



## General Assembly

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

Fifth session

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Agenda item 3

**Consideration of the draft United Nations Convention against  
Transnational Organized Crime, with particular emphasis  
on articles 4, 4 bis, 7, 7 bis, 7 ter, 10, 14 (paragraphs 14-22) and 15-19**

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

#### **Netherlands: comments on the revised draft of article 4 contained in document A/AC.254/L.26**

1. The Netherlands would like to make a proposal on article 4 of the draft United Nations Convention against Transnational Organized Crime, which is presented below.
2. Almost all crimes require proof of some state of mind. To distinguish the crime element of the state of mind from the other elements of the crime, the term *mens rea* is used. The state of mind is distinguished in terms of intention in relation to a specified act and consequence and in terms of knowledge in relation to a specified circumstance. In article 4, the words "intentionally" and "knowing" appear, so both forms of *mens rea* are used. The circumstance that has to be known is that the property is the proceeds of crime. What does the word "knowing" mean in article 4? A person acts knowingly in regard to a particular fact or circumstance if (a) he is aware of (the truth of) the fact; (b) he correctly believes in the existence of the fact or (c) he accurately suspects that the fact exists and he purposely avoids learning that his suspicions are accurate. The third form of knowledge is sometimes described as wilful blindness. Knowing in the first sense means that the person is certain of the existence of the circumstance. If A is handed by B a packet that contains heroin and B says so to A and A opens the packet to inspect the contents (and it turns out to be heroin), A knows that the packet contains heroin. If A is handed a packet by B that contains heroin and this time the packet is not opened by A, but A has seen packets like this before and believes (correctly) that the packet contains heroin, A is knowingly in the possession of heroin because A believes with a high degree of probability that the packet contains heroin.

3. The question is whether the word “knowing” in article 4 also covers cases involving wilful blindness, in which the person suspects that the property is the proceeds of crime but turns a blind eye to this and avoids taking steps that might confirm his belief that the property is indeed the proceeds of crime. For example, A, an art dealer, sells to B, for too high a price, a medieval painting of an unknown master that B pays for with a large amount of cash in small bank notes, which A accepts. Asking questions would not have been of much help in this case (Is this money derived from criminal activity? No.), but A could have asked for another way of paying, such as through a bank. The purpose of providing against wilful blindness is to prevent A from accepting money without testing whether it could be dirty money.

4. Equating wilful blindness with knowledge is not entirely uncontroversial because it extends the meaning of the word “knowledge”. It is possible to provide against wilful blindness by saying so, but a better way is to redraft the provision using the words “knowing or suspecting” as in the proposal presented in paragraph 5 below. That proposal is not meant to incorporate the idea of negligence into paragraph 1 of article 4. Paragraph 3 of article 4 provides for the adoption of measures that may be taken when a State Party considers it necessary. One of the measures may be taken in cases in which the offender ought to have assumed that the property was the proceeds of crime. Insofar as this provision is also meant to cover negligence, this is different from wilful blindness. Negligence may mean lack of proper care that would be expected of an ordinarily or reasonably careful, prudent person under such circumstances. This is a requirement of fault of a normative nature which is based on the offender’s state of mind. The offender did not assume that the property was the proceeds of crime, but, given the circumstances, he ought to have assumed that it was. The proposed extension of the provision to include the idea of “suspecting” differs from “ought to have assumed” in this sense. In the first case, the offender, knowing the risk that the property was the proceeds of crime, took that risk without taking any precautions. The offender in this case demonstrated recklessness. In the second case, the person knew the circumstances and, knowing them, he ought to have perceived the inherent risk, but he did not. It is only the first case that is covered by the word “suspecting”. Concealing or disguising may also be done when the person is in such a state of mind that he suspects that the property is the proceeds of crime. In article 4, subparagraph 2 (c), it is stated that knowledge required as an element of an offence may be inferred from objective factual circumstances. In the context of money-laundering this means that the act of concealing or disguising, which is not an act with a neutral value, is a circumstance from which knowledge may be inferred. A too restrictive meaning of the term “knowledge” makes the use of that term within article 4 inconsistent.

5. It is proposed that article 4, paragraph 1, as presented in document A/AC.254/L.26, be amended to read as follows:

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

“(a) The conversion or transfer of property, knowing or suspecting that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

“(b) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property, knowing or suspecting that such property is the proceeds of crime; and, subject to its constitutional principles and basic concepts of its legal system:

*[amended placement of clause]*

“(c) The acquisition, possession or use of property, knowing or suspecting, at the time of receipt [or subsequently], that such property was the proceeds of crime;

“(d) 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.”

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