



LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOL THERETO



UNITED NATIONS OFFICE ON DRUGS AND CRIME
DIVISION FOR TREATY AFFAIRS

**LEGISLATIVE GUIDES FOR THE
IMPLEMENTATION OF THE
UNITED NATIONS CONVENTION
AGAINST TRANSNATIONAL
ORGANIZED CRIME
AND THE PROTOCOLS THERETO**



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(b) Expert group meeting on the legislative guides for the implementation of the United Nations Convention against Transnational Organized Crime and for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, held in Paris from 18 to 20 November 2002. The meeting was organized by the United Nations Office on Drugs and Crime, in cooperation with the Government of France;

(c) Expert group meeting on the legislative guides for the implementation of the United Nations Convention against Transnational Organized Crime and for the implementation of the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, held in Courmayeur, Italy, from 6 to 8 December 2002. The meeting was organized by the United Nations Office on Drugs and Crime, in cooperation with the International Scientific and Professional Advisory Council, and was supported by the Government of Italy;

(d) Expert group meeting on the legislative guides for the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto, held in Monte Carlo, Monaco, on 5 and 6 September 2003. The meeting was organized by the United Nations Office on Drugs and Crime, in cooperation with the Government of Monaco.

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Foreword

Aim of the legislative guides

The main purpose of the legislative guides contained in the present publication is to assist States seeking to ratify or implement the United Nations Convention against Transnational Organized Crime (the “Organized Crime Convention”, General Assembly resolution 55/25, annex I), and its supplementary Protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the “Trafficking in Persons Protocol”, Assembly resolution 55/25, annex II), the Protocol against the Smuggling of Migrants by Land, Sea and Air (the “Migrants Protocol”, Assembly resolution 55/25, annex III) and the Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (the “Firearms Protocol”, Assembly resolution 55/255, annex).

While the guides have been drafted chiefly for policy makers and legislators in countries preparing for the ratification and implementation of the Convention and its Protocols, they also aim at providing a helpful basis for bilateral technical assistance projects and other initiatives that will be undertaken as part of international efforts to promote the broad ratification and implementation of the Convention and the Protocols thereto.

The guides have been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options. As the guides are for use primarily by legislative drafters in countries preparing for the ratification and implementation of the Convention and its Protocols, not every provision of each instrument is addressed. The major focus will be on those provisions which will require legislative change and/or those which will require action prior to or at the time the Convention and its Protocols become applicable to the State party concerned.

The guides lay out the basic requirements of the Convention and the Protocols thereto, as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may

wish to consider as they try to implement the Convention and its Protocols. The guides do not cover articles that do not contain legislative implementation obligations.

Those involved in the negotiation of the Convention and its Protocols were well aware of the need for flexibility, as well as consistency and a degree of harmonization, at the international level. In this spirit, the guides list items that are mandatory or optional for States parties and relate each article and provision to other regional or international instruments and to examples of how States with different legal traditions have implemented the Convention and the Protocols thereto.

It should be noted that the guides are not intended to provide definitive legal interpretation of the articles of the Convention and its Protocols. The content is not authoritative and, in assessing each specific requirement, the actual language of the provisions should be consulted. Caution should also be used in incorporating provisions from the Convention and its Protocols verbatim into national law, which generally requires higher standards of clarity and specificity so as to permit enforcement in courts of law. It is also recommended that drafters check for consistency with other offences and definitions in existing domestic legislation before relying on formulations or terminology used in the Convention and the Protocols thereto.

The United Nations Office on Drugs and Crime is available to provide assistance in implementing the Convention and its Protocols. The Office is based in Vienna and can be contacted by telephone at +(43)(1) 26060-4534 or 4281 or e-mail at crimeconventions@unodc.org. The text of the Convention, the Protocols thereto and other relevant information can be obtained at the web site of the Office, at http://www.unodc.org/unodc/en/crime_cicp_convention.html.

Aims of the Convention and its Protocols

In a context of growing concern about organized criminal groups and criminal operations that cross national borders, an increasing number of countries have been considering and adopting new laws, measures and strategies to deal with the problem. When offenders, victims, instruments and products of crime are located in or pass through several jurisdictions, the traditional law enforcement approach, focused at the local level, is inevitably frustrated. When the types of transnational crime and the number of criminal groups seem to be increasing, no country is immune and States

must therefore turn to assist each other in the fight against sophisticated and harmful offences. When rapid advances in technology and the remarkable cross-border mobility of people, capital and commodities are taken advantage of by clever criminals acting either alone or, more dangerously, with additional associates, law enforcement must not fall behind. When criminals can generate extraordinary profits from their illicit enterprises and move and hide them from the authorities, the international community falls victim in many ways.

Political processes, democratic institutions, social programmes, economic development and human rights are all undermined by the wealth of organized criminal groups and the influence they can wield. Also at stake is the integrity of the financial system, particularly in parts of the world awash with the proceeds of crime. Victims and witnesses feel intimidated and doubly victimized if justice is not done. The message conveyed is that certain crimes do actually pay, even when the offenders are caught if they are then sanctioned by inadequate penalties.

Bilateral, regional and global agreements and arrangements reflect the realization that transnational crimes can be addressed effectively only through collaboration of law enforcement agencies from the States involved or affected. While ad hoc arrangements, mutual legal assistance treaties and extradition treaties may bear positive results in some instances, the complexities of the legislative and procedural framework within and across jurisdictions sometimes prevent those arrangements and treaties from being sufficient to respond to the current challenges. International conventions on specific offences, such as trafficking in drugs, terrorism, corruption and money-laundering, have paved the way for further coordination of efforts and stronger collaboration between States.* The most pressing need, however, is for a more integrated and synchronized approach, with effective enforcement mechanisms. Such an approach must be espoused as widely as possible.

The Convention is the response of the international community to the need for a truly global approach. Its purpose is to promote cooperation, both for the prevention of and for the effective fight against transnational organized crime (art. 1 of the Convention). It seeks to enlarge the number of

*For example, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the Inter-American Convention against Corruption and the International Convention for the Suppression of the Financing of Terrorism. Many more bilateral, regional and international instruments are cited throughout the guides and are listed in the sections on information resources.

States that take effective measures against transnational organized crime and to forge and strengthen cross-border links between States. It respects the differences and specificities of diverse legal traditions and cultures, while at the same time promoting a common language and helping to remove some of the existing barriers to effective transnational collaboration.

While the Organized Crime Convention focuses essentially on offences that facilitate the profit-making activities of organized criminal groups, the three Protocols supplementing the Convention target certain types of organized criminal activity requiring specialized provisions.

The Trafficking in Persons Protocol has three basic purposes: the prevention and combating of trafficking in persons; the protection and support of victims of trafficking; and the promotion of cooperation between States parties (art. 2 of the Trafficking in Persons Protocol).

The Migrants Protocol aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties, while protecting the rights of smuggled migrants (art. 2 of the Migrants Protocol).

The purpose of the Firearms Protocol is to promote, facilitate and strengthen cooperation among States parties in order to prevent, combat and eradicate the illicit manufacture of and trafficking in firearms, their parts and components and ammunition (art. 2 of the Firearms Protocol).

Article 37, paragraph 2, of the Convention provides that, in order to become a party to a Protocol supplementing the Convention, a State or regional economic integration organization must also be a party to the Convention. The provisions of all the Protocols to the Convention are to be interpreted together with the Convention, taking into account the purpose of the specific Protocol (art. 37, para. 4). However, these provisions of the three Protocols are binding on States parties only if they are parties to the Protocols as well.

Disclaimer

The legislative guides have been prepared by the United Nations Secretariat in response to the request of the General Assembly to the Secretary-General to promote and assist the efforts of Member States to become States parties to the United Nations Convention against

Transnational Organized Crime and the Protocols thereto. They are not intended to provide analysis or interpretative commentaries beyond the extent necessary directly to assist national legislators, legislative drafters and other appropriate officials in their efforts to develop the legislative and other measures needed for each country to become a party to these instruments. The interpretation of the instruments, as well as the exercise of any discretion set out in any provision thereof, is a matter for the States parties themselves, individually and in the context of the conference of the parties to each instrument. For authoritative information about the content of each provision, the appropriate official text should be consulted. Interpretative information on some provisions was provided to the General Assembly by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime and can be found in the report of the Ad Hoc Committee on the work of its first to twelfth sessions (A/55/383 and Add.1-3).*

*The *travaux préparatoires* of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime will be issued as a United Nations publication at a later date.

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, 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 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, DAFPE/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

2.

. . .

(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.

Part Two

**LEGISLATIVE GUIDE FOR THE
IMPLEMENTATION OF THE PROTOCOL TO
PREVENT, SUPPRESS AND PUNISH
TRAFFICKING IN PERSONS,
ESPECIALLY WOMEN AND CHILDREN,
SUPPLEMENTING THE UNITED NATIONS
CONVENTION AGAINST TRANSNATIONAL
ORGANIZED CRIME**

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I. Background and general provisions

A. Introduction

1. Structure of the legislative guide for the implementation of the Trafficking in Persons Protocol

1. There is some overlapping of the provisions of the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I, “the Organized Crime Convention”), the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex II, “the Trafficking in Persons Protocol”), and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex III, “the Migrants Protocol”). Provisions of the instruments are intended to be complementary. Many of the provisions that have parallel or overlapping elements are likely to involve many of the same policy, legislative and administrative areas in the Governments of States that intend to become parties to one or more of the Protocols. Each of those legislative guides for the implementation of the Protocols therefore begins with subject matter that is often common to the Protocols, such as technical provisions, including important provisions of the Organized Crime Convention that apply to, and thus create additional obligations with respect to, offences established in accordance with the Protocols. Chapter II of the present legislative guide deals with matters specific to the Trafficking in Persons Protocol. To allow Governments to take maximum advantage of overlapping or parallel elements, reference has been made to related provisions and instruments.

2. For ease of access and convenient reference, chapter II of the present legislative guide contains sections on criminalization, providing victims with assistance and protection, prevention and cooperation.

3. The above-mentioned general topics do not necessarily correspond to specific provisions of the Protocols. Many of the provisions have multiple

aspects, including, for example, elements of prevention, protection and cooperation. Specific references to the relevant provisions of the Organized Crime Convention and its Protocols have been included wherever possible.

4. To facilitate further the use of the legislative guides, a common format has been used for each chapter wherever feasible. Each section starts by quoting the relevant provisions of the Protocol and, where appropriate, the Organized Crime Convention. That has been done to provide faster, easier access to the language of the instruments. Each section includes some or all of the following general elements: introduction; summary of the main requirements; main elements of the articles; implementation of the articles; related provisions; optional elements; and information resources.

5. The subsection entitled “Summary of main requirements” provides in a checklist the essential requirements of the article concerned.

6. The process by which the requirements of the Trafficking in Persons Protocol can be fulfilled will vary from State to State. Monist systems could ratify the Protocol and incorporate its provisions into domestic law by official publication. Dualist systems would require implementing legislation.

7. In sorting out the priorities and obligations under the Trafficking in Persons Protocol, the guidelines presented below should be kept in mind.

8. In establishing their priorities, drafters of national legislation should bear in mind that the provisions of the Organized Crime 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 words “States are required to” are used, the reference is to a mandatory provision. Otherwise, the language used in the legislative guide is “required to consider”, which means that States are strongly asked

to seriously consider adopting a certain measure and make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the legislative guide employs the words “may wish to consider”. Occasionally, States “are required” to choose one or another option (as in the case of offences established in accordance with article 5 of the Organized Crime Convention). In that case, States are free to opt for one or the other or both options.

10. The subsection entitled “Summary of main requirements” at the beginning of each section lists measures that are mandatory and measures that States parties must consider applying or must endeavour to apply. In the analysis that follows, measures that are mandatory are discussed first, and those measures which States parties must consider applying or must endeavour to apply and which are optional are discussed together.

11. In general, the articles of the Organized Crime Convention and the Protocols 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 Organized Crime 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 (see the interpretative notes (A/55/383/Add.1, para. 9)).

13. It is recommended that drafters of legislation check for consistency with other offences, definitions and other legislative uses before relying on formulations or terminology of the Organized Crime Convention, which was drafted for general purposes and addressed to Governments. Thus, the level of abstraction is higher than that necessary for domestic legislation. Therefore, in drafting legislation, care should be taken not to incorporate verbatim parts of the text but to reflect the spirit and meaning of the various articles. To assist in that process, interpretative notes will be cited throughout the legislative guide, providing context and insight into the intent and concerns of the negotiators of the Organized Crime Convention and its Protocols.

2. *Other materials to be considered in ratifying or acceding to¹ the Trafficking in Persons Protocol*

14. Legislators, drafters and other officials engaged in efforts to ratify or implement the Protocol should also refer to the following:²

(a) The text of the Organized Crime Convention (General Assembly resolution 55/25, annex I);

(b) The text of the Protocols (Assembly resolutions 55/25, annexes II and III, and 55/255, annex);

(c) Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1);

(d) The legislative guides for the implementation of the Organized Crime Convention and the other Protocols.

15. For more detailed information about the nature and extent of the problem of trafficking and an assessment of related policy issues and options, the “anti-trafficking toolkit” prepared by the United Nations Office on Drugs and Crime may also be consulted. It should be noted, however, that the toolkit is not specifically oriented towards providing guidance on measures required to implement the Protocol.³

¹Those States which have signed the Organized Crime Convention and its Protocols by the date prescribed for each instrument may become parties by filing an instrument of ratification. Those which did not sign within that period may become parties at any time once the instrument is in force by acceding to the instrument. Information about the exact requirements may be obtained from the Office of Legal Affairs, United Nations Headquarters. For the sake of simplicity, references in this guide are mainly to “ratification”, but the possibility of joining an instrument by accession should also be borne in mind.

²The texts of all of the documents in all official languages of the United Nations, as well as other information about the legislative history of the instruments and their present status, can be obtained from the web site of the United Nations Office on Drugs and Crime (<http://www.unodc.org>).

³See also A. Kartusch, *Reference Guide for Anti-Trafficking Legislative Review with Particular Emphasis on South Eastern Europe* (Warsaw, Organisation for Security and Cooperation in Europe, Office for Democratic Institutions and Human Rights, 2001) and *Combating Human Trafficking in Asia: A Resource Guide to International and Regional Legal Instruments, Political Commitments and Recommended Practices*, United Nations Economic and Social Commission for Asia and the Pacific (available at <http://www.unescap.org/esid/gad/04widresources/05pubreport/combat%2D1.pdf> and <http://www.unescap.org/esid/gad/04widresources/05pubreport/combat%2D2.pdf>).

B. Scope and technical provisions of the Trafficking in Persons Protocol and its relationship to the United Nations Convention against Transnational Organized Crime

Trafficking in Persons Protocol

“Article 1

“Relation with the United Nations Convention against Transnational Organized Crime

“1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

“2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

“3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.”

“Article 2

“Statement of purpose

“The purposes of this Protocol are:

“(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

“(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

“(c) To promote cooperation among States Parties in order to meet those objectives.”

“Article 4

“Scope of application

“This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.”

“Article 14

“Saving clause

“1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention⁴ and the 1967 Protocol⁵ relating to the Status of Refugees and the principle of non-refoulement as contained therein.

“2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”

“Article 17

“Entry into force

“1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

“2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.”

Organized Crime Convention

“Article 37

“Relation with protocols

“1. This Convention may be supplemented by one or more protocols.

⁴United Nations, *Treaty Series*, vol. 189, No. 2545.

⁵*Ibid.*, vol. 606, No. 8791.

“2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

“3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

“4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.”

1. Main elements of the articles

(a) Application of the Organized Crime Convention to the Trafficking in Persons Protocol (article 1 of the Protocol and article 37 of the Convention)

16. Article 37 of the Organized Crime Convention and article 1 of each of the Protocols thereto together establish the basic relationship between the Convention and its Protocols. The four instruments were drafted as a group, with general provisions against transnational organized crime (for example, extradition and mutual legal assistance) in the Convention and elements specific to the subject matter of the Protocols in each of the Protocols (for example, offences established in accordance with the Protocol and provisions relating to travel and identity documents). As the Protocols are not intended to be independent treaties, to become a party to any of the Protocols, a State is required to be a State party to the Convention. That ensures that, in any case that arises under a Protocol to which the States concerned are parties, all of the general provisions of the Convention will also be available and applicable. Many specific provisions are drafted on this basis: the Convention contains general requirements for mutual legal assistance and other forms of international cooperation, for example, while requirements to render specific assistance such as the verification of travel documents or the tracing of a firearm, are found only in the appropriate Protocol or Protocols. Additional rules established by the relevant articles deal with the interpretation of similar or parallel provisions in each instrument and the application of general provisions of the Convention to the offences established in accordance with the Protocol and other provisions.

17. Article 1 of the Trafficking in Persons Protocol and article 37 of the Organized Crime Convention establish the following basic principles governing the relationship between the two instruments:

(a) *No State can be a party to any of the Protocols unless it is also a party to the Convention* (art. 37, para. 2, of the Convention). Simultaneous ratification or accession is permitted, but it is not possible for a State to be subject to an obligation of any of the Protocols unless it is also subject to the obligations of the Convention;

(b) *The Convention and the Trafficking in Persons Protocol must be interpreted together* (art. 37, para. 4, of the Convention and art. 1, para. 1, of the Protocol). In interpreting the various instruments, all relevant instruments should be considered and provisions that use similar or parallel language should be given generally similar meaning. In interpreting one of the Protocols, the purpose of that Protocol must also be considered, which may modify the meaning applied to the Convention in some cases (art. 37, para. 4, of the Convention);

(c) *The provisions of the Convention apply, mutatis mutandis, to the Protocol* (art. 1, para. 2, of the Protocol). The meaning of the phrase *mutatis mutandis* is clarified in the interpretative notes (A/55/383/Add.1, para. 62) as “with such modifications as circumstances require” or “with the necessary modifications”. This means that, in applying provisions of the Convention to the Protocol, minor modifications of interpretation or application may be made to take account of the circumstances that arise under the Protocol, but modifications should not be made unless they are necessary, and then only to the extent that is necessary. This general rule does not apply where the drafters have specifically excluded it;

(d) *Offences established in accordance with the Protocol shall also be regarded as offences established in accordance with the Convention* (art. 1, para. 3, of the Protocol). This principle, which is analogous to the *mutatis mutandis* requirement, is a critical link between the Protocol and the Convention. It ensures that any offence or offences established by a State in order to criminalize trafficking in human beings as required by article 5 of the Protocol will automatically be included within the scope of the basic provisions of the Convention governing forms of international cooperation such as extradition (art. 16) and mutual legal assistance (art. 18).⁶ It also links the Protocol and the Convention by making applicable to offences established in accordance with the Protocol other mandatory provisions of the Convention. In particular, as discussed below in chapter III, on criminalization, obligations in the Convention concerning money-laundering (art. 6), liability of legal persons (art. 10), prosecution,

⁶In most cases, the drafters used the phrase “offences covered by this Convention” to make this link. See, for example, article 18, paragraph 1, which sets the scope of the obligation to extradite offenders.

adjudication and sanctions (art. 11), confiscation (arts. 12-14), jurisdiction (art. 15), extradition (art. 16), mutual legal assistance (art. 18), special investigative techniques (art. 20), obstruction of justice (art. 23), witness and victim protection and enhancement of cooperation (arts. 24-26), law enforcement cooperation (art. 27), training and technical assistance (arts. 29 and 30) and implementation of the Convention (art. 34) apply equally to the offences established in the Protocol. Establishing a similar link is therefore an important element of national legislation on the implementation of the Protocols;

(e) *The Protocol requirements are a minimum standard.* Domestic measures may be broader in scope or more severe than those required by the Protocol, as long as all obligations specified in the Protocol have been fulfilled (art. 34, para. 3, of the Convention).

(b) *Application of other relevant international instruments
(article 14 of the Protocol)*

18. The Trafficking in Persons Protocol is only the latest in a series of international instruments that deal with trafficking in human beings or related subjects. Slavery and different forms of trafficking in humans have long been a matter of concern, and other attempts have been made to prevent and combat the problem. That made it necessary, in the course of drafting the Protocol, to consider carefully the language of the various provisions and how they would interact with principles already established in international law.

19. The basic principle established is that any rights, obligations or responsibilities applied to a State party prior to the Protocol are maintained and not affected by the Protocol. The Protocol does not narrow or diminish rights, obligations or responsibilities; it only adds to them to the extent that is provided for in the text (art. 14 of the Protocol). Thus, for example, requirements established by different instruments for dealing with asylum-seekers and victims of trafficking would apply jointly to the same case whenever a victim requests political asylum. At the same time, care has also been taken to recognize that not all States that become parties to the Protocol are parties to some of the other relevant international instruments. While the Protocol refers to principles of international humanitarian and human rights law, becoming a party to the Protocol does not indirectly make those principles applicable to a State to which they had not previously applied (see the interpretative notes (A/55/383/Add.1, para. 85)). However, given the number of overlapping principles that may apply to any State

party in both developing and applying legislation, drafters and legislators are advised to review the scope of any pre-existing obligations under customary international law and any instruments that apply, as well as any national legislation previously enacted or adopted to implement those obligations, in order to ensure that any measures undertaken in conformity with the Protocol are consistent. Apart from the basic humanitarian and human rights principles, a number of specific attempts have also been made to deal with slavery or other earlier concepts of trafficking in human beings. A list of instruments that might be considered or consulted by drafters is found at the end of the present section.

(c) *Non-discrimination (article 14 of the Protocol)*

20. Article 14, paragraph 2, of the Trafficking in Persons Protocol states that the measures set forth in the Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. This focuses on the interpretation of the Protocol and not the national law that implements it; however, drafters may wish to consider the principle of non-discrimination in drafting specific provisions, particularly where they deal with victims.⁷

(d) *Interpretation of the Trafficking in Persons Protocol
(articles 1 and 14 of the Protocol and
article 37 of the Convention)*

21. The interpretation of treaties is a matter for States parties to the Protocol. This is generally covered by the 1969 Vienna Convention on the Law of Treaties,⁸ and will not be discussed in detail in the present guide. One factor in interpreting treaties, however, is that interpretative principles may be established by the treaty itself. A number of specific interpretative references appear in both the Convention and the Protocol,⁹ and the dispute settlement provisions of the instruments, where the States parties concerned

⁷See also the Vienna Declaration and the Programme of Action, adopted on 25 June 1993 by the World Conference on Human Rights (A/CONF.157/24 (Part I), chap. III) (available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)).

⁸United Nations, *Treaty Series*, vol. 1155, No. 18232. The text of the Vienna Convention is made available online by the International Law Commission (<http://www.un.org/law/ilc/texts/treaties.htm>).

⁹See, for example, article 16, paragraph 14, of the Convention, which makes the principle of non-discrimination a limit on the interpretation and application of the basic obligation to extradite offenders.

have agreed to be bound by them, all require negotiations, followed by arbitration, as the means of resolving any disputes over interpretation or application matters. Specific references will be raised in relation to the subject matter to which they apply, but there are also two general provisions which apply to the Protocol. The first, described above, established by article 37 of the Convention and article 1 of the Protocol, is that elements of the Convention must be taken into consideration when interpreting the Protocol. These involve the relationship between the two instruments and will therefore be covered below. The second is found in article 14, paragraph 2, of the Protocol, which requires that the measures set forth in the Protocol should be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. Further, the interpretation and application of those measure should be consistent with internationally recognized principles of non-discrimination.

2. Purposes of the Trafficking in Persons Protocol (article 2 of the Protocol)

22. Three basic purposes of the Protocol are established by article 2: the prevention and combating of trafficking; the protection and support of victims of trafficking; and the promotion of cooperation between States parties. Article 2, subparagraph (a), requires that “particular attention” be paid to combat and prevent trafficking in women and children, while maintaining the basic principle that any human being, regardless of age or gender, could become a victim and that all forms of trafficking should be covered by the Protocol. That reflects a decision taken by the General Assembly to expand the scope of the Protocol after the negotiations had already commenced.¹⁰ In drafting legislation on the implementation of the Protocol, legislators should generally bear in mind that, although anyone could become a victim, in addition to general rules, more specific provisions may be needed in some areas to take into account the problems of women and children who are victimized.

3. Scope of application (article 4 of the Protocol)

23. The range of activities and circumstances in which the Protocol will apply, as well as exclusions to its application, are governed by article 4 of

¹⁰The original mandate (General Assembly resolution 53/111, para. 10) refers only to trafficking in women and children, which was expanded (see Assembly resolution 54/126, para. 3) to the formula which appears in the final title and the text of article 2, subparagraph (a).

the Protocol and articles 2 and 3 of the Convention, which apply to the Protocol, *mutatis mutandis*. Except as otherwise provided therein, the provisions of the Convention limit the application of the Protocol to cases where at least one of the offences involved has some element of transnationality and some degree of involvement of an “organized criminal group”, limits that also apply to the Convention itself and all of the other Protocols (see the relevant chapters of the legislative guide for the implementation of the Organized Crime Convention for a detailed discussion of these concepts).

24. In addition, article 4 of the Protocol further limits the Protocol to matters relating to trafficking in persons. That illustrates the importance of ensuring that any legislation on the implementation of the Convention and the Protocols is drafted in a consistent and coordinated manner. For example, it is easy to imagine a single case in which investigators encounter trafficking (the Trafficking in Persons Protocol and the Convention), money-laundering (the Convention) and the smuggling of migrants (the Migrants Protocol) and in which the extradition of offenders is sought (the Convention); it will be important to ensure that all of those forms of cooperation are handled by the States involved in a consistent manner. Notwithstanding the comment in paragraph 23 about the Convention dealing only with situations having an element of transnationality or organized crime, it will be noted that the relevant provisions of the Convention and the Protocol must be reviewed carefully. The text of the provisions is relatively broad.

25. It is important for drafters of legislation to note that the provisions relating to the involvement of transnationality and organized crime do not always apply. While in general the reader should consult the legislative guide for the implementation of the Organized Crime Convention (paras. 29-31) for details about when the criteria apply and do not apply, it is important to emphasize that, for example, article 34, paragraph 2, of the Convention provides that legislators must not incorporate elements concerning transnationality or an organized criminal group into domestic offence provisions.¹¹ Together, these establish the principle that, while States parties should have to establish some degree of transnationality or involvement of an organized criminal group with respect to most aspects of

¹¹The only exception to this principle arises where the language of the criminalization requirement specifically incorporates one of these elements, such as art. 5, para. 1, of the Convention (presence of an organized criminal group). These requirements are discussed in more detail in the legislative guide for the implementation of the Organized Crime Convention.

the Protocol, their prosecutors do not have to prove either in order to obtain a conviction for trafficking in persons or any other offence established by the Convention or its Protocols. In the case of trafficking in persons, domestic offences should apply even where transnationality and the involvement of organized criminal groups do not exist. As another example, the first paragraphs of the articles on extradition (art. 16) and mutual legal assistance (art. 18) of the Convention set forth certain circumstances in which one or both of these elements are to be considered satisfied. Regarding the definition of organized criminal group, it should be noted that, according to the interpretative notes to article 2, subparagraph (a), of the Convention (A/55/383/Add.1, para. 3), the *travaux préparatoires* should indicate that the words “in order to obtain, directly or indirectly, a financial or other material benefit” should be understood broadly, to include, for example, crimes in which the predominant motivation may be 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. Finally, it is also important for drafters of legislation to note that the Trafficking in Persons Protocol also applies to the protection of victims regardless of transnationality and involvement of an organized criminal group.

4. Implementation

26. In general, most of the provisions discussed in the present chapter govern the interpretation and application of the other provisions. Thus they may provide for assistance and guidance to be given to Governments, drafters and legislatures, but they do not themselves require specific measures for implementation.

27. However, there may be a need for legislation to ensure the fulfilment of the requirements that the Organized Crime Convention be applied *mutatis mutandis* to the Protocol and that offences covered by the Trafficking in Persons Protocol be regarded as offences established in accordance with the Convention. The measures required as a result of these provisions are described in detail in chapter II, section A, below.

5. Information resources

28. Drafters of national legislation may wish to refer to the related instruments listed below.

(a) *Other instruments*

(i) *Humanitarian, human rights and other instruments of general application*

1948 Universal Declaration of Human Rights
General Assembly resolution 217 A (III)
<http://www.unhchr.ch/udhr/index.htm>

1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
United Nations, *Treaty Series*, vol. 75, No. 970
http://www.unhchr.ch/html/menu3/b/q_genev1.htm

1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
United Nations, *Treaty Series*, vol. 75, No. 971
http://www.unhchr.ch/html/menu3/b/q_genev2.htm

1949 Geneva Convention relative to the Treatment of Prisoners of War
United Nations, *Treaty Series*, vol. 75, No. 972
<http://www.unhchr.ch/html/menu3/b/91.htm>

1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War
United Nations, *Treaty Series*, vol. 75, No. 973
<http://www.unhchr.ch/html/menu3/b/92.htm>

1950 Convention for the Protection of Human Rights and Fundamental Freedoms
United Nations, *Treaty Series*, vol. 213, No. 2889
<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>

1951 Convention relating to the Status of Refugees
United Nations, *Treaty Series*, vol. 189, No. 2545 p. 137
http://www.unhchr.ch/html/menu3/b/o_c_ref.htm

1966 International Covenant on Civil and Political Rights
United Nations, *Treaty Series*, vol. 999, No. 14668 p. 171
http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

1967 Protocol relating to the Status of Refugees
United Nations, *Treaty Series*, vol. 606, No. 8791
http://www.unhchr.ch/html/menu3/b/o_p_ref.htm

1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I)

United Nations, *Treaty Series*, vol. 1125, No. 17512

<http://www.unhchr.ch/html/menu3/b/93.htm>

1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

United Nations, *Treaty Series*, vol. 1125, No. 17513

<http://www.unhchr.ch/html/menu3/b/94.htm>

1979 Convention on the Elimination of All Forms of Discrimination against Women

United Nations, *Treaty Series*, vol. 1249, No. 20378

<http://www.unhchr.ch/html/menu3/b/e1cedaw.htm>

1989 Convention on the Rights of the Child

United Nations, *Treaty Series*, vol. 1577, No. 27531

<http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm>

1993 Vienna Declaration and the Programme of Action adopted by the World Conference on Human Rights

Document A/CONF.157/24 (Part I), chap. III

[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)

2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

General Assembly resolution 54/263, annex I

<http://www.unhchr.ch/html/menu2/6/crc/treaties/opac.htm>

2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

General Assembly resolution 54/263, annex II

<http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>

(ii) *Instruments against trafficking or slavery in general*

1926 Slavery Convention

United Nations, *Treaty Series*, vol. 212, No. 2861

<http://www.unhchr.ch/html/menu3/b/f2sc.htm>

1930 Convention concerning Forced or Compulsory Labour

International Labour Organization Convention No. 29

<http://www.ilo.org/ilolex/english/convdisp1.htm>

1953 Protocol amending the Slavery Convention
United Nations, *Treaty Series*, vol. 182, No. 2422
<http://www.unhchr.ch/html/menu3/b/f2psc.htm>

1956 Supplementary Convention on the Abolition of Slavery, the Slave
Trade, and Institutions and Practices Similar to Slavery
United Nations, *Treaty Series*, vol. 266, No. 3822
<http://www.unhchr.ch/html/menu3/b/30.htm>

1957 Convention concerning the Abolition of Forced Labour
International Labour Organization Convention No. 105
United Nations, *Treaty Series*, vol. 320, No. 4648
<http://www.ilo.org/ilolex/english/convdisp1.htm>

1973 Convention concerning Minimum Age for Admission to
Employment
International Labour Organization Convention No. 138
United Nations, *Treaty Series*, vol. 1015, No. 14862
<http://www.ilo.org/ilolex/english/convdisp1.htm>

1999 Convention concerning the Prohibition and Immediate Action for
the Elimination of the Worst Forms of Child Labour
International Labour Organization Convention No. 182
United Nations, *Treaty Series*, vol. 2133, No. 37245
<http://www.ilo.org/ilolex/english/convdisp1.htm>

(iii) *Instruments concerning slavery or trafficking related to
sexual exploitation*

1904 International Agreement for the Suppression of the White Slave
Traffic
League of Nations, *Treaty Series*, vol. 1, p. 83

1910 International Convention for the Suppression of the White Slave
Traffic
League of Nations, *Treaty Series*, vol. VIII, p. 278

1921 International Convention for the Suppression of the Traffic in
Women and Children
League of Nations, *Treaty Series*, vol. IX, p. 415

1933 International Convention for the Suppression of the Traffic in
Women of Full Age
League of Nations, *Treaty Series*, vol. CL, p. 431

1947 Protocol to amend the 1921 Convention for the Suppression of the Traffic in Women and Children and the 1933 Convention for the Suppression of the Traffic in Women of Full Age

United Nations, *Treaty Series*, vol. 53, No. 770

(See also the 1921 International Convention for the Suppression of the Traffic in Women and Children, as amended by the 1947 Protocol (United Nations, *Treaty Series*, vol. 53, No. 771) and the 1933 International Convention for the Suppression of the Traffic in Women of Full Age, as amended by the 1947 Protocol (United Nations, *Treaty Series*, vol. 53, No. 772))

1949 Protocol amending the 1904 International Agreement for the Suppression of the White Slave Traffic, and the 1910 International Convention for the Suppression of the White Slave Traffic

United Nations, *Treaty Series*, vol. 30, No. 446

(See also the 1904 International Agreement for the Suppression of the White Slave Traffic, as amended by the 1949 Protocol (United Nations, *Treaty Series*, vol. 92, No. 1257) and the 1910 International Convention for the Suppression of the White Slave Traffic as amended by the 1949 Protocol (United Nations, *Treaty Series*, vol. 98, No. 1358))

1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others

United Nations, *Treaty Series*, vol. 96, No. 1342

<http://www.unhchr.ch/html/menu3/b/33.htm>

II. Specific obligations of the Trafficking in Persons Protocol

A. Definition and criminalization of trafficking in persons

Trafficking in Persons Protocol

“Article 3

“Use of terms

“For the purposes of this Protocol:

“(a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

“(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

“(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;

“(d) ‘Child’ shall mean any person under eighteen years of age.”

“Article 5

“Criminalization

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

“(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

“(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

“(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.”

29. Several general principles of criminalization established in the Organized Crime Convention apply to its Protocols. It may also be important in some legal systems to ensure that criminal offences established in accordance with the Convention and the Protocols are coherent to support the investigation and prosecution of organized criminal groups and their members for any offence, or combination of offences, established in accordance with the instruments. In many cases, for example, organized criminal groups involved in firearms trafficking are also engaged in smuggling or trafficking human beings or narcotic drugs or other commodities, or in other crimes such as money-laundering, and national legislatures will need to ensure that the formulation of provisions on the relevant criminal offences pursuant to the Convention and its Protocols will support coordinated efforts to investigate and prosecute all of those activities together, where appropriate (see also the section entitled “Definition and criminalization of the smuggling of migrants” of the legislative guide for the implementation of the Migrants Protocol, in particular paras. 27-30, for a discussion of the definition of “smuggling of migrants” and the distinctions between illegal migration, smuggling of migrants and trafficking in persons).

1. Summary of main requirements

30. In the Trafficking in Persons Protocol, States parties are required to establish as criminal offences:

(a) The conduct set forth in article 3 of the Protocol, when committed intentionally (art. 5, para. 1);

(b) Subject to the basic concepts of its legal system, attempting to commit that offence (art. 5, para. 2 (a));

(c) Participating as an accomplice in that offence (art. 5, para. 2 (b));

(d) Organizing or directing other persons to commit that offence (art. 5, para. 2 (c)).

States parties are also required in article 1, paras. 2 and 3, of the Protocol to apply numerous provisions of the Organized Crime Convention to such conduct, as described in section 3 below.

2. Main elements of the articles

(a) Definition of the term “trafficking in persons”

31. Article 3 of the Protocol represents the first clear, internationally agreed definition of trafficking in persons (see also paras. 25-62 of the section entitled “Definition and criminalization of the smuggling of migrants” in the legislative guide for the Protocol). This forms the basis of the subject matter covered in the Protocol, the basis of international cooperation and other fundamental elements of the treaty. Prominent among these is the obligation to establish criminal offences: all States parties to the Protocol are obliged by article 5 to criminalize trafficking, either as a single criminal offence or a combination of offences that cover, at a minimum, the full range of conduct covered by the definition. Unlike the other two Protocols, which require also the criminalization of other related conduct, the Trafficking in Persons Protocol requires the criminalization of only “trafficking in persons” as defined, although many States have voluntarily identified and criminalized other related conduct.¹² States parties to the Protocol are also obliged to criminalize participating as an accomplice and organizing or directing other persons to commit the offence. Attempting to commit the offence must also be criminalized, but only “subject to the basic concepts” of the legal system of each State party (art. 5). The obligation applies to both natural persons and legal persons, though in the case of the latter the liability established need not necessarily be “criminal” liability (see art. 10 of the Convention).

32. The basic obligation to establish criminal offences is directly linked to the definition of “trafficking in persons” and it is this definition which is

¹²The Migrants Protocol requires the criminalization of enabling illegal residence and certain conduct in relation to travel or identity documents; and the Firearms Protocol requires the criminalization of multiple offences in relation to illicit manufacturing and trafficking, as well as a further offence of tampering with serial numbers or other markings of firearms. Additional offences adopted by some countries to supplement the trafficking in persons offence include conduct in relation to child abduction and the sale of children. These also supplement pre-existing offences such as abduction or kidnapping, which are already present in most countries.

therefore central to any legislation seeking to implement the Protocol. As defined, trafficking consists of a combination of three basic elements, each of which must be taken from a list set out in the definition. As defined in article 3 of the Protocol, “trafficking in persons” consists of:

(a) *The action of*: recruitment, transportation, transfer, harbouring or receipt of persons;

(b) *By means of*: the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability,¹³ or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person;

(c) *The purpose of exploitation*, which include, *at a minimum*: the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery,¹⁴ servitude or the removal of organs.

33. The obligation is to criminalize trafficking as a combination of constituent elements and not the elements themselves. Thus, any conduct that combines any listed action and means and is carried out for any of the listed purposes must be criminalized as trafficking. Individual elements such as abduction or the exploitation of prostitution¹⁵ need not be criminalized, although in some cases supplementary offences may support the purposes

¹³Examples already adopted in national legislation include specific positions of vulnerability such as illegal or uncertain immigration or residency status, minority status, or conditions such as illness, pregnancy, or physical or mental disability (Belgium, *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (Law of 15 December 1980 on entry, stay, status and removal of aliens), art. 77 bis, para. 1). In other countries (such as Bulgaria), legislation has taken a more general approach, referring to abuse of authority and allowing the courts to define and apply the term to the facts of cases as they arise.

¹⁴“Forced labour” is not defined in the Protocol. There are, however, several international instruments in this regard, for example: the 1930 Convention concerning Forced or Compulsory Labour (Convention No. 105) of the International Labour Organization; and the 1957 Convention concerning the Abolition of Forced Labour (Convention No. 105) of the International Labour Organization. “Slavery” is not defined in the Protocol, but numerous international instruments, as well as the domestic laws of many countries, define or deal with slavery and similar practices (see, for example, article 4 of the 1948 Universal Declaration of Human Rights; the 1926 Slavery Convention, as amended by the 1953 Protocol (United Nations, *Treaty Series*, vol. 212, No. 2861); the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (United Nations, *Treaty Series*, vol. 266, No. 3822); the 1999 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention No. 182) of the International Labour Organization; article 11, paragraph 1, of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (General Assembly resolution 45/158, annex); and article 4 (Prohibition of slavery and forced labour) of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms).

¹⁵Dealing with prostitution and related matters outside of the scope of trafficking in persons is specifically reserved for the laws and policies of individual States parties (see the interpretative notes (A/55/383/Add.1, para. 64)).

of the Protocol and States parties are free to adopt or maintain them if they wish to do so. The offence defined in article 3 of the Protocol is completed at a very early stage. No exploitation needs to take place.

34. Several additional interpretative issues specific to the definition and criminalization requirements are dealt with in part in the interpretative notes. The reference to the words “abuse of a position of vulnerability” is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved (A/55/383/Add.1, para. 63). Forms of sexual exploitation other than in the context of trafficking in persons are not covered by the Protocol (A/55/383/Add.1, para. 64). The removal of a child’s organs for legitimate medical or therapeutic reasons cannot form an element of trafficking if a parent or guardian has validly consented (A/55/383/Add.1, para. 65). References to slavery and similar practices may include illegal adoption in some circumstances (A/55/383/Add.1, para. 66).

(b) Criminalization of trafficking in persons

(i) Rationale

35. The main reason for defining the term “trafficking in persons” in international law was to provide some degree of consensus-based standardization of concepts. That, in turn, was intended to form the basis of domestic criminal offences that would be similar enough to support efficient international cooperation in investigating and prosecuting cases. Apart from direct advantages in that area, it was also hoped that the agreed definition would also standardize research and other activities, allowing for better comparison of national and regional data and giving a clearer global picture of the problem. The requirement to criminalize trafficking was intended as an element of a global counterstrategy that would also include the provision of support and assistance for victims and that would integrate the fight against trafficking into the broader efforts against transnational organized crime.

(ii) Implementation

36. Where such offences do not already exist, the adoption of criminal offences covering the full range of trafficking in persons, as well as organizing, directing and participating as an accomplice in any form of trafficking, is a central and mandatory obligation of all States parties to the

Protocol. Similar action must be taken in respect of attempts if that can be done within the basic concepts of the legal system of the country concerned. Liability must extend to both natural and legal persons, although for legal persons it can be criminal, civil or administrative liability. As discussed in section 4 below, entitled “Other general requirements for legislation criminalizing trafficking in persons”, it is important that the meaning of the Protocol, rather than the actual language used, should be reflected in national law. Generally simple incorporation of the definition and criminalization elements into national law will not be sufficient; given the nature and complexity of trafficking and other forms of transnational organized crime, drafters of legislation and legislators are advised to consider, draft and adopt the criminal offences and related provisions with great care.

37. Once it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence.

38. Article 3, subparagraphs (c) and (d), of the Protocol reflects the fact that no improper means need to be established when persons under 18 years of age are involved.¹⁶ Thus, in a prosecution in which the victim of trafficking is less than 18 years old, the prosecution must prove only action such as recruitment or transportation of the minor for the purpose of exploitation.

39. In defining and criminalizing trafficking, legislators are not bound by other international legal instruments, but a number of provisions could be taken into consideration. This is particularly true where the country concerned is a State party to another international instrument that has previously been implemented in national law. In such cases, legislators will generally wish to ensure that the various provisions use similar terminology and are consistent, to the extent that this is possible, while still implementing the required elements of the Protocol. In reconciling other obligations, drafters should bear in mind that national legislation may generally be broader or “more strict and severe” (art. 34, para. 3, of the Convention) than is actually required without affecting national conformity. To avoid inconsistencies with major principles of humanitarian and human rights law, article 14, paragraph 1, of the Protocol provides that “nothing in the Protocol shall affect the rights, obligations and responsibilities of States and

¹⁶Drafters should ensure that this does not extend to cases where parents consent to the removal of a child’s organ for legitimate medical or therapeutic purposes (see the interpretative notes (A/55/383/Add.1, para. 65)).

individuals under international law”. Provisions of other instruments that may be considered include the following:

(a) The definition of the term “international traffic in minors” in article 2, subparagraph (b), of the 1994 Inter-American Convention on International Traffic in Minors;

(b) The definition of trafficking used in article 1, paragraph 3, of the 2002 South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution;

(c) Annex 2 of the Convention based on article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention);

(d) Council of the European Union Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings.¹⁷

(c) *Criminalization of attempted trafficking in persons*

40. Paragraph 2 (a) of article 5 reads:

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

“(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;”

(i) *Rationale*

41. Generally, the negotiators were of the view that attempts to commit the basic trafficking offence should also be criminalized. However, the concept of “attempts” does not apply widely in the criminal justice systems of some States. Thus, the language “subject to the basic concepts of its legal system” was incorporated to create a general obligation on States parties to criminalize attempts, while not making this fully mandatory for States where it would be inconsistent with basic systemic requirements for the application of the crime of attempt.

¹⁷This document provides additional clarification and analysis for the assistance of European countries seeking to ratify the Protocol. However, it reflects policies agreed within Europe, which in some areas go beyond those reflected in the Protocol. Many of these may be seen as useful supplements to the Protocol, but they are not necessarily required for conformity.

(ii) *Implementation*

42. Since States developing legislation to ratify or implement the Protocol will either already have ratified the Organized Crime Convention or be in the process of doing so, drafters and legislators may wish to consider action to be taken in respect of the criminalization requirement set out in article 6, paragraph 1 (b), of the Convention (on attempted money-laundering), in which the same basic conditional obligation applies in respect of an attempt (see paras. 110-112 of the legislative guide for the implementation for the Organized Crime Convention). Where a State's criminal law system includes the limited concept of attempt, legislative consideration could be given to supplementing the basic trafficking offences with additional offences (see para. 46 below) to ensure the covering of as many scenarios as possible where offences are partially completed.

43. Generally, legislation seeking to criminalize "attempt" requires a basic intent to commit the offence as well as some concrete action in furtherance of that intent. In some countries a single act may suffice, while in others a higher standard requires every action necessary to complete the offence to have been committed. Mere preparation for an offence generally does not constitute an attempt, and some legislative language will usually be needed to allow the courts to distinguish between mere preparation and acts done in commission of the offence.

**3. *Application of mandatory provisions of the
Organized Crime Convention to
the Trafficking in Persons Protocol***

44. In establishing the offences required by the Protocols, it is important to bear in mind that each Protocol must be read in conjunction with the Organized Crime Convention. As set forth in chapter I above, the provisions of the Convention apply to the Protocol, *mutatis mutandis*, and among States parties to the Protocol the offences established in accordance with the Protocol are to be considered offences established by the Convention. Application of those provisions creates an obligation on States parties to take the following measures with respect to offences established in accordance with the Protocol, the implementation of which is discussed in greater detail in the legislative guide for the implementation of the Organized Crime Convention:

(a) *Money-laundering*. States parties must criminalize the laundering of the proceeds of a comprehensive range of trafficking offences in

accordance with article 6 of the Convention (see also paras.77-162 of the legislative guide for the implementation of the Organized Crime Convention);

(b) *Liability of legal persons.* Liability for offences must be established both for “natural” or biological persons and for “legal” persons, such as corporations, in accordance with article 10 of the Convention (see also paras. 240-260 of the legislative guide for the implementation of the Organized Crime Convention);

(c) *Offences must be “criminal” offences (except for legal persons).* Each of the provisions on offences in the Convention and the Protocol states that offences must be established as offences in criminal law. This principle applies unless the accused is a legal person, in which case the offence may be a criminal, civil or administrative offence (arts. 5, 6, 8 and 23 of the Convention; see also paras. 48-209 of the legislative guide for the implementation of the Organized Crime Convention);

(d) *Sanctions.* Sanctions adopted within domestic law must take into account and should be proportionate to the gravity of the offences (art. 11, para. 1, of the Convention; see also paras. 261-286 of the legislative guide for the implementation of the Organized Crime Convention);

(e) *Presence of defendants.* States parties are to take appropriate measures, in accordance with domestic law and with due regard to the rights of the defence, to ensure that conditions of release do not jeopardize the ability to bring about the defendant’s presence at subsequent criminal proceedings (art. 11, para. 3, of the Convention; see also paras. 261-286 of the legislative guide for the implementation of the Organized Crime Convention);

(f) *Parole or early release.* The gravity of offences established in accordance with the Protocol must be taken into account when considering the possibility of early release or parole of convicted persons (art. 11, para. 4, of the Convention; see also paras. 261-286 of the legislative guide for the implementation of the Organized Crime Convention);

(g) *Statute of limitations.* A long domestic statute of limitations period for commencement of proceedings for the Convention offences should be established, where appropriate, especially when “the alleged offender has evaded the administration of justice” (art. 11, para. 5, of the Convention; see also paras. 261-286 of the legislative guide for the implementation of the Organized Crime Convention);

(h) *Asset confiscation.* To the greatest extent possible, tracing, freezing and confiscation of the proceeds and instrumentalities of these offences should be provided for in domestic cases and in aid of other States

parties (arts. 12-14 of the Convention; see also paras. 287-340 of the legislative guide for the implementation of the Organized Crime Convention);

(i) *Jurisdiction*. The Convention requires States parties to establish jurisdiction to investigate, prosecute and punish all offences established by the Convention and any of the Protocols to which the State in question is a party. Jurisdiction must be established over all offences committed within the territorial jurisdiction of the State, including its marine vessels and aircraft. If the national legislation prohibits the extradition of its own nationals, jurisdiction must also be established over offences committed by such nationals anywhere in the world to permit the State to meet its obligation under the Convention to prosecute offenders who cannot be extradited on request owing to nationality. The Convention also encourages the establishment of jurisdiction in other circumstances, such as all cases where the nationals of a State are either victims or offenders, but does not require this (art. 15, para. 1 (mandatory jurisdiction) and para. 2 (optional jurisdiction); and art. 16, para. 10 (obligation to prosecute where no extradition due to nationality of offender); see also the discussion of jurisdictional issues in paras. 210-239 of the legislative guide for the implementation of the Organized Crime Convention);

(j) *Extradition*. The obligations of the Convention require States parties to, inter alia, treat offences established in accordance with the Protocol as extraditable offences under their treaties and laws and to submit to competent authorities such offences for domestic prosecution where extradition has been refused on grounds of nationality (art. 16 of the Convention; see also paras. 394-449 of the legislative guide for the implementation of the Organized Crime Convention);

(k) *Mutual legal assistance*. Mutual legal assistance shall be afforded to other States parties in investigations, prosecutions and judicial proceedings for such offences; numerous specific provisions of article 18 of the Convention apply (see also paras. 450-499 of the legislative guide for the implementation of the Organized Crime Convention);

(l) *Special investigative techniques*. Special investigative techniques shall be provided for the purpose of combating such offences, if permitted by basic principles of the domestic legal system of the State party concerned and, where deemed appropriate, other techniques such as electronic surveillance and undercover operations (art. 20 of the Convention; see also paras. 384-393 of the legislative guide for the implementation of the Organized Crime Convention);

(m) *Obstruction of justice*. Obstruction of justice must be criminalized in accordance with article 23 of the Convention when carried out with

respect to offences established in accordance with the Protocol (see also paras. 195-209 of the legislative guide for the implementation of the Organized Crime Convention);

(n) *Protection of victims and witnesses.* Victims and witnesses are to be protected from potential retaliation or intimidation under the provisions of articles 24 and 25 of the Convention (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention);

(o) *Cooperation of offenders.* Article 26 of the Convention requires the taking of appropriate measures to encourage those involved in organized crime to cooperate with or assist competent authorities. The actual measures are not specified, but in many States they include the enactment of provisions whereby offenders who cooperate may be excused from liability or have otherwise applicable punishments mitigated. Some States possess sufficient discretion in prosecution and sentencing to allow this to be done without legislative authority, but where such discretion does not exist, legislation that creates specific offences, establishes mandatory minimum punishments or sets out procedures for prosecution may require adjustment if the legislature decides to use mitigation or immunity provisions to implement article 26. This could be done by establishing a general rule, or on an offence-by-offence basis, as desired (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention);

(p) *Law enforcement cooperation and training and technical assistance.* Channels of communication and police-to-police cooperation shall be provided for with respect to offences established in accordance with the Protocol under article 27 of the Convention (see also paras. 500-511 of the legislative guide for the implementation of the Organized Crime Convention); and training and technical assistance under articles 29-30 of the Convention.

4. Other general requirements for legislation criminalizing trafficking in persons

45. In addition to the above measures that must be provided for with respect to offences established in accordance with the Protocol, the Convention and Protocol contain specific requirements that are to be taken into account when drafting legislation establishing criminal offences in accordance with the Protocol, in particular:

(a) *Non-inclusion of transnationality in domestic offences.* The element of transnationality is one of the criteria for applying the Convention

and the Protocols (art. 3 of the Convention), but transnationality must not be required as a proof in a domestic prosecution. For this reason, transnationality is not required as an element of domestic offences;

(b) *Non-inclusion of an organized criminal group in domestic offences.* As with transnationality, the involvement of an organized criminal group must not be required as a proof in a domestic prosecution. Thus, offences established in accordance with the Protocol should apply equally, regardless of whether they were committed by individuals or by individuals associated with an organized criminal group and regardless of whether this can be proved or not (see art. 34, para. 2, of the Convention and the interpretative notes (A/55/383/Add.1, para. 59));

(c) *Criminalization may use legislative and other measures but must be founded in law.* Both the Convention and the Protocol refer to criminalization using “such legislative or other measures as may be necessary”, in recognition of the fact that a combination of measures may be needed in some States. The drafters of those instruments were concerned, however, that the rule of law would generally require that criminal offences be prescribed by law, and the reference to “other measures” was not intended to require or permit criminalization without legislation. The interpretative notes therefore provide that other measures are additional to and presuppose the existence of a law;¹⁸

(d) *Only intentional conduct need be criminalized.* All of the criminalization requirements of the Convention and Protocols require that the conduct of each offence must be criminalized only if committed intentionally. Thus, conduct that involves lower standards, such as negligence, need not be criminalized. Such conduct could, however, be made a crime under article 34, paragraph 3, of the Convention, which expressly allows for measures that are “more strict or severe” than those provided for in the Convention. Drafters should note that the element of intention refers only to the conduct or action that constitutes each criminal offence and should not be taken as a requirement to excuse cases, in particular where persons may have been ignorant or unaware of the law establishing the offence;

(e) *Description of offences.* While article 11, paragraph 6, of the Convention states that the description of the offences is in principle reserved to the domestic law of a State party, drafters should consider the

¹⁸The same principle is applied separately to the Convention and all of its Protocols (see the interpretative notes (A/55/383/Add.1, paras. 9, 69 and 91, and A/55/383/Add.3, para. 5); see also article 15 of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex).

meaning of the provisions of the Convention and the Protocol concerning offences and not simply incorporate the language of the Protocols verbatim. In drafting the domestic offences, the language used should be such that it will be interpreted by domestic courts and other competent authorities in a manner consistent with the meaning of the Protocol and the apparent intentions of its drafters. In some cases, the intended meaning may have been clarified in the interpretative notes, which were drafted and adopted by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, which drafted the Convention and its Protocols;¹⁹

*(f) Provisions of the Convention apply to the Protocol mutatis mutandis and should be interpreted together.*²⁰

5. *Optional elements*

46. The criminalization article contains no optional elements. At the same time, it should be emphasized that not only are, for example, the recruitment and transportation of persons for purposes of exploitation significant problems, but also maintaining those forms of exploitation is itself a serious problem. Therefore, in addition to criminalizing the mandatory and central offence of trafficking, national legislatures that have not already done so may wish to consider, pursuant to article 9, paragraph 5, of the Protocol, the criminalization of other forms of exploitations of persons, especially women and children.

6. *Information resources*

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

¹⁹The formal *travaux préparatoires* for the Convention and its Protocols have not yet been published. Recognizing that this would take some time, and seeking to ensure that legislative drafters would have access to the interpretative notes during the early years of the instruments, the Ad Hoc Committee drafted and agreed on language for interpretative notes on many of the more critical issues during its final sessions. The following documents were submitted to the General Assembly, along with the finalized texts of the draft instruments: interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Convention and the first two Protocols thereto (A/55/383/Add.1), and interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Firearms Protocol (A/55/383/Add.3).

²⁰See paras. 16 and 17 above.

(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 10 (Liability of legal persons)

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 15 (Jurisdiction)

Article 16 (Extradition)

Article 18 (Mutual legal assistance)

Article 20 (Special investigative techniques)

Article 23 (Criminalization of obstruction of justice)

Article 24 (Protection of witnesses)

Article 25 (Assistance to and protection of victims)

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

Article 27 (Law enforcement cooperation)

Article 29 (Training and technical assistance)

Article 30 (Other measures: implementation of the Convention through economic development and technical assistance)

Article 34 (Implementation of the Convention)

Article 37 (Relation with protocols)

(ii) *Trafficking in Persons Protocol*

Article 1 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 14 (Saving clause)

(iii) *Other instruments*

1994 Inter-American Convention on International Traffic in Minors
Organization of American States, *Treaty Series*, No. 79
<http://www.oas.org/juridico/english/Treaties/b-57.html>
Article 2, subparagraph (b)

1995 Europol Convention
<http://www.europol.eu.int/ANNEX>
Annex 2

2002 SAARC Convention on Preventing and Combating Trafficking in
Women and Children for Prostitution
<http://www.saarc-sec.org/publication/conv-traffiking.pdf>
Article 1, paragraph 3

(b) *Other sources of information*

Council of European Union framework decision of 19 July 2002 on
combating trafficking in human beings
Official Journal of the European Communities, L 203, 1 August 2002
[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!
CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett)
Articles 1-5

7. *Examples of legislation*

48. One legislative approach already taken in drafting legislation for implementing the Trafficking in Persons Protocol has been to criminalize the recruitment, transportation, transfer, harbouring or receipt of persons for the purpose of exploitation as defined in the Protocol, without incorporating an additional element of requiring a prohibited means. This approach may simplify the process of drafting legislation. Examples of legislation in which that approach has been followed include:

United States of America, Title 18, United States Code, Section 1590
<http://uscode.house.gov/download.htm>

United States of America, Office to Monitor and Combat Trafficking
in Persons
“Model Law to Combat Trafficking in Persons”

B. Providing assistance to and protecting victims of trafficking in persons

Trafficking in Persons Protocol

“Article 6

“Assistance to and protection of victims of trafficking in persons

“1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

“2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

“(a) Information on relevant court and administrative proceedings;

“(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

“3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

“(a) Appropriate housing;

“(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

“(c) Medical, psychological and material assistance; and

“(d) Employment, educational and training opportunities.

“4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

“5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

“6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.”

“Article 7

“*Status of victims of trafficking in persons in receiving States*

“1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

“2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.”

“Article 8

“*Repatriation of victims of trafficking in persons*

“1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

“2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

“3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

“4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right

of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

“5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

“6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.”

1. Summary of main requirements

49. Each State party is obliged to fulfil the following mandatory requirements:

(a) Protect the privacy and identity of victims in appropriate cases and to the extent possible under domestic law (art. 6, para. 1);

(b) Ensure that victims receive information on relevant court proceedings in appropriate cases and have an opportunity to have their views presented and considered (art. 6, para. 2);

(c) Endeavour to provide for the physical safety of victims while they are in their territory (art. 6, para. 5);

(d) Ensure that measures exist to allow victims the opportunity to seek compensation for damages suffered (art. 6, para. 6);

(e) Facilitate and accept the return of victims who are nationals or have the right of permanent residence, with due regard for their safety (art. 8, para. 1);

(f) Verify without unreasonable delay whether a trafficking victim is a national or has the right of permanent residence and issue the necessary travel documents for re-entry (art. 8, paras. 3 and 4).

50. In addition, each State party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons (art. 6, para. 3).

2. Main elements of the articles

51. Articles 6, 7 and 8 of the Trafficking in Persons Protocol include measures that must be taken or considered in respect of trafficking victims.

Those articles should be read and implemented in conjunction with articles 24 and 25 of the Convention, which make provisions for victims and witnesses that apply to all cases covered by the Convention (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention). Essentially, the intention of the drafters of the Convention and the Protocol was to supplement the general rules for dealing with witnesses and victims with additional assistance and support specifically established for victims of trafficking. Thus, where the Trafficking in Persons Protocol applies, trafficking would be an offence covered by the Convention and victims would be covered by articles 6-8 of the Protocol and article 25 of the Convention. To the extent that the victims are also witnesses, they would also be covered by article 24 of the Convention.

52. Generally, the provisions of the Protocol setting out procedural requirements and basic safeguards are mandatory, while requirements to provide assistance and support for victims incorporate some element of discretion. The various obligations apply equally to any State party in which the victims are located, whether a country of origin, transit or destination (see the interpretative notes (A/55/383/Add.1, para. 71)). The nature of the social obligations reflects concerns about the costs and difficulties in delivering social assistance to all victims (or indeed, the general population) in many developing countries.

3. Implementation of the articles

(a) Protection of victims' identity and/or privacy (article 6, paragraph 1)

53. Article 6, paragraph 1, of the Trafficking in Persons Protocol requires that measures be taken to protect the privacy and identity of victims, including by making legal proceedings confidential, to the extent that that is possible under domestic law. Procedural laws may require amendments to ensure that courts have the authority to shield the identities or otherwise protect the privacy of victims in appropriate cases. That may include keeping the proceedings confidential, for example, by excluding members of the public or representatives of the media or by imposing limits on the publication of specific information, such as details that would permit identification of the victim.

54. These measures raise issues similar to those discussed under the obligation set out in article 24, paragraph 2 (b), of the Convention to permit

witnesses to give evidence in safety. Drafters should bear in mind that denying information to the defence must be reconciled with any applicable constitutional or other rights, including the right to confront witnesses or accusers and the right to disclose any information that might be exculpatory or assist the defence. Drafters should also consider that excluding the media or the public from legal proceedings limits the effectiveness of openness and transparency as a safeguard to ensure the propriety of the proceedings and may infringe the rights of the media to free expression. One option is to permit exclusion but to create a preference for open proceedings and require the courts to find some justification before ordering them closed.

*(b) Participation of victims in proceedings
(article 6, paragraph 2)*

55. The obligation to provide victims with information and an opportunity to present their views and concerns is mandatory but will not necessarily require legislative measures. The basic obligation to ensure that victims are permitted an opportunity to participate is set out in article 25, paragraph 3, of the Convention and will have been implemented by legislation under that article. Further legislation may not be needed; if it is needed, it may be based on that already adopted under the Organized Crime Convention. The requirement of the Convention applies to all offences covered by the Convention, which includes the offence of trafficking covered by the Protocol, once it applies to a particular State.

56. In many cases, the requirements of article 6, paragraph 2, of the Protocol can be implemented by administrative measures that require officials to provide victims with information and to furnish any practical assistance needed to support the presentation of “views or concerns”. However, legislators may consider provisions that ensure that judges cannot deny information or exclude participation on any basis other than prejudice to the rights of the defence. One means that has been employed to reconcile these interests in some States is the idea of a victim statement about the impact of the offence, which is made after a conviction but prior to the passing of sentence, when fundamental questions of guilt or innocence are no longer an issue. This is a process that is separate and distinct from calling a victim to provide evidence of guilt, which is subject to the otherwise applicable rules of evidence and safeguards against the disclosure of information that is not admissible. Drafters should also bear in mind that article 6, paragraph 4, of the Protocol requires factors such as age, gender and special needs to be taken into account (see also paras. 65-67 below). These have more

significant ramifications for the optional and non-legislative social support and assistance elements of article 6 but may also influence any legislation on access to judicial proceedings.

(c) *Physical safety of victims (article 6, paragraph 5)*

57. In considering the requirements of article 6, paragraph 5, of the Protocol, attention should be given to articles 24 and 25 of the Convention.²¹ The requirements of article 6, paragraph 5, of the Protocol are additional to the obligations contained in articles 24 and 25 of the Convention to provide assistance and protection to victims and witnesses but differ in two important aspects:

(a) The obligation to make provision for victims of trafficking is limited to measures needed to provide for their physical safety only, with most of the support measures being made discretionary by article 6, paragraph 3, of the Protocol while the measures for the protection of witnesses set forth in the Organized Crime Convention include domestic or foreign relocation and special arrangements for giving evidence as well;

(b) The obligation of the Protocol is only to “endeavour to provide” for safety, whereas the obligation of the Organized Crime Convention is to take any measures that are appropriate within the means of the State party concerned.

58. Articles 24 and 25 of the Convention both refer to the dangers represented by intimidation and retaliation for those who cooperate with authorities, whereas article 9, paragraph 1 (b), of the Protocol also refers to protection from the risk of revictimization, a significant problem in trafficking cases.

59. Generally, the legislative measures needed to implement this provision will be subsumed within those used to implement articles 24 and 25 of the Convention. Under the Protocol, each State party is obliged to actually take at least some steps that amount to an “endeavour” to protect safety.

(d) *Possibility of obtaining compensation (article 6, paragraph 6)*

60. The possibility of obtaining compensation (art. 6, para. 6, of the Trafficking in Persons Protocol) is similar but not identical to the

²¹See paras. 352-375 of the legislative guide for the implementation of the Organized Crime Convention.

corresponding obligation under the Convention (art. 25, para. 2).²² Legislation will generally be required if appropriate schemes offering at least the possibility of obtaining compensation are not already in place. The Protocol does not specify any potential source of compensation, which means that any or all of the following general options would suffice to meet the requirement of the Protocol:

(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 (that is, to order that compensation be paid by offenders to victims) 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 a result of a criminal offence.

(e) *Repatriation of victims (article 8)*

61. Legislators may find it advisable to adopt legislative guidance for officials responsible for repatriation in order to implement obligations under article 8. The following provisions could be considered:

(a) The Convention and its Protocols are primarily criminal justice instruments and, apart from criminal proceedings against offenders, there are no formal judicial or administrative proceedings in which the status of victims of trafficking as such can be determined. Legislation on immigration, criminal law statutes and other relevant legislation could be amended to incorporate the definition of “trafficking in persons” and allow those who claim to be victims an opportunity to do so in appropriate proceedings, including proceedings to deport them as illegal immigrants and proceedings in which they are prosecuted for criminal offences that they are alleged to have committed while being victims;

(b) Legislative provisions could be adopted requiring officials or tribunals responsible for matters relating to illegal immigration and deportation not to order or carry out orders of deportation of a victim while that person was (or may be) required in criminal proceedings against alleged traffickers or in relation to other offences covered by the Convention, or in civil proceedings against alleged offenders. Alternatively, legislation could

²²See paras. 368-371 of the legislative guide for the implementation of the Organized Crime Convention.

direct such officials or tribunals to verify whether any relevant proceedings were ongoing and, if so, to take the status of such proceedings into consideration before deporting a victim. Article 25, paragraph 3, of the Convention and article 6, paragraph 2 (b), of the Protocol both require States parties to ensure that victims are able to present their views and concerns at appropriate stages of proceedings against offenders, which may require the deferral of deportations until that stage has been reached (usually after conviction but prior to sentencing);

(c) Regarding the safety of the victim, legislative measures are not specified, but essentially the same provisions as may be needed to ensure the protection of witnesses in cases involving organized crime, such as powers to conceal identities, relocate the victim or issue new identity documents, could be considered here. This is similar to the requirements of article 24 of the Convention, and drafters may find it possible to rely on legislation implementing that provision as a precedent for trafficking cases. Alternatively, if such legislation is made applicable, further amendments may be unnecessary, provided that officials are given appropriate instructions. It may be necessary to specifically apply such legislation to victims of trafficking, since they may not have been witnesses at all or may have given evidence only in the State party to which they were trafficked and from which they have been repatriated. Article 8, paragraph 2, of the Protocol requires that any repatriation of victims must be with due regard for the safety of that person, and this requirement also applies to victims who have not been witnesses. It also applies to countries to whom the victim is repatriated as a national or permanent resident, even where the victim has not testified or has done so in another country;

(d) Article 8, paragraph 4, of the Protocol also requires a State party to whom one of its nationals or permanent residents is to be repatriated to issue any necessary travel or identity documents on request. This is primarily an administrative obligation, but it may require legislation to ensure that the appropriate officials or agencies are both able and obliged to issue the documents when the conditions set out in article 8 are met.

4. *Optional elements*

(a) Social assistance and protection of victims (article 6, paragraph 3)

62. Article 6, paragraph 3, of the Protocol contains an extensive list of support measures intended to reduce the suffering and harm caused to victims and to assist in their recovery and rehabilitation. As noted above,

the high costs of these benefits and the fact that they apply equally to all States parties in which victims are found, regardless of the level of socio-economic development or availability of resources, precluded these from being made obligatory. States seeking to ratify and implement the Protocol are, however, required to consider implementing these requirements and are urged to do so to the greatest extent possible within resource and other constraints. Apart from the humanitarian goal of reducing the effects on victims, there are several major practical reasons why this should be done. The first is that providing support, shelter and protection for victims increases the likelihood that they will be willing to cooperate with and assist investigators and prosecutors, a critical factor in a crime where the victims are almost always witnesses and intimidation by traffickers has repeatedly been cited as a major obstacle to prosecution. Such support and protection shall, however, not be made conditional upon the victim's capacity or willingness to cooperate in legal proceedings.²³ More generally, addressing the social, educational, psychological and other needs of victims as soon as they are discovered may ultimately prove less costly than dealing with them at a later stage. This is a particularly compelling justification where child victims are concerned, as children harmed by trafficking may later become re-victimized. Generally, legislative measures will not be needed to implement article 6, paragraph 3, of the Protocol except to the extent that legislation may be needed in some States to ensure that the necessary resources are allocated and that officials are assigned and instructed to deal with victims.

63. In some States, legislation has also been applied to regulate the activities of non-governmental organizations that deal with victims. This is neither required nor excluded by the Protocol itself, but it does raise some significant issues. A significant problem in trafficking cases is that offenders often control victims by convincing them that they will be arrested and prosecuted or deported if they approach authorities to complain or ask for help. Generally, the value of shelters, counselling and other services offered by non-governmental organizations in this area is that victims will approach them rather than State-based agencies in such cases, and the viability of such services in this role depends on their being as independent as possible from the State and in ensuring that this is known to potential victims. Thus, while some degree of regulation (for example, to establish basic security requirements and safety standards) may be needed,

²³This is also recommended in the report of the United Nations High Commissioner for Human Rights on the Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1).

legislators should consider the implications and may wish to use as much restraint as possible in developing and applying such regulations.

64. While the Protocol makes some provision for the assistance and support of victims, there is no specific requirement or process established whereby the status of victims as such can be established. In cases where steps are taken to provide assistance to victims, legislators may therefore wish to consider establishing some process or processes whereby victims or others acting on their behalf can seek such status. Generally, these might involve any or all of the following:

(a) Allowing courts or tribunals that convict traffickers or deal with trafficking in civil or other litigation to certify as such any victims who are identified during the proceedings, whether or not they actually participate in those proceedings;

(b) Allowing a judicial or administrative determination to be made based on the application of law enforcement, border control or other officials who encounter victims in the course of investigations or prosecutions; and/or²⁴

(c) Allowing a judicial or administrative determination to be made based on the application of the alleged victim personally or some representative, such as a representative of a non-governmental organization.²⁵

(b) *Special needs of children (article 6, paragraph 4)*

65. Article 6, paragraph 4, of the Protocol provides that each State party, in considering measures to assist and protect victims of trafficking, shall take into account the special needs of child victims. In a case where the age of a victim is uncertain and there are reasons to believe that the victim is a child, a State party may, to the extent possible under its domestic law, treat the victim as a child in accordance with the Convention on the Rights of the Child until his or her age is verified. In addition, a State party may also wish to consider:

(a) Appointing, as soon as the child victim is identified, a guardian to accompany the child throughout the entire process until a durable solution in the best interest of the child has been identified and implemented.

²⁴Such a process would be particularly important in obtaining the cooperation of victims, as it would enable assurances of safety to be given prior to any prosecution of the offenders.

²⁵This may require a legislative provision that is separate from the preceding one in order to require some extrinsic evidence of victimization in cases where the application is not brought or supported by law enforcement.

To the extent possible, the same person should be assigned to the child victim throughout the entire process;

(b) Ensuring that, during investigation, as well as prosecution and trial hearings where possible, direct contact between the child victim and the suspected offender be avoided. Unless it is against the best interest of the child, the child victim has the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings. During legal proceedings, the right to legal safeguards and effective protection of child witnesses needs to be strongly emphasized. Child victims who agree to testify should be accorded special protection measures to ensure their safety;

(c) Providing appropriate shelters for child victims in order to avoid the risk of re-victimization. Child victims should especially be hosted in safe and suitable accommodation, taking due account of their age and special needs;

(d) Establishing special recruitment practices and training programmes in order to ensure that individuals responsible for the care and protection of the child victims understand their needs, are gender-sensitive and possess the necessary skills both to assist children and to ensure that their rights are safeguarded.

66. In cases where child victims are involved, legislators may also wish to consider not returning those child victims unless doing so is in their best interest and, prior to the return, a suitable caregiver such as a parent, another relative, another adult caretaker, a government agency or a child-care agency in the country of origin has agreed and is able to take responsibility for the child and to provide him or her with appropriate care and protection. Relevant judicial authorities and government ministries, in cooperation with the relevant social service authorities and/or guardian, should be responsible for establishing whether or not the repatriation of a child victim is safe and should ensure that the process takes place in a dignified manner and is in the best interest of the child. Social service authorities, in cooperation with the Ministry of the Interior or other relevant authorities or agencies, where necessary, should take all necessary steps to trace, identify and locate family members and facilitate the reunion of the child victim with his or her family where that is in the best interest of the child. States should establish procedures to ensure that the child is received in the country of origin by an appointed member of the social services of the country of origin and/or the child's parents or legal guardian.

67. In those cases where return is voluntary or in the best interest of the child, each State party is encouraged to ensure that the child returns to

his or her home country in a speedy and safe manner. In situations where the safe return of the child to his or her family and/or country of origin is not possible or where such return would not be in the child's best interest, the social welfare authorities should make adequate long-term care arrangements to ensure the effective protection of the child and the safeguarding of his or her human rights. In this regard, relevant government authorities in countries of origin and of destination should develop effective agreements and procedures for collaborating with each other in order to ensure that a thorough inquiry into the individual and family circumstances of the child victim is conducted to determine the best course of action for the child.

(c) *Status of victims (article 7)*

68. There is no obligation to legislate measures relating to the status of victims. However, in several countries where measures have been adopted for the temporary or permanent residence of victims of trafficking, such as Belgium, Italy, the Netherlands and the United States of America, such measures have had a positive effect on victims coming forward to testify against traffickers and on non-governmental organizations encouraging victims to whom they provide services to report incidents to the Government.

5. Information resources

69. 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 24 (Protection of witnesses)

Article 25 (Assistance to and protection of victims)

(ii) *Trafficking in Persons Protocol*

Article 9 (Prevention of trafficking in persons)

(iii) *Migrants Protocol*

Article 16 (Protection and assistance measures)

(iv) *Other instruments*

1989 Convention on the Rights of the Child
General Assembly resolution 44/25, annex
<http://www.unhchr.ch/html/menu2/6/crc/treaties/crc.htm>
Article 7
Article 8
Article 12
Article 13
Article 40

1990 International Convention on the Protection of the Rights of All
Migrant Workers and Members of Their Families
General Assembly resolution 45/158, annex
Article 16, paragraph 2

2000 Optional Protocol to the Convention on the Rights of the Child
on the sale of children, child prostitution and child pornography
General Assembly resolution 54/263, annex II
<http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>
Article 8, paragraph 1

(b) *Other sources of information*

Council of the European Union framework decision 2001/220/JHA of
15 March 2001 on the standing of victims in criminal proceedings
Official Journal of the European Communities, L 82, 22 March 2001
http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_082/l_08220010322en00010004.pdf
Article 9, paragraph 1

Council of the European Union framework decision 2002/629/JHA of
19 July 2002 on combating trafficking in human beings
Official Journal of the European Communities, L 203, 1 August 2002
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett
Article 7

Recommended Principles and Guidelines on Human Rights and Human Trafficking

Document E/2002/68/Add.1

[http://www.unhcr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/caf3deb2b05d4f35c1256bf30051a003/\\$FILE/N0240168.pdf](http://www.unhcr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/caf3deb2b05d4f35c1256bf30051a003/$FILE/N0240168.pdf)

Proposal 2002/C 142/02 for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, adopted by the JHA Council of Ministers of the European Union (Justice and Home Affairs)

Official Journal of the European Communities, C142, 14 June 2002

http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_142/c_14220020614en00230036.pdf

Part II, section E

Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, adopted by the Committee of Ministers of the Council of Europe

<http://cm.coe.int/ta/rec/2000/2000r11.htm>

Measures 16-18 and 38-41

United Nations Children's Fund Guidelines for Protection of the Rights of Children Victims of Trafficking in South-Eastern Europe, May 2003

http://www.seerights.org/data/reports/Reports/UNICEF_Guidelines_Trafficking_Final_May03.doc

C. Prevention

Trafficking in Persons Protocol

"Article 9

"Prevention of trafficking in persons

"1. States Parties shall establish comprehensive policies, programmes and other measures:

"(a) To prevent and combat trafficking in persons; and

"(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

“2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

“3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

“4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

“5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”

“Article 11

“Border measures

“1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

“2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

“3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

“4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

“5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

“6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”

“Article 12

“Security and control of documents

“Each State Party shall take such measures as may be necessary, within available means:

“(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

“(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.”

“Article 13

“Legitimacy and validity of documents

“At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.”

1. Summary of main requirements

70. Each State party to the Trafficking in Persons Protocol is obliged to carry out the following mandatory requirements:

(a) Establish comprehensive programmes to prevent and combat trafficking in persons and to protect victims from revictimization (art. 9, para. 1);

(b) Endeavour to undertake measures such as media campaigns and social and economic initiatives to prevent and combat trafficking in

persons, including through cooperation with non-governmental organizations (art. 9, paras. 2 and 3);

(c) Take or strengthen measures to make persons less vulnerable to trafficking and to discourage the demand that fosters all forms of trafficking in persons (art. 9, paras. 4 and 5);

(d) Strengthen border controls (art. 11, para. 1);

(e) Adopt measures to prevent commercial carriers from being used to commit trafficking offences and to require commercial transportation carriers to ascertain that all passengers have the required travel documents, including sanctions for failure to do so (art. 11, paras. 2 and 3);

(f) Ensure that travel and identity documents are of such quality that they cannot be altered or misused (art. 12, subpara. (a));

(g) Prevent the unlawful issuance of a State party's travel documents (art. 12, subpara. (b)).

2. Main elements of the articles

71. The Trafficking in Persons Protocol attempts, in conjunction with article 31 of the Organized Crime Convention, to require States parties to adopt what amount to comprehensive prevention strategies. Social prevention measures, including addressing the adverse social and economic conditions believed to contribute to the desire to migrate and hence to the vulnerability of victims to traffickers, are dealt with in article 31, paragraph 7, of the Convention and article 9, paragraph 4, of the Protocol. The more direct prevention afforded by education and awareness-raising is dealt with in article 31, paragraph 5, of the Convention and article 9, paragraph 2, of the Protocol. These are worded so as to encompass campaigns intended to raise awareness of the problem and mobilize support for measures against it among the general population, as well as more targeted efforts directed at warning specific groups or even individuals believed to be at high risk of victimization.

72. In these areas, preventive measures to be taken against trafficking in persons parallel those against organized crime in general, but the Protocol contains additional requirements relating specifically to such trafficking. Recognizing that trafficking in persons could be dealt with from both the demand side and the supply side, the drafters introduced article 9, paragraph 5, into the Protocol requiring measures intended to discourage the demand for services, which fosters the exploitive element of trafficking and

hence its major source of illicit revenue. The Protocol also takes into consideration that former victims are often even more vulnerable later on, especially if they are repatriated to places where trafficking is common. In addition to the basic requirements to protect victims from intimidation or retaliation by offenders, article 9, paragraph 1 (*b*), of the Protocol also calls for measures to protect victims from being trafficked again and from other forms of revictimization.

73. Finally, the Protocol seeks to prevent trafficking in persons by requiring measures intended to make it more difficult for traffickers to use conventional means of transport and enter into countries by requiring States parties to ensure that border controls are effective and by taking measures to prevent the misuse of passports and other travel or identification documents. Those provisions, found in articles 11-13 of the Trafficking in Persons Protocol, are identical to the corresponding provisions of the Migrants Protocol, which permit States seeking to ratify both Protocols to implement those measures jointly (see also paras. 80-90 of the legislative guide for the implementation of the Migrants Protocol). Implementation of the resulting legislation may vary depending on the means preferred by smugglers or traffickers, but the underlying legislation will generally be the same.

3. Implementation

(a) General prevention measures (article 9)

74. Most of the various measures called for in article 9 of the Trafficking in Persons Protocol involve non-legal initiatives and will not require legislative authority in most countries, apart from ensuring that the basic powers and resources are allocated to the appropriate officials. Efforts such as research into the nature and extent of the problem and the conducting of mass media campaigns or other public information campaigns and the alleviation of harsh social or economic conditions may be difficult to implement in some States but will not require legislation. In some areas, legislation may indirectly be used to address the problem. Another area is demand reduction, which could be achieved in part through legislative or other measures targeting those who knowingly use or take advantage of the services of victims of exploitation. All of these obligations are mandatory, requiring States parties to adopt or strengthen measures, but only in the sense that some action on each point must be taken. The Protocol does not specify in detail the exact actions required, leaving States parties some flexibility to apply the measures that they think are most likely to be effective.

(b) Measures dealing with commercial carriers (article 11)

75. The major legislative requirement set out in article 11 of the Trafficking in Persons Protocol is that States parties must adopt legislative or other measures to prevent, to the extent possible, commercial carriers from being used by traffickers (art. 11, para. 2). The exact nature of such measures is left to the discretion of the legislature; for example, cross-border carriers would be obliged to check the travel documents of passengers (art. 11, para. 3) and subjected to appropriate sanctions if that is not done (art. 11, para. 4). Drafters of legislation to implement these requirements should consider the following points:

(a) The basic obligation to be placed on carriers is to ascertain basic possession of whatever documents may be needed to enter the State of destination, but there is no obligation to assess the authenticity or validity of the documents or whether they have been validly issued to the person who possesses them (A/55/383/Add.1, paras. 80 and 103);

(b) The obligation is to attach liability to the carriers for not having checked the documents as required. States may establish liability for having transported undocumented migrants, but the Protocol does not require this;

(c) States are also reminded of their discretion not to hold carriers liable in cases where they have transported undocumented refugees (A/55/383/Add.1, paras. 80 and 103). This is not obligatory, however, and can be dealt with in the exercise of prosecutorial discretion where available and appropriate;

(d) The obligation in article 11, paragraph 4, is to provide for sanctions, the nature of which is not specified in either the Protocol or the interpretative notes. If criminal liability is to be provided for, drafters should consider article 10 of the Convention, regarding the obligation to provide for the liability of legal persons such as corporations;

(e) In the interpretative notes, there are several references to the meaning of the phrase “travel or identity document”, which includes any document that can be used for inter-State travel and any document commonly used to establish identity in a State under the laws of that State (A/55/383/Add.1, paras. 78 and 83).

*(c) Measures relating to travel or identity documents
(article 12)*

76. Article 12 of the Trafficking in Persons Protocol requires measures to ensure the adequacy of the quality and the integrity and security of

documents such as passports. The language makes it clear that this includes such measures as technical elements to make documents more difficult to falsify, forge or alter and administrative and security elements to protect the production and issuance process against corruption, theft or other means of diverting documents.²⁶ These do not entail direct legislative obligations, except possibly to the extent that the forms of documents such as passports are prescribed by legislation that would have to be amended to raise standards or legally designate the enhanced versions as formally valid documents. Indirectly, additional supplementary offences to deal with theft, falsification and other misconduct in relation to travel or identity documents could be considered if more general offences do not already apply.

77. Several kinds of technology that are new or in the process of being developed offer considerable potential for the creation of new types of document that identify individuals in a unique manner, can be rapidly and accurately read by machines and are difficult to falsify because they rely on information stored in a database out of the reach of offenders rather than information provided in the document itself. One example is the European Image Archiving System called False and Authentic Documents (FADO).²⁷ FADO makes possible the speedy verification of documents and fast, comprehensive notification of relevant law enforcement or immigration authorities in other participating States when misuse of a document or a fraudulent document is detected. One concern raised during the negotiation of article 12 of the Trafficking in Persons Protocol was the cost and technical problems likely to be encountered by developing countries seeking to implement such systems. The development of systems and technologies that minimize the amount of sophisticated maintenance and high-technology infrastructure needed to support and maintain such systems will be critical to the success of deployment in developing countries and, in some cases it may be necessary for technical assistance to be provided pursuant to article 30 of the Organized Crime Convention.

²⁶The interpretative notes establish a relatively broad range of abuses in relation to documents. Drafters intended to cover not only the creation of false documents, but also the alteration of genuine ones and the use of valid and genuine documents by persons not entitled to do so (A/55/383/Add.1, para. 105).

²⁷Council of the European Union Joint Action 98/700/JHA of 3 December 1998, adopted by the Council on the basis of article K.3 of the Treaty on European Union concerning the setting up of a European Image Archiving System (FADO) (*Official Journal of the European Communities*, L 333, 9 December 1998) (available at <http://europa.eu.int/scadplus/leg/en/lvb/l33075.htm>).

4. Related provisions of the Organized Crime Convention and the Protocol against the Smuggling of Migrants by Land, Sea and Air

78. Legislators and drafters should note that these provisions should be read and applied in conjunction with article 31 of the Convention, which deals with the prevention of all forms of organized crime. Given the nature of migration and the smuggling of migrants, in article 31, paragraph 5, of the Convention, on the promotion of public awareness of the problems associated with organized crime, and paragraph 7, on the alleviation of social conditions that render socially marginalized groups vulnerable to organized crime, may be of particular interest in implementing the Trafficking in Persons Protocol.

79. Legislators and drafters charged with implementing both the Migrants Protocol and the Trafficking in Persons Protocol may also wish to take into consideration the fact that many similarities exist between the origins of cases involving smuggling of migrants and those involving trafficking in persons. Therefore, prevention measures may in many cases be developed and implemented jointly. For example, awareness-raising programmes to caution potential victims, including migrants, about the dangers of smuggling, trafficking and general dealings with organized criminal groups and more general efforts to alleviate social or other conditions that create pressure to migrate may be efficiently and effectively implemented on a joint basis.

5. Information resources

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

(a) Related provisions and instruments

(i) Organized Crime Convention

Article 10 (Liability of legal persons)

Article 30 (Other measures: implementation of the Convention through economic development and technical assistance)

Article 31 (Prevention)

(ii) *Smuggling of Migrants Protocol*

Chapter III (Prevention, cooperation and other measures)

(iii) *Other instruments*

2000 Optional Protocol to the Convention on the Rights of the Child
on the sale of children, child prostitution and child pornography

General Assembly resolution 54/263, annex II

<http://www.unhchr.ch/html/menu2/6/crc/treaties/opsc.htm>

Article 9, paragraphs 1 and 2

Article 10, paragraphs 1 and 3

(b) *Other sources of information*

Council of the European Union Joint Action 98/700/JHA of 3 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the setting up of a European Image Archiving System (FADO)

Official Journal of the European Communities, L 333, 9 December 1998

<http://europa.eu.int/scadplus/leg/en/lvb/l33075.htm>

Recommendation No. R (2000) 11, of 19 May 2000, on Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation, adopted by the Committee of Ministers of the Council of Europe

<http://cm.coe.int/ta/rec/2000/2000r11.htm>

Council of the European Union Directive 2001/51/EC of 28 June 2001, supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985

Official Journal of the European Communities, L 187, 10 July 2001

http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_187/l_18720010710en00450046.pdf

Article 4

Twelve Commitments in the Fight against Trafficking in Human Beings, agreed upon at the meeting of Justice and Home Affairs (JHA) Council of Ministers of the member States of the European Union and the candidate States, Brussels, 28 September 2001

Point 12

2002 Recommended Principles and Guidelines on Human Rights and
Human Trafficking

Document E/2002/68/Add.1

Guideline 7 (Preventing trafficking)

Proposal 2002/C 142/02 for a comprehensive plan to combat illegal
immigration and trafficking of human beings in the European
Union, adopted by the JHA Council of Ministers of the European
Union (Justice and Home Affairs) in Brussels on 28 February
2002

Official Journal of the European Communities, C 142, 14 June 2002
[http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_142/c_14220020614
en00230036.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_142/c_14220020614en00230036.pdf)

Paragraph 56

Brussels Declaration on Preventing and Combating Trafficking in
Human Beings, made at the European Conference on Preventing
and Combating Trafficking in Human Beings: Global Challenge
for the 21st Century, Brussels, 18-20 September 2002

[http://europa.eu.int/comm/justice_home/news/forum_crimen/2002/
workshop/brussels_decl_en.htm](http://europa.eu.int/comm/justice_home/news/forum_crimen/2002/workshop/brussels_decl_en.htm)

D. Cooperation

Trafficking in Persons Protocol

“Article 6

“Assistance to and protection of victims of trafficking in persons

“ . . .

“3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

“(a) Appropriate housing;

“(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

“(c) Medical, psychological and material assistance; and

“(d) Employment, educational and training opportunities.

“ . . . ”

“Article 8

“*Repatriation of victims of trafficking in persons*

“1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

“2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

“3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

“4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

“5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

“6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.”

“Article 9

“Prevention of trafficking in persons

“ . . .

“3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

“4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

“5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.”

“Article 10

“Information exchange and training

“1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

“(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

“(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

“(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

“2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the

prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

“3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.”

“Article 11

“Border measures

“1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

“2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

“3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

“4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

“5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

“6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”

“Article 13

“Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.”

1. Summary of main requirements

81. Pursuant to the Trafficking in Persons Protocol, each State party shall:

(a) Cooperate with each other by exchanging information concerning the means and methods of traffickers, including their use of travel documents (art. 10, para. 1);

(b) Provide or strengthen training for law enforcement, immigration and other relevant officials (art. 10, para. 2);

(c) Comply with use restrictions placed on information received from another State Party (art. 10, para. 3);

(d) Facilitate and accept the return of victims who are nationals or have the right of permanent residence, with due regard for their safety (art. 8, para. 1);

(e) Verify without unreasonable delay whether a trafficking victim is a national or has the right of permanent residence, and issue necessary travel documents for re-entry (art. 8, para. 3).

82. In addition, a State party shall:

(a) Consider implementing support measures in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society (art. 6, para. 3);

(b) Where appropriate, consider including cooperation with non-governmental organizations, other relevant organizations and other elements of civil society in establishing preventive measures in accordance with article 9 (art. 9, para. 3);

(c) Consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication, without prejudice to article 27 (Law enforcement cooperation) of the Organized Crime Convention (article 11, para. 6, of the Protocol).

2. *Main elements of the articles*

83. Various articles set out a series of specific obligations to cooperate with other States parties with respect to specific subject matter and, in two cases, obligations to cooperate with entities that are not States parties to the Trafficking in Persons Protocol. As with other requirements of the Protocol, it is essential that, both in developing and applying implementing legislation, the Protocol provisions must be read and applied together with the corresponding articles of the Convention. For example, apart from the specific obligation to assist in verifying travel or identity documents under article 13 of the Protocol, there are no articles on extradition or mutual legal assistance in the Protocol because these are already fully covered by articles 16 and 18 of the Convention.

(a) *Information-sharing (article 10)*

84. The most general obligation to cooperate with other States parties is found in article 10 of the Trafficking in Persons Protocol, which requires the sharing of information about a range of relevant matters, including the identification of possible victims and/or traffickers in transit and information about the various means used by offenders, including the misuse of travel or identity documents. As with similar elements of the Organized Crime Convention and the other Protocols, the sharing of information raises some concerns about confidentiality. The obligation to share is limited to such sharing as is in accordance with domestic law, and article 10, paragraph 3, obliges States that receive information to comply with any restrictions placed on the use of the information by the sending State party. Generally, this may include both restrictions on the cases or types of cases in which the information could be used as evidence as well as more general restrictions intended to prevent disclosure to the public or potential criminal suspects. One issue that may arise in States with constitutional or other obligations to disclose potentially exculpatory information to defence counsel in criminal cases is that absolute confidentiality cannot always be guaranteed. The negotiators of the Convention worked out a compromise formula for dealing with this scenario (see paragraphs 5 and 19 of article 18), and officials confronted with this issue may wish to review those provisions and paragraphs 500-511 of the legislative guide for the implementation of the Convention. (Similar language is also used in article 12, paragraph 5, of the Firearms Protocol.)

(b) *Repatriation of victims (article 8)*

85. Article 8, which deals with the repatriation of victims of trafficking in persons, imposes a basic obligation on States parties to facilitate and accept the repatriation of any victim who is one of their nationals or who had a right of permanent residence²⁸ in their country at the time the victim entered the country. In support of repatriation, other specific forms of cooperation are also required. States parties must assist in verifying nationality and residence status on request (art. 8, para. 3), and agree to issue any travel documents or other authorizations needed to permit the victim to travel for repatriation (art. 8, para. 4). These obligations are fully mandatory, but they are subject to any other applicable bilateral or other agreements (art. 8, para. 6) and any rights afforded to victims by applicable national laws (art. 8, para. 5) and must be undertaken by all concerned with due regard for the safety of the victims involved (art. 8, para. 2).²⁹

(c) *Border measures and travel documents
(articles 11-13)*

86. Articles 11-13 of the Trafficking in Persons Protocol are identical to the corresponding provisions of the Migrants Protocol; where a State intends to become a party to both Protocols, joint implementation is recommended, at least insofar as legislative measures are concerned (see paras. 91-112 of the legislative guide for the implementation of the Migrants Protocol). In developing and implementing such legislation, however, drafters and legislators should bear in mind that there are significant differences between smuggling and trafficking, particularly with respect to the people affected by those acts. Persons who have been trafficked are victims of crime and are generally far more vulnerable to harm, both as a result of the trafficking and the intended or subsequent exploitation and through intimidation or retaliation on the part of the traffickers. This has important implications for the implementation of national laws and particularly important implications for programmes established for the training of officials.

²⁸Regarding the meaning of “permanent residence”, see the interpretative notes (A/55/383/Add.1, para.72). Drafters should also note that the basic obligation to accept repatriation of nationals or residents under this Protocol differs from the scope of the similar obligation in the Smuggling of Migrants Protocol.

²⁹See also the general obligations to protect and assist victims in article 6, paragraph 5, of the Protocol and article 25 of the Convention, as well as chapter II, section B, of the present legislative guide and chapter IV.E of the legislative guide for the implementation of the Organized Crime Convention.

87. Under article 11, generally, States parties are required to strengthen border controls to the extent possible and, in addition to taking measures pursuant to article 27 of the Convention, to consider strengthening cooperation between border control agencies, including by the establishment of direct channels of communication (art. 11, paras. 1 and 6). Under article 12, they are required to ensure the integrity and security of their travel documents. Under article 13, they are also required to verify within a reasonable time the legitimacy and validity of documents purported to have been issued by them at the request of another State party.

(d) Obligations to cooperate with entities that are not States parties to the Trafficking in Persons Protocol (article 6, paragraph 3, and article 9, paragraph 3)

88. The Protocol obliges its States parties to cooperate with entities that are not States parties in some circumstances. In the case of providing assistance to victims (art. 6) and the establishment of prevention measures (art. 9), the importance of non-governmental organizations, other relevant organizations and other elements of civil society was recognized, and cooperation with those entities is required, where appropriate, under article 6, paragraph 3, and article 9, paragraph 3.

3. Implementation of the articles

(a) Information-sharing (article 10)

89. As with other areas of cooperation, the mere exchange of information is not likely to require legislative action. Given the nature of some of the information that may be exchanged, however, amendments may be needed to domestic confidentiality requirements to ensure that such information can be disclosed, and precautions may be needed to ensure that it does not become public as a result. The interpretative notes also raise the need for prior consultations in some cases, especially before sensitive information is shared spontaneously and not on request (A/55/383/Add.1, para. 37). Amendments may involve changes to media or public access-to-information laws, official secrecy laws and similar legislation to ensure an appropriate balance between secrecy and disclosure. As noted above, the requirements of the Trafficking in Persons Protocol regarding confidentiality are less elaborate than those of the Organized Crime Convention and the Firearms Protocol, but the issues and the possible legislative responses will generally be similar. Countries in receipt of information may face

restrictions on disclosure (for example, no disclosure except where essential as criminal evidence) or restrictions on use (for example, prohibition on use in any other cases, in cases that do not involve trafficking, or restrictions on use in non-criminal matters, such as immigration-related proceedings). Where national laws implementing article 18 of the Convention are of sufficient scope regarding the types of information covered, further amendments may not be needed to implement the Trafficking in Persons Protocol. Alternatively, amendments to expand that legislation or parallel provisions might be sufficient.

(b) Repatriation of victims (article 8)

90. The repatriation of victims of trafficking raises difficult policy issues for many Governments, but in most countries, conformity with the basic requirements involves primarily the issuance of administrative instructions to the appropriate officials and ensuring that the necessary resources are available to permit them to provide the necessary assistance. Legislative amendments might be required in some States, however, to ensure that officials are required to act (or in appropriate cases, to consider acting) in response to requests and that they have the necessary legal authority to issue visas or other travel documents when a national or resident is to be returned. In drafting such legislation, officials should bear in mind that any obligations in international law governing the rights or treatment of victims of trafficking, including those applicable to asylum-seekers, are not affected by the Trafficking in Persons Protocol or the fact that the State concerned has or will become a party to it (art. 14, para. 1, of the Protocol and the interpretative notes (A/55/383/Add.1, paras. 76, 77, 84 and 85)). Actual repatriations should preferably, but not necessarily, be voluntary, and should take into consideration the status of any ongoing legal proceedings involving the victim as such (art. 8, para. 2, of the Protocol).³⁰ The interpretative notes also indicate that repatriation should not be carried out until any relevant nationality or residency status has been ascertained (A/55/383/Add. 1, para. 113).

91. Any principal legislative measures needed to implement these requirements would involve changes to ensure that officials have adequate resources and authority to carry them out. For example, amendments might be needed to laws governing the issuance of passports or other travel or

³⁰The major concern about ongoing legal proceedings arose from cases cited by some delegations in which victims have been deported from some countries by immigration authorities before they could be called as witnesses or provide other assistance to prosecution authorities.

identification documents to ensure that they may lawfully be issued in repatriation cases and that the appropriate officials have sufficient powers to issue them based on appropriate criteria. To implement the requirements that safety, legal proceedings and other factors are taken into consideration, laws and administrative practices may require adjustment to ensure that the decision-making officials have the appropriate information and are legally obliged to consider it. An important element in some countries will be ensuring that there are adequate links between law enforcement and prosecution officials who may be developing a criminal case against traffickers and immigration authorities responsible for deporting and repatriating victims to ensure that victims are not removed before they can participate effectively in the criminal process. Where feasible, States should also consider training officials likely to be involved in the return of victims, bearing in mind the requirements to ensure that basic rights are respected (art. 8, para. 5, of the Protocol); the preservation of other rights, notably those associated with asylum-seekers, pursuant to article 14, paragraph 1; and the obligation of States parties to ensure that the provisions of the Protocol are not applied in a discriminatory manner (art 14, para. 2).³¹

92. Drafters and legislators may wish to bear in mind that the obligation to facilitate and accept the return or repatriation of victims of trafficking under article 8, paragraph 1, parallels the obligation to accept the return of persons who are smuggled migrants or whose illegal residence has been procured contrary to domestic laws adopted pursuant to the Migrants Protocol. There are similarities, but there are also some significant differences between article 8 of the Trafficking in Persons Protocol and article 18 of the Migrants Protocol (see paras. 91-112 of the legislative guide for the implementation of the Migrants Protocol), and caution is therefore advised if joint or parallel provisions are under consideration. The major differences are in the class or category of persons whose return must be facilitated and accepted. In the Trafficking in Persons Protocol (art. 8, para. 1), the category of victims of trafficking includes any person who is a national or had the right of permanent residence at the time of entry into the territory of the receiving State party whereas, in the Migrants Protocol (art. 18, para. 2), it includes only a person who is its national or who has the right of permanent residence in its territory at the time of return. Thus, a person who had residency status on entering the country of destination but who has subsequently lost it could be repatriated if he or she is also a victim of trafficking but not if he or she is a smuggled migrant or illegal resident.

³¹This obligation includes precautions against both discrimination based on the status of victims as such and generally-recognized principles of non-discrimination.

This difference arises from positions taken by delegations during the negotiations and the fact that the language of the provisions was developed at separate times, but it does not arise from any particular policy objective of the Ad Hoc Committee as a whole, which negotiated both instruments. Drafters of legislation should also note that while one obligation extends only to victims of trafficking, the other extends to all persons who have been the object of conduct proscribed by the Migrants Protocol, which includes both smuggled migrants and persons whose migration (or at least entry and exit) may have been legal but whose illegal residence was subsequently enabled by an organized criminal group.

(c) Border measures (article 11)

93. The requirement to strengthen basic border controls does not necessarily involve cooperation with other States, and such cooperation or coordination of border controls as may be needed will not generally require legislation. The strengthening of cooperation between agencies and the establishment of direct channels of communication may require some legislation to establish that the agencies concerned have the authority to cooperate and to allow the sharing of information that might otherwise be protected by confidentiality laws. Many of the issues raised by cooperation between border control agencies will be similar to those raised by cooperation between law enforcement agencies, and article 27 of the Organized Crime Convention, paragraphs 500-511 of the legislative guide for the implementation of the Convention and domestic legislation used to implement it might therefore be considered.

(d) Travel or identity documents (articles 12 and 13)

94. The establishment of specific forms or the setting or amendment of technical standards for the production of documents such as passports may be a legislative matter in some countries. In such cases, legislators will generally need to consult technical experts, either within their countries or in other States parties to determine what basic standards are feasible and how they should be formulated. Understanding technologies such as biometrics and the use of documents containing electronically stored information, for example, will be essential to the drafting of legal standards requiring the use of these technologies. Implementing the requirement to verify travel or identity documents will generally not require legislation, since virtually all States already do that on request, but it may require

resources or administrative changes to permit the process to be completed in the relatively short time frames envisaged by the Protocol.

(e) Cooperation with entities (article 6, paragraph 3, and article 9, paragraph 3)

95. States parties are required, where appropriate, to cooperate with non-governmental organizations, other relevant organizations and other elements of civil society in matters relating to the prevention of trafficking and the provision of assistance to its victims. This recognizes the knowledge possessed by such organizations and other bodies in this field, as well as the fact that many victims fear deportation or prosecution in their countries of destination and are reluctant to come forward and approach officials or agencies that are too closely associated with the State. The value and principal role of non-governmental organizations in such situations lies in their independence and ability to act on behalf of victims, often serving as a bridge between otherwise isolated victims and officials. Apart from consideration of the question of whether to regulate the organizations themselves,³² States may not require legislative amendments to implement these requirements. Officials can be instructed to cooperate using administrative means, reinforced by training if necessary. If needed, amendments might take the form of measures to ensure that organizations have the resources and security needed to perform their functions, directing officials to cooperate with and protect facilities such as victim shelters. As noted above, however, legislation that links victim organizations too closely with the State or that compromises their actual or perceived autonomy may prove counterproductive, since it may deter victims from coming forward at all.

4. Information resources

96. 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 18 (Mutual legal assistance)

Article 27 (Law enforcement cooperation)

³²For discussion of the issues relating to the use of laws to regulate such organizations, see paragraph 63 above.

(ii) *Trafficking in Persons Protocol*

Article 14 (Saving clause)

(iii) *Migrants Protocol*

Article 11 (Border measures)

Article 12 (Security and control of documents)

Article 13 (Legitimacy and validity of documents)

Article 18 (Return of smuggled migrants)

(iv) *Firearms Protocol*

Article 12 (Information)

(v) *Other instruments*

2001 Convention on Cybercrime

Council of Europe, *European Treaty Series*, No. 185

<http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>

Article 28

(b) *Other sources of information*

Guidelines for the regulation of computerized personal data files

General Assembly resolution 45/95 of 14 December 1990

Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation, adopted by the Committee of Ministers of the Council of Europe on 19 May 2000

<http://cm.coe.int/ta/rec/2000/2000r11.htm>

Twelve Commitments in the Fight against Trafficking in Human Beings, agreed upon at the meeting of Justice and Home Affairs (JHA) Council of Ministers of the member States of the European Union and the candidate States, Brussels, 28 September 2001

Point 5

Council of the European Union Decision 2002/187/JHA of 28 February 2002, on setting up Eurojust with a view to reinforcing the fight against serious crime

Official Journal of the European Communities, L 63, 6 March 2002
[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!
CELEXnumdoc&lg=EN&numdoc=32002D0187&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002D0187&model=guichett)

Article 3, paragraph 1

Proposal 2002/C 142/02 for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, adopted by the JHA Council of Ministers of the European Union (Justice and Home Affairs)

Official Journal of the European Communities, C 142, 14 June 2002
[http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_142/c_14220020614
en00230036.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_142/c_14220020614en00230036.pdf)

Part II, section E

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Document E/2002/68/Add.1

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Guideline 11

Council of the European Union framework decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States

Official Journal of the European Communities, L 190, 18 July 2002
[http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!
CELEXnumdoc&lg=en&numdoc=32002F0584](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=32002F0584)

Article 2

European Commission, “Brussels Declaration on Preventing and Combating Trafficking in Human Beings”, European Conference on Preventing and Combating Trafficking in Human Beings: Global Challenge for the 21st Century, Brussels, 18-20 September 2002
[http://europa.eu.int/comm/justice_home/news/forum_crimen/2002/
workshop/brusels_decl_en.htm](http://europa.eu.int/comm/justice_home/news/forum_crimen/2002/workshop/brusels_decl_en.htm)

Council of the European Union, *Status Report on the Follow-up on the Plan for the Management of the External Borders of the Member States of the European Union and the Comprehensive Plan to Combat Illegal Immigration* (Brussels, 10 October 2002)

http://www.ecre.org/eu_developments/controls/followup_borders_plan.pdf
Point 2.1

Annex. Reporting requirements under the Trafficking in Persons Protocol

The following is a list of the notifications that States parties are required to make to the Secretary-General of the United Nations:

Article 15. 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 16. Signature, ratification, acceptance, approval and accession

“3. This Protocol 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 Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

“4. This Protocol 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 Protocol. 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 Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.”

Article 18. Amendment

“1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol 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. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.”

“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 19. Denunciation

“1. A State Party may denounce this Protocol 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.”

Part Three

**LEGISLATIVE GUIDE FOR THE
IMPLEMENTATION OF THE PROTOCOL
AGAINST THE SMUGGLING OF MIGRANTS
BY LAND, SEA AND AIR, SUPPLEMENTING
THE UNITED NATIONS CONVENTION
AGAINST TRANSNATIONAL ORGANIZED CRIME**

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I. Background and general provisions

A. Introduction

1. Structure of the legislative guide

1. The present legislative guide for the implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex III), is very similar to the legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Assembly resolution 55/25, annex II), which appears in part two of the present document. Both contain substantive provisions that have parallel or overlapping elements and are likely to involve many of the same policy, legislative and administrative areas in the Governments of States that intend to become party to one or both Protocols. The first chapter of each of these two guides therefore begins with subject matter that is often common to both Protocols, such as technical provisions. Even if sometimes some parts may also be common, chapter II deals, for the present guide, with matters specific to the Migrants Protocol, and, for the other guide, with the Trafficking in Persons Protocol. To allow Governments to take maximum advantage of overlapping or parallel elements, cross reference is made at the end of each section to related provisions and instruments.

2. For ease of access and convenient reference, chapter II of the present legislative guide contains sections on criminalization; protection; prevention; and cooperation.

3. These general topics do not necessarily correspond to specific provisions of the Protocols, many of which have multiple aspects, including, for example, elements of prevention, protection and cooperation. Specific references to the relevant provisions of the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/255, annex I) and the Protocols thereto have been included wherever possible.

4. To facilitate further the use of the legislative guide, a common format has been used for each section wherever feasible. Each section starts by quoting the relevant provisions of the Protocol and, where appropriate, the Organized Crime Convention. This is intended to provide faster, easier access to the language of the instruments. Each section also includes some or all of the following general elements:

- (a) Introduction;
- (b) Summary of main requirements;
- (c) Main elements of the articles;
- (d) Implementation of the articles;
- (e) Related provisions;
- (f) Optional elements;
- (g) Information resources.

5. The section entitled “Summary of main requirements” provides a check list of essential requirements of the article or articles under discussion.

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

7. In sorting out the priorities and obligations under the Protocol, drafters of national legislation should take the guidelines presented below into consideration.

8. In establishing their priorities, drafters should bear in mind that the provisions of the Organized Crime Convention and its Protocols do not all have the same level of obligation. In general, provisions can be grouped into the following 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 words “States are required to” are used, the reference is to a mandatory provision. Otherwise, the language used in the legislative

guide is “required to consider”, which means that States are strongly asked to seriously 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 phrase “may wish to consider”. Occasionally, States “are required” to choose one or another option (as in the case of offences established in accordance with article 5 of the Organized Crime Convention). In that case, States are free to opt for one or the other or for both options.

10. The exact nature of each provision will be discussed as it arises. As noted above, since the purpose of the legislative guide is to promote and assist in efforts to ratify and implement the Migrants Protocol, the primary focus will be on provisions that are mandatory to some degree and the elements of those provisions which are particularly essential to ratification and implementation efforts. Elements that are likely to be legislative or administrative or are likely to fall within other such categories will be identified as such in general terms, but appear in the guide based on the substance of the obligation and not the nature of actions that may be required to carry it out, which may vary to some degree from one State or legal system to another. (It should be noted, however, that the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime made it clear that it saw the obligation to establish criminal offences as being primarily legislative in nature (see A/55/383/Add.1, para. 69).)

2. Other materials to be considered in ratifying or acceding¹ to the Protocol

11. Legislators, drafters and other officials engaged in efforts to ratify or implement the Protocol should also refer to the following:²

(a) The text of the Organized Crime Convention (General Assembly resolution 55/25, annex I);

¹Those States which have signed the Organized Crime Convention and its Protocols by the date prescribed for each instrument may become parties by filing an instrument of ratification. Those which did not sign within that period may become parties at any time once the instrument is in force by acceding to the instrument. Information about the exact requirements may be obtained from the Office of Legal Affairs of the Secretariat. For the sake of simplicity, references in this guide are mainly to “ratification”, but the possibility of joining an instrument by accession should also be borne in mind.

²Texts of all of the documents in all official languages of the United Nations, as well as other information about the legislative history of the instruments and their present status, can be obtained from the web site of the United Nations Office of Drugs and Crime (<http://www.unodc.org/>).

(b) The text of the Protocols (Assembly resolutions 55/25, annexes II and III, and 55/255, annex);

(c) The interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1);

(d) The legislative guides for the Organized Crime Convention and the other two Protocols (parts one, two and four respectively of the present document).

12. In addition to the appeal for ratification contained herein, other international bodies have also urged States to ratify the Convention and the Migrants Protocol, including:

(a) The Conference of the Ministers of Justice and of the Interior of the Group of Eight, held in Milan, Italy, on 26 and 27 February 2001 (see http://www.mofa.go.jp/policy/i_crime/high_tec/conf0102.html);

(b) The Organization for Security and Cooperation in Europe, in its decisions 1, paragraph 2, adopted at the Eighth Meeting of the Ministerial Council, held on 27 and 28 November 2000, and 6, adopted at the Ninth Meeting of the Ministerial Council, held on 3 and 4 December 2001 (see <http://www.osce.org/docs/english/chronos.htm>);

(c) The Economic Community of West African States, in its Declaration on the Fight against Trafficking in Persons, adopted by the Heads of State and Government of the Community at the 25th ordinary session of the Authority, held in Dakar on 20 and 21 December 2001;

(d) The International Organization for Migration, in its Brussels Declaration on Preventing and Combating Trafficking in Human Beings, made at the European Conference on Preventing and Combating Trafficking in Human Beings: Global Challenges for the 21st Century, held in Brussels from 18 to 20 September 2002 (see <http://www.belgium.iom.int/STOPConference/ConferencePapers/brudeclaration.pdf> (point 16));

(e) The Conference of Ministers on the Prevention of Irregular Migration in the Wider European Region, held in Rhodes, Greece, on 25 and 26 June 2003, in the framework of the Budapest Process (<http://www.icmpd.org/default.asp?alltext=Budapest&pubdatef=&pubdatet=&nav=results>).

B. Scope and technical provisions of the Protocol and its relationship with the Convention

Migrants Protocol

“Article 1

“Relation with the United Nations Convention against Transnational Organized Crime

“1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

“2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

“3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention.”

Organized Crime Convention

“Article 37

“Relation with protocols

“1. This Convention may be supplemented by one or more protocols.

“2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

“3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

“4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.”

Migrants Protocol

“Article 2

“Statement of purpose

“The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.”

“Article 4

“Scope of application

“This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.”

“Article 19

“Saving clause

“1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention³ and the 1967 Protocol⁴ relating to the Status of Refugees and the principle of non-refoulement as contained therein.

“2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”

³United Nations, *Treaty Series*, vol. 189, No. 2545.

⁴*Ibid.*, vol. 606, No. 8791.

“Article 22

“Entry into force

“1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

“2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.”

1. Main elements of the articles

*(a) Application of the Convention to the Protocol
(article 1 of the Protocol and article 37 of the Convention)*

13. Article 37 of the convention and article 1 of each of the Protocols thereto together establish the basic relationship between the Convention and the Protocols. The four instruments were drafted as a group, with general provisions against transnational organized crime (e.g. extradition and mutual legal assistance) in the parent Convention and elements specific to the subject matter of the Protocols in each of the Protocols themselves (e.g. offences established in accordance with the Protocol and provisions relating to travel and identity documents). As the Protocols are not intended to be independent treaties, to become a party to any of the Protocols a State is required to be a party to the parent Convention. This ensures that, in any case that arises under a Protocol to which the States concerned are parties, all of the general provisions of the Convention will also be available and applicable. Many specific provisions were drafted on that basis: the Convention contains general requirements for mutual legal assistance and other forms of international cooperation, for example, while requirements to render specific assistance such as the verification of travel documents or the tracing of a firearm are found only in the appropriate Protocols. Additional

rules established by the relevant articles deal with the interpretation of similar or parallel provisions in each instrument and with the application of general provisions of the Convention to offences established in accordance with the Protocol and its other provisions. The Convention and its Protocols are all international treaties.

14. Article 1 of the Protocol and article 37 of the Convention establish the following basic principles governing the relationship between the two instruments:

(a) *No State can be a party to any of the Protocols unless it is also a party to the Convention* (art. 37, para. 2, of the Convention). Simultaneous ratification or accession is permitted, but it is not possible for a State to be subject to any obligation arising from the Protocol unless it is also subject to the obligations of the Convention;

(b) *The Convention and the Protocol must be interpreted together* (art. 37, para. 4, of the Convention and art. 1, para. 1, of the Protocol). In interpreting the various instruments, all relevant instruments should be considered and provisions that use similar or parallel language should be given generally similar meaning. In interpreting one of the Protocols, the purpose of that Protocol must also be considered, which may modify the meaning applied to the Convention in some cases (art. 37, para. 4, of the Convention);

(c) *The provisions of the Convention apply, mutatis mutandis, to the Protocol* (art. 1, para. 2, of the Protocol). The meaning of the phrase “mutatis mutandis” is clarified in the interpretative notes (A/55/383/Add.1, para. 62) as “with such modifications as circumstances require” or “with the necessary modifications”. This means that, in applying provisions of the Convention to the Protocol, minor modifications of interpretation or application can be made to take account of the circumstances that arise under the Protocol, but modifications should not be made unless they are necessary and then only to the extent that is necessary. This general rule does not apply where the drafters have specifically excluded it;

(d) *Offences established in accordance with the Protocol shall also be regarded as offences established in accordance with the Convention* (art. 1, para. 3, of the Protocol). This principle, which is analogous to the mutatis mutandis requirement, is a critical link between the Protocol and the Convention. It ensures that any offence or offences established by each State in order to criminalize smuggling of migrants as required by article 6 of the Protocol will automatically be included within the scope of the basic provisions of the Convention governing forms of international cooperation

such as extradition (art. 16) and mutual legal assistance (art. 18).⁵ It also links the Protocol and the Convention by making applicable to offences established in accordance with the Protocol other mandatory provisions of the Convention. In particular, as discussed further in paragraphs 25-62 of the present guide on criminalization, obligations in the Convention concerning money-laundering (art. 6), liability of legal persons (art. 10), prosecution, adjudication and sanctions (art. 11), confiscation (arts. 12-14), jurisdiction (art. 15), extradition (art. 16), mutual legal assistance (art. 18), special investigative techniques (art. 20), criminalization of obstruction of justice (art. 23), protection of witnesses and victims (arts. 24 and 25), enhancement of cooperation (art. 26), law enforcement cooperation (art. 27), training and technical assistance (arts. 29 and 30) and implementation of the Convention (art. 34), apply equally to the offences established in accordance with the Protocol. Establishing a similar link is therefore an important element of national legislation in the implementation of the Protocol;

(e) *The Protocol requirements are a minimum standard.* Domestic measures may be broader in scope or more severe than those required by the Protocol, as long as all the obligations set forth in the Protocol have been fulfilled (art. 34, para. 3, of the Convention).

(b) *Interpretation of the Protocol (articles 1 and 19 of the Protocol and article 37 of the Convention)*

15. The interpretation of treaties is a matter for States parties. General rules for the interpretation and application of treaties are covered by the 1969 Vienna Convention on the Law of Treaties⁶ and will not be discussed in detail in the present guide. These general rules may be amended or supplemented by rules established in individual treaties, however, and a number of specific interpretative references appear in both the Convention and the Protocol. (See, for example, article 16, paragraph 14, of the Convention, which makes the principle of non-discrimination a limit on the interpretation and application of the basic obligation to extradite offenders.) The dispute settlement provisions found in all four instruments also require negotiations, followed by arbitration, as the means of resolving any disputes over interpretation or application matters (see article 35 of the

⁵In most cases, the drafters used the phrase “offences covered by this Convention” to make this link. (See, for example, article 18, paragraph 1, which sets forth the scope of the obligation to extradite offenders.)

⁶United Nations, *Treaty Series*, vol. 1155, No. 18232 (also available at <http://www.un.org/law/ilc/texts/treaties.htm>).

Convention and article 20 of the Protocol). Specific references will be raised in relation to the subject matter to which they apply, but there are also general interpretative provisions that apply to the Protocol. Pursuant to article 37 of the Convention and article 1 of the Protocol, elements of the Convention must be taken into consideration when interpreting the Protocol. These provisions involve the relationship between the two instruments and will therefore be covered in the following section. The second is found in article 19, paragraph 2, of the Protocol, which requires that the measures set forth in the Protocol be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of the Protocol.

2. Purposes of the Protocol (article 2 of the Protocol)

16. Three basic purposes of the Protocol are established by article 2: prevention and combating of smuggling of migrants; protection of the rights of smuggled migrants; and promotion of cooperation between States parties.

3. Scope of application (article 4 of the Protocol)

17. Article 4 applies the Protocol to the prevention, investigation and prosecution of the offences established in accordance with it, as well as to the protection of the rights of persons who have been the object of such offences. This is broader than the formulation used in article 3 of the Convention, in order to ensure that the Protocol will apply with respect to the rights of migrants. Article 4 then sets two basic limits on application based on the parallel provisions of articles 2 and 3 of the Convention. The Protocol only applies where the offences are transnational in nature and involve an organized criminal group, both of which are defined by the Convention (see below and articles 2, subparagraph (a), and 3, paragraph 2, of the Convention). As with the parent Convention, it was not the intention of the drafters to deal with cases where there was no element of transnationality or organized crime, but the relevant provisions of the Convention and the Protocols should be reviewed carefully, as they set relatively broad and inclusive standards for both requirements.

18. In considering transnationality, the nature of smuggling of migrants should also be taken into account. As discussed elsewhere (see paras. 25-62 below), the general principle governing transnationality is that any element

of foreign involvement would trigger application of the Convention and the relevant Protocols, even in cases where the offence(s) at hand are purely domestic. In the case of smuggling of migrants, however, without some element of cross-border movement, there would be neither migrants nor smuggling. It should be noted, however, that the same considerations do not apply to the other offences established in accordance with or provisions of the Protocol: falsification or misuse of travel or identity documents and the enabling of illegal residence would trigger application of the instruments whenever the basic requirements of articles 2 and 3 of the Convention and article 4 of the Protocol were met.

19. A further consideration is raised by the reference to “organized criminal group” in article 4 of the Protocol and by the reference to “financial or other material benefit” in article 6, paragraph 1. In developing the text, there was concern that the Protocol should not require States to criminalize or take other action against groups that smuggle migrants for charitable or altruistic reasons, as sometimes occurs with the smuggling of asylum-seekers. The reference in article 4 to “organized criminal group” means that a profit motive or link is required because the words “financial or other material benefit” are used in the definition of that term in article 2, subparagraph (a), of the Convention, and this is further underscored by the specific inclusion of the same language in the criminalization requirement in article 6.

20. It is important for drafters of national legislation to note that the provisions relating to the involvement of transnationality and organized crime do not always apply. While in general the reader should consult the legislative guide for the implementation of the Convention for details of when these criteria apply and do not apply (see paras. 16-31 and 36-76), it is important to emphasize here that, for example, article 34, paragraph 2, of the Convention specifically provides that legislatures must not incorporate elements of transnationality or organized crime into domestic offence provisions.⁷ Together, these establish the principle that, while States parties should have to establish some degree of transnationality and organized crime with respect to most aspects of the Protocol, their prosecutors should not have to prove either element in order to obtain a conviction for smuggling of migrants or any other offence established in accordance with the

⁷The only exception to this principle arises where the language of the criminalization requirement specifically incorporates one of these elements, such as in article 5, paragraph 1, of the Convention, concerning the presence of an organized criminal group. These requirements are discussed in more detail in the legislative guide for the implementation of the Convention.

Convention or its Protocols. In the case of smuggling of migrants, domestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist or cannot be proved. As another example, the first paragraphs of the extradition and mutual legal assistance articles of the parent Convention (arts. 16 and 18, respectively) set forth certain circumstances in which one or both of those elements are to be considered satisfied. Regarding the definition of “organized criminal group”, it should be noted that, according to the interpretative note to article 2, subparagraph (a), of the Convention (A/55/383/Add.1, para. 3):

“The *travaux préparatoires* should indicate that the words ‘in order to obtain, directly or indirectly, a financial or other material benefit’ should be understood broadly, to include, for example, crimes in which the predominant motivation may be 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.”

4. Implementation of the articles

21. Generally, most of the articles in this section govern the interpretation and application of the other provisions. Thus they may provide assistance and guidance to Governments, drafters and legislatures but do not themselves require specific implementation measures.

22. However, requirements that the Convention be applied, *mutatis mutandis*, to the Protocol and that the offences established in accordance with the Protocol be regarded as offences established in accordance with the Convention, may give rise to a need for implementing legislation. The measures required as a result of these “*mutatis mutandis*” and offences established in accordance with the Protocol are to be regarded as “offences established in accordance with the Convention” requirements are described in detail in the next chapter.

5. Information resources

23. For a list of humanitarian, human rights and other instruments of general application, see paragraph 28 of the legislative guide for the Trafficking in Persons Protocol.

24. Drafters of national legislation may wish to refer to the following instruments:

1949 Convention concerning Migration for Employment (revised)
Convention No. 97 of the International Labour Organization
United Nations, *Treaty Series*, vol. 120, No. 1616
<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>

1975 Convention concerning Migrations in Abusive Conditions and
the Promotion of Equality of Opportunity and Treatment of
Migrant Workers
Convention No. 143 of the International Labour Organization
United Nations, *Treaty Series*, vol. 1120, No. 17426
<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143>

1990 United Nations International Convention on the Protection of the
Rights of All Migrant Workers and Members of Their Families
General Assembly resolution 45/158, annex
http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm

1994 Programme of Action of the International Conference on Popu-
lation and Development
*Report of the International Conference on Population and Develop-
ment, Cairo, 5-13 September 1994* (United Nations publication,
Sales No. E.95.XIII.18), chap. I, resolution 1, annex
<http://www.iisd.ca/linkages/Cairo/program/p10000.html>
Chapter 10

II. Specific obligations of the Protocol

A. Definition and criminalization of the smuggling of migrants

“Article 3

“Use of terms

“For the purposes of this Protocol:

“(a) ‘Smuggling of migrants’ shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

“(b) ‘Illegal entry’ shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

“(c) ‘Fraudulent travel or identity document’ shall mean any travel or identity document:

“(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or

“(ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

“(iii) That is being used by a person other than the rightful holder;

“(d) ‘Vessel’ shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.”

“Article 5

“Criminal liability of migrants

“Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.”

“Article 6

“Criminalization

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

“*(a)* The smuggling of migrants;

“*(b)* When committed for the purpose of enabling the smuggling of migrants:

“*(i)* Producing a fraudulent travel or identity document;

“*(ii)* Procuring, providing or possessing such a document;

“*(c)* Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph *(b)* of this paragraph or any other illegal means.

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

“*(a)* Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

“*(b)* Participating as an accomplice in an offence established in accordance with paragraph 1 *(a)*, *(b)* *(i)* or *(c)* of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 *(b)* *(ii)* of this article;

“*(c)* Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

“3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 *(a)*, *(b)* *(i)* and *(c)* of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 *(b)* and *(c)* of this article, circumstances:

“*(a)* That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

“*(b)* That entail inhuman or degrading treatment, including for exploitation, of such migrants.

“4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.”

1. Summary of main requirements

25. Each State party is required to criminalize, when committed intentionally and in order to obtain a financial or other material benefit:

(a) Conduct constituting the smuggling of migrants (the procurement for material gain of the illegal entry of a person into a State party of which the person is not a national or permanent resident) (art. 6, para. 1 (a));

(b) Producing, procuring, providing or possessing fraudulent travel or identity documents when done for the purpose of enabling smuggling of migrants (art. 6, para. 1 (b));

(c) Enabling a person to remain in a country where the person is not a legal resident or citizen without complying with requirements for legally remaining by illegal means (art. 6, para. 1 (c));

(d) Organizing or directing any of the above crimes (art. 6, para. 2 (c));

(e) Attempting to commit any of the above offences, subject to the basic concepts of the State party's legal system (art. 6, para. 2 (a));

(f) Participating as an accomplice in any of the above offences, subject to the basic concepts of the State party's legal system (art. 6, para. 2 (b)).

26. Each State party is also required:

(a) To establish as aggravating circumstances for the above offences conduct that is likely to endanger or does endanger the migrants concerned or that subjects them to inhumane or degrading treatment (art. 6, para. 3);

(b) To apply numerous provisions of the Convention to this conduct, as described in section 3 below (art. 1, paras. 2 and 3).

2. Main elements of the articles

(a) *Definition of "smuggling of migrants" and the distinctions between illegal migration, smuggling of migrants and trafficking in persons*⁸

27. The Trafficking in Persons Protocol can be seen as part of a continuum of instruments that deal with trafficking and related activities, in particular slavery. These reflect the basic facts that both trafficking and

⁸See also chapter II, sect. A, "Definition and criminalization of Trafficking in Persons", of the legislative guide for the implementation of the Trafficking in Persons Protocol, in particular, paras. 31-34, for a discussion of the definition of the term "trafficking in persons".

legal responses to it have been evolving for a very long time. The problem of smuggling of migrants, on the other hand, has similarities with that of trafficking in persons, but it is relevant in a legal sense to address the issue in a separate protocol. The Migrants Protocol is more novel and unique, reflecting relatively new concerns that have arisen about the smuggling of migrants as a criminal activity distinct from legal or illegal activity on the part of migrants themselves. The use of criminal and other laws to exercise control over immigration is not new and many States have offences relating to illegal entry or illegal residence. The criminal exploitation of migration and the generation of illicit profits from the procurement of illegal entry or illegal residence and the responses found in that Protocol, however, do represent a relatively new development.

28. Two basic factors are essential to understanding and applying the Migrants Protocol. The first is the intention of the drafters that the sanctions established in accordance with the Protocol should apply to the smuggling of migrants by organized criminal groups and not to mere migration or migrants, even in cases where it involves entry or residence that is illegal under the laws of the State concerned (see articles 5 and 6, paragraph 4, of the Protocol). Mere illegal entry may be a crime in some countries, but it is not recognized as a form of organized crime and is hence beyond the scope of the Convention and its Protocols. Procuring the illegal entry or illegal residence of migrants by an organized criminal group (a term that includes an element of financial or other material benefit), on the other hand, has been recognized as a serious form of transnational organized crime and is therefore the primary focus of the Protocol.

29. The second is the relationship between the conduct defined as trafficking in persons and the smuggling of migrants in the respective Protocols. These were defined separately and dealt with in separate instruments primarily because of differences between trafficked persons, who are victims of the crime of trafficking and, in many cases, of other crimes as well, and smuggled migrants. While it was seen as necessary to deal with smuggling and trafficking as distinct issues, there is actually a substantial overlap in the conduct involved in the two offences. In many cases, smuggled migrants and victims of trafficking are both moved from one place to another by organized criminal groups for the purpose of generating illicit profits.

30. The major differences lie in the fact that, in the case of trafficking, offenders recruit or gain control of victims by coercive, deceptive or abusive means and obtain profits as a result of some form of exploitation of the victims after they have been moved, commonly in the form of

prostitution or coerced labour of some kind. In the case of smuggling, on the other hand, migrants are recruited voluntarily and may be to some degree complicit in their own smuggling. While intended exploitation is a necessary element for the Trafficking in Persons Protocol, it is not the case for the Migrants Protocol; instead, intended exploitation may be considered one of the aggravating circumstances for the Migrants Protocol. In addition, the illicit profits are derived from the smuggling itself. One further difference is that, as a criminal offence covered by the Organized Crime Convention, trafficking must be criminalized whether it occurs across national borders or entirely within one country. Smuggling, on the other hand, contains a necessary element of transnationality, which requires illegal entry from one country to another.⁹

(b) *Fully mandatory requirements*

(i) *Offence of smuggling migrants (article 3, subparagraph (a), and article 6, paragraph 1)*

31. Article 6, paragraph 1 (a), requires States parties to criminalize the smuggling of migrants, which is defined in article 3, subparagraph (a). The definition of “smuggling” in turn subsumes procuring “illegal entry”, which is defined in article 3, subparagraph (b).

32. As noted above, the intention of the drafters was to require legislatures to create criminal offences that would apply to those who smuggle others for gain, but not those who procure only their own illegal entry or who procure the illegal entry of others for reasons other than gain, such as individuals smuggling family members or charitable organizations assisting in the movement of refugees or asylum-seekers (see A/55/383/Add.1, para. 92).

33. Incorporating these elements and exclusions, the conduct required to be criminalized is the procurement of the entry of a person into a country, where that person is not a national or permanent resident of the country and where any or all of the requirements for entry of persons who are not nationals or permanent residents have not been complied with. (The term

⁹It should also be noted that, while the Trafficking in Persons Protocol requires only that trafficking itself be criminalized, the Migrants Protocol requires also the criminalization of both the procurement of illegal entry (i.e. smuggling) and the procurement of legal residence by illegal means, even if the actual entry that preceded it was legal. The Protocol also establishes some further offences in relation to documents. (See the criminalization requirements in paras. 31-50), and articles 3, subparagraph (a), and 6 of the Protocol.)

“permanent” resident is also used in article 18 (Return of smuggled migrants) and its meaning is clarified in that context as meaning “long-term, but not necessarily indefinite residence” (see A/55/383/Add.1, para. 112).) Generally, this will involve cases where legal entry requirements such as obtaining visas or other authorizations have not been complied with, or where visas or similar documents had been obtained or used in some illegal manner that made them invalid. (Common examples may include the forgery or falsification of documents, obtaining genuine documents using false information, and the use of genuine and valid documents by persons to whom they were not issued.)

34. The drafters intended that cases in which valid documents were used improperly and the entry was technically legal would be dealt with by the offence of enabling illegal residence (art. 6, para. 1 (c), of the Protocol). The exact boundary between these offences may well vary from country to country, depending on laws such as those governing the validity of documents. (The most commonly occurring scenario is where smugglers obtain a visitor’s permit that is valid at the time of entry and the migrant remains illegally after it expires (illegal residence offence). In most countries, cases where a valid visa was used by a person other than the one for whom it was issued, on the other hand, would be treated as falling under the illegal entry offence.) In formulating the two offences, exactly how they are formulated or where the boundary is drawn is not critical for conformity with the Protocol. What is essential, both for conformity and effective enforcement, is that drafters ensure that no gaps are created and that no conduct covered by the Protocol is left uncriminalized.

35. As noted above, the general standard of the Convention and Protocols for offences is that they must have been committed intentionally. Applied to the smuggling offence, this actually entails two requirements: there must have been some primary intention to procure illegal entry and there must have been a second intention, that of obtaining a financial or other material benefit.

(ii) *Offence of enabling illegal residence*
(article 6, paragraph 1 (c))

36. The second principal offence required by the Protocol to be criminalized is that of enabling a person to remain in a State where the person is not entitled to remain by virtue of status (national or permanent resident) or by virtue of having met alternative requirements, such as the

issuance of a visa or permit of some kind by the means mentioned in article 6, paragraph 1 (*b*), or any other illegal means. As noted above, the intention in establishing this offence was to include cases where the smuggling scheme itself consisted of procuring the entry of migrants using legal means, such as the issuance of visitors' permits or visas, but then resorting to illegal means to enable them to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorizations to enter.

37. The conduct required to be criminalized consists simply of committing any act that amounts to enabling illegal residence, where the resident or residents in question lack the necessary legal status or authorizations. The requirement specifically includes the document offences set forth in subparagraph (*b*), but could also include other conduct, to be determined by each State party by its domestic legislation.

38. The intent element is the same as for the previous offence: there must have been the intention to commit whatever act is alleged as having enabled illegal residence and the further intent or purpose of obtaining some financial or other material benefit.

*(iii) Offences in relation to travel or identity documents
(article 6, paragraph 1 (b))*

39. To support the two basic offences of smuggling and enabling illegal residence, article 6, paragraph 1 (*b*), of the Protocol also establishes a series of offences in relation to travel or identity documents. The term "fraudulent travel or identity document" is defined in article 3, subparagraph (*c*), and further clarified by the interpretative notes (A/55/383/Add.1, para. 89).

40. The conduct required to be criminalized is the producing and the procuring, providing or possessing of a fraudulent travel or identity document. (The separation of the requirements in article 6, paragraph 1, into subparagraphs (*b*) (i) (ii) was done to facilitate the drafting of paragraph 2, which distinguishes between fully mandatory and conditional obligations to criminalize attempts, participation as an accomplice and organizing or directing others to commit the offences. It has no bearing on the basic obligation to criminalize the principal conduct involved.) Drafters of national legislation could establish a separate offence in respect of each of these, or combine them in a single provision, leaving the specification of the actual conduct alleged for the drafters of criminal charges or indictments.

41. As above, the same basic element of intent applies: there must have been the intention to produce, procure, provide or possess the document, with the added intention or purpose of obtaining a financial or other material benefit. In the case of the document offences, however, there must also have been the intention or purpose of enabling the smuggling of migrants. This is an additional safeguard against criminalizing those who smuggle themselves (see A/55/383/Add.1, para. 93), but, taken literally, it also excludes those who commit the document offences for the purpose of enabling illegal residence as opposed to procuring illegal entry. It should be noted, however, that legislatures implementing the Protocol can apply the document offences to both of the principal offences if they wish, in accordance with article 34, paragraph 3, of the Convention. Apart from expanding the application of the legislation to additional conduct associated with smuggling of migrants, such an approach would have the advantage of reducing litigation on the issue of whether illicit entry or illicit residence was involved in specific cases, since the criminal liability would be the same in either case.

42. The definition of the term “fraudulent travel or identity document” then adds several further factual elements that must be taken into consideration when formulating the offence or offences:

(a) The document can either be “falsely made” from nothing or it can be a genuine document that has been “altered in some material way”;

(b) “Falsely made” should include both documents that are forged or fabricated from nothing and documents that consist of genuine document forms, but information that is not accurate and put onto the form by someone not authorized to do so or who is not authorized to issue the document in question;

(c) Whether a document is “falsely made” or “improperly issued” will depend in some cases on how national law treats cases where an official acts illegally or without authorization. If a consular official issues a travel document beyond his or her powers, systems that would treat this as non-issuance would consider the document as having been made by someone not authorized to do so, falling under subparagraph (i). Systems that considered the basic issuance to have occurred would see the same document as having been “improperly issued” under subparagraph (ii). What is important is that drafters of national legislation consider the approach taken by national law and ensure that all of the possible scenarios result in documents that are treated as “fraudulent” and that there are no gaps;

(d) Documents that have been altered must have been changed in some way that is material to the other offences established in accordance

with the Protocol, such as changing the identity or photograph of the holder or the dates for which it was valid. If the document is “altered”, this must have been by someone not authorized to do so;

(e) “Fraudulent” documents also include documents that are genuine, but improperly issued through misrepresentation, corruption or duress. Here also the approach of drafters will depend to some degree on how domestic law treats cases where an official acts illegally or without authority;

(f) Finally, “fraudulent” documents include papers that are formally valid and have been validly issued, but are being used by someone other than the person to or for whom they were issued, whether the document in question has been altered (e.g. by changing a photograph) or not;

(g) The interpretative notes clarify that the term “travel document” includes any document needed to enter or leave a State by the laws of that State (A/55/383/Add.1, para. 89). This could include the laws of any State involved in a specific case. For example, a passport issued by one State could contain a visa issued by another and either or both could be required to both leave one State and enter another, making the laws of both applicable. An “identity document” is a document used to identify persons by and in accordance with the laws of the State that issued or is purported to have issued it. It should be noted that article 13 of the Protocol, which is parallel to the same article of the Trafficking in Persons Protocol, requires States parties to verify within a reasonable time the legitimacy and validity of documents issued by or purported to have been issued by them. Drafters may wish to consider similar language in provisions implementing the offences in relation to documents under the Migrants Protocol.

(iv) Attempts, participation as an accomplice, organizing or directing others (article 6, paragraph 2)

43. Article 6, paragraph 2, also requires the extension of criminal liability to those who attempt to commit or organize or direct others to commit any offence established in accordance with the Protocol or who are accomplices to such offences. Some of these requirements parallel elements of the criminalization requirements of articles 5, 6 and 8 of the Convention and of the other two Protocols and drafters may wish to consider legislation implementing parallel requirements to ensure consistency where appropriate.

44. Not all legal systems incorporate the concept of criminal attempts, and the obligation to criminalize attempts to commit any offence established in

accordance with the Protocol is therefore subject to the qualification “subject to the basic concepts of its legal system”. Similarly, not all systems could provide for the criminalization of participation as an accomplice in an offence that amounted to procuring, providing or possessing a fraudulent document and that requirement was therefore limited in the same way. These subjects will therefore be discussed in paragraphs 51-53 below.

(v) *Aggravating circumstances (article 6, paragraph 3)*

45. Without adding further offences, States parties are also required to incorporate into some of the offences established in accordance with the Protocol specific circumstances that would ensure that cases in which they have occurred are taken more seriously. The obligation is fully mandatory for all offences except those of participating as an accomplice and organizing or directing others to commit offences, which are made subject to the basic concepts of the legal system of the implementing State party (see paras. 51-53 below).

46. Generally, legislatures are required to make smuggling offences that involve dangerous or degrading circumstances into aggravating circumstances. Depending on the legal system, this could take the form of either complete parallel offences, such as aggravated smuggling, or of provisions that require the courts to consider longer or more severe sentences where the aggravating conditions are present and the accused have been convicted of one or more of the basic offences established in accordance with the Protocol. The fundamental obligation is to ensure that, where the aggravating circumstances are present, offenders are subjected to at least the risk of harsher punishments.

47. In most systems subjecting offenders to a harsher punishment where the specified circumstances have existed will require that those circumstances be established as a matter of fact to a criminal standard of proof. Depending on domestic law, drafters may wish to consider making specific provision on what must be proved, to what standard and at what stage of the proceedings, as well as establishing any relevant inferences or legal or evidentiary presumptions.

48. The most common occurrence towards which this requirement is directed is the use of modes of smuggling, such as shipping containers, that are inherently dangerous to the lives of the migrants, but legislation should be broad enough to encompass other circumstances, such as cases where fraudulent documents create danger or lead to inhuman or degrading treatment.

49. “Inhuman or degrading treatment” may include treatment inflicted for the purposes of some form of exploitation. It should be noted that if there is no consent or if there is consent that has been vitiated or nullified as provided for in article 3, subparagraphs (b) or (c), of the Trafficking in Persons Protocol, the presence of exploitation in what would otherwise be a smuggling case will generally make the trafficking offence applicable if the State party concerned has ratified and implemented that Protocol. The interpretative notes indicate that the reference to exploitation here is without prejudice to that Protocol (A/55/383/Add.1, para. 96).

(vi) *Legal status of migrants (articles 5 and 6, paragraph 4)*

50. As noted above, the fundamental policy set by the Protocol is that it is the smuggling of migrants and not migration itself that is the focus of the criminalization and other requirements. The Protocol itself takes a neutral position on whether those who migrate illegally should be the subject of any offences: article 5 ensures that nothing in the Protocol itself can be interpreted as requiring the criminalization of mere migrants or of conduct likely to be engaged in by mere migrants as opposed to members of or those linked to organized criminal groups. At the same time, article 6, paragraph 4, ensures that nothing in the Protocol limits the existing rights of each State party to take measures against persons whose conduct constitutes an offence under its domestic law.

(c) *Conditional requirements*

(i) *Attempts (article 6, paragraph 2 (a))*

51. As noted above, not all legal systems make provision for the criminalization of cases in which an unsuccessful attempt has been made to commit the offence. Of those States that do criminalize attempts, most require that some fairly substantial course of conduct be established before there can be a conviction. In some cases one or more positive acts must be established, while in others prosecutors must establish that the accused has done everything possible to complete the offence, which failed for other reasons. The fact that the offence subsequently turns out to have been impossible (e.g. cases where the person being smuggled was deceased, non-existent or a law enforcement officer) is generally not considered a defence in cases of attempt. To assist in clarifying the range of approaches, the interpretative notes indicate that attempts should be “understood in some

countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law” (A/55/383/Add.1, para. 95; see also para. 70, concerning the Trafficking in Persons Protocol, and para. 6, dealing with the same issue for the Firearms Protocol). The option of prosecuting cases of attempt can be an effective measure, in particular with respect to crimes such as trafficking in persons and the smuggling of migrants, which are committed over relatively long periods and are sometimes interrupted by law enforcement or other authorities before completion. Where it is not possible to criminalize attempts, drafters and legislators may wish to consider other means of reinforcing the offence provisions, such as criminalizing individual elements of the offences that could still be prosecuted when the offence established in accordance with the Protocol was not complete. One example of this could be offences such as transporting or concealing migrants for the purpose of smuggling them, which could be prosecuted even where the smuggling was not completed or unsuccessful.

(ii) Participation as an accomplice in procuring, providing or possessing a fraudulent document (article 6, paragraphs 1 (b) (ii) and 2 (b))

52. Participating as an accomplice to some of the document offences was also made subject to the basic concepts of each State party’s legal system, primarily because of concerns in some systems about overly broad legislation and whether one could be made an accomplice to offences such as possession. There were also concerns about viability in view of some of the defined meanings of “fraudulent document” and whether one could, for example, be an accomplice to the possession of a document that only became a “fraudulent document” when actually used by a person to whom it was not issued (see art. 3, subpara. (c) (iii)). The same concerns did not arise with respect to the actual production of such documents and the obligation to criminalize being an accomplice to this offence is unqualified.

(iii) The designation of organizing, directing and participating as an accomplice as an aggravating circumstance to the principal offences (article 6, paragraphs 3 and 2 (b) and (c))

53. The intention in including article 6, paragraph 3, in the Protocol was to increase deterrence where offences established in accordance with the Protocol were committed in ways that either involved degradation or

danger to the migrants involved. Generally, there were concerns that, while the primary actors in the offence would be in a position to exercise control over whether dangerous or degrading conditions were present or not, accomplices and others not directly involved in the offences would in many cases not be in such a position. This in turn triggered constitutional and other concerns about the possibility of imposing aggravated offences or sanctions for circumstances beyond the control of those accused of the basic crime, and the obligation was therefore qualified to allow States in that position to avoid such problems.

(d) *Purpose of the articles*

54. The specific rationales underlying most of the foregoing provisions have been set out in the course of the explanations of the provisions themselves. Generally, the purpose of the Protocol is to prevent and combat the smuggling of migrants as a form of transnational organized crime, while at the same time not criminalizing mere migration, even if illegal under other elements of national law. This is reflected both in article 5 and article 6, paragraph 4, as noted above, and in the fact that the offences that might otherwise be applicable to mere migrants, and especially the document-related offences established by article 6, paragraph 1 (b), have been formulated to reduce or eliminate such application. Thus, for example, a migrant caught in possession of a fraudulent document would not generally fall within domestic offences adopted pursuant to paragraph 1 (b), whereas a smuggler who possessed the same document for the purpose of enabling the smuggling of others would be within the same offence.

55. More generally, the criminalization requirements are central to both the Protocol and the Convention, serving not only to provide for the deterrence and punishment of the smuggling of migrants, but as the basis for the numerous forms of prevention, international cooperation, technical assistance and other measures set out in the instruments. The purpose of the Protocol is expressly given (in part) as the prevention and combating of one offence—the smuggling of migrants—and the application of the Protocol is expressly directed at the prevention, investigation and prosecution of the offences established in accordance with the Protocol (see arts. 3 and 4). At the same time, as with the Trafficking in persons Protocol, it must be borne in mind that the “commodity” being smuggled or trafficked consists of human beings, raising human rights and other issues not associated with other commodities. In the case of the criminalization requirements of the Migrants Protocol, the major implications of this can be seen in the

language that ensures that offences should not apply to groups that smuggle migrants or asylum-seekers for reasons other than “financial or other material benefit”.

(e) Implementation of the articles

56. Implementation of the criminalization requirements will require legislative measures, except in cases where the necessary provisions already exist, a point underscored by the interpretative notes, which state that any other measures taken to implement the requirements presuppose the existence of a law (A/55/383/Add.1, para. 91; parallel requirements were established for the Convention and the other two Protocols). As noted above, the language of the Protocol itself is directed at States parties on the assumption that they will draft and adopt the necessary legislation to ensure that, taken as a whole, national laws will conform to the requirements of the Protocol. The language used was not intended for enactment or adoption verbatim, and will generally not be sufficiently detailed or specific to support effective investigations and prosecutions that are both effective and consistent with basic human rights and procedural safeguards. Identical terminology may be interpreted and applied differently in accordance with different legal systems and practices. Drafters and legislators should therefore bear in mind that it is the meaning of the Protocol and not the literal language that matters.

57. In developing the necessary offences, drafters should ensure that the full range of conduct covered by the relevant provisions is criminalized. This may be done using single offences or multiple offences, although where the latter approach is taken, care should be taken to ensure that no gaps or inconsistencies are created that might leave some conduct not covered. As noted above, drafters and legislators will also generally wish to take into consideration the formulation and application of any offences adopted to implement the Convention and the Trafficking in Persons Protocol, as well as other relevant offences, especially those directed at organized crime. Where pre-existing offences overlap with conduct covered by the Protocol, legislators will wish to consider whether such offences are adequate and, if not, whether to proceed by amendments to expand them, their repeal and replacement with entirely new offences or the adoption of supplementary offences that cover any conduct covered by the Protocol that has not already been criminalized. Generally, the use of supplementary offences will be the most complex option, but offers the advantage of leaving existing offences and, where applicable, case law based on those

offences intact. The option of creating entirely new offences offers the advantage of reforming and streamlining legislation, but also may lead to greater uncertainty as to how the new offences will be interpreted and applied.

58. Finally, as noted above, the Protocol sets only a minimum requirement for the range of conduct that must be criminalized and how seriously it should be punished, leaving it open to States parties to go further in both aspects. The adoption of further supplementary offences or offences that are broader in scope than those required may well enhance the effectiveness of prevention, investigation and prosecution in cases of smuggling of migrants or more general matters of organized crime. This is true not only in cases where domestic legal systems cannot deal with matters such as attempts (see above) but in other areas as well. In many cases, it may not be possible to prove all of the elements of offences such as smuggling, but more narrowly framed supplementary offences could still be prosecuted and used as the basis for domestic investigations. It should be borne in mind, however, that offences that go beyond the scope of the requirements of the Protocol would not be offences covered by the Convention such as to trigger the various requirements of the Convention and Protocol for international cooperation. States may cooperate voluntarily in such cases, but would not be required to do so by the instruments themselves.

59. The Protocol is silent as to the punishment or range of punishments that should be applied to the various offences, leaving the basic requirement of article 11, paragraph 1, of the Convention, to the effect that sanctions should take into account the gravity of the offence, intact. In the case of legal persons, the principle of article 10, paragraph 4, of the Convention that sanctions should be effective, proportionate and dissuasive, also applies. Beyond this, legislators will generally wish to consider the punishments applied in national law for other offences seen as being of equivalent seriousness and the seriousness of the specific problem of smuggling of migrants and the more general (and often more serious) problem of transnational organized crime into account. In cases where legislatures decide to apply mandatory minimum punishments, the possibility of excuse or mitigation for cases where offenders have cooperated with or assisted competent authorities should also be considered as a possible means of implementing article 26 of the Convention. In addition to the basic punishments of fines and imprisonment, drafters should also bear in mind that articles 12-14 of the Convention also require the availability of measures to search for, seize and confiscate property or assets that are the proceeds of offences established in accordance with the Protocol, equivalent assets or

property, or other property that was used in or destined for use in such offences. (See article 13, paragraphs 1-4, of the Convention for the full range of property covered; apart from basic proceeds, property used or destined for use in smuggling could include items such as air tickets, motor vehicles, aircraft or vessels.) As an example, the European Union has required its Member States to provide for maximum punishments of eight years' imprisonment (six years in some circumstances) for cases where smuggling was for financial gain, involved a criminal organization or endangered the lives of any persons, as well as for the confiscation of instrumentalities such as means of transport. (See the directive of the Council of the European Union 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence (*Official Journal of the European Communities*, L 328, 5 December 2002), in particular its article 3, relating to sanctions.)

3. Application of mandatory provisions of the Convention to the Protocol

60. In establishing the offences required by the Protocols, it is important to bear in mind that each Protocol must be read in conjunction with the parent Convention. As set forth in the prior section, the provisions of the Convention apply to the Protocol, *mutatis mutandis*, and among States parties to the Protocol the offences established in accordance with the Protocol are to be considered offences established in accordance with the Convention. Application of these provisions creates an obligation upon States parties, *inter alia*, to take the following measures with respect to the offences established in accordance with the Protocol, the implementation of which is discussed in greater detail in the legislative guide for the implementation of the Organized Crime Convention (part one of the present document):

(a) *Money-laundering.* States parties must criminalize the laundering of the proceeds of a comprehensive range of trafficking offences in accordance with article 6 of the Convention (see also paras. 77-162 of the legislative guide for the implementation of the Convention);

(b) *Liability of legal persons.* Liability for offences must be established both for natural or biological persons and for legal persons, such as corporations, in accordance with article 10 of the Convention (see also paras. 240-260 of the legislative guide for the implementation of the Convention);

(c) *Offences must be criminal offences (except for legal persons).* Each of the provisions on offences in the Convention and the Protocol states that offences must be established as offences in criminal law. This principle applies unless the accused is a legal person, in which case the offence may be a criminal, civil or administrative offence (arts. 5, 6, 8 and 23 of the Convention) (see also paras. 48-209 of the legislative guide for the implementation of the Convention);

(d) *Sanctions.* Sanctions adopted within domestic law must take into account and should be proportionate to the gravity of the offences (art. 11, para. 1, of the Convention) (see also paras. 261-286 of the legislative guide for the implementation of the Convention);

(e) *Presence of defendants.* States parties are to take appropriate measures in accordance with domestic law and with due regard to the rights of the defence, to ensure that conditions of release do not jeopardize the ability to bring about the defendant's presence at subsequent criminal proceedings (art. 11, para. 3, of the Convention) (see also paras. 261-286 of the legislative guide for the implementation of the Convention);

(f) *Parole or early release.* The gravity of offences established in accordance with the Protocol shall be taken into account when considering the possibility of early release or parole of convicted persons (art. 11, para. 4, of the Convention) (see also paras. 261-286 of the legislative guide for the implementation of the Convention);

(g) *Statute of limitations.* A long domestic statute of limitations period for commencement of proceedings for the Convention offences should be established, where appropriate, especially when the alleged offender has evaded the administration of justice (art. 11, para. 5, of the Convention) (see also paras. 261-286 of the legislative guide for the implementation of the Convention);

(h) *Asset confiscation.* To the greatest extent possible, tracing, freezing and confiscation of the proceeds and instrumentalities of these offences should be provided for in domestic cases and in aid of other States parties. (arts. 12-14 of the Convention) (see also paras. 287-340 of the legislative guide for the implementation of the Convention);

(i) *Jurisdiction.* The Convention requires States parties to establish jurisdiction to investigate, prosecute and punish all offences established by the Convention and any of the Protocols to which the State in question is a party. Jurisdiction must be established over all offences committed within the territorial jurisdiction of the State, including its marine vessels and aircraft. If the national legislation of a State prohibits the extradition of its own nationals, jurisdiction must also be established over offences

committed by such nationals anywhere in the world, in order to permit the State to meet its obligation under the Convention to prosecute offenders who cannot be extradited on request owing to their nationality. The Convention also encourages the establishment of jurisdiction in other circumstances, such as all cases where the nationals of a State are either victims or offenders, but does not require this (arts. 15, para. 1 (mandatory jurisdiction); 15, para. 2 (optional jurisdiction); and 16, para. 10 (obligation to prosecute where no extradition due to nationality of offender); see also the discussion of jurisdictional issues in paras. 210-239 of the legislative guide to the Convention);

(j) *Extradition.* The obligations of the Convention require States parties to treat offences established in accordance with the Protocol as extraditable offences under their treaties and laws and to submit to competent authorities such offences for domestic prosecution where extradition has been refused on grounds of nationality (art. 16 of the Convention) (see also paras. 394-449 of the legislative guide for the implementation of the Organized Crime Convention);

(k) *Mutual legal assistance.* Mutual legal assistance shall be afforded to other States parties in investigations, prosecutions and judicial proceedings for such offences; numerous specific provisions of article 18 of the Convention apply (see also paras. 450-499 of the legislative guide for the implementation of the Organized Crime Convention);

(l) *Special investigative techniques.* Special investigative techniques shall be provided for to combat such offences, if permitted by basic principles of the domestic legal system of the State party concerned and, where deemed appropriate, other techniques such as electronic surveillance and undercover operations (art. 20 of the Convention) (see also paras. 384-393 of the legislative guide for the implementation of the Organized Crime Convention);

(m) *Obstruction of justice.* Obstruction of justice must be criminalized in accordance with article 23 of the Convention when carried out with respect to offences established in accordance with the Protocol (see also paras. 195-209 of the legislative guide for the implementation of the Organized Crime Convention);

(n) *Protection of victims and witnesses.* Victims and witnesses are to be protected from potential retaliation or intimidation under the provisions of articles 24 and 25 of the Convention (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention);

(o) *Cooperation of offenders.* Article 26 of the Convention requires the taking of appropriate measures to encourage those involved in organized crime to cooperate with or assist competent authorities. The actual measures are not specified, but in many States they include the enactment of provisions whereby offenders who cooperate may be excused from liability or have otherwise applicable punishments mitigated. Some States have sufficient discretion in prosecution and sentencing to allow this to be done without legislative authority, but where such discretion does not exist, legislation that creates specific offences, establishes mandatory minimum punishments or sets out procedures for prosecution may require adjustment if the legislature decides to use mitigation or immunity provisions to implement article 26. This could be done either by establishing a general rule or on an offence-by-offence basis, as desired (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention);

(p) *Law enforcement cooperation; training and technical assistance.* Channels of communication and police-to-police cooperation shall be provided for with respect to the offences established in accordance with the Protocol pursuant to article 27 of the Convention (see also paras. 500-511 of the legislative guide for the implementation of the Organized Crime Convention); and training and technical assistance shall be provided pursuant to articles 29 and 30 of the Convention.

4. Other general requirements for legislation criminalizing domestic smuggling offences

61. In addition to the above measures that must be provided for with respect to offences established in accordance with the Protocol, the Convention and Protocol contain specific requirements that are to be taken into account when drafting legislation establishing criminal offences in accordance with the Protocol, in particular:

(a) *Non-inclusion of transnationality in domestic offences.* The element of transnationality is one of the criteria for applying the Convention and the Protocols (art. 3 of the Convention). At the same time, article 34, paragraph 2, provides that transnationality must not be required as an element of domestic offences. Of course, the definition of smuggling of migrants in this Protocol provides for a crime that involves transborder smuggling. Thus, in general, domestic legislation implementing the Protocol will appropriately include an element of transborder activity. However, the specific transnationality criteria of article 3 of the Convention must not be incorporated into such domestic legislation;

(b) *Non-inclusion of “organized criminal group” in domestic offences.* As with transnationality, above, the involvement of an organized criminal group must not be required as an element of a domestic prosecution. Thus, the offences established in accordance with the Protocol should apply equally, regardless of whether they were committed by individuals or by individuals associated with an organized criminal group, and regardless of whether this can be proved or not (art. 34, para. 2, of the Convention; see also A/55/383/Add.1, para. 59);

(c) *Criminalization may use legislative and other measures, but must be founded in law.* Both the Convention and the Protocol refer to criminalization using “such legislative or other measures as may be necessary” in recognition of the fact that a combination of measures may be needed in some States. The drafters of those instruments were concerned, however, that the rule of law generally would require that criminal offences be prescribed by law, and the reference to “other measures” was not intended to require or permit criminalization without legislation. The interpretative notes therefore provide that other measures are additional to and presuppose the existence of a law. (The same principle is applied separately to the Convention and all of its Protocols: see A/55/383/Add.1, paras. 9, 69 and 91, and A/55/383/Add.3, para. 5; see also article 15 of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex));

(d) *Only intentional conduct need be criminalized.* All of the criminalization requirements of the Convention and Protocols require that the conduct of each offence must be criminalized only if committed intentionally. Thus, conduct that involves lower standards, such as negligence, need not be criminalized. Such conduct could, however, be made a crime under article 34, paragraph 3, of the Convention, which expressly allows for measures that are more strict or severe than those provided for by the Convention. Drafters should note that the element of intention refers only to the conduct or action that constitutes each criminal offence and should not be taken as a requirement to excuse cases, in particular where persons may have been ignorant or unaware of the existence of the law that establishes the offence;

(e) *Description of offences.* While article 11, paragraph 6, of the Convention states that the description of the offences is in principle reserved to the domestic law of a State party, drafters should consider the meaning of the provisions of the Convention and the Protocol concerning offences and not simply incorporate the language of the Protocol verbatim. In the drafting of the domestic offences, the language used should be such that it will be interpreted by domestic courts and other competent

authorities in a manner consistent with the meaning of the Protocol and the apparent intentions of its drafters. In some cases, the intended meaning may have been clarified in the interpretative notes;¹⁰

(f) *Provisions of the Convention apply to the Protocol, mutatis mutandis, and should be interpreted together.* The application of article 37 of the Convention and article 1 of the Protocol is discussed in paragraphs 13 and 14 above.

5. *Information resources*

62. Drafters of national legislation may wish to refer to the related provisions and instruments listed below.

(a) *Organized Crime Convention*

Article 3 (Scope of application)

Article 5 (Criminalization of participation in an organized criminal group)

Article 10 (Liability of legal persons)

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 15 (Jurisdiction)

Article 16 (Extradition)

Article 18 (Mutual legal assistance)

Article 20 (Special investigative techniques)

Article 23 (Criminalization of obstruction of justice)

¹⁰The formal *travaux préparatoires* for the Convention and its Protocols have not yet been published. Recognizing that this would take some time and seeking to ensure that legislative drafters would have access to the interpretative notes during the early years of the instruments, the Ad Hoc Committee drafted and agreed language for notes on many of the more critical issues during its final sessions. These were submitted to the General Assembly along with the finalized texts of the instruments, and can now be found in the Assembly documents annexed to its reports: A/55/383/Add.1 (notes on the Convention, the Trafficking in Persons Protocol and the Migrants Protocol, submitted to the Assembly with resolution 55/25) and A/55/383/Add.3 (notes on the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, submitted to the Assembly with resolution 55/255).

Article 24 (Protection of witnesses)

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

Article 27 (Law enforcement cooperation)

Article 29 (Training and technical assistance)

Article 30 (Other measures: implementation of the Convention through economic development and technical assistance)

Article 34 (Implementation of the Convention)

Article 37 (Relation with protocols)

(b) Trafficking in Persons Protocol

Article 3 (Use of terms)

Article 5 (Criminalization)

(c) Migrants Protocol

Article 2 (Statement of purpose)

Article 4 (Scope of application)

Article 16 (Protection and assistance measures)

Article 18 (Return of smuggled migrants)

(d) Other instruments

1951 Convention relating to the Status of Refugees

United Nations, *Treaty Series*, vol. 189, No. 2545

Article 31

1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

General Assembly resolution 45/158, annex

Article 19, paragraph 2

http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm

2002 Framework decision of the Council of the European Union on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (2002/946/JHA)

Official Journal of the European Communities, L 238, 5 December 2002

Articles 1 and 3 (penalties and sanctions)

2002 Directive of the Council of the European Union defining the facilitation of unauthorized entry, transit and residence (2002/90/EC)

Official Journal of the European Communities, L 328, 5 December 2002

B. Providing assistance to and protection of victims of smuggling of migrants

Assistance to and protection of smuggled migrants and persons whose illegal residence has been procured (articles 5, 16, 18 and 19)

“Article 5

“Criminal liability of migrants

“Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.”

“Article 16

“Protection and assistance measures

“1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

“2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

“3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

“4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

“5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations,¹¹ where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.”

“Article 18

“Return of smuggled migrants

“1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.

“2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.

“3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

“4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State

¹¹United Nations, *Treaty Series*, vol. 596, No. 8638-8640.

Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

“5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

“6. States Parties may cooperate with relevant international organizations in the implementation of this article.

“7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

“8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.”

“Article 19

“Saving clause

“1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention¹² and the 1967 Protocol¹³ relating to the Status of Refugees and the principle of non-refoulement as contained therein.

“2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.”

¹²Ibid., vol. 189, No. 2545.

¹³Ibid., vol. 606, No. 8791.

Safeguards in relation to maritime vessels (article 9)

“Article 9

“Safeguard clauses

“1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

“(a) Ensure the safety and humane treatment of the persons on board;

“(b) Take due account of the need not to endanger the security of the vessel or its cargo;

“(c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

“(d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

“2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

“3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

“(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

“(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

“4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”

1. Summary of main requirements

63. Each State party is required to take all appropriate measures:

(a) To protect smuggled persons from death, torture or other cruel, inhumane or degrading treatment or punishment (art. 16, para. 1);

(b) To provide appropriate assistance to persons endangered by smugglers, taking into account the special needs of women and children (art. 16, paras. 3 and 4).

64. Each State party is also required:

(a) To comply with its obligation under the Vienna Convention on Consular Relations to inform the person of the notification and communication obligations under that Convention (art. 16, para. 5);

(b) To accept without undue delay and facilitate the return of a smuggled person who is a national of the State party or has the right of permanent residence (art. 18, para. 1);

(c) To verify without unreasonable delay whether a smuggled person who is a national or has the right of permanent residence and issue the travel documents required for re-entry (art. 18, paras. 3 and 4);

(d) To carry out the return in an orderly manner with due regard for the safety and dignity of the person being returned (art. 18, para. 5).

65. When carrying out measures aboard vessels, States parties shall:

(a) Ensure the safety and humane treatment of passengers (art. 9, para. 1);

(b) Compensate the vessel for any loss or damage where enforcement grounds for measures against the vessel prove to be unfounded (art. 9, para. 2).

2. *Main elements of the articles*

66. Generally, the safeguard provisions were included to protect certain fundamental interests and to clarify the relationship or interaction between the Protocol and other areas of international law. As noted above, the major areas of concern were principles of humanitarian law governing the migration of refugees or asylum-seekers and principles of maritime law governing the detention, boarding and searching of vessels, and it is these which are most likely to be encountered by drafters developing legislation to implement elements of the Protocol. It should be borne in mind, however, that the framing of article 19, paragraph 1, covers all other rights, obligations and responsibilities under international law and that other issues could well arise, depending on the other global or regional instruments to which the implementing State is also a party and to individual characteristics of pre-existing domestic law.

67. The Protocol contains safeguard requirements in two major areas:

(a) The rights, legal status and safety of smuggled migrants and illegal residents, including those who are also asylum-seekers;

(b) The rights and interests of States and shipowners under maritime law.

68. In recognition that illegal or irregular migration and, in some cases, the criminal smuggling of migrants may involve the movement of legitimate refugees or asylum-seekers, precautions were taken to ensure that the implementation of the Protocol would not detract from the existing protections afforded by international law to migrants who also fell into one of these categories. Here the language is intended to ensure that the offences and sanctions established in accordance with the Protocol will apply to those who smuggle migrants, even if they are also asylum-seekers, but only if the smuggling involves an organized criminal group. As discussed in the previous section, several precautions were taken to ensure that altruistic or charitable groups who smuggle asylum-seekers for purposes other than financial or other material gain were not criminalized (see arts. 5 and 19).

69. There were also concerns about the basic safety, security and human rights of persons who have been the object of one of the major offences established in accordance with the Protocol, including migrants who have been smuggled and those who may have entered legally, but whose subsequent illegal residence has been made possible by an organized criminal group.¹⁴ Here the provisions are intended to set an appropriate standard of conduct for officials who deal with smuggled migrants and illegal residents and to deter conduct on the part of offenders that involves danger or degradation to the migrants. At the same time, the formulation of the relevant provisions was intended to ensure that no additional legal status or substantive or procedural rights were accorded to illegal migrants, who are not subject to the offences established in accordance with the Protocol but may still be liable for other offences relating to illegal entry or illegal residence and to sanctions such as deportation (arts. 9, para. 1, and 16).

¹⁴The need to include both categories resulted in the formulation “persons who have been the object of conduct set forth in article 6 of this Protocol”. For simplicity, references in this guide will be to “smuggled migrants” and “illegal residents” with the understanding that the latter category refers to persons whose illegal residence has been procured or enabled by an organized criminal group contrary to domestic offence provisions that implement article 6, paragraph 1 (c), of the Protocol; see also the interpretative notes (A/55/383/Add.1), para. 107, in this regard.

70. The third area of concern was more specialized and arose from the relationship between the Protocol and pre-existing maritime law. Part II of the Protocol allows States parties that encounter vessels suspected of involvement in smuggling to board and search such vessels under some circumstances. This raised concerns about the basic safety and security of migrants and others on board such vessels, given the dilapidated conditions of vessels often used by smugglers and the fact that boarding may take place at sea and far from safe harbour conditions. Stopping and boarding vessels also raised concerns about the sovereignty of States to which such vessels were flagged or registered and about the commercial losses to ship-owners that might result. For this reason, it was also felt necessary to incorporate basic safeguard requirements to protect such interests before and during boarding and to make some provision for access to remedies later, in cases where the search proved to be unfounded (arts. 8 and 9).

*(a) Legal status, safety and rights of migrants
and illegal residents*

71. As noted in the preceding chapter, the various provisions of the Protocol have been formulated so as not to require the criminalization of migrants or illegal residents or of conduct likely to be engaged in only by such persons, while at the same time protecting the sovereign right of States parties to establish or maintain other offences that would apply to such persons. In addition, the Protocol requests the State party to apply such rights as are established in article 16, including general basic human rights (arts. 16, paras. 1 and 2, and 19, para. 2) and the right to consular assistance (art. 16, para. 5). Article 16, paragraph 3, does not create a new right, but does establish a new obligation in that it requires States parties to provide basic assistance to migrants and illegal residents in cases where their lives or safety have been endangered by reason of an offence established in accordance with the Protocol. Particular attention is paid to ensuring that rights established by international humanitarian law, which primarily concern migrants or illegal residents who are also asylum-seekers, are preserved (art. 19, para. 1).

72. Article 18, which sets out conditions for the return of smuggled migrants and illegal residents to their countries of origin, also does not require the creation of any substantive or procedural rights for such persons, but paragraph 5 of that article does require measures to ensure that such return occurs in an orderly manner and with due regard for the safety and dignity of the person.

(b) *Provisions relating to maritime vessels*

73. As noted above, the provisions of part II (arts. 8 and 9) of the Protocol impose requirements intended to afford some protection both to illegal migrants and to other persons found on board vessels searched as a result of suspicions of involvement in smuggling and to the national and commercial interests of other States and shipowners in such cases. These are direct obligations imposed on States parties by the Protocol and will not generally require legislation to implement, but some legislative or administrative measures may be needed to ensure that the actions of officials meet the required standards and to establish a substantive and procedural basis for seeking remedies in cases where a search is conducted, where some form of loss or harm results and where the search proves to have been unfounded.

3. *Implementation of the articles*

74. Assuming national conformity with the basic pre-existing rights and the instruments in which they are established, none of the requirements to protect or preserve the human rights of migrants and illegal residents should raise legislative issues, although they should be carefully considered in developing administrative procedures and the training of officials. Where a State is not already in conformity with the pre-existing standards, they may have to be established to the extent necessary to conform to the Protocol. There is no obligation to go beyond this, however: the interpretative notes specify that the various cross-references to other international instruments, including those dealing with humanitarian law and asylum-seekers, do not mean that States that ratify and implement the Protocol are also bound by the provisions of those instruments (A/55/383/Add.1, para. 118; see also para. 117 relating to the status of refugees). Where existing national laws do not meet the basic requirements of the Protocol, the following amendments to the laws may be needed:

(a) To preserve and protect the basic rights of smuggled migrants and illegal residents (art. 16, para. 1);

(b) To protect against violence (art. 16, para. 2);

(c) To provide information on consular notification and communication (art. 16, para. 5).¹⁵

¹⁵This only applies where the Vienna Convention on Consular Relations has not been implemented and may not necessarily require legislation, provided that officials are directed to afford the necessary access when required or requested. (See also jurisprudence of the International Court of Justice.)

75. Drafters may also be required to adjust the language of other legislative provisions to ensure that they are not applied in a manner that discriminates against smuggled migrants or illegal residents by reason of their status as such (art. 19, para. 2).

76. As noted above, article 18 does not require the creation of any substantive or procedural rights for smuggled migrants or illegal residents to be returned to their countries of origin. Article 18, paragraph 5, does require measures to ensure that such return occurs in an orderly manner and with due regard for the safety and dignity of the person, which could be implemented administratively in most countries, but could involve legislation if this is necessary to ensure that it is implemented properly.

77. Drafters who are in the process of developing legislation to implement both the Migrants Protocol and the Trafficking in Persons Protocol should also note that the provisions of the other Protocol governing the safe and secure return of victims of trafficking are much more extensive in view of the additional jeopardy in which such victims usually find themselves (see para. 61 of the legislative guide for the implementation of the Trafficking in Persons Protocol), and that articles 24 and 25 of the Convention (concerning assistance and protection of victims and witnesses in all cases covered by the Convention) also apply with respect to victims of trafficking (see also paras. 341-383 of the legislative guide for the implementation of the Organized Crime Convention). They do not apply to smuggled migrants or illegal residents and legislatures will therefore generally find it necessary to adopt separate provisions in this area.

78. It should also be noted that the International Maritime Organization and the Office of the United Nations High Commissioner for Refugees have expressed concern that unnecessary searches or detention of vessels may deter masters of vessels from meeting fundamental humanitarian requirements, including the rescue of migrants from small vessels found in distress at sea. In establishing and implementing powers to stop and search vessels and to detain vessels or crew members who may be witnesses (but not criminal suspects) legislators should bear in mind that such procedures should be carefully considered and used with as much restraint as possible.

4. Information resources

79. Drafters of national legislation may wish to refer to the related provisions and instruments listed below.

(a) *Organized Crime Convention*

Article 24 (Protection of witnesses)

Article 25 (Assistance to and protection of victims)

(b) *Trafficking in Persons Protocol*

Article 6 (Assistance to and protection of victims of trafficking in persons)

(c) *Migrants Protocol*

Article 2 (Statement of purpose)

Article 3 (Use of terms)

Article 4 (Scope of application)

Article 5 (Criminal liability of migrants)

Article 8 (Measures against the smuggling of migrants by sea)

Article 10 (Information)

Article 14 (Training and technical cooperation)

Article 15 (Other prevention measures)

(d) *Other instruments*

1974 International Convention for the Safety of Life at Sea
United Nations, *Treaty Series*, vol. 1184, No. 18961

1979 International Convention on Maritime Search and Rescue
United Nations, *Treaty Series*, vol. 1405, No. 23489
Annex

1982 United Nations Convention on the Law of the Sea
United Nations, *Treaty Series*, vol. 1833, No. 31363
Article 98, paragraph 1

1990 International Convention on the Protection of the Rights of All
Migrant Workers and Members of Their Families
General Assembly resolution 45/158, annex
http://unhchr.ch/html/menu3/b/m_mwctoc.htm
Article 8

- 1994 Recommendation of the Council of the European Union of 30 November 1994 concerning a specimen bilateral readmission agreement between a member State and a third country
Official Journal of the European Communities, C 274, 19 September 1996
Annex to annex II.2, article 2, paragraph 1
- 1997 Conference of Ministers on the Prevention of Illegal Migration, held in the context of the Budapest Process in Prague on 14 and 15 October 1997
[http://www.icmpd.org/uploading/Recommendations%20Prague%20Ministerial%20Oct 97.pdf](http://www.icmpd.org/uploading/Recommendations%20Prague%20Ministerial%20Oct%2097.pdf)
Recommendations 24-38 (Return of migrants)
- 2002 General comments adopted by the Human Rights Committee under article 40, paragraph 4, of the International Covenant on Civil and Political Rights (CCPR/C/21/Rev.1/Add.9)
General comment no. 27 (67), paragraph 21 (on return of migrants)
- 2002 Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union (2002/C 142/02)
Official Journal of the European Communities, C 142, 14 June 2002
Part II, section E (Readmission and return policy)
- 2002 Recommended Guidelines on Human Rights and Human Trafficking
Document E/2002/68/Add.1
Guidelines 1 (Promotion and protection of human rights) and 6 (Protection and support for trafficked persons)

C. Prevention

“Article 11

“Border measures

“1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

“2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the

commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.

“3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

“4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

“5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

“6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”

“Article 12

“Security and control of documents

“Each State Party shall take such measures as may be necessary, within available means:

“(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

“(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.”

“Article 14

“Training and technical cooperation

“1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.

“ . . . ”

“Article 15

“Other prevention measures

“1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

“2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

“3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.”

1. Summary of main requirements

80. Each State party is required:

(a) To strengthen border controls (art. 11, para. 1);

(b) To adopt measures to require commercial transportation carriers to ascertain that all passengers have the required travel documents, including sanctions for failure to do so (art. 11, para. 3);

(c) To ensure that travel and identity documents are of such quality that they cannot be altered or misused (art. 12, subpara. (a));

(d) To ensure the security of States parties' travel documents so they are not unlawfully issued (art. 12, subpara. (b));

(e) To provide or strengthen training to prevent smuggling and ensure humane treatment of smuggled persons (art. 14, para. 1);

(f) To provide or strengthen public information campaigns (art. 15, paras. 1 and 2);

(g) To provide or strengthen development programmes to combat the root causes of smuggling (art. 15, para. 3).

2. Main elements of the articles

81. Generally, the drafters of the Protocol and the parent Convention realized that various forms of prevention represented an important part of the effort against it. These have the potential to reduce or even avoid the high financial and institutional costs of conducting major multinational investigations and prosecutions. Perhaps more importantly, they can avoid many of the human costs suffered by victims and, by reducing the potential for the smuggling of migrants and trafficking in persons, they may reduce the illicit proceeds that organized criminal groups derive from such offences and often turn to other illegal purposes such as the corruption of officials or funding of other criminal activities.

82. Part III of the Protocol contains requirements to apply both social and situational prevention measures. Recognizing that a root cause of smuggling is the desire of people to migrate away from conditions such as poverty or oppression in search of better lives, article 15, paragraph 3, requires the promotion or strengthening of development programmes to address the socio-economic causes of smuggling. Article 15, paragraphs 1 and 2, seek to target potential migrants and others involved in smuggling more directly using public information about the evils of organized crime in general and the smuggling of migrants in particular. Articles 11-13 seek to prevent smuggling more directly, by making it more difficult and risky for offenders to commit. Article 11 requires measures to ensure that commercial carriers check their passengers' travel documents and other unspecified measures to enhance the effectiveness of border controls. Article 12 requires States parties to have travel documents that are more difficult to falsify or obtain improperly and article 13 seeks to decrease the risk of misuse and increase the probability of detection by requiring States parties to verify within a reasonable time whether a document purporting to have been issued by them is genuine and valid or not.

3. Implementation of the articles

(a) Increasing public awareness and addressing socio-economic causes (article 15)

83. As noted above, the drafters sought to require measures to increase public awareness of the nature of smuggling of migrants and the fact that much of the activity involved organized criminal groups. This is a mandatory obligation, but there is nothing in it that would require the use of

legislative measures. In conjunction with other information about smuggling, however, public information campaigns about the legislation used to establish the offences set forth in the Protocol and elements of the Convention in national law could be applied. This would serve to emphasize that the smuggling of migrants is a serious criminal activity, often harmful to the migrants themselves and with broader implications for community crime levels.

(b) Promotion or strengthening of development programmes to address root socio-economic causes of smuggling

84. As above, this is also a positive obligation, but not one that entails any legislative elements. Legislation in other areas may, however, form part of such development programmes. These include areas such as reforms to address problems of corruption and to establish elements of the rule of law, which stabilize social and economic conditions.

(c) Measures dealing with commercial carriers

85. The major legislative requirement set out in part III of the Protocol is that States parties must, to the extent possible, adopt legislative or other measures to prevent commercial carriers from being used by smugglers (art. 11, para. 2). The exact nature of such measures is left to the discretion of the legislature, except that cross-border carriers should be obliged to check the travel documents of passengers (art. 11, para. 3) and subjected to appropriate sanctions if that is not done (art. 11, para. 4). Drafters of legislation to implement these requirements should consider the following points:

(a) The basic obligation to be placed on carriers is to ascertain basic possession of whatever documents may be needed to enter the State of destination, but there is no obligation to assess the authenticity or validity of the documents or whether they have been validly issued to the person who possesses them (see A/55/383/Add.1, paras. 80 and 103);

(b) The obligation is to attach liability to the carriers for not having checked the documents as required. States may establish liability for having transported undocumented migrants, but the Protocol does not require this;

(c) States are also reminded of their discretion not to hold carriers liable in cases where they have transported undocumented refugees (see A/55/383/Add.1, paras. 80 and 103). This is not obligatory, however, and can be dealt with in the exercise of prosecutorial discretion where available and appropriate;

(d) The obligation in article 11, paragraph 4, is to provide for sanctions, the nature of which is not specified in either the Protocol or of the interpretative notes. If criminal liability is to be provided for, drafters should consider article 10 of the Convention regarding the obligation to provide for the liability of legal persons such as corporations;

(e) In the interpretative notes, there are several references to the meaning of the phrase “travel or identity document”, which includes any document that can be used for inter-State travel and any document commonly used to establish identity in a State under the laws of that State (see A/55/383/Add.1, paras. 78 and 83).

(d) *Measures relating to travel or identity documents*

86. As noted above, article 12 requires measures to ensure the adequacy of the quality and integrity and security of documents such as passports. The language makes it clear that this includes such measures as technical elements to make documents more difficult to falsify, forge or alter and administrative and security elements to protect the production and issuance process against corruption, theft or other means of diverting documents.¹⁶ These do not entail direct legislative obligations, except possibly to the extent that the forms of documents such as passports are prescribed by legislation that would have to be amended to raise standards or legally designate the enhanced versions as formally valid documents. Indirectly, additional supplementary offences to deal with theft, falsification and other misconduct in relation to travel or identity documents could be considered if more general offences do not already apply.

87. Several kinds of technology that are new or in the process of being developed offer considerable potential for the creation of new types of document that identify individuals in a unique manner, can be rapidly and accurately read by machines and are difficult to falsify because they rely on information stored in a database out of the reach of offenders rather than on information provided in the document itself. One example is the European Image Archiving System, called False and Authentic Documents (FADO),¹⁷

¹⁶The interpretative notes establish a relatively broad range of abuses in relation to documents. Drafters intended to cover not only the creation of false documents, but also the alteration of genuine ones and the use of valid and genuine documents by persons not entitled to do so (A/55/383/Add.1, para. 105).

¹⁷Council of the European Union Joint Action 98/700/JHA of 3 December 1998, adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning the setting up of a European Image Archiving System (FADO) (*Official Journal of the European Communities* L 333, 9 December 1998, available at <http://europa.eu/int/scadplus/leg/en/lvb/133075.htm>).

which makes possible the speedy verification of documents and fast, comprehensive notification of relevant law enforcement or immigration authorities in other participating countries when misuse of a document or a fraudulent document is detected. One concern raised during the negotiation of article 12 of the Protocol was the cost and technical problems likely to be encountered by developing countries seeking to implement such systems. The development of systems and technologies that minimize the amount of sophisticated maintenance and high-technology infrastructure needed to support and maintain such systems will be critical to the success of deployment in developing countries and, in some cases, technical assistance to be provided pursuant to article 30 of the Convention.

4. Related provisions of the Convention and the Trafficking in Persons Protocol

88. Legislators and drafters should note that these provisions should be read and applied in conjunction with article 31 of the Convention, which deals with the prevention of all forms of organized crime. Given the nature of migration and the smuggling of migrants, in article 31, paragraphs 5, of the Convention, on the promotion of public awareness of the problems associated with organized crime and 7, on the alleviation of social conditions that render socially marginalized groups vulnerable to organized crime, may be of particular interest in implementing the Protocol.

89. Legislators and drafters charged with implementing both the Migrants Protocol and the Trafficking in Persons Protocol may also wish to take into consideration the fact that many similarities exist between the origins of cases involving smuggling of migrants and those involving trafficking in persons. Therefore, prevention measures may in many cases be developed and implemented jointly. For example, awareness-raising programmes to caution potential victims, including migrants, about the dangers of smuggling, trafficking and general dealings with organized criminal groups and more general efforts to alleviate social or other conditions that create pressure to migrate may be efficiently and effectively implemented on a joint basis.

5. Information resources

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

(a) Organized Crime Convention

Article 29, paragraphs 1 and 3 (Training and technical assistance)
 Article 31 (Prevention)

(b) Trafficking in Persons Protocol

Article 10 (Information exchange and training)
 Article 11 (Border measures)
 Article 12 (Security and control of documents)
 Article 13 (Legitimacy and validity of documents)

(c) Migrants Protocol

Article 2 (Statement of purpose)
 Article 6 (Criminalization)
 Article 13 (Legitimacy and validity of documents)
 Article 14, paragraph 2 (Training and technical cooperation)

(d) Other instruments

1997 Conference of Ministers on the Prevention of Illegal Migration,
 held in the context of the Budapest Process in Prague on 14 and
 15 October 1997

<http://www.icmpd.org/uploading/Recommendations%20Prague%20Ministerial%20Oct%201997.pdf>

Recommendation 13 (information campaigns)

2001 Twelve Commitments in the fight against trafficking in human
 beings, agreed upon at the meeting of the JHA Council of
 Ministers of the member States of the European Union (Justice
 and Home Affairs) and the candidate States, held in Brussels on
 28 September 2001

Points 5, 8 and 12

(Cooperation, prevention campaigns and combating false documents)

2002 Brussels Declaration on Preventing and Combating Trafficking in
 Human Beings, made at the European Conference on Preventing
 and Combating Trafficking in Human Beings: Global Challenge for
 the 21st Century, held in Brussels from 18 to 20 September 2002

<http://www.belgium.iom.int/STOPConference/Conference%20Papers/brudeclaration.pdf>

Points 8, 10 and 11

2002 Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union (2002/C 142/02)

Official Journal of the European Communities, C 142, 14 June 2002
Chapter II, section C.III (Awareness-raising campaigns)

2002 Recommended Guidelines on Human Rights and Human Trafficking Document E/2002/68/Add.1
Guideline 7 (Preventing trafficking)

D. Cooperation and assistance requirements

“Article 7

“Cooperation

“States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.”

“Article 8

“Measures against the smuggling of migrants by sea

“1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

“2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

“(a) To board the vessel;

“(b) To search the vessel; and

“(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

“3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

“4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

“5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

“6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

“7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.”

“Article 10

“Information

“1. Without prejudice to articles 27 and 28 of the Convention, States Parties, in particular those with common borders or located on routes along which migrants are smuggled, shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

“(a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in conduct set forth in article 6 of this Protocol;

“(b) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;

“(c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;

“(d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;

“(e) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and

“(f) Scientific and technological information useful to law enforcement, so as to enhance each other’s ability to prevent, detect and investigate the conduct set forth in article 6 of this Protocol and to prosecute those involved.

“2. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.”

“Article 11

“Border measures

“1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

“ . . .

“5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

“6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.”

“Article 13

“Legitimacy and validity of documents

“At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.”

“Article 14

“Training and technical cooperation

“1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.

“2. States Parties shall cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6 of this Protocol and to protect the rights of migrants who have been the object of such conduct. Such training shall include:

“(a) Improving the security and quality of travel documents;

“(b) Recognizing and detecting fraudulent travel or identity documents;

“(c) Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;

“(d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and

“(e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.

“3. States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of

origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.”

“Article 15

“Other prevention measures

“1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

“2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

“3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.”

“Article 17

“Agreements and arrangements

“States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at:

“(a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or

“(b) Enhancing the provisions of this Protocol among themselves.”

“Article 18

“Return of smuggled migrants

“1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.

“2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.

“3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

“4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

“5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

“6. States Parties may cooperate with relevant international organizations in the implementation of this article.

“7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

“8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.”

1. Summary of main requirements

91. Each State party is required:

(a) To cooperate to the fullest extent possible to prevent the smuggling of migrants by sea (art. 7);

(b) To render assistance to a State party that has the right to board a vessel flying its state flag (art. 8, para. 1);

(c) To inform the flag State if it has boarded its vessel (art. 8, para. 3);

(d) To respond expeditiously to a request for determination if a vessel is entitled to claim that State as the State of its registry (art. 8, para. 4);

(e) To respond expeditiously to a request for authorization to board, search and take other measures with respect to a vessel flying its flag (art. 8, para. 4);

(f) To designate an authority to assist or respond to requests for assistance concerning such vessels (art. 8, para. 6);

(g) To exchange information with other relevant States regarding the smuggling of migrants, consistent with domestic legal systems (art. 10, para. 1);

(h) To comply with conditions imposed upon it by States sending such information (art. 10, para. 2);

(i) To provide or strengthen specialized training to combat smuggling of migrants (art. 14, para. 1);

(j) To cooperate with each other and competent international organizations and non-governmental organizations to ensure adequate training to prevent and eradicate smuggling of migrants (art. 14, para. 2).

2. Main elements of the articles

Importance of considering elements of both the Convention and the Protocol together

92. Generally, the scope of cooperation under the Convention and its Protocols is governed by the scope of the Convention itself—general and specific forms of cooperation and assistance are established for the prevention, investigation and prosecution of offences covered by the Convention and any applicable Protocols, where the offence is transnational in nature and involves an organized criminal group. In formulating legislative and

administrative rules and procedures for cooperation under the Protocol, it is important that the Convention and the Protocol be read together. The Convention contains both general requirements for States parties to cooperate (arts. 27 (Law enforcement cooperation), 28 (Collection, exchange and analysis of information on the nature of organized crime), 29 (Training and technical assistance), 30 (Other measures: implementation of the Convention through economic development and technical assistance) and 31 (Prevention)) and a series of obligations focused on specific subject matter or forms of cooperation (arts. 12 (confiscation and seizure), 13 (international cooperation for purposes of confiscation), 16 (Extradition), 17 (Transfer of sentenced persons), 18 (Mutual legal assistance), 21 (Transfer of criminal proceedings) and 24 (Protection of witnesses)). It is particularly important to ensure that cooperative rules and practices under the Convention and Protocol are consistent with one another and that there are no gaps that could create areas in which assistance could not be rendered on request. Apart from forms of assistance, such as those in article 17 of the Protocol and cooperative measures set forth in its article 8, the Convention also recognizes that more general forms of assistance, in the form of both resources and technical or other expertise, will be needed by many developing countries if they are to fully implement the Convention and Protocols and to be in a position to render such assistance or cooperation as is requested of them once they are in force. Thus, article 29 of the Convention deals with the provision of training and technical assistance and articles 30 and 31 call for more general development assistance to help developing countries implement the Convention and address the underlying circumstances that render socially marginalized groups vulnerable to organized crime (see in particular art. 31, para. 7. Article 30, paragraph 2 (c), calls for voluntary contributions to support implementation, as does the resolution in which the General Assembly adopted the Convention and Protocol (resolution 55/25, para. 9)).

93. The specific areas in which some form of cooperation is required by the Protocol are the following:

(a) *Assistance in relation to maritime cases.* In cases where States parties suspect a maritime vessel flying their flag or a stateless vessel of involvement in smuggling, they may request general assistance of other States parties in suppressing such use of the vessel. Such assistance must be provided, within the means of the requested State party (art. 8, para. 1). Where States parties suspect a vessel registered or flagged to another State party, they may request that other State party to authorize boarding, searching and other appropriate measures. Such requests must be considered and responded to expeditiously (art. 8, paras. 2 and 4). In turn, the State party

that searches the vessel must promptly inform the authorizing State party of the results of any measures taken (art. 8, para. 3). Each State party is required to designate an authority or authorities to receive and respond to requests for assistance in maritime cases (art. 8, para. 6);

(b) *Border measures.* Generally, States parties are required to strengthen border controls to the extent possible and to consider strengthening cooperation between border control agencies, including by the establishment of direct channels of communication (art. 11, paras. 1 and 6);

(c) *Travel and identity documents.* States parties are required to ensure the integrity and security of their travel documents, which may include informing other States parties of measures taken to make documents resistant to tampering and of measures that can be used to verify that the documents are authentic (art. 12). They are also required to verify within a reasonable time the legitimacy and validity of documents purported to have been issued by them at the request of another State party (art. 13);

(d) *Training and technical assistance.* In addition to training their own officials, States parties are required to cooperate with one another in training to prevent and combat smuggling and in appropriate methods for dealing with smuggled migrants. The obligation to cooperate also includes cooperation with intergovernmental and non-governmental organizations, a number of which are active in matters related to migration (art. 14, para. 2). The Protocol also calls for relevant technical assistance to countries of origin or transit, in addition to the more general call for such assistance in articles 29 and 30 of the Convention (art. 14, para. 3);

(e) *Prevention.* The Protocol requires each State party to promote or strengthen development programmes that combat the root socio-economic causes of the smuggling of migrants (art. 15, para. 3);

(f) *Return of smuggled migrants.* Generally, States parties are required on request to accept the repatriation of their nationals and to consider accepting those who have or have had rights of residence. This includes verifying status as a national or resident without unreasonable delay, re-admitting the person and, where necessary, providing any documents or authorizations needed to allow that person to travel back to the requested State party (art. 18, paras. 1-4);

(g) *Information exchange.* States parties are required, consistent with existing legal and administrative systems, to exchange a series of categories of information ranging from general research and policy-related material about smuggling and related problems to more specific details of methods used by smugglers (art. 10);

(h) *Other agreements or arrangements.* As with the parent Convention, States parties are encouraged to consider entering into other agreements of a bilateral or regional nature to support forms of cooperation and assistance that may go beyond those required by the Protocol (art. 17).

3. *Implementation of the articles*

94. Generally, the provision of cooperation and assistance will be a matter for administrative rules and practices and will not require legislation, but there are some exceptions.

(a) Cooperation and assistance in maritime matters (articles 7-9)

95. These articles require States parties to cooperate to suppress smuggling of migrants by sea. Establishment of jurisdiction over smuggling at sea is a prerequisite for effective implementation of articles 7-9. Article 15 of the parent Convention requires States parties to establish jurisdiction when offences have been committed on board a vessel flying their flag. In addition and although not a requirement under the Convention or the Protocol, States parties may wish also to establish their jurisdiction over vessels on the high seas flying the flag of another State party as well as over those without nationality, as this will ensure the proper functioning of the measures provided for under part II of the Protocol.

96. The main focus of article 8 is to facilitate law enforcement action in relation to smuggling of migrants involving the vessels of other States parties. The enactment of implementing legislation providing for enforcement powers in respect of foreign flag vessels may therefore be necessary. Issues to be addressed in such legislation include the provision of powers to search and obtain information, powers of arrest and seizure, the use of reasonable force, the production of evidence of authority and the provision of appropriate legal protection for the officers involved.

97. Drafters should note that the meaning of the phrase “engaged in the smuggling of migrants by sea” is discussed in the interpretative notes (A/55/383/Add.1, para. 102). It includes both direct and indirect engagement, including cases where a mother ship has already transferred migrants to smaller vessels for landing and no longer has any on board or else has picked up migrants while at sea for the purposes of smuggling them. It

would not include a vessel that had simply rescued migrants who were being smuggled by another vessel.

98. Article 8, paragraph 6, requires that each State party designate a central authority to deal with maritime cases, which may require legislative action establishing an authority and providing for the necessary powers, in particular the power to authorize another State party to take action against vessels flying its flag. In determining the appropriate location for their designated authority, States parties should consider factors such as ease of access to the national shipping registry in order to provide confirmation of registry, ease of coordination with other domestic agencies, including maritime law enforcement authorities, and the existence of arrangements for the conduct of business on a round-the-clock basis. The designated authority should also be responsible for outgoing requests to other States parties. It should therefore be able to receive requests from domestic authorities—customs, police and other law enforcement agencies—and be in a position to assist in transmission to foreign States.

99. Article 8, paragraph 6, further requires States parties to notify their designated authority to the Secretary-General to permit a list of contact points to be maintained and circulated to all States parties. Governments responding to this should consider providing essential contact information (addresses, telephone and facsimile numbers, hours of operation and the language or languages in which requests can be processed).

100. The law enforcement and cooperation regime defined by articles 7-9 has been inspired to a large extent by the set of measures included in article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,¹⁸ to combat illicit traffic by sea. However, because of the fundamental difference between trafficking in drugs and smuggling of persons, there will be specific factors in judging the appropriateness of intervening at sea against smuggling of persons and in ensuring that adequate safeguards regarding safety and humane treatment of persons on board. The focus of articles 7 and 8 on suppression of a criminal activity should not lead law enforcement officers to overlook the duty established under maritime law and custom to rescue those in peril at sea. Vessels used for smuggling may be confiscated if apprehended and smugglers often use dilapidated vessels as a result. In some cases, such vessels are encountered at sea overloaded with migrants and in imminent danger of sinking. Legislation should be drafted and

¹⁸United Nations, *Treaty Series*, vol. 1582, No. 27627.

implemented so as to ensure that officials are aware that the duty to effect a rescue has priority in such circumstances and that where there is evidence of peril at sea, vessels should be boarded whether there is a suspicion of smuggling or not. Domestic powers and safeguards, if needed, should consider the safeguards set out in article 9 and the interests of maritime rescue and safety. They should not, however, limit the duty or power of authorities to act in cases where lives or safety may be at risk or in cases where there was reason to believe migrants or other persons were being trafficked or held on board against their will.

101. The Protocol does not limit the class or status of officials who can exercise maritime search powers to warships and military aircraft, leaving it open to legislatures to extend them to any official or agency with appropriate law enforcement activities. It should be noted, however, that any boats, ships or aircraft used must be clearly marked and identifiable as being on government service and authorized to that effect (art. 9, para. 4). Given the risks and difficulty associated with boarding and searching vessels at sea, legislatures may also wish to consider limiting the authority to exercise powers created pursuant to the Protocol to a relatively small number of officials or officers who have the necessary training, competence and equipment.

(b) Border measures (article 11)

102. The requirement to strengthen basic border controls does not necessarily involve cooperation with other States and such cooperation or coordination of border controls as may be needed will not generally require legislation. The strengthening of cooperation between agencies and establishment of direct channels of communication may require some legislation to establish that the agencies concerned have the authority to cooperate and to allow the sharing of information that may otherwise be protected by confidentiality laws. Many of the issues raised by cooperation between border control agencies will be similar to those raised by cooperation between law enforcement agencies and article 27 of the Convention, the part of the legislative guide concerning that article (paras. 500-511) and domestic legislation used to implement it might therefore be considered.

(c) Travel or identity documents (articles 12 and 13)

103. The establishment of specific forms or the setting or amendment of technical standards for the production of documents such as passports may

be a legislative matter in some States. In such cases, legislators will generally need to consult technical experts, either domestically or in other States parties, to determine what basic standards are feasible and how they should be formulated. Understanding technologies such as biometrics and the use of documents containing electronically stored information, for example, will be essential to the drafting of legal standards requiring the use of such technologies. Implementing the requirement to verify travel or identity documents will generally not require legislation, since virtually all States already do this on request, but may require resources or administrative changes to permit the process to be completed in the relatively short time frames envisaged by the Protocol.

(d) Technical assistance, cooperation and training (article 14)

104. The establishment of programmes of training for domestic officials will not generally require legislative measures, but the materials and personnel used to deliver such training will rely heavily on domestic legislation, the international instruments and in many cases the legislation of other States with whom a particular State party is likely to find it necessary to cooperate on a frequent or regular basis. To ensure efficient and effective cooperation with other States parties in administering the treaties, cooperation in the development and application of training programmes and the rendering of assistance to other States by providing resources and/or expertise, will also be important.¹⁹

(e) Information exchange (article 10)

105. As with other areas of cooperation, the mere exchange of information is not likely to require legislative action. Given the nature of some of the information that may be exchanged, however, amendments may be needed to domestic confidentiality requirements to ensure that it can be disclosed and precautions may be needed to ensure that it does not become public as a result. The interpretative notes also raise the need for prior consultations in some cases, especially before sensitive information is shared spontaneously and not on request (A/55/383/Add.1, para. 37, which refers to art. 18, para. 15, of the Convention). These may involve changes to

¹⁹Art. 14, paras. 2 and 3, of the Protocol. For an example, see also the Proposal for a Comprehensive Plan to combat illegal immigration and trafficking in human beings in the European Union, points 64-66 (see sect. 4, Information resources, below). Point 54 stresses the need for these programmes to take account of the specific features of each national training system.

media or public access-to-information laws, official secrecy laws and similar legislation to ensure an appropriate balance between secrecy and disclosure.

(f) Return of smuggled migrants (article 18)

106. As outlined above, States parties are required to cooperate in the identification or determination of status of their nationals and residents. They are required to cooperate in (“facilitate and accept”) the return of nationals and to consider cooperation in the return of those with some rights of residency short of citizenship, including by the issuance of documents needed to allow the travel of such persons back from countries to which they have been smuggled (for the exact obligations, see above and art. 18 of the Protocol). In most States, conformity with these requirements would involve primarily the issuance of administrative instructions to the appropriate officials and ensuring that the necessary resources are available to permit them to provide the necessary assistance.

107. Legislative amendments might be required in some States, however, to ensure that officials are required to act (or in appropriate cases, to consider acting) in response to requests and that they have the necessary legal authority to issue visas or other travel documents when a national or resident was to be returned. In drafting such legislation, officials should bear in mind that any obligations in international law governing the rights or treatment of smuggled migrants, including those applicable to asylum-seekers, are not affected by the Protocol or the fact that the State concerned has or will become a party to it (art. 18, para. 8, of the Protocol and the interpretative notes (A/55/383/Add.1), para. 116). Legislatures may wish also to consult the provisions of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (General Assembly resolution 45/158, annex) which provides for measures that go beyond those set out in the Protocol. (In particular, article 67 calls for cooperation “with a view to promoting adequate economic conditions for . . . resettlement and to facilitating . . . durable social and cultural reintegration in the State of origin”.)

108. The requirements to accept the return of nationals and to consider accepting the return of those with some right of residency turn on the status of those individuals at the time of return. Paragraph 111 of the interpretative notes should be taken into account:

“The *travaux préparatoires* should indicate that this article is based on the understanding that States parties would not deprive persons of their nationality contrary to international law, thereby rendering them stateless.”

109. The notes also indicate that return should not be carried out until any relevant nationality or residency status has been ascertained (A/55/383/Add.1, para. 113).

110. Where feasible, States should also consider training for officials likely to be involved in the return of smuggled migrants, bearing in mind the requirement of article 16 to ensure that basic rights are preserved and respected and the requirement of article 18, paragraph 5, that returns must involve any measures necessary to ensure that they are carried out in an orderly manner and with due regard for the safety and dignity of the person.

(g) *Other agreements or arrangements (article 17)*

111. As with the Convention, the Protocol is intended to set a minimum global standard for various measures to deal with the smuggling of migrants, return and other related problems. The drafters specifically envisaged that some States would wish to proceed with more elaborate measures, in particular in response to problems that have arisen or are seen as particularly serious only in the context of bilateral or regional situations. Two States parties with a specific cross-border smuggling problem might find it appropriate to develop a bilateral treaty or arrangement to expedite cooperation between them, for example, or States with similar legal systems, such as those in Europe, might be able to adopt streamlined procedures to take advantage of this. The legal or legislative requirements to implement this provision—which is not mandatory—will vary from country to country. In some cases, legislative or executive authority is required to enter into discussions or negotiations, while in others legislation may be needed only to ratify or adopt the resulting treaty or to implement it in domestic law. The words “agreements or operational arrangements” are used to ensure that options ranging from formal legal treaties to less formal agreements or arrangements are included.

4. Information resources

112. Drafters of national legislation may wish to refer to the related provisions and instruments listed below.

(a) *Organized Crime Convention*

- Article 11 (Prosecution, adjudication and sanctions)
- Article 12 (Confiscation and seizure)
- Article 13 (International cooperation for purposes of confiscation)
- Article 15 (Jurisdiction)
- Article 16 (Extradition)
- Article 17 (Transfer of sentenced persons)
- Article 18 (Mutual legal assistance)
- Article 21 (Transfer of criminal proceedings)
- Article 24 (Protection of witnesses)
- Article 27 (Law enforcement cooperation)
- Article 28 (Collection, exchange and analysis of information on the nature of organized crime)
- Article 29 (Training and technical assistance)
- Article 30 (Other measures: implementation of the Convention through economic development and technical assistance)
- Article 31 (Prevention)

(b) *Trafficking in Persons Protocol*

- Article 8 (Repatriation of victims of trafficking in persons)
- Article 10 (Information exchange and training)
- Article 11 (Border measures)

(c) *Migrants Protocol*

- Article 2 (Statement of purpose)
- Article 7 (Cooperation)
- Article 8 (Measures against the smuggling of migrants by sea)
- Article 9 (Safeguard clauses)
- Article 10 (Information)
- Article 11 (Border measures)
- Article 12 (Security and control of documents)

- Article 13 (Legitimacy and validity of documents)
- Article 14 (Training and technical cooperation)
- Article 15, paragraph 3 (Other prevention measures)
- Article 17 (Agreements and arrangements)
- Article 18 (Return of smuggled migrants)

(d) *Other instruments*

- 1949 Convention concerning Migration for Employment (revised)
Convention No. 97 of the International Labour Organization
United Nations, *Treaty Series*, vol. 120, No. 1616
<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C097>
- 1975 Convention concerning Migrations in Abusive Conditions and
the Promotion of Equality of Opportunity and Treatment of
Migrant Workers
Convention No. 143 of the International Labour Organization
United Nations, *Treaty Series*, vol. 1120, No. 17426
<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C143>
- 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 International Convention on the Protection of the Rights of All
Migrant Workers and Members of Their Families
General Assembly resolution 45/158, annex
http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm
- 1994 Programme of Action of the International Conference on Popu-
lation and Development
*Report of the International Conference on Population and Develop-
ment, Cairo, 5-13 September 1994* (United Nations publication,
Sales No. E.95.XIII.18), chap. I, resolution 1, annex
<http://www.iisd.ca/linkages/Cairo/program/p10000.html>
Paragraphs 10.1 and 10.2 (a)
- 1997 Conference of Ministers on the Prevention of Illegal Migration,
held in the context of the Budapest Process in Prague on 14 and
15 October 1997
<http://www.icmpd.org/uploadimg/recommendations%20prague%20Ministerial%20Oct%2097.pdf>
Recommendations 14 (Cooperation relative to effective practices for
control of persons at external frontiers) and 17 (Training)

1999 Bangkok Declaration on Irregular Migration, adopted at the International Symposium on Migration: Towards Regional Cooperation on Irregular/ Undocumented Migration, held in Bangkok from 21 to 23 April 1999

Document A/C.2/54/2, annex

2000 Recommendation 1467 (2000) of the Parliamentary Assembly of the Council of Europe on clandestine immigration and the fight against traffickers

Paragraph 11

2001 Twelve Commitments in the fight against trafficking in human beings, agreed upon at the Meeting of the JHA Council of Ministers of the member States of the European Union (Justice and Home Affairs) and the candidate States, held in Brussels on 28 September 2001

Point 5 (Cooperation)

2002 Proposal 2002/C 142/02 for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, adopted by the JHA Council of Ministers of the European Union (Justice and Home Affairs) in Brussels on 28 February 2002

Official Journal of the European Communities, C 142, 14 June 2002
Chapter II.E (points 64-66)

2002 Recommended Guidelines on Human Rights and Human Trafficking

Document E/2002/68/Add.1

Guideline No. 11 (Cooperation and coordination between States and regions)

Annex. Reporting requirements under the Migrants Protocol

The following is a list of the notifications States parties are required to make to the Secretary-General of the United Nations:

Article 8. Measures against the smuggling of migrants by sea

“6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.”

Article 20. 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 21. Signature, ratification, acceptance, approval and accession

“3. This Protocol 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 Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

“4. This Protocol 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 Protocol. 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 Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.”

Article 23. Amendment

“1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol 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. The States Parties to this

Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.”

“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 24. Denunciation

“1. A State Party may denounce this Protocol 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.”

Part Four

**LEGISLATIVE GUIDE FOR THE
IMPLEMENTATION OF THE PROTOCOL
AGAINST THE ILLICIT MANUFACTURING OF
AND TRAFFICKING IN FIREARMS,
THEIR PARTS AND COMPONENTS
AND AMMUNITION, SUPPLEMENTING
THE UNITED NATIONS CONVENTION
AGAINST TRANSNATIONAL ORGANIZED CRIME**

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I. Introduction

A. Structure of the legislative guide

1. The present legislative guide for the implementation of the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/255, annex) is divided into five chapters: introduction; scope and technical provisions of the Protocol and its relationship with the Convention; definitions; control measures; substantive criminal law; and information exchange.

2. Each of the four substantive chapters is prefaced by a brief description that summarizes the main points contained in it. Within each of the four chapters, the main articles of the Protocol are described in separate sections. Each section starts by quoting the relevant provisions of the Protocol and, where appropriate, the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I) and includes the following elements: an introduction; a summary of main requirements; mandatory requirements; optional measures, including optional issues; and information resources.

3. The guide is supplemented by annexes that provide a list of the reporting requirements under the Protocol (annex I) as well as examples of relevant national legislation (annex II). Readers are encouraged to consult the annexes as appropriate. The sections entitled “Summary of main requirements” provide a checklist of the essential requirements of the article concerned.

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

5. In sorting out the priorities and obligations under the Protocol, the guidelines presented below should be kept in mind.

6. In establishing their priorities, drafters of national legislation 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 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.

7. Whenever the words “States are required to” are used, the reference is to a mandatory provision. Otherwise, the language used in the legislative guide is “required to consider”, which means that States are strongly asked to seriously consider adopting a certain measure and make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the legislative guide employs the words “may wish to consider”. Occasionally, States “are required” to choose one or another option (e.g. as in the case of offences established in accordance with article 5 of the Convention). In that case, States are free to opt for one or the other or both options.

8. The exact nature of each provision will be discussed as it arises. As noted above, as the purpose of this guide is to promote and assist in efforts to ratify and implement the primary focus will be on provisions that are mandatory to some degree and the elements of those provisions which are particularly essential to ratification and implementation efforts. Elements that are likely to be legislative or administrative or are likely to fall within other such categories will be identified as such in general terms, but appear in the guide based on the substance of the obligation and not the nature of actions that may be required to carry it out, which may vary to some degree from one country or legal system to another. (It should be noted, however, that the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime made it clear that it saw the obligation to establish criminal offences as being primarily legislative in nature (see the interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Organized Crime Convention (A/55/383/Add.1), para. 69).)

B. Structure of the Protocol

9. The Protocol provides for a comprehensive system to control the movement of firearms, their parts and components and ammunition. Since

the specific focus is on transnational transactions, the Protocol provides for comprehensive procedures for the import, export and transit of firearms, their parts and components and ammunition. It is a reciprocal system requiring States to provide authorizations to one another before permitting shipments of firearms to leave, arrive or transit across their territory and enables law enforcement to track the legal movement of shipments to prevent theft and diversion. These standards are intended to help ensure a level of transparency to assist States parties to better target illicit transactions. Measures are also included to control manufacturing.

10. Linked to manufacturing and to the import/export/transit regime is the article dealing with marking of firearms. Both domestic and international efforts to reduce illicit trafficking rest on the ability to track and trace individual firearms. That, in turn, requires firearms to be uniquely identified. One of the law enforcement tools in the Protocol is, therefore, the marking of firearms.

11. The measures to control the legal movement of firearms are enforced through the criminalization provision in the Protocol, which requires States parties to establish criminal offences for illicit manufacturing, illicit trafficking and the illicit alteration or obliteration of markings. Recognizing that criminal offences cannot be detected or prosecuted effectively without the appropriate evidence, the Protocol contains articles requiring comprehensive record-keeping on the transnational movement of firearms, as well as the provision for exchange of information between countries involved in such transactions. The tools contained in the Convention are also critical in that regard. In particular, the articles dealing with mutual legal assistance and extradition for commission of offences covered by the Protocol will be essential tools for law enforcement.

12. The Protocol sets the minimum standard that must be dealt with in domestic law. States can legislate with respect to a broader range of weapons and impose increased or stricter measures in domestic law, if they wish, but they may not be able to get foreign cooperation with respect to the provisions that go beyond the standards set in the Protocol.

II. Scope and technical provisions of the Protocol and its relationship with the Convention

Firearms Protocol

“Article 1

“Relation with the United Nations Convention against Transnational Organized Crime

“1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

“2. The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein.

“3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.”

Organized Crime Convention

“Article 37

“Relation with protocols

“1. This Convention may be supplemented by one or more protocols.

“2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

“3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

“4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.”

Firearms Protocol

“Article 2

“Statement of purpose

“The purpose of this Protocol is to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.”

“Article 4

“Scope of application

“1. This Protocol shall apply, except as otherwise stated herein, to the prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to the investigation and prosecution of offences established in accordance with article 5 of this Protocol where those offences are transnational in nature and involve an organized criminal group.

“2. This Protocol shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations.”

“Article 18

“Entry into force

“1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

“2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.”

A. Main elements of the articles

1. Application of the Convention to the Protocol (article 1 of the Protocol and article 37 of the Convention)

13. Article 37 of the Convention and article 1 of each of the Protocols thereto together establish the basic relationship between the Convention and its Protocols. The four instruments were drafted as a group, with general provisions against transnational organized crime (e.g. extradition and mutual legal assistance) in the parent Convention and elements specific to the subject matter of the Protocols in each of the Protocols (e.g. offences established in accordance with the Protocol and provisions relating to travel and identity documents). As the Protocols are not intended to be independent treaties, to become a party to any of the Protocols, a State is required to be a State party to the parent Convention. This ensures that, in any case that arises under a Protocol to which the States concerned are parties, all of the general provisions of the Convention will also be available and applicable. Many specific provisions were drafted on that basis: the Convention contains general requirements for mutual legal assistance and other forms of international cooperation, for example, while requirements to render specific assistance such as the verification of travel documents or the tracing of a firearm are found only in the appropriate Protocols. Additional rules established by the relevant articles deal with the interpretation of similar or parallel provisions in each instrument and the application of general provisions of the Convention to the offences established in accordance with the Protocol and its other provisions.

14. Article 1 of the Protocol and article 37 of the Convention establish the following basic principles governing the relationship between the two instruments:

(a) No State can be a party to any of the Protocols unless it is also a party to the Convention (art. 37, para. 2, of the Convention). Simultaneous ratification or accession is permitted, but it is not possible for a State to be subject to any obligation under the Protocol unless it is also subject to the obligations of the Convention;

(b) The Convention and the Protocol must be interpreted together (art. 37, para. 4, of the Convention and art. 1, para. 1, of the Protocol). In interpreting the various instruments, all relevant instruments should be considered and provisions that use similar or parallel language should be given generally similar meaning. In interpreting one of the Protocols, the purpose of that Protocol must also be considered, which may modify

the meaning applied to the Convention in some cases (art. 37, para. 4, of the Convention);

(c) The provisions of the Convention apply, *mutatis mutandis*, to the Protocol (art. 1, para. 2, of the Protocol). The meaning of the phrase “*mutatis mutandis*” is clarified in the interpretative notes (A/55/383/Add.1, para. 62) as “with such modifications as circumstances require” or “with the necessary modifications”. This means that, in applying provisions of the Convention to the Protocol, minor modifications of interpretation or application may be made to take account of the circumstances that arise under the Protocol, but modifications should not be made unless they are necessary and then only to the extent that is necessary. This general rule does not apply where the drafters have specifically excluded it;

(d) Offences established in accordance with the Protocol shall also be regarded as offences established in accordance with the Convention (art. 1, para. 3, of the Protocol). This principle, which is analogous to the *mutatis mutandis* requirement, is a critical link between the Protocol and the Convention. It ensures that any offence or offences established by each State in order to criminalize illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and tampering with markings as required by article 5 of the Protocol will automatically be included in the scope of the basic provisions of the Convention governing forms of international cooperation such as extradition (art. 16) and mutual legal assistance (art. 18).¹ It also links the Protocol and the Convention by making applicable to offences established in accordance with the Protocol other mandatory provisions of the Convention. In particular, as discussed below in chapter V of the present guide, on substantive criminal law, obligations in the Convention concerning money-laundering (art. 6), liability of legal persons (art. 10), prosecution, adjudication and sanctions (art. 11), confiscation (arts. 12-14), jurisdiction (art. 15), extradition (art. 16), mutual legal assistance (art. 18), special investigative techniques (art. 20), obstruction of justice (art. 23), witness and victim protection and enhancement of cooperation (arts. 24-26), law enforcement cooperation (art. 27), training and technical assistance (arts. 29 and 30) and implementation of the Convention (art. 34), apply equally to the offences established in accordance with the Protocol. Establishing a similar link is therefore an important element of national legislation in the implementation of the Protocols;

(e) The Protocol requirements are a minimum standard. Domestic measures may be broader in scope or more severe than those required by

¹In most cases, the drafters used the phrase “offences covered by this Convention” to make this link. See, for example, article 18, paragraph 1, which sets forth the scope of the obligation to extradite offenders.

the Protocol, as long as all obligations set forth in the Protocol have been fulfilled (art. 34, para. 3, of the Convention).

2. Interpretation of the Protocol (articles 1 and 19 of the Protocol and article 37 of the Convention)

15. The interpretation of treaties is a matter for States parties. General rules for the interpretation and application of treaties are covered by the 1968 Vienna Convention on the Law of Treaties² and will not be discussed in detail in the present guide. These general rules may be amended or supplemented by rules established in individual treaties, however, and a number of specific interpretative references appear in both the Convention and the Protocol. (See, for example, article 16, paragraph 14, of the Convention, which makes the principle of non-discrimination a limit on the interpretation and application of the basic obligation to extradite offenders.) The dispute settlement provisions found in all four instruments also require negotiations, followed by arbitration, as the means of resolving any disputes over interpretation or application matters (see article 35 of the Convention and article 16 of the Protocol). Specific references will be raised in relation to the subject matter to which they apply, but there are also general interpretative provisions that apply to the Protocol. Pursuant to article 37 of the Convention and article 1 of the Protocol, elements of the Convention must be taken into consideration when interpreting the Protocol.

B. Purposes of the Protocol (article 2 of the Protocol)

16. The purpose of the Protocol is “to promote, facilitate and strengthen cooperation among States Parties in order to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” (art. 2 of the Protocol).

C. Scope of application (article 4 of the Protocol)

17. It is essential to understand the scope of the Protocol, which is set out in article 4. Paragraph 1 of article 4 establishes the full scope of application of the Protocol and paragraph 2 then contains exclusions related to certain state- and national security-related transactions and transfers.

²United Nations, *Treaty Series*, vol. 1155, No. 18232 (also available online: <http://www.un.org/law/ilc/texts/treaties.htm>).

18. The general principle established in article 4, paragraph 1, of the Protocol is that the instrument applies to the “prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” and to the “investigation and prosecution of offences established in accordance with article 5 of this Protocol where those offences are transnational in nature and involve an organized criminal group”.

19. Article 4, paragraph 2, provides that the Protocol “shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations”. The intention in paragraph 2 was to exclude certain transactions or transfers that involve States. The extent of the limitation turns on the interpretation of the terms “state-to-state transactions” and “state transfers”. Generally, this is left to States parties, but the drafters were concerned that the Protocol should apply to activities undertaken by States parties on a commercial basis, such as the dealings of state-owned or operated manufacturers of firearms. To clarify this, the interpretative notes indicate that the words “state-to-state transactions” refer only to transactions by States in a sovereign capacity, thereby excluding States acting in their commercial capacity.³

20. As with other provisions of the Convention and Protocols, article 34, paragraph 3, of the Convention sets a minimum standard, which States parties are free to exceed if they wish, bearing in mind that any investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol would not be covered by the various requirements to provide international cooperation.

21. It is important for drafters of national legislation to note that the provisions relating to the involvement of transnationality and organized crime do not always apply. While in general the reader should consult the legislative guide for the implementation of the Convention for details (art. 34, para. 3, of the Convention) of when those criteria apply and when they do not (see paras. 29-31 of the legislative guide to the parent Convention), it is important to emphasize that, for example, article 34,

³See the interpretative notes (A/55/383/Add.3), para. 4; see also the record of the meeting of the General Assembly at which resolution 55/255, containing the text of the Firearms Protocol, was adopted (*Official Records of the General Assembly, Fifty-fifth Session, Plenary Meetings, 101st meeting*).

paragraph 2, of the Convention specifically provides that legislatures must not incorporate elements of transnationality or organized crime into domestic offence provisions. (The only exception to this principle arises where the language of the criminalization requirement specifically incorporates one of these elements, such as in article 5, paragraph 1, of the Convention (presence of an organized criminal group). These requirements are discussed in more detail in the legislative guide for the implementation of the parent Convention.) Together, these provisions establish the principle that, while States parties should have to establish some degree of transnationality and organized crime with respect to most aspects of the Protocol, their prosecutors must not be obliged to prove either element in order to obtain a conviction for illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and tampering with markings or any other offence established by the Convention or its Protocols. In the case of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and tampering with markings, domestic offences should apply even where transnationality and the involvement of organized criminal groups does not exist or cannot be proved. As another example, the first paragraphs of the articles on extradition (art. 16) and mutual legal assistance (art. 18) of the Convention set forth certain circumstances in which one or both of these elements are to be considered satisfied. Regarding the definition of “organized criminal group”, it should be noted that, according to the interpretative notes to article 2, subparagraph (a), of the Convention (A/55/383/Add.1, para. 3):

“The *travaux préparatoires* should indicate that the words ‘in order to obtain, directly or indirectly, a financial or other material benefit’ should be understood broadly, to include, for example, crimes in which the predominant motivation may be 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.”

D. Implementation of the articles

22. Generally, most of the articles covered in the present chapter govern the interpretation and application of the other provisions. Thus, they may provide assistance and guidance to Governments, drafters and legislators but do not themselves require specific implementation measures.

23. However, requirements that the Convention be applied, *mutatis mutandis*, to the Protocol and that offences established in accordance with the Protocol be regarded as offences established in accordance with the Convention may give rise to a need for implementing legislation. The measures required as a result of such requirements are described in detail in chapter V.

III. Definitions

A. “Firearm”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“(a) ‘Firearm’ shall mean any portable barrelled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899;

“ . . . ”

1. Introduction

24. The definition of the term “firearm” establishes the main physical subject matter of the Protocol.

2. Summary of the main requirements

25. According to the definition in the Protocol, a firearm:

- (a) Is portable;
- (b) Is a barrelled weapon; and
- (c) Expels a projectile by the action of an explosive.

A firearm is not:

- (a) An antique; or
- (b) A replica of an antique.

3. *Mandatory requirements*

26. The term “firearm” is defined in order to establish a clear meaning for the Protocol. There is no requirement that the term be defined in domestic law, although national legislatures may find it necessary to adopt or amend legislative definitions to ensure that other legislative requirements apply to the full range of subject matter specified by the Protocol.

(a) Main elements of the article

27. The drafters of the Protocol adopted the basic definition of “firearm” as a “barrelled weapon”. Added to that, however, is qualifying language containing specific limitations, such as the exclusion of non-portable firearms and of specified antique firearms and their replicas, and language to exclude such barrelled weapons as air guns.

(i) Portability

28. By including the word “portable”, very large firearms are excluded from the definition. To clarify the meaning of “portable”, the interpretative notes indicate that “the intended meaning was to limit the definition of ‘firearm’ to firearms that could be moved or carried by one person without mechanical or other assistance” (A/55/383/Add.3, para. 3).

(ii) Action of an explosive

29. The inclusion of the phrase “by the action of an explosive” in the definition excludes weapons using another form of propulsion, such as compressed gas, to propel the projectile.

(iii) Antiques

30. In addition, the drafters found it appropriate to exclude from the application of the Protocol firearms manufactured up to and during 1899.

(iv) Replicas

31. Replicas of antique firearms are also excluded from the definition, but drafters should be aware that only functional replicas using modern firing systems (i.e. those which are actually designed to expel projectiles) need to

be considered. Non-firing replicas would only be included if they can be “readily converted” to discharge projectiles.

(b) Implementation of the article

32. As the basic category of subject matter, the definition of “firearm” will be a critical element of domestic implementing legislation. In many cases, States will already have one or more domestic legal definitions. States that do not already have a definition in domestic law should include one that as a minimum standard complies with the definition in the Protocol.

(i) Where the domestic meaning of “firearm” is narrower than the definition in the Protocol

33. A domestic definition that does not include the full range of items included within the definition in the Protocol will require expansion in order to conform to the requirements of the Protocol. Amending the existing domestic definition to conform to or exceed those requirements would have the effect of also amending, consequentially, other domestic provisions and offences that rely on the domestic definition. Where the domestic definition is expanded, for example, other domestic laws concerning, for example, domestic crimes and licensing rules that apply to “firearms” would automatically be expanded as well. This approach has the advantage of ensuring simplicity of drafting and internal consistency in the law affecting domestic and transnational matters relating to firearms. It would, however, have policy implications beyond those required by the Protocol, which would have to be considered by each Government. If it is essential to preserve the integrity of existing rules without amendment, it would also be possible to establish definitions that are subject-specific, using language such as “For the purposes of this requirement/provision, ‘firearm’ includes/does not include . . .”, but this approach should be avoided if possible. The creation of separate definitions and schemes for implementing the Protocol and overlapping domestic policies is likely to result in confusion between the categories of firearm and the rules that apply to each, as well as inefficiencies due to parallel regulatory frameworks.

(ii) Where the domestic definition is broader than the definition in the Protocol

34. Domestic definitions that include a broader range of weapons as “firearms” will be in conformity with the Protocol provided that no

firearm covered by the Protocol is omitted, making legislative amendments unnecessary.

35. However, legislators and drafters should bear in mind that, in this case, items that are “firearms” under national law but not within the definition in the Protocol might not lead to cooperation from other States parties in tracing under the Protocol or other forms of cooperation under various provisions of the Convention itself. This is because an offence committed with respect to a weapon that is not a “firearm” as defined by the Protocol would not be an offence established in accordance with the Protocol sufficient to trigger the application of article 1, paragraph 3, of the Protocol and article 3 of the Convention. The only way the Convention would be triggered in such cases is if the offence constituted a “serious crime” and the other requirements of article 3 of the Convention were met. (See article 3 of the Convention (application) and article 2, subparagraph (b) (definition of “serious crime”), both of which apply to the Protocol, *mutatis mutandis*.)

(iii) *Where domestic definitions are based on use or intended use (e.g. military firearms)*

36. Drafters should note that the definition is based on physical or forensic characteristics associated with firearms and not with design characteristics or the intended application for which a particular firearm was designed. National definitions based on categories or using qualifying terms such as “military” or “sporting or recreational” will generally not comply with the Protocol unless they also embody the basic forensic elements in the definition. National definitions and laws that regulate military and recreational firearms differently, for example, would only be in conformity if the combination of categories covered the full range of “firearms” covered by the Protocol and if the lowest standard of regulation met the minimum standard set by the Protocol. Otherwise, amendments to the definitions and/or the substantive regulatory requirements would probably be required.

(iv) *Antiques*

37. In developing or refining their definition of “firearm”, drafters should take into consideration their current treatment of antique firearms.

38. Existing definitions that apply national law to firearms made before 1899, although stricter than what is called for by the Protocol, include all

of the firearms covered by the Protocol and would therefore be in conformity with it without amendment. Since this is a stricter standard than that applied by the Protocol, other States parties would not be obliged to provide cooperation with respect to firearms made in or prior to 1899.

39. Existing definitions that specify a later date than 1899, excluding from national law firearms made after 1899 as antiques, would not be in conformity. This would have to be addressed by amending the existing definition.

40. Another formulation that should be reviewed is one that defines antique firearms with reference to a specific number of years, as opposed to a date in time. For instance, where a country defines antique firearms as those which are 100 years old, the cut-off date would be later than 1899 and would therefore not conform to the definition in the Protocol. Even if the number of years were greater, 125 for instance, eventually the cut-off date would cease to comply with the terms of the Protocol.

(v) *Replicas*

41. Beyond the cut-off date, the Protocol does not provide any guidance with respect to the meaning of “antique firearms or their replicas”, leaving this up to national legislatures. However, the domestic laws of many States subject both antique firearms and their replicas to a lower standard of regulation on the basis that their reduced capabilities make them less dangerous and, for this reason, drafters and legislators may wish to consider applying criteria that focus on the capabilities of a replica rather than its appearance. Thus, a firearm that superficially resembles an antique firearm but has substantial added capabilities, owing to the use of technology not available at the time of the manufacture of the original, would not be considered a replica. On the other hand, a replica that must be muzzle-loaded in the same manner as the original, for example, has the same limits on cartridge power and rate-of-fire as the original and would be considered to be a replica. Drafters and legislators are advised to consult forensic or other experts on this question.

4. *Optional measures, including optional issues*

42. Consideration may be given to extending the meaning of “firearm” or the scope of implementing legislation to include larger types of military weaponry or non-firearms. It should be borne in mind, however, that such

provisions would be subject to the same considerations relating to international cooperation set out above.

5. *Information resources*

43. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 1, paragraph 3 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 12, paragraph 4 (Information)

(b) Organized Crime Convention

Article 2, subparagraph (b) (Use of terms)

Article 3 (Scope of application)

Article 34, paragraph 3 (Implementation of the Convention)

(c) Other instruments

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article I

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc

Article 1.3

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20) <http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, preamble

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Article 2

B. “Parts and components”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(b) ‘Parts and components’ shall mean any element or replacement element specifically designed for a firearm and essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block, and any device designed or adapted to diminish the sound caused by firing a firearm;

“ . . . ”

1. *Introduction*

44. The term “parts and components” refers to one of the three categories of subject matter covered by the Protocol. Parts and components of firearms were included in the Protocol to ensure that the requirements for firearms moving across borders could not be circumvented by simply disassembling the firearms into their constituent parts. To avoid this, most of the offences established by the Protocol and its requirements, apart from marking, apply equally to parts and components. Marking parts and components was seen as impracticable and is thus not required. Devices “designed or adapted to diminish the sound caused by firing a firearm” or “silencers” are expressly included, on the basis that muffled or silenced firearms could pose an additional threat to public safety when added to a firearm.

2. Summary of main requirements

45. There are two parts to this definition:

- (a) Elements of firearms; and
- (b) One specific firearm accessory, the silencer.

3. Mandatory requirements

46. The term “parts and components” is defined in order to establish a clear meaning for the Protocol. There is no requirement that the term be defined in domestic law, although national legislatures may find it necessary to adopt or amend legislative definitions to ensure that other legislative requirements apply to the full range of subject matter specified by the Protocol.

(a) Main elements of the article

47. With respect to the first part of the definition, “elements of firearms”, the definition excludes all parts and components that are not both designed specifically for a firearm and essential to its operation. Thus, for example, a small part such as a spring or machine-screw would be excluded if that screw were a standard item used in devices other than firearms. Components or accessories, such as carrying-slings or gun cases, would also be excluded because the firearm can be operated without them. In addition to the general definition, for greater clarity, the category expressly includes the major elements of a firearm, the “barrel, frame or receiver, slide or cylinder, bolt or breech block”. The second part of the definition refers to accessories designed or adapted to diminish the sound caused by firing a firearm, commonly referred to as “silencers”.

48. It should be noted, however, that while all of the requirements and offences established by the Protocol apply to firearms, there are certain provisions that are not mandatory with respect to parts and components (e.g. marking or record-keeping). Where this is the case, the description of the provisions set out below highlight this fact.

(b) Implementation of the article

49. With respect to the items in the first part of the definition (“any element or replacement element specifically designed for a firearm and

essential to its operation, including a barrel, frame or receiver, slide or cylinder, bolt or breech block”), drafters may choose to use the general description only, relying on forensic experts to assist judicial consideration, or to include the indicative list for greater clarity. The final item listed in the definition (“any device designed or adapted to diminish the sound caused by firing a firearm”) raises a further issue. Such devices are designed for use with a firearm, but are not essential to its operation and would therefore have to be dealt with expressly in domestic legislative provisions.

4. Optional measures, including optional issues

50. It should be noted that, in countries where restrictions apply, attempts have been made to avoid the restrictions by producing and selling “kits” of parts that can easily be assembled into a finished device. Drafters may wish to consider taking the potential for this type of activity into consideration while drafting this definition. It is recommended that drafters or legislators consult domestic forensic or technical experts on these issues.

5. Information resources

51. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 8 (Marking of firearms)

(b) Organized Crime Convention

Article 34, paragraph 3 (Implementation of the Convention)

(c) Other instruments

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc

Article 1.3

C. “Ammunition”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(c) ‘Ammunition’ shall mean the complete round or its components, including cartridge cases, primers, propellant powder, bullets or projectiles, that are used in a firearm, provided that those components are themselves subject to authorization in the respective State Party;

“ . . . ”

1. *Introduction*

52. The definition of “ammunition” establishes the third category of subject matter covered by the Protocol. The language of the definition recognizes that, on the one hand, transactions involving the import, export or other transfer of ammunition cannot be controlled effectively without some degree of regulation of the basic components of ammunition, since these can in some cases easily be transferred for assembly at the destination. At the same time, the regulatory burdens and other factors relating to the control of components that are inert and that do not, without assembly, constitute a risk have led most States to avoid the regulation of all components and many States to regulate only assembled cartridges. Some regulate finished ammunition and, for safety or security reasons, primers and propellants, which create additional risks of explosion or fire.

2. *Summary of main requirements*

53. Ammunition is:

(a) The complete round; or

(b) The complete round and its component parts, if the latter are already subject to authorization in the State party.

3. *Mandatory requirements*

54. The term “ammunition” is defined in order to establish a clear meaning for the Protocol. There is no requirement that the term be defined in domestic law, although national legislatures may find it necessary to adopt or amend legislative definitions to ensure that other legislative requirements apply to the full range of subject matter specified by the Protocol.

(a) Main elements of the article

55. Any reference in the Protocol to “ammunition” includes all finished or assembled types of ammunition, generally consisting of a cartridge case into which a primer, propellant and a projectile (or projectiles) have been inserted. The definition in the Protocol would require States to go beyond this and to apply the same controls to the components, if such components are already subject to legal regulation in their existing legislation.

(b) Implementation of the article

56. In many cases, States will already have a domestic legal definition. States that do not already have a definition in domestic law should include one that as a minimum standard complies with the definition in the Protocol. As noted above, in general the definition should refer to all finished or assembled types of ammunition. Ammunition is subject to the basic import and export requirements of the Protocol but is not required to be marked. Records of ammunition transfers are only required “where appropriate and feasible”.

4. *Optional measures, including optional issues*

57. In States where the constituent parts of ammunition are not subject to authorization requirements, drafters may wish to consult with law enforcement communities to determine whether an expansion of the domestic definition of ammunition is necessary to capture those items. Drafters should note that two major elements of ammunition, the propellants and the primers, may already be regulated or restricted as explosive materials and may therefore not require new legislation.

5. *Information resources*

58. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Organized Crime Convention*

Article 34, paragraph 3 (Implementation of the Convention)

(b) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.un.org/juridico/english/treaties/a-63.html>

Article I

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc

Article 1.3

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Article 2

IV. Control measures

A. Introduction

1. *Summary of provisions*

59. The following articles of the Protocol set out the administrative requirements needed to support the criminal offences established in accordance with the Protocol. Given the legal and constitutional differences between States, the classification of those measures as legislative, regulatory or administrative may vary to some degree. The principle, however, is that the measures must provide a sufficient basis for the related offences. They must be founded in law (see A/55/383/Add.3, para. 5) and they must be in place at the time of ratification.

60. The central policy of the Protocol is to control the cross-border movement of firearms, their parts and components and ammunition and to criminalize any transaction or transfer that does not comply with the requirements of the Protocol or that is not excluded from the scope of the Protocol (art. 4, para. 2, of the Protocol). Firearms must be uniquely marked to support identification and tracing (art. 8); systems must be established for the issuance of import and export authorizations (art. 10); and records must be kept to support later tracing, based on the information generated by marking the firearms and the issuance of authorizations (art. 7). In addition, the Protocol establishes rules for confiscation, seizure and disposal of firearms, their parts and components and ammunition that operate as an exception to the rules established for other property used or destined for use in crime by articles 12-14 of the Convention (art. 6). The Protocol also sets standards for the deactivation of firearms (art. 9) and requires States to consider measures to regulate brokers (art. 15).

61. There are five situations requiring the marking of firearms. These occur at the time of manufacture, import, transfer from government stocks, when disposal other than destruction occurs and when a firearm is deactivated. There are four activities requiring authorization: import, export, transit and manufacture.

2. *Scope of application*

62. Before proceeding to discuss the requirements for controlling marking, transfers and other transactions, it is essential to review the scope of the Protocol, which is set out in article 4. Paragraph 1 of article 4 establishes the full scope of application of the Protocol and paragraph 2 then contains exclusions related to certain state- and national security-related transactions and transfers (see paras. 17-21 for a general discussion).

63. The general principle established in article 4, paragraph 1, of the Protocol is that the instrument applies to the “prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” and “to the investigation and prosecution of offences established in accordance with article 5 of this Protocol *where those offences are transnational in nature and involve an organized criminal group*” [emphasis added]. One may ask whether the qualifiers “transnational in nature” and the involvement of “an organized criminal group” limit the application of the Protocol’s control measures. The answer is that they do not. This is because the two qualifiers apply to the investigation and prosecution of offences, but not to the prevention of the offences. The Protocol recognizes that, in order to prevent illicit trafficking and manufacturing, a State must establish a legal regime with broad application. Essentially, to identify illicit transactions, all transactions must be subject to scrutiny to determine which are legitimate and which are not. For this reason, the control measures are to be applied to all transactions apart from those excluded by article 4, paragraph 2.

64. Article 4, paragraph 2, provides that the Protocol “shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations”. The intention in paragraph 2 was to exclude certain transactions or transfers that involve States. The extent of the limitation turns on the interpretation of the terms “state-to-state transactions” and “state transfers”. Generally, this is left to States parties, but the drafters were concerned that the Protocol should apply to activities undertaken by States parties on a commercial basis, such as the dealings of state-owned or operated firearm manufacturers. To clarify this, the interpretative notes indicate that the words “state-to-state transactions” refer only to transactions by States in a sovereign capacity, thereby excluding States acting in their commercial capacity.³

B. Marking

“Article 8

“Marking of firearms

“1. For the purpose of identifying and tracing each firearm, States Parties shall:

“(a) At the time of manufacture of each firearm, either require unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number, or maintain any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture;

“(b) Require appropriate simple marking on each imported firearm, permitting identification of the country of import and, where possible, the year of import and enabling the competent authorities of that country to trace the firearm, and a unique marking, if the firearm does not bear such a marking. The requirements of this subparagraph need not be applied to temporary imports of firearms for verifiable lawful purposes;

“(c) Ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by all States Parties of the transferring country.

“2. States Parties shall encourage the firearms manufacturing industry to develop measures against the removal or alteration of markings.”

1. Introduction

65. Article 8 of the Protocol requires States parties to take measures to ensure that firearms that are manufactured in or imported into their jurisdictions are marked.

66. The unique marking of each firearm identifies it and forms the basis on which records are kept and firearms are traced and was, therefore, seen by many States as a core provision of the Protocol. Where a firearm is recovered in the course of illicit manufacturing or trafficking, or in some

other context, the markings can be used by that State party to search its own records and as the basis of a request for the tracing of that firearm and possibly for mutual legal assistance under the Convention. (Assistance under the Convention may also be available in other circumstances, such as recovery of a firearm in the context of a “serious crime” to which the Convention applies (arts. 2, subpara. (b), and 3) or where firearms could be considered as having been used or destined for use in an offence covered by the Convention or where they could be considered as proceeds derived from such an offence (arts. 12-14). Where the relevant States are parties to the Protocol, the offences “covered by the Convention” include those established by the Protocol itself. Under its article 3, the Convention applies to a “serious crime” if the crime is transnational in nature and involves an organized criminal group.)

67. The addition of the importing country is intended to supplement the marking affixed at the time of manufacture, under which the original country of manufacture should already be identifiable. The import marking will be particularly relevant for firearms that have been in circulation for many years as they can expedite the tracing process by identifying the last country into which the firearm was imported. An exception to the import marking requirement was created to allow States parties to reduce the regulatory burden on individuals importing or exporting personal firearms for recreational purposes and on companies that frequently import and export firearms for purposes such as maintenance and repair (art. 8, para. 1 (b), and art. 10, para. 6).

68. Since state-owned firearms may be marked differently than commercially available firearms, the Protocol makes additional provisions for the marking of firearms transferred from government stocks.

2. Summary of main requirements

69. The Protocol requires States parties to ensure appropriate markings at:
- (a) Manufacture;
 - (b) Import; and
 - (c) Transfer from government stocks to permanent civilian use.

3. *Mandatory requirements*

(a) *Main elements of the article*

(i) *Marking at manufacture (art. 8, para. 1 (a))*

70. There are three basic manufacture marking requirements. The marking must:

- (a) Uniquely identify each weapon (in conjunction with other characteristics, such as make, model, type and calibre);
- (b) Allow anyone to determine country of origin; and
- (c) Permit country of origin experts to identify the individual firearm.

71. Article 8, paragraph 1 (a), sets out two distinct options for marking, but only one of the options will be open to drafters of legislation in most cases. States that already employ the second system, which involves “any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code” are permitted to “maintain” or to continue using such a system. States that are not already using such a system, however, are obliged to limit permitted forms of marking to “unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number”. With this standard, it is important to note that the uniqueness of the marking may take into account other identifying characteristics, such as the make, model, type and calibre. The choice of additional identifying characteristics and how they are incorporated into marking systems is left to States parties. (Some guidance may be derived from the additional characteristics used by the International Criminal Police Organization (Interpol) in its Interpol Weapons and Explosives Tracing System (see annex III), which uses, in addition to serial numbers or other markings, make, model, calibre, barrel-length and number of shots as identifying characteristics, bearing in mind that some of these may not be relevant or particularly helpful for some types of firearm. For example, the number of shots is a good identifier for firearms such as revolvers where the number is fixed at manufacture, but not for many other types, which can use detachable cartridge magazines of different capacities.)

72. Where the alternative of geometric symbols is employed, the marking has to be sufficient to indicate clearly to law enforcement officials in any State party the country of manufacture in order to permit a request to that

country to trace the firearm. It must also be sufficient to enable the experts in the country of manufacture to trace the firearm's source. The term "user-friendly" is intended to mean that the marking must be easily recognizable as marking and that characters or symbols used should be easy to read and transmit from one country to another to ensure that the international tracing process is both feasible and accurate.

(ii) *Marking on import (art. 8, para. 1 (b))*

73. Article 8, paragraph 1 (b), requires the marking of each imported firearm with additional information. The content of such markings must enable later identification of the country of import and, where possible, the year of import.

74. Another marking may also have to be applied in addition to the import mark. Where the firearm does not already have a manufacturing mark that complies with the basic marking requirements set forth in article 8, paragraph 1 (a), such a mark must also be placed on the imported firearm. This may be necessary where the firearm is imported from a country that is not a State party to the Protocol or where the firearm was manufactured without markings prior to the entry into force of the Protocol. Such additional markings must be affixed to all "imported firearms", which means that the process must generally be complete at the time the firearm is actually imported. The Protocol does not specify whether the importer or exporter should be required to affix such additional markings or at what stage of the process this must be done, leaving those decisions to the discretion of national legislatures.

75. Legislators must generally require import markings to all imported firearms, but are permitted to make an exception for firearms imported temporarily for a "verifiable lawful purpose" (see also article 10, paragraph 6, of the Protocol, regarding simplified import/export procedures in such cases).

(iii) *Marking on transfer from government stocks to "permanent civilian use" (art. 8, para. 1 (c))*

76. In order to conform to article 8, paragraph 1 (c), firearms transferred from government stocks to permanent civilian use must meet the same basic marking requirements of unique identification. If not already marked

sufficiently to permit the identification of the transferring country by all States, the firearms must be so marked at the time of transfer.

77. It should be noted here that this requirement does not apply to confiscated firearms that re-enter the civilian market. Firearms of this type are subject to specific marking requirements set forth in article 6, paragraph 2.

(b) Implementation of the article

78. The language used in article 8 assumes that States parties will impose requirements on those who manufacture, import or export firearms to affix the necessary markings, with one exception. Article 8, paragraph 1 (c), which deals with marking firearms upon transfer from government stocks to permanent civilian use, uses language intended to allow States parties either to mark the firearms themselves or to enforce requirements that some involved party do so (“States Parties shall . . . ensure . . . the appropriate unique marking”).

79. In most States, implementation of the marking requirements is likely to involve a combination of legislative, regulatory, delegated legislative and administrative measures. The delegation of legislative powers to officials may be particularly useful in areas where frequent adjustments may be needed to take account of technical developments, provided that these are founded in law.

80. For example, where basic requirements to mark items and offences for failing to mark them would normally be established by legislatures in statutory provisions, the authority to promulgate detailed specifications as to what the marking should consist of and how it should be done could be delegated to officials, provided that rules, specifications or other regulatory provisions are duly made, properly drafted and published. This approach maintains the rule of law and principle of legality, while still allowing for technical adjustments to the requirements as new marking techniques are developed and as different items that require marking are encountered. It should be noted, however, that changes or amendments must be made using the same procedures. (In the case of marking requirements, for example, legislatures might establish a basic requirement to mark firearms and an offence for non-compliance and then delegate to an official the power to impose and amend regulatory requirements setting standards for such things as what markings should consist of, where they should be placed on each type of firearm and the specific methods that should be used to create

the actual marking. The interpretative notes specify that any “other measures” used in relation to offences established in accordance with the Protocol presuppose the existence of a law (A/55/383/Add.3, para. 5.)

81. In the case of import markings, the person who should be required to affix the markings is not specified, leaving legislators the option of imposing the requirement on the manufacturer, exporter or importer. Since the exporter is generally outside the jurisdiction of the legislature, legislation imposing the requirement on exporters would generally take the form of a provision prohibiting the entry of firearms unless appropriately marked prior to entry. Imposing the requirement on importers, who are within the jurisdiction of the legislature, would take the form of a requirement to mark appropriately at some time immediately after importation and an offence of not having done so within a set period of time. A combination of these two formulations may also be adopted, placing the onus on the importer to ensure markings are applied, but leaving the implementing provision flexible enough to allow the marking to be applied by the importer or the exporter.

82. As for the content of the marking, the language of the provision permits the name of the country to be printed out in full or a symbol to be used to identify the country, as long as this symbol is familiar enough to permit “identification of the country of import”. In States that require proof markings to certify the safety of firearms, for instance, these proof markings can be used as the import mark if they satisfy the requirements of the provision.

83. Regarding transfers from government stocks to permanent civilian use, the provision requires States parties to “ensure [that] . . . the appropriate unique marking” is present. States parties could fulfil this obligation by imposing this requirement on officials responsible for the disposal of firearms using administrative directives, or on outside actors such as the recipients, which would entail the use of legislation, including a requirement to mark and an offence of failing to do so.

4. Optional measures, including optional issues

84. The standards set by the Protocol are intended as minimum standards for marking and States are free to establish or maintain requirements that go beyond those of the Protocol, subject to the potential limits on cooperation found in the Protocol and the Convention. From a policy standpoint,

periodic review of domestic marking standards may be advisable to take account of new technical developments in marking and identifying firearms as they emerge and are taken up by law enforcement agencies and industry. (Article 8, paragraph 2, of the Protocol calls on States parties to encourage firearms manufacturers to develop precautions against the removal of markings.)

85. A number of options are available for legislatures seeking marking requirements that exceed those of the Protocol but that would make marking more reliable and useful in combating illicit manufacturing and trafficking. Legislative standards could be used to ensure an adequate degree of permanency and resistance to tampering. In the case of the most commonly used method, that of stamping numbers or characters into metallic parts, for example, this might involve the pressures used, the depth to which characters must be stamped, the size of the mark, the location of the mark or the nature of the parts into which they are stamped. Provisions specifying the form of markings and where they should be placed on each type of firearm could also be considered. To the extent that such standardization is feasible, it would simplify the recognition and reading of markings by law enforcement, customs and other officials, reducing errors as well as the need for specialized training. The reduction of errors would also improve the quality and reliability of the records kept pursuant to article 7 and might lower costs associated with ratifying and implementing the Protocol. Legislators may wish to consider consulting forensic experts and manufacturers to determine what requirements are feasible and how appropriate standards could be formulated and established.

86. Legislators and drafters may wish to specify more clearly the time at which firearms must be marked, providing more precision to the phrase “at the time of manufacture”. For instance, requiring the marking of the firearm at the time of assembly and the receiver and/or barrel at the time of its manufacture would address the problem of the diversion and trafficking of disassembled firearms. For similar reasons, legislators and drafters may wish to consider establishing specific requirements designating which firearm parts and components must be marked, in order to defeat attempts to create untraceable firearms by marking some part or component that can easily be removed or exchanged. Most States that have dealt with this problem require that the “frame/receiver” of the firearm, to which all of the other parts and components are attached, be marked. Some require the marking of the barrel instead of or in addition to the frame.

87. In relation to import marking, the feasibility of imposing the same standards on imported firearms as those produced under domestic regulations may have to be taken into consideration.

88. As regards firearms transferred from government stocks to permanent civilian use, the content of markings is not specified in detail and legislators, drafters and forensic experts should consider the likely use of the information in tracing and the nature of markings that are placed on types of firearm produced for state use and likely to be transferred later into private hands. If the firearms do not meet the requirements of article 8, paragraph 1 (a), legislators should consider requiring the application of markings that would meet this standard.

89. States that wish to impose marking requirements for some parts and components or markings such as “headstamps” or package markings that partially identify cartridges or ammunition batches are free to do so, but this is not required by the Protocol. Where a State’s domestic marking requirements go beyond those set in the Protocol, drafters may wish to expand the appropriate illicit manufacturing offences to cover the additional situations, bearing in mind that the investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol would not be covered by the various requirements to provide international cooperation.

5. Information resources

90. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 3, subparagraphs (d) (iii) and (e) (Use of terms)

Article 4 (Scope of application)

Article 5, paragraphs 1 (a), (b) and (c) (Criminalization)

Article 6, paragraph 2 (Confiscation, seizure and disposal)

Article 7 (Record-keeping)

Article 10, paragraph 6 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

(b) *Organized Crime Convention*

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article VI

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section II

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects
Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15),

chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Articles 5 and 9

C. Licensing or authorization systems

“Article 10

“General requirements for export, import and transit licensing or authorization systems

“1. Each State Party shall establish or maintain an effective system of export and import licensing or authorization, as well as of measures on international transit, for the transfer of firearms, their parts and components and ammunition.

“2. Before issuing export licences or authorizations for shipments of firearms, their parts and components and ammunition, each State Party shall verify:

“(a) That the importing States have issued import licences or authorizations;

and

“(b) That, without prejudice to bilateral or multilateral agreements or arrangements favouring landlocked States, the transit States have, at a minimum, given notice in writing, prior to shipment, that they have no objection to the transit.

“3. The export and import licence or authorization and accompanying documentation together shall contain information that, at a minimum, shall include the place and the date of issuance, the date of expiration, the country of export, the country of import, the final recipient, a description and the quantity of the firearms, their parts and components and ammunition and, whenever there is transit, the countries of transit. The information contained in the import licence must be provided in advance to the transit States.

“4. The importing State Party shall, upon request, inform the exporting State Party of the receipt of the dispatched shipment of firearms, their parts and components or ammunition.

“5. Each State Party shall, within available means, take such measures as may be necessary to ensure that licensing or authorization procedures are secure and that the authenticity of licensing or authorization documents can be verified or validated.

“6. States Parties may adopt simplified procedures for the temporary import and export and the transit of firearms, their parts and components and ammunition for verifiable lawful purposes such as hunting, sport shooting, evaluation, exhibitions or repairs.”

1. Introduction

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

2. *Summary of main requirements*

92. The Protocol requires States parties:

(a) To establish a system to ensure that firearms are not exported to or through countries that have not authorized the transfer (art. 10, paras. 2 and 4);

(b) To ensure that the content of the documents used for legal import and export is sufficient to support the offence of trafficking (art. 10, para. 3); and

(c) To enhance the accountability and security associated with the import and export system (art. 10, para. 5).

93. The Protocol also allows States parties to adopt a simplified procedure for private individuals to temporarily import or export small numbers of firearms for recreational purposes (art. 10, para. 6). (It should also be noted that additional import markings need not be affixed where firearms are imported temporarily for a “verifiable lawful purpose” under article 8, paragraph 1 (b).)

3. *Mandatory requirements*

(a) *Main elements of the article*

94. Article 10, paragraph 1, contains the basic requirement to establish measures that control transactions or transfers that involve import, export or transit. There is no obligation to deal with activities of a purely domestic nature.

95. Article 10, paragraph 2, requires that, prior to allowing the export of firearms, each State party ascertain that the proposed State of import has licensed or authorized the import and that any transit States have indicated in writing that they are aware of the transit and do not object. The means by which the exporting State would be notified by transit and destination States are not specified and it is likely that, in most cases, the burden of establishing the necessary approvals will fall on the private parties involved. Either the exporter, the importer or both will be required to obtain the necessary documents from the transit and destination countries and convey them to the authorities from whom the export permit is sought.

96. There is no automatic requirement to provide direct notification or verification of documents or transfers, but importing States are required to

inform exporting States of the receipt of an authorized shipment if this is requested (art. 10, para. 4). More generally, States parties are required to ensure that procedures are secure and that licensing or authorization documents can be verified or validated (art. 10, para. 5).

97. Article 10, paragraph 3, and article 7 together set out basic minimum requirements for import and export documentation. Essentially, documents must include the following: the markings applied to the firearms in accordance with article 8; the dates of issuance and expiry of licences or authorizations; the place of issue of permits or authorizations; the countries involved, including countries of import, export and final destination, and any countries of transit; a description of the articles imported or exported; and the quantities of articles imported or exported.

98. Article 10, paragraph 6, allows (but does not require) States parties to create a partial exception to the otherwise applicable licence or authorization requirements, where importation is temporary and for verifiable lawful purposes, such as recreational use.

(b) Implementation of the article

99. In most States, statutory provisions will be required to establish the basic licensing or authorization framework set out in paragraphs 1 and 2 of article 10. Where import/export control regimes already exist, legislation may be needed to extend them to firearms, their parts and components and ammunition and to any specific requirements of the Protocol that are not already covered. It will generally be important to place the licence or authorization process on a clear legal basis, both to ensure compliance and because failure to comply with any aspect of the process will be a criminal offence.

100. Generally, legislative measures will also be needed to ensure that officials have the necessary authority to consider and issue or refuse to issue the necessary import, export and, if required, transit documents. This may be done either by creating new offices or by amending legislation to expand the roles of existing officials. Power to revoke the import, export and transit documents and a process for appealing refusal to issue or revocation should also be provided for.

101. In determining the actual scope of the discretion to be delegated to officials, there are several points to take into account. Generally, broad

discretion facilitates transfers, but may also create opportunities for corruption or other activities that are inconsistent with the Protocol or with whatever national policy criteria are established for the issuance or refusal of permits. The actual drafting can simply require officials to take specific criteria into consideration in making decisions or, if the criteria are sufficiently clear, can simply prohibit the issuance of the requested documents if certain criteria are not met. The latter approach is commonly the case for linkages to domestic controls. For example, officials may simply be prohibited from allowing the import of a firearm unless whatever domestic licensing procedures are needed to lawfully possess it after import have been commenced or completed.

102. To ensure that importing and transit countries are notified of proposed or pending transfers, it will be necessary to establish channels of communication. It is left to implementing States parties to determine, however, whether it will be the State party or the exporter who will be responsible for acquiring the required authorizations from the importer and transit States or if it will be a combination of the two, that is, the exporter obtains the authorization from the importer (via the importer) and the exporting State contacts the transit country to confirm that it has no objection to the transaction.

103. Setting out a form to process import and export transactions will also be needed to gather the information required by article 10, paragraph 3. The types of form that may be needed to implement various elements of the Protocol include the following:

(a) One or more application forms for those seeking the issuance of licences. These serve as the basic obligation to provide necessary information about the transaction. If a legally prescribed form is used, the omission of any of the information required on the face of an application form means that the partially completed form would not constitute a formally valid application for the required permit or authorization. Such an application could not lawfully be considered by decision makers and the refusal to do so would not be a matter of discretion nor a decision that could be appealed to an administrative tribunal or the general courts. If providing false or misleading information is also criminalized, then the completion of the document would also form the basis of a prosecution. The prescription and design of a form that clearly sets out the information requirements helps to establish the mental element of such offences. A warning about the offence and the liability to prosecution would also help to enhance deterrence and establish intent if added to the form itself. Since the policy criteria for

allowing firearms to be exported or imported are likely to be different, separate forms for those applying to import or export may be appropriate;

(b) A formal licence or authorization to import or export firearms, parts and components and ammunition. This is necessary both for conformity with article 10 and to support the illicit trafficking offence relating to import and export without such documents (arts. 5, para. 1 (b), and 3, subpara. (e)). Generally, this permit will serve as proof to domestic officials that the import or export has been approved and, in the case of an import permit, will certify to the exporting Government that the import has been approved. The permit may also serve as the basis for notification and consideration of transit States, if any, under article 10, paragraph 2 (b). Depending on any additional information sought and the structure of national laws and record-keeping systems, separate forms could be established for complete firearms, their parts and components, and for ammunition, or a single unified form could be used. Either the form itself or the information it contains will ultimately become the record kept pursuant to article 7 and serve as the basis for later attempts to trace the firearms involved and to provide assistance to other States in doing so under article 12, paragraph 4. The development of forms that incorporate elements making them difficult to forge, alter or otherwise falsify would also support conformity with the security requirements of article 10, paragraph 5;

(c) The Protocol is silent with respect to the use of electronic forms or the use of telecommunications to transmit forms or other information between States. This leaves open the possibility of using such technologies, provided that adequate security is maintained and the States involved have the necessary capacity. Electronic media should be capable of producing authentic printed documents when needed. (This is not expressly dealt with in the Protocol, but it is an express requirement for the forms used in general requests for mutual legal assistance under the Convention (see art. 18, para. 14, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 450-499));

(d) Forms seeking and granting approval of transit shipments may also be required. Article 10, paragraph 2 (b), bars the issuance of a licence or authorization if the proposed transfer is through a transit State and that State has not been notified and given its approval in writing. This could be done on an ad hoc basis, but States that seek to standardize procedures and reduce unnecessary discretion or that handle relatively large volumes of transit shipments may wish to establish standard and legally binding forms for making application and authorizing transit shipments. The legal prescription of such forms would give greater reassurance to countries whose licensing decisions are contingent on such approvals, in particular if

supported by some mechanism that permits speedy verification of the form. Such measures may also increase the degree of security as required by article 10, paragraph 5, and reduce costs.

104. To comply with the requirement that the importing State must be able to confirm shipment receipt (art. 10, para. 4), it may be necessary to designate a specific official for this purpose.

105. Validation on request is the minimum required for conformity with article 10, paragraph 5, but a system under which States designated as transit or importing States on an export licence application are automatically notified may also be implemented. States may require production of original documentation or certified copies of original documentation. The notification may be conducted by the single point of contact required under article 13, paragraph 2, of the Protocol or another official. If the official designated as the single point of contact is not the authority who will verify or validate forms and confirm the receipt of actual transfers, the contact point should be prepared to identify the appropriate official and legislative or administrative provisions should allow for the establishment of direct channels of communication where possible. (It should be noted that other points of contact are established under the Convention and Protocol. Generally, central authorities established pursuant to article 18, paragraph 13, of the Convention and points of contact designated under article 13, paragraph 2, of the Protocol will be departments or agencies responsible for law enforcement or prosecutorial functions. Authorities who would process and verify firearm import and export transfers, on the other hand, may be more likely to be customs control agencies or in some cases agencies responsible for security or defence matters.)

106. Should the legislature choose to create a partial exception to the otherwise applicable licence or authorization requirements where importation is temporary and for verifiable lawful purposes such as recreational use in accordance with article 10, paragraph 6, adjustments would have to be made to the substantive and procedural provisions governing the issuance of licences or authorizations.

4. Other measures, including optional issues

107. The information required by articles 7 and 10 of the Protocol is essential to conformity with the Protocol, but those provisions represent a minimum standard and it is also open to States to include additional

requirements if they wish, bearing in mind that the investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol will not be covered by the various requirements to provide international cooperation.

108. The Protocol does not require restrictions on firearms for the purposes of domestic controls nor does it contain import and export criteria for security or arms control purposes. Where these do exist in a State, however, drafters should ensure that legislation implementing the Protocol is not inconsistent with the policies or legislation in those areas and that administrative measures are coherent. The Protocol operates primarily through the authorization of transactions and transfers and links between measures in the Protocol and other measures would generally take the form of legislative or administrative criteria applied to structure or limit the discretion of officials charged with deciding whether to issue the required import or export authorizations. Some examples of the linkages that should be considered include the following:

(a) The denial of licences or authorizations to persons or groups known to be engaged in domestic or transnational criminal activities or who have previous records of such criminal involvement;

(b) The denial of licences or authorizations where the proposed manufacture, transaction or transfer raises domestic crime concerns of any kind;

(c) The denial of licences or authorizations in cases where legal requirements for domestic licensing or other controls have not been met. (For example, officials could be given the discretion or obligation to refuse an import permit without proof that the firearms are being imported to a dealer or individual owner licensed under domestic law or re-exported in accordance with the Protocol);

(d) The denial of licences or authorizations in cases where the intended destination or other factors suggest that the items will be used in or contribute to an ongoing or potential insurgency or armed conflict. (See, for example, the Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20, annex, appendix), section III, paragraph 2 (b), which lists substantive criteria such as ongoing or potential conflict and the potential use in suppressing human rights as reasons why export should not be permitted);

(e) The denial of licences or authorizations where some extrinsic international legal obligation, such as another treaty or an embargo imposed by the Security Council of the United Nations would be breached or

infringed if the manufacture, transaction or transfer was permitted to take place. (Apart from legal obligations imposed by the Security Council, such obligations could arise from other bilateral or regional treaties, such as the Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials);⁴

(f) The denial of licences or authorizations in cases where the proposed manufacture, transaction or transfer raises national security concerns for the State party itself, such as transfers to potential enemies or enemies of the country's allies.

109. The Protocol imposes no requirement for internal consultations or deliberations prior to any decision to issue or refuse a licence or authorization, but in developing legislation establishing the necessary powers, legislators may wish to ensure that the various significant interests within the Government are taken into account. Specific agencies or interests may vary from State to State, but in most cases where firearms or related items are under consideration relevant interests will include those of departments or agencies responsible for crime control, import/export regulation, trade interests and taxation, national security and international political considerations (embargoes). An inter-agency group could be established to operationalize this consultation process.

110. There is also no express requirement in the Protocol for States parties to establish or prescribe separate forms to accompany actual shipments of firearms, their parts and components or ammunition, although the basic content requirements for export and import licences or authorizations are also applied to "accompanying documentation" by article 10, paragraph 3. Most systems of export and import control include requirements that copies or parallel documents must be sent both with a shipment and separately and that these must provide detailed specifications of what each shipment contains, so that the accuracy of the documents and content of the shipment can be cross-checked for tampering or diversion between source and destination. Such systems could be implemented either by ensuring that copies of the export and import permits are transmitted from customs agencies in the source and destination countries both with the shipment and separately in advance, or by prescribing separate documents containing the same basic information to accompany the shipments, so that the shipment itself can be checked against the documents upon arrival and prior to its release to the

⁴United Nations, *Treaty Series*, vol. 2029, No. 35005.

importer. This could also be supported by the use of electronic forms and means of transmission, where the necessary technical infrastructure is present. (As noted above, the corresponding provision of article 18, paragraph 14, of the Convention requires that electronic forms be able to produce written documents when needed, an important factor for ensuring accurate transmission to States parties that do not use electronic forms (see also the legislative guide for the implementation of the Convention, paras. 450-499).)

111. While the Protocol requires only that transit countries not object to the movement of firearms, their parts and components and ammunition across their territory, States may wish to consider developing a licence or authorization permitting transit movements in order to promote consistency and to deter the production of false documentation. The creation of such forms promotes security.

112. Article 15, paragraph 1 (c), of the Protocol, which is not mandatory, invites States parties to require the disclosure and identity of the brokers, if any, involved in a particular transaction or transfer on the relevant import and export documents. Requiring disclosure of the involvement and identities of brokers on the licences or authorizations that may be established in accordance with article 10 may require ensuring that the legislative authority to create those documents themselves is broad enough to encompass additional requirements for brokered transactions or transfers. Adding brokerage activities to licences or authorizations will generally require that they be added to application forms as well.

113. Another element that drafters and legislators may wish to consider deals with the simplified procedures for temporary import or export that States may adopt pursuant to article 10, paragraph 6. Legislation establishing simplified procedures for temporary import or export for verifiable lawful purposes such as hunting, sport shooting, evaluation, exhibitions or repairs could involve creating a parallel set of forms (e.g. application and permit forms) and issuance criteria and procedures, or of expansions or adjustments to the principal forms to permit them to be used for this purpose. It could also involve expedited procedures, such as allowing the issuance of licences by control officers at border points when items actually cross borders or at the point of shipment or receipt once in a country.

114. To ensure the integrity of domestic controls and the tracing of firearms under the Protocol, drafters creating simplified procedures for temporary import and export should ensure that basic information that identifies the firearms and importer or exporter is recorded. In addition, drafters may

wish to consider provisions limiting the duration for which temporarily imported firearms could remain in the country and safeguards to ensure that firearms imported temporarily are re-exported back to the State of origin. Exporting to a State other than the State from which the firearms were temporarily imported could either be made an offence or included within the general trafficking offences. Legislators could also require evidence that the transaction is for a verifiable, lawful purpose. In this context, for example, a hunting licence may be required as evidence to prove that an individual is exporting/importing a firearm for the purpose of hunting.

5. *Information resources*

115. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 3, subparagraph *(e)* (Use of terms)

Article 4 (Scope of application)

Article 5, paragraph 1 *(b)* (Criminalization)

Article 7 (Record-keeping)

Article 8, paragraph 1 *(b)* (Marking of firearms)

Article 11, subparagraph *(a)* (Security and preventive measures)

Article 13, paragraph 2 (Cooperation)

Article 15 (Brokers and brokering)

(b) Organized Crime Convention

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

(c) Other instruments

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article IX

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc
Chapters I-III

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>
Annex, appendix, section III

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001* (A/CONF.192/15),

chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_firearms
Article 5

2002 Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW) of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies

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

D. Record-keeping

“Article 7

“Record-keeping

“Each State Party shall ensure the maintenance, for not less than ten years, of information in relation to firearms and, where appropriate and feasible, their parts and components and ammunition that is necessary to trace and identify those firearms and, where appropriate and feasible, their parts and components and

ammunition which are illicitly manufactured or trafficked and to prevent and detect such activities. Such information shall include:

“(a) The appropriate markings required by article 8 of this Protocol;

“(b) In cases involving international transactions in firearms, their parts and components and ammunition, the issuance and expiration dates of the appropriate licences or authorizations, the country of export, the country of import, the transit countries, where appropriate, and the final recipient and the description and quantity of the articles.”

1. Introduction

116. The basic record-keeping obligation of the Protocol, set forth in article 7, is to ensure that records are kept that are sufficient to ensure that firearms can later be traced. “Tracing” is itself defined as the “systematic tracking” of firearms from manufacturer to purchaser in article 3, subparagraph (f).

2. Summary of main requirements

117. The Protocol requires States parties:

(a) To maintain records in relation to firearms for at least 10 years; and

(b) To maintain records containing the markings on firearms and the details associated with the international movement of firearms.

118. States parties are also required to keep records on parts and components, but only where this is “appropriate and feasible”.

3. Mandatory requirements

(a) Main elements of the article

119. Article 7 specifies that records must be kept for 10 years. Since no single commencement date for the 10-year period is specified, the time would start with each event that the record in question documents: either manufacture or a specific transaction or transfer (import, export or transit). The 10-year duration is the minimum required, but records may be kept longer.

120. Records must be kept with respect to complete “firearms”, but are only required to be kept for parts and components and ammunition “where appropriate and feasible”. Generally, the drafters considered such records to be desirable, but recognized that keeping detailed records, especially of individual parts and components, would create technical problems associated with unique marking and entail a major commitment of resources that would not be available in most countries.

121. Article 7 contains two specifications, one of which applies to all firearms that are present in the State party concerned (subpara. (a)) and the other only to firearms also involved in international transactions (subpara. (b)). The fundamental record-keeping requirement applicable to all firearms set forth in subparagraph (a) is simply that the record must contain “the appropriate markings” required by the Protocol. Paragraph 1 (a) of article 8 then requires that such markings include the “name of the manufacturer, the country or place of manufacture and the serial number”. Alternatively, States already using such systems may continue to employ “unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture”. A basic record, therefore, must be created for each firearm at the time of manufacture or import (if the firearm was not uniquely marked at manufacture) documenting which of the two marking systems applies to the firearm and documenting all of the required information applicable to that system.

122. In addition to the information that identifies each firearm, additional records are required by article 7 (b) for firearms that are the subject of international transactions. Together with article 10, paragraph 3, article 7, subparagraph (b), determines the information to be included in import/export documentation. Generally, that information will include sufficient information to allow the countries involved in the transaction to identify other involved countries, the individual importer and exporter, the items for which they sought the import/export documentation, as well as the validity period for the licence or authorization. The “final recipient” must be identified, whether or not it is a party to the immediate transaction itself. The requirement that the “description and quantity” of the articles involved be documented will mean, in the case of complete firearms, the same information listed in article 7, subparagraph (a).

(b) Implementation of the article

123. The formulation of the requirement to “ensure the maintenance of [records]” is intended to include the two basic record-keeping systems at

present in use in many countries. Some States use systems in which records are kept in a centralized location by the State using information collected by it (e.g. from inspections) or supplied by those engaged in manufacturing or transferring firearms (e.g. on licence application forms). Other States use systems in which those engaged in manufacturing or transferring firearms are themselves required to create and retain records, which must then be made available when needed for tracing and, in many cases, for routine inspection.

124. There is no requirement that the records be computerized, but the use of automated record-keeping, where feasible, will assist countries in meeting their obligations to respond promptly to tracing requests as required by article 12, paragraph 4.

125. As a practical matter, it should be noted that the basic requirement to include only the manufacturer, place and country of manufacture and a serial number may not be sufficient to uniquely identify a firearm in a record, as firearms of different types (e.g. a rifle and a handgun made by the same manufacturer) may carry the same serial number. Other characteristics such as make, model and type are therefore also relevant in this context. It is recommended that domestic forensic experts be consulted with respect to the exact formulation, bearing in mind that the basic requirement of both article 7 (record-keeping) and article 8 is identification and tracing, which both require that information be sufficient to identify each firearm to the exclusion of all others. (As noted above, some guidance may be derived from the additional characteristics used by Interpol in its Interpol Weapons and Explosives Tracing System, which uses, in addition to serial numbers or other markings, make, model, calibre, barrel-length and number of discharges as identifying characteristics, bearing in mind that some of these may not be relevant or particularly helpful for some types of firearm. For example, the number of shots is a good identifier for firearms such as revolvers where this is fixed at manufacture, but not for many other types that can use detachable cartridge magazines of different capacities.)

126. While article 7 makes no general provision for the creation of records with respect to firearms that have been destroyed, article 6, paragraph 2, does require the creation of records where illicitly manufactured or trafficked firearms or ammunition that have been confiscated are disposed of.

127. Article 10, paragraph 6, allows for “simplified procedures” with respect to firearms, parts and components or ammunition temporarily imported or exported, which may involve record-keeping requirements that

differ from those applied to transactions of a permanent nature. Care should be taken, however, to formulate such procedures in a way that does not undermine the basic policies of the Protocol. There should, for instance, be a time limit associated with “temporary imports”. If a transaction takes place within this limited time frame, the keeping of records for the full 10 years required by article 7 would be unnecessary, but only if the firearms are re-exported to the same country from which they were temporarily imported in the first place. In such a case, later tracing would not disclose the temporary export and re-import, but would still locate the firearm within the appropriate country. If re-export to third countries is permitted, however, then unless full records are kept for the required 10-year period, re-export to a third country effectively creates an onward transaction that cannot be traced in the future. Therefore, to ensure that the option for simplified procedures for temporary imports does not create an obstacle to tracing, domestic law should require that records be kept until the re-export of the firearm is confirmed. Alternatively, such cases could be made subject to the full record-keeping requirements to ensure that the firearms can later be traced.

4. *Optional measures, including optional issues*

(a) Offences

128. Generally, States that intend to keep the records themselves will wish to consider legislative offences and requirements intended to ensure the fidelity of the information provided to them. States that require others to keep the necessary records, on the other hand, will wish to consider offences and other requirements that ensure that the records are in fact kept, that they are accurate and that they are made available when necessary for tracing or other investigative measures. In the latter system it will also generally be necessary to ensure that the punishment for non-compliance with the record-keeping requirements is the same as for illicit manufacturing and/or trafficking, to prevent offenders from simply destroying records to avoid greater liability for the principal offences established in accordance with the Protocol.

(b) Length of time records are to be kept

129. Article 7 specifies that records must be kept for 10 years, but it is clear that this is a minimum period (art. 7, subpara. (a), of the Protocol and art. 34, para. 3, of the Convention) and that States are free to impose longer

periods if they wish. Given the durability of firearms, legislators and drafters may wish to consider this approach, where feasible.

(c) Destroyed and deactivated firearms

130. The deactivation standards set by article 9 of the Protocol are intended to ensure that deactivated firearms are not restored to function as firearms after previous records of them have been destroyed. As an additional safeguard against illicit reactivation, however, legislators could consider requiring records to be kept of destroyed or deactivated firearms for 10 years after the date of destruction or deactivation. Although the Protocol does not expressly require this, it would assist in the tracing of firearms that had been reactivated.

(d) Parts and components

131. Some countries will wish to consider requiring the maintenance of records for parts and components to ensure that record-keeping requirements cannot be avoided simply by transferring entire firearms in a disassembled condition. At the same time, consideration ought to be given to the administrative and commercial burden of having to create records for each individual component. One way of striking an appropriate balance is to limit the requirement to specific major components, such as the barrel, frame or both, or whichever component is marked in accordance with article 8.

(e) Brokering

132. If information about brokering activities is required for inclusion in licences or authorizations, it may also be appropriate to incorporate it into the records required by article 7 of the Protocol.

5. Information resources

133. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 3, subparagraph (f) (Use of terms)

Article 4 (Scope of application)

Article 6, paragraph 2 (Confiscation, seizure and disposal)

Article 8, paragraph 1 (Marking of firearms)

Article 9 (Deactivation of firearms)

Article 10, paragraph 3 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

Article 13, paragraph 2 (Cooperation)

Article 15 (Brokers and brokering)

(b) *Organized Crime Convention*

Article 34, paragraph 3

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article XI

1997 Model Regulations for the Control of the International Movement of Firearms, their Parts and Components and Ammunition (Organization of American States)

http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc

Chapter IV

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section II

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects
Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Article 9

E. Confiscation, seizure and disposal

“Article 6

“Confiscation, seizure and disposal

“1. Without prejudice to article 12 of the Convention, States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of firearms, their parts and components and ammunition that have been illicitly manufactured or trafficked.

“2. States Parties shall adopt, within their domestic legal systems, such measures as may be necessary to prevent illicitly manufactured and trafficked firearms, parts and components and ammunition from falling into the hands of unauthorized persons by seizing and destroying such firearms, their parts and components and ammunition unless other disposal has been officially authorized, provided that the firearms have been marked and the methods of disposal of those firearms and ammunition have been recorded.”

1. Introduction

134. Although the issues of confiscation and seizure are addressed in the Convention (arts. 12-14 of the Convention, see also the legislative guide for the implementation of the Convention, paras. 287-340), there are two fundamental reasons for modifying this process when the subject matter of the confiscation is firearms, parts, components or ammunition covered by the Protocol. Firstly, the dangerous nature of items covered by the Protocol may require additional security precautions to ensure that they do not fall

into the wrong hands before, during or after the seizure and confiscation process. Secondly, whereas the basic policy of the Convention is that confiscated property should be sold to the benefit of the confiscating State party, or for purposes such as sharing with other States parties or for the payment of compensation or restitution to victims of crime (art. 14), the dangerousness of the items covered by the Protocol favours a policy of destruction, with other forms of disposal only permissible where additional precautions are taken.

2. Summary of main requirements

135. To comply with this article, States parties must:

(a) Adopt measures to confiscate firearms and related items that have been illicitly manufactured or trafficked;

(b) Seize and destroy those firearms and related items unless another form of disposal is state-sanctioned; and

(c) Record any form of state-sanctioned disposal other than destruction and mark the firearms as appropriate.

3. Mandatory requirements

(a) Main elements of the article

136. Article 6 of the Protocol must be read and interpreted together with articles 12-14 of the Convention, which apply to the seizure, confiscation and disposal of property that is either proceeds of crime or used or destined for use in crime. This will generally include illicitly manufactured and/or trafficked firearms, their parts and components and ammunition.

137. To the extent that illicitly manufactured or trafficked firearms are considered to have been either property “derived” from these offences or “used or destined for use” in such offences, they become subject to articles 12 and 13 of the Convention, which require States parties to ensure that laws enabling confiscation are in place and to actually seek confiscation by the appropriate authority when this is requested by another State party.

138. The rules for disposal established by article 14 of the Convention are then modified by the Protocol. As noted above, the key distinction is that the policy governing firearms favours destruction, whereas the policy for

other proceeds and instrumentalities assumes that these will be sold and the proceeds returned to the confiscating State or used for other purposes. For that reason, an exception to the rules of the Convention is specified for firearms in article 6, paragraph 2, of the Protocol. This requires legal measures to ensure destruction “unless other disposal has been officially authorized, provided that the firearms have been marked and the methods of disposal of those firearms and ammunition have been recorded”.

(b) Implementation of the article

139. In order to make possible the confiscation of firearms and related items, it will generally be necessary to establish powers to search for and seize such items and to seek the order of a court declaring them to be forfeited or confiscated. For conformity with the Protocol, those powers should be linked to suspicion or other grounds for believing that an offence established in accordance with the Protocol has been or is about to be committed and that the items are either evidence of this or that they are themselves the subject matter of the offence involved. Such powers would generally be consistent with national legislation that implements the seizure and forfeiture provisions of the Convention, although some States apply more expedited procedures to allow firearms to be seized quickly on account of the safety or security risks that may arise if there are procedural delays.

140. In requiring the establishment of powers to “enable” confiscation, article 6, paragraph 1, does not specifically mention search and seizure (this is, however, covered by article 12, paragraph 2, of the Convention), and does not, therefore, discuss procedural safeguards for seizure. Article 6, paragraph 1, requires measures that enable confiscation if items “have been illicitly manufactured or trafficked”, but drafters and legislators should consider a lower standard for the initial seizure of the items, since this will in many cases be done as an investigative measure before illicit manufacturing or trafficking can be fully proved. Seizure may also be necessary in some cases as an urgent measure to prevent weapons from being exported illegally or falling into illicit domestic circulation or use.

141. In many cases, States may already have search, seizure and confiscation provisions that apply specifically to firearms. Where such provisions exist, it will only be necessary to consider whether they require amendment to conform to the Protocol. They must apply to “firearms, their parts and components and ammunition” and must be available for all of the offences

set forth in the Protocol, some of which may not have been covered by pre-existing legislation. Regardless, drafters should ensure consistency with any existing search and seizure rules.

142. States that have enabled search, seizure and confiscation of a more general class of property based on links to any offence “covered by the Convention” in implementing article 12 of the Convention will not need to make more specific provision for firearm-related property, provided it is clear that the general class includes all firearms, parts and components and ammunition covered by the Protocol.

143. Legal measures to implement the general rule of destruction of firearms could include the following:

(a) The establishment of powers to authorize disposal other than by destruction and setting appropriate limits on cases where a decision maker could give such an authorization. In this context, legislation could include examples of authorized means of disposal such as for scientific, historical or forensic purposes;

(b) Legislative or administrative criteria for the issuance or refusal of an authorization to dispose by means other than destruction. This must include the two requirements set out in article 6, paragraph 2, that the firearms must have been marked and that a record be kept of how they were disposed of. Other criteria could also be established in accordance with domestic policy assessments.

4. Optional measures, including optional issues

144. States that do not have general powers to search for, seize and seek the forfeiture of firearms and related items might consider extending the new powers created to meet the requirements of the Protocol to include firearms associated with all offences and not just those covered by the Convention and the Protocol.

145. To enforce a policy favouring destruction of seized firearms and related items, legislation establishing criminal offences to deter the theft or diversion of seized firearms, their parts and components and ammunition could be established (e.g. offences of misleading or misinforming decision makers).

146. Legislative or other standards ensuring the adequacy of destruction could also be developed. Generally, this will entail, at a minimum, the deactivation standards established by article 9 of the Protocol. More generally, methods such as crushing, cutting into small pieces and melting are commonly used.⁵ As a practical matter, it is important to ensure the security of destruction processes, to ensure that firearms, parts, components or ammunition are not illicitly diverted prior to destruction.

147. The creation of records of destruction sufficient to support later attempts to trace the firearms involved could also be required (see optional requirements for record-keeping above).

148. Standards for marking seized firearms that are retained and not destroyed could also be established.

5. *Information resources*

149. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 3, subparagraphs *(a)*, *(b)* and *(c)* (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8, paragraph 1 *(c)* (Marking of firearms)

(b) Organized Crime Convention

Article 12 (Confiscation and seizure)

Article 13 (International cooperation for purposes of confiscation)

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

Article 34, paragraph 3 (Implementation of the Convention)

⁵An extensive examination of the practical methods of destruction and related matters can be found in the report of the Secretary-General of 15 November 2000 on methods of destruction of small arms, light weapons, ammunition and explosives (S/2000/1092) (<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/747/29/PDF/N0074729.pdf?OpenElement>).

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article VII

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section IV

2000 Report of the Secretary-General on methods of destruction of small arms, light weapons, ammunition and explosives (S/2000/1092)

<http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/747/29/PDF/N0074729.pdf?OpenElement>

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001* (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Articles 5 and 11

F. Deactivation of firearms

“Article 9

“Deactivation of firearms

“A State Party that does not recognize a deactivated firearm as a firearm in accordance with its domestic law shall take the necessary measures, including the establishment of specific offences if appropriate, to prevent the illicit reactivation of deactivated firearms, consistent with the following general principles of deactivation:

“(a) All essential parts of a deactivated firearm are to be rendered permanently inoperable and incapable of removal, replacement or modification in a manner that would permit the firearm to be reactivated in any way;

“(b) Arrangements are to be made for deactivation measures to be verified, where appropriate, by a competent authority to ensure that the modifications made to a firearm render it permanently inoperable;

“(c) Verification by a competent authority is to include a certificate or record attesting to the deactivation of the firearm or a clearly visible mark to that effect stamped on the firearm.”

1. Introduction

150. Drafters defining “firearm” and determining the scope of subject matter to which domestic laws apply face the technical challenge of including items that represent a threat of actual use as firearms, while not extending legislative measures to firearms that have been permanently deactivated. Many countries accomplish this by limiting the basic definition of “firearm” to devices that are capable of actually being used as such and excluding deactivated firearms. This in turn raises the threat that firearms will be deactivated in some way that results in their being excluded from domestic and international control mechanisms, but that can be reversed after they have been transferred to an illicit destination. To defeat this, article 9 sets out technical standards intended to ensure that any deactivation that results in a firearm no longer being treated or recorded as such must also be essentially irreversible.

2. Summary of main requirements

151. States parties that allow deactivation of firearms and subject those firearms to fewer controls are required to take action to prevent their reactivation.

3. Mandatory requirements

(a) Main elements of the article

152. There are three limiting factors associated with the article. Firstly, the article is applicable only to those States parties which do not treat deactivated firearms as firearms. Secondly, while the principle of preventing the

reactivation of deactivated firearms is mandatory, the creation of offences and the requirement for the verification of deactivated firearms is only required if it is determined to be appropriate by the State party. Thirdly, the specific provisions of sub-paragraphs (a)-(c) are essentially advisory and not prescriptive, stating “general principles” to guide implementation.

(b) Implementation of the article

153. There are several ways to approach the issue of deactivation: deactivation can be determined in accordance with specific criteria established by jurisprudence, by legislation or by delegated legislation. Once criteria for assessing deactivation are established, authority will then generally be delegated to a specific official to determine whether each firearm has been deactivated adequately. In formulating legislative provisions, consideration may be given to the circumstances in which deactivated status may have to be determined. These may range from cases where an administrative determination is sought in order to establish that a former firearm is not subject to the restrictions imposed by domestic legislation or the Protocol to cases where legal or factual deactivation is an issue in criminal prosecutions for trafficking or domestic firearms offences.

154. In drafting legislation, definitions of “firearm” may be worded in such a way as to exclude firearms that are not able to function or that meet specific deactivation criteria, or separate definitions of “deactivated firearm” may be created, an approach taken by some civil law countries. Generally, the technical nature of the subject matter and the need to make adjustments to keep pace with new types of criminal reactivation method favour an administrative or delegated legislative approach for setting technical standards, where this is feasible. An example of this approach is provided in annex IV.

4. Optional measures, including optional issues

155. To ensure that deactivated firearms are traceable if they are illicitly reactivated, States may wish to consider retaining records of deactivated firearms.

156. States may also wish to consider having the import/export system in article 10 extend to deactivated firearms. This will avoid the possibility of deactivated firearms being exported without a record (e.g. as ornaments)

and reactivated in the importing country without adequate records documenting the transaction.

5. *Information resources*

157. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 3, subparagraph (a) (Use of terms)

Article 4 (Scope of application)

(b) *Organized Crime Convention*

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section IV

G. **Brokers and brokering**

"Article 15

"Brokers and brokering

"1. With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States Parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as:

"(a) Requiring registration of brokers operating within their territory;

"(b) Requiring licensing or authorization of brokering; or

“(c) Requiring disclosure on import and export licences or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction.

“2. States Parties that have established a system of authorization regarding brokering as set forth in paragraph 1 of this article are encouraged to include information on brokers and brokering in their exchanges of information under article 12 of this Protocol and to retain records regarding brokers and brokering in accordance with article 7 of this Protocol.”

1. Introduction

158. Article 15 is intended to encourage States to begin considering how to broaden controls to capture all activity in relation to the movement of firearms, their parts and components and ammunition. Since brokers can often play a pivotal role in arranging shipments of firearms and related items, increasing the transparency associated with the involvement of brokers in such transactions can result in increased information to feed investigations and tracing efforts.

2. Summary of main requirements

159. States parties are required to consider establishing a system for regulating the activities of brokering.

160. Although provision is made in the Protocol for brokering, legislative or other measures to control or regulate it are not mandatory. Thus, it is ultimately left to States parties to decide whether to adopt legislation or not, with some basic guidance furnished in article 15 of the Protocol.

3. Mandatory requirements

161. Article 15 is not mandatory.

4. Optional measures, including optional issues

(a) Main elements of the article

162. Brokering, which is not defined in the Protocol, generally refers to activities that involve the arranging of transactions or transfers of firearms,

parts and components and/or ammunition by persons or companies that are not direct parties to the transactions (e.g. as vendor or purchaser) and do not usually come into direct contact with or possession of the actual items. Often they operate from countries that may not be directly involved, which raises numerous jurisdictional issues. The term “broker” is intended to cover more than simply customs brokers.

163. Three models, or a combination thereof, are contemplated for the control of brokers in article 15. Firstly, States parties could require the brokers themselves to be registered, ensuring that basic scrutiny could be applied to their business operations and providing a strong compliance mechanism (deregistration), should illicit activities be disclosed. Secondly, States parties could require that each transaction or transfer undertaken by each broker be licensed separately. Generally, this model generates more information and scrutiny of the ongoing activities of brokers, but also imposes a greater regulatory burden on both the States parties and the businesses involved. Thirdly, States parties could require disclosure of the involvement and identities of brokers on the licences or authorizations that must be issued in conformity with article 10 of the Protocol.

(b) Implementation of the article

164. Should legislators choose to implement controls on brokering activities, the method of implementation will depend on which of the three models is chosen.

5. Information resources

165. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 3, subparagraphs (a), (b) and (c) (Use of terms)

Article 10, paragraph 3 (General requirements for export, import and transit licensing or authorization systems)

(b) *Organized Crime Convention*

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>
Annex, appendix, section III

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects *Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001* (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Article 5

2003 Elements for Effective Legislation on Arms Brokering of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies

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

V. Substantive criminal law

A. Introduction

1. Summary of offences

166. Article 5 of the Protocol establishes a series of offences relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition. Generally, these are intended to ensure that States parties establish a legal framework within which legitimate manufacturing and transfer of firearms can be conducted and which will allow illicit transactions to be identified to facilitate the prosecution and punishment of offenders.

167. The Protocol requires the criminalization of the following three groups of offences involving “illicit manufacturing”, “illicit trafficking” and tampering with firearm markings:

- (a) Illicit manufacturing (three offences):
 - (i) Any manufacturing or assembly of firearms without marking;
 - (ii) Any manufacturing or assembly from illicit (trafficked) parts and components; and
 - (iii) Any manufacturing or assembly without legal permit or authorization;
- (b) Illicit trafficking (two offences):
 - (i) Any transnational transfer without legal authorization; and
 - (ii) Any transnational transfer if firearms are not marked;
- (c) Removing or altering serial numbers or other markings (one offence).

168. The basic requirements to establish criminal offences are found in article 5 of the Protocol, but the actual content of the various offences depends on other provisions. The content of the “central” offences of illicit manufacturing and illicit trafficking are themselves terms defined in article 3.

The defined terms “firearm”, “parts and components” and “ammunition” must also be consulted in drafting domestic legislation. Specific elements of the central offences are also linked to the other obligations under the Protocol concerning marking and the issuance of authorizations or licences to import or export.

169. The basic conducts of illicit manufacturing and trafficking can be seen as the “central” offences established by the Protocol. Each of these is in fact a group of related offences, the details of which are set out in the appropriate definition section. Illicit manufacturing, for example, includes three individual offences dealing with the assembly of firearms from parts and components that have themselves been trafficked (art. 3, subpara. (d) (i)); manufacturing without meeting the licensing or authorization requirements established by locally applicable laws or requirements (subpara. (d) (ii)); and manufacturing without placing identification markings which meet the requirements of article 8 of the Protocol on each firearm (subpara. (d) (iii)).

170. Similarly, the offence of illicit trafficking includes two specific offences dealing with various kinds of transfers of firearms, their parts and components and ammunition, including import, delivery, sale and other kinds of transfers without authorization (art. 3, subpara. (e)), or, in the case of firearms, if they have not been appropriately marked (art. 3, subpara. (e)).

171. It is important to note that some of the offences apply only to conduct with respect to firearms. These include the offence defined in article 3, subparagraph (d) (iii); the offence of trafficking in unmarked firearms, which is one of the offences defined in article 3, subparagraph (e); and the offences of tampering with markings, established by article 5, paragraph 1 (c). These offences relate to the markings required by article 8. Since article 8 requires only the marking of “firearms” because of the technical and other difficulties associated with the unique marking of parts, components and ammunition, these offences also apply only to firearms, although drafters in States that do require some form of marking for parts, components or ammunition may wish to consider a corresponding expansion of the relevant offence provisions.

172. In addition to the five central offences noted above, article 5, paragraph 1 (c), establishes a further group of offences criminalizing a list of activities that render the markings on a firearm unintelligible or inaccurate, making it impossible to uniquely identify the firearm or trace it against past

records created using the original marking. These generally support the policy of ensuring that firearms can be identified and traced. These offences apply to all conduct that involves tampering with the markings at any time after the manufacturing or assembly process is complete, with the exception of cases where markings are altered or added pursuant to some legal authority.

2. Application of mandatory provisions of the parent Convention to the Protocol

173. In establishing the offences required by the Protocols, it is important to bear in mind that each Protocol must be read in conjunction with the parent Convention. As set forth in chapter II, the provisions of the Convention apply to the Protocol, *mutatis mutandis*, and among States parties to the Protocol the offences established pursuant to the Protocol are to be considered offences established by the Convention. Application of these provisions creates an obligation upon States parties, *inter alia*, to take the following measures with respect to the offences established by the Protocol, the implementation of which is discussed in greater detail in the legislative guide for the implementation of the parent Convention:

(a) *Money-laundering*. States parties must criminalize the laundering of the proceeds of a comprehensive range of trafficking offences;⁶

(b) *Liability of legal persons*. Liability for offences must be established both for “natural” or biological persons and for “legal” persons such as corporations;⁷

(c) *Offences must be “criminal” offences (except for legal persons)*. Each of the offence provisions in the Convention and the Protocol state that offences must be established as offences in criminal law. This principle applies unless the accused is a legal person, in which case the offence may be a criminal, civil or administrative offence;⁸

(d) *Sanctions*. Sanctions adopted in domestic law must take into account and should be proportionate to the gravity of the offences;⁹

⁶Article 6 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 77-162.

⁷Article 10 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 240-260.

⁸Articles 5, 6, 8 and 23 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 48-209.

⁹Article 11, paragraph 1, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 261-286.

(e) *Presence of defendants.* States parties are to take appropriate measures in accordance with domestic law and with due regard to the rights of the defence to ensure that conditions of release do not jeopardize the ability to bring about the defendant's presence at subsequent criminal proceedings;¹⁰

(f) *Parole or early release.* The gravity of offences established in accordance with the Protocol shall be taken into account when considering the possibility of early release or parole of convicted persons;¹¹

(g) *Statute of limitations.* Appropriately long statutes of limitations should be provided for with respect to such offences;¹²

(h) *Asset confiscation.* To the greatest extent possible, tracing, freezing and confiscation of the proceeds and instrumentalities of these offences should be provided for in domestic cases and in aid of other States parties;¹³

(i) *Jurisdiction.* The Convention requires States parties to establish jurisdiction to investigate, prosecute and punish all offences established by the Convention and any Protocols to which the State in question is a party. Jurisdiction must be established over all offences committed within the territorial jurisdiction of the State, including its marine vessels and aircraft. If the national legislation prohibits the extradition of its own nationals, jurisdiction must also be established over offences committed by such nationals anywhere in the world to permit the State to meet its obligation under the Convention to prosecute offenders who cannot be extradited on request owing to nationality. The Convention also encourages the establishment of jurisdiction in other circumstances, such as all cases where the nationals of a State are either victims or offenders, but does not require this;¹⁴

(j) *Extradition.* The obligations of the parent Convention require States parties to, inter alia, treat offences established in accordance with the Protocol as extraditable offences under their treaties and laws and to submit

¹⁰Article 11, paragraph 3, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 261-286.

¹¹Article 11, paragraph 4, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 261-286.

¹²Article 11, paragraph 5, of the Convention; see also the legislative guide for the implementation of the Convention, paras. 261-286.

¹³Articles 12-14 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 287-340.

¹⁴Article 15, paragraph 1, of the Convention (mandatory jurisdiction); article 15, paragraph 2 (optional jurisdiction); and article 16, paragraph 10 (obligation to prosecute where no extradition due to nationality of offender); see also the discussion of jurisdictional issues in paras. 210-239, of the legislative guide for the implementation of the Convention.

to competent authorities such offence for domestic prosecution where extradition has been refused on grounds of nationality;¹⁵

(k) *Mutual legal assistance.* Mutual legal assistance shall be afforded to other States parties in investigations, prosecutions and judicial proceedings for such offences; numerous specific provisions of article 18 of the parent Convention apply;¹⁶

(l) *Special investigative techniques.* Special investigative techniques shall be provided for to combat such offences, in particular controlled delivery if permitted by basic principles of the domestic legal system of the State party concerned, and, where deemed appropriate, other techniques such as electronic surveillance and undercover operations;¹⁷

(m) *Obstruction of justice.* Obstruction of justice must be criminalized when carried out with respect to offences established in accordance with the Protocol;¹⁸

(n) *Protection of victims and witnesses.* Witnesses and victims are to be protected from potential retaliation or intimidation under the provisions of articles 24 and 25 of the Convention;¹⁹

(o) *Cooperation of offenders.* Article 26 of the Convention requires the taking of appropriate measures to encourage those involved in organized crime to cooperate with or assist competent authorities. The actual measures are not specified, but in many States they include the enactment of provisions whereby offenders who cooperate may be excused from liability or have otherwise applicable punishments mitigated. Some States possess sufficient discretion in prosecution and sentencing to allow this to be done without legislative authority, but where such discretion does not exist, legislation that creates specific offences, establishes mandatory minimum punishments or sets out procedures for prosecution may require adjustment, if the legislature decides to use mitigation or immunity provisions to implement article 26. This could be done by establishing a general rule, or on an offence-by-offence basis, as desired;²⁰

¹⁵Article 16 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 394-449.

¹⁶Article 18 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 450-499.

¹⁷Article 20 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 384-393.

¹⁸Article 23 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 195-209.

¹⁹See also the legislative guide for the implementation of the Convention, paras. 341-383.

²⁰Article 26 of the Convention; see also the legislative guide for the implementation of the Convention, paras. 341-383.

(p) *Law enforcement cooperation and training and technical assistance.* Channels of communication and police-to-police cooperation shall be provided for with respect to the offences established in accordance with the Protocol under article 27 of the Convention; and training and technical assistance under articles 29 and 30.²¹

3. Other general considerations in legislating domestic criminal trafficking offences

174. In addition to the above measures that must be provided for with respect to offences established in accordance with the Protocol, the Convention and the Protocol contain specific requirements that are to be taken into account when drafting legislation to implement the criminal offences established by the Protocol, in particular:

(a) *Non-inclusion of transnationality in domestic offences.* As noted in part one, the element of transnationality is one of the criteria for applying the Convention and Protocols (art. 3 of the Convention), but transnationality must not be required as a proof in a domestic prosecution. For this reason, transnationality is not required as an element of domestic offences. The exception to this principle is any offence that expressly requires transnationality as an element of the offence;

(b) *Non-inclusion of “organized criminal group” in domestic offences.* As with transnationality, above, the involvement of an “organized criminal group” must not be required as a proof in a domestic prosecution. Thus, the offences established in accordance with the Protocol should apply equally, regardless of whether the offence was committed by an individual, or was committed by individuals associated with an organized criminal group, and regardless of whether this can be proved or not;²²

(c) *Criminalization may use “legislative and other measures”, but must be founded in law.* Both the Convention and the Protocol refer to criminalization using “such legislative or other measures as may be necessary” in recognition that a combination of measures may be needed in some countries. The drafters were concerned, however, that the rule of law generally requires that criminal offences be prescribed by law and the reference to “other measures” was not intended to require or permit

²¹See also the legislative guide for the implementation of the Convention, paras. 500-511.

²²See article 34, paragraph 2, of the Convention and the interpretative notes (A/55/383/Add.1), para. 59.

criminalization without legislation. The interpretative notes therefore provide that other measures are additional to and “presuppose the existence of a law”;²³

(d) *Only intentional conduct need be criminalized.* All of the criminalization requirements of the Convention and Protocols require that the conduct of each offence must be criminalized only if committed intentionally. Thus, conduct that involves lower standards such as negligence need not be criminalized. Such conduct could, however, be made a crime under the provisions of article 34, paragraph 3, of the Convention, which expressly allows measures that are “more strict or severe” than the minimum crimes that are required. Drafters should also note that the element of intention refers only to the conduct or action that constitutes each criminal offence and should not be taken as a requirement to excuse cases in particular where persons may have been ignorant or unaware of the law that constituted the offence;

(e) *Description of offences.* As with all the requirements of the Convention and Protocols, drafters should consider the meaning of the offence provisions and not simply incorporate the literal language of the Protocols verbatim. In drafting the domestic offences, the language used should be such that it will be interpreted by domestic courts and other competent authorities in a manner consistent with the meaning of the Protocol and the apparent intentions of its drafters. In some cases, the intended meanings have been clarified by the interpretative notes;²⁴

(f) *Provisions of the Convention apply to the Protocol, mutatis mutandis, and should be interpreted together.* As noted in the preceding segment of the present guide, article 1 of the Protocol and article 37 of the Convention govern the relationship between the Protocol and the Convention. They provide that the Protocol must be read as supplementary to the Convention and interpreted together with it. All offences established under the Protocol are also considered offences established in accordance with the Convention, and provisions of the Convention apply to the Protocol,

²³The same principle is applied separately to the Convention and all of its Protocols; see the interpretative notes (A/55/383/Add.1), paras. 9, 69 and 91, and (A/55/383/Add.3), para. 5; see also article 15 of the International Covenant on Civil and Political Rights.

²⁴The formal *travaux préparatoires* for the Convention and its Protocols have not yet been published. Recognizing that this would take some time and seeking to ensure that legislative drafters would have access to the interpretative notes during the early years of the instruments, the Ad Hoc Committee drafted and agreed on the language for interpretative notes on many of the more critical issues during its final sessions. These were submitted to the General Assembly along with the finalized texts of the instruments and can now be found in addenda to a report of the Ad Hoc Committee. Interpretative notes on the Convention and first two Protocols are contained in document A/55/383/Add.1 and interpretative notes on the Firearms Protocol are contained in document A/55/383/Add.3.

mutatis mutandis.²⁵ For this reason, drafters developing legislation that implements the Protocol are also advised to consult the Convention and national laws that implement it as a matter of general principle. For example, terminology that is common to the Convention and a Protocol should not be interpreted in one instrument in a way that is inconsistent with its interpretation in the other.

4. Basic principles established by the Protocol

175. Additional general principles established by the Protocol should also be considered.

(a) Scope of offences established by the Protocol

176. Article 4 of the Protocol states that the instrument applies to the “prevention of illicit manufacturing of and trafficking in firearms, their parts and components and ammunition” and “to the investigation and prosecution of the offences contained in the instrument *where those offences are transnational in nature and involve an organized criminal group*” [emphasis added]. One may ask how the qualifier “transnational in nature” and the involvement of an “organized criminal group” affect the creation of the offences. As noted above, the general principle in formulating criminal offences established by the Convention and Protocols under domestic law is that elements of transnationality and the involvement of organized criminal groups must not be made elements of the domestic offence (art. 34, para. 2, of the Convention, applicable to the Protocol, mutatis mutandis, by art. 1, para. 2, of the Protocol).

(b) Exception

177. Article 4, paragraph 2, provides that the Protocol “shall not apply to state-to-state transactions or to state transfers in cases where the application of the Protocol would prejudice the right of a State Party to take action in the interest of national security consistent with the Charter of the United Nations”. The intention in drafting this paragraph was to exclude certain transactions or transfers that involve States. The extent of the limitation

²⁵The term “mutatis mutandis” should be interpreted to mean “with the necessary modifications” or “with such modifications as the circumstances require” (see A/55/383/Add.1, para. 26). Similar notes were also adopted with respect to the other two Protocols.

turns on the interpretation of the terms “state-to-state transactions” and “state transfers”. The interpretative notes indicate that the words “state-to-state transactions” refer only to transactions by States in a sovereign capacity. This would therefore not include States acting in their commercial capacity.²⁶

(c) *Firearms, their parts and components and ammunition*

178. The Protocol refers repeatedly to “firearms, their parts and components *and* ammunition” [emphasis added] because this is the language of General Assembly resolution 53/111 (para. 10), pursuant to which the Protocol was negotiated. In drafting domestic offence provisions, however, drafters should carefully consider whether a conjunctive (“and”) or a disjunctive (“or”) construction should be used, having regard to the legislative context set by the Convention, the Protocol and relevant domestic legislation. In formulating criminal offence provisions, the disjunctive will generally be more appropriate. For example, the intention in requiring States parties to criminalize the “illicit manufacturing of firearms, their parts and components and ammunition” was to require criminalization of illicitly manufacturing *any* of those elements. If incorporated verbatim into a domestic offence provision, the use of the conjunctive “and” could have the effect of requiring proof that an accused person had illicitly manufactured *all* of them (i.e. at least one item in each of the four groups), which was not the intention. This analysis applies to the criminalization requirements of article 5, paragraph 1 (a) and (b), and to the interpretation of article 3, subparagraphs (d) and (e). The issue does not arise with respect to those offences which apply only to firearms (see art. 3, subparagraph (d) (iii)).

(d) *Attempts to commit*

179. States parties are required to criminalize attempts to commit the offences established in accordance with the Protocol. The *travaux préparatoires* should elaborate on this by indicating that references to attempting to commit the offences are understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law (A/55/383/Add.3, para. 6). The

²⁶See the interpretative notes (A/55/383/Add.3), para. 4; see also the record of the meeting of the General Assembly at which resolution 55/255, containing the text of the Protocol, was adopted (*Official Records of the General Assembly, Fifty-fifth Session, Plenary Meetings*, 101st meeting).

Protocol also requires the criminalization of organizing, directing, aiding, abetting, facilitating or counselling.

5. *Optional offences*

180. To supplement the mandatory offences, States may wish to consider additional offences that are set out in section E, Optional offences, of this chapter, bearing in mind that the investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol will not be covered by the various requirements to provide international cooperation.

B. *Illicit manufacturing*

“Article 5

“Criminalization

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

“(a) Illicit manufacturing of firearms, their parts and components and ammunition;

“ ...

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

“(a) Subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

“(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(d) ‘Illicit manufacturing’ shall mean the manufacturing or assembly of firearms, their parts and components or ammunition:

- “(i) From parts and components illicitly trafficked;
- “(ii) Without a licence or authorization from a competent authority of the State Party where the manufacture or assembly takes place; or
- “(iii) Without marking the firearms at the time of manufacture, in accordance with article 8 of this Protocol;

Licensing or authorization of the manufacture of parts and components shall be in accordance with domestic law;

“ . . . ”

1. Introduction

181. Article 5, with its three offences for illicit manufacturing, is intended to ensure that all stages of the manufacturing process from raw materials to finished firearms are included. More specifically, the intent of the first offence—manufacture or assembly from illicit parts and components—is to ensure that the basic import, export and tracing requirements of the Protocol will not be circumvented by manufacturing all of the parts and components of a firearm and carrying out exports before assembly into the finished product. The second offence ensures that the manufacturing of the firearms will not take place covertly since a competent authority must authorize the activity. The intent of the third offence is to ensure that the manufacturing process includes markings sufficient for tracing.

2. Summary of main requirements

182. The basic obligation to criminalize illicit manufacturing is expanded by the definition of “illicit manufacturing” to encompass the requirement for States parties to adopt the following three distinct but related offences:

- (a) Manufacture or assembly from illicit parts and components;
- (b) Unlicensed or unauthorized manufacture or assembly; and
- (c) Manufacture or assembly of firearms without marking.

3. *Mandatory requirements*

(a) *Main elements of the article*

(i) *Offence of manufacture or assembly from illicit parts and components*

183. There are several issues to consider in the implementation of this illicit manufacturing offence.

184. Firstly, the scope of the offence must be clearly understood. Since the term “parts and components” is defined in the Protocol as “any element or replacement element specifically designed for a firearm and essential to its operation”, the term is limited to items falling within the ambit of the definition. As such, the term does not apply to parts and components of anything other than firearms; to very basic components (such as springs and machine-screws) that are not exclusive to firearms and items that, while they may be exclusive to firearms, are not essential to their operation; or to raw materials.

185. Secondly, since one of the elements of this illicit manufacturing offence is that the parts and components must themselves have been “illicitly trafficked”, it may be advisable to include in any domestic criminal offence provision language specifying the meaning of “illicitly trafficked” and making some provision for different ways in which this element can be proved in a criminal prosecution. In this context, the meaning of “illicitly trafficked” should be consistent with the meaning accorded to that term in the Protocol.

186. Thirdly, given the transnational nature of this offence,²⁷ a provision should be considered to the effect that criminal proof with respect to the same parts and components in any other domestic or foreign legal proceeding can be recognized by a court as meeting this requirement. It should be noted that in cases where a criminal conviction is recognized, there

²⁷As noted above and in article 34, paragraph 2, of the Convention, the offences of illicit manufacture need not necessarily involve transnationality insofar as the actual manufacturing or assembly are concerned. However, the offence of manufacture using illicitly trafficked parts and components does require an element of transnationality insofar as the parts and components are concerned because the definition of “illicit trafficking” requires that a national border have been crossed. The manufacture of firearms by one person from parts illicitly trafficked by another would still be an offence under the Protocol, provided that the illicit manufacture was intentional, which would generally require some degree of knowledge that the parts and components had been illicitly trafficked.

should be no requirement that the same accused persons have been involved. It should also be possible to convict a person of illegal manufacture on the basis that the parts and components were illicitly trafficked by someone in another jurisdiction, assuming, of course, that the manufacturer had knowledge, actual or constructive, that the parts had been trafficked.

187. Finally, the offence should generally extend to cases where the parts and components were illicitly trafficked at any time in the past, whether or not that transaction or transfer actually ended with the person now accused of assembling them. Subsequent transactions or transfers by persons unaware of the illicit origin of the parts and components should not effectively legitimize them or immunize those who subsequently assemble them. There should be two exceptions to this principle. The first is that parts and components that have been trafficked, confiscated and disposed of other than by destruction under article 6 of the Protocol should not form the basis of an illicit manufacturing offence. The second is where the manufacturer was genuinely unaware of the illicit origin or history of the parts and components.

188. In systems that recognize the defence of mistake-of-fact, that defence would exclude such cases, and such defences are expressly permitted by article 11, paragraph 6, of the Convention if they already exist in domestic law. Systems that do not recognize the defence may find it necessary to incorporate equivalent limits into the offence provision. In either case, the general policy of the Protocol is that manufacturers should not be permitted to assume that parts and components are derived from a legitimate source without making reasonable inquiries. To achieve this, language including within the offence cases of “wilful blindness”, in which the accused ignored evidence of illegality or avoided making obvious inquiries that would have disclosed it, could be considered. This would not necessarily be inconsistent with the basic standard of intentional conduct set by article 5, paragraph 1. Effectively, in such a case, the accused would be convicted of having intentionally assembled firearms while being wilfully blind as to the origin of the parts and components.

(ii) *Offence of unlicensed or unauthorized manufacture or assembly*

189. While article 10 of the Protocol requires the establishment of licences or authorizations to import and export, there is no parallel requirement for the licensing of manufacture or assembly. Article 3, subparagraph (d) (ii),

effectively creates such a requirement, however, by making the failure to have such a licence or authorization an element of the offence. Licence or authorization requirements need only be imposed on the manufacturing and assembly of firearms and ammunition. This is because article 3, subparagraph (d), specifies that licensing or authorizations for the manufacture or assembly of parts and components “shall be in accordance with national law”. The effect is that countries may impose manufacturing licences or authorizations for the making of parts and components, but are not required to do so.

190. Licensing offences should generally be drafted in conformity with the corresponding licence requirements, taking into account provisions made for such things as issuance and validity period. For example, offence provisions should extend to manufacturing or assembly not only where no licence had been issued, but where licences had expired or did not extend to some or all of the activities that took place. The offences should also include cases where the individual or legal persons who manufactured or assembled were not those actually licensed to do so and cases where the types or quantities of firearms produced were not authorized by the licence.

191. The reference to issuance by a “competent authority” of the State party involved refers to any official who is empowered to consider and issue licences or authorizations under the laws of that State party. Effectively, this would include regional, provincial or state officials in federal systems where such officials are made responsible for licensing matters by provisions of the national constitution or by the delegation of powers by the federal or national Government. The Protocol does not seek to establish federal licensing powers in States parties where this is a matter of regional, provincial or state responsibility.

(iii) *Offences of manufacture or assembly of firearms without marking*

192. The third offence of illicit manufacturing required by the Protocol consists of any manufacture or assembly of firearms that does not include the marking of the firearms in conformity with one of the two options for marking set out in article 8, paragraph 1 (a). The offence should include any case where a firearm is manufactured or assembled either without markings of any kind or with markings that do not meet the requirements of article 8 governing content and uniqueness.

193. Drafters formulating this offence provision should note that the Protocol does not require the marking of parts and components or ammunition and the offence provision therefore need only criminalize the manufacture or assembly of firearms without marking. At the same time, drafters in States that require some degree of marking of parts, components or ammunition may also wish to consider criminalizing manufacture of those items without marking, bearing in mind that offences that go beyond the scope of the Protocol are expressly authorized by article 34, paragraph 3, of the Convention, but would not invoke the various obligations to provide international cooperation under the Convention or Protocol.

194. Legislation establishing this offence should clearly specify the time at which firearms must be marked. The Protocol obligation is to criminalize the “manufacture or assembly” of firearms without marking “at the time of manufacture”. This suggests that not only complete “firearms” need be marked, but also that firearms that are complete but not yet assembled must be marked as well. It is also consistent with the practice of many manufacturers, which is to mark a major component, such as the “frame or receiver”, at or near the completion of its manufacture and then to assemble the firearm by adding the smaller, unmarked parts and components at a later stage. This defeats attempts to create untraceable firearms by marking only smaller, easily interchangeable parts and supports additional audit or record-keeping requirements for manufacturers if these are imposed.

195. Paragraph 1 (a) of article 8 sets out two distinct options for marking, but only one of the options will be open to drafters of legislation in most cases. States that already employ “any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code” are permitted to “maintain” or to continue using such a system. Those States will require offence provisions that exclude cases where this system is used instead of or in addition to the first option. States that are not already using such a system, however, are obliged to limit permitted forms of marking to “unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number” (see also paras. 65-90 above). The corresponding domestic offence should either criminalize the failure to meet this standard expressly or make reference to the corresponding requirement in national laws that reflect the standard set by the Protocol.

(b) Implementation of the article

196. The three distinct but related offences can be implemented either as a single unified offence of illicit manufacturing, using a format similar to

that employed by article 3, subparagraph (d), or by adopting three distinct offences. The latter approach may offer the advantage of more specific, straightforward offences that simplify the laying and prosecution of criminal charges in most systems and are more likely to meet basic constitutional standards for the clarity and specificity of criminal offence provisions where these apply. This approach may also lend itself to further additions or amendments if required or desired in the future. The drafting of a unified offence provision, on the other hand, may make it less likely that gaps or inconsistencies between offences will arise and drafters developing specific individual offences should take precautions to avoid this. In either case, the offence should either criminalize the failure to meet the required standard and set out that standard in detail or else make reference to the corresponding requirement in national laws.

4. Optional measures, including optional issues

197. It is open to States to adopt a broader (“more strict or severe”) standard for “illicit manufacturing” in support of their domestic offences (art. 34, para. 3, of the Convention). It should be noted, however, that in cases that involve manufacturing that is illicit by domestic law but does not fall within the ambit of the provisions of the Protocol, investigators might not be able to avail themselves of the cooperation provisions in the Protocol and the Convention.

198. Within the general standard of intent, legislators might consider whether lower standards are appropriate for some specific elements of offences. Those who manufacture or assemble firearms, for example, could be required to avoid wilful blindness or exercise some standard of diligence in determining whether parts and components they use have been illicitly trafficked by someone else.

199. As noted above, drafters in countries that extend marking requirements beyond the scope of the Protocol—for example, to include some degree of marking of parts, components or ammunition—should consider a corresponding expansion of the offence provisions.

5. Information resources

200. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 1, paragraph 3 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8 (Marking of firearms)

Article 10 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

(b) *Organized Crime Convention*

Article 11 (Prosecution, adjudication and sanctions)

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article IV

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section II

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects

Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Article 5

C. Illicit trafficking

“Article 5

“Criminalization

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

“ ...

“(b) Illicit trafficking in firearms, their parts and components and ammunition;

“(c) Falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of this Protocol.

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

“(a) Subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

“(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(e) ‘Illicit trafficking’ shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the

terms of this Protocol or if the firearms are not marked in accordance with article 8 of this Protocol;

“ . . . ”

1. Introduction

201. The two offences relating to illicit trafficking are intended to increase transparency associated with the cross-border movement of firearms and related items. The first offence is intended to ensure that firearms and related items are sent to and through States only if the latter have agreed to receive the shipments. The system adopted in the Protocol creates this reciprocal approval process and has the effect of implicating more than just States parties to the Protocol. The reason for this is that a State party that is the exporting State will require authorizations from the importing and transit States even if the latter are not States parties to the Protocol. The intent of the second offence is to ensure that the movement of firearms is only authorized if the firearms have markings sufficient for tracing.

2. Summary of main requirements

202. The basic obligation to criminalize illicit trafficking in article 5, paragraph (1) (b), of the Protocol is expanded by the definition of illicit trafficking in article 3, subparagraph (e), to encompass a series of distinct elements (import, export, etc.) and two distinct offences:

(a) Specified conduct (importing, etc.) with respect to firearms where any of the States parties concerned (import, export or transit States) has not authorized the conduct in accordance with the Protocol;

(b) Specified conduct (importing, etc.) with respect to firearms that are not marked in accordance with article 8.

3. Mandatory requirements

(a) Main elements of the article

(i) *Offence of illicit trafficking where States parties concerned have not authorized the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts or components or ammunition*

203. In this first part of the illicit trafficking offence the requirement is to criminalize cases involving the specified conduct, if there is movement of

firearms, parts and components or ammunition “from or across the territory of one State Party to that of another State Party”.

204. What constitutes “import” and “export” should generally be consistent with existing national law and international standards. One issue is whether importation occurs at the instant firearms, parts and components or ammunition physically enter the territory of the State party concerned or whether they can be physically in a country temporarily prior to later “importation” or in transit en route to another country without triggering import requirements or offences. Generally, international practice and article 10 of the Protocol allow for some forms of limited entry, at least for “transit” purposes, which is not considered to be importation and for which suitable security precautions are required.

(ii) Offence of trafficking unmarked firearms

205. In the second part of the illicit trafficking offence, the requirement is to criminalize cases involving the specified elements discussed above, if there is movement of firearms and “the firearms are not marked in accordance with article 8”.

206. The applicable requirements would depend on the firearms involved: the marking requirements of article 8, paragraph 1 (a), would apply to all firearms (all having been “manufactured” at some point) and the requirements of article 8, paragraph 1 (b), would apply to all firearms being imported. The requirements of article 8, paragraph 1 (c), would also apply in the case of firearms that had been transferred at some previous time from government stocks to permanent civilian use.

207. Drafters should also consider that any firearm on which the marking had been falsified, illicitly obliterated, removed or altered contrary to the offence established in accordance with article 5, paragraph 1 (c), of the Protocol would no longer be “marked in accordance with article 8 of this Protocol” and should ensure that trafficking in such firearms falls within the ambit of the offence of trafficking unmarked firearms.

208. It should also be noted that, as an offence in relation to the marking of firearms, the offence of trafficking unmarked firearms is required to apply only to firearms and not to parts and components or ammunition.

(b) *Implementation of the article*

209. The distinct but related offences can be implemented either as a single unified offence of illicit trafficking, using a format similar to that employed by article 3, subparagraph (e), or by adopting two or more distinct offences. As with the offences of illicit manufacture above, the latter approach may offer the advantage of more specific, straightforward offences that simplify the laying and prosecution of criminal charges in most systems and are more likely to meet basic constitutional standards for the clarity and specificity of criminal offence provisions where these apply. This approach may also lend itself to further amendments or additions if required or desired in the future. The drafting of a unified offence provision, on the other hand, may make it less likely that gaps or inconsistencies between offences will arise, however, and drafters developing specific individual offences should take precautions to avoid this. In either case, the offences should either criminalize the failure to meet the required standard and set out that standard in detail or make reference to the corresponding requirement in national laws.

210. Drafters have several options for formulating the necessary offence provisions:

(a) The creation of separate offences for each of the prohibited forms of conduct;

(b) The creation of several offences involving conduct grouped by other characteristics (e.g. creating groups for import-export offences); or

(c) The creation of two offences dealing with unauthorized actions and with unmarked firearms, each of which includes all of the listed prohibited forms of conduct.

211. In drafting the offence provision, care should be taken to criminalize not only cases where any form of licence or authorization from a State party is completely lacking, but also cases in which some form of authorization existed but did not cover the actions that actually occurred in their entirety. Transfers or other trafficking actions that might exceed authorizations include cases where licences were not validly issued or had expired, where conditions precedent for the activity on which the licence was contingent had not been met and cases where they did not extend to the types or quantities of firearms, parts and components or ammunition involved.

212. Drafters should also note that more than one “authorization” must be raised to avoid liability for the offence. All of the “States Parties

concerned” must have authorized the transfer or other trafficking act, which will generally include the countries of export, import and, where appropriate, any countries of transit.

213. It should further be noted that, to be valid, the authorization to undertake a particular act must have come from a State party entitled to authorize the action in question. Thus, for example, a licence to import firearms must have come from the State party into which the firearms were actually imported.

214. Articles 5, paragraph 1 (*b*), and 3, subparagraph (*e*), require the criminalization of any import or export where the countries of export, import and, where applicable, transit have not authorized the transfer. Article 10 then sets out the conditions under which the necessary permits or authorizations should be issued and the contents of various documents for the purpose of creating the records needed to trace transactions or firearms. Article 10, paragraph 6, allows (but does not require) States parties to create a partial exception to the otherwise applicable permit or authorization requirements, where importation is temporary and for verifiable lawful purposes such as recreational use. Should the legislature choose to create such an exception, it will be necessary to ensure that the offences relating to importation without the necessary permits or authorizations incorporate parallel exceptions. Drafters should ensure that in any case where a court concludes that firearms were imported for purposes that did not fall within the exclusion, the principal offence of trafficking would apply.

215. Articles 5, paragraph 1 (*b*), and 3, subparagraph (*e*), also require the criminalization of importing firearms not marked in accordance with the requirements of article 8. An exclusion exists to this general rule. The requirement to affix markings when firearms are imported need not be applied to firearms imported temporarily for a “verifiable lawful purpose”. This is intended to allow States parties to reduce the regulatory burden on individuals importing or exporting personal firearms for recreational purposes and on companies that frequently import and export firearms for purposes such as maintenance and repair (see also art. 10, para. 6, on this point). Where a Government chooses to apply this exclusion, a parallel exclusion should be incorporated into the offence of trafficking without the necessary markings. In this case, importing without the necessary basic markings would still be an offence, but importing without the additional markings required by article 8, paragraph 1 (*b*), would not be, if the import was temporary and for a verifiable lawful purpose.

4. *Optional measures, including optional issues*

216. It is open to States to adopt a broader (“more strict or severe”) standard for “illicit trafficking” in support of their domestic offences (see art. 34, para. 3, of the Convention). It should be noted, however, that in cases involving trafficking that is illicit by domestic law but does not fall within the ambit of the provisions of the Protocol, investigators might not be able to avail themselves of the cooperation provisions in the Protocol and the Convention. Within the general standard of intent, legislators might also wish to consider whether lower standards are appropriate for some specific elements of offences.

217. Legislators and drafters may wish to consider making specific provision for the use of foreign documents, such as import, export or transit licences, as proof that the necessary authorizations were given, bearing in mind that the actual names and format of such documents are likely to vary from one State party to another and that the language chosen should ensure that the legislation will support the production of evidence of foreign authorization regardless of its format.

5. *Information resources*

218. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 1, paragraph 3 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8 (Marking of firearms)

Article 10 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

(b) *Organized Crime Convention*

Article 11 (Prosecution, adjudication and sanctions)

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article IV

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<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section III

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Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chapter IV, paragraph 24, section II

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Article 5

D. Tampering with markings

“Article 5

“Criminalization

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

“ ...

“(c) Falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of this Protocol.

“2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

“(a) Subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

“(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.”

1. Introduction

219. Offenders seeking to frustrate efforts to identify and trace firearms used or intended for use in criminal offences, including trafficking, frequently attempt to remove or alter unique markings or to render them impossible to read. For this reason, many States with previously established legislation requiring firearms to be marked have also established offences relating to tampering with such markings and article 5, paragraph 1 (c), of the Protocol contains the requirement for all States parties to implement such an offence.

2. Summary of main requirements

220. This offence includes:

(a) Any case where a firearm is marked at manufacture with markings that meet the requirements, but that are false in relation to any records that would subsequently be used to trace the firearm;

(b) The full range of methods devised by offenders to prevent the successful reading of markings.

3. Mandatory requirements

(a) Main elements of the article

221. The inclusion of the word “falsifying” in paragraph 1 (c) is intended to create an offence that supplements the offence of illicit manufacturing.

It includes any case where a firearm is marked at manufacture with markings that meet the requirements, but that are false in relation to any records that would subsequently be used to trace the firearm. Thus, for example, knowingly marking a firearm with the same number as another firearm would fall within the manufacturing offence (arts. 5, para. 1 (a), and 3, subpara. (d) (iii)), whereas affixing a marking that was unique but that gave a false country or place of manufacture or was inconsistent with records kept by the manufacturer or information transmitted to state records for later use in tracing would fall within the tampering offence.

222. The terms “obliterating, removing or altering” markings are intended to cover the full range of methods devised by offenders to prevent the successful reading of markings. Generally, prosecution of such offences will be supported by evidence from a law enforcement or forensic expert to the effect that this has taken place.

223. The terms “obliterating, removing or altering” markings are qualified with the term “illicitly” to ensure that States parties may make provision for legal alteration of markings if they wish. In some systems, firearms acquired or disposed of by military forces or other state entities are re-marked, for example. Since this would be an exception to an offence prescribed by law, such an exemption would, if established, generally also require the use of a legislative provision.

(b) Implementation of the article

224. The exact formulation of the offences of manufacture without marking and falsification of markings may vary, but drafters should ensure that the full range of conduct is covered and that there are no gaps between the two.

225. For offences of “obliterating, removing or altering” markings, drafters may wish to consult with experts regarding the selection of terminology that will ensure that the legislation is interpreted so as to cover the full range of methods used by offenders. Generally, the evidence of forensic experts identifying firearms and establishing tampering with the markings will be based on a visual, physical, chemical or radiological examination of the firearm and legislators may wish to include language ensuring that expert testimony is admissible.

226. Drafters and legislators developing exceptions for the legal alteration of markings should bear in mind the need to ensure that re-marked firearms

can still be traced, either by setting standards that ensure that the original marking is not made unreadable (e.g. by simply adding further markings to the original) or by ensuring that records are made of the re-marking that would link the new and old identification of the firearm, should it later be necessary to trace it.

4. *Optional measures, including optional issues*

227. The nature of firearm markings, most of which are deeply imprinted into one or more of the major metallic parts of each firearm, make removal, alteration or obliteration difficult to accomplish without rendering the firearm itself unusable or dangerous to any future users. This results in large numbers of unsuccessful attempts and in cases where markings are superficially removed but can still be made legible by chemical or radiological methods. Article 5, paragraph 2 (a), requires the criminalization of attempts where this is consistent with the basic concepts of the legal system of the country concerned. Where separate criminalization of attempts per se is not possible, drafters and legislators could consider making attempts part of the actual conduct prohibited. (An example of such a provision is “anyone who removes or attempts to remove a marking”.) Alternatively, other actions could be prohibited if done for the purpose of removal, alteration and so on. (An example of this formulation is “anyone who files, grinds, stamps or does anything to the marking on a firearm for the purpose of obliterating, removing, altering the marking”.) Further, since forensic experts often “restore” markings using chemical etching or other methods, the language chosen for offence provisions should ensure that the fact that a forensic expert was subsequently able to read the marking or restore it to a form in which it could be read did not constitute evidence that the marking had not, in fact, been removed, altered or obliterated.

5. *Information resources*

228. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 1, paragraph 3 (Relation with the United Nations Convention against Transnational Organized Crime)

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8 (Marking of firearms)

Article 10 (General requirements for export, import and transit licensing or authorization systems)

Article 12, paragraph 4 (Information)

(b) Organized Crime Convention

Article 11 (Prosecution, adjudication and sanctions)

Article 18 (Mutual legal assistance)

Article 34, paragraph 3 (Implementation of the Convention)

E. Optional offences

229. Depending on the state of a country's existing laws and the methods chosen to implement the record-keeping, marking, licensing and other requirements of the Protocol, Governments may wish to consider adopting further offences in several areas, although this is not required (art. 34, para. 3, of the Convention), bearing in mind that the investigation, prosecution or other procedures relating to activities that are outside the scope of the Convention or Protocol will not be covered by the various requirements to provide international cooperation.

1. Record-keeping

230. Where a State chooses to require the parties who transfer firearms to keep the records needed for subsequent tracing, for example, it may wish to consider offences relating to the failure to keep records and the falsification and destruction of records, whereas States that choose to have the records kept by a state agency would wish to consider offences relating to the failure to report transactions or giving of false, inaccurate or incomplete information and similar conduct.

231. Generally, punishments specified for these offences should seek to ensure that the same punishments are applied as for the basic offences of

illicit manufacture and illicit trafficking in order to ensure that offenders cannot avoid harsher sanctions simply by failing to keep or destroying the records needed to establish that criminal conduct has taken place.

2. *Marking*

232. States that wish to impose marking requirements for some parts and components or markings such as “headstamps” or package markings, which partially identify cartridges or ammunition batches, will also wish to consider the corresponding offence of illicit manufacture for such items.

233. If additional standards are set for the form, content, placement or other characteristics of marking on firearms, offences could be established for failure to meet those standards.

3. *Licences*

234. Consideration may also be given to establishing offences for the giving of false or misleading information likely to unduly influence the judgement of the officials responsible for deciding whether to issue the required licence or authorization needed to complete an import or export transfer. Such offences could be further expanded by including material non-disclosure to cover cases in which accurate but incomplete information was given. States will also want to consider offences relating to the falsification or misuse of such documents. Such offences could also be supported by offences dealing with the possession or use of fraudulent licences.²⁸

235. States parties may opt for a simplified procedure distinct from the licensing and authorization system set out in article 10, paragraph 6, for temporary transactions (import, export and transit movement). While States parties may limit their legislative intervention to provide for a simple exclusion of such cases, they may also, in addition, opt for the creation of

²⁸Offences in relation to the falsification or misuse of documents and the verification of documents such as passports were incorporated into the other two Protocols, but not into the Firearms Protocol, as a result in part of lack of time during the negotiations and in part because of the greater range of documents used by various States to control the import and export of firearms. For examples, drafters may find it useful to consider national legislation that implements articles 6, 12 and 13 of the Protocol against the Smuggling of Migrants by Land, Sea and Air and articles 12 and 13 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as well as the relevant portions of the legislative guides for the implementation of those Protocols.

a simplified permit or authorization system along with an associated offence for cases where the simplified permit or authorization was not obtained. The limitation of the exception established by paragraph 6 of article 10 extends only to “temporary” imports, which requires that time limits be established. This in turn requires either the establishment of a further offence of not re-exporting within the time limit. Finally, if separate applications and permits are established for this process, any offences relating to the giving of false or misleading information should be expanded to include the additional forms.

4. Deactivated firearms

236. In addition to setting technical standards, article 9 encourages States that do not consider deactivated weapons to be “firearms” for purposes of domestic controls to establish criminal offences to punish and deter attempts at reactivation.

5. Brokering

237. Should a State adopt a regime for brokering, it may also wish to create an associated offence for illicit brokering. Alternatively, if a State requires disclosure of a broker as part of the import/export licensing/authorization process, offences relating to providing false or misleading information on licence application forms could include an offence for failing to provide required information about brokerage activities.

VI. Information exchange

238. Articles 12 and 13 of the Protocol establish a framework for cooperation that supplements the more general provisions of the Convention.

239. While some of the legislative requirements dealing with cooperation may have been met by legislation implementing the more general provisions of the Convention, several provisions of the Protocol require the exchange of information relating specifically to firearms, their parts and components and ammunition. These may or may not require the adoption of legislative or other measures prior to ratification of the Protocol.

A. Tracing

“Article 12

“Information

“1. Without prejudice to articles 27 and 28 of the Convention, States Parties shall exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant case-specific information on matters such as authorized producers, dealers, importers, exporters and, whenever possible, carriers of firearms, their parts and components and ammunition.

“2. Without prejudice to articles 27 and 28 of the Convention, States Parties shall exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

“(a) Organized criminal groups known to take part or suspected of taking part in the illicit manufacturing of or trafficking in firearms, their parts and components and ammunition;

“(b) The means of concealment used in the illicit manufacturing of or trafficking in firearms, their parts and components and ammunition and ways of detecting them;

“(c) Methods and means, points of dispatch and destination and routes customarily used by organized criminal groups engaged in illicit trafficking in firearms, their parts and components and ammunition; and

“(d) Legislative experiences and practices and measures to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

“3. States Parties shall provide to or share with each other, as appropriate, relevant scientific and technological information useful to law enforcement authorities in order to enhance each other’s abilities to prevent, detect and investigate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition and to prosecute the persons involved in those illicit activities.

“4. States Parties shall cooperate in the tracing of firearms, their parts and components and ammunition that may have been illicitly manufactured or trafficked. Such cooperation shall include the provision of prompt responses to requests for assistance in tracing such firearms, their parts and components and ammunition, within available means.

“5. Subject to the basic concepts of its legal system or any international agreements, each State Party shall guarantee the confidentiality of and comply with any restrictions on the use of information that it receives from another State Party pursuant to this article, including proprietary information pertaining to commercial transactions, if requested to do so by the State Party providing the information. If such confidentiality cannot be maintained, the State Party that provided the information shall be notified prior to its disclosure.”

“Article 3

“Use of terms

“For the purposes of this Protocol:

“ . . .

“(f) ‘Tracing’ shall mean the systematic tracking of firearms and, where possible, their parts and components and ammunition from manufacturer to purchaser for the purpose of assisting the competent authorities of States Parties in detecting, investigating and analysing illicit manufacturing and illicit trafficking.”

1. Introduction

240. A key requirement of the Protocol is that the information accumulated from the markings required to be placed on each firearm (art. 8) and the information that must be provided and kept concerning manufacture and international transactions (arts. 7 and 10) must be made available for the purpose of tracing firearms to determine whether they have been illicitly manufactured or trafficked and, if so, to support investigation and prosecution of the offenders involved.

2. Summary of main requirements

241. The Protocol requires States parties to provide tracing assistance in any case where the items involved “may have” been illicitly manufactured or trafficked, which means that requests based on the suspicion of the requesting State party must be responded to.

3. Mandatory requirements

(a) Main elements of the article

242. Article 12, paragraph 4, requires cooperation not only in tracing firearms, but also their parts and components and ammunition. The definition of “tracing” in article 3, subparagraph (f), on the other hand, refers to the tracing of firearms, and “where possible” their parts and components and ammunition. Article 8 requires only the marking of firearms, and article 7 requires the keeping of records in relation to firearms and “where appropriate and feasible” their parts and components and ammunition. For these reasons, there is an obligation in article 12, paragraph 4, for States parties to “cooperate” in tracing parts and components and ammunition, but the exact extent of such cooperation is not specified and is limited by the definition of tracing in article 2, subparagraph (f), to providing such cooperation only where this is possible.

243. In addition, article 12, paragraph 4, limits the actual delivery of assistance to such assistance as is “within available means”. Since this would have to be determined on a case-by-case basis having regard to the availability of resources and the demand placed on those resources by the individual request, it should not be reflected in legislation. Where it is feasible for a State to develop a computer-based system, the storage and retrieval of information will generally be easier if a centralized state-operated system is used.

244. Recognizing the sensitivity of some information, the Protocol contains the obligation for a State party to whom information is given not to transmit that information on to other States or otherwise disclose it. These obligations apply only when the State party that provides the information actually requests confidentiality. The article also recognizes that in some cases confidentiality cannot be guaranteed or maintained, usually because the requesting State party has procedural protections (many of which are entrenched and enforceable constitutional rights) that require that prosecutors disclose potentially exculpatory information, or in some systems all relevant information, to accused persons prior to trial. The requirement in the Protocol is that the notification must reach the State party that provided the information prior to any disclosure.

(b) Implementation of the article

245. In some States, the cooperation requirements found in article 12 may be met by administrative instructions to ensure that requests are received and that the necessary information is obtained and provided to the requesting State party. In most States, however, legislation will be needed to place the handling of tracing requests on a formal legal basis consistent with the handling of other formal and informal legal assistance matters. Legislative and administrative measures should ensure that any element of the records kept under article 7 can be located and transmitted to a requesting State party, provided that enough information is given to locate the records concerned.

246. As with other areas of information exchange, the primary need for legislative powers, if any are needed at all, will be powers and safeguards to reconcile the exchanges with any applicable confidentiality, privacy or similar protections. In most countries and for most of the other information envisaged under article 12, paragraphs 2 and 3, this issue may not arise, because the nature of the information itself makes it unlikely to be subject to such protections to begin with. Information about legislative experiences and most scientific or technological information, for example, may well be in the public domain and therefore able to be shared or exchanged without legal authority of any kind.

247. Drafters, however, will want to ensure that exceptions are created to any legislation that protects the privacy or confidentiality of information about firearms, transactions or the parties involved allowing this information to be provided on request. A further and related legislative requirement may be needed to require the keeping of requests confidential (requested

State) and to shield information that is provided and for which confidentiality is requested from disclosure, subject to constitutional requirements. Some of these measures may be implemented jointly with article 18, paragraphs 19 and 20, of the Convention or may already fall within the ambit of measures taken to implement those paragraphs.

248. Where a fundamental obligation to disclose information to the defence exists, it is likely that exceptions, if they can be made at all, will require specific legislative authority and appropriate safeguards to ensure that the rights of accused persons are not unduly compromised if disclosure is limited or to establish formulae for limiting the manner or content of disclosure in ways which protect basic rights, while avoiding or minimizing any harm that might arise from the disclosure itself. Whether or not legislative measures are needed to protect confidentiality or establish a framework for disclosure will depend to some degree on the nature of existing domestic constitutional, legal and other requirements, the effects of any other applicable international agreements and the implementation of articles 18, paragraphs 4 and 5 (protection of information shared voluntarily), and 19 and 20 (protection of information transmitted pursuant to legal assistance requested under article 18) of the Convention. It is likely that, in most cases, the legislative measures taken under article 18 of the Convention can either be applied directly to the Protocol or could form the basis of parallel provisions. The administration of such provisions may differ, depending on whether the same agencies are used to deal with requests under the Convention and Protocol or not.

249. The Protocol requires that officials who are legally obliged to disclose information provide advance notification of the disclosure. Legislative or administrative requirements should ensure that this is transmitted to the office or agency responsible for cooperation under article 13, paragraph 2, of the Protocol so that it can in turn be transmitted back to the State party that provided the information required by article 12, paragraph 5.

250. In addition to articles 12-14 (proceeds and other crime-related property) and article 18 (mutual legal assistance) of the Convention, other general requirements for cooperation are also found in its articles 27-29. Generally, legislators should consider the (past or pending) implementation of these provisions when developing measures to implement the corresponding provisions of the Protocol, both to ensure consistency and coherence in the delivery of assistance and cooperation and to determine whether it is feasible to implement the various requirements using the same legislative provisions and/or administrative structures.

4. Optional measures, including optional issues

251. The Protocol does not require either the keeping of records of internal transfers or the tracing of a firearm while within a country. As with other provisions of the Convention and Protocol, however, this is a minimum standard and it is open to States parties that do create and keep records of domestic possession and transfer to provide such information voluntarily as part of a tracing request.

252. Legislators may also wish to consider amendments to legislation governing cooperation with organizations such as Interpol, the Customs Cooperation Council (also known as the World Customs Organization) and their regional counterparts to expand the network of sources for tracing assistance.

5. Information resources

253. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) Firearms Protocol

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 7 (Record-keeping)

Article 8 (Marking of firearms)

Article 10, paragraphs 2 and 4 (General requirements for export, import, and transit licensing or authorization systems)

(b) Organized Crime Convention

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)

Article 27 (Law enforcement cooperation)

Article 28 (Collection, exchange and analysis of information on the nature of organized crime)

Article 34, paragraph 3 (Implementation of the Convention)

(c) Other instruments

1997 Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article XIII

2000 Organization for Security and Cooperation in Europe document on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section III

2001 Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects
Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, New York, 9-20 July 2001 (A/CONF.192/15), chapter IV, paragraph 24, sections II and III

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Articles 15 and 16

B. Cooperation

“Article 13

“Cooperation

“1. States Parties shall cooperate at the bilateral, regional and international levels to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

“2. Without prejudice to article 18, paragraph 13, of the Convention, each State Party shall identify a national body or a single point of contact to act as liaison between it and other States Parties on matters relating to this Protocol.

“3. States Parties shall seek the support and cooperation of manufacturers, dealers, importers, exporters, brokers and commercial carriers of firearms, their parts and components and ammunition to prevent and detect the illicit activities referred to in paragraph 1 of this article.”

1. Introduction

254. In dealing with the specialized subject matter of the Protocol, drafters of the instrument recognized that it would, in some cases, be more effective to channel some forms of cooperation through specialized agencies, in addition to the “central authority” designated under article 18, paragraph 13, of the Organized Crime Convention to handle formal requests for mutual legal assistance.

2. Summary of main requirements

255. States parties are required to have a single point of contact to act as liaison with other countries on matters related to the Protocol.

3. Mandatory requirements

(a) Main elements of the article

256. A central feature of article 13 requires the establishment of a national body or single point of contact to receive requests or notifications concerning “matters relating to this Protocol”. The interpretative notes indicate that the reference to “matters relating to this Protocol” in this article was included in order to take into account the fact that, for matters relating to the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, some States parties might find it necessary to establish different authorities than those responsible for dealing with mutual legal assistance matters under article 18 of the Convention.

(b) *Implementation of the article*

257. In implementing these provisions at the legislative and administrative levels, Governments should consider the extent to which various forms of cooperation should be directed through central authorities for purposes of mutual legal assistance under article 18 of the Convention, other law enforcement channels under article 27 of the Convention or a more specialized mechanism established under article 13, paragraph 2, of the Protocol. One important consideration in this regard is the nature of existing cooperation channels and the extent to which various forms of tracing, identification or other firearm-related information require formal channels of communication; whether evidence admissible at trial is required such that formal mutual legal assistance channels must be utilized; or where informal and faster sharing could be used.

258. There is no obligation to establish a separate or distinct office or body for the purpose of providing cooperation in cases arising from the Protocol, only to formally decide which body will be responsible for requests under the Protocol and to “identify” such a body. Where such a body is established, however, legislation may be needed to do so. In cases where a new unit is created within an existing law enforcement or customs agency, the need for legislation will depend on whether this is authorized by existing authorities or not.

259. It should be noted as well that the single point of contact can act as a point of entry to direct queries to the appropriate agency or can be an office with subject matter expertise. In addition, the single point of contact does not have to be the sole office within a State able to speak to issues related to the Protocol.

260. As with article 12, countries should ensure that article 13 is consistent with domestic privacy legislation.

4. *Information resources*

261. Drafters of national legislation may wish to refer to the related provisions and instruments listed below:

(a) *Firearms Protocol*

Article 3, subparagraphs (a), (b), (c), (d) and (e) (Use of terms)

Article 4 (Scope of application)

Article 8, paragraph 2 (Marking of firearms)

(b) *Organized Crime Convention*

Article 18, paragraph 13 (Mutual legal assistance)

Article 27 (Law enforcement cooperation)

Article 34, paragraph 3 (Implementation of the Convention)

(c) *Other instruments*

1997 Inter-American Convention against the Illicit Manufacturing of
and Trafficking in Firearms, Ammunition, Explosives, and Other
Related Materials

United Nations, *Treaty Series*, vol. 2029, No. 35005

<http://www.oas.org/juridico/english/treaties/a-63.html>

Article XIV

1997 Model Regulations for the Control of the International Move-
ment of Firearms, their Parts and Components and Ammunition
(Organization of American States)

[http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/
Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc](http://www.cicad.oas.org/Desarrollo_Juridico/esp/Reglamentos/Reglamento_Modelo/RegModeloIdiomas/ReglArmseng.doc)

Chapter IV

2000 Organization for Security and Cooperation in Europe document
on small arms and light weapons (A/CONF.192/PC/20)

<http://www.osce.org/docs/english/fsc/2000/decisions/fscew231.htm>

Annex, appendix, section III

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*Report of the United Nations Conference on the Illicit Trade in Small
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2001* (A/CONF.192/15), chapter IV, paragraph 24, sections II
and III

2001 Protocol on the Control of Firearms, Ammunition and Other Related Materials in the Southern African Development Community Region

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

Article 15

Annex I. Reporting requirements under the Firearms Protocol

The following is a list of the notifications that States parties are required to make to the Secretary-General of the United Nations:

Article 16. 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 17. Signature, ratification, acceptance, approval and accession

“3. This Protocol 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 Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

“4. This Protocol 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 Protocol. 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 Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.”

Article 19. Amendment

“1. After the expiry of five years from the entry into force of this Protocol, 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. The Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the Parties.”

“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 20 . Denunciation

“1. A State Party may denounce this Protocol 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.”

Annex II. Table of examples of relevant national legislation

States parties preparing legislation in relation to the provisions of the Firearms Protocol may wish to refer for further guidance, inter alia, to the legislation presented below.

Canada

Firearms Act 1995, c. 39, An Act respecting firearms and other weapons
[Assented to on 5 December 1995]

(<http://laws.justice.gc.ca/en/F-11.6/58586.html>)

United States of America

Gun Control Act (title 18, United States Code, chapter 44)

National Firearms Act (title 26, United States Code, chapter 53)

Arms Export Control Act (title 22, United States Code, § 2778)/title 18, United States Code, § 1715 (Non-mailable firearms)

Code of Federal Regulations (CFR)

27 C.F.R. Part 47

27 C.F.R. Part 178

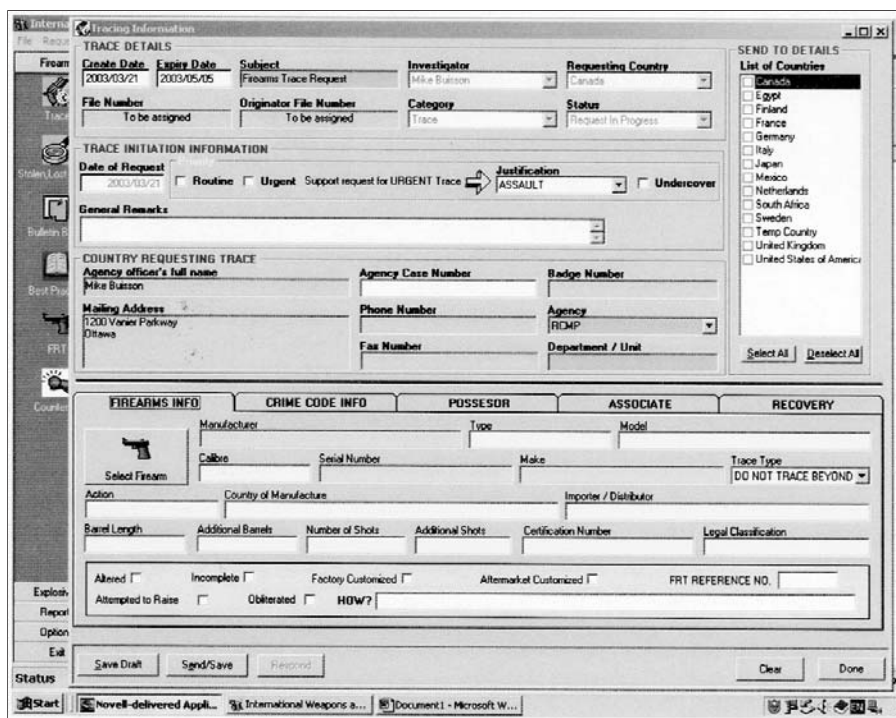
27 C.F.R. Part 179

27 C.F.R. Part 25

(All the regulations listed above are available at http://www.atf.gov/pub/fire-explo_pub/2000_ref.htm)

Annex III. International Criminal Police Organization

A. Interpol Weapons and Explosives Tracking System: sample screen



B. Contact information

International Criminal Police Organization (Interpol)
 General Secretariat
 200, quai Charles de Gaulle
 69006 Lyons
 France
 Facsimile: +(33) (4) 72 44 71 63

Annex IV. Canada: deactivation standards

Deactivation involves the removal of parts or portions of parts from a firearm, and the addition of pins and welds so that the firearm can no longer chamber or fire ammunition.

1. Deactivation of Small Arms of Calibre 20 mm or Less

a. Semi-automatic, Full Automatic, Selective Fire, and Converted Firearms

1. A hardened steel blind pin of bore diameter or larger must be force fitted through the barrel at the chamber, and where practical, simultaneously through the frame or receiver, to prevent chambering of ammunition. Furthermore, the blind pin must be welded in place so that the exposed end of the pin is completely covered by weld. This strength and hardness of the weld must be similar to that of the metal used in the construction of the firearm. In the case of firearms having calibres greater than 12.7mm (.5 inch), the pin need not be larger in diameter than 12.7mm. In the case of multi-barrelled firearms, all barrels must be pinned, using as many pins as necessary to block all chambers.
2. The barrel must be welded to the frame or receiver to prevent replacement.
3. The breech face or portion of the breech bolt which supports the cartridge must be removed or drilled out to a diameter at least as large as the base of the cartridge, so that the bolt can no longer support the cartridge.
4. The receiver must be welded closed to prevent replacement of the breech bolt.
5. In the case of firearms designed to support full-automatic fire, the trigger mechanism must be rendered unusable. Any trigger mechanism part or component which is necessary for full-automatic fire must be destroyed by cutting or grinding and welded in place to prevent replacement.

b. Rifles, Shotguns and Handguns Other Than Revolvers

1. The barrel, bolt and frame or receiver must be modified as in 1.a.
2. The bolt, if present as a separate piece, must be welded to the frame or receiver to prevent replacement.

c. Revolvers, Revolving Rifles and Shotguns, and Cap and Ball Revolvers

1. The barrel and cylinder must be blocked by a hardened steel pin of bore diameter which traverses the entire length of the barrel and cylinder. The pin must be welded in place at the muzzle, barrel/cylinder gap and except for muzzle-loading firearms, at the breech end of the frame. The strength and hardness of the welds must be similar to that of the firearm.

d. Black Powder Rifles and Shotguns

1. The barrel must be blocked immediately forward of the flash hole using a blind pin in the manner described in paragraph 1.c.1.
2. The flash hole must be welded closed. In the case of percussion guns, the nipple may be welded closed and then welded to the barrel to prevent replacement.

e. Magazines

1. The magazine follower must be welded to the interior of the magazine to prevent loading of ammunition.
2. The body of the magazine must be welded to the frame or receiver to prevent removal or replacement.

2. Firearms of Unusual Design or Construction

- a. Allowances may be made for variations of the procedures outlined in 1.a. to e. if the firearm is made of unusual substances or is of an unusual design. However, any variation in the procedure must accomplish the same goals as the original procedures.



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