

ELABORATION OF A UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

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The purpose of the present paper is to provide background information on the present work on the drafting of the United Nations Convention against Transnational Organized Crime and on a number of protocols. The paper also focuses on a few issues that have proved to be of particular interest.

It should be emphasized that the draft Convention and the protocols are very much a „work in progress“. Meetings are being held almost every other month, and each meeting explores new issues. (The paper was written in May 1999; at least three more two-week sessions are planned for 1999, and at least four two-week sessions during the beginning of the year 2000.)

1. The need for a United Nations Convention

Over the past years, transnational organized crime has grown rapidly and has come to have a major impact on the economy and the stability of society in many countries around the world. For example, drug trafficking, trafficking in illegal immigrants, economic crime and money laundering appear to be increasing, often aided by wide-spread corruption and endemic violence.

Individual countries have undertaken a range of measures in order to respond to this challenge. Criminal law and criminal procedure have been reformed to provide the practitioners with new or strengthened tools for investigation and prosecution. The police, prosecutors and in part even courts have been restructured and training has been provided in order to ensure that practitioners have the necessary specialist skills in order to be able to identify criminal activities, break up criminal organizations, seize and confiscate the proceeds of crime, and bring the offenders to justice. Considerable work is under way to mobilize the public to help in preventing and controlling organized crime.

Practitioners have long known, however, that local and national action is no longer enough. In many cases, the offender seeks to evade justice by fleeing to another state, or indeed never even enters the state where the crime is committed or where it has its main impact. Victims, witnesses and evidence may for similar reasons be found abroad.

A network of bilateral agreements on extradition and mutual assistance in criminal matters has grown over the years, but is still very weak. This network has emerged primarily between countries that for political or historical reasons have close ties with each other. However, with the increased mobility of the offenders, with the possibilities opened up by modern computer and communications

technology, and with the fact that modern organized crime can have an impact that extends far beyond the borders of any one state, it has begun to be clear that all states around the world, regardless of their economic, legal or political system, must find ways to cooperate in finding an effective international response to organized crime.

It is for this reason that work has begun on the drafting of a United Nations Convention against Transnational Organized Crime. The Convention is intended to provide a global framework for international cooperation in the investigation, prosecution and adjudication of such crime. The multilateral conventions that currently exist either deal only with certain specific types of crime (such as the widely ratified 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances), they are limited to certain groups of countries, or their provisions have proven to be ineffective (or indeed all three).

2. The emergence of a draft Convention

The idea for preparing a United Nations Convention against Transnational Organized Crime was formally raised at the World Ministerial Conference on Organized Transnational Crime (Naples, Italy, 21-23 November 1994). The first actual draft was introduced by Poland at the autumn 1996 session of the General Assembly (General Assembly resolution 51/120 of 12 December 1996).

Exactly one year later, on 12 December 1997 (General Assembly resolution 52/85), the General Assembly established an intergovernmental group of experts, which met in Warsaw on 2-6 February 1998, in Vienna on 21-30 April 1998 and in Buenos Aires on 31 August - 4 September 1998 in order to work on a preliminary draft for the international convention. As the basis for their work, the group of experts utilized the Polish draft, the model of the 1998 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and other texts submitted by Member States. During the first meeting in Warsaw, Finland presented a consolidated version (an „options paper“) of these various texts, which has been taken as the basic working document.

In its resolution 53/111 of 9 December 1998, the General Assembly took note of this preliminary work and decided to establish an open-ended intergovernmental Ad Hoc Committee to carry on the work. Official meetings have been held thus far in Vienna on 18-29 January, 8-12 March and 29 April - 4 May 1999. The next meetings have tentatively been scheduled for 28 June - 2 July, 4-15 October and 6-17 December 1999, with further dates in the year 2000 to be agreed upon. A plenipotentiary conference during the summer or autumn of 2000 (presumably in Palermo, Sicily) would formally review and adopt the Convention in time for submission to the Millennium Session of the General Assembly.

3. The structure of the draft Convention and its protocols

The work so far has produced a draft Convention that consists of 35 articles¹ with a varying number of paragraphs in each. Some of the articles contain two or more options for some of the paragraphs, reflecting the at times divergent views that have been expressed by Member States. The work at present seeks to reduce the number of different options and identify the contentious issues.

The goal is a Convention that would contain provisions that establish the basic framework for international cooperation, regardless of the type of organized crime in question. For this reason, the various articles of the draft Convention deal with, for example, jurisdiction, extradition, mutual legal assistance in criminal matters, special investigative techniques, protection of witnesses and victims, cooperation among law enforcement authorities, training and technical assistance, and so on. The Convention as presently drafted would also require criminalization of two specific types of conduct: participation in an organized criminal group, and money laundering. Finally, the draft Convention includes the standard articles on settlement of disputes, signature, ratification, acceptance, approval, accession and reservations, entry into force, amendment, denunciation, and languages and depositary.

In addition, Member States have so far identified three issues that require a considerable number of special provisions: trafficking in persons, in particular women and children; combatting the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition; and illegal trafficking in and transporting of migrants, by land, sea and air. Since incorporating detailed provisions (on such matters as the repatriation of migrants who have illegally crossed borders, or the tracing of illegally trafficked firearms) into the basic Convention on all of these issues would presumably make the Convention quite lengthy and cumbersome, and incidentally might slow the process of finalization of the Convention, it has been decided that such special issues could more appropriately go into protocols to the Convention. (At a later stage - presumably not until after adoption of the Convention - more protocols may well be developed, for example on corruption, and on the illicit manufacturing of and trafficking in explosives).

Although the question of the relationship between the main Convention and the protocols has yet to be decided, it would seem that Member States that sign (and ratify) the main Convention would not be required to sign and ratify each and every one of the protocols, although they would be encouraged to do so.

4. The scope of the draft Convention

In the work so far, there has been extensive discussion on how organized crime should be defined, and thus directly on what the scope of the draft Convention should be. The working definition at present is that the Convention shall apply, unless otherwise provided, to the prevention, investigation and prosecution of

serious crime involving an organized criminal group. An „organized criminal group“ is tentatively defined as a structured group existing for a period of time and having the aim of committing a serious crime in order to obtain, directly or indirectly, a financial or other benefit (articles 2 and 2bis). In addition, the Convention applies to the two offences expressly criminalized under the draft Convention, participation in an organized criminal group and money laundering (articles 3 and 4).

Almost all of these modifiers, such as „structured“, „crime“ and „financial or other material benefit“, are footnoted, indicating that at least some Member States are not in full agreement with the formulation used (see A/AC.254/L.27/Add.2).² Indeed, the drafting work has once again demonstrated the difficulties that arise when practitioners from different legal systems, speaking different languages and using different legal concepts, try to agree on the rules of international cooperation. The matter is made even more complex by the ambiguity of the concept of „organized crime“. Because of their different experience with organized crime, states may justifiably have different understandings of the concept as well as quite different priorities.

One point that has been discussed extensively is whether or not the Convention should include an indicative or exhaustive list of offences. Some Member States have argued that the Convention can be sufficiently precise only if it applies to a given set of specific offences. Others, however, have argued that one of the most characteristic features of organized crime is its adaptability to economic, legal, political and other changes. In their view, any exhaustive list of offences would soon become out of date.

The present status of the draft is that no list, either indicative or exhaustive, is included in the draft text of the Convention itself. However, it is possible that such a list - presumably only indicative - could be included either as an annex to the Convention or in the *travaux préparatoires*. (An example of such a list has been attached to A/AC.254/L.27/Add.2.)

A second issue is whether the Convention should deal with organized crime, or only with transnational organized crime. Member States favouring the latter view point out that the General Assembly mandate itself refers to transnational organized crime. Some Member States have also argued that the principles of territorial integrity and non-intervention in the domestic affairs of other States imply that the Convention can only deal with the transnational aspects. Other Member States, however, have argued that many of the draft articles, such as on investigative techniques, training and technical assistance, would in practice apply to organized crime in general, regardless of whether or not it had international connections.

The present understanding is that the scope of the Convention can be flexible; for some articles, such as on extradition, the scope would be more narrow, but for other articles, such as on training and technical assistance, States Parties could agree on an *in casu* basis to apply a wider scope.

5. Selected issues in the draft Convention

Corporate liability (article 6). The issue of corporate criminal responsibility is one where the differences between states in their law and legal practice come to the fore. Several states do not recognize this concept and are reluctant to include it in the Convention, in particular if the Convention has as wide a scope as has been suggested. At present, the favoured option is simply to require that each state party establish the possibility that legal persons may be held liable „if they derive profits from organized crime or function as a cover for a criminal organization“. This liability need not necessarily be criminal; it may also be civil or administrative.

Jurisdiction (article 9). On jurisdictional issues, a traditional difference between legal systems has been that some primarily or solely apply the territorial principle of jurisdiction (jurisdiction can be assumed only if the offence is committed in the territory of the state in question), while others also apply the active nationality principle (jurisdiction can be assumed if the offence is committed by a national of the country in question). Some jurisdictions supplement the active nationality principle with the simple protection, universality and absolute protection principles. The present approach being followed in the drafting of the Convention is to require application of the territorial principle, but allow countries the possibility of applying other principles as well, at their discretion.

Extradition (article 10). The article on extradition raises a number of issues that still need to be considered, such as the grounds on which requests for extradition could be refused, and the obligation of a state refusing to extradite to prosecute the suspect.

Mutual legal assistance (article 14). Among the issues that need to be considered in this connection are whether or not double criminality should be a requirement for the providing of mutual legal assistance, and the grounds on which requests for extradition could be refused.

Special investigative techniques (article 15). The only special investigative technique referred to in the 1988 Convention was controlled delivery. There appears to be broad agreement that the draft Convention against Transnational Organized Crime should not only extend the use of controlled delivery beyond drug offences to all organized crime, but should also include provisions on, for example, surveillance (including electronic surveillance) and undercover operations.

Protection of witnesses and victims (article 18). There also appears to be broad agreement that provisions on the protection of witnesses and victims should be included in the draft Convention, especially in order to protect witnesses and victims from intimidation or retaliation. One difficulty that has been noted by some Member States is that many of the measures envisaged could place extensive financial obligations on the state.

Measures to enhance cooperation with law enforcement authorities (article 18bis). The primary purpose of this article is to provide for the possibility of

granting immunity from prosecution to persons who agree to testify against accomplices in crime, or at least of considering such cooperation a mitigating factor in sentencing. Some states have noted that their legal system do not allow for the possibility of granting immunity, and some other states have raised various practical or theoretical arguments against this possibility. Other states, on the other hand, have noted that often the testimony of an accomplice is the only way to secure evidence of organized crime, and that in their own experience the granting of immunity is a successful tool in law enforcement.

Law enforcement cooperation (article 19). There has been broad agreement in the Ad Hoc Committee that, since law enforcement cooperation is conceptually different from mutual legal assistance in criminal matters, the draft Convention should include separate provisions on this. The majority of Member States have agreed for example on the benefits of establishing direct contacts between law enforcement authorities, and on the advisability of establishing and strengthening a network of liaison officers. However, some Member States have noted that the measures envisaged could have extensive financial implications.

Collection and sharing of information on organized crime (article 20). One proposal made in this connection has been for the establishment of regional data banks, which could benefit in particular those Member States which would have insufficient resources to establish national data banks.

Training and technical assistance (article 21). Several Member States have stressed the importance of training and international technical assistance in disseminating information on best practices in law enforcement, prosecution and adjudication.

Prevention (articles 22 and 22bis). There has been broad agreement on including provisions on prevention in the draft Convention, but again several Member States have pointed out that the draft provisions as presently worded might lead to a considerable financial burden on some States.

Monitoring of implementation of the Convention (articles 22ter, 23 and 23bis). Three different options have been presented on monitoring of the implementation of the Convention. According to the first model, the United Nations Commission on Crime Prevention and Criminal Justice would be responsible for this function. According to the second model, the responsibility would be given to a separate Committee of the States Parties. A third model, which was submitted as a compromise between the first two models, would assign the responsibility to a Conference of the Parties of the Convention, but the Centre for International Crime Prevention of the United Nations would nonetheless have a major role as secretariat of the Conference.

Relation with other conventions (article 24). The Ad Hoc Committee is considering two quite different models for the relation of the draft Convention to other conventions. According to one model, the new Convention would not prejudice the application of other United Nations conventions on criminal matters.

According to the second model, the provisions of the new Convention would prevail over those of other United Nations conventions dealing with the same matters. Several Member States have suggested that this article should also deal with the relation between the new Convention and existing bilateral and multilateral conventions, and not only with United Nations convention.

Concluding articles (articles 25 through 30). There are in particular two issues to be considered in respect of the final articles. One is whether or not a State Party can enter a reservation in respect of some or all of the provisions of the Convention; some Member States have supported this idea, others have not. The second issue is whether the number of ratifications needed for entry of the Convention into force should be small (in order to seek to ensure that the Convention enters into force as soon as possible) or high (in order to seek to ensure that the Convention is truly global in coverage).

6. Setting the timetable

As indicated above, the Ad Hoc Committee is working not only on the proposed convention, but also „as appropriate“ on protocols to the convention on such specific subjects as trafficking in persons, in particular women and children; combatting the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition; and illegal trafficking in and transporting of migrants, including by sea.

Each of these three protocols contains a large number of issues that need to be considered. One major problem is that of timing: with the goal being to complete the drafting of the Convention and its protocols by mid-2000, there may be an insufficient number of meetings to do the work on drafting. It is for this reason that the Secretary-General has encouraged Member States to consider the possibility of providing extrabudgetary financial contributions that can be used to pay for additional meetings of the Ad Hoc Committee. The goal is important; the only ones to benefit from delay in the response of the international community to the challenge of organized crime would be the organized criminal groups themselves.

Notes:

¹ The numbering of the articles at this stage is not consistent. During the process, some draft articles have been deleted and various „bis“ articles have been added.

² A/AC.254/L.27/Add.2 incorporates the draft text of the Convention following the meeting of the Ad Hoc Committee on 28 April - 3 May. A new and updated draft is produced following each meeting; the next such meeting, as noted, will be held on 28 June - 9 July 1999.

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