court of law, an arbitrator or an expert appointed either by a court or by the parties, or by a person appointed by a judicial authority to carry out conciliation or mediation, in return for performing or abstaining from performing an act of his office, is punished by ten years' imprisonment and a fine of €150,000.

Yielding to the solicitations of a person described in the previous paragraph, or to a proposal of any offer, promise, donation, gift or reward with a view to obtaining from such a person the performance or non-performance of an act pertaining to his office, is subject to the same penalties.

Where the offence referred to under the first paragraph is committed by a judge or prosecutor in favour or against a person who is being criminally prosecuted, the penalty is increased to fifteen years' criminal imprisonment and a fine of €225,000.

Article 434-11 (Ordinance no. 2000-916 of 19 September 2000, article 3, Official Journal of 22 September 2000, entry into force 1 January 2002)

Any person who, knowing evidence showing that a person provisionally detained or sentenced for a felony or misdemeanour is innocent, wilfully abstains to produce the evidence before the administrative or judicial authorities is punished by three years' imprisonment and a fine of €45,000.

Nevertheless, the person who is late in bringing his testimony but does so spontaneously is exempt from penalty.

Also exempted from the provisions of the first paragraph are:

1. the perpetrator or accomplice to the offence that led to the prosecution, their relatives in a direct line and spouses, their brothers and sisters and their spouses;
2. the spouse of the perpetrator or the accomplice to the offence that led to the prosecution, or the person who openly cohabits with him.

Also exempted from the provisions of the first paragraph are persons bound by an obligation of secrecy under the conditions specified by article 226-13.

Article 434-15 (Ordinance no. 2000-916 of 19 September 2000, article 3, Official Journal of 22 September 2000, entry into force 1 January 2002)

The use of promises, offers, presents, pressures, threats, acts of violence, manoeuvres or tricks in the course of proceedings or in respect of a claim or defence in court to persuade others to make or deliver a statement, declaration or false affidavit, or to abstain from making a statement, declaration or affidavit, is punished by three years' imprisonment and a fine of €45,000, even where the subornation of perjury was ineffective.

United States

<http://uscode.house.gov/download.htm>

18 U.S.C. §§ 1501 through 1518

Sec. 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offence under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offence shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offence charged in such case.

(b) The punishment for an offence under this section is:

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offence was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

Sec. 1510. Obstruction of criminal investigations

(a) Whoever willfully endeavors by means of bribery to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator shall be fined under this title, or imprisoned not more than five years, or both.

(b) (1) Whoever, being an officer of a financial institution, with the intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that financial institution, or information that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than five years, or both.

(2) Whoever, being an officer of a financial institution, directly or indirectly notifies:

(a) a customer of that financial institution whose records are sought by a grand jury subpoena; or

(b) any other person named in that subpoena;

about the existence or contents of that subpoena or information that has been furnished to the grand jury in response to that subpoena, shall be fined under this title or imprisoned not more than one year, or both.

(3) As used in this subsection:

(a) the term “an officer of a financial institution” means an officer, director, partner, employee, agent, or attorney of or for a financial institution; and

(b) the term “subpoena for records” means a Federal grand jury subpoena or a Department of Justice subpoena (issued under section 3486 of title 18), for customer records that has been served relating to a violation of, or a conspiracy to violate:

(i) section 215, 656, 657, 1005, 1006, 1007, 1014, 1344, 1956, 1957, or chapter 53 of title 31; or

(ii) section 1341 or 1343 affecting a financial institution.

(c) As used in this section, the term “criminal investigator” means any individual duly authorized by a department, agency, or armed force of the United States to conduct or engage in investigations of or prosecutions for violations of the criminal laws of the United States.

(d) (1) Whoever:

(a) acting as, or being, an officer, director, agent or employee of a person engaged in the business of insurance whose activities affect interstate commerce, or

(b) is engaged in the business of insurance whose activities affect interstate commerce or is involved (other than as an insured or beneficiary under a policy of insurance) in a transaction relating to the conduct of affairs of such a business, with intent to obstruct a judicial proceeding, directly or indirectly notifies any other person about the existence or contents of a subpoena for records of that person engaged in such business or information that has been furnished to a Federal grand jury in response to that subpoena, shall be fined as provided by this title or imprisoned not more than five years, or both.

(2) As used in paragraph (1), the term "subpoena for records" means a Federal grand jury subpoena for records that have been served relating to a violation of, or a conspiracy to violate, section 1033 of this title.

Sec. 1512. Tampering with a witness, victim, or informant

(a) (1) Whoever kills or attempts to kill another person, with intent to:

(a) prevent the attendance or testimony of any person in an official proceeding;

(b) prevent the production of a record, document, or other object, in an official proceeding; or

(c) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offence or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (2).

(2) The punishment for an offence under this subsection is:

(a) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112; and

(b) in the case of an attempt, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to:

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to:

(a) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(b) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(c) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(d) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offence or a violation of conditions of probation, parole, or release pending judicial proceedings; shall be fined under this title or imprisoned not more than 10 years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from:

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offence or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offence; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding; or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(d) In a prosecution for an offence under this section, it is an affirmative defence, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section:

(1) an official proceeding need not be pending or about to be instituted at the time of the offence; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(f) In a prosecution for an offence under this section, no state of mind need be proved with respect to the circumstance:

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction over an offence under this section.

(h) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offence occurred.

(i) If the offence under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offence shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offence charged in such case.

Sec. 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section:

(1) the term "official proceeding" means:

(a) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(b) a proceeding before the Congress;

(c) a proceeding before a Federal Government agency which is authorized by law; or

(d) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term "physical force" means physical action against another, and includes confinement;

(3) the term "misleading conduct" means:

(a) knowingly making a false statement;

(b) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(c) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(d) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(e) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant:

- (a) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offence; or
- (b) serving as a probation or pretrial services officer under this title;
- (5) the term “bodily injury” means:
 - (a) a cut, abrasion, bruise, burn, or disfigurement;
 - (b) physical pain;
 - (c) illness;
 - (d) impairment of the function of a bodily member, organ, or mental faculty; or
 - (e) any other injury to the body, no matter how temporary; and
- (6) the term “corruptly persuades” does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term “corruptly” means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

IV. Procedural and other legislative amendments to ensure effective criminalization

A. Jurisdiction over offences

“Article 15

“Jurisdiction

“1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

“(a) The offence is committed in the territory of that State Party; or

“(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

“2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

“(a) The offence is committed against a national of that State Party;

“(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

“(c) The offence is:

“(i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;

“(ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.

“3. For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

“4. Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.

“5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

“ . . . ”

1. Introduction

210. In the context of globalization, offenders frequently try to evade national regimes by moving between States or engaging in acts in the territories of more than one State. The main concern in the international community is that no serious crimes go unpunished and that all parts of the crime are punished wherever they took place. Jurisdictional gaps that enable fugitives to find safe havens need to be reduced or eliminated. Another concern is to ensure that in cases where a criminal group is active in several States that may have jurisdiction over the conduct of the group, there is a mechanism available for those States to facilitate coordination of their respective efforts.

211. The jurisdiction to prosecute and punish such crimes is addressed in article 15 of the Convention. Subsequent articles provide a framework for cooperation among States that have already exercised such jurisdiction. It is anticipated that there will be cases in which many States parties will be called upon to cooperate in the investigation, but only a few of them will be in a position actually to prosecute the offenders.

212. The Convention requires that States establish jurisdiction when the offences are committed in their territory or on board aircraft and vessels

registered under their laws.⁹ States are also required to establish jurisdiction in cases where they cannot extradite a person on grounds of nationality. In these cases, the general principle *aut dedere aut judicare* (extradite or prosecute) would apply (see arts. 15, para. 3, and 16, para. 10).

213. In addition, States are invited to consider the establishment of jurisdiction in cases where their nationals are victimized, where the offence is committed by a national or stateless person residing in its territory, or where the offence is linked to serious crimes and money-laundering planned to be committed in its territory (art. 15, para. 2). Finally, States are required to consult with other interested States in appropriate circumstances in order to avoid, as much as possible, the risk of improper overlapping of exercised jurisdictions.

214. Provisions similar to those of the Organized Crime Convention can be found in other international legal instruments, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (art. 4), the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 4) and the 1996 Inter-American Convention against Corruption (art. V) (see sect. 5 of the present chapter, in which the text of the relevant articles is reproduced). States that have enacted implementing legislation as parties to those conventions may not need major amendments for meeting the requirements of the Organized Crime Convention.

2. *Summary of main requirements*

Mandatory jurisdiction

215. In accordance with article 15, paragraph 1, each State party must be able to assert jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of the Organized Crime Convention when these are committed:

- (a) In its territory;
- (b) On board a ship flying its flag;
- (c) On board an aircraft registered under its laws.

⁹See also the 1982 United Nations Convention on the Law of the Sea (especially arts. 27, 92, para. 1, 94 and 97), which entered into force in November 1994.

216. In addition, under article 15, paragraph 3, in cases where an alleged offender is in the territory of a State and the State does not extradite him or her solely on the ground that he or she is their national (see art. 16, para. 10), that State must be able to assert jurisdiction over the following conduct committed even outside of its territory:

(a) Offences established in accordance with articles 5, 6, 8 and 23, when they involve an organized criminal group;

(b) Serious crime that involves an organized criminal group, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State party and the requested State party;

(c) Offences included in the Protocols to which States are or intend to become parties.

217. States may already have jurisdiction over the specified conduct, but they must ensure that they have jurisdiction for conduct committed both inside and outside of their territory by one of their nationals. Therefore, legislation may be required.

218. Each State Party must also, as appropriate, consult with other States parties that it has learned are also exercising jurisdiction over the same conduct in order to coordinate their actions (art. 15, para. 5).

3. *Mandatory requirements*

219. States are required to establish jurisdiction where the offence involved is actually committed in their territory and aboard vessels flying their flag or aircraft registered in them. They must also have jurisdiction to prosecute offences committed outside their territory, if the offender is one of their nationals who cannot be extradited for prosecution elsewhere for that reason, that is, they must be able to apply the principle of *aut dedere aut judicare* (arts. 15, para. 3, and 16, para. 10).

(a) *Article 15, paragraph 1*

220. Article 15, paragraph 1, requires that States assert jurisdiction on the basis of the territorial principle. This paragraph requires each State

party to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of the Organized Crime Convention, when committed:

- (a) In its territory;
- (b) On board a ship flying its flag;
- (c) On board an aircraft registered under its laws.

221. States parties whose penal jurisdiction does not currently extend to all of the conduct made punishable in articles 5, 6, 8 and 23 committed in their territory or on board the above-described ships or aircraft, will need to supplement their existing jurisdiction regime. In doing so, they may refer for guidance to the laws referenced in section 5 below.

222. It should be stressed that the obligation to establish this jurisdiction is not conditioned by the factors set forth in article 3 (Scope of application), that is transnationality or involvement of an organized criminal group. Under article 34, paragraph 2, these factors are not to be taken into account for purposes of establishing penal offences (except to the extent that article 5, by its terms, requires the involvement of an organized criminal group).

(b) Article 15, paragraph 3

223. The Convention also requires that States are able to assert jurisdiction over offences committed outside their territory by their own nationals, when extradition is denied on grounds of nationality.

224. This provision requires States to assert jurisdiction over the offences covered by the Convention in order to be able to meet the obligation under article 16, paragraph 10, which is that they must submit a case for domestic prosecution if extradition has been refused on grounds of the nationality of the offender. In order to understand the nature of the obligation imposed by this paragraph, a review of a number of factors is necessary.

225. Firstly, paragraph 1 already requires States parties to have jurisdiction over offences committed in their territory and on their ships and aircraft.

226. This paragraph requires States to go further, by establishing jurisdiction over offences committed abroad by their nationals. Since most extradition requests that would trigger application of this paragraph can be expected to involve conduct that took place in another country, this application is an essential component of the obligation imposed by article 16, paragraph 10.

227. Secondly, the obligation to establish jurisdiction over offences committed abroad is limited to the establishment of jurisdiction over that State party's nationals when extradition has been refused solely on the ground of nationality. States parties are not required to establish jurisdiction over offences committed by non-nationals under the terms of this paragraph.

228. Thirdly, jurisdiction must be extended over the offences covered by the Convention. This means not only the offences established in accordance with articles 5, 6, 8 and 23, but also all other offences covered by the Convention, that is, serious crimes either involving an organized criminal group that is transnational in nature or when the person sought is located in the requested State (which will be the case if extradition is refused on grounds of nationality).

229. Thus, in essence, each State party that does not extradite its nationals must establish jurisdiction over:

(a) The conduct set forth in articles 5, 6, 8 and 23 involving an organized criminal group when committed abroad by its nationals;

(b) Serious crime (as defined in art. 2, subpara. (b)) under its laws involving an organized criminal group committed abroad by its nationals;

(c) Crimes established by Protocols to which the State is or intends to become party.

(c) Article 15, paragraph 5

230. Further specific obligations flow from article 15 with respect to the coordination of effort when more than one State investigates a particular offence.

231. The Convention requires States that become aware that other States parties are investigating or prosecuting the same offence to consult with those countries, where appropriate, to coordinate their actions. In some cases, this coordination will result in one State party deferring to the

investigation or prosecution of another. In other cases, the States concerned may be able to advance their respective interests through the sharing of information they have gathered. In yet other cases, States may each agree to pursue certain actors or offences, leaving other actors or related conduct to the other interested States. This obligation to consult is operational in nature and, in most cases, does not require any domestic implementing legislation.

232. It should be noted that the term “as appropriate” provides flexibility not to consult, if doing so may not be advisable. However, in many cases, the successful investigation and prosecution of serious offenders will hinge upon the swift coordination of efforts among concerned national authorities and coordination between States parties can ensure that time-sensitive evidence is not lost (A/55/383/Add.1, para. 27).

4. Other measures, including optional issues

233. Beyond the mandatory jurisdiction addressed above, the Convention encourages States parties to consider establishing jurisdiction in additional instances, in particular when their national interests have been harmed.

234. Article 15, paragraph 2, sets forth a number of further bases for jurisdiction that States parties may assume when:

(a) The offence is committed against one of their nationals (art. 15, subpara. (a)) or against a habitual or permanent stateless person resident in their territory (A/55/383/Add.1, para. 26);

(b) The offence is committed by one of their nationals or a habitual resident in their territory (art. 15, subpara. (b));

(c) The offence relates to activities outside their territory of an organized criminal group aimed at the commission of a serious crime inside their territory (art. 15, subpara. (c) (i)); or

(d) The offence consists of participation in money-laundering outside their territory aimed at the laundering of criminal proceeds in their territory (art. 15, subpara. (c) (ii)).

235. Article 15, paragraph 4, sets forth an additional non-mandatory basis for jurisdiction that States parties may wish to consider. In contrast to the mandatory establishment of jurisdiction provided for in paragraph 3 to

enable domestic prosecution in lieu of extradition of its nationals, paragraph 4 allows the establishment of jurisdiction over persons whom the requested State party does not extradite for other reasons.

236. States seeking to establish such bases for jurisdiction may refer to the laws cited in section 5 below for guidance.

237. Finally, the Convention makes clear that the listing of these bases for jurisdiction is not exhaustive. States parties can establish additional bases of jurisdiction without prejudice to norms of general international law and in accordance with the principles of their domestic law:

“Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law” (art. 15, para.6).

238. The intent is not to affect general jurisdictional rules but rather for States parties to expand their jurisdiction in order to ensure that serious transnational crimes of organized criminal groups do not escape prosecution as a result of jurisdictional gaps.

5. *Information resources*

239. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) Related provisions and instruments

(i) Organized Crime Convention

Article 3 (Scope of application)

Article 5 (Criminalization of participation in an organized criminal group)

Article 6 (Criminalization of the laundering of proceeds of crime)

Article 8 (Criminalization of corruption)

Article 16, paragraph 10 (Extradition)

Article 18 (Mutual legal assistance)

Article 23 (Criminalization of obstruction of justice)

(ii) *Other instruments*

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

United Nations, *Treaty Series*, vol. 1582, No. 27627

http://www.unodc.org/pdf/convention_1988_en.pdf

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.

1996 Inter-American Convention against Corruption
Organization of American States
<http://www.oas.org/juridico/english/Treaties/b-58.html>

Article V. Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with this Convention when the offence in question is committed in its territory.

2. Each State Party may adopt such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with this Convention when the offence is committed by one of its nationals or by a person who habitually resides in its territory.

3. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with this Convention when the alleged criminal is present in its territory and it does not extradite such person to another country on the ground of the nationality of the alleged criminal.

4. This Convention does not preclude the application of any other rule of criminal jurisdiction established by a State Party under its domestic law.

1997 Convention on Combating Bribery of Foreign Public Officials in
International Business Transactions
Organisation for Economic Cooperation and Development, DAFFE/
IME/BR(97)20
http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

Article 4

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of

them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

(b) Examples of national legislation

Albania

Criminal Code

Article 6. The applicable law on criminal acts committed by Albanian citizens

As concerning criminal acts committed by Albanian citizens within the territory of the Republic of Albania, the criminal law of the Republic of Albania shall apply.

Criminal law of the Republic of Albania shall also be applicable to the Albanian citizen who commits an offence within the territory of another country, when that offence is concurrently punishable, unless a final sentence has been given by a foreign court.

In the sense of this article, Albanian citizens shall also be considered those persons who hold another nationality besides the Albanian one.

Article 7. The applicable law on criminal acts committed by foreign citizens

The foreign citizen who commits a criminal act within the territory of the Republic of Albania responds on the basis of the criminal law of the Republic of Albania.

The criminal law of the Republic of Albania is also applicable to a foreign citizen who, outside of the Republic of Albania, commits against the interests of the Albanian state or an Albanian citizen one of the following offences:

- a) crimes against humanity;
- b) crimes against the Albanian independence and its constitutional order;
- c) terrorism;
- d) organization of prostitution, illegal manufacturing and trafficking in drugs, other narcotic substances, weapons, nuclear substances, as well as pornographic materials;
- e) hijacking airplanes or ships;

f) falsifying the Albanian state seal, Albanian currency, or Albanian bonds or stocks;

g) crimes that affect the life or health of Albanian citizens, to which the law provides for a punishment by imprisonment of five years or any other heavier punishment.

Article 8. *Applicable law on criminal acts committed by a person without nationality*

If a person who does not hold any nationality commits a criminal act within the territory of the Republic of Albania or an offence outside it, the provisions of article 7 of this Code shall apply.

Germany

<http://wings.buffalo.edu/law/bclcl/germind.htm>

Penal Code

Japan

<http://arapaho.nsuok.edu/~dreveskr/jap.html-ssi>

<http://www.law.tohoku.ac.jp/tohokulaw2.html>

Penal Code

Poland

Chapter XIII. Liability for offences committed abroad

Article 109

The Polish penal law shall be applied to Polish citizens who have committed an offence abroad.

Article 110

§1. The Polish penal law shall be applied to aliens who have committed abroad an offence against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organisational unit not having the status of a legal person.

§2. The Polish penal law shall be applied to aliens in the case of the commission abroad of an offence other than listed in §1, if, under the Polish penal law, such an offence is subject to a penalty exceeding 2 years of deprivation of liberty, and the perpetrator remains within the territory of the Republic of Poland and where no decision on his extradition has been taken.

Article 111

§1. The liability for an act committed abroad is, however, subject to the condition that the liability for such an act is likewise recognised as an offence, by a law in force in the place of its commission.

§2. If there are differences between the Polish penal law and the law in force in the place of commission, the court may take these differences into account in favour in the perpetrator.

§3. The condition provided for in §1 shall not be applied to the Polish public official who, while performing his duties abroad has committed an offence there in connection with performing his functions, nor to a person who committed an offence in a place not under the jurisdiction of any state authority.

Article 112

Notwithstanding the provisions in force in the place of the commission of the offence the Polish penal law shall be applied to a Polish citizen or an alien in case of the commission of:

- 1) an offence against the internal or external security of the Republic of Poland;
- 2) an offence against Polish offices or public officials;
- 3) an offence against essential economic interests of Poland;
- 4) an offence of false deposition made before a Polish office.

Article 113

Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements.

B. Liability of legal persons*“Article 10**“Liability of legal persons*

“1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.

“2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

“3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

“4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.”

1. Introduction

240. Serious and sophisticated crime is frequently committed through or under the cover of legal entities, such as companies or charitable organizations. Complex corporate structures can effectively hide the true ownership, clients or particular transactions related to crimes ranging from smuggling to money-laundering and corrupt practices. Individual executives may reside outside the country where the offence was committed and responsibility for specific individuals may be difficult to prove. Thus, the view has been gaining ground that the only way to remove this instrument and shield of transnational organized crime is to introduce liability for legal entities. Criminal liability of a legal entity may also have a deterrent effect, partly because reputational damage can be very costly and partly because it may act as a catalyst for more effective management and supervisory structures to ensure compliance.

241. The principle that corporations cannot commit crimes (*societas delinquere non potest*) used to be universally accepted. This changed initially in some common law systems. Today, the age-old debate on whether legal entities can bear criminal responsibility has shifted more widely to the question of how to define and regulate such responsibility.

242. There are still concerns over the attribution of intent and guilt, the determination of the degree of collective culpability, the type of proof required for the imposition of penalties on corporate entities and the appropriate sanctions, in order to avoid the penalization of innocent parties. Policy makers everywhere follow the ongoing debates on issues such as collective knowledge, the regulation of internal corporate controls, corporate accountability and social responsibility, as well as the application of negligence and other standards.

243. Nevertheless, national legislatures¹⁰ and international instruments¹¹ increasingly complement the liability of natural persons with specific provisions on corporate liability. At the same time, national legal regimes remain quite diverse relative to corporate liability, with some States resorting to criminal penalties against the organization itself, such as fines, forfeiture of property or deprivation of legal rights, whereas others employ non-criminal or quasi-criminal measures.¹² As the main questions revolve around the modalities of accountability and the sort of penalties that can be imposed on legal entities, several attempts at harmonization prior to the Organized Crime Convention acknowledged such diversity of approaches.¹³

244. For example, in its resolution 1994/15, the Economic and Social Council noted the recommendations of the Ad Hoc Expert Group on More Effective Forms of International Cooperation against Transnational Crime, including Environmental Crime, concerning the role of criminal law in protecting the environment, recommendation (g) of which states that support should be given to the extension of the idea of imposing criminal or non-criminal fines or other measures on corporations in jurisdictions in which corporate criminal liability is not currently recognized in the legal systems. The same spirit is found in the 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law, article 9

¹⁰In the past, it has essentially been common law jurisdictions that have established corporate liability. However, States outside that tradition are also moving in that direction. See, for example, the Criminal Code Act 1995 of Australia, part 2.5, Corporate Criminal Responsibility; the 1976 Criminal Code of the Netherlands, article 51; the New Criminal Code of France, article 121, para. 2, which became effective in 1994; and China's 1993 Company Law, which establishes criminal corporate liability. See also the criminal liability of "danwei" (a "working unit") which pre-dates the trend of privatization of companies but seems to apply to contemporary legal entities. See also section 5, Information resources, below.

¹¹Under article 2 of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, each State party is required to take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

¹²See, for example, paragraph 30 of Germany's *Ordnungswidrigkeitengesetz* on the persons whose acts trigger corporate liability.

¹³The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, in 1985, recommended for national, regional and international action the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, paragraph 9 of which states: "Due consideration should be given by Member States to making criminally responsible not only those persons who have acted on behalf of an institution, corporation or enterprise, or who are in a policy-making or executive capacity, but also the institution, corporation or enterprise itself, by devising appropriate measures that would prevent or sanction the furtherance of criminal activities." That recommendation was subsequently reiterated by the General Assembly in paragraph 4 of its resolution 40/32. See *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. B.

of which stipulates that criminal or administrative sanctions or measures could be imposed to hold corporate entities accountable.

245. International initiatives related to money-laundering include recommendation 6 of the Forty Recommendations originally agreed by FATF in 1996, which states: “Where possible, corporations themselves—not only their employees—should be subject to criminal liability.” The OAS Model Regulations concerning Laundering Offences connected to Illicit Trafficking and Other Serious Offences contain similar provisions in article 15, which is reproduced in section 5 below. OAS model legislation with respect to corporate liability for transnational bribery may also be of interest.

246. Corruption offences have been the subject of similar efforts, for example by the OECD in its Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which obliges parties to introduce at least the possibility of imposing non-criminal monetary sanctions on legal persons for bribing foreign public officials. A green paper issued by the Commission of the European Communities on criminal law protection of the financial interests of the Community refers to earlier European initiatives and adds that, on the basis of those initiatives, heads of businesses or other persons with decision-making or controlling powers within a business could be held criminally liable in accordance with the principles determined by the domestic law, in the event of fraud, corruption or money-laundering the proceeds of such offences committed by a person under their authority on behalf of the business. The paper also states that legal persons should be liable for commission, participation (as an accomplice or an instigator) and attempt in respect of fraud, active corruption and capital laundering, committed on their behalf by any person who exercises managerial authority within them and that provision should be made to hold legal persons liable where defective supervision or management by such a person made it possible for a person under his authority to commit the offences on behalf of the legal person. As regards liability of a body corporate, such liability does not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money-laundering.

247. Building on such initiatives, the Organized Crime Convention requires that liability for offences be established both for natural or biological persons and for legal persons. Article 10 requires States parties to take the necessary steps, in accordance with their fundamental legal principles, to provide for corporate liability. This liability can be criminal, civil or administrative, accommodating thus the various legal systems and approaches.

At the same time, the Convention requires that whatever sanctions (monetary or other) that are introduced must be effective, proportionate and dissuasive, in order to achieve the overall objective of deterrence.

2. Summary of main requirements

248. Article 10 of the Organized Crime Convention requires the establishment of liability for legal entities, consistent with the State's legal principles, for the following:

(a) Participation in serious crimes involving an organized criminal group;

(b) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention;

(c) Protocol offences, to the extent States are or are considering becoming parties to the Protocols (art. 1, para. 3, of each Protocol).

249. In that regard, liability may be criminal, civil or administrative and sanctions must be effective, proportionate and dissuasive.

3. Mandatory requirements

250. Article 10, paragraph 1, requires that all States parties adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of the Convention.

251. Therefore, the obligation to provide for the liability of legal entities is mandatory, to the extent that this is consistent with each State's legal principles, in three types of cases: for participation in serious crimes involving an organized criminal group; for offences established by States parties as they implement articles 5, 6, 8 and 23; and for offences established by any Protocol to which the State is or intends to become a party (see art. 1, para. 3, of each Protocol).

252. The subsequent paragraph provides that, subject to the legal principles of the State party, the liability of legal persons may be criminal, civil or administrative (art. 10, para. 2).

253. As mentioned earlier, this is consistent with other international initiatives that acknowledge and accommodate the diversity of approaches adopted by different legal systems with respect to the liability of legal entities. Thus, there is no obligation to establish criminal liability, if that is inconsistent with a State's legal principles. In those cases, a form of civil or administrative liability will be sufficient to meet the requirement. Examples of non-criminal measures that may be adopted are given below.

254. Under article 10, paragraph 3, the liability of legal entities must be established without prejudice to the criminal liability of the natural persons who have committed the offences. The liability of natural persons who perpetrated the acts, therefore, is in addition to any corporate liability and must not be affected at all by the latter. When an individual commits crimes on behalf of a legal entity, it must be possible to prosecute and sanction them both.

255. Finally, the Convention requires that States ensure that legal persons held liable in accordance with article 10 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (art. 10, para. 4).

256. This is a specific provision, which complements the more general requirement of article 11, paragraph 1, that sanctions must take into account the gravity of the offence. It is well known that the investigation and prosecution of transnational organized crime is comparatively lengthy. Consequently, States with legal systems providing for statutes of limitation must ensure that the limitation periods for the offences covered by the Convention and the Protocols to which they are parties are comparatively long, taking into account and in accordance with their domestic law and fundamental principles (art. 11, para. 5) (see sect. C below). Whereas the provisions of article 11 apply to both natural and legal persons, those of article 10 apply only to legal persons.

257. The most frequently used sanction is a fine, which is sometimes characterized as criminal, sometimes as non-criminal (as in Bulgaria, Germany and Poland) and sometimes as a hybrid (as in Spain and Switzerland). Other sanctions include forfeiture, confiscation (see sect. D below, covering articles 12-14 of the Convention), restitution, or even closing down of legal entities. In addition, States may wish to consider non-monetary sanctions available in some jurisdictions, such as withdrawal of certain advantages, suspension of certain rights, prohibition of certain activities, publication of the judgement and the appointment of a trustee

and the direct regulation of corporate structures (see, for example, provisions in France, the Netherlands and Spain).

258. The obligation to ensure that legal persons are subject to appropriate sanctions requires that these be provided for by legislation and should not limit or infringe on existing judicial independence or discretion with respect to sentencing.

259. Finally, it must be borne in mind that the Convention requires mutual legal assistance to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State party, in cases where a legal entity is subject to a criminal, civil or administrative liability (art. 18, para. 2; see also chap. V, sect. B, below).

5. Information resources

260. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) Related provisions and instruments

(i) Organized Crime Convention

Article 2 (Definition of terms)

Article 11 (Prosecution, adjudication and sanctions)

Article 12 (Confiscation and seizure)

Article 13 (International cooperation for purposes of confiscation)

Article 14 (Disposal of confiscated proceeds of crime or property)

Article 18 (Mutual legal assistance)

(ii) Other instruments

1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Organisation for Economic Cooperation and Development, DAF/IME/BR(97)20

http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

1998 Convention on the Protection of the Environment through
Criminal Law

Council of Europe, *European Treaty Series*, No. 172

<http://conventions.coe.int/Treaty/EN/Treaties/Html/172.htm>

1999 Criminal Law Convention on Corruption

Council of Europe, *European Treaty Series*, No. 173

<http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>

Article 18. Corporate liability

1. Each Party shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for the criminal offences of active bribery, trading in influence and money-laundering established in accordance with this Convention, committed for their benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:

- a power of representation of the legal person; or
- an authority to take decisions on behalf of the legal person; or
- an authority to exercise control within the legal person;

as well as for involvement of such a natural person as accessory or instigator in the above-mentioned offences.

2. Apart from the cases already provided for in paragraph 1, each Party shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators of, or accessories to, the criminal offences mentioned in paragraph 1.

(b) Examples of national legislation

Australia

<http://www.ausimm.com.au/ohs/crimcode.pdf>

Australia's Criminal Code Act 1995 contains a very comprehensive treatment of corporate criminal liability.

Criminal Code

Chapter 2. General principles of criminal responsibility

Part 2.5. Corporate criminal responsibility

Clause 12

12.1 General principles

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the *Crimes Act 1914* enables a fine to be imposed for offences that only specify imprisonment as a penalty.

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

(1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

(2) The means by which such an authorisation or permission may be established include:

(a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

(c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the relevant provision; or

(d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

(3) Paragraph (2) (b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

(4) Factors relevant to the application of paragraph (2) (c) or (d) include:

(a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

(b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

(5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

(6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element; that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.5 Mistake of fact (strict liability)

(1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

(a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

(b) the body corporate proves that it exercised due diligence to prevent the conduct.

(2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

China

Chinese Criminal Code

Article 30

Any company, enterprise, institution, state organ or organization that commits an act that endangers society, which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility.

Denmark

1993 Act on Measures to Prevent Money-Laundering

Subsection 2

If the [money-laundering] offence is committed by a limited liability company, share company (*anpartsselskab*) or the like, the fine may be imposed on the company as such.

France**Penal Code****Title II. Of Criminal Liability****Chapter I. General provisions****Article 121-1**

No one is criminally liable except for his own conduct.

Article 121-2

Act No. 2000-647 of 10 July, art. 8, Official Journal of 11 July 2000

Juridical persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7 and in the cases provided for by statute or regulations.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.

The criminal liability of legal persons does not exclude that of the natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

[example of liability for “discrimination”]:

Article 225-4

Legal persons may incur criminal liability for the offence defined under article 225-2, pursuant to the conditions set out under article 121-2. The penalties incurred by legal persons are:

1. a fine, pursuant to the conditions set out under article 131-38;
2. the penalties enumerated under 2°, 3°, 4°, 5°, 8° and 9° of article 131-39.

The prohibition referred to in 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.

(c) *Other sources of information*

Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order
Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat

(United Nations publication, Sales No. E.86.IV.1), chap. I, sect. B
<http://www.un.org/documents/ga/res/40/a40r032.htm>

Economic and Social Council resolution 1994/15
<http://www.un.org/documents/ecosoc/res/1994/eres1994-15.htm>

Corporate Liability Rules in Civil Law Jurisdictions
Organisation for Economic Cooperation and Development
<http://www.greco.coe.int/evaluations/seminar/HeineOLIS.pdf>

Model 1. An act of management as the enterprise's own misconduct

Most countries, also the draft texts of laws of most East European countries, stick to the idea of identifying the enterprise with leading persons respectively imputing responsibility of persons in charge to the legal person.

Model 2. Deficient corporation, especially defective organization of the enterprise

The concept of this second model is as follows: an incident, such as a bribery in entrepreneurial matters, is linked with deficiencies of the corporation. Sometimes, i.e., in Australia, the law is focused on a deficient corporate culture, stimulating commission of specific offences (article 12.2, Criminal Code Act 1995). In the European context the special liability of enterprises is more and more based on a defective organization of the corporation. With these forms of corporate liability it is no longer a question of responsibility for the misconduct of subordinates, but rather a type of organizational blame of the entity as such for neglecting its organizational duty to concern itself with the adequate balancing of endangerment potentialities which arise with the opening and operation of a complex system. This approach emphasizes that criminal liability of an enterprise means a special liability of the legal person as such which is not congruent to the responsibility of natural persons.

Model 3. Strict liability (the causation principle)

According to this concept of liability, proof of actual deficits in corporate organizations causing or facilitating offences is completely dispensed with. The creation of an organization with complex operational structures which carries out intrinsically dangerous processes is rather deemed to be per se sufficient to impute dangerous consequences to the enterprise which business activities are the source of.

Model Legislation on Illicit Enrichment and Transnational Bribery
(Spanish only)

Organization of American States

<http://www.oas.org/juridico/spanish/legmodel.htm>

2. A corporation domiciled in a country that commits the crime of transnational bribery will be subject to a fine of (. . .), without adversely affecting the other sanctions established in the laws.

Model regulations concerning laundering offences connected to illicit trafficking and other serious offences (Amended to cover financing of terrorism)

Organization of American States

http://www.cicad.oas.org/en/?/Lavado_Activos/eng/MODEL_REGULATIONS.htm

Article 15. Liability of a financial institution

1. Financial institutions, or their employees, staff, directors, owners or other authorized representatives who, acting as such, participate in money-laundering or the financing of terrorism shall be subject to the most severe sanctions.

2. Financial institutions shall be liable, in accordance with the law, for the actions of their employees, staff, directors, owners or other authorized representatives who, acting as such, participate in the commission of any money-laundering or terrorism financing offence. Such liability may include, among other measures, the imposition of a fine, temporary suspension of business or charter, or suspension or revocation of the license to operate as a financial institution.

3. A criminal offence is committed by a financial institution or its employees, staff, director, owners or other authorized representatives who, acting as such, willfully fail to comply with the obligations in articles 11 through 14 of these Regulations, or who willfully make a false or falsified record or report as referred to in the above-mentioned articles.

4. Without prejudice to criminal and/or civil liabilities for offences connected to illicit traffic or other serious offences, financial institutions that fail to comply with the obligations described in articles 11 through 14 and 16 of these Regulations, shall be subject to other sanctions, such as imposition of a fine, temporary suspension of business or charter, or suspension or revocation of the license to operate as a financial institution.

The Forty Recommendations (revised in 2003)
Financial Action Task Force on Money Laundering
http://www1.oecd.org/fatf/pdf/40Recs-2003_en.pdf

Recommendation 2, subparagraph (b)

Countries should ensure that:

. . .

b) Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability are available. Legal persons should be subject to effective, proportionate and dissuasive sanctions. Such measures should be without prejudice to the criminal liability of individuals.

C. Prosecution, adjudication and sanctions

“Article 11

“Prosecution, adjudication and sanctions

“1. Each State Party shall make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of this Convention liable to sanctions that take into account the gravity of that offence.

“2. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention 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.

“3. In the case of offences established in accordance with articles 5, 6, 8 and 23 of this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

“4. Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.

“5. Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.

“6. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.”

1. Introduction

261. Harmonizing legal provisions on transnational crimes committed by organized criminal groups, detecting the offences, identifying and arresting the culprits, enabling jurisdiction to be asserted and facilitating smooth coordination of national and international efforts are all indispensable components of a concerted, global strategy against serious crime. Yet they are not sufficient. After all of the above has taken place, it is also necessary to ensure that the prosecution, treatment and sanctioning of offenders around the world is also comparatively symmetric and consistent with the harm they have caused and with the benefits they have derived from their criminal activities.

262. The penalties provided for similar crimes in various jurisdictions diverge significantly, reflecting different national traditions, priorities and policies. It is essential, however, to ensure that at least a minimum level of deterrence is applied by the international community to avoid the perception that certain types of crimes “pay”, even if the offenders are convicted. In other words, the sanctions must clearly outweigh the benefits of the crime. Therefore, in addition to harmonizing substantive provisions, States need to engage in a parallel effort with respect to the issues of prosecution, adjudication and punishment.

263. International initiatives have sought to do this with respect to particular offences, as, for example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (General Assembly resolution 45/110, annex).

264. Article 11 addresses this important aspect of the fight against transnational organized crime with respect to the offences covered by the Convention and complements the provisions relative to the liability of legal persons (art. 10) and to the seizure and confiscation of proceeds of crime (see arts. 12-14). This article requires that States parties give serious consideration to the gravity of the offences covered by the Convention when they decide on the appropriate punishment and possibility of early release or parole. It also requires that States make an effort to ensure that any discretionary powers they have under domestic law is used to deter the offences covered by the Convention, offences established in accordance with its Protocols, if they are or are considering becoming parties, and “serious offences” (art. 2, subpara. (b)).

265. Transnational offenders are frequently considered likely to flee the country where they face legal proceedings. For this reason, the Convention requires that States take measures to ensure that those charged with the four main offences covered by the Convention (under arts. 5, 6, 8 and 23) appear at forthcoming criminal proceedings consistently with their law and the rights of the defence. This relates to decisions on the defendants’ release before trial or appeal.

266. Finally, this article addresses the question of statutes of limitation. Generally, such statutes set time limits on the institution of proceedings against a defendant. Many States do not have such statutes, while others apply them across the board or with limited exceptions. Where such statutes exist, the purpose is mainly to discourage delays on the part of the prosecuting authorities, or on the part of plaintiffs in civil cases, to take into account the rights of defendants and to preserve the public interest in closure and prompt justice. Long delays often entail loss of evidence, memory lapses and changes of law and social context, and therefore increase the possibilities of some injustice. However, a balance must be achieved between the various competing interests and the length of the period of limitation varies considerably from State to State. Nevertheless, serious offences must not go unpunished, even if it takes longer periods of time to bring offenders to justice. This is particularly important in cases of fugitives, as the delay of instituting proceedings is beyond the control of authorities.

267. For this reason, the Convention requires States with statutes of limitation to introduce long periods for all offences covered by the Convention, including offences established in accordance with its Protocols and serious crimes, and longer ones for alleged offenders that have evaded the administration of justice.

268. In addition to the issues discussed immediately above, paragraph 6 of article 11 addresses the manner in which offences are to be denominated in the national laws of States parties. Further discussion regarding this issue, as well as other issues treated in this article, can be found in chapter II and chapter III, section A, of the present guide.

2. Summary of main requirements

269. The Organized Crime Convention requires that States:

(a) Ensure that offences covered by the Convention are subject to adequate sanctions taking the gravity of each offence into account (art. 11, para. 1);

(b) Ensure that any discretionary powers they may have are exercised to maximize the effectiveness of law enforcement and deterrence (art. 11, para. 2);

(c) Take appropriate measures to ensure the presence of defendants at criminal proceedings (art. 11, para. 3);

(d) Consider the grave nature of the four main offences covered by the Convention when considering early release or parole (art. 11, para. 4);

(e) Establish, where appropriate, long domestic statute of limitation periods for commencement of proceedings for offences covered by the Convention, especially when the alleged offender has evaded the administration of justice (art. 11, para. 5).

3. Mandatory requirements

270. The provisions of article 11 are outlined below under the headings of adequacy of sanctions, prosecution, adjudication and statutes of limitation.

(a) Adequacy of sanctions

271. Under article 11, paragraph 1, each State party is to make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of the Convention liable to sanctions that take into account the gravity of the offence.

272. This is a general requirement that penalties take into account the gravity of the offence. This paragraph applies to the four types of

criminalization required by the Convention and to the offences established in accordance with the Protocols to which States are or are considering becoming parties (art. 1, para. 3, of each Protocol). Penalties for serious crimes under domestic law are left to the discretion of national drafters. It is reiterated that, should they wish to have the Convention applied to such offences, they need to provide for a maximum penalty of at least four years' deprivation of liberty.¹⁴

273. This requirement is general and applies to both natural persons and legal entities. As noted in chapter IX of the present guide, there are additional and more specific provisions regarding legal entities in article 10, paragraph 4, which requires that States ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

(b) Prosecution

274. The Convention requires that States endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences covered by the Convention 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 (art. 11, para. 2).

275. This provision refers to discretionary prosecutorial powers available in some States. These States must make an effort to encourage the application of the law to the maximum extent possible in order to deter the commission of the four main offences covered by the Convention, the offences established in accordance with the three Protocols (to the extent States are parties to the Protocols) and serious crimes.

(c) Adjudication

276. The Convention requires that, with respect to the offences established under articles 5, 6, 8 and 23, each State take appropriate measures, in accordance with its domestic law and with due regard to the rights of the

¹⁴For example, see art. 3, para. 4 (a), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which reads: "such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation"; see also the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), General Assembly resolution 45/110, annex.

defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings (art. 11, para. 3).

277. The illegal operations in which many transnational criminal groups engage generate substantial profits. Consequently, large sums of money may be available to defendants, to the effect that they can post bail and avoid detention before their trial or their appeal. The dissuasive effect of bail is correspondingly diminished. The risk that law enforcement may be undermined is therefore higher. Thus, article 11, paragraph 3, points to this risk of imprudent use of pretrial and pre-appeal releases and requires that each State take appropriate measures consistent with its law and the rights of defendants to ensure that they do not abscond.

278. The Convention also encourages a stricter post-conviction regime by requiring each State to ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by the Convention when considering the eventuality of early release or parole of persons convicted of such offences (art. 11, para. 4).

279. Many jurisdictions allow for an early release or parole of incarcerated offenders, while others completely prohibit it. The Convention does not ask States to introduce such a programme, if their systems do not provide for it (A/55/383/Add.1, para. 20). It does, however, urge those States which provide for early release or parole to consider increasing the eligibility period, bearing in mind the gravity of the offences covered by the Convention.¹⁵

(d) Statutes of limitation

280. Under article 11, paragraph 5, each State party shall, where appropriate, establish under its domestic law a long statute of limitation period in which to commence proceedings for any offence covered by the Convention and a longer period where the alleged offender has evaded the administration of justice.

¹⁵This may be done through consideration of aggravating circumstances that may be listed in domestic laws or other conventions. See, for example, the Migrants Protocol, art. 6, para. 3; see also the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, art. 3, para. 7.

281. As mentioned in the introduction to the present section, many States do not have any limitation period for criminal offences after the passage of which the crimes cannot be prosecuted. Others prescribe a general limitation period for the commencement of proceedings, which may be applied either to all crimes or with clearly defined exceptions. The concern underlying such provisions is a balance between the interests for swift justice, closure and fairness to victims and defendants. Many legal systems and international conventions, for example the International Covenant on Civil and Political Rights in its article 14, paragraph 3 (c), also include clauses for trial without undue delays.

282. Article 10 does not require States without statutes of limitation to introduce them.

283. There are variations among States as to when the limitation period starts and how the time is counted. For example, in some countries time limits do not run until the commission of the offence becomes known (for example, when a complaint is made or the offence is discovered or reported) or when the accused has been arrested or extradited and can be compelled to appear for trial.

284. Moreover, in some systems, time limits may be stopped or extended if the accused flees or fails to appear at any stage of the proceedings. The Organized Crime Convention requires that, when an alleged offender evades the administration of justice, the drafters set a longer limitation period. The longer period is regarded as necessary in cases where accused offenders take positive actions to flee or otherwise evade justice proceedings. It should also be noted that in many States trial *in absentia* is not permitted.

285. These factors should be considered in setting time limits, if any, and States that do set limits should set longer periods for cases where the accused has evaded proceedings. In such cases, the additional delay, which may make defending against the charges more difficult, is justified by the misconduct of the accused.

4. Information resources

286. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) *Related provisions and instruments*

(i) *Organized Crime Convention*

Article 2 (Use of terms)

Article 5 (Criminalization of participation in an organized criminal group)

Article 6 (Criminalization of the laundering of proceeds of crime)

Article 8 (Criminalization of corruption)

Article 10 (Liability of legal persons)

Article 12 (Confiscation and seizure)

Article 14 (Disposal of confiscated proceeds of crime or property)

Article 23 (Criminalization of obstruction of justice)

Article 26 (Measures to enhance cooperation with law enforcement authorities)

(ii) *Protocols to the Organized Crime Convention*

Article 1, paragraph 3, of each Protocol

Article 6, paragraph 3, of the Migrants Protocol

(iii) *Other instruments*

1966 International Covenant on Civil and Political Rights

United Nations, *Treaty Series*, vol. 999, No. 14668

General Assembly resolution 2200 A (XXI)

<http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>

http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

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

United Nations, *Treaty Series*, vol. 1582, No. 27627

http://www.unodc.org/pdf/convention_1988_en.pdf

(b) *Examples of national legislation*

See the web site of the United Nations Office on Drugs and Crime for an extensive list of various national laws and statutes of limitation

http://www.undcp.org/odccp/legal_library/index-keyword-114.html

(c) *Other sources of information*

United Nations Standard Minimum Rules for Non-custodial Measures
(The Tokyo Rules)

General Assembly resolution 45/110, annex

<http://www.un.org/documents/ga/res/45/a45r110.htm>

**D. Identification, tracing, freezing or seizure of assets
and confiscation of proceeds of crime**

“Article 12

“Confiscation and seizure

“1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

“(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

“(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

“2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

“3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

“4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

“5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

“6. For the purposes of this article and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

“7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

“8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

“9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.”

“Article 13

“International cooperation for purposes of confiscation

“1. A State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

“(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

“(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, situated in the territory of the requested State Party.

“2. Following a request made by another State Party having jurisdiction over an offence covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other

instrumentalities referred to in article 12, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

“3. The provisions of article 18 of this Convention are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 18, paragraph 15, requests made pursuant to this article shall contain:

“(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

“(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested;

“(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested.

“4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting State Party.

“5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

“6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

“7. Cooperation under this article may be refused by a State Party if the offence to which the request relates is not an offence covered by this Convention.

“8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

“9. States Parties shall consider concluding bilateral or multi-lateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this article.”

“Article 14

“Disposal of confiscated proceeds of crime or property

“1. Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.

“2. When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.

“3. When acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on:

“(a) Contributing the value of such proceeds of crime or property or funds derived from the sale of such proceeds of crime or property or a part thereof to the account designated in accordance with article 30, paragraph 2 (c), of this Convention and to intergovernmental bodies specializing in the fight against organized crime;

“(b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.”

1. Introduction

287. Criminalizing the conduct from which substantial illicit profits are made does not adequately punish or deter organized criminal groups. Even if arrested and convicted, some of these offenders will be able to enjoy their illegal gains for their personal use and for maintaining the operations of their criminal enterprises. Despite some sanctions, the perception would still remain that crime pays in such circumstances and that Governments

have been ineffective in removing the means for continued activities of criminal groups.

288. Practical measures to keep offenders from profiting from their crimes are necessary. One of the most important ways to do this is to ensure that States have strong confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property. Specific international cooperation mechanisms are also necessary to enable countries to give effect to foreign freezing and confiscation orders and to provide for the most appropriate use of confiscated proceeds and property.

289. Significant variation exists in the methods and approaches employed by different legal systems. Some opt for a property-based system, others for a value-based system, while still others combine the two. The first one allows confiscation of property found to be proceeds or instrumentalities, that is, used for the commission of crime. The second allows the determination of the value of proceeds and instrumentalities of crime and the confiscation of an equivalent value. Some States allow for value confiscation under certain conditions (for example, the proceeds have been used, destroyed or hidden by the offender).

290. Other variations relate to the range of offences with respect to which confiscation can take place, the requirement of a prior conviction of the offender,¹⁶ the required standard of proof (to the criminal or lower civil level),¹⁷ whether and the conditions under which third-party property is subject to confiscation and the power to confiscate the products or instrumentalities of crime.

291. The need for integration and the beginnings of a more global approach is clear. To this end, the Convention devotes three articles to the issue.¹⁸ Articles 12-14 cover domestic and international aspects of identifying, freezing and confiscating the proceeds and instrumentalities of

¹⁶Some countries allow confiscation without conviction, if the defendant has been a fugitive for a certain period of time and there is proof to the civil standard that the property is the proceeds or instrumentalities of crime. Other countries allow confiscation ordered through civil or administrative proceedings (for example, Germany and the United States).

¹⁷Some jurisdictions provide for a discretionary power to reverse the burden of proof, in which case the offenders have to demonstrate the legal source of the property (for example, Hong Kong Special Administrative Region of China).

¹⁸The purpose of the present guide is to assist national drafters by covering the basic procedures that need to be followed, rather than to explain in detail the complex issues involved, such as the administration of confiscated assets, how this is done, safeguards that would have to be introduced, etc. Most of this is part of a much broader discussion covering the issues of record keeping, client-lawyer privileges and conditions under which records can be seized, reporting requirements, etc.

crime.¹⁹ The terms “property”, “proceeds of crime”, “freezing”, “seizure”, “confiscation” and “predicate offence” are defined in article 2, subparagraphs (d)-(h), as follows:

“(d) ‘Property’ shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

“(e) ‘Proceeds of crime’ shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

“(f) ‘Freezing’ or ‘seizure’ shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

“(g) ‘Confiscation’, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

“(h) ‘Predicate offence’ shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention;”.

292. Article 12 requires a State party to adopt measures, to the greatest extent possible within its legal system, to enable confiscation of proceeds, equivalent value of proceeds and instrumentalities of offences covered by the Convention. The term “to the greatest extent possible within their domestic legal systems” is intended to reflect the variations in the way that different legal systems carry out the obligations imposed by this article. Nevertheless, countries are expected to have a broad ability to comply with the provisions of article 12. Article 12 also obligates each State party to adopt measures to enable the identification, tracing, freezing and seizing of items for the purpose of eventual confiscation. In addition, it obligates each State party to empower courts or other competent authorities to order production of bank records and other evidence for purposes of facilitating such identification, freezing and confiscation.

¹⁹Drafters in States intending to become party to the Firearms Protocol should note that that Protocol establishes additional principles for the confiscation of firearms and their destruction as the preferred method of disposal and should study article 6 of the Firearms Protocol and the legislative guide thereto.

293. Article 13 then sets forth procedures for international cooperation in confiscation matters. These are important powers, as criminals frequently seek to hide proceeds and instrumentalities of crime abroad, as well as evidence relating thereto, in order to thwart law enforcement efforts to locate and gain control over them. A State party that receives a request from another State party is required by article 13 to take particular measures to identify, trace and freeze or seize proceeds of crime for purposes of eventual confiscation. Article 13 also describes the manner in which such requests are to be drafted, submitted and executed. It is important to note that these are special procedures aimed at obtaining the proceeds of crime, as opposed to procedures that assist in the search for such proceeds as part of the evidence of crime (for example, warrants and in rem procedures).

294. Article 14 addresses the final stage of the confiscation process: the disposal of confiscated assets. While disposal is to be carried out in accordance with domestic law, States parties are called upon to give priority to requests from other States parties for the return of such assets for use as compensation to crime victims or restoration to legitimate owners. States parties are also encouraged to consider concluding an agreement or arrangement whereby proceeds may be contributed to the United Nations to fund technical assistance activities under the Organized Crime Convention or shared with other States parties that have assisted in their confiscation.

295. Detailed provisions similar to those of the Organized Crime Convention can be found in article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the International Convention for the Suppression of the Financing of Terrorism, Security Council resolution 1373 (2001) and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. States that have enacted legislation to implement their obligations as parties to those conventions may not need major amendments for meeting the requirements of the Organized Crime Convention. In addition, the FATF Forty Recommendations provide guidance to countries on means of identifying, tracing, seizing and forfeiting the proceeds of crime.

296. Conversely, implementing the provisions of the Organized Crime Convention would bring States closer to conformity with the other conventions.

2. Summary of main requirements

(a) Article 12

297. States parties must, to the greatest extent possible under their domestic system, have the necessary legal framework to permit:

(a) The confiscation of proceeds of crime derived from offences covered by the Convention or property the value of which corresponds to that of such proceeds (article 12, para. 1 (a));

(b) The confiscation of property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention (art. 12, para. 1 (b));

(c) The identification, tracing and freezing and/or seizure of the proceeds and instrumentalities of crime covered by the Convention, for the purpose of eventual confiscation (art. 12, para. 2);

(d) The application of confiscation powers to transformed or converted property and proceeds intermingled with legitimately obtained property (to the value of the proceeds in question) and to benefits or income derived from the proceeds (art. 12, paras. 3-5);

(e) The power of courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. Bank secrecy shall not be a legitimate reason for failure to comply (art. 12, para. 6).

(b) Article 13

298. A State party, to the greatest extent possible under its system, is required:

(a) Either to submit to its competent authorities another State party's request for confiscation, for the purpose of obtaining an order of confiscation and giving effect to it, or to submit to its competent authorities, with a view to giving effect to it, a confiscation order issued by another State party (art. 13, para. 1);

(b) Upon request of another State party, to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities relating to offences covered by the Convention for the purpose of eventual confiscation (art. 13, para. 2);

(c) To furnish copies of its laws and regulations that give effect to article 13 to the Secretary-General of the United Nations (art. 13, para. 5).

299. Article 13 also sets forth the types of information required for various types of requests (art. 13, paras. 3 (a)-(c)).

300. States parties are also required to consider concluding bilateral or multilateral agreements to enhance the effectiveness of international cooperation in this area.

(c) Article 14

301. To the extent permitted by its domestic law and if requested by a requesting State party under article 13, the confiscating State party shall give priority consideration to returning the proceeds or property to the requesting State so that it can give compensation to victims or return the proceeds or property to the legitimate owners (art. 14, para. 2).

3. *Mandatory requirements*

(a) *Scope*

302. Articles 12-14 apply to all offences covered by the Convention. This includes the offences established in accordance with the Convention, other serious crimes (art. 2, subpara. (b)) and offences established in accordance with the Protocols to which States become parties.²⁰

303. The primary legislative obligations to create powers that enable confiscation and seizure are set forth in article 12. Some additional requirements or legislative guidance may be drawn from article 13, which mainly covers international cooperation issues, and article 14, which deals with the disposal of property and other proceeds of crime.

²⁰Drafters who intend to ratify and implement the Firearms Protocol should note that that Protocol modifies the basic principles for tracing and disposal, as it takes into account the nature of firearms. Article 6 of the Firearms Protocol establishes additional principles for the confiscation of firearms and their destruction as the preferred method of disposal. The Protocol also defines “tracing” as it applies to firearms and contains a specific obligation to assist in tracing (arts. 3, subpara. (f), and 12, para. 4). To the extent that firearms are either proceeds of crime or instrumentalities, however, they would also be covered by articles 12-14 of the Convention (for example, in cases where States are parties to the Organized Crime Convention, but not to the Firearms Protocol).

(b) *Proceeds or property subject to seizure or confiscation*
(*article 12, paragraphs 1, 3, 4 and 5*)

304. The substantive obligation to enable confiscation and seizure is found in article 12, paragraphs 1, 3, 4 and 5, while procedural powers to trace, locate and gain access to assets are found in the remaining paragraphs.

305. Article 12, paragraph 1 (a), requires that States parties enable, to the greatest extent possible within their domestic legal systems, the confiscation of:

(a) Proceeds of crime derived from offences covered by the Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention.

306. An interpretative note indicates that the words “used in or destined for use in” are meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a crime (A/55/383/Add.1, para. 22).

307. Paragraphs 3 and 4 cover situations in which the source of proceeds or instrumentalities may not be immediately apparent, because the criminals have made their detection more difficult by mingling them with legitimate proceeds or converting them into other forms. These paragraphs require States parties to enable the confiscation of property into which such proceeds have been converted, as well as intermingled proceeds of crime up to their assessed value.

308. Article 12, paragraph 5, further requires that States ensure that income or other benefits derived from investing proceeds of crime are also liable to confiscation. An interpretative note indicates that the words “other benefits” are intended to encompass material benefits as well as legal rights and interests of an enforceable nature that are subject to confiscation (A/55/383/Add.1, para. 23).

309. Many States already have such measures in place with respect to narcotics offences, by virtue of legislation they enacted to implement the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. They will need to review that legislation to determine whether it requires amendment to comply with the broad range of crimes covered by the Organized Crime Convention.

(c) *Obligations to adopt procedural powers*
(*article 12, paragraphs 2 and 6*)

310. The investigative capability needed to implement articles 12-14 fully will depend to a large degree on non-legislative elements, such as ensuring that law enforcement agencies and prosecutors are properly trained and provided with adequate resources. In most cases, however, legislation will also be necessary to ensure that adequate powers exist to support the tracing and other investigative measures needed to locate and identify assets and link them to relevant crimes. Criminals who become aware that they are under investigation or charges will try to hide property and shield it from law enforcement actions. Without the ability to trace such property as offenders move it about, law enforcement efforts will be frustrated.

311. The legislation required by article 12, paragraphs 2 and 6, involves:

(a) Such measures as may be necessary to enable the identification, tracing, freezing or seizure of proceeds or other property (art. 12, para. 2);

(b) Powers for courts or other competent authorities to order that bank, financial or commercial records be made available or be seized (art. 12, para. 6).

312. Article 12, paragraph 6, sets forth procedural law requirements to facilitate the operation of the other provisions of the article. It requires States parties to ensure that bank records, financial records (such as those of other financial services companies) and commercial records (such as of real estate transactions or shipping lines, freight forwarders and insurers) are subject to compulsory production, for example through production orders and search and seizure or similar means that ensure their availability to law enforcement officials for purposes of carrying out the measures called for in article 12. The same paragraph establishes the principle that bank secrecy cannot be raised by States as an excuse for not implementing that paragraph. As will be seen, the Organized Crime Convention establishes the same rule with respect to mutual legal assistance matters (see art. 18, para. 8, and chap. V, sect. B, of the present guide).

313. Again, these measures are very similar to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Thus, many States already have such measures in place, at least with respect to narcotics offences, by virtue of legislation implementing that treaty. States will need to review that legislation in order to ensure that it covers the broader range of crimes covered by the Organized Crime Convention.

(d) *Third parties (article 12, paragraph 8)*

314. Article 12, paragraph 8, requires that the seizure and forfeiture requirements be interpreted as not prejudicing the rights of bona fide third parties, which would at a minimum exclude those with no knowledge of the offence or connection with the offender(s).

315. The system of confiscation intentionally constitutes an interference with the economic interests of individuals. For this reason, particular care must be taken to ensure that the system developed by States parties maintains the rights of bona fide third parties who may have an interest in the property in question.

316. An interpretative note indicates that the interpretation of article 12 should take into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State (A/55/383/Add.1, para. 21). The same note goes on to indicate that it is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations.

(e) *International cooperation requirements (article 13)*

317. Article 13 sets forth various mechanisms to enhance international cooperation with respect to confiscation. As stated above, criminals frequently seek to hide proceeds and instrumentalities of crime abroad. Thus, such mechanisms are necessary to ensure that criminals do not take advantage of national borders and differences in legal systems in order to retain their illegal profits, which may enable them to maintain the viability of their criminal enterprise, even if they are prosecuted and convicted.

318. Article 13, paragraph 1, requires States parties that receive a request for confiscation from another State party to take one of two actions, to the greatest extent possible within their domestic legal systems. The requested State party must either directly submit for enforcement by its competent authorities an order issued by the requesting State party (subparagraph (b)), or submit the request to its competent authorities in order to obtain a domestic order of confiscation, to which the requested State party would be required to give effect if granted (subparagraph (a)).

319. The Convention provides the two alternatives in order to allow flexibility in the way States must give effect to requests for confiscation. Some

States use a system of confiscation by which specific property is traced as derived from or used to commit an offence. Other States use a value-based system by which the value of the proceeds or instrumentalities is calculated and property up to such value is then confiscated. Problems may arise when a request from a State with one system is directed at a State using the other, unless the domestic law of the requested party has been framed in a sufficiently flexible manner. Examples of legislation set forth in section 5 below may be of assistance in crafting domestic legislation to contain such flexibility.

320. Article 13, paragraph 2, requires that the application of the judicial and investigative powers established under article 12 be extended to cases initiated on the basis of a request from another State party. An interpretative note indicates that references in article 13 to article 12, paragraph 1, should be understood to include reference to article 12, paragraphs 3-5 (A/55/383/Add.1, para. 24), which apply when proceeds of crime have been converted into other property or intermingled with funds derived from lawful activity. Subject to domestic law and applicable treaties, States are required to take action when requested by another State party.

321. For that purpose, paragraph 3 provides that the provisions of article 18 of the Organized Crime Convention (Mutual legal assistance) are applicable to produce the evidence and information necessary to justify identification, tracing, freezing or seizing and confiscation pursuant to article 13 and sets forth the contents of requests for such assistance. Under paragraph 7, no obligation to cooperate, however, arises if the offence for which assistance is sought is not an offence covered by the Convention.

322. Moreover, as in article 12, paragraph 8, the international cooperation measures set forth in the article should not be construed to prejudice the rights of bona fide third parties.

323. Drafters should ensure that the admissibility of the various documents listed in article 13, paragraph 3, will not be an issue when they are filed by another State in support of requests for tracing, seizure or confiscation.

324. Further, judicial authorities should be given the power to recognize the findings, judgements or orders of a foreign court regarding the essential elements leading to seizure and confiscation, including any finding that a crime was planned or has been committed, findings of fact respecting links between the proceeds or property and any relevant crimes and offenders

or alleged offenders and orders respecting investigative powers, seizure and confiscation.

325. The requirements of article 13 are also subject to the provisions of any other bilateral or multilateral treaties that apply to the States parties involved.

326. The Convention states that the procedure and standards for arriving at the ultimate decision on a request for cooperation pursuant to article 13, paragraphs 1 or 2, is subject to, and in accordance with, the domestic law of the requested State or any relevant treaty or convention to which both the requested and requesting States are party (art. 13, para. 4). Drafters need to review such instruments and any existing implementing legislation with a view to avoiding inconsistencies and ensuring that any current procedures that are more expeditious or extensive than those required by article 13 are not adversely affected by new legislative amendments.

327. Many countries presently provide for these measures, at least with respect to narcotics offences, by virtue of legislation they enacted to implement the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. They will need to review their legal framework to determine whether it requires amendment to apply to the broad class of crime covered by the Organized Crime Convention and whether it is flexible enough to enable assistance to be provided to States parties using a different system of confiscation than they currently have in place.

328. Each State party must furnish copies of its laws and regulations that give effect to article 13 to the Secretary-General of the United Nations (art. 13, para. 5). These materials should be provided to the United Nations Office on Drugs and Crime.

4. Other measures, including optional issues

(a) Burden of proof

329. In creating the judicial powers to order seizure and forfeiture, national drafters should consider issues relating to the applicable burden of proof. In some systems, confiscation is treated as a civil matter, with the attendant balance of probabilities standard. In others, confiscation is considered a criminal punishment, for which the higher beyond a reasonable

doubt standard should be applied and may in some cases be required by constitutional or other human rights standards.

330. To some extent, this may depend on whether there have already been one or more convictions in related criminal prosecutions. Since these entail a judicial finding that the crime was committed based on the high criminal standard of proof, the lower civil standard may then apply in subsequent confiscation proceedings on the question of whether the property involved was derived from, used in, or destined for use in the committed offence.

331. Article 12, paragraph 7, permits shifting the burden of proof to the defendant to show that alleged proceeds of crime were actually from legitimate sources. Because countries may have constitutional or other constraints on such shifting of the burden of proof, countries are only required to consider implementing this measure to the extent that it is consistent with their domestic law.

332. Similarly, legislative drafters may wish to consider adopting the related practice in some legal systems of not requiring a criminal conviction as a prerequisite to obtaining an order of confiscation, but providing for confiscation based on a lesser burden of proof to be applied in proceedings. For example, the laws of Ireland and the United Kingdom of Great Britain and Northern Ireland provide for such a system, with a lower burden of proof for deprivation of property than is required for deprivation of liberty.

(b) Accommodation of diverse systems

333. Article 12, paragraph 9, recognizes that, because of wide variations in domestic legal systems, States parties are not bound to implement the provisions of article 12 by following any particular formula (such as by adopting the precise wording of the article), but have the flexibility to carry out their obligations in a manner consistent with their domestic legal framework.

(c) Additional treaties

334. Article 13, paragraph 9, encourages States parties to consider concluding treaties, agreements or arrangements to enhance the effectiveness of international cooperation.

*(d) Disposal of confiscated proceeds or property
(article 14)*

335. Article 14 governs the disposal of confiscated proceeds and property, but does not impose any mandatory requirements. Generally, disposal is governed by domestic law and administrative procedures. However, paragraphs 2 and 3 call for the consideration of specific disposal options.

336. Article 14, paragraph 2, requires that, where permitted by domestic law, priority consideration should be given to returning proceeds or property to a requesting State for compensation of, or return to, victims. For most confiscation systems, a key objective is to restore to victims property taken from them by criminals and it is extremely useful to provide for a procedure under domestic law to enable sharing of confiscated assets with domestic and foreign victims (see arts. 24 and 25 of the Organized Crime Convention and chap. IV, sect. E, of the present guide).

337. Article 14, paragraph 3 *(a)*, calls for giving special consideration to contributing proceeds or property to the United Nations Crime Prevention and Criminal Justice Fund for use against organized crime (see also art. 30, para. 2 *(c)*, and General Assembly resolution 55/25, para. 9).

338. Article 14, paragraph 3 *(b)*, calls for giving special consideration to sharing confiscated funds with other States parties on a regular or case-by-case basis. An interpretative note indicates that, when feasible, States parties would examine whether it would be appropriate, in conformity with individual guarantees embodied in their domestic law, to use confiscated assets to cover the cost of assistance provided pursuant to article 14, paragraph 2 (A/55/383/Add.1, para. 25). Asset sharing is a powerful, yet underutilized weapon against organized crime. It can encourage enhanced cooperation among law enforcement authorities with respect to locating, freezing and confiscating proceeds of crime, as the foreign authorities that provide assistance leading to the confiscation may receive a portion of the funds for official use in their further crime fighting efforts. Agreements among a number of States already provide for such mutually beneficial disposition of confiscated assets and countries are encouraged to provide for this mechanism.

339. In some countries, such provisions may involve legislative amendments or international agreements making these options available and creating procedures whereby they can be considered in appropriate cases.

5. *Information resources*

340. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) *Related provisions and instruments*

(i) *Organized Crime Convention*

Article 2 (Use of terms)

Article 6 (Criminalization of the laundering of proceeds of crime)

Article 18 (Mutual legal assistance)

Article 24 (Protection of witnesses)

Article 25 (Assistance to and protection of victims)

Article 34 (Implementation of the Convention)

(ii) *Protocols to the Organized Crime Convention*

Article 1, paragraph 3, of each Protocol

Firearms Protocol

(iii) *Other instruments*

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

United Nations, *Treaty Series*, vol. 1582, No. 27627

http://www.unodc.org/pdf/convention_1988_en.pdf

1990 Convention on Laundering, Search, Seizure and Confiscation of
the Proceeds from Crime

Council of Europe, *European Treaty Series*, No. 141

<http://conventions.coe.int/treaty/EN/WhatYouWant.asp?NT=141>

1999 International Convention for the Suppression of the Financing of
Terrorism

General Assembly resolution 54/109, annex

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/251/28/PDF/N0025128.pdf?OpenElement>

(b) *Examples of national legislation*

Albania

Criminal Code

Article 36. Confiscation of the means for committing the criminal act

Confiscation is necessarily decided by the court on persons committing criminal acts, and consists of the seizure and transfer in favour of the State of the means which have served or were chosen as a means to commit a criminal act, as well as the objects, money and any other property resulting from the criminal act or the reward given or promised for its commitment.

Algeria

Article 93

Payment received by the offender, or a sum equal to its value where confiscation of such payment has not been possible, shall be declared Treasury property by order of the court.

A confiscation order shall be made in respect of the proceeds of the offence and any object or instrument used in its commission.

Article 133

Payments in money or in kind, or their value, shall never be returned to a briber; they must be confiscated and declared Treasury property by order of the court.

Australia

http://www.austlii.edu.au/au/legis/act/consol_act/poca1991160/index.html

Proceeds of Crime Act 1991

Austria

<http://www.ris.bka.gv.at/>

Confiscation, Forfeiture and other relevant texts, including article 20 (a)-(c) of the Penal Code, articles 1441 and 445 of the Code of Criminal Procedure and articles 50 and 64 of the Extradition and Mutual Legal Assistance Law

The full texts of the above laws may be consulted in German at the web site of the Legal Information System of the Republic of Austria (see link above), which includes a search guide in English.

Botswana

http://www.unodc.org/odccp/legal_library/bw/legal_library_1994-09-12_1994-44.html

Proceeds of Serious Crime Act, 1990

Germany

<http://www.bmj.bund.de/images/10927.pdf>

Criminal Code***Title Seven. Forfeiture and confiscation******Section 73. Prerequisites for forfeiture***

(1) If an unlawful act has been committed and the perpetrator or inciter or accessory has acquired something as a result thereof or for the purpose of committing it, then the court shall order its forfeiture. This shall not apply to the extent that a claim by the aggrieved party has arisen out of the act the satisfaction of which would deprive the perpetrator or inciter or accessory of the value of that which was acquired by virtue of the act.

(2) The order of forfeiture shall extend to derived benefits. It may also extend to objects which the perpetrator or inciter or accessory has acquired through alienation of an acquired object, as a replacement for its destruction, damage or seizure or on the basis of an acquired right.

(3) If the perpetrator or inciter or accessory acted for another and the latter acquired something thereby, then the order of forfeiture under subsections (1) and (2) shall be directed at him.

(4) Forfeiture of an object shall also be ordered if it is owned or claimed by a third party, who furnished it for the act or otherwise with knowledge of the attendant circumstances of the act.

Section 73a. Forfeiture of the replacement value

To the extent that the forfeiture of a particular object is impossible due to the nature of what was acquired or for some other reason or because forfeiture of a replacement object pursuant to Section 73, subsection (2), sentence 2, has not been ordered, the court shall order the forfeiture of a sum of money which corresponds to the value of that which was acquired. The court shall also make such an order collateral to the forfeiture of an object to the extent its value falls short of the value of that which was originally acquired.

Section 73b. Estimation

The extent of what has been acquired and its value, as well as the amount of the claim the satisfaction of which would deprive the perpetrator or inciter or accessory of that which was acquired, may be estimated.

Section 73c. Hardship provision

(1) Forfeiture shall not be ordered to the extent it would constitute an undue hardship for the person affected. The order need not be made to the extent the value of that which was acquired is no longer part of the affected person's assets at the time of the order or if that which was acquired is only of slight value.

(2) In approving facilitation of payment Section 42 shall apply accordingly.

Section 73d. Extended forfeiture

(1) If an unlawful act has been committed pursuant to a law which refers to this provision, then the court shall also order the forfeiture of objects of the perpetrator or inciter or accessory if the circumstances justify the assumption that these objects were acquired as a result of unlawful acts, or for the purpose of committing them. Sentence 1 shall also be applicable if the perpetrator or inciter or accessory does not own or have a claim to the object only because he acquired the object as a result of an unlawful act or for the purpose of committing it. Section 73, subsection (2), shall apply accordingly.

(2) If forfeiture of a particular object after the act has become impossible in whole or in part, then Sections 73a and 73b shall to that extent be applied by analogy.

(3) If, after an order of forfeiture pursuant to subsection (1) due to another unlawful act which the perpetrator or inciter or accessory committed before the order, a decision must again be made as to the forfeiture of objects of the perpetrator or inciter or accessory, then the court, in so doing, shall consider the order already issued.

(4) Section 73c shall apply accordingly.

Section 73e. Effect of forfeiture

(1) If forfeiture of an object is ordered, then ownership of the property or the right forfeited shall pass to the State when the decision becomes final, if the person affected by the order has a claim thereto at the time. The rights of third parties in the object shall remain intact.

(2) Before it becomes final the order shall have the effect of prohibiting alienation within the meaning of section 136 of the Civil Code; the prohibition shall also encompass dispositions other than alienations.

Section 74. Prerequisites for confiscation

(1) If an intentional crime has been committed, then objects which were generated thereby or used or intended for use in its commission or preparation may be confiscated.

(2) Confiscation shall only be permissible if:

1. the perpetrator or inciter or accessory owns or has a claim to the objects at the time of the decision; or
2. the objects, due to their nature and the circumstances, endanger the general public or there exists a danger that they will be used for the commission of unlawful acts.

(3) Under the provisions of subsection (2), no. 2, confiscation of objects shall also be permissible if the perpetrator acted without guilt.

(4) If confiscation is prescribed or permitted by a special provision over and above subsection (1), then subsections (2) and (3) shall apply accordingly.

Section 74a. Extended prerequisites for confiscation

If the law refers to this provision, then objects may also be confiscated, as an exception to Section 74, subsection (2), no. 1, if at the time of the decision the person who owns or has a claim to them:

1. has at least recklessly contributed to the fact that the property or the right thereto has been the object or instrumentality of the act or its preparation; or
2. has acquired the objects in a reprehensible manner with knowledge of the circumstances which would have permitted their confiscation.

Section 74b. Principle of proportionality

(1) If confiscation is not prescribed, then it may not be ordered in cases under Sections 74, subsection (2), no. 1 and 74a when it is disproportionate to the significance of the act committed or the reproach attaching to the perpetrator or inciter or accessory or the third party in cases of Section 74a affected by the confiscation.

(2) In cases under Sections 74 and 74a the court shall order that the confiscation be reserved and shall impose a less incisive measure if the objective of the confiscation can also be thereby attained. Particular consideration shall be given to instructions:

1. to render the objects unusable;
2. to remove particular fittings or distinguishing marks or otherwise modify the objects; or

3. to deal with the objects in a specified manner. If the instructions are followed, the reservation on confiscation shall be lifted; otherwise the court shall subsequently order the confiscation.

(3) If the confiscation is not prescribed, then it may be limited to a part of the objects.

Section 74c. Confiscation of replacement value

(1) If the perpetrator or inciter or accessory has used, particularly through alienation or consumption, the object which he owned or had a claim to at the time of the act and which could have been subject to confiscation, or if he has otherwise obstructed the confiscation of the object, then the court may order the confiscation from the perpetrator or inciter or accessory of a sum of money no greater than an amount equivalent to the value of the object.

(2) The court may also make such an order collateral to the confiscation of an object or in place thereof, if the perpetrator or inciter or accessory has, prior to the decision on confiscation, encumbered it with the right of a third party, the extinguishment of which cannot be ordered without compensation or could not be ordered in the case of confiscation (Sections 74e, subsection (2), and 74f); if the court makes the order collateral to the confiscation, then the amount of the replacement value shall be measured according to the value of the encumbrance on the object.

(3) The value of the object and the encumbrance may be estimated.

(4) In approving facilitation of payment Section 42 shall apply.

Section 74d. Confiscation of writings and rendering unusable

(1) Writings (Section 11, subsection (3)), which have a content such that every intentional dissemination with knowledge of their content would satisfy the elements of a penal norm, shall be confiscated if at least one copy was disseminated by means of an unlawful act or was intended for such dissemination. It shall simultaneously be ordered that the equipment used or intended for the production of the writings, such as plates, frames, type, blocks, negatives or stencils, be rendered unusable.

(2) The confiscation shall extend only to copies which are in the possession of the persons involved in their dissemination or preparation or which have been publicly displayed or, having been forwarded for dissemination, have not yet been distributed to the recipient.

(3) Subsection (1) shall correspondingly apply to writings (Section 11, subsection (3)) which have a content such that intentional dissemination with knowledge of their content would satisfy the elements of a penal norm only when

additional attendant circumstances of the act are present. Confiscation and rendering unusable shall, however, only be ordered to the extent that:

1. the copies and the objects indicated in subsection (1), sentence 2, are in the possession of the perpetrator, inciter or accessory or another on whose behalf the perpetrator or inciter or accessory acted, or are intended by these people for dissemination; and
2. the measures are required to prevent unlawful dissemination by these persons.

(4) It shall be deemed equivalent to dissemination within the meaning of subsections (1) to (3), if a writing (Section 11, subsection (3)) or at least one copy of the writing has been made accessible to the public by display, posting, presentation or other means.

(5) Section 74b, subsections (2) and (3), shall apply accordingly.

Section 74e. Effect of confiscation

(1) If an object is confiscated, then ownership of the property or the right confiscated shall pass to the State when the decision becomes final.

(2) The rights of third parties in the object shall remain intact. However, the court shall order the extinguishment of these rights if it bases confiscation on the fact that the conditions of Section 74, subsection (2), no. 2, exist. It may also order the extinguishment of the rights of a third party if he may not be granted compensation pursuant to Section 74f, subsection (2), nos. 1 or 2.

(3) Section 73e, subsection (2), shall apply accordingly for the order of confiscation and the order reserving confiscation, even when it has not yet become final.

Section 74f. Compensation

(1) If a third party had a claim of ownership in the property or the confiscated right at the time the decision on confiscation or rendering unusable became final or if the object was encumbered by a right of a third party which was extinguished or interfered with by the decision, then the third party shall be appropriately compensated in money from the public treasury taking into consideration the fair market value.

(2) Compensation shall not be granted, if:

1. the third party has at least recklessly contributed to the fact that the property or the right thereto has been the object or instrumentality of the act or its preparation;
2. the third party has acquired the object or the right in the object in a reprehensible manner with knowledge of the circumstances which permit its confiscation or rendering unusable; or

3. it would be permissible, under the circumstances which justify the confiscation or rendering unusable, to confiscate the object from the third party permanently and without compensation on the basis of legal provisions outside of the criminal law.

(3) In cases under subsection (2) compensation may be granted to the extent it would constitute an undue hardship to refuse it.

New Zealand

http://www.unodc.org/odccp/legal_library/nz/legal_library_1993-03-01_1992-38.html

Proceeds of Crime Act 1991

Poland

<http://www.imolin.org/lawpolan.htm>

Chapter V. Penal measures

Article 44

§1. The court shall impose the forfeiture of items directly derived from an offence, unless they are subject to return to the injured person or to another entity.

§2. The court may decide on the forfeiture of the items which served or were designed for committing the offence unless they are subject to the return to another entity.

§3. The forfeiture described in §2 shall not be applied if its imposition would not be commensurate with the severity of the offence committed, the court may impose a supplementary payment to the State Treasury.

§4. In the event that the perpetrator has intentionally prevented the possibility of imposing the forfeiture of items specified in §§1 or 2, the court may impose the obligation to pay a pecuniary equivalent of their value.

§5. In the event that the conviction has pertained to an offence of violating a prohibition of production, possession or dealing in or transporting specific items, the court may decide on the forfeiture thereof.

§6. If the items referred to in §§2 or 5 are not the property of the perpetrator, the forfeiture may be decided by the court only in the cases provided for in law; in the case of co-ownership, the decision shall cover only the forfeiture of the share owned by the perpetrator, or the obligation to pay a pecuniary equivalent of its value.

§7. Property which is the subject of forfeiture shall be transferred to the ownership of the State Treasury at the time the sentence becomes final and valid.

Article 45

§1. If the perpetrator has obtained, even if indirectly, a financial benefit from the commission of an offence, the court may decree its forfeiture or the forfeiture of its equivalent. The forfeiture shall not be decreed, in part or in whole, if the benefit or its equivalent is to be returned to the wronged person or to another entity.

§2. In the case of sentencing a perpetrator referred to in article 65 or a perpetrator who has obtained a substantial benefit from the commission of an offence, the court shall decree the forfeiture of the benefit obtained or its financial equivalent. The provision of §11, sentence two, shall apply accordingly.

§3. The financial benefit subject to forfeiture, or its equivalent, shall become the property of the State Treasury at the time the judgment becomes final.

Article 52

In the event of sentencing for an offence which brought material benefits to a natural or legal person or an organisational unit not possessing the status of a legal person, and committed by a perpetrator who acted on its behalf or in its interest, the court shall obligate the entity which acquired the material benefit, to return it in whole or in part to the benefit of the State Treasury; this shall not affect the material benefit subject to return to another entity.

United States

<http://uscode.house.gov/download.htm>

18 U.S.C. §§981 through 986; 28 U.S.C. §§2461 through 2467

(c) Other sources of information

General Assembly resolution 55/25

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/560/89/PDF/N0056089.pdf?OpenElement>

Security Council resolution 1373 (2001)

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>

1999 United Nations model legislation on laundering, confiscation and international cooperation in relation to the proceeds of crime

<http://www.imolin.org/ml99eng.htm>

1998 Council of Europe Joint action 98/699/JHA adopted by the Council on the basis of article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime *Official Journal of the European Communities*, No. L 333, 9 December 1998

http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_333/l_33319981209en00010003.pdf

The Forty Recommendations (revised in 2003)
Financial Action Task Force on Money Laundering
http://www1.oecd.org/fatf/pdf/40Recs-2003_en.pdf

E. Protection of witnesses and victims

"Article 24

"Protection of witnesses

"1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

"2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

"(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

"(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

"3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

"4. The provisions of this article shall also apply to victims insofar as they are witnesses."

*“Article 25**“Assistance to and protection of victims*

“1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

“2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

“3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.”

*“Article 26**“Measures to enhance cooperation with law enforcement authorities*

“1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:

“(a) To supply information useful to competent authorities for investigative and evidentiary purposes on such matters as:

“(i) The identity, nature, composition, structure, location or activities of organized criminal groups;

“(ii) Links, including international links, with other organized criminal groups;

“(iii) Offences that organized criminal groups have committed or may commit;

“(b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.

“2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

“3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of

granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

“4. Protection of such persons shall be as provided for in article 24 of this Convention.

“5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.”

1. Introduction

341. Two previous sections have focused on the significance of efforts to prevent perpetrators of transnational organized crime from undermining the integrity of the criminal justice process and shielding themselves and their profits from law enforcement actions. The need to address effectively a variety of acts related to official corruption and obstruction of justice has been discussed. It has been shown that the Organized Crime Convention contains a number of provisions on what States must and may do in these regards (chap. III, sects. D and E).

342. Article 24 supplements those provisions with respect to witnesses by requiring that States take appropriate measures against potential retaliation or intimidation and by encouraging procedural and evidentiary rules strengthening those protections.

343. For justice to be served, however, special attention must be paid also to the victims of crime. They may also be witnesses, but their protection is particularly important given the substantial harm they suffer from transnational organized crime. News articles, government reports and academic studies are replete with disturbing accounts of the hundreds of thousands who fall victim to human traffickers, illegal traders in body parts and perpetrators of other transnational crime every year. Men, women and children are subjected to forced labour and other economic, physical and sexual exploitation around the globe. The call to stop contemporary forms of slavery is universal.

344. The rights of victims of crime have long been neglected, but several initiatives have recently been made not only with respect to their standing

in the justice process, but also relative to reparation, due compensation and concrete assistance for as complete a recovery as possible (see information resources listed in sect. 5 below). Transnational terrorism has added, of course, its own substantial level of victimization, prompting further international responses, including Security Council resolution 1373 (2001) on threats to international peace and security caused by terrorist acts.

345. The Organized Crime Convention recognizes the importance of alleviating the impact of transnational organized crime on vulnerable individuals and groups and requires States to take measures to protect victims against retaliation or intimidation and to ensure that they introduce procedures for compensation and restitution. In addition, States will have to consider the perspective of victims, in accordance with domestic legal principles and consistent with the rights of defendants.

346. Quite importantly, two of the Protocols to the Organized Crime Convention are especially relevant to the protection of victims. The Trafficking in Persons Protocol provides for the criminalization and prevention of such trafficking (art. 5), as well as assistance for and protection and repatriation of victims (arts. 6, 8 and 9, para. 1). The Migrants Protocol also seeks to protect migrants and the rights of refugees (arts. 16 and 19). The legislative guides to those two Protocols provide information for States on how to implement the additional requirements (see Parts Two and Three of the present publication).

347. Finally, the investigation of sophisticated transnational criminal groups and the process of enforcing the law against them can be greatly assisted by the cooperation of members and other participants in the criminal group. The same applies to the prevention of serious crimes, where inside information can lead to the foiling of planned criminal operations.

348. These are special witnesses, as they are subject to prosecution themselves by means of their direct or indirect participation in an organized criminal group. Some States have sought to promote the cooperation of such witnesses through the granting of immunity from prosecution or comparative lenience, under certain conditions, which vary from State to State.

349. The Organized Crime Convention requires that States take measures to encourage such cooperation in accordance with their fundamental legal principles. The specific steps to be taken are left to the discretion of States, which are asked, but not obliged, to adopt immunity or leniency provisions.

2. Summary of main requirements

(a) Articles 24 to 25

350. Bearing in mind that some victims may also be witnesses, States are required to:

(a) Provide effective protection for witnesses, within available means. This may include:

- (i) Physical protection;
- (ii) Domestic or foreign relocation;
- (iii) Special arrangements for giving evidence;

(b) Establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention;

(c) Provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law;

(d) Consider relocation agreements.

(b) Article 26

351. Under article 26, States must:

(a) Take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:

- (i) To supply information for investigative and evidentiary purposes;
- (ii) To provide factual, concrete help contributing to depriving organized criminal groups of their resources or of the proceeds of crime;

(b) Consider providing for the possibility of mitigating punishment of an accused person who provides substantial cooperation;

(c) Consider providing for the possibility of granting immunity from prosecution to a person who provides substantial cooperation (this may require legislation in systems not providing prosecutorial discretion).

3. Mandatory requirements

352. The Organized Crime Convention recognizes the importance of protecting victims and witnesses, both as an end in itself and as a means

necessary to ensure the willingness of witnesses to cooperate in reporting crime and providing the evidence needed to prosecute and convict offenders.

353. Articles 24 and 25 deal respectively and separately with witnesses (protection only) and victims (assistance and protection).

354. The obligations to protect witnesses are more extensive, but these also apply to persons who are both victims and witnesses (art. 24, para. 4), and will therefore almost always apply to victims as well.

(a) Protection of witnesses

355. Each State party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Organized Crime Convention and, as appropriate, for their relatives and other persons close to them. These measures may include:

(a) Establishing procedures for the physical protection of such persons, such as relocating them and permitting limitations on the disclosure of information concerning their identity and whereabouts;

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness.

These requirements are mandatory, but only where appropriate and within the means of the State party concerned.

356. This means that the obligation to provide effective protection for witnesses is limited to specific cases or prescribed conditions where, in the view of the implementing State party, such means are appropriate. Officials might be given discretion to assess the threat or risks in each case and to extend protection only where justified by the assessment, for example. The obligation to provide protection also arises only where such protection is within the means, such as available resources and the technical capabilities, of the State party concerned.

(b) Scope of protection and meaning of the term “witness”

357. The term “witness” is not defined, but article 24 limits the scope of witnesses to whom the obligations apply to witnesses in criminal

proceedings who give testimony concerning offences covered by the Convention, and, as appropriate, for their relatives or other persons close to them.

358. Interpreted narrowly, this would only apply where testimony is actually given, or when it is apparent that testimony will be given, although the requirement to protect witnesses from potential retaliation may lead to a broader interpretation.

359. The experience of States that have witness-protection schemes suggests that a broader approach to implementing this requirement will be needed to guarantee sufficient protection to ensure that witnesses are willing to cooperate with investigations and prosecutions. In addition to witnesses who have actually testified, protection schemes should generally seek to extend protection in the following cases:

(a) To all persons who cooperate with or assist in investigations until it becomes apparent that they will not be called upon to testify; and

(b) To persons who provide information that is relevant but not required as testimony or not used in court because of concerns for the safety of the informant or other persons.

360. Legislators may therefore wish to make provisions applicable to any person who has or may have information that is or may be relevant to the investigation or prosecution of an offence covered by the Convention, whether this is produced as evidence or not.

361. It should be noted also that this obligation is extended to include the protection of persons who participate or have participated in the activities of an organized criminal group and who then cooperate with or assist law enforcement, whether or not they are witnesses (see art. 26, para. 4).

(c) *Constitutional limits: confrontation and disclosure*

362. Depending on the constitutional or other legal requirements of each State party, two significant constraints may exist on what may be done to implement article 24. Both involve the basic rights of persons accused of crimes and, accordingly, article 24, paragraph 2, provides that the measures implemented should be without prejudice to the rights of the defendant. For example, in some States, the giving of evidence without the physical presence of the witness or while shielding his or her true identity from the

media and accused criminal may have to be reconciled with constitutional or other rules allowing the accused criminal the right to confront his or her accuser. Another example would be that in some States constitutional or other basic legal requirements include the requirement that either all information possessed by prosecutors, or all such information which may be exculpatory to the accused, must be disclosed in order to enable an adequate defence to the charges. This may include personal information or the identities of witnesses to permit proper cross-examination.

363. In cases where these interests conflict with measures taken to protect the identity or other information about a witness for safety reasons, the courts may be called upon to fashion solutions specific to each case that meet basic requirements regarding the rights of the accused while not disclosing enough information to identify sensitive investigative sources or endanger witnesses or informants. Legislation establishing and circumscribing judicial discretion in such cases could be considered. Some options include the following measures:

(a) Statutory limits on disclosure obligations, applicable where some basic degree of risk has been established;

(b) Judicial discretion to review and edit written materials, deciding what does not have to be disclosed and can be edited out;

(c) Closed hearings of sensitive evidence, from which the media and other observers can be excluded.

364. Some elements of witness protection may be related to the offence of obstructing justice (art. 23), which includes the application of threats, force and intimidation against witnesses (see chap. III, sect. E, of the present guide).

(d) *Assistance to and protection of victims*

365. Article 25, paragraph 1, requires States to take appropriate measures within their means to provide assistance and protection to victims of offences covered by the Organized Crime Convention, in particular in cases of threat of retaliation or intimidation.

366. Generally, the requirements for the protection of victims will be subsumed within legislation providing protection for witnesses. Article 24, paragraph 4, requires States parties to ensure that those protections will extend to all victims who are also witnesses but, to meet the requirements

of article 25, legislators must either extend them to victims who are not witnesses, or adopt parallel provisions for victims and witnesses. In either case, the substantive requirements will be the same and both article 24 and article 25 make specific reference to potential cases of retaliation or intimidation.

367. In addition to protection requirements, article 25 also requires measures to assist victims.²¹

(e) Compensation or restitution

368. Article 25, paragraph 2, requires that at least some appropriate procedures are established to provide access to compensation or restitution. This does not require that victims are guaranteed compensation or restitution, but legislative or other measures must provide procedures whereby it can be sought or claimed.²²

369. In most cases, legislation will be needed to create the necessary procedures, if they do not already exist. Generally, States have developed one or more of the following three possibilities for obtaining compensation or restitution:

(a) Provisions allowing victims to sue offenders or others under statutory or common law torts for civil damages;

(b) Provisions allowing criminal courts to award criminal damages, or to impose orders for compensation or restitution against persons convicted of offences;

(c) Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages suffered as the result of a criminal offence.

370. In many States, more than one of these options may already exist. The status of existing schemes would not be affected, although amendments may be necessary to ensure that all offences covered by the Convention and its Protocols may form the basis of a claim under at least one option.

²¹See also the Trafficking in Persons Protocol (arts. 6-8), which contains additional requirements for victims of trafficking.

²²Article 6, paragraph 6, of the Trafficking in Persons Protocol, which was drafted later than the Organized Crime Convention, is clearer, referring to measures that offer victims of trafficking in persons the possibility of obtaining compensation.

371. Countries that have none of these options available are required to establish at least one and are free to adopt more than one option.

(f) Victim participation in criminal proceedings

372. Article 25, paragraph 3, requires that victims are given an opportunity to express views and concerns during criminal proceedings. In States where such opportunities do not already exist, amendments to laws governing trial procedures may be necessary. Such legislation should take the following factors into consideration:

(a) The obligation only extends to victims of offences covered by the Convention, which includes the four offences established in accordance with the Convention, the additional offences established in accordance with the Protocols and other serious crimes as defined by article 2, subparagraph (b), provided that these are transnational in nature and involve an organized criminal group (art. 3);

(b) Whether a person who sought to make his or her views or concerns known was a victim of such an offence or not would normally be a question of fact for the court hearing the case or conducting the proceedings to decide. If a victim is to be given the opportunity to appear prior to the final determination of the court as to whether the offence actually occurred and the person accused is convicted of that offence, legislation should allow the court to permit the participation based on the claims of the victim, but without making any finding prejudicial to the eventual outcome in the case. If the victim is only permitted to appear in the event that the accused is convicted and prior to or after a sentence is imposed, this issue does not arise;

(c) Legislation should both allow for some form of expression on the part of the victim and require that it actually be considered by the court;

(d) The obligation is to allow concerns to be presented, which could include either written submissions or viva voce statements. The latter may be more effective in cases where the victim is able to speak effectively. The victim is not normally prepared or represented by legal counsel, however, and there is a risk that information that is not admissible as evidence will be disclosed to those deciding matters of fact. This is of particular concern in proceedings involving lay persons such as juries and where statements may be made prior to the final determination of guilt;

(e) The obligation is to allow participation at appropriate stages and in a manner not prejudicial to the rights of the defence. This may require precautions to ensure that victims do not disclose information that has been excluded as evidence because defence rights had been infringed, or which was so prejudicial as to infringe the basic right to a fair trial. Many States that allow victims to appear (other than as witnesses) consider that the only appropriate stage is following a conviction. If the victim's evidence is needed, then he or she is called as an ordinary witness. If the accused is acquitted, the victim's statements become irrelevant. If the accused is convicted, however, information relating to the impact of the crime on the victim is often highly relevant to sentencing.

373. There is an interpretative note indicating that while the purpose of article 25 is to concentrate on the physical protection of victims, the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime was cognizant of the need for protection of the rights of individuals as accorded under applicable international law (A/55/383/Add.1, para. 48).

*(g) Cooperation between persons involved
in organized crime and law enforcement*

374. According to article 26, each State party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:

(a) To supply information useful to competent authorities for investigative and evidentiary purposes on a variety of matters;

(b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.

375. Generally, the inducements and protections needed to encourage persons within organized crime to assist investigators or prosecutors can be provided without legislative authority, but some provisions will have to be enacted if they do not already exist. States parties are required to take appropriate measures, but the substance of such measures is left to national drafters (see sect. 4 (b) below).

4. *Other measures, including optional issues*

(a) *Evidentiary law measures to protect witnesses*

376. Subject to domestic legal principles and the rights of the defence, article 24, paragraph 2, allows the adoption of measures such as:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as videoconferencing or other adequate means, such as use of masking screens.

(b) *Witness protection regimes*

377. Article 24, paragraph 3, encourages, but does not require, States to enter into agreements or arrangements to relocate to other countries witnesses, their relatives and other persons close to them, who will or have testified with respect to the offences covered by the Convention and who require protection from potential intimidation or retaliation.

378. Many elements of witness protection schemes are administrative or operational in nature, but the following elements may require legislative measures:

(a) Such legislative or delegated legislative powers as may be needed to protect the confidentiality of the identity of witnesses and to facilitate the creation of new identities and the issuance of new identification and other documents in a secure and confidential manner. This may include powers to make arrangements with other States to permit cross-border relocations;

(b) To regulate the exercise of official discretion in such cases, it may also be advisable to consider dedicated legislation in the form of regulations or directives governing the following:

- (i) Procedures to be followed in determining who is a witness for the purposes of determining whether the scheme should be applied or not;
- (ii) Procedures to be followed in the assessment of risks or threats;

- (iii) Safeguards to prevent the misuse of discretionary powers and funds;
- (iv) Requirements regarding physical and information security;
- (v) In the case of witnesses who are or may also be offenders, limits and safeguards to protect members of the public from any potential future offences;

(c) In countries where the Organized Crime Convention and Trafficking in Persons Protocol are being implemented, legislators should consider extending the application of some or all of the foregoing measures to persons who are victims of trafficking. Article 8, paragraph 2, of the Trafficking in Persons Protocol requires that any repatriation of victims must be with due regard for the safety of that person and this requirement applies to victims who have not been witnesses. It also applies to States to which the victim is repatriated as a national or permanent resident, even where the victim has not testified or has done so in another country (see arts. 7 and 8 of the Trafficking in Persons Protocol and the legislative guide to that Protocol (Part Two below) for further details).

(c) *Sentence mitigation and immunity*

379. States are required to consider the options of immunity and mitigation of sentences for those who cooperate under article 26, paragraphs 2 and 3. The experience of certain jurisdictions has highlighted the merits of such provisions in the fight against organized criminal groups involved in serious crime.²³ That is why the Convention encourages the adoption of such options, consistent with domestic fundamental legal principles, and why it contains requirements on adequate and deterrent sanctions for serious offenders (see art. 11 of the Organized Crime Convention and chap. IV, sect. C, of the present guide).

380. Possible legislative measures include the following:

(a) Judges may require specific authority to mitigate sentences for those convicted of offences but who have cooperated and exceptions may have to be made for any otherwise applicable mandatory minimum sentences. Provisions that require judges to impose more lenient sentences should be approached with caution, as they may raise concerns about judicial independence and create potential for the corruption of prosecutors;

²³For example, see the experience in Italy.

(b) Affording immunity from prosecution (art. 26, para. 3), if implemented, may require legislation either creating discretion not to prosecute in appropriate cases or structuring such prosecutorial discretion as already exists. Some form of judicial review and ratification may have to be provided for, in order to set out the terms of any informal arrangements and ensure that decisions to confer immunity are binding;

(c) The physical protection and safety of persons who cooperate is the same as for witnesses under article 24 and is specifically linked to article 24 by article 26, paragraph 4.

381. Where a person can provide important information to more than one State for purposes of combating organized crime, article 26, paragraph 5, encourages States parties to consider the possibility of reaching an agreement on providing mitigation of punishment or immunity to the person with respect to charges that might be brought in those States.

382. Finally, an interpretative note indicates that the term “mitigating punishment” might include not only prescribed but also de facto mitigation of punishment (A/55/383/Add.1, para. 49).

5. *Information resources*

383. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) *Related provisions and instruments*

(i) *Organized Crime Convention*

Article 5 (Criminalization of participation in an organized criminal group)

Article 6 (Criminalization of the laundering of proceeds of crime)

Article 8 (Criminalization of corruption)

Article 11 (Prosecution, adjudication and sanctions)

Article 23 (Criminalization of obstruction of justice)

(ii) *Protocols to the Organized Crime Convention*

Article 1, paragraph 3, of each Protocol

Trafficking in Persons Protocol

Migrants Protocol

(iii) *Other instruments*

1983 European Convention on the Compensation of Victims of Violent Crimes

Council of Europe, *European Treaty Series*, No. 116

<http://conventions.coe.int/Treaty/EN/WhatYouWant.asp?NT=116&CM=8&DF=26/09/03>

1989 Convention on the Rights of the Child

United Nations, *Treaty Series*, vol. 1577, No. 27531

General Assembly resolution 44/25, annex

<http://www.un.org/documents/ga/res/44/a44r025.htm>

(b) *Examples of national legislation*

In a number of jurisdictions, the law provides some measure of protection from either conviction or punishment to an individual who has reported the activity of a criminal organization to the authorities (for example, Costa Rica and the Dominican Republic). In other cases, having reported the activities of the organization to the authorities can be considered a mitigating factor at the time of sentencing (for example, Paraguay).

Albania

Criminal Code

Article 311. Threat to remain silent

A threat made to a victim of a criminal act to not report, or complain or a threat to withdraw the report or complaint, constitutes criminal contravention and is sentenced to a fine or up to two years of imprisonment.

Article 79. Murder for reasons of special qualities of the victim

Murder committed against:

. . .

c) a deputy, judge, prosecutor, lawyer, policeman, military officer or state employee, during the work period or because of work, provided that the qualities of the victim are obvious or known;

d) the person who reported the criminal act, the witness, the damaged person or other parties in the trial;

shall be sentenced to life imprisonment or death.

Canada**Witness Protection Program Act 1996**

An Act to provide for the establishment and operation of a program to enable certain persons to receive protection in relation to certain inquiries, investigations or prosecutions

. . .

2. In this Act,

“Commissioner” means the Commissioner of the Force;

“Force” means the Royal Canadian Mounted Police;

“Minister” means the Solicitor General of Canada;

“Program” means the Witness Protection Program established by section 4;

“protectee” means a person who is receiving protection under the Program;

“protection”, in respect of a protectee, may include relocation, accommodation and change of identity as well as counselling and financial support for those or any other purposes in order to ensure the security of the protectee or to facilitate the protectee’s re-establishment or becoming self-sufficient;

“protection agreement” means an agreement referred to in paragraph 6 (1) (c) that applies in respect of a protectee;

“witness” means

(a) a person who has given or has agreed to give information or evidence, or participates or has agreed to participate in a matter, relating to an inquiry or the investigation or prosecution of an offence and who may require protection because of risk to the security of the person arising in relation to the inquiry, investigation or prosecution, or

(b) a person who, because of their relationship to or association with a person referred to in paragraph (a), may also require protection for the reasons referred to in that paragraph.

PURPOSE OF ACT

3. The purpose of this Act is to promote law enforcement by facilitating the protection of persons who are involved directly or indirectly in providing assistance in law enforcement matters in relation to:

(a) activities conducted by the Force, other than activities arising pursuant to an arrangement entered into under section 20 of the *Royal Canadian Mounted Police Act*; or

(b) activities conducted by any law enforcement agency or international criminal court or tribunal in respect of which an agreement or arrangement has been entered into under section 14.

WITNESS PROTECTION PROGRAM

4. A program to facilitate the protection of witnesses is hereby established called the Witness Protection Program to be administered by the Commissioner.

5. Subject to this Act, the Commissioner may determine whether a witness should be admitted to the Program and the type of protection to be provided to any protectee in the Program.

6. (1) A witness shall not be admitted to the Program unless

(a) a recommendation for the admission has been made by a law enforcement agency or an international criminal court or tribunal;

(b) the Commissioner has been provided by the witness with such information, in accordance with any regulations made for the purpose, concerning the personal history of the witness as will enable the Commissioner to consider the factors referred to in section 7 in respect of the witness; and

(c) an agreement has been entered into by or on behalf of the witness with the Commissioner setting out the obligations of both parties.

(2) Notwithstanding subsection (1), the Commissioner may, in a case of emergency, and for not more than ninety days, provide protection to a person who has not entered into a protection agreement.

7. The following factors shall be considered in determining whether a witness should be admitted to the Program:

(a) the nature of the risk to the security of the witness;

(b) the danger to the community if the witness is admitted to the Program;

(c) the nature of the inquiry, investigation or prosecution involving the witness and the importance of the witness in the matter;

(d) the value of the information or evidence given or agreed to be given or of the participation by the witness;

(e) the likelihood of the witness being able to adjust to the Program, having regard to the witness's maturity, judgment and other personal characteristics and the family relationships of the witness;

(f) the cost of maintaining the witness in the Program;

(g) alternate methods of protecting the witness without admitting the witness to the Program; and

(h) such other factors as the Commissioner deems relevant.

8. A protection agreement is deemed to include an obligation

(a) on the part of the Commissioner, to take such reasonable steps as are necessary to provide the protection referred to in the agreement to the protectee; and

(b) on the part of the protectee,

(i) to give the information or evidence or participate as required in relation to the inquiry, investigation or prosecution to which the protection provided under the agreement relates,

(ii) to meet all financial obligations incurred by the protectee at law that are not by the terms of the agreement payable by the Commissioner,

(iii) to meet all legal obligations incurred by the protectee, including any obligations regarding the custody and maintenance of children,

(iv) to refrain from activities that constitute an offence against an Act of Parliament or that might compromise the security of the protectee, another protectee or the Program, and

(v) to accept and give effect to reasonable requests and directions made by the Commissioner in relation to the protection provided to the protectee and the obligations of the protectee.

9. (1) The Commissioner may terminate the protection provided to a protectee if the Commissioner has evidence that there has been

(a) a material misrepresentation or a failure to disclose information relevant to the admission of the protectee to the Program; or

(b) a deliberate and material contravention of the obligations of the protectee under the protection agreement.

(2) The Commissioner shall, before terminating the protection provided to a protectee, take reasonable steps to notify the protectee and allow the protectee to make representations concerning the matter.

10. Where a decision is taken

(a) to refuse to admit a witness to the Program, the Commissioner shall provide the law enforcement agency or international criminal court or tribunal that

recommended the admission or, in the case of a witness recommended by the Force, the witness, with written reasons to enable the agency, court, tribunal or witness to understand the basis for the decision; or

(b) to terminate protection without the consent of a protectee, the Commissioner shall provide the protectee with written reasons to enable the protectee to understand the basis for the decision.

PROTECTION OF IDENTITY

11. (1) Subject to this section, no person shall knowingly disclose, directly or indirectly, information about the location or a change of identity of a protectee or former protectee.

(2) Subsection (1) does not apply

(a) to a protectee or former protectee who discloses information about the protectee or former protectee if the disclosure does not endanger the safety of another protectee or former protectee and does not compromise the integrity of the Program; or

(b) to a person who discloses information that was disclosed to the person by a protectee or former protectee if the disclosure does not endanger the safety of the protectee or former protectee or another protectee or former protectee and does not compromise the integrity of the Program.

(3) Information about the location or a change of identity of a protectee or former protectee may be disclosed by the Commissioner

(a) with the consent of the protectee or former protectee;

(b) if the protectee or former protectee has previously disclosed the information or acted in a manner that results in the disclosure;

(c) if the disclosure is essential in the public interest for purposes such as

(i) the investigation of a serious offence where there is reason to believe that the protectee or former protectee can provide material information or evidence in relation to, or has been involved in the commission of, the offence,

(ii) the prevention of the commission of a serious offence, or

(iii) national security or national defence; or

(d) in criminal proceedings where the disclosure is essential to establish the innocence of a person.

(4) A disclosure of information made to a person under this section does not authorize the person to disclose the information to anyone else.

(5) The Commissioner shall, before disclosing information about a person in the circumstances referred to in paragraph (3) (b), (c) or (d),

take reasonable steps to notify the person and allow the person to make representations concerning the matter.

(6) Subsection (5) does not apply if, in the opinion of the Commissioner, the result of notifying the person would impede the investigation of an offence.

12. The following factors shall be considered in determining whether information about a person should be disclosed under section 11:

- (a) the reasons for the disclosure;
- (b) the danger or adverse consequences of the disclosure in relation to the person and the integrity of the Program;
- (c) the likelihood that the information will be used solely for the purpose for which the disclosure is made;
- (d) whether the need for the disclosure can be effectively met by another means; and
- (e) whether there are effective means available to prevent further disclosure of the information.

13. A person whose identity has been changed as a consequence of the protection provided under the Program shall not be liable or otherwise punished for making a claim that the new identity is and has been the person's only identity.

AGREEMENTS AND ARRANGEMENTS WITH OTHER JURISDICTIONS

14. (1) The Commissioner may enter into an agreement
- (a) with a law enforcement agency to enable a witness who is involved in activities of the law enforcement agency to be admitted to the Program;
 - (b) with the Attorney General of a province in respect of which an arrangement has been entered into under section 20 of the *Royal Canadian Mounted Police Act* to enable a witness who is involved in activities of the Force in that province to be admitted to the Program; and
 - (c) with any provincial authority in order to obtain documents and other information that may be required for the protection of a protectee.
- (2) The Minister may enter into a reciprocal arrangement with the government of a foreign jurisdiction to enable a witness who is involved in activities of a law enforcement agency in that jurisdiction to be admitted to the Program, but no such person may be admitted to Canada pursuant to any such arrangement without the consent of the Minister of Citizenship and Immigration nor admitted to the Program without the consent of the Minister.
- (3) The Minister may enter into an arrangement with an international criminal court or tribunal to enable a witness who is involved in activities of that court or tribunal to be admitted to the Program, but no such person may be admitted to Canada pursuant to any such arrangement without the consent of the Minister of Citizenship and Immigration, nor admitted to the Program without the consent of the Minister.

(c) *Other sources of information*

Security Council resolution 1373 (2001)

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>

2000 United Nations model witness protection bill and commentary thereon

http://www.unodc.org/pdf/lap_witness-protection_2000.pdf

http://www.unodc.org/pdf/lap_witness-protection_commentary.pdf

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

General Assembly resolution 40/34, annex

<http://www.un.org/documents/ga/res/40/a40r034.htm>

Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice

Official Journal of the European Communities, No. C 19/1,

23 January 1999

http://europa.eu.int/eur-lex/pri/en/oj/dat/1999/c_019/c_01919990123en00010015.pdf

Crime victims in the European Union: reflexions on standards and action

Communication to the European Parliament, the Council and the Economic and Social Committee, COM(1999) 349, 14 July 1999

http://europa.eu.int/comm/justice_home/pdf/com1999-349-en.pdf

F. Special investigative techniques

“Article 20

“Special investigative techniques

“1. If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime.

“2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

“3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level 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 States Parties concerned.

“4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part.”

1. Introduction

384. Article 20 of the Organized Crime Convention specifically endorses the investigative techniques of controlled delivery, electronic surveillance and undercover operations. These techniques are especially useful in dealing with sophisticated organized criminal groups because of the dangers and difficulties inherent in gaining access to their operations and gathering information and evidence for use in domestic prosecutions, as well as providing mutual legal assistance to other States parties. In many cases, less intrusive methods will simply not prove effective, or cannot be carried out without unacceptable risks to those involved.

385. Controlled delivery is useful in particular in cases where contraband is identified or intercepted in transit and then delivered under surveillance to identify the intended recipients or to monitor its subsequent distribution throughout a criminal organization. Legislative provisions are often required to permit such a course of action, however, as the delivery of the contraband by a law enforcement agent or other person may itself be a crime under domestic law. Undercover operations may be used where it is possible for a law enforcement agent or other person to infiltrate a criminal organization to gather evidence. Electronic surveillance in the form of listening devices or the interception of communications performs a similar

function and is often preferable where a close-knit group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators. Given its intrusiveness, electronic surveillance is generally subject to strict judicial control and numerous statutory safeguards to prevent abuse.

386. Article 20, paragraph 1, pertains to investigative methods that are to be applied at the domestic level. Article 20, paragraphs 2-4, provide for measures to be taken at the international level.

2. Summary of main requirements

387. In accordance with article 20, a State party must:

(a) Establish controlled delivery as an investigative technique available at the domestic and international level, if permitted by the basic principles of its domestic legal system;

(b) Have the legal ability to provide on a case-by-case basis international cooperation with respect to controlled deliveries, where not contrary to the basic principles of its domestic legal system;

(c) Where it deems it appropriate, establish electronic surveillance and undercover operations as an investigative technique available at the domestic and international level.

3. Mandatory requirements

388. Article 20, paragraph 1, requires States parties to establish the special investigative technique of controlled delivery, provided that this is not contrary to the basic principles of their respective domestic legal systems. Many States will already have this mechanism available at least with respect to trafficking in narcotics, as it was provided for in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. The decision on whether to use this technique in a specific circumstance is left to the law, discretion and resources of the State concerned, as reflected by the phrase “within its possibilities and under the conditions prescribed by its domestic law”.

389. Paragraph 3 provides that in the absence of an agreement or arrangement, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis. This formulation

requires a State party to have the ability to cooperate on a case-by-case basis at least with respect to controlled delivery, the establishment of which is mandatory pursuant to paragraph 1 where not contrary to the basic principles of the legal system of the State concerned. For a number of countries, this provision will itself be a sufficient source of legal authority for case-by-case cooperation. However, in cases in which a State cannot directly implement this type of treaty provision but will require new legislation to engage in such activities, reference should be made to the sample legislation set forth in section 5 below.

390. Paragraph 4 clarifies that among the methods of controlled delivery that may be applied at the international level are to intercept and allow goods to continue intact, to intercept and remove goods, or to intercept and replace goods in whole or in part. It leaves the choice of method to the State party concerned. The method applied may depend on the circumstances of the particular case.

4. Other measures, including optional issues

391. Not mandatory but specifically encouraged by article 20, paragraph 1, is the use of electronic surveillance and undercover operations. As stated above, these techniques may be the only way law enforcement can gather the necessary evidence to obstruct the activities of often secretive organized criminal groups.

392. Article 20, paragraph 2, encourages, but does not require, States parties to enter into agreements or arrangements to enable special investigative techniques, such as undercover investigations, electronic surveillance and controlled deliveries, to be conducted on behalf of another State, as a form of international cooperation.

5. Information resources

393. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) Related provisions and instruments

(i) Organized Crime Convention

Article 34 (Implementation of the Convention)

(ii) *Protocols to the Convention*

Article 1, paragraph 3, of each Protocol

(b) *Examples of national legislation*

Australia

<http://scaleplus.law.gov.au/html/pasteact/3/3479/pdf/136of2001.pdf>

Measures to Combat Serious and Organized Crime Act 2001

This act amends the Crime Act 1914 and others (see also the Crime Act 1914 at <http://scaleplus.law.gov.au/html/pasteact/0/28/top.htm>)

Canada

<http://laws.justice.gc.ca/en/c-46/text.html>

Criminal Code

Section 25. Protection of persons administering and enforcing the law

States Parties considering entering into bilateral or multilateral agreements or arrangements to regulate at the international level special investigative techniques such as undercover investigations, electronic surveillance and controlled deliveries for purposes of article 20, paragraphs 2, 3 and 4, may refer for further guidance to, inter alia: (1) the European Union Convention on Mutual Legal Assistance in Criminal Matters, Articles 12, 14, 17-22 at: <http://conventions.coe.int/Treaty/en/Summaries/Html/030.htm>

France

<http://www.legifrance.gouv.fr/> (select “*les codes*”, then “*code des douanes*”)

Customs Code

Title II

Chapter IV. Powers of customs officers

Section 7. Controlled deliveries

Article 67 bis

In order to establish that offences against the Customs Code have been committed in respect of the import, export or possession of substances or plants classified as narcotic, to identify the perpetrators of and accomplices to such

offences and also those who have participated as interested parties under the terms of article 399, and to effect the seizures provided for under this Code, customs officers authorized by the Minister for Customs may, in circumstances established by decree, after informing the government procurator and under his control, monitor the transport of such substances or plants.

They shall not be criminally liable when, to that end, with the authorization of the government procurator and under his control, they purchase, hold, transport or deliver such substances or plants or provide persons possessing such substances or plants or engaging in the customs offences referred to in the previous paragraph with legal support or means of transport, deposit or communication. Authorization may be granted only for actions that do not involve committing the offences referred to in the first paragraph.

The provisions of the previous two paragraphs shall be applicable for the same purposes to substances used for the illicit manufacture of narcotics the list of which shall be established by decree and to the equipment used for such manufacture.

Customs officers who, in respect of funds involved in the offence specified in article 415 and in order to establish that such an offence has been committed, carry out the actions referred to in the first two paragraphs shall not be liable to criminal punishment.

Code of Criminal Procedure (Legislative part)

Title XVI. Prosecution, investigation and trial of drug trafficking offences

http://lexinter.net/PROCPEN/poursuite_instruction_et_jugement_en_matiere_de_trafic_de_stupefiants.htm

Article 706-26

(Introduced by Law No. 92-1336 of 16 December 1992, art. 77, Official Gazette of 23 December 1992, entered into force 1 March 1994)

The serious offences covered by articles 222-34 to 222-39 of the Criminal Code, and the minor offence of participation in a criminal conspiracy covered by article 450-1 of the same Code, when its purpose is to carry out an act preparatory to the commission of one of these offences, shall be prosecuted, investigated and tried according to the rules of this Code, subject to the provisions of this title.

Article 706-27

(Law No. 92-1336 of 16 December 1992, art. 77, Official Gazette of 23 December 1992, entered into force 1 March 1994) (Law No. 2000-516 of 15 June 2000, art. 83, Official Gazette of 16 June 2000, entered into force 1 January 2001)

In the jurisdictional area of each appeal court, one or more assize courts of which the list is established by a decree shall have jurisdiction to try the crimes

covered by article 706-26 and related offences. The rules governing the composition and functioning of the assize court shall, for the trial of adults, be fixed by the provisions of article 698-6.

For the application of the previous paragraph, the examining court shall, when it orders committal for trial in accordance with the first paragraph of article 214, determine that the facts fall within the scope of article 706-26.

Article 706-28

(Law No. 92-1336 of 16 December 1992, art. 77, Official Gazette of 23 December 1992, entered into force 1 March 1994) (Law No. 96-647 of 22 July 1996, art. 11, Official Gazette of 23 July 1996) (Law No. 2000-516 of 15 June 2000, art. 49, Official Gazette of 16 June 2000, entered into force 16 June 2002)

To investigate offences covered by article 706-26 and establish their commission, the visits, searches and seizures provided for in article 59 conducted on premises where narcotics are used by a number of persons, or where narcotics are illicitly manufactured, processed or stored, may take place outside the hours laid down by that article.

An operation covered by the previous paragraph, when conducted in a dwelling house or an apartment, must, under penalty of nullity, be authorized, upon the application of the government procurator, by the judge responsible for civil liberties and detention unless authorized by the examining magistrate. Each authorization shall take the form of a written decision stating the characterization of the offence for which evidence is sought and the address of the premises on which the visit, searches or seizures may be effected and shall be reasoned by reference to facts that establish that such an operation is necessary. The operation shall be supervised by the authorizing judge, who may visit the premises to ensure that the legal provisions are complied with.

Under penalty of nullity, the actions provided for in this article must have no object other than to investigate the offences mentioned in article 706-26 and establish that they have been committed.

Article 706-29

(Law No. 92-1336 of 16 December 1992, art. 77, Official Gazette of 23 December 1992, entered into force 1 March 1994) (Law No. 2000-516 of 15 June 2000, art. 49, Official Gazette of 16 June 2000, entered into force 16 June 2002)

For the application of articles 63, 77 and 154, if the inquiry or investigation in respect of one of the offences specified in article 706-26 so requires, the detention of a person in police custody may be extended by an additional 48 hours.

Such extension shall be authorized, on application by the government procurator, by the judge for civil liberties and detention or, for offences covered by articles 72 and 154, by the examining magistrate.

A person in police custody must be brought before the authority ruling upon the extension prior to any decision. In exceptional cases, an extension may be granted by means of a written and reasoned decision without prior submission.

At the commencement of the period of police custody, the government procurator or the examining magistrate must appoint a medical expert, who shall examine the person in custody every 24 hours and shall, after each examination, issue a reasoned medical certificate, which shall be attached to the file. The person in custody shall be advised by an officer of the criminal investigation service of his or her right to request other medical examinations. Such a request shall be automatically granted. A note of the advice shall be entered in the record and initialled by the person concerned. Refusal to sign shall be indicated in the record.

Article 706-30

(Law No. 92-1336 of 16 December 1992, art. 77, Official Gazette of 23 December 1992, entered into force 1 March 1994) (Law No. 94-89 of 1 February 1994, art. 10, Official Gazette of 2 February 1994, entered into force 1 March 1994) (Law No. 2001-420 of 15 May 2001, art. 47, Official Gazette of 16 May 2001) (Law No. 2003-239 of 18 March 2003, art. 39, Official Gazette of 19 March 2003)

Where examination proceedings have been initiated for an offence under articles 222-34 to 222-38, 324-1 and 324-2 of the Criminal Code, the judge for civil liberties and detention may, on application by the government procurator and in order to ensure payment of fines incurred and the enforcement of the confiscation provided for in the second paragraph of article 222-49 and in paragraph 12 of article 324-7 of the Criminal Code, order preservation measures, at the Treasury's expense and in accordance with the conditions and terms set out by the Code of Civil Procedure, in respect of the property of the person under examination.

Conviction shall have the effect of validating the provisional attachments and shall allow the final registration of guarantees.

Dismissal of proceedings, discharge or acquittal shall automatically entail the cancellation of the measures ordered, at the Treasury's expense. The same shall apply where a public right of action is discontinued.

In respect of implementation of the provisions of this article, the judge for civil liberties and detention shall exercise jurisdiction over the whole of the national territory.

Article 706-30-1

(Introduced by Law No. 99-515 of 23 June 1999, art. 24, Official Gazette of 24 June 1999)

Where the provisions of the third paragraph of article 99-2 are applied to narcotic substances seized during the proceedings, the examining magistrate must retain a sample of the substances in order that they may, if necessary, be analysed. The sample shall be placed under seal.

The examining magistrate or an officer of the criminal investigation service acting under letters rogatory must weigh the seized substances before they are destroyed. Such weighing must be conducted in the presence of the person in whose possession they were found or, failing that, in the presence of two witnesses called upon by the examining magistrate or the officer of the criminal investigation service and chosen from among persons not under their authority. The weighing may also be conducted, under the same conditions, in the course of a flagrancy investigation or a preliminary inquiry by an officer of the criminal investigation service, or, in the case of a customs investigation, by a category A or B customs officer.

The record of the weighing process shall be signed by the persons mentioned above. Refusal to do so shall be noted in the record.

Article 706-31

(Law No. 92-1336 of 16 December 1992, art. 77, Official Gazette of 23 December 1992, entered into force 1 March 1994) (Law No. 95-125 of 8 February 1995, art. 52, Official Gazette of 9 February 1995) (Ordinance No. 2000-916 of 19 September 2000, art. 3, Official Gazette of 22 September 2000, entered into force 1 January 2002)

A public right of action for the serious offences referred to in article 706-26 shall be time-barred after 30 years. A sentence imposed in the event of conviction for such an offence shall be time-barred after 30 years from the date on which the conviction became final.

A public right of action for the minor offences referred to in article 706-26 shall be time-barred after 20 years. A sentence imposed in the event of conviction for such an offence shall be time-barred after 20 years from the date on which the conviction became final.

By way of exception to the provisions of article 750, the duration of the enforcement by committal shall be fixed at two years, where the fine or financial penalties imposed for one of the minor offences referred to in the previous paragraph or for related customs offences exceed €75,000.

Article 706-32

(Introduced by Law No. 92-1336 of 16 December 1992, art. 77, Official Gazette of 23 December 1992, entered into force 1 March 1994)

In order to establish that offences covered by articles 222-34 to 222-38 of the Criminal Code have been committed, to identify the perpetrators and accomplices and to conduct the seizures provided for by this Code, officers of the criminal investigation service, or officials under their authority, may, after informing the government procurator, monitor the transport of narcotics or the movement of the proceeds of such offences.

They shall not be criminally liable when, to that end, with the authorization of the government procurator or the examining magistrate in charge of the case, who shall inform the prosecution service beforehand, they purchase, hold, transport or deliver such narcotics or such proceeds or provide the perpetrators of the offences referred to in the previous paragraph with legal support or means of transport, deposit, storage, preservation or communication. Authorization may be granted only for actions that do not involve committing the offences referred to in the first paragraph.

The provisions of the previous two paragraphs shall be applicable, for the same purpose, to substances used for the illicit manufacture of narcotics the list of which is established by decree and to equipment used for such manufacture.

Article 706-33

(Law No. 92-1336 of 16 December 1992, art. 77, Official Gazette of 23 December 1992, entered into force 1 March 1994) (Law No. 2000-516 of 15 June 2000, art. 83, Official Gazette of 16 June 2000, entered into force 1 January 2001)

In the event of proceedings in respect of one of the offences covered by article 706-26, the examining magistrate may order the provisional closure for a maximum term of six months of any hotel, furnished house, boarding house, bar, restaurant, club, dance hall, place of entertainment or their outbuildings or of any premises open to or used by the public where the offences were committed by the operator or with his complicity.

Such closure may, whatever its initial duration, be renewed under the same procedure for a maximum of three months on each occasion.

An appeal against decisions provided for under the previous paragraphs or decisions ruling on applications for cancellation may be brought before the examining court within 24 hours of their enforcement or of the notification of the parties concerned.

Where the case is before a trial court, the lifting of the closure measures or their renewal for a maximum term of three months on each occasion shall be decided according to the rules established in the second to fourth paragraphs of article 148-1.

United Kingdom

<http://www.hms0.gov.uk/acts/acts2000/00023--d.htm>

Regulation of Investigatory Powers Act 2000

Part II. Surveillance and covert human intelligence sources

V. Legislative and administrative measures to enhance legal assistance and law enforcement and other forms of international cooperation

A. Extradition

“Article 16

“Extradition

“1. This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

“2. If the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences.

“3. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

“4. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

“5. States Parties that make extradition conditional on the existence of a treaty shall:

“(a) At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the

Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

“(b) If they do not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

“6. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

“7. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

“8. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

“9. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

“10. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

“11. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person

agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 10 of this article.

“12. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

“13. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

“14. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person’s position for any one of these reasons.

“15. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

“16. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

“17. States Parties shall seek to conclude bilateral and multi-lateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.”

1. Introduction

394. Ease of travel from country to country provides serious offenders seeking a safe haven a way of escaping prosecution and justice. Perpetrators of transnational crimes may flee a country to avoid prosecution. Extradition proceedings are then required to bring them to justice in the prosecuting State.

395. Extradition is a formal and, most frequently, a treaty-based process, leading to the return or delivery of fugitives to the jurisdiction in which they are wanted.²⁴ Since the late nineteenth century, States have signed bilateral extradition treaties in their efforts to eliminate safe shelters for serious offenders. Treaty provisions vary from State to State and do not always cover the same offences.

396. In the past, treaties commonly have contained a list of offences covered, which created difficulties every time a new type of crime emerged with the advancement of technology and other social and economic changes. For this reason, more recent treaties are based on the principle of dual criminality, which applies when the same conduct is criminalized in both the requesting and requested States and the penalties provided for it are above a defined threshold, for example, one year of deprivation of liberty.

397. In this way, authorities do not have to update their treaties constantly for the coverage of unanticipated and entirely new offences. This generated the need for a model extradition treaty, in response to which the United Nations adopted the Model Treaty on Extradition (General Assembly resolution 45/116, annex). However, in addition to action by States to amend old treaties and sign new ones, some conventions on particular offences contain provisions for extradition, as well as jurisdiction and mutual assistance. One such example is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (see art. 10 of the Convention).

398. In addition, the need for a multilateral approach has led to several regional initiatives, such as the Inter-American Convention on Extradition, the European Convention on Extradition, the Economic Community of West African States Convention on Extradition and others (see sect. 5 below).

399. The Organized Crime Convention sets a basic minimum standard for extradition for the offences it covers and also encourages the adoption of a variety of mechanisms designed to streamline the extradition process. The Convention encourages States to go beyond this basic standard in bilateral or regional extradition arrangements to supplement article 16 (see also art. 34, para. 3, providing for harsher measures).

²⁴In some instances, extradition may take place voluntarily and in the absence of a treaty between the States concerned. This, however, does not occur frequently.

400. Some legislative changes may be required. Depending on the extent to which domestic law and existing treaties already deal with extradition, this may range from the establishment of entirely new extradition frameworks to less extensive expansions or amendments to include new offences or make substantive or procedural changes to conform to the Organized Crime Convention.

401. In making legislative changes, drafters should note that the intention of the Convention is to ensure the fair treatment of those whose extradition is sought and the application of all existing rights and guarantees applicable in the State party from whom extradition is requested (see art. 16, para. 13).

402. Generally, the extradition provisions are designed to ensure that the Convention supports and complements pre-existing extradition arrangements and does not detract from them.

2. Summary of main requirements

403. States Parties must ensure that the following offences are deemed extraditable offences in any extradition treaties between them:

(a) Offences established in accordance with articles 5, 6, 8 and 23 of the Organized Crime Convention that are transnational and involve an organized criminal group;

(b) Serious crime that is transnational and involves an organized criminal group;

(c) Offences established in accordance with articles 5, 6, 8 and 23 that involve an organized criminal group, where the person who is to be extradited is located in the territory of the requested State party;

(d) Serious crime that involves an organized criminal group, where the person who is to be extradited is located in the territory of the requested party;

provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State party and the requested State party. (art. 16, paras. 1 and 3). Legislation is required only if treaties are subordinate to domestic extradition legislation.

404. States parties must deem extraditable offences those established in accordance with the Protocols to the Organized Crime Convention to which they become parties.

405. States parties that require a treaty basis as a prerequisite to extradition must notify the Secretary-General of the United Nations as to whether or not they will permit the Organized Crime Convention to be used as a treaty basis for extradition (art. 16, para. 5).

406. States parties with a general statutory extradition scheme must ensure that the offences described in paragraph 403 above are deemed extraditable offences under that scheme (art. 16, paras. 1 and 6). Legislation may be required if current legislation is not sufficiently broad.

407. A State party that denies an extradition request on the ground that the fugitive is its national shall submit the case for domestic prosecution. In doing so, it shall ensure that the decision to prosecute and any subsequent proceedings are conducted with the same diligence as a serious domestic offence and shall cooperate with the requesting State party to ensure the efficiency of the prosecution (art. 16, para. 10). Legislation may be required if current law does not permit evidence obtained from foreign sources to be used in domestic proceedings.

408. Each State party must ensure fair treatment for persons facing extradition proceedings pursuant to article 16, including enjoyment of all rights and guarantees provided for by its domestic law (art. 16, para. 13). Legislation may be required if no specific domestic extradition procedures are provided for.

409. Each State party must ensure that extradition is not refused by it on the sole ground that the offence for which extradition is sought is also considered to involve fiscal matters (art. 16, para. 15). Legislation may be required if existing laws or treaties are in conflict.

410. Prior to refusing extradition, a requested State party must, where appropriate, consult with the requesting State party to provide it with the opportunity to present information and views on the matter (art. 16, para. 16).

411. A State party shall endeavour to expedite extradition procedures and simplify evidentiary requirements relating thereto (art. 16, para. 8).

412. A State party can discharge its obligation to submit a case for prosecution pursuant to article 16, paragraph 10, by temporary surrender (art. 16, para. 11).

413. Where it denies extradition for enforcement of a sentence, the State party shall consider enforcing the sentence if its law so permits (art. 16, para. 12).

3. *Mandatory requirements*

(a) Scope (article 16, paragraph 1)

414. Article 16, paragraph 1, establishes the scope of the obligation to provide extradition. Extradition is to be provided with respect to the offences covered by the Convention or in cases where an offence referred to in article 3, paragraph 1 *(a)* or *(b)*, involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State party and the requested State party. While this articulation appears complex, it consists of several key components that can be readily differentiated.

415. First of all, the extradition obligation applies to the offences covered by the Convention, which, by application of article 3 (Scope of application), means:

(a) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention that are transnational (defined in art. 3, para. 2) and involve an organized criminal group (defined in art. 2, subpara. *(a)*);

(b) Serious crimes (defined in art. 2, subpara. *(b)*) that are transnational and involve an organized criminal group;

(c) Offences established in accordance with the Protocols, which are considered as offences established in accordance with the Convention under article 1, paragraph 3, of each Protocol.

416. The extradition obligation also applies where an offence referred to in article 3, paragraph 1 *(a)* or *(b)*, involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State party, meaning:

(a) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention, where the person who is to be extradited is located in the territory of the requested party and which involve an organized criminal group; and

(b) Serious crime, where the person who is to be extradited is located in the territory of the requested party and where the offence involves an organized criminal group.

417. Finally, the extradition obligation applies provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State party and the requested State party. This dual criminality requirement will automatically be satisfied with respect to the offences established in articles 6, 8 and 23 of the Convention, since all States parties are obligated to criminalize such conduct. However, with respect to requests relating to offences established in accordance with article 5 or to serious crime, where States parties are not required to criminalize the same conduct, no obligation to extradite arises unless this dual criminality requirement is fulfilled.

(b) *Extraditable offences in extradition treaties
(article 16, paragraph 3)*

418. Article 16, paragraph 3, obliges States parties to consider the offences described in paragraph 1 as automatically included in all extradition treaties existing between them. In addition, the parties undertake to include them in all future extradition treaties between them.

419. By virtue of this paragraph, the offences are automatically incorporated by reference into extradition treaties. Accordingly, there would normally be no need to amend them. However, if treaties are considered subordinate to domestic extradition statutes under the legal system of a particular country and its current statute is not broad enough to cover all of the offences set forth in article 16, paragraph 1, amending legislation may be required.

(c) *Notification regarding application or non-application of
paragraph 4 (relevant to countries in which a treaty basis
is a prerequisite to extradition, article 16, paragraph 5)*

420. Article 16, paragraph 5, does not apply to States parties that can extradite to other countries pursuant to a statute (see comments related to art. 16, para. 6, below). It applies only to States parties for which a treaty basis is a prerequisite to extradition. Such countries are required to notify the Secretary-General of the United Nations as to whether or not they will

permit the Organized Crime Convention to be used as a treaty basis for extradition. The notification should be provided to the United Nations Office on Drugs and Crime. They are also, where appropriate, requested to conclude additional extradition treaties in order to expand the number of States parties to which fugitives can be extradited in accordance with this article.

421. States parties that are considering expanding their network of bilateral extradition treaties may refer for guidance to the instruments cited in section 5 below.

(d) Extradition on the basis of a statute (relevant to countries that provide for extradition by statute, article 16, paragraph 6)

422. Article 16, paragraph 6, mandates States parties that do not require a treaty basis for extradition (that is, States parties that provide for extradition pursuant to a statute) to include the offences described in article 16, paragraph 1, as extraditable offences under their applicable statute governing international extradition in the absence of a treaty.

423. Thus, where the existing statute in a particular State party governing international extradition is not sufficiently broad in scope to cover the offences described in article 16, paragraph 1, it will be required to enact legislation to broaden the offences covered by the existing statute.

424. States parties considering establishing a regime for extradition pursuant to statute may refer for guidance to the statutory schemes and models referenced in section 5 below.

(e) Conditions to extradition (article 16, paragraph 7)

425. Article 16, paragraph 7, provides that grounds for refusal and other conditions to extradition (such as the minimum penalty required for an offence to be considered as extraditable) are governed by the applicable extradition treaty in force between the requesting and requested States or, otherwise, the law of the requested State. The paragraph thus establishes no implementation requirements separate from the terms of domestic laws and treaties governing extradition. The statutory schemes and instruments referenced in section 5 below provide examples of such conditions and grounds for refusal that may be instructive.

(f) Prosecution where a fugitive is not extradited on grounds of nationality (article 16, paragraph 10)

426. Article 16, paragraph 10, provides that where a requested State party does not extradite a person found in its territory for an offence set forth in article 16, paragraph 1, on grounds that the person is its national, that State shall, at the request of the State party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities are to take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State party. The States parties concerned are to cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.

427. In essence, the obligation to submit a case for domestic prosecution consists of a number of distinct elements:

(a) An extradition request concerning an offence set forth in article 16, paragraph 1, must have been denied because the fugitive is a national of the requested State;

(b) The State party seeking extradition must have requested submission for domestic prosecution in the requested State;

(c) The State party that denied extradition must thereafter:

- (i) Submit the case to its authorities for prosecution without undue delay;
- (ii) Take the decision and conduct the proceedings in the same manner as a serious domestic crime;
- (iii) Cooperate with the other State party in order to obtain the necessary evidence and otherwise ensure the efficiency of the prosecution.

428. Such domestic prosecutions are time consuming and resource intensive, as the crime will normally have been committed in another country. It will generally be necessary to obtain most or all of the evidence from abroad and to ensure that it is in a form that can be introduced into evidence in the courts of the State party conducting the investigation and prosecution.

429. To carry out such prosecutions, the State party concerned will first need to have a legal basis to assert jurisdiction over offences committed abroad, as required by article 15, paragraph 3, of the Convention (see chap. IV, sect. A, of the present guide for further discussion on how to

implement this requirement). In addition, effective implementation of paragraph 10 requires a State conducting a domestic prosecution in lieu of extradition to have mutual legal assistance laws and treaties to enable it to obtain evidence from abroad. At a minimum, effective implementation of article 18 (see chap. V, sect. B, below) should suffice for this purpose. Drafters of national legislation should also ensure that domestic laws permit such evidence obtained abroad to be validated by its courts for use in such proceedings.²⁵

430. Implementation of paragraph 10 also requires allocation of adequate human and budgetary resources to enable domestic prosecution efforts to succeed. Thus, the Convention requires the investigation and prosecution to be given the same priority as would be given to a grave domestic offence.

431. An interpretative note reflects the general understanding that States parties should also take into consideration the need to eliminate safe havens for offenders who commit heinous crimes in circumstances not covered by paragraph 10. Several States indicated that such cases should be reduced and several States stated that the principle of *aut dedere aut judicare* should be followed (A/55/383/Add.1, para. 31).

432. An optional method of meeting the requirements of this paragraph is the temporary surrender of a fugitive (see art. 16, para. 11, and sect. 4 below).

(g) *Guarantees of persons undergoing the extradition process*
(article 16, paragraph 13)

433. Article 16, paragraph 13, requires a State party to provide fair treatment to the fugitive during extradition proceedings it is conducting, including by allowing enjoyment of all rights and guarantees that are provided for by that State's law with respect to such proceedings. In essence, this paragraph obligates States parties to ensure that they have procedures to ensure fair treatment of fugitives and that the fugitive is given the opportunity to exercise such legal rights and guarantees.

²⁵See, for example, the Mutual Legal Assistance in Criminal Matters Act of Canada.

*(h) Prohibition on denial of extradition for fiscal offences
(article 16, paragraph 15)*

434. Article 16, paragraph 15, provides that States parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters. States parties must therefore ensure that no such ground for refusal may be invoked under its extradition laws or treaties.

435. Thus, where a State party's laws currently permit such ground for refusal, amending legislation should be enacted to remedy this. Where such a ground for refusal is included in any of a State party's extradition treaties, normally the act of that country becoming party to the Organized Crime Convention, or the enactment of domestic amending legislation, would automatically invalidate the contrary provisions of an earlier treaty. Given this, only rarely, if at all, should amendments to particular treaties be required. With respect to future extradition treaties, States parties must not include such grounds for refusal.

(i) Consultations prior to refusing (article 16, paragraph 16)

436. Article 16, paragraph 16, provides that, where appropriate, the requested State party shall consult with the requesting State party before refusing extradition. This process could enable the requesting State party to present additional information or explanations that may result in a different outcome. Since there may be some cases in which additional information could never bring about a different result, the obligation is not categorical and the requested State party retains some degree of discretion to determine when to do so would be appropriate. Nevertheless, the interpretative notes indicate that the words "as appropriate" are to be understood and interpreted in the spirit of full cooperation and should not affect, to the extent possible, the obligatory nature of article 16, paragraph 16, of the Convention. Requested States parties when applying this paragraph are expected to give full consideration to the need to bring offenders to justice through extradition cooperation (A/55/383/Add.1, para. 35).

*(j) Conclusion of new agreements and arrangements
(article 16, paragraph 17)*

437. Article 16, paragraph 17, calls upon States parties to seek to conclude bilateral and multilateral agreements or arrangements to carry out or to

enhance the effectiveness of extradition. States that wish to expand their network of extradition treaties are invited to review the instruments described in section 5 below as examples of treaties that may be instructive. With respect to arrangements to enhance the effectiveness of extradition, States may wish to review consultation provisions provided for under some of these treaties.

4. Other measures, including optional issues

(a) Optional application to other offences (article 16, paragraph 2)

438. Article 16, paragraph 2, allows States parties to apply the extradition article to offences other than those set forth in article 16, paragraph 1. States parties are not under obligation to extradite for other offences, although they are encouraged to do so.

439. An interpretative note indicates that the purpose of article 16, paragraph 2, is to serve as an instrument for States parties wishing to avail themselves of the facility it provides and that it is not intended to broaden the scope of the article unduly (A/55/383/Add.1, para. 28).

(b) Extradition on the basis of the United Nations Convention against Transnational Organized Crime (article 16, paragraphs 4 and 5 (b))

440. Article 16, paragraph 4, allows, but does not require, States parties to use the Convention as a treaty basis for extradition, if such a treaty basis is a prerequisite to extradition. Alternatively, States would have to seek the conclusion of treaties on extradition with other States parties to the Convention in order to implement article 16 (art. 16, paragraph 5 (b)).

(c) Expediting extradition procedures (article 16, paragraph 8)

441. Article 16, paragraph 8, provides that States parties shall, subject to their domestic laws, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of the offences set forth in article 16, paragraph 1. Modern extradition practice has been to simplify requirements with respect to the form of and channels of transmission for extradition requests, as well as evidentiary standards for

extradition. The instruments referenced in section 5 below contain information on these issues that may be instructive.

442. An interpretative note indicates that this paragraph should not be interpreted as prejudicing in any way the fundamental legal rights of the defendant (A/55/383/Add.1, para. 29). According to another interpretative note, one example of implementation of this paragraph would be speedy and simplified procedures of extradition, subject to the domestic law of the requested State party, for the surrender of persons sought for the purpose of extradition, subject to the agreement of the requested State party and the consent of the person in question. The consent, which should be expressed voluntarily and in full awareness of the consequences, should be understood as being in relation to the simplified procedures and not to the extradition itself (A/55/383/Add.1, para. 30).

*(d) Detention pending extradition proceedings
in the requested State (article 16, paragraph 9)*

443. Article 16, paragraph 9, provides that the requested State party may take a fugitive into custody or take other appropriate measures to ensure his or her presence for purposes of extradition. Provisions on provisional arrest and detention pending extradition are standard features of extradition treaties and statutes and States parties should have an appropriate legal basis for such custody. However, the article imposes no specific obligation to take persons into custody in specific cases. The instruments referenced in section 5 below contain information on these issues that may be instructive.

*(e) Conditional extradition as a basis for
satisfying paragraph 10 (article 16, paragraph 11)*

444. Rather than conduct a domestic prosecution of a national in lieu of extradition under paragraph 10, article 16, paragraph 11, provides the option of temporarily surrendering the fugitive to the State party requesting extradition for the sole purpose of conducting the trial, with any sentence to be served in the State party that denied extradition. If this option is exercised, it discharges the obligation set forth in paragraph 10.

*(f) Enforcement of a foreign sentence where extradition is
refused on the ground of nationality (article 16, paragraph 12)*

445. Article 16, paragraph 12, calls upon a State party that has denied, on the ground of nationality, a request by another State party to extradite a

fugitive to serve a sentence, to consider enforcing the sentence itself. However, the paragraph imposes no obligation on a party to enact the legal framework to enable it to do so, or to actually do so under specific circumstances.

446. An interpretative note indicates that this action would be taken without prejudice to the principle of double jeopardy (*ne bis in idem*) (A/55/383/Add.1, para. 32).

(g) *Lack of obligation under the Convention to extradite where there are substantial grounds for believing a fugitive will be discriminated against (article 16, paragraph 14)*

447. Article 16, paragraph 14, provides that nothing in the Convention is to be interpreted as imposing an obligation to extradite if the requested State party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of those reasons.

448. This provision preserves the ability to deny extradition on such grounds, unless such ground of refusal is not provided for in its extradition treaty in force with the requesting State party, or in its domestic law governing extradition in the absence of a treaty.²⁶

²⁶An interpretative note indicates that the *travaux préparatoires* should indicate that, at the informal consultations held during the eighth session of the Ad Hoc Committee, the delegation of Italy proposed the insertion after paragraph 8 of the following provision:

"Without prejudice to the use of other grounds for refusal, the requested State may refuse to extradite on the ground that a decision has been issued in absentia only if it is not proved that the case has been tried with the same guarantees as when a defendant is present and he or she, having knowledge of the trial, has deliberately avoided being arrested or has deliberately failed to appear at the trial. However, when such proof is not given, extradition may not be refused if the requesting State gives assurance, deemed satisfactory by the requested State, that the person whose extradition is sought shall be entitled to a new trial protecting his or her rights of defence."

In the discussion that followed, several delegations expressed serious concerns about whether this provision would be compatible with the fundamental principles of their respective legal systems. The delegation of Italy withdrew its proposal at the ninth session of the Ad Hoc Committee on the understanding that, when considering a request for extradition pursuant to a sentence issued in absentia, the requested State party would take into due consideration whether or not the person whose extradition was sought had been sentenced following a fair trial, for example, whether or not the defendant had been assured the same guarantees as he or she would have enjoyed had he or she been present at the trial and had voluntarily escaped from justice or failed to appear at the trial, or whether or not he or she was entitled to a new trial (A/55/383/Add.1, para. 34).

5. *Information resources*

449. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) *Related provisions and instruments*

(i) *Organized Crime Convention*

Article 15 (Jurisdiction)

Article 17 (Transfer of sentenced persons)

Article 18 (Mutual legal assistance)

Article 19 (Joint investigations)

Article 20 (Special investigative techniques)

Article 27 (Law enforcement cooperation)

Article 34 (Implementation of the Convention)

(ii) *Other instruments*

1957 European Convention on Extradition

Council of Europe, *European Treaty Series*, No. 24

<http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>

1966 Commonwealth Scheme for the Rendition of Fugitive Offenders

[http://www.thecommonwealth.org/law/docs/Extrad - London.doc](http://www.thecommonwealth.org/law/docs/Extrad-London.doc)

1981 Inter-American Convention on Extradition

Organization of American States, *Treaty Series*, No. 60

[http://www.oas.org/juridico/english/treaties/b-47\(1\).html](http://www.oas.org/juridico/english/treaties/b-47(1).html)

1983 Arab League Convention on Mutual Assistance in Criminal Matters

1994 Economic Community of West African States Convention on Extradition

http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/4ConExtradition.pdf

1995 Convention drawn up on the basis of article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union

Official Journal of the European Communities, C 078, 30 March 1995

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41995A0330\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41995A0330(01)&model=guichett)

(b) *Examples of national legislation*

Albania

http://pbosnia.kentlaw.edu/resources/legal/albania/crim_code.htm

Criminal Code

Article 11

Extradition

Extradition may be granted only when explicitly provided for by international treaties where the Republic of Albania is a party.

Extradition shall be granted when the criminal act which constitutes the object of the request for extradition is provided for as such simultaneously by both Albanian law and foreign law.

Extradition shall not be granted:

a) if the person to be extradited is an Albanian citizen, unless otherwise provided for by the treaty;

b) if the criminal act constituting the object of the request for extradition is of political or military character;

c) when there is reasonable ground to believe that the person requested to be extradited will be persecuted, punished or wanted because of his political, religious, national, racial or ethnic beliefs;

d) if the person requested to be extradited has been tried for the criminal act for which the extradition is demanded by a competent Albanian court.

Relevant provisions in the Albanian Criminal Procedures Code: Title X (Jurisdictional relations with foreign authorities), chapter I (Extradition), section I (Extradition abroad), articles 488-499

Canada

<http://laws.justice.gc.ca/en/E-23.01/>

Canada Extradition Act, S.C. 1999, c. 18

Republic of Korea

Korean Extradition Act 1988

1997 Extradition Treaty Between the United States of America and the Argentine Republic

2001 Extradition Treaty Between Lithuania and the United States

<http://www3.lrs.lt/c-bin/eng/preps2?Condition1=161503&Condition2=>

(c) *Other sources of information*

1990 Model Treaty on Extradition

General Assembly resolution 45/116

<http://www.un.org/documents/ga/res/45/a45r116.htm>

1998 United Nations model extradition (amendment) bill

<http://www.imolin.org/ex98.htm>

2003 United Nations model law on international cooperation (extradition and mutual legal assistance) with regard to illicit traffic in narcotic drugs, psychotropic substances and precursors for civil law (available in French only)

http://www.unodc.org/pdf/lap_civil_mod-leg_international_cooperation_fr.pdf

B. Mutual legal assistance in criminal matters

“Article 18

“Mutual legal assistance

“1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance where the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1 (a) or (b), is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group.

“2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10 of this Convention in the requesting State Party.

“3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

“(a) Taking evidence or statements from persons;

“(b) Effecting service of judicial documents;

- “(c) Executing searches and seizures, and freezing;
- “(d) Examining objects and sites;
- “(e) Providing information, evidentiary items and expert evaluations;
- “(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- “(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- “(h) Facilitating the voluntary appearance of persons in the requesting State Party;
- “(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

“4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

“5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

“6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

“7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are

strongly encouraged to apply these paragraphs if they facilitate cooperation.

“8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

“9. States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party.

“10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

“(a) The person freely gives his or her informed consent;

“(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

“11. For the purposes of paragraph 10 of this article:

“(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

“(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

“(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

“(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

“12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be

prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

“13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

“14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

“15. A request for mutual legal assistance shall contain:

“(a) The identity of the authority making the request;

“(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

“(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

“(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

“(e) Where possible, the identity, location and nationality of any person concerned; and

“(f) The purpose for which the evidence, information or action is sought.

“16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

“17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

“18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by videoconference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

“19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

“20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request,

except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

“21. Mutual legal assistance may be refused:

“(a) If the request is not made in conformity with the provisions of this article;

“(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

“(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

“(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

“22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

“23. Reasons shall be given for any refusal of mutual legal assistance.

“24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requested State Party shall respond to reasonable requests by the requesting State Party on progress of its handling of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

“25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

“26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

“27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

“28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

“29. The requested State Party:

“(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

“(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

“30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.”

1. Introduction

450. In the context of globalization, national authorities increasingly need the assistance of other States for the successful investigation, prosecution and punishment of offenders, particularly those who have committed

transnational offences. The ability to assert jurisdiction and secure the presence of an accused offender in its territory accomplishes an important part of the task, but does not complete it.

451. The international mobility of offenders and the use of advanced technology, among other factors, make it more necessary than ever that law enforcement and judicial authorities collaborate and assist the State that has assumed jurisdiction over the matter.

452. In order to achieve that goal, States have enacted laws to permit them to provide such international cooperation and increasingly have resorted to treaties related to mutual legal assistance in criminal matters. Such treaties commonly list the kind of assistance to be provided, the rights of the requesting and requested States relative to the scope and manner of cooperation, the rights of alleged offenders and the procedures to be followed in making and executing requests.

453. These bilateral instruments enhance law enforcement in several ways. They enable authorities to obtain evidence abroad in a way that it is admissible domestically. For example, witnesses can be summoned, persons located, documents and other evidence produced and warrants issued. They supplement other arrangements on the exchange of information (for example, information obtained through the International Criminal Police Organization (Interpol), police-to-police relationships and judicial assistance and letters rogatory). They also resolve certain complications between countries with different legal traditions, some of which restrict assistance to judicial authorities rather than prosecutors. The mutual legal assistance treaty between Argentina and the United States is a good example (see chap. V, sect. A.5, above).

454. There have been some multilateral efforts through treaties aimed at mutual legal assistance in criminal matters with respect to particular offences, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (see art. 7), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (see arts. 8-10), the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the Council of Europe Convention on Cybercrime, the Inter-American Convention against Corruption (see art. XIV), the Inter-American Convention on Mutual Legal Assistance and optional Protocol thereto and the OECD Convention on Combating Bribery of Foreign Public

Officials in International Business Transactions (see art. 9). There have also been some regional initiatives, such as the Schengen Implementation Agreement,²⁷ the European Convention on Mutual Assistance in Criminal Matters, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters and the 1983 Arab League Convention on Mutual Assistance in Criminal Matters.

455. In its article 3, the Organized Crime Convention builds on the above initiatives, calls for the widest measure of mutual legal assistance as listed in paragraph 3, in investigations, prosecutions and judicial proceedings, and expands the scope of application to all offences covered by the Convention. This includes the offences established under articles 5, 6, 8 and 23, offences established under any of the Protocols States become parties to and transnational serious crimes involving an organized criminal group (art. 2, subpara. (b)).

456. Legal assistance may be requested for taking evidence or statements, effecting service of judicial documents, executing searches and seizures, examining objects and sites, providing information, evidence and expert evaluations, documents and records, tracing proceeds of crime, facilitating the appearance of witnesses and any other kind of assistance not barred by domestic law. Article 18 applies also to international cooperation in the identification, tracing and seizure of proceeds of crime, property and instrumentalities for the purpose of confiscation (see also art. 13).

457. The Organized Crime Convention recognizes the diversity of legal systems and allows States to refuse mutual legal assistance under certain conditions (see art. 18, para. 21). However, it makes clear that assistance cannot be refused on the ground of bank secrecy (art. 18, para. 8) or for offences considered to involve fiscal matters (art. 18, para. 22). States are required to provide reasons for any refusal to assist. Otherwise, States must execute requests expeditiously and take into account possible deadlines facing the requesting authorities (for example expiration of a statute of limitation).

²⁷Often cited as the Schengen Convention, which binds all European Union member States with the exception of the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland. See also the 1996 Agreement between the European Community and the United States of America on Customs Cooperation and Mutual Assistance in Customs Matters, especially Title IV, art. 11 ff (<http://www.eurunion.org/partner/agreemen.htm>).

2. Summary of main requirements

458. All States parties must ensure the widest measure of mutual legal assistance as listed in article 18, paragraph 3, in investigations, prosecutions and judicial proceedings in relation to the following offences:

(a) Offences established in accordance with articles 5, 6, 8 and 23 that are transnational and involve an organized criminal group;

(b) Serious crime that is transnational and involves an organized criminal group;

(c) Offences established in accordance with the three Protocols, which are considered as offences established in accordance with the Convention under article 1, paragraph 3, of each Protocol;

(d) Offences established in accordance with articles 5, 6, 8 and 23 that involve an organized criminal group, where there are reasonable grounds to suspect that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party;

(e) Serious crime which involves an organized criminal group, where there are reasonable grounds to suspect that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party (art. 18, paras. 1 and 3).

459. All States parties must provide for mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences for which a legal entity may be held liable under article 10 (art. 18, para. 2).

460. Each State party must ensure that mutual legal assistance is not refused by it on the ground of bank secrecy (art. 18, para. 8). Legislation may be necessary if existing laws or treaties governing mutual legal assistance are in conflict.

461. Each State party must provide for article 18, paragraphs 9-29, to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State party (art. 18, paras. 7 and 9-29). Legislation may be necessary if existing domestic law governing mutual legal assistance is inconsistent with any of the terms of these paragraphs and if domestic law prevails over treaties.

462. Each State party must notify the Secretary-General of the United Nations of its central authority designated for the purpose of article 18, as well as of the language(s) acceptable to each State party in this regard (art. 18, paras. 13 and 14).

463. Each State party shall consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of this article (art. 18, para. 30).

3. *Mandatory requirements*

(a) Scope (article 18, paragraph 1)

464. Article 18, paragraph 1, establishes the scope of the obligation to provide mutual legal assistance.

465. First of all, parties are required to provide the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention as provided in article 3. Thus, each State party must ensure that its mutual legal assistance treaties and laws provide for assistance to be provided for cooperation with respect to investigations, prosecutions and judicial proceedings. The term “judicial proceedings” is separate from investigations and prosecutions and connotes a different type of proceeding. Since it is not defined in the Convention, States parties have discretion in determining the extent to which they will provide assistance for such proceedings, but assistance should at least be available with respect to portions of the criminal process that in some countries may not be part of the actual trial, such as pretrial proceedings, sentencing proceedings and bail proceedings. These investigations, prosecutions or proceedings must relate to offences covered by the Convention as provided in article 3. This means:

(a) Offences established in accordance with articles 5, 6, 8 and 23 that are transnational (defined in art. 3, para. 2) and involve an organized criminal group (defined in art. 2, subpara. (a));

(b) Serious crime (defined in art. 2, subpara. (b)) that is transnational and involves an organized criminal group;

(c) Offences established in accordance with the three Protocols, which are considered as offences established in accordance with the Convention under article 1, paragraph 3, of each Protocol.

466. In addition, States parties are obliged by paragraph 1 to reciprocally extend to one another similar assistance where the requesting State has reasonable grounds to suspect that the offence referred to in article 3,

paragraph 1 (a) or (b), is transnational in nature including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party and that the offences involve an organized criminal group. This means that the obligation to provide mutual legal assistance also extends to:

(a) Offences established in accordance with articles 5, 6, 8 and 23, where there are reasonable grounds to suspect that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party and the offence involves an organized criminal group;

(b) Serious crime, where there are reasonable grounds to suspect that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party and the offence involves an organized criminal group.

467. If a State party's current mutual legal assistance laws and treaties are not broad enough to cover all of the offences set forth in paragraph 1, amending legislation may be necessary.

468. In drafting legislation creating powers to execute assistance requests, legislators should note that the criterion for the requests and provision of legal assistance is slightly broader than that applying to most other Convention and Protocol obligations.

469. Under article 3, the Convention applies where the offence in question is transnational in nature and involves an organized criminal group. In contrast, article 18, paragraph 1, requires the provision of mutual legal assistance where the requesting State party has reasonable grounds to suspect that the offence is transnational in nature and that the offence involves an organized criminal group. It should be noted that the mere fact that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State party constitutes in itself a sufficient reasonable ground to suspect that the offence is transnational.

470. This sets a lower evidentiary standard intended to facilitate assistance requests for the purpose of determining whether elements of transnationality and organized crime are present and whether international cooperation may be necessary and may be sought under the Convention for subsequent investigative measures, prosecution or extradition. It is important that this standard is reflected in domestic implementing legislation.

(b) *Mutual legal assistance for proceedings involving legal persons (article 18, paragraph 2)*

471. Article 18, paragraph 2, provides that mutual legal assistance shall be furnished to the fullest extent possible under relevant laws, treaties, agreements and arrangements with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10 (see also chap. IV, sect. B, of the present guide).

472. Thus, a State party should have the ability to provide a measure of mutual legal assistance with respect to investigations, prosecutions and judicial proceedings into the conduct of legal persons. Here too, some discretion is granted to States parties regarding the extent to which assistance is to be provided. Where a State party presently lacks any legal authority to provide assistance with respect to investigations, prosecutions and judicial proceedings against legal persons, amending legislation should be considered.

473. An interpretative note indicates that the term “judicial proceedings” in article 18, paragraph 2, refers to the matter for which mutual legal assistance is requested and is not intended to be perceived as in any way prejudicing the independence of the judiciary (A/55/383/Add.1, para. 36).

(c) *Purposes for which mutual legal assistance is to be provided (article 18, paragraph 3)*

474. Article 18, paragraph 3, sets forth the following list of specific types of mutual legal assistance that a State party must be able to provide:

- (a) Taking evidence or statements from persons;
- (b) Effecting service of judicial documents;
- (c) Executing searches and seizures, and freezing;
- (d) Examining objects and sites;
- (e) Providing information, evidentiary items and expert evaluations;
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the voluntary appearance of persons in the requesting State party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State party.

475. States parties should review their current mutual legal assistance treaties to ensure that these sources of legal authority are broad enough to cover each form of cooperation listed above. Generally, mutual legal assistance treaties provide for such forms of cooperation. However, in the rare situation in which a form of cooperation listed in article 18, paragraph 3, is not provided for (in particular in countries in which treaties are considered subordinate to mutual legal assistance laws), then the States parties concerned should consider such mutual legal assistance treaties as being automatically supplemented by those forms of cooperation. Alternatively, under some legal systems, amending legislation or other action may be required.

476. In most cases, domestic law already provides powers to take the measures necessary to deliver the above types of assistance. If not, such powers must be created. If they exist, amendments may be necessary to ensure that they can be used in legal assistance cases. For example, search and seizure powers limited to cases where judicial authorities are satisfied that a domestic crime has been committed and that the search for evidence is warranted, would have to be amended to allow search warrants for alleged foreign offences evidence of which is believed to be in the requested State.

477. In order to obtain from and provide mutual legal assistance to States parties in the absence of a mutual legal assistance treaty, a mechanism is provided pursuant to the provisions of article 18, paragraphs 7 and 9-29. The implementation requirements pertaining to this situation are described below.

(d) *Procedure to be followed in the absence of a treaty*
(article 18, paragraph 7)

478. Article 18, paragraph 7, provides that where there is no mutual legal assistance treaty in force between a State party seeking cooperation and the State party from whom cooperation is sought, the rules of mutual legal assistance set forth in article 18, paragraphs 9-29, apply in providing the forms of cooperation listed in paragraph 3. If a treaty is in force between

the States parties concerned, the rules of the treaty will apply instead, unless they agree to apply paragraphs 9-29.

479. For many States parties, that is those whose legal systems permit direct application of treaties, no implementing legislation will be needed. If the legal system of a State party does not permit direct application of these paragraphs, legislation will be required to ensure that in the absence of a mutual legal assistance treaty, the terms of paragraphs 9-29 apply to requests made under the Convention, rather than rules that may otherwise apply. Such an enabling statute may be general in nature, consisting of a reference to the effect that in cases falling within the scope of article 18, and in the absence of a treaty with the State party concerned, the rules of paragraphs 9-29 apply.

480. States parties are also strongly encouraged, but not obliged, to apply any of paragraphs 9-29 if they facilitate cooperation to a greater extent than the terms of a mutual legal assistance treaty in force between them.

(e) Prohibition on denial of mutual legal assistance on the ground of bank secrecy (article 18, paragraph 8)

481. Article 18, paragraph 8, provides that States parties shall not decline to render mutual legal assistance pursuant to article 18 on the ground of bank secrecy. It is significant that this paragraph is not included among the paragraphs that only apply in the absence of a mutual legal assistance treaty. Instead, States parties are obliged to ensure that no such ground for refusal may be invoked under their mutual legal assistance laws or treaties.

482. Thus, where a State party's laws currently permit such ground for refusal, amending legislation should be enacted to remedy this. Where such a ground for refusal is included in any State party's mutual legal assistance treaties, the act of that country's becoming party to the Organized Crime Convention should as a matter of treaty law automatically invalidate the contrary provisions of an earlier treaty. Should a State party's legal system provide that treaties are not applied directly, domestic legislation may be required.

483. An interpretative note indicates that article 18, paragraph 8, is not inconsistent with paragraphs 17 and 21 of article 18 (A/55/383/Add.1, para. 38).

(f) *Measures to be applied in the absence of a treaty*
(article 18, paragraphs 9-29)

484. The actions required in order to implement article 18, paragraphs 9-29, which provide certain procedures and mechanisms that must be applied in the absence of a mutual legal assistance treaty between the States parties concerned, are discussed above in general terms in relation to article 18, paragraph 7. Some States parties will usually apply these paragraphs directly where they are relevant to a particular request for assistance, because under their legal system the Convention's terms can be directly applied. Otherwise, it may be easiest for a general legislative grant of authority to be enacted to permit direct application of paragraphs 9-29 for countries in which treaties are not directly applied.

485. There are, however, some interpretative notes relative to some of these paragraphs to be borne in mind.

486. With respect to the transfer of detained or convicted persons to another State party (see art. 18, paragraph 10 (b)), among the conditions to be determined by States parties for the transfer of a person, States parties may agree that the requested State party may be present at witness testimony conducted in the territory of the requesting State party (A/55/383/Add.1, para. 39).

487. The costs associated with such transfers of persons (art. 18, paras. 10 and 11) would generally be considered extraordinary in nature. The interpretative note also indicates the understanding that developing countries may encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article (A/55/383/Add.1, para. 43). Article 18, paragraph 28, also deals with the issue of costs.

488. The Convention requires the designation of a central authority with the power to receive and execute or transmit mutual legal assistance requests to the competent authorities to handle it in each State party. This central authority may be different at different stages of the proceedings for which mutual legal assistance is requested. Further, the interpretative notes indicate that this paragraph is not intended to create an impediment to countries having a central authority as regards receiving requests or to a different central authority as regards making requests (A/55/383/Add.1, para. 40).

489. The central authority, as well as its acceptable language(s) to be used for requests, should be notified to the Secretary-General of the United Nations at the time of signature or deposit (art. 18, paras. 13 and 14). The notification should be provided to the United Nations Office on Drugs and Crime.

4. Other measures, including optional issues

(a) Spontaneous transmission of information

490. Article 18, paragraphs 4 and 5, provide a legal basis for a State party to forward to another State party information or evidence it believes is important for combating the offences covered by the Convention, where the other country has not made a request for assistance and may be completely unaware of the existence of the information or evidence. However, there is no obligation to do so in a particular case. For those States parties whose legal system permits direct application of treaties, these paragraphs empower them to transmit information spontaneously where such transmissions are not otherwise possible under domestic law and no new legislation is needed.

491. If a State party does not already have a domestic legal basis for such spontaneous transmissions and under its legal system the terms of these paragraphs cannot be directly applied, it is strongly encouraged, but not obliged, to take such steps as may be necessary to establish such a legal basis.

492. There is an interpretative note indicating (a) that when a State party is considering whether to spontaneously provide information of a particularly sensitive nature or is considering placing strict restrictions on the use of information thus provided, it is considered advisable for the State party concerned to consult with the potential receiving State beforehand; and (b) that when a State party that receives information under this provision already has similar information in its possession, it is not obliged to comply with any restrictions imposed by the transmitting State (A/55/383/Add.1, para. 37).

(b) Savings clause for mutual legal assistance treaties (no specific obligations, article 18, paragraph 6)

493. Article 18, paragraph 6, simply provides that the article does not preclude or affect the independent obligations that may arise under other

treaties that govern mutual legal assistance. At the same time, becoming a party to the Organized Crime Convention gives rise to separate obligations that States parties must comply with among themselves.

(c) *Testimony by videoconferencing*

494. Provision of testimony via videoconferencing is not mandatory. Note should also be taken of article 18, paragraph 28, which provides for consultations regarding the allocation of the costs of mutual legal assistance of a substantial or extraordinary nature.

495. Article 18, paragraph 18, requires States parties to make provision wherever possible and consistent with the fundamental principles of domestic law for the use of videoconferencing as a means of providing *viva voce* evidence in cases where it is impossible or undesirable for a witness to travel. This may require the following legislative changes:

(a) Legislative powers allowing authorities to compel the attendance of a witness, administer oaths and subjecting witnesses to criminal liability for non-compliance (for example, using contempt-of-court or similar offences);

(b) Amendments to evidentiary rules to allow for the basic admissibility of evidence provided by videoconferencing and setting technical standards for reliability and verification (for example, identification of the witness);

(c) Expansion of perjury offences, putting in place legislation to ensure that:

- (i) A witness physically in the country who gives false evidence in foreign legal proceedings is criminally liable;
- (ii) A witness in a foreign country who gives false evidence in a domestic court or proceeding via videoconferencing is criminally liable;
- (iii) Persons alleged to have committed perjury via videoconferencing can be extradited into and out of the jurisdiction, as applicable;
- (iv) An untruthful witness can be extradited for having committed perjury in the jurisdiction of the foreign tribunal.

496. During the negotiations that led to the Convention, the delegation of Italy made a proposal on the issue covered by article 18, paragraph 18 (see A/AC.254/5/Add.23). When the proposal of Italy was discussed, it was

considered that part of it could serve as a guideline for the implementation of paragraph 18 (A/55/383/Add.1, para. 41), as follows:

“(a) The judicial authority of the requested State party shall be responsible for the identification of the person to be heard and shall, on conclusion of the hearing, draw up minutes indicating the date and place of the hearing and any oath taken. The hearing shall be conducted without any physical or mental pressure on the person questioned;

“(b) If the judicial authority of the requested State considers that during the hearing the fundamental principles of the law of that State are infringed, he or she has the authority to interrupt or, if possible, to take the necessary measures to continue the hearing in accordance with those principles;

“(c) The person to be heard and the judicial authority of the requested State shall be assisted by an interpreter as necessary;

“(d) The person to be heard may claim the right not to testify as provided for by the domestic law of the requested State or of the requesting State; the domestic law of the requested State applies to perjury;

“(e) All the costs of the videoconference shall be borne by the requesting State party, which may also provide as necessary for technical equipment.”

497. With respect to the last point, concerning costs, there is an additional interpretative note indicating that costs in connection with article 18, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature and pointing out that developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of the article (A/55/383/Add.1, para. 43).

*(d) Paragraph 30: conclusion of new agreements
and arrangements*

498. Article 18, paragraph 30, calls upon States parties to consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of the article. States that wish to expand their network of extradition treaties are invited to review the instruments listed in section 5 below as examples of mutual legal assistance that may be instructive and helpful.

5. Information resources

499. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) Related provisions and instruments

(i) Organized Crime Convention

Article 2 (Use of terms)

Article 3 (Scope of application)

Article 10 (Liability of legal persons)

Article 13 (International cooperation for purposes of confiscation)

Article 20 (Special investigative techniques)

(ii) Other instruments

1950 Convention for the Protection of Human Rights and Fundamental Freedoms

Council of Europe, *European Treaty Series*, No. 5

<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

1959 European Convention on Mutual Assistance in Criminal Matters

Council of Europe, *European Treaty Series*, No. 30

<http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>

1978 Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

Council of Europe, *European Treaty Series*, No. 99

<http://conventions.coe.int/Treaty/en/Treaties/Html/099.htm>

1983 Arab League Convention on Mutual Assistance in Criminal Matters

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

United Nations, *Treaty Series*, vol. 1582, No. 27627

http://www.unodc.org/pdf/convention_1988_en.pdf

1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

Council of Europe, *European Treaty Series*, No. 141

<http://conventions.coe.int/Treaty/EN/Treaties/Html/141.htm>

1992 Inter-American Convention on Mutual Legal Assistance in Criminal Matters

Organization of American States, *Treaty Series*, No. 75

<http://www.oas.org/juridico/english/Treaties/a-55.html>

1993 Optional Protocol Related to the Inter-American Convention on Mutual Legal Assistance in Criminal Matters

Organization of American States, *Treaty Series*, No. 77

<http://www.oas.org/juridico/english/treaties/A-59.htm>

1996 International Covenant on Civil and Political Rights

United Nations, *Treaty Series*, vol. 999, No. 14668

General Assembly resolution 2200 A (XXI)

<http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/005/03/IMG/NR000503.pdf?OpenElement>

http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

1996 Inter-American Convention against Corruption

Organization of American States

<http://www.oas.org/juridico/english/Treaties/b-58.html>

1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Organisation for Economic Cooperation and Development, DAFFE/IME/BR(97)20

http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

Official Journal of the European Communities, No. C 197, 12 July 2000

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712(01)&model=guichett)

2000 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders

Official Journal of the European Communities, No. L 239, 22 September 2000

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0922\(02\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0922(02)&model=guichett)

2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

Council of Europe, *European Treaty Series*, No. 182

<http://conventions.coe.int/Treaty/en/Treaties/Html/182>

2001 Council of Europe Convention on Cybercrime

Council of Europe, *European Treaty Series*, No. 185

<http://conventions.coe.int/Treaty/en/Treaties/Word/185.doc>

2001 Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union

Official Journal of the European Communities, No. C 326, 21 November 2001

[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42001A1121\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42001A1121(01)&model=guichett)

Economic Community of West African States Convention on Mutual Assistance in Criminal Matters

(b) Examples of national legislation

Canada

<http://laws.justice.gc.ca/en/M-13.6/>

Mutual Legal Assistance in Criminal Matters Act. R.S.C. 1985, c. 30 (4th Supp.), s. 1

Germany

<http://jurcom5.juris.de/bundesrecht/irg/gesamt.pdf>

Gesetz über die internationale Rechtshilfe in Strafsachen

Switzerland

http://www.admin.ch/ch/f/rs/351_1/index.html

Loi fédérale sur l'entraide internationale en matière pénale 351.1

Thailand

<http://www.imolin.org/Thaimaa.htm>

Act on Mutual Assistance in Criminal Matters, B.E. 2535

United Kingdom

<http://www.homeoffice.gov.uk/oicd/jcu/guidelns.htm>

Description of procedures available in English, French, German and Italian

2000 Treaty Between the Government of the United States of America and the Government of the Hellenic Republic on Mutual Legal Assistance in Criminal Matters

(c) Other sources of information

2000 Revised United Nations model treaty on mutual legal assistance in criminal matters

http://www.unodc.org/pdf/lap_mutual-assistance_2000.pdf

Commentary on the United Nations model treaty

http://www.unodc.org/pdf/lap_mutual-assistance_commentary.pdf

2000 United Nations model foreign evidence bill

http://www.unodc.org/pdf/lap_foreign-evidence_2000.pdf

Commentary on the United Nations model foreign evidence bill

http://www.unodc.org/pdf/lap_foreign-evidence_commentary.pdf

Commonwealth Scheme relating to Mutual Assistance in Criminal Matters

The Harare Scheme, as amended in 1999

<http://www.thecommonwealth.org/law/docs/Macm99 - Harare.doc>

C. Other forms of international cooperation*“Article 19**“Joint investigations*

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

*“Article 27**“Law enforcement cooperation*

“1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. Each State Party shall, in particular, adopt effective measures:

“(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

“(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

- “(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;
- “(ii) The movement of proceeds of crime or property derived from the commission of such offences;
- “(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

“(c) To provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

“(d) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

“(e) To exchange information with other States Parties on specific means and methods used by organized criminal groups, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;

“(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

“2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law

enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the Parties may consider this Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

“3. States Parties shall endeavour to cooperate within their means to respond to transnational organized crime committed through the use of modern technology.”

1. Introduction

500. The Convention provides for a number of other mandatory and non-mandatory mechanisms to facilitate international cooperation. Discussed in the present chapter are joint investigations (art. 19) and law enforcement assistance (art. 27).

2. Summary of main requirements

(a) Article 27

501. Under article 27, a State party must:

(a) Consistent with their respective domestic legal and administrative systems, adopt effective measures for purposes of effective investigation with respect to the offences established by the Convention, including:

- (i) Enhancing and, where necessary, establishing channels of communication between their respective law enforcement agencies;
- (ii) Cooperating with other States parties in their inquiries concerning:
 - a. The identity, whereabouts and activities of particular persons;
 - b. The movement of proceeds or property derived from the commission of offences and of property, equipment and other instrumentalities used or intended for use in the commission of offences;

- (iii) Providing, when appropriate, items and substances for analytical or investigative purposes;
- (b) Consider bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of this article;
- (c) Endeavour to cooperate in order to respond to transnational organized crime committed by use of modern technology.

(b) Article 19

502. Under article 19 a State party must consider bilateral or multilateral agreements or arrangements regarding an establishment of joint investigative bodies, while ensuring that the sovereignty of the State party in whose territory such investigation is to take place is fully respected.

3. *Mandatory requirements*

Scope of law enforcement cooperation (article 27, paragraph 1)

503. Article 27, paragraph 1, establishes the scope of the obligation to cooperate. States parties are required to cooperate closely with one another in terms of law enforcement (police-to-police) cooperation in a number of enumerated areas described in subparagraphs (a) through (f) of paragraph 1.

504. This general obligation to cooperate is not absolute; rather, it is to be conducted consistent with their respective domestic legal and administrative systems. This clause gives States parties the ability to condition or refuse cooperation in specific instances in accordance with their respective requirements.

505. Subject to this general limitation, States parties are to strengthen the channels of communication among their respective law enforcement authorities (para. 1 (a)); undertake specific forms of cooperation in order to obtain information about persons, the movements of proceeds and instrumentalities of crime (para. 1 (b)); provide to each other items or quantities of substances for purposes of analysis or other investigative purposes (para. 1 (c)); promote exchanges of personnel including the posting of liaison officers (para. 1 (d)); exchange information on a variety of means and methods used by organized criminal groups (para. 1 (e)); and conduct other cooperation for purposes of facilitating early identification of offences (para. 1 (f)).

4. Other measures, including optional issues

(a) Joint investigations (article 19)

506. Article 19 encourages, but does not require, States to enter into agreements or arrangements to conduct joint investigations, prosecutions and proceedings in more than one State, where a number of States parties may have jurisdiction over the offences involved.

507. The second sentence of the article provides a grant of legal authority to conduct joint investigations, prosecutions and proceedings on a case-by-case basis, even absent a specific agreement or arrangement. The domestic laws of most countries already permit such joint activities and for those few countries whose laws do not so permit, this provision will be a sufficient source of legal authority for case-by-case cooperation of this sort. In the unusual case in which a country will require new legislation to take part in such activities, reference should be made to the sample legislation set forth in section 5 below.

(b) Establishment of bilateral or multilateral agreements or arrangements on law enforcement cooperation (article 27, paragraph 2)

508. The first sentence of article 27, paragraph 2, calls upon States parties to consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies, with a view to giving effect to the Convention. States parties may refer to the examples of agreements set forth in section 5 below when doing so. The second sentence provides a grant of legal authority for such cooperation in the absence of a specific agreement or arrangement. The domestic laws of most countries already permit such cooperation (indeed, virtually all countries are members of Interpol, a multilateral arrangement by which such cooperation can generally be carried out). For any States parties whose laws do not so permit, this provision will be a sufficient source of legal authority for this type of cooperation on a case-by-case basis.

(c) Cooperation through use of modern technology (article 27, paragraph 3)

509. Article 27, paragraph 3, calls upon States to endeavour to conduct law enforcement cooperation in order to respond to transnational organized

crime committed through the use of modern technology. Criminals may use computer technology to commit such crimes as theft, extortion and fraud and to communicate with one another, or maintain their criminal organizations through computer systems.

510. The Group of Eight maintains a network of international law enforcement contacts available around the clock to respond to crimes and acts of terrorism using or targeting networked computer systems. The Group sponsors training for the points of contact participating in the network and also regularly provides participating countries with an updated network directory. The network included 37 countries as at 14 April 2004. States parties interested in further information on taking part in this network should refer to the contact information set forth in section 5 below.

5. *Information resources*

511. Drafters of national legislation may wish to refer to the sources of information listed below.

(a) *Related provisions and instruments*

(i) *Organized Crime Convention*

Article 13 (International cooperation for purposes of confiscation)

Article 18 (Mutual legal assistance)

Article 20 (Special investigative techniques)

(ii) *Protocols to the Organized Crime Convention*

Article 1, paragraph 3, of the three Protocols

(iii) *Other instruments*

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

United Nations, *Treaty Series*, vol. 1582, No. 27627

http://www.unodc.org/pdf/convention_1988_en.pdf

(b) *Examples of national legislation*

(i) *Article 19 of the Convention*

2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters
Council of Europe, *European Treaty Series*, No. 182
<http://conventions.coe.int/Treaty/en/Treaties/Html/182.htm>

(ii) *Article 27 of the Convention*

Group of Eight Subgroup on High Tech Crime
United States Department of Justice
Computer Crime and Intellectual Property Section
Chair of Group of Eight Subgroup on High Tech Crime
Washington, D.C., 20530
United States of America

2003 Agreement on Mutual Legal Assistance between the United States of America and the European Union
[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=22003A0719\(02\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=22003A0719(02)&model=guichett)

Article 5

Joint investigative teams

1. The Contracting Parties shall, to the extent they have not already done so, take such measures as may be necessary to enable joint investigative teams to be established and operated in the respective territories of each member State and the United States of America for the purpose of facilitating criminal investigations or prosecutions involving one or more member States and the United States of America where deemed appropriate by the member State concerned and the United States of America.

2. The procedures under which the team is to operate, such as its composition, duration, location, organisation, functions, purpose, and terms of participation of team members of a State in investigative activities taking place in another State's territory shall be as agreed between the competent authorities responsible for the investigation or prosecution of criminal offences, as determined by the respective States concerned.

3. The competent authorities determined by the respective States concerned shall communicate directly for the purposes of the establishment and operation of such team except that where the exceptional complexity, broad scope, or other circumstances involved are deemed to require more central coordination as to some or all aspects, the States may agree upon other appropriate channels of communications to that end.

4. Where the joint investigative team needs investigative measures to be taken in one of the States setting up the team, a member of the team of that State may request its own competent authorities to take those measures without the other States having to submit a request for mutual legal assistance. The required legal standard for obtaining the measure in that State shall be the standard applicable to its domestic investigative activities.

(c) Other sources of information

2003 Model agreement on the establishment of a joint investigation team

Official Journal of the European Union, C 121, 23 May 2003

http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_121/c_12120030523_en00010006.pdf

Annex. List of requirements of States parties to notify the Secretary-General of the United Nations

The following is a list of the notifications States parties are required to make to the Secretary-General of the United Nations.

Article 5. Criminalization of participation in an organized criminal group

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 6. Criminalization of the laundering of proceeds of crime

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. . .

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

Article 13. International cooperation for purposes of confiscation

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

Article 16. Extradition

5. States Parties that make extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention;

Article 18. Mutual legal assistance

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. . . . The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. . . .

14. . . . The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. . . .

Article 31. Prevention

6. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that can assist other States Parties in developing measures to prevent transnational organized crime.

Article 35. Settlement of disputes

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 36. Signature, ratification, acceptance, approval and accession

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 39. Amendment

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. . . .

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

Article 40. Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

