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Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime

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Agenda item 3

**Consideration of the draft United Nations Convention against
Transnational Organized Crime, with particular emphasis
on articles 4 *ter*, 5, 6, 9, 10 and 14**

Proposals and contributions received from Governments on the draft United Nations Convention against Transnational Organized Crime

Slovakia: comments and proposals on the revised draft United Nations Convention against Transnational Organized Crime

1. Having studied the draft United Nations Convention against Transnational Organized Crime (A/AC.254/4/Rev.2), as well as documents A/AC.254/L.26 and A/AC.254/L.27/Add.2, the delegation of Slovakia wishes to make a number of comments and proposals concerning articles 4 *ter*, 5, 6, 9, 10 and 14.

Article 4 *ter*: Measures against corruption

2. In its content, this draft article has not followed the logic of the preceding provisions of the Convention (articles 4 and 4 *bis*), but proposes the adoption of measures against corruption, although it is not stated in any of the preceding articles that for the purposes of the Convention States Parties shall consider corruption to be an offence (crime). This is probably due to the fact that no generally accepted definition of corruption has yet been formulated in international legal instruments.¹ In view of the time constraints, and also of the objectives and scope of application of the Convention, it would seem inadvisable for the Ad Hoc Committee to undertake the task of formulating such a generally accepted definition of corruption.

¹ For example, the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, of 17 December 1997, and the Council of Europe Criminal Law Convention on Corruption, which was opened for signature in Strasbourg on 27 January 1999, deal either with specific aspects of the problem or else have a purely regional character.

3. However, if such a definition were to be formulated, or proposed and adopted, it would have to be included in article 2 *bis* (Use of terms), in order not to extend artificially the scope of application of the Convention, which should be confined to criminal offences recognized as such in articles 3 and 4 of the draft.
4. When considered from this point of view, the draft texts proposed by Uruguay (both options) for article 4 *ter* would appear to be too restrictive since they:
 - (a) Do not deal with corruption in the private sphere;
 - (b) Concern corruption only and not bribery;
 - (c) May prove inadequate in terms of content.
5. In view of the foregoing, the Slovak delegation prefers the formulation proposed by the United States of America with the following amendment to the title of the article:

*“Article 4 ter
“Measures against corruption and bribery”*

6. The purpose of the proposed amendment is to bring the title and the content of the article into line with each other. Given the purpose of the Convention (article 1), the Slovak delegation is also in favour of placing the text in square brackets.
7. The Slovak delegation reserves the right to comment on the substance (content) of the list of measures to be inserted at a later stage. With regard to the nature of those measures, reference may be made to paragraphs 2 and 3 of article 6 (Effective implementation of the Convention).
8. The Criminal Code of Slovakia currently in force (No. 140/1961 Zb., including all subsequent amendments, additions and revisions) contains independent statutory definitions of the offences of bribery (para. 160, punishable by deprivation of liberty for a term of up to two years, or up to five years in the case of public officials) and for corruption (para. 161, punishable by deprivation of liberty for a term of up to one year, or up to three years in the case of the corruption of a public official). Under paragraph 34 (g) of the Criminal Code, the fact that a person acted as the organizer or member of an organized group in the commission of any criminal offence established by the Code is an aggravating factor. At the current session of Parliament the possibility is being discussed of extending the statutory definitions of both of the aforementioned offences in the light of the obligations undertaken by the country as a result of its signature of the Organization for Economic Cooperation and Development and Council of Europe conventions referred to in footnote 1.

Article 5: Corporate liability

9. The delegation of Slovakia generally supports the idea behind this article, but considers that it should be borne in mind that no single definition of “legal [corporate] person” exists in international law and that the question of the constitution and legal personality of legal [corporate] persons is decided by each State in accordance with its domestic law.
10. However, in the territory of any State there are also entities, such as international or intergovernmental organizations, authorities administered by foreign States (such as embassies) and other such entities, which have the status of legal persons. Furthermore, the status of a legal [corporate] person is also possessed by the State itself, by state authorities, by local and municipal governmental authorities, and so forth. Consequently, there is a need

to settle the question of the exclusion, as a minimum, of the criminal liability of such legal [corporate] persons and the application in their case of deterrent measures.

11. The foregoing does not affect the criminal or other liability of officials (physical persons) in public administrations. However, it makes little sense in connection with such persons to speak of civil law (para. 3). Generally speaking, where an unlawful act on the part of a state authority causes damage to another person (physical or legal), the civil liability for that act is incurred by the authority (i.e. the State), while the public official representing that authority may incur administrative or criminal liability, but may not incur full civil liability except in certain circumstances (for example, if the damage suffered is minor).

12. Accordingly, it is proposed that in paragraph 3 the word “administrative” be added in the square brackets as follows: “[, administrative or civil]”.

13. The Slovak delegation is in favour of including in the text of article 5 the text contained in the fourth set of square brackets in paragraph 1 and, subject to the proposed addition to paragraph 3, of deleting paragraph 5 in its entirety. This decision would make it possible to avoid artificially extending the range of offences covered by the Convention (failure to comply with supervisory arrangements) and to meet fully the requirement of penalizing intentional and/or negligent criminal acts in accordance with domestic law.

Article 6: Effective implementation of the Convention

14. It is proposed that paragraphs 1 and 2 be combined to form a single paragraph to read:

“Each State Party, in conformity with the fundamental principles of its domestic legal system, shall take the necessary measures, including legislative and administrative measures, to promote and monitor within its territory the implementation of the object and aims of the Convention.”

15. It is proposed that paragraph 4 be deleted in its entirety on the following grounds:

- (a) It merely restates in more specific terms the general obligation contained in paragraph 1;
- (b) In the form stated, this obligation is not one that can be fulfilled;
- (c) “Planning” a crime is not established as a criminal offence under articles 3 and 4 of the Convention, nor under criminal law in the majority of countries. The preparation and organization of an offence and attempts to commit an offence are punishable, but not “planning” in the sense of a thought process.

16. In paragraph 5, the Slovak delegation prefers the first version of the text with the reference to specific articles of the Convention.

17. In paragraph 7, it is proposed that the word “ensure” be replaced by a less severe formulation such as, for example, “authorize”, “take the necessary measures, including legislative measures, ...”. Although the draft text adopts wording from the 1988 Convention, it goes too far in the direction of drawing the State into interfering in the work of courts and thus violates the principle of their independence. The State should exert an influence to bring about a necessary change in conditions, but should not directly influence the courts.

18. It is proposed to delete paragraph 10, since this matter is dealt with (more pertinently) in article 9, paragraph 5, of the draft Convention.

19. Paragraph 11 should be considered in conjunction with other matters relating to extradition or the furnishing of legal assistance. It is therefore suggested that this paragraph be moved to article 10.

Article 14: Mutual legal assistance

20. In paragraph 13, it is proposed that it be stated in more specific terms that perjury under such circumstances shall be considered a criminal offence only in respect of a protected witness but not in respect of a defendant. Such a provision would otherwise infringe on the right of the defendant to a defence.
