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

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Draft report

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Addendum

Articles 1-3, 5 and 6 of the revised draft United Nations Convention against Transnational Organized Crime

Article 1

Statement of objectives

The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.

Article 2

Scope of application^{1, 2}

1. The Convention shall apply, except as otherwise provided herein, to the prevention, investigation and prosecution of:

- (a) The offences established in accordance with articles 3, 4, 4 *ter* and 17 *bis*; and
- (b) Serious offences involving an organized criminal group as defined in article 2 *bis*.

¹ As decided by the Ad Hoc Committee at its seventh session, the order of articles 2 and 2 *bis* will be reversed in the final text.

² Paragraphs 1 and 2 of article 2 remain under review (see the report of the Ad Hoc Committee on its seventh session (A/AC.254/L.147)).

2. This Convention shall not apply, except as otherwise provided herein, when such an offence is committed within a single State, all members of the organized criminal group or, where no such group is involved, all alleged offenders are nationals of that State and are present in that State, and no other State has a basis under article 9, paragraphs 1 and 2, to exercise jurisdiction.

3. 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.³

4. 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.

Article 2 bis
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 pursuant to this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;⁴

(b) “Serious crime” shall mean conduct constituting a criminal offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. For the purpose of implementing articles 3, 4, 4 *ter* and 17 *bis* of this Convention, a State Party shall consider this definition to refer to a criminal offence under its laws;⁵

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

[Old subparagraph (d) has been deleted.]

(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 property;

(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 a competent authority;

³ At the seventh session, the delegation of Poland proposed that paragraphs 3 and 4 be placed in a separate article.

⁴ In the discussion on the definition of “organized criminal group”, the Ad Hoc Committee agreed that the term “financial or other material benefit” should be understood broadly to include, for example, personal or sexual gratification. Some delegations, including those of Algeria, Egypt and Turkey, were of the view that the scope of the Convention should specifically include crimes committed in order to obtain, directly or indirectly, moral benefit. Other delegations were of the view that this concept was ambiguous.

⁵ Subparagraph b (ii) of article 2 *bis* in the version contained in document A/AC.254/4/Rev.6 was deleted at the seventh session of the Ad Hoc Committee, with its substance to be reconsidered in connection with articles 10, paragraph 5, and 14, paragraph 6.

(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 crime or offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 4 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.

[Subparagraph (k) has been deleted.]⁶

Article 3

Criminalization of participation in an organized criminal group

1. Each State Party shall 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 any 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 a 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 active part in:

a. Criminal activities of an organized criminal group as defined in article 2 *bis* of this Convention;

b. Other activities of the 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. A State whose laws require involvement of an organized criminal group for purposes of the offences established under paragraph 1 (a) (i) of this article shall ensure that its domestic laws cover all serious crimes involving organized criminal groups. Such States, as well as States whose laws require an act in furtherance of the agreement for purposes of the offences established under paragraph 1 (a) (i), shall so advise the

⁶ At the seventh session of the Ad Hoc Committee, it was decided that the need to include a definition of “financial institution” in the present article should be reviewed in the context of the final formulation of article 4 *bis*.

Secretary-General of the United Nations at the time of their signature, ratification, acceptance or approval of or accession to this Convention.

[Articles 4, 4 bis, 4 ter and 4 quater were not considered at the seventh session.]

Article 5
Liability of legal persons

1. Each State Party shall take 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 under articles 3 and 4 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 incurred 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.

Article 6
Prosecution, adjudication and sanctions

1. Each State Party shall make the commission of an offence established under 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 that are 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 3, 4, 4 ter and 17 bis 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 that are 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.
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