



**UNODC**

United Nations Office on Drugs and Crime

# Model Legislative Provisions *against* Organized Crime

SECOND EDITION, 2021



UNITED NATIONS OFFICE ON DRUGS AND CRIME  
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# Model Legislative Provisions *against* Organized Crime

SECOND EDITION, 2021



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# INTRODUCTION

## Background and purpose

The first edition of the *Model Legislative Provisions against Organized Crime*, published in 2012, was developed by the United Nations Office on Drugs and Crime (UNODC) in response to a request made by the General Assembly to the Secretary-General to promote and assist the efforts of Member States to become party to and implement the United Nations Convention against Transnational Organized Crime and the Protocols thereto.<sup>1</sup>

The *Model Legislative Provisions* facilitate and systematize the provision of legislative assistance by UNODC and facilitate the review and amendment of existing legislation and the adoption of new legislation by Member States themselves. The *Model Legislative Provisions* are designed to be adapted to the needs of each State, whatever its legal tradition and social, economic, cultural and geographical conditions.

Any national legislation on transnational organized crime needs to be developed in line with the State's constitutional principles, the basic concepts of its legal system and its existing legal structure and enforcement arrangements. Furthermore, national laws on transnational organized crime need to operate consistently with other existing national laws on related issues. Accordingly, the model legislative provisions are not intended to be incorporated directly into national laws as presented without a careful review of the whole legislative context of a given State.

## Second edition

The present second edition of the *Model Legislative Provisions* was developed in 2020 and 2021 to better facilitate the review, amendment and adoption of legislation to implement the Organized Crime Convention and the provision of legislative assistance to that end. For that purpose, an online expert group meeting on updating the model legislative provisions against transnational organized crime was held from 7 to 10 December 2020. Experts participating in the meeting engaged in group discussions to review an early draft second edition of these Model Legislative Provisions and provided written input on successive drafts.

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<sup>1</sup> United Nations, *Treaty Series*, vols. 2225, 2237, 2241 and 2326, No. 39574.

The second edition of the *Model Legislative Provisions* has been restructured into seven chapters and includes new model legislative provisions on undercover investigations and assistance to and protection of victims. The model legislative provisions included in the first edition have also been revised and improved, with particularly noteworthy revisions being made to the model legislative provisions on liability of legal persons, special investigative techniques, international law enforcement cooperation, joint investigations, pretrial detention and transfer of sentenced persons. The explanatory notes for each of the model legislative provisions have also been updated to explain the context and design of the provisions and to provide additional guidance as to relevant considerations for legislators. Lastly, the legislative examples of implementation of the various model legislative provisions have been updated and expanded.

## Structure and design

The present Model Legislative Provisions are divided into seven chapters, each dealing with different aspects of implementation of the Organized Crime Convention. Chapter I includes provisions intended to apply generally to legislation that implements the Organized Crime Convention, including a statement of purpose, principles to be applied in the interpretation of the law, key definitions, and provisions regarding jurisdiction. Chapter II includes model legislative provisions for specific offences relating to organized crime and general principles of criminal liability, namely, proof of mens rea and liability of legal persons. Chapter III addresses special investigative techniques, law enforcement cooperation and joint investigations. Chapter IV deals with matters relating to prosecution and criminal procedure. Chapter V concerns witnesses and victims. Chapter VI provides a legal basis for the transfer of sentenced persons. Lastly, chapter VII includes provisions regarding the establishment of a national coordinating committee to oversee the implementation of these provisions and other policies and programmes directed at preventing organized crime.

Within each chapter, model legislative provisions are set out and are accompanied by explanatory notes and examples of national legislation. Within the provisions, square brackets are used to indicate optional additional language or paragraphs, choices between different wordings and places where wording must be adapted to the domestic context. The explanatory notes to the model legislative provisions explain the relevant requirements of the Organized Crime Convention, drawing on the interpretative notes for the official records (contained in the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*)<sup>2</sup> and the Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime.<sup>3</sup> The explanatory notes also explain the design of the model legislative provisions and provide guidance on further issues for consideration by legislators in the implementation of such provisions. Lastly, examples of domestic

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<sup>2</sup> United Nations publication, 2006.

<sup>3</sup> Available on the United Nations Office on Drugs and Crime (UNODC) knowledge management portal known as Sharing Electronic Resources and Laws against Organized Crime (SHERLOC) (<https://sherloc.unodc.org/cld/v3/sherloc/legislative-guide/index.html?lng=en>).

legislation are included to show how countries have legislated in practice. Care has been taken to ensure an equitable geographical representation of examples of domestic legislation that also reflects the diversity of legal traditions of States.

### Other model laws and model legislative provisions produced by the United Nations Office on Drugs and Crime

The present Model Legislative Provisions are intended to be used alongside other model laws and model legislative provisions produced by UNODC concerning organized crime and related topics. These include the following:

- (a) Model Legislative Provisions against Trafficking in Persons (2020);
- (b) Model Law against the Smuggling of Migrants (2010);
- (c) Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition (2011);
- (d) Model Legislation on Money-Laundering and Financing of Terrorism (2005);<sup>4</sup>
- (e) Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Legal Systems) (2009);<sup>5</sup>
- (f) Model Law on Extradition (2004);
- (g) Model Law on Mutual Assistance in Criminal Matters (2007);
- (h) Model Law on Witness Protection (2008) (annexed to the present publication);
- (i) Justice in Matters Involving Child Victims and Witnesses of Crime: Model Law and Related Commentary (2009);
- (j) Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary (2013);
- (k) Model Law on Legal Aid in Criminal Justice Systems (2017).

To avoid duplication, the present Model Legislative Provisions focus on matters pertaining to the implementation of the Organized Crime Convention that are not covered in the aforementioned model laws and model legislative provisions. More specifically, these Model Legislative Provisions are focused on the implementation of articles 5, 10, 11, 15, 17 and 19–31 of the Convention.

<sup>4</sup> Prepared by UNODC and the International Monetary Fund (IMF).

<sup>5</sup> Prepared by UNODC, the Commonwealth Secretariat and IMF.

Table 1 provides a guide to the articles of the Organized Crime Convention and provides a cross-reference to the model law or model legislative provisions relevant to each article. Table 2 sets out the model laws and model legislative provisions relevant to the implementation of the Protocols to the Organized Crime Convention.

**Table 1. Model laws and model legislative provisions produced by the United Nations Office on Drugs and Crime for implementation of the United Nations Convention against Transnational Organized Crime**

<i>Article of the Organized Crime Convention</i>	<i>Subject</i>	<i>Corresponding model law or model legislative provisions</i>
Article 1	Statement of purpose	—
Article 2	Use of terms	—
Article 3	Scope of application	—
Article 4	Protection of sovereignty	—
Article 5	Criminalization of participation in an organized criminal group	Model Legislative Provisions against Organized Crime
Article 6	Criminalization of the laundering of proceeds of crime	Model Legislation on Money-Laundering and Financing of Terrorism Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Legal Systems)
Article 7	Measures to combat money-laundering	Model Legislation on Money-Laundering and Financing of Terrorism Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Legal Systems)
Article 8	Criminalization of corruption	—
Article 9	Measures against corruption	—
Article 10	Liability of legal persons	Model Legislative Provisions against Organized Crime
Article 11	Prosecution, adjudication and sanctions	Model Legislative Provisions against Organized Crime
Article 12	Confiscation and seizure	Model Legislation on Money-Laundering and Financing of Terrorism Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Legal Systems) Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition

<i>Article of the Organized Crime Convention</i>	<i>Subject</i>	<i>Corresponding model law or model legislative provisions</i>
Article 13	International cooperation for purposes of confiscation	Model Legislation on Money-Laundering and Financing of Terrorism Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Legal Systems) Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition
Article 14	Disposal of confiscated proceeds of crime or property	Model Legislation on Money-Laundering and Financing of Terrorism Model Provisions on Money-Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for Common Law Legal Systems) Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition
Article 15	Jurisdiction	Model Legislative Provisions against Organized Crime
Article 16	Extradition	Model Law on Extradition
Article 17	Transfer of sentenced persons	Model Legislative Provisions against Organized Crime
Article 18	Mutual legal assistance	Model Law on Mutual Assistance in Criminal Matters
Article 19	Joint investigations	Model Legislative Provisions against Organized Crime
Article 20	Special investigative techniques	Model Legislative Provisions against Organized Crime
Article 21	Transfer of criminal proceedings	Model Legislative Provisions against Organized Crime
Article 22	Establishment of criminal record	Model Legislative Provisions against Organized Crime
Article 23	Criminalization of obstruction of justice	Model Legislative Provisions against Organized Crime
Article 24	Protection of witnesses	Model Legislative Provisions against Organized Crime
Article 25	Assistance to and protection of victims	Model Legislative Provisions against Organized Crime

<i>Article of the Organized Crime Convention</i>	<i>Subject</i>	<i>Corresponding model law or model legislative provisions</i>
Article 26	Measures to enhance cooperation with law enforcement authorities	Model Legislative Provisions against Organized Crime
Article 27	Law enforcement cooperation	Model Legislative Provisions against Organized Crime
Article 28	Collection, exchange and analysis of information on the nature of organized crime	Model Legislative Provisions against Organized Crime
Article 29	Training and technical assistance	Model Legislative Provisions against Organized Crime
Article 30	Other measures: implementation of the Convention through economic development and technical assistance	Model Legislative Provisions against Organized Crime
Article 31	Prevention	Model Legislative Provisions against Organized Crime
Article 32	Conference of the Parties to the Convention	—
Article 33	Secretariat	—
Article 34	Implementation of the Convention	—
Article 35	Settlement of disputes	—
Article 36	Signature, ratification, acceptance, approval and accession	—
Article 37	Relation with protocols	—
Article 38	Entry into force	—
Article 39	Amendment	—
Article 40	Denunciation	—
Article 41	Depositary and languages	—

**Table 2. Model laws and model legislative provisions produced by the United Nations Office on Drugs and Crime for implementation of the Protocols to the United Nations Convention against Transnational Organized Crime**

<i>Protocol</i>	<i>Corresponding model law or model legislative provisions</i>
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime	Model Legislative Provisions against Trafficking in Persons
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime	Model Law against the Smuggling of Migrants
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	Model Law against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition





# CHAPTER I.

## GENERAL PROVISIONS

The present chapter, comprising articles 1 to 4 of the Model Legislative Provisions, contains general provisions that apply across all of the Model Legislative Provisions and guide their interpretation and use. Some of these matters, such as definitions of relevant terms and rules relating to jurisdiction, may already be covered by existing national laws. Furthermore, some States may already have specific laws or provisions implementing the Protocols to the Organized Crime Convention that contain provisions and use terms identical or similar to those set out in the following articles.

### Article 1. Purpose

1. This [Act/Law/Chapter ...] implements the United Nations Convention against Transnational Organized Crime.
2. The purposes of this [Act/Law/Chapter ...] are:
  - (a) To prevent and suppress organized crime;
  - (b) To facilitate the investigation and prosecution of organized crime; and
  - (c) To promote and facilitate national and international cooperation in order to achieve these purposes.
3. This [Act/Law/Chapter ...] shall be interpreted and applied in a way:
  - (a) That is consistent with the obligations of [*insert name of State*] under international law, including human rights law; and
  - (b) That is not discriminatory on any ground, such as gender, age, disability, language, ethnic background, colour, sexual orientation, religion, cultural beliefs or practices, political opinion, nationality, membership of a particular social group, property, birth or other status; and
  - (c) That takes into account the special needs of victims who are women, children or vulnerable persons.

## *Explanatory notes*

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### *Relevant provisions of the Organized Crime Convention: article 1*

Article 1 of these Model Legislative Provisions reflects the objectives and the spirit of the Organized Crime Convention and serves as a guide for the correct interpretation of the Model Legislative Provisions and the Convention. It reflects the obligation under article 31 of the Vienna Convention on the Law of Treaties, which provides that a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. To accommodate the different forms in which these Model Legislative Provisions may be adopted, the terms “Act/Law/Chapter ...” are used, where relevant, throughout this document. Rather than legislating a dedicated section containing a statement of purpose, in some jurisdictions it is common to state the purpose and origins of the statute (or any of its chapters) in a preamble or in the full title of the statute.

### *Article 1, paragraph 1, of the Model Legislative Provisions against Organized Crime*

The inclusion of an express reference to the Organized Crime Convention is useful in legal systems in which the inclusion of a direct reference to the relevant treaty in the corresponding national law allows the courts to refer to the treaty to resolve questions of interpretation. Furthermore, such a reference provides direction and guidance to those enforcing, applying and interpreting these provisions.

### *Article 1, paragraph 2, of the Model Legislative Provisions against Organized Crime*

Article 1, paragraph 2, states the express purposes of these Model Legislative Provisions and reflects the statement of purpose set out in article 1 of the Organized Crime Convention. A statement of purpose as proposed by article 1 of these Model Legislative Provisions is particularly useful if the Convention is implemented through a stand-alone piece of legislation or inserted as a separate chapter into an existing statute. Such a statement is a common requirement in some jurisdictions, but is not required in others.

### *Article 1, paragraph 3, of the Model Legislative Provisions against Organized Crime*

It is important for drafters to consider how the obligations in the Organized Crime Convention interact with other international obligations, particularly with regard to human rights and the administration of justice. For this reason, article 1, subparagraph 3 (a), of these Model Legislative Provisions includes a statement to ensure consistency with fundamental principles of law and human rights and to make it clear that the implementation of obligations under the Convention is not intended to operate to the detriment of other critical international obligations. Drafters also need to take into account relevant domestic laws, including human rights legislation, that may set higher standards than international obligations binding on the State.

Subparagraph 3 (b) includes a list of prohibited grounds of discrimination that has been adapted from article 2, paragraph 1, of the International Covenant on Civil and Political Rights, article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, and article 1, paragraph 2, of the Convention relating to the Status of Refugees. This list is non-exhaustive and the term “other status” encompasses forms of discrimination that are not expressly listed.

Subparagraph 3 (c) highlights that women, children and vulnerable persons may have special needs that need to be taken into consideration when interpreting and applying these Model Legislative Provisions.

*Example: Singapore**Section 4 of the Organised Crime Act 2015 (Singapore) – Purpose of Act*

The purpose of this Act is to deal with organised crime with the object of —

- (a) punishing persons who are involved in the activities of organised criminal groups;
- (b) preventing, restricting and disrupting the activities of organised criminal groups and persons who are involved in such groups;
- (c) protecting members of the public from the harm caused, or likely to be caused, by such groups;
- (d) empowering a court to make various orders in order to prevent, restrict or disrupt the involvement of persons associated with such groups; and
- (e) establishing a regime for the confiscation of benefits from organised crime activities.

*Example: Romania**Article 1 of Law No. 39/2003 on preventing and combating organized crime (Romania)*

The present law regulates specific measures for the prevention and combating of organized crime at the national and the international level.

*Example: Japan**Article 1 of the Act on Punishment of Organized Crimes, Control of Proceeds of Crime and other Matters (Japan)*

The purpose of this law shall be to provide for heavier punishment of organized homicide and other organized acts and for punishment of concealment and receipt of proceeds of crime as well as of acts performed for the purpose of control of management of enterprises of juristic persons and other entities through proceeds of crime, and to set forth provisions for special procedures for confiscation and collection of equivalent value with regard to proceeds of crime, for report of suspicious transactions and for other matters, considering that organized crimes are most detrimental to safe and healthy social life, that proceeds of crime encourage crimes of this kind, and that intervention in enterprises by means of proceeds of crime has significant harmful effect on healthy economic activities.

## Article 2. Scope of application

This [Act/Law/Chapter ...] applies to the prevention, investigation and prosecution of:

- (a) Offences established under [*insert reference to provisions implementing chapter II of these Model Legislative Provisions*]; and
- (b) Serious crime where the offence involves an organized criminal group.

## Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 3, read together with article 34, paragraph 2*

Article 2 of these Model Legislative Provisions sets out the scope of their application. The inclusion of this provision is important for making measures and mechanisms established pursuant to these provisions (and those of the Organized Crime Convention) available for a defined set of offences.

The scope of application of the Model Legislative Provisions encompasses the prevention, investigation and prosecution of two types of offences, as described below.

Article 2, subparagraph (a), of the Model Legislative Provisions refers to the offences established under chapter II, including participation in an organized criminal group (art. 5) and obstruction of justice (art. 6).

Article 2, subparagraph (b), of the Model Legislative Provisions refers to the general category of “serious crime”, a term further defined in article 3, subparagraph (b), below. Serious crime is only captured by the Model Legislative Provisions where it involves an “organized criminal group” as defined in article 2, subparagraph (a), of the Organized Crime Convention. This also applies to the Protocols supplementing the Convention, which are the Protocol against the Smuggling of Migrants by Land, Sea and Air, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, as set out in article 37 of the Convention and article 1 of each of the three Protocols. Accordingly, it is important for drafters to identify all relevant national laws that address these crime types and ensure that any national laws intended to implement the Convention apply equally to national laws intended to implement the Protocols.

The term “organized criminal group” used in article 2, subparagraph (a), of the Model Legislative Provisions is defined in article 3, subparagraph (a).

Article 2, subparagraphs (a) and (b), of the Model Legislative Provisions must be read together with article 34, paragraph 2, of the Organized Crime Convention, which provides that offences established in accordance with articles 5, 6, 8 and 23 of the Convention in domestic law shall be established independently of the transnational nature or the involvement of an organized criminal group, except to the extent that article 5 of the Convention would require the involvement of an organized criminal group. As noted in the interpretative notes to the Convention:

The purpose of [article 34, paragraph 2] 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.<sup>6</sup>

In other words, even though the focus of the Convention is on transnational organized crime, national drafters should ensure that national laws criminalizing the laundering of proceeds of crime (art. 6 of the Convention), corruption (art. 8) or obstruction of justice (art. 23) and offences established in accordance with the Protocols do not include elements relating to transnationality or organized criminal groups. Neither should national laws criminalizing participation in an organized criminal

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<sup>6</sup> Interpretative note on article 34 (see A/55/383/Add.1, para. 59), cited in *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Organized Crime Convention and the Protocols Thereto*, p. 285.

group [art. 5] include an element relating to transnationality. The offences set out in articles 5 and 6 of these Model Legislative Provisions reflect these principles.

### Article 3. Use of terms

For the purpose of this [Act/Law/Chapter ...]:

(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 offences to which this [Act/Law/Chapter ...] applies, in order to obtain, directly or indirectly, a financial or other material benefit;

#### Explanatory notes

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##### *Relevant provisions of the Organized Crime Convention: article 2*

The definition of an “organized criminal group” in article 2, subparagraph (a), of the Organized Crime Convention is central to the operation of the Convention and to these Model Legislative Provisions. Accordingly, it is critical that national drafters clearly define this term in national law.

The definition in article 3, subparagraph (a), of these Model Legislative Provisions, which is largely identical to that set out in the Convention, consists of four main elements, as described below.

The phrase “structured group of three or more persons” reflects the composition of the group and excludes those comprising less than three persons. The term “structured group” is not further defined or used in the Model Legislative Provisions. Article 2, subparagraph (c), of the Convention defines this term only in a negative way, to 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”. In essence, groups of individuals that operate on an ad hoc basis with little or no organization cannot be said to pose the type of increased risk contemplated by the Convention. The structured nature of organized criminal groups sets them apart from criminal conspiracies. However, the structures of organized criminal groups vary greatly and are often quite loose, informal, changing and clandestine.

Similarly, the requirement that the group exist “for a period of time” refers to the continuity of the group, thus excluding ad hoc, randomly-formed groups. As a practical matter, some States may want or need to be more specific about the period of time for which a group has to exist, or to refer simply to “any period of time”. As the examples of national laws below show, some States have legislated definitions and elements relating to the composition and continuity of organized criminal groups to distinguish them from gangs that gather spontaneously.

The phrase “acting in concert” refers to group activity in a general sense. It merely excludes simultaneous acts by participants of the organized crime group each acting on their own account but does not mean that all members participate in all activities of the group.

The remaining element refers to the aim and purpose of the organized criminal group, which is to commit one or more offences covered by these Model Legislative Provisions (as specified in art. 2) in order to obtain, directly or indirectly, a financial or other material benefit (as defined in art. 3, subpara. (c)). The interpretative notes to the Convention state 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.<sup>7</sup>

This element would not, in principle, include groups such as some terrorist or insurgent groups, provided that their goals were purely non-material. The Convention and these Model Legislative Provisions may only apply to such groups in the event that they commit crimes covered by the Convention or the Model Legislative Provisions in order to obtain, directly or indirectly, a financial or other material benefit.<sup>8</sup>

While the reference to a financial or other material benefit is an important element of the definition of organized criminal groups and of the offences relating to such groups (see art. 5 of these Model Legislative Provisions), pursuant to article 34, paragraph 3, of the Organized Crime Convention, States parties may adopt more severe or strict measures than those provided for by the Convention. It is thus permissible, for instance, to define the term “organized criminal group” or formulate the offence of participation in an organized criminal group without any reference to this element.

In these Model Legislative Provisions, the term “organized criminal group” is used in articles 2, 5 [option 2], 15, 19, 20 and 37.

### *Example: Algeria*

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#### *Article 176 of the Penal Code (Algeria)*

Any association or agreement, whatever its duration or the number of its members, formed or established for the purpose of planning one or more serious offences or one or more ordinary offences against persons or property punishable by at least five (5) years of imprisonment shall constitute a criminal association, which exists by the sole fact of the resolution to act decided by mutual consent.

### *Example: Bulgaria*

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#### *Article 93, paragraph 20, of the Criminal Code 1968 (Bulgaria) – Use of terms*

An “organized criminal group” is the permanent structured association of three or more individuals intended for the agreed perpetration, inside the country or abroad, of crime punishable by deprivation of liberty of more than three years. An association shall also be considered structured in the absence of any formal distribution of functions among its participants, duration of their involvement or any developed internal structure.

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<sup>7</sup> Interpretative notes on article 2 (see A/55/383/Add.1, para. 3), cited in *Travaux Préparatoires*, p. 17.

<sup>8</sup> UNODC, Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, para. 34.

### *Example: Czechia*

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#### *Section 129 of the Criminal Code (Czechia) – Organised Criminal Group*

An organised criminal group is a community of multiple persons with an inner organisational structure, division of functions and activities, aimed at systematic commission of criminal activities.

### *Example: Estonia*

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#### *Section 255(1) of the Penal Code (Estonia) – Criminal organisation*

Membership in a permanent organisation consisting of three or more persons who share a distribution of tasks, created for the purpose of proprietary gain and whose activities are directed at the commission of criminal offences in the second degree for which the maximum term of imprisonment of at least three years is prescribed, or criminal offences in the first degree, is punishable by 3 to 12 years' imprisonment.

### *Example: Gabon*

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#### *Article 288 of the Penal Code (Gabon) – On offences against public order and criminal associations*

Any group formed or agreement established for the purpose of preparing, as characterized by one or more material facts, one or more serious offences or one or more ordinary offences shall constitute a criminal association.

### *Example: Germany*

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#### *Section 129 of the Criminal Code (Germany) – Forming criminal associations*

(1) Whoever forms an organisation or participates as a member in an organisation the objectives or activities of which are directed at the commission of offences which incur a penalty of a maximum term of imprisonment of at least two years incurs a penalty of imprisonment for a term not exceeding five years or a fine. Whoever supports such an organisation or recruits members or supporters for such an organisation incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(2) An organisation is a structured association of more than two persons, established to exist for a longer period of time, regardless of whether it has formally defined roles for its members, continuous membership or a developed structure and whose purpose is the pursuit of an overriding common interest.

### *Example: Italy*

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*Article 416 bis of the Penal Code (Italy) – Mafia-type associations, including foreign associations*

[...]

A Mafia-type organisation is an organisation whose members use the violent intimidation deriving from the bonds of membership, discipline and a code of silence in order to commit offences, to acquire directly or indirectly management or control of economic activities, concessions, authorizations, public procurement contracts and services or to obtain unjust profits or advantages for themselves or others, or to prevent or obstruct the free exercise of vote, or to procure votes for themselves or others at elections.

[...]

The provisions of the present article shall also apply to the Camorra, the 'Ndrangheta and other associations, whatever their local designation, including foreign associations, that rely on the intimidative force of associative ties in order to pursue aims corresponding to those of mafia-type associations.

### *Example: Norway*

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*Section 79(c) of the Criminal Code (Norway) – Imposition of penalties exceeding the maximum penalty (multiple offences, repeated offences, organised crime)*

“Organised criminal group” means a collaboration between three or more persons for the primary purpose of committing an act that may be punishable by a sentence of imprisonment for a term of at least three years, or which is based on activities consisting to a not insignificant degree of the commission of such acts.

### *Example: Republic of Moldova*

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*Article 46 of the Criminal Code (Republic of Moldova) – Organized criminal group*

An organized criminal group shall be a stable union of persons that organized themselves in advance in order to commit one or more crimes.

### *Example: Romania*

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*Article 367(6) of the Criminal Code (Romania) – Establishing an organized criminal group*

An “organized criminal group” means a structured group, made up of three or more persons, which exists for a certain period of time and acts in a coordinated manner for the purpose of perpetrating one or more offences.



### *Example: South Africa*

#### *Section 1(1)(iv) of the Prevention of Organised Crime Act 1998 (South Africa) – Definitions and interpretation of Act*

“Criminal gang” includes any formal or informal ongoing organisation, association or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity;

### *Example: Spain*

#### *Article 570 bis of the Criminal Code (Spain) – Interpretation*

1. Whosoever promotes, establishes, organizes, coordinates or directs a criminal organization shall be punished by imprisonment for a period from four to eight years if the purpose or objective of the organization is the commission of serious offences, and by imprisonment for a period from three to six years in other cases; and whosoever actively participates in the organization, is a member or cooperates financially or in any other way with it shall be punished by imprisonment for a period from two to five years if its purpose is the commission of serious offences, and by imprisonment for a period from one to three years in other cases.

For the purposes of this Code, “criminal organization” refers to an association of a permanent nature or existing for an indefinite period that is made up of more than two persons who in a concerted and coordinated manner share among themselves various tasks or functions with a view to committing offences.

2. The penalties provided for in the preceding paragraph shall be set in the upper half of the range when the organization:

- (a) Is made up of a large number of people.
- (b) Possesses weapons or dangerous instruments.
- (c) Has advanced technological means of communication or transport at its disposal that, by virtue of their characteristics, are especially suitable for facilitating the commission of the offences or the impunity of the offenders.

If two or more of the above circumstances are present at the same time, the higher-degree penalties shall be imposed.

3. The various penalties provided for in this article shall be set in the upper half of the range if the offences involve violence to life and person, encroach on the freedom of individuals or their sexual freedom and inviolability, or consist in trafficking in human beings.

### *Example: Vanuatu*

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*Section 2 of the Counter Terrorism and Transnational Organized Crime Act 2005 [CAP313] (Vanuatu) – Interpretation*

“organized criminal group” means a group of persons, existing for a period of time, that acts together with an objective of obtaining material benefits from the commission of offences that are punishable by a maximum penalty of at least four years imprisonment;

*Section 28(3) of the Counter Terrorism and Transnational Organized Crime Act 2005 [CAP313] (Vanuatu) – Participation in an organized criminal group*

A group of people is capable of being an organized criminal group for the purposes of this section whether or not:

- (a) some of them are subordinates or employees of others; or
- (b) only some of the people involved in it at a particular time are involved in the planning, arrangement or execution at that time of any particular action, activity, or transaction; or
- (c) its membership changes from time to time.

## Article 3. Use of terms (*continued*)

For the purpose of this [Act/Law/Chapter ...]:

(b) “Serious crime” shall mean an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 2, subparagraph (b)*

Many of the provisions of the Organized Crime Convention can be invoked with respect to serious crimes involving an organized criminal group, and article 3, paragraph 1 (b), requires States parties to implement the Convention insofar as it applies to serious crime. The concept of “serious crime” is defined in article 2, subparagraph (b), of the Convention, and article 3, subparagraph (b), of the Model Legislative Provisions adopts the same language.

While there is no requirement for national legislatures to introduce a definition of “serious crime”, it should be noted that, in relation to international cooperation and if they wish to have offences beyond those set out in the Convention and its Protocols (and those set out in part A of chapter II of the Model Legislative Provisions) fall under the scope of application of these Model Legislative Provisions (art. 2), States parties need to ensure that the penalties provided for in domestic legislation are sufficiently high to fulfil the conditions of the definition of “serious crime”.

In these Model Legislative Provisions, the term “serious crime” is used in articles 2, 4 [option 1], 19 and 21.

*Example: Kiribati**Section 3(1) of the Proceeds of Crime Act (Kiribati) – Interpretation*

“serious offence” means:

- (a) an offence against a law of Kiribati for which the maximum penalty is imprisonment for 12 months or longer or a fine of over \$500; or
- (b) an offence against the law of another country for which the maximum penalty is imprisonment for 12 months or longer or the equivalent of a fine of over \$500 Australian dollars in the currency of that country.

*Example: Kenya**Section 2 of the Prevention of Organised Crime Act 2010 (Kenya) – Interpretation*

[...]

“serious crime” means conduct constituting an offence against a provision of any law in Kenya punishable by a term of imprisonment of at least six months, or an offence against a provision of any law in a foreign State for conduct which, if it occurred in Kenya, would constitute an offence against a provision of any law in Kenya;

[...]

*Example: Australia**Section 23WA(1) of the Crimes Act 1914 (Commonwealth) (Australia) – Definitions*

[...]

“serious offence” means an offence under a law of the Commonwealth, or a State offence that has a federal aspect, punishable by a maximum penalty of imprisonment for life or 5 or more years;

[...]

*Example: Romania**Article 2 of Law No. 39/2003 on preventing and combating organised crime (Romania) – Interpretation*

In the present law, the terms and expressions below have the following meaning:

[...]

- (b) *serious crime* – offences for which the law provides for the penalty of life imprisonment or imprisonment whose special maximum is at least 4 years, as well as the following offences:

1. submission to forced or compulsory labor, provided in art. 212 of the Criminal Code;

2. disclosure of secret service or non-public information, provided in art. 304 of the Criminal Code;
3. the deletion or modification of the markings on lethal weapons, provided in art. 344 of the Criminal Code;
4. offences against unfair competition;
5. corruption offenses, offences assimilated to them, as well as offenses against the financial interests of the European Union;
6. drug trafficking offences;
7. offences concerning the legal regime of drug precursors;
8. offences concerning non-compliance with the provisions regarding the introduction of waste and residues in the country;
9. offences related to the organization and operation of gambling;

[...]

### Article 3. Use of terms (*continued*)

For the purpose of this [Act/Law/Chapter ...]:

(c) “Financial or other material benefit” shall include any type of financial or non-financial inducement, payment, bribe, reward, or other advantage, including services;

#### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 2, subparagraph (a)*

The term “financial or other material benefit” is an integral element of the definition of “organized criminal group” in article 2, subparagraph (a), of the Organized Crime Convention and article 3, subparagraph (a), of these Model Legislative Provisions. As noted in the interpretative notes to article 2 of the Convention:

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.<sup>9</sup>

While the reference to a financial or other material benefit is an important element of the definition of organized criminal groups and of the offences relating to such groups (see art. 5 of these Model Legislative Provisions), pursuant to article 34, paragraph 3, of the Organized Crime Convention, States parties may adopt more severe or strict measures than those provided for by the Convention. It is thus permissible, for instance, to define the term “organized criminal group” or formulate the offence of participation in an organized criminal group without any reference to this element (see art. 3, subpara. (a), above).

In these Model Legislative Provisions, the term “financial or other material benefit” is used in article 5 [option 1].

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<sup>9</sup> Interpretative notes on article 2 (see A/55/383/Add.1, para. 3), cited in *Travaux Préparatoires*, p. 17.

*Example: Fiji**Section 4(1) of the Crimes Act 2009 (Fiji) – Interpretation*

'benefit' includes any advantage, and is not limited to property;

*Example: Pakistan**Article 2 of the Prevention of Smuggling of Migrants Act 2018 (Pakistan) – Definitions*

'benefit' includes monetary profit, proceeds or payment in cash or in kind.

### Article 3. Use of terms (*continued*)

For the purpose of this [Act/Law/Chapter ...]:

(d) “[Confiscation/forfeiture]” shall mean the permanent deprivation of property by order of the [*insert relevant court or other competent authority*];

#### Explanatory notes

*Relevant provisions of the Organized Crime Convention: article 2, subparagraph (g)*

Confiscation can have different meanings in different jurisdictions and may be used in a variety of contexts and laws, which explains the need for a statutory definition of the term. Reflecting the wording of article 2, subparagraph (g), of the Organized Crime Convention, the definition of “confiscation” in article 3, subparagraph (d), of these Model Legislative Provisions includes reference to “forfeiture” to reflect the terminology of those jurisdictions where that term is used to refer to permanent deprivation of property by a court or other competent authority. In these Model Legislative Provisions and in the Organized Crime Convention, the terms “seizure” and “freezing” are used to refer to temporary prohibitions in relation to the use of property; some jurisdictions, however, define and differentiate the terms “confiscation”, “forfeiture”, “seizure” and “freezing” differently and drafters should take note of any existing definitions, uses and interpretations of these terms in their jurisdiction.

The competent authority or type of competent authority designated to make a confiscation order varies between jurisdictions and may or may not be a court. The interpretative notes to the Organized Crime Convention state that when the domestic law of a State party requires the order of a court for confiscation, that court will be considered the only competent authority for the purposes of the definition.<sup>10</sup>

In these Model Legislative Provisions, the term “confiscation” is used in article 9.

*Example: European Union*

*Article 2(4) of the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union – Definitions*

<sup>10</sup> Interpretative notes on article 2 (see A/55/383/Add.1, para. 6), cited in *Travaux Préparatoires*, pp. 17–18.

'confiscation' means a final deprivation of property ordered by a court in relation to a criminal offence;

*Example: Austria*

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*§ 19a of the Criminal Code (Austria) – Confiscation*

(1) Any item used or intended to be used for the commission of an intentional offence, and any item yielded from such an offence, is to be confiscated if it belongs to the perpetrator at the time of the judgment at first instance.

(1a) The confiscation also extends to the replacement value of the items referred to in para. 1 if these items belong to the perpetrator at the time of the judgment at first instance.

(2) Confiscation shall not occur if the confiscation is disproportionate relative to the significance of the offence or to the responsibility of the perpetrator.

*§ 20 of the Criminal Code (Austria) – Forfeiture*

(1) Any assets acquired for or through an offence are to be forfeited to the court.

(2) Forfeiture also extends to any benefits and replacement value of assets that are to be forfeited under para. 1.

(3) Unless the assets to be forfeited under paras. 1 and 2 are secured or seized (§§ 110 para. 1 subpara. 3, 115 para. 1 subpara. 3 of the Code of Criminal Procedure [Strafprozeßordnung (StPO)], the court has to forfeit the monetary equivalent of these assets.

(4) The court has discretion to determine the extent of asset forfeiture if the determination of the true extent of the assets that are to be forfeited is either impossible or involves excessive effort.

### Article 3. Use of terms *(continued)*

For the purpose of this [Act/Law/Chapter ...]:

(e) “[Freezing/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;

### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 2, subparagraph (f)*

The terms “freezing” and “seizure” are used as alternatives in these Model Legislative Provisions and in article 2, subparagraph (f), of the Organized Crime Convention. Different jurisdictions use either or both of these terms to impose temporary prohibitions on the use of property. The competent authority or type of competent authority authorized to make a freezing or seizure order also varies among jurisdictions.

The Convention requires States parties to establish mechanisms for the freezing and seizure of proceeds of crime both domestically and as a form of international cooperation (arts. 12, 13 and 18, para. (c) and (f)). The freezing or seizure of proceeds of crime may also occur in the context of sentencing to ensure that sentenced persons do not retain the profits of their crimes. For these reasons, it may be helpful for drafters to ensure that terms such as “freezing” and “seizure” are defined in national law.

### *Example: European Union*

*Article 2(5) of the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union – Definitions*

‘freezing’ means the temporary prohibition of the transfer, destruction, conversion, disposal or movement of property or temporarily assuming custody or control of property;

### *Example: Austria*

*§ 109 of the Code of Criminal Procedure (Austria) – Definitions*

For the purposes of this Code

1. ‘securing’ means
  - a. temporary establishment of the power of disposition over items and
  - b. temporary prohibition to surrender items or other assets to third parties (third party prohibition) and the temporary prohibition to sell or pawn such things or assets,
2. ‘seizure’ means
  - a. a court decision that establishes or continues securing under para. 1 and
  - b. a prohibition by the court to sell, debit, or pawn real estate or rights recorded in a public register.

## Article 3. Use of terms (*continued*)

For the purpose of this [Act/Law/Chapter ...]:

(f) “Proceeds of crime” shall mean any property derived, in whole or in part, from, or obtained, directly or indirectly, through, the commission of an offence, whether committed within or outside the territory of [*insert name of State*].

### Explanatory notes

*Relevant provisions of the Organized Crime Convention: article 2, subparagraph (e)*

The Organized Crime Convention obliges States parties to take a number of steps with regard to the

proceeds of crimes involving organized criminal groups. Accordingly, it is important that this concept be defined.

If the legislature wants to ensure that proceeds of crime that are located outside the State's territorial jurisdiction are covered, it may be useful to clearly state that proceeds of crime can include proceeds located abroad. Whether or not national authorities can, as a practical matter, recover these proceeds of crime then becomes a question of enforcement.

In these Model Legislative Provisions, the term "proceeds of crime" is used in article 9, paragraph 5 (b).

### *Example: South Africa*

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#### *Section 1 of the Prevention of Organised Crime Act 1998 (South Africa) – Definitions and interpretation of Act*

(1) In this Act, unless the context otherwise indicates—

[...]

"proceeds of unlawful activities" means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived;

[...]

"unlawful activity" means any conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.

## Article 4. Jurisdiction

1. [Insert reference to relevant courts] shall have jurisdiction to determine proceedings for offences to which this [Act/Law/Chapter ...] applies when:

(a) Committed [in whole or in part] within the territory of [insert name of State];  
or

(b) Committed [in whole or in part] on board a vessel that is flying the flag of [insert name of State] or an aircraft that is registered under the laws of [insert name of State] at the time that the offence was committed; or

(c) Committed by a [insert name of State] national present in [insert name of State] territory whose extradition is refused on the grounds of nationality; or

(d) Committed by a person present in [insert name of State] whose extradition is refused on any ground.

2. [Insert reference to relevant courts] shall also have jurisdiction to determine



proceedings for offences committed outside the territory of [*insert name of State*] to which this [Act/Law/Chapter] applies when:

(a) The [victim/object of the crime] is a national [or permanent resident] [or habitual resident] of [*insert name of State*];

(b) The offence is committed by a national [or permanent resident] [or habitual resident] of [*insert name of State*] [or one of its legal persons];

(c) The offence is committed outside the territory of [*insert name of State*] with a view to the commission of a serious crime within the territory of [*insert name of State*]; or

(d) Such jurisdiction is based on an international agreement binding on [*insert name of State*].

### Explanatory notes

Article 15 of the Organized Crime Convention sets out requirements for establishing jurisdiction over offences under the Convention. Some of these are mandatory requirements, while others are optional provisions.

*Article 4, paragraph 1 (a), of the Model Legislative Provisions against Organized Crime  
Relevant provisions of the Organized Crime Convention: article 15, paragraph 1 (a)*

Article 15, paragraph 1 (a), of the Organized Crime Convention requires States parties to assert jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 on the basis of the territorial principle. That is, States parties must ensure that they have jurisdiction over these offences when committed within their territory. Article 4, paragraph 1 (a), of these Model Legislative Provisions reflects this requirement.

The obligation to establish jurisdiction over offences under the Convention is not conditional on the existence of a transnational element or the involvement of an organized criminal group. On the contrary, as a result of article 34, paragraph 2, of the Convention, these factors are not to be taken into account for the purposes of establishing criminal offences (except to the extent required by the terms of article 5, which, as it deals with offences focused on participation in an organized criminal group, necessarily requires the involvement of such a group).

*Article 4, paragraph 1 (b), of the Model Legislative Provisions against Organized Crime  
Relevant provisions of the Organized Crime Convention: article 15, paragraph 1 (b)*

Article 15, paragraph 1 (b), of the Organized Crime Convention – which is mirrored in article 4, paragraph 1 (b), of these Model Legislative Provisions – is a further reflection of the territorial principle and ensures that each State party asserts jurisdiction over offences that are committed on board vessels and aircraft registered in that State party.

*Article 4, paragraph 1 (c), of the Model Legislative Provisions against Organized Crime  
Relevant provisions of the Organized Crime Convention: article 15, paragraph 3*

Article 15, paragraph 3, of the Organized Crime Convention, on which article 4, paragraph 1 (c), of these Model Legislative Provisions is based, requires States parties, for the purposes of article 16, paragraph 10, of the Convention to establish jurisdiction over the offences covered by the Convention – irrespective of where the offence occurred – in situations where the suspect is present in

their territory and they refuse extradition solely on the grounds that the suspect is one of their nationals. This reflects the obligation to “extradite or prosecute” (“aut dedere aut judicare”), which is further elaborated in article 16, paragraph 10, of the Convention.

The phrase “offences to which this article applies” in article 16, paragraph 10, refers to article 16, paragraph 1, which extends the scope of the extradition provision to the offences established under the Convention and, furthermore, to offences referred to in article 3, paragraph 1 (a) and (b), where these involve an organized criminal group and the suspect is located in the territory of the requested State party (see also art. 16, para. 1, read together with art. 3).

*Article 4, paragraph 1 (d), of the Model Legislative Provisions against Organized Crime  
Relevant provisions of the Organized Crime Convention: article 15, paragraph 4*

Article 15, paragraph 4, of the Convention provides that each State party may establish jurisdiction over offences when the alleged offender is present in its territory and it does not extradite him or her.

If article 4, paragraph 1 (d), of these Model Legislative Provisions is used in domestic law, there is no need to include paragraph 1 (c), because paragraph 1 (d) covers situations where extradition is refused for any reason, including nationality.

*Article 4, paragraph 2 (a) and (b), of the Model Legislative Provisions against Organized Crime  
Relevant provisions of the Organized Crime Convention: article 15, paragraph 2 (a) and (b)*

Article 15, paragraph 2, of the Organized Crime Convention encourages – but does not require – States parties to establish jurisdiction in several other situations where their national interests may be affected. Article 15, paragraph 2, must be read in conjunction with article 4, paragraph 2, of the Convention to limit far-reaching claims of extraterritorial jurisdiction.

Article 15, paragraph 2 (a), of the Organized Crime Convention makes reference to the passive nationality (or passive personality) principle by extending jurisdiction to offences committed against nationals wherever they may be. This is reflected in article 4, paragraph 2 (a), of these Model Legislative Provisions. Legislators may wish to further extend such jurisdiction to offences committed abroad against permanent or habitual residents of that State.

Article 15, paragraph 2 (b), of the Organized Crime Convention reflects the active nationality (or active personality) principle by extending jurisdiction to offences committed by nationals abroad. This is reflected in article 4, paragraph 2 (b), of these Model Legislative Provisions. Legislators may wish to further extend such jurisdiction to offences committed abroad by permanent or habitual residents or legal persons of that State.

With regard to legal persons, the State of nationality of a legal person is the State where the corporation – or another type of legal person – is incorporated. According to the draft articles on diplomatic protection of the International Law Commission, if the corporation is controlled by nationals of another State or States or has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the legal person are both located in another State, that State shall be regarded as the State of nationality of the legal person.<sup>11</sup>

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<sup>11</sup> Article 9 of the draft articles on diplomatic protection (A/61/10, chap. IV, sect. E).

*Article 4, paragraph 2 (c), of the Model Legislative Provisions against Organized Crime  
Relevant provisions of the Organized Crime Convention: article 15, paragraph 2 (c) (i) and (ii)*

Article 15, paragraph 2 (c) (i) and (ii), of the Organized Crime Convention reflects the transnational nature of organized crime by extending jurisdiction to persons organizing and planning crimes from abroad, thus distancing themselves from direct involvement and execution of the crimes and insulating themselves from prosecution and punishment. It applies only to offences established under article 5, paragraph 1 (participation in an organized criminal group), and article 6, paragraph 1 (b) (ii) (participation in, association with or conspiracy to commit, attempts to commit and aiding and abetting the laundering of proceeds of crime), of the Organized Crime Convention.

Accordingly, article 4, paragraph 2 (c), of these Model Legislative Provisions provides a draft text for States wanting to extend jurisdiction over only these offences when they are committed outside the territory with a view to the commission of a serious crime in the territory. However, equally, States may want to extend jurisdiction in this way over any offences under the Convention (and its Protocols). As noted above, article 15, paragraph 2, of the Organized Crime Convention must be read in conjunction with article 4, paragraph 2, of the Convention to limit far-reaching claims of extraterritorial jurisdiction.

*Article 4, paragraph 2 (d), of the Model Legislative Provisions against Organized Crime*

Article 4, paragraph 2 (d), provides a basis for the judicial determination of cases for which jurisdiction has been conferred by an international agreement binding on the State. Such an agreement could also be a decision of the United Nations Security Council.

*Example: Samoa*

*Section 7(1) of the Crimes Act 2013 (Samoa) – Jurisdiction in respect of crimes on ships or aircraft beyond Samoa*

This section applies to any act done or omitted beyond Samoa by any person:

- (a) on board any Samoan registered ship; or
- (b) on board any Samoan aircraft; or
- (c) on board any ship or aircraft, if that person arrives in Samoa on that ship or aircraft in the course or at the end of a journey during which the act was done or omitted; or
- (d) being a citizen of Samoa, on board any foreign ship (not being a ship to which he or she belongs) on the high seas; or
- (e) being a Samoan citizen or a person ordinarily resident in Samoa, on board any aircraft provided that paragraph (c) does not apply where the act was done or omitted by a person, not being a citizen of Samoa, on any ship or aircraft for the time being used as a ship or aircraft of any of the armed forces of any country; or
- (f) being a Samoan citizen or a person ordinarily resident in Samoa, on board any ship or aircraft as a servant or an officer of the Government of Samoa.

*Section 8 of the Crimes Act 2013 (Samoa) – Extraterritorial jurisdiction for offences with transnational aspects*

(1) Even if the acts or omissions alleged to constitute the offence occurred wholly outside Samoa, proceedings may be brought for any offence against this Act committed in the course of committing any offence against the Counter Terrorism Act 2014, or an offence against sections 146 to 152 and 154 to 157 of this Act, if the person to be charged:

- (a) is a Samoan citizen; or
- (b) is ordinarily resident in Samoa; or
- (c) has been found in Samoa and has not been extradited; or
- (d) is a body corporate, or a corporation sole, incorporated under the law of Samoa.

(2) Even if the acts or omissions alleged to constitute the offence occurred wholly outside Samoa, proceedings may be brought for any offence against this Act, if the person to be charged:

- (a) is a Samoan citizen or an ordinary resident of Samoa; and
- (b) is outside of Samoa as an ambassador, diplomat, representative, envoy, attaché or employee or officer of the Government of Samoa.

*Example: Spain*

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*Article 23(4)(j) of the Organic Act No. 6/1985 of 1 July (Official Gazette No. 157 of 2 July 1985) (Spain)*

In the circumstances outlined below, the trying of acts perpetrated by Spanish citizens or foreigners outside Spanish territory will also fall under Spanish jurisdiction where they can be categorised as any of the following crimes, in accordance with Spanish law:

[...]

- (j) Crimes of setting up, financing or belonging to a criminal group or organisation or crimes perpetrated within such associations, where we are dealing with groups or organisations that act for the purpose of perpetrating a crime in Spain that is sanctioned with a maximum sentence equal to or greater than three years of imprisonment.

## CHAPTER II.

# CRIMINAL OFFENCES AND LIABILITY

The present chapter includes provisions relating to criminalization. This includes, in part A, model legislative provisions relating to the offences under article 5 (participation in an organized criminal group) and article 23 (obstruction of justice) of the Organized Crime Convention. Model legislative provisions concerning the offence of money-laundering (art. 6 of the Convention) can be found in other, more specific model laws produced by UNODC. Part B of this chapter sets out several general matters relating to criminal liability for the specific offences under part A. These matters are meant to complement general principles of criminal law and criminal liability under domestic law if they are not already addressed in the domestic law.

### Part A. Specific offences

#### Offences relating to participation in an organized criminal group

Article 5 of the Organized Crime Convention focuses on criminalization of participation in an organized criminal group. States parties are required to criminalize either or both of the offences set out in article 5, paragraph 1 (a) (i) and (ii), in their national laws, along with aiding, abetting, organizing or directing such offences. Accordingly, these Model Legislative Provisions include options for the following types of offences:

(a) Conspiracy-type offences (that is, those involving an agreement to commit a serious crime), as set out in article 5, paragraph 1 (a) (i) [option 1];

(b) Participation-type offences (that is, those involving participation in the activities of an organized criminal group), as set out in article 5, paragraph 1 (a) (ii) [option 2].

These options reflect different legal traditions. The conspiracy model reflects the tradition of many common law jurisdictions. However, in many civil law jurisdictions, conspiracy is insufficient to establish criminal liability; instead, those jurisdictions tend to criminalize participation in an organized criminal group or a criminal association. The various examples of national laws presented below demonstrate that the distinction between these legal traditions is not absolute, as some countries have implemented both options, conceptualizing the offences slightly differently. A third offence, called racketeering, is used in some countries to combat participation in organized criminal groups.

## Article 5 [option 1]. Conspiracy

1. Any person who agrees with one or more other persons to commit a serious crime in order to obtain, directly or indirectly, a financial or other material benefit, commits an offence punishable by [*insert penalty*].

[2. For a person to be convicted under this article an act other than the making of the agreement must be undertaken by one of the participants in furtherance of the agreement.]

### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 5, paragraph 1 (a) (i)*

The offence specified in article 5, paragraph 1 (a) (i), of the Organized Crime Convention, and in article 5 [option 1] of these Model Legislative Provisions, is akin to the common law concept of conspiracy. Liability for this offence is based on an agreement to commit serious crime. The elements of the offence combine the agreement to commit a crime with the purpose of obtaining a financial or other material benefit.

For criminal liability to arise, the material or physical elements (actus reus) of the offence require proof of an agreement to commit a serious crime and that the agreement was between two or more persons (that is, between the offender and at least one other person).

Some jurisdictions include an additional element by requiring proof of conduct by one of the participants in furtherance of the agreement. This “overt act” element is sometimes added to the offence to ensure that it covers instances in which the conspirators actually put their plans into action, so that agreements that amount to no more than bare intent or wishful thinking do not fall within the spectrum of criminal liability. Article 5 [option 1], paragraph 2, of these Model Legislative Provisions reflects this position.

Furthermore, States parties may add an element requiring the involvement of an organized criminal group. This may be done, for instance, to clearly flag the connection of this offence to organized crime or to legislate an aggravated conspiracy offence.

Article 5, paragraph 3, of the Convention provides that, where elements such as conduct in furtherance of the criminal agreement or the involvement of an organized criminal group are required by domestic law, States parties are required to ensure that offences established to give effect to article 5, paragraph 1, cover all serious crimes involving organized criminal groups. Article 5, paragraph 3, further provides that States parties whose domestic law requires one of these elements need to inform the Secretary-General of that fact at the time of signature or of deposit of their instrument of ratification, acceptance, approval or accession to the Convention.<sup>12</sup>

The mental elements (mens rea) under article 5, paragraph 1 (a) (i), of the Convention require proof that:

(a) The accused entered into the agreement intentionally; and

(b) The purpose of the agreement or the crime committed was to obtain a financial or other material benefit.

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<sup>12</sup> See further, United Nations Treaty Collection, available at [www.unodc.org/unodc/en/treaties/CTOC/countrylist\\_fix.html](http://www.unodc.org/unodc/en/treaties/CTOC/countrylist_fix.html).

Legal systems deal with the concept of intention as a mental element differently. In many legal systems, the concept of intention has its ordinary meaning, in the sense that a person only needs to have intended to carry out the action for that action to be considered intentional. This is an issue that must be resolved by reference to local legal traditions.

Article 5 of these Model Legislative Provisions has to be read together with article 11, paragraph 1, of the Convention, which provides that offences under the Convention must be liable to sanctions that take into account the gravity of the offence.

### *Example: Norway*

#### *Section 198 of the Penal Code (Norway) – Conspiracy to commit serious organised crime*

Any person who enters into a conspiracy with someone to commit an act that is punishable by imprisonment for a term not exceeding three years, and that is to be committed as part of the activities of an organised criminal group, shall be subject to a penalty of imprisonment for a term not exceeding three years, unless the offence is subject to a stricter penal provision. An increased maximum penalty due to a repeated offence or concurrent offences is not taken into account.

“Organised criminal group” means a collaboration between three or more persons for the primary purpose of committing an act that is punishable by a sentence of imprisonment for a term of at least three years, or which to a not insignificant degree is founded on the commission of such acts.

## Article 5 [option 2]. Participation in an organized criminal group

1. Any person who intentionally [or knowingly] takes an active part in criminal activities of an organized criminal group, knowing either the aim and general activity of the organized criminal group, or its intention to commit the crimes in question, commits an offence punishable by *[insert penalty]*.
2. Any person who intentionally [or knowingly] takes an active part in [any other] activities of an organized criminal group:
  - (a) Knowing either the aim and general activity of the organized criminal group, or its intention to commit the crimes in question; and
  - (b) Knowing that his or her conduct will contribute to the achievement of the aim of the organized criminal group or its intention to commit the crimes in question; commits an offence punishable by *[insert penalty]*.

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 5, paragraph 1 (a) (ii)*

Article 5, paragraph 1 (a) (ii), of the Convention, as well as article 5 [option 2] of these Model Legislative Provisions, sets out an offence that is based on the criminal association laws originally developed in several jurisdictions that follow the civil law tradition but that has since been adopted by a range of different legal systems. In essence, option 2 attaches criminal liability to intentional contributions to organized criminal groups, not to the pursuit of a preconceived plan or agreement to commit crime, as in option 1.

### *Article 5 [option 2], paragraph 1, of the Model Legislative Provisions against Organized Crime*

The physical elements of article 5 [option 2], paragraph 1, require that the accused must have taken an active part in criminal activities of the organized criminal group (which is defined in article 3 (a) above). Determining whether the person has taken “an active part” is a question of fact and jurisdictions may vary in determining whether and when more passive roles suffice to establish this element.

The mental elements of this offence require that the accused must have intentionally, or knowingly, taken an active part in criminal activities of the organized criminal group and, in addition, must have had knowledge of the aim and general criminal activity of the organized criminal group or of the group’s intention to commit specific offences.

### *Article 5 [option 2], paragraph 2, of the Model Legislative Provisions against Organized Crime*

For the offence set out in article 5, paragraph 2, of these Model Legislative Provisions, the activities conducted for the organized criminal group need not otherwise be illegal. “Any other activities” may include, for instance, bookkeeping for an organized criminal group, chauffeuring the leader of an organized criminal group, cleaning a firearm with the knowledge that it will be used by an organized criminal group or managing the finances of an organized criminal group.

The mental elements of this offence require that the accused must have intentionally, or knowingly, taken an active part in activities of the organized criminal group and, in addition, must have known either the aim and general activity of the organized criminal group or its intention to commit the crimes in question and furthermore must have known that his or her conduct (act or omission) would contribute to the achievement of the aim of the organized criminal group or its intention to commit the crimes in question.

Article 8 of these Model Legislative Provisions offers further guidance on the meaning and proof of these mental elements.

Article 5 of these Model Legislative Provisions has to be read together with article 11, paragraph 1, of the Convention, which provides that offences under the Convention must be liable to sanctions that take into account the gravity of the offence.

### *Note*

In addition to, or in lieu of, options 1 and 2 set out above, in some jurisdictions, criminal liability may arise from involvement in so-called racketeering activities. In general, the term “racketeering activities” refers to specific offences under domestic law that may relate, directly or indirectly, to organized crime. Liability for racketeering arises if a person derives or receives any financial or other material benefit from two or more racketeering activities (referred to as a “pattern of racketeering activity”)



in which the person has participated, if the person uses or invests proceeds of the racketeering to establish or operate an enterprise, if the persons conducts or participates in the conduct of an enterprise's affairs through a pattern of racketeering activity, or if, through a pattern of racketeering activity, the person acquires or maintains any interest in or control over an enterprise.

*Example: Austria*

*§ 278 of the Criminal Code (Austria) – Criminal association*

(1) Any person who founds or participates as a member in a criminal association is liable to imprisonment for up to three years.

(2) A criminal association is a longer-term affiliation of more than two persons with the aim that one or more of its members commit one or more felonies, other significant violent offences against limb and life, more than merely minor property damage, theft or fraud, misdemeanours under §§ 165, 177b, 233 to 239, 241a to 241c, 241e, 241f, 283, 304, or 307, misdemeanours listed in § 278d para. 1, or misdemeanours under §§ 114 para. 1 or 116 of the Policing of Foreigners Act [Fremdenpolizeigesetz (FPG)].

(3) A person participates as a member of a criminal association if the person commits an offence within the criminal aims of the association or if the person participates by providing information or assets or participates in any other way knowing that his or her actions support the association or its offences.

(4) If the association has not led to the commission of any of the planned offences, no member is liable if the association freely dissolves or if the association's activities demonstrate that it has freely abandoned its plans. Moreover, a person is not liable for the offence of criminal association if the person freely withdraws from the association before the association commits or attempts to commit any of the planned offences; a person who participated in a criminal association in a leading capacity is only not liable if the person freely and by notification of the authorities (§ 151 para. 3) or in any other way effects that the danger created by the association is removed.

*§ 278a of the Criminal Code (Austria) – Criminal organization*

Any person who founds or participates as a member (§ 278 para. 3) in a longer-term business-like association of a larger number of people which

1. even if not exclusively, aims to repeatedly plan and commit serious offences against life, physical integrity, liberty, or property, or serious offences relating to sexual exploitation of persons, smuggling of migrants, or trafficking in weapons, nuclear material, radioactive material, hazardous waste, counterfeit money, or illicit drugs,
2. through the commission of any of these offences seeks to gain significant profits, and
3. seeks to corrupt or intimidate others or seeks to shield itself from law enforcement measures in specific ways

is liable to imprisonment for six months to five years. § 278 para. 4 applies *mutatis mutandis*.

*Example: Canada*

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*Section 467.11 of the Criminal Code (R.S.C., 1985, c. C-46) (Canada) – Participation in activities of criminal organization*

(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

- (a) an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) an offence punishable on summary conviction.

**Prosecution**

(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.

**Factors**

(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.

*Example: France*

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*Article 450-1 of the Penal Code (France) – Participation in a criminal association*

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.

### *Example: Ireland*

#### *Section 72 of the Criminal Justice Act 2006 (Ireland) – Offence to participate in, or contribute to, certain activities*

(1) A person is guilty of an offence if, with knowledge of the existence of the organisation referred to in this subsection, the person participates in or contributes to any activity (whether constituting an offence or not)—

(a) intending either to—

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of,

a serious offence, or

(b) being reckless as to whether such participation or contribution could either—

(i) enhance the ability of a criminal organisation or any of its members to commit, or

(ii) facilitate the commission by a criminal organisation or any of its members of,

a serious offence.

(2) A person guilty of an offence under this section shall be liable on conviction on indictment to a fine or imprisonment for a term not exceeding 15 years or both.

(3) The reference in subsection (1) to the commission of a serious offence includes a reference to the doing of an act in a place outside the State that constitutes a serious offence under the law of that place and which act would, if done in the State, constitute a serious offence.

(4) In proceedings for an offence under this section it shall not be necessary for the prosecution to prove—

(a) that the criminal organisation concerned or any of its members actually committed, as the case may be—

(i) a serious offence in the State, or

(ii) a serious offence under the law of a place outside the State where the act constituting the offence would, if done in the State, constitute a serious offence,

- (b) that the participation or contribution of the defendant actually—
  - (i) enhanced the ability of the criminal organisation concerned or any of its members to commit, or
  - (ii) facilitated the commission by it or any of its members of, a serious offence, or
- (c) knowledge on the part of the defendant of the specific nature of any offence referred to in subsection (1)(a) or (b).

[...]

*Example: Italy*

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*Article 416 of the Penal Code (Italy) – 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 of the Penal Code (Italy) – 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 10 to 15 years.

Those promoting, directing or organizing the association shall be punished, for that alone, by a term of imprisonment of 12 to 18 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 12 to 20 years under the circumstances mentioned in paragraph 1, and imprisonment of 15 to 26 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, the 'Ndrangheta 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.

### *Example: Barbados*

#### *Section 3 of the Transnational Organized Crime (Prevention and Control) Act 2010 (Barbados)*

(1) Subject to subsection (3), a person is engaged in the offence of organized criminal activity within the meaning of this Act where that person

(a) acts in concert with other persons to commit a serious offence for the purpose of obtaining a financial or other material benefit or for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit;

(b) with knowledge of the purpose or of the general criminal activity of an organized criminal group, or of the intention of the group to commit a serious offence, engages in conduct preliminary to or takes part in

(i) the criminal activity of the group; or

(ii) other activities which that person knows will contribute to a criminal purpose or the criminal activity of the group;

(c) being one of the persons who is a member of an organized criminal group, knowingly instructs any person to commit a serious offence for the benefit of, at the direction of, or in association with, the group; or

(d) knowingly advises, causes, encourages or recruits another person to become a member of an organized criminal group.

(2) In this section, "organized criminal group" or "group" means a structured group that

(a) consists of 3 or more persons whether in or outside of Barbados acting in concert;

(b) has as its primary purpose the commission of one or more serious offences in order to obtain direct or indirect financial or other material benefit for the group or any of the members of the group, but does not include a group that is formed randomly for the commission of a single offence.

(3) An offence referred to in subsection (1) occurs only where it is committed

(a) in more than one country;

- (b) in one country but a substantial part of the preparation, planning, direction or control takes place in another country;
- (c) in one country but involves an organized criminal group that engages in criminal activity in more than one country; or
- (d) in one country but has substantial effects in another country.

*Section 4 of the Transnational Organized Crime (Prevention and Control) Act 2010 (Barbados)*

(1) In a prosecution of an offence under paragraph (b) of section 3(1), it is not necessary to prove

- (a) actual facilitation or commission of the offence by the criminal group;
- (b) that the participation or contribution of the accused enabled the criminal group to facilitate or commit the offence;
- (c) that the accused had knowledge of the specific nature of any offence that may have been committed by the criminal group; or
- (d) that the accused knew the identity of any of the members of the criminal group.

(2) In a prosecution of an offence under paragraph (d) of section 3(1), it is not necessary to prove that

- (a) the offence in question was committed;
- (b) the accused instructed a particular person to commit the offence; or
- (c) the accused knew the identity of every member of the criminal group.

*Section 5 of the Transnational Organized Crime (Prevention and Control) Act 2010 (Barbados)*

The Court may, in determining whether an accused person has participated in or contributed to the organized criminal activity of a criminal group, consider, inter alia, whether the accused, in relation to the group

- (a) admits to being a member;
- (b) has been identified as a member by a parent or guardian or any other person;
- (c) habitually associates with its members;
- (d) adopts the name, colours, symbol or other representation that is associated therewith; or
- (e) receives any financial or material benefit from the group.

*Example: Tonga*

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*Section 66(1) of the Counter Terrorism and Transnational Organised Crime Act 2014 (Tonga) – Participation in an organised criminal group*

Any person who participates (whether as a member, associate member or prospective member) in an organised criminal group, knowing that it is an organised criminal group -

(a) knowing that his participation contributes to the occurrence of criminal activity; or

(b) reckless as to whether his participation contributes to the occurrence of criminal activity;

commits an offence under this section.-

### *Example: Chile*

#### *Articles 293–294 bis of the Criminal Code (Chile) – On unlawful associations*

Article 293. If the purpose of the association was to perpetrate serious offences, its leaders, those who held positions of leadership therein and its instigators shall be punished by a minimum to maximum term of rigorous imprisonment. Where the purpose of the association was to perpetrate ordinary offences, the penalty for the aforementioned individuals shall be a minimum to maximum term of ordinary imprisonment.

Article 294. Any other individuals who participated in the association and those who knowingly and willingly provided it with means or instruments for committing the serious or ordinary offences or with accommodation, shelter or a meeting place shall be punished, in the first case referred to in the preceding article, by a medium term of ordinary imprisonment, and in the second case, by a minimum term of ordinary imprisonment.

Article 294 bis. The penalties under articles 293 and 294 shall be imposed without prejudice to the penalties that apply for any serious or ordinary offences committed on account of, or in connection with, such activities. Where the association was set up through a legal entity, the latter shall, moreover, be dissolved or annulled as a secondary consequence of the penalty imposed on the individual offenders.

### *Example: Ukraine*

#### *Article 255 of the Criminal Code (Ukraine) – Creation of a criminal organization*

1. Creation of a criminal organization for the purpose of committing a grave or special grave offense, and also leadership or participation in such organization, or participation of offenses committed by such organization, and also the organizing, running or facilitating a meeting (convention) of members of criminal organizations or organized groups for the purpose of development of plans and conditions for joint commission of criminal offenses, providing logistical support of criminal activities or coordination of activities of so associated criminal organizations or organized groups, shall be punishable by imprisonment for a term of five to twelve years.

2. A person, other than an organizer or leader of a criminal organization, shall be discharged from criminal liability for the offense created by this Article, if he/she has voluntarily reported the creation of the criminal organization or his/her participation in it, and effectively assisted in uncovering this organization.

*Article 256 of the Criminal Code (Ukraine) – Assistance to members of criminal organizations and covering up of their criminal activity*

1. Assistance, which was not promised in advance, to members of criminal organizations and covering up of their criminal activities by providing premises, shelters, vehicles, information, documents, equipment, money, or securities, and also taking other actions, which were not promised in advance, to create conditions facilitating their criminal activities, shall be punishable by imprisonment for a term of three to five years.

2. The same actions committed by an official or repeated shall be punishable by imprisonment for a term of five to ten years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

*Article 257 of the Criminal Code (Ukraine) – Gangsterism*

Organizing an armed criminal gang for the purpose of attacking businesses, institutions, organizations or private individuals, and also participation in such gang or its attacks shall be punishable by imprisonment for a term of five to fifteen years with the forfeiture of property.

**Example: Gabon**

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*Article 193 of the Criminal Code (Gabon)*

Any association formed, whatever its duration or the number of its members, or agreement established for the purpose of planning or committing serious offences or ordinary offences against persons or property shall constitute an offence against public order.

*Article 194 of the Criminal Code (Gabon)*

Anyone who has become affiliated to an association formed or participated in an agreement established for the purpose referred to in the preceding article shall be liable to capital punishment.

Anyone who has knowingly or intentionally aided the perpetrators of the offences set forth in this chapter by supplying them with instruments of crime, means of communication, shelter or meeting places, even if this occurred after the commission of the criminal acts, shall be liable to the same penalty.

*Article 195 of the Criminal Code (Gabon)*

However, persons convicted of the offences established in article 194 above shall be punished by life imprisonment if, prior to any prosecution, they informed the authorities about the agreement that had been established or about the existence of the association.



*Example: South Africa**Section 1 of the Prevention of Organised Crime Act 1998 (South Africa) – Definitions and interpretation of Act*

(1) In this Act, unless the context otherwise indicates—

[...]

“pattern of racketeering activity” means the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1;

*Section 2(1) of the Prevention of Organised Crime Act 1998 (South Africa) – Offences*

Any person who—

(a)(i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity; and

(ii) knows or ought reasonably to have known that such property is so derived; and

(iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

(b)(i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(c)(i) uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(d) acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;

(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise’s affairs through a pattern of racketeering activity;

(f) manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise’s affairs through a pattern of racketeering activity; or

(g) conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or ( f ), within the Republic or elsewhere,

shall be guilty of an offence.

## Article 6. Obstruction of justice

1. Any person who, in relation to the commission of any offence under this [Act/Chapter/Law ...], uses force, threats or intimidation, or promises, offers or gives any undue advantage in order to:

(a) Induce false testimony; or

(b) Interfere in the giving of testimony or production of evidence;

commits an offence punishable by [*insert penalty*].

2. Any person who, in relation to the commission of any offence under this [Act/Chapter/Law ...], uses force, threats or intimidation in order to interfere with the exercise of the duties of law enforcement, prosecution or judicial officials commits an offence punishable by [*insert penalty*].

### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 23*

Article 23 of the Organized Crime Convention requires States parties to criminalize two sets of conduct involving the obstruction of justice; these are reflected in article 6, paragraphs 1 and 2, of these Model Legislative Provisions. These provisions apply to the commission of any offence covered by these Model Legislative Provisions;<sup>13</sup> they are not limited to cases involving organized criminal groups.

The focus of article 23 of the Organized Crime Convention, and article 6 of these Model Legislative Provisions, is on the conduct of the person and the intention of that conduct, not the result of that conduct. In other words, it is not necessary to prove that the conduct actually resulted in the giving of false testimony or the production of false evidence, or that the exercise of the official's duties were actually interfered with; any intention to do so fulfils the elements of the offence.<sup>14</sup>

*Article 6, paragraph 1, of the Model Legislative Provisions against Organized Crime*

Article 6, paragraph 1, criminalizes the use of force, threats or intimidation, or the promise, offering or giving of an undue advantage either to induce false testimony or in order to interfere in the giving of testimony or the production of evidence in proceedings in relation to offences covered by these Model Legislative Provisions. This offence seeks to cover situations involving the intimidation of witnesses but may also be extended to jurors, court reporters, translators and others who may be associated with the administration of justice. States may also want to extend the offence to journalists who uncover a story.

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<sup>13</sup> Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, para. 233.

<sup>14</sup> *Ibid.*, para. 240.

Depending on whether or not the term is already sufficiently clear in national law, it may be necessary to further define “undue advantage”. The concept of “undue advantage” also appears in the United Nations Convention against Corruption. The *Legislative Guide for the Implementation of the United Nations Convention against Corruption* notes that “an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary”. The *Legislative Guide* further notes that:

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. Some national legislation might cover the promise and offer under provisions regarding the attempt to commit bribery. When this is not the case, it will be necessary to specifically cover promising (which implies an agreement between the bribe giver and the bribe taker) and offering (which does not imply the agreement of the prospective bribe taker). The undue advantage or bribe must be linked to the official’s duties.<sup>15</sup>

States are not limited to the types of “obstruction” enumerated in the chapeau of article 6, paragraph 1. For example, States may wish to expressly include the concealment or destruction of evidence, while in some jurisdictions, the terms used in subparagraphs (a) and (b) are interpreted to cover such conduct. Furthermore, subparagraphs (a) and (b) are not limited to positive acts; they also capture omissions, for example, when a witness fails to give evidence as a result of the force, threats or other inducements used against the witness.

In domestic law, this provision is intended to supplement other related offences, such as perjury, or giving false testimony or taking other steps to manipulate or influence the course of justice (which may already exist in many legal systems). Furthermore, this offence needs to go hand in hand with measures to protect the persons and witnesses involved. These measures, including model legislative provisions, are further outlined in chapter V below.

*Article 6, paragraph 2, of the Model Legislative Provisions against Organized Crime*

Article 6, paragraph 2, makes it an offence to use physical force, threats or intimidation in order to interfere with the exercise of official duties by a law enforcement official, prosecutor or judicial official in relation to offences covered by these Model Legislative Provisions.

The use of force, threats and inducements for false testimony can occur at any time regardless of whether formal proceedings are in progress or not. The *Travaux Préparatoires* to article 23 of the Organized Crime Convention indicate that the term “proceeding” is intended to cover all official governmental proceedings.<sup>16</sup> This may include the pretrial stage of a case, which is of particular significance in civil law systems.

Article 23 of the Convention (and article 6 of these Model Legislative Provisions) has to be read together with article 11, paragraph 1, of the Convention, which provides that offences under the Convention must be liable to sanctions that take into account the gravity of the offence.

<sup>15</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed. (Vienna, 2012), para. 197.

<sup>16</sup> Interpretative notes on article 23 (see A/55/383/Add.1, paras. 46–47), cited in *Travaux Préparatoires*, p. 216.

### *Example: Brazil*

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*Articles 343, 344 and 347 of the Criminal Code (Brazil) – Title XI: Crimes against the Public Administration, Chapter III: Crimes against the Administration of Justice*

#### False testimony or false expertise

[...]

Article 343. To give, to offer or promise money or any other advantage to a witness, expert, accountant, translator or interpreter, for them to give false testimony, to deny the truth or not to tell the truth in a hearing, expert report, calculations, translation or interpretation:

Penalty — imprisonment for a term of three up to four years, and a fine.

The penalties will be increased from one sixth up to one third if the crime is committed with the intent to obtain evidence to be used in a criminal procedure or in a civil procedure in which one litigant is the public administration.

#### Constraint in the course of a proceeding

Article 344. To use violence or to threaten severely, with the intent to satisfy self or someone else's interest, against authority, part (litigant) or any other person who serves or is called to serve in a judicial proceeding, police investigation, administrative proceeding or arbitration.

Penalty — imprisonment, for a term of one up to four years, and a fine, plus the penalty that corresponds to the violence.

[...]

#### Procedural fraud

Article 347. To change artificially, during a civil or administrative proceeding, the state of a place, a thing or a person, in order to mislead the judge or the expert.

Penalty — imprisonment, from a term of three months up to two years, and a fine.

If the alteration is intended to take effect in a criminal proceeding, even if it is still not initiated, the penalties shall be doubled.

### *Example: France*

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*Article 433-3 of the Penal Code (France) (Modified by Act No. 2017-258 of 28 February 2017, Article 23)*

The threat to commit an offence against persons or property made to an elected official, a magistrate, a juror, a lawyer, a public or ministerial officer, a member of the Gendarmerie Nationale, an officer belonging to the National Police, to the Customs Offices, to the labour inspectorate, to the Penitentiary Administration or to any person vested of public authority, a professional or voluntary firefighter, a caretaker [sworn guard] of a building or a group of buildings, or an agent exercising on behalf of a lessor [landlord] the functions of guarding

or surveillance of buildings for residential use in application of Article L. 127-1 of the Construction and Housing Code, while on duty or because of his duty, if his position is known by the author, is punished by 3 years' imprisonment and a fine of €45,000.

The same penalties apply to the threat of committing a crime or an offense against persons or property made against an agent of an operator of a public passenger transport network, a teacher or any member of the staff working in schools or any other person responsible for a public service mission as well as a health professional, in the exercise of his functions, when the quality of the victim is apparent or known to the author.

The same penalties are applicable when threats are made to the spouse, ascendants, descendants in direct line of persons mentioned in the two first paragraphs, or to any persons living usually in their home, when those threats are motivated by the duties of these persons.

The penalty is brought to five years imprisonment and €75,000 fine when it is a death threat or a threat of attack against property which is dangerous for the persons.

Threats, violence or any other act of intimidation used to obtain from a person mentioned in the first or the second paragraph, in order that he accomplish, refrain from accomplishing any part of his duty, mission, mandate or facilitated by his duty, mission, mandate or that he abuse his actual or alleged authority in order to obtain from a public authority or a public administration some honour, employment, public contract or any other favourable decision, is punished by 10 years' imprisonment and a fine of €150,000.

*Article 434-5 of the Penal Code (France) (Ordinance No. 2000-916 of 19 September 2000, article 3, Official Journal of 22 September 2000 in force 1 January 2002)*

Any threat or any other intimidation made against any person with a view to persuading the victim of a felony or a misdemeanour not to file a complaint or to retract is punished by three years' imprisonment and a fine of €45,000.

*Article 434-8 of the Penal Code (France) (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 434-15 of the Penal Code (France) (Ordinance No. 2000-916 of 19 September 2000, article 3, Official Journal of 22 September 2000 in force 1 January 2002)*

The use of promises, offers, gifts, 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.

### *Example: Philippines*

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#### *Section 17 of the Witness Protection, Security and Benefit Act (Republic Act No. 6981) (Philippines) – Penalty for Harassment of Witness*

Any person who harasses a Witness and thereby hinders, delays, prevents or dissuades a Witness from:

- a. attending or testifying before any judicial or quasi-judicial body or investigating authority;
- b. reporting to a law enforcement officer or judge the commission or possible commission of an offense, or a violation of conditions or probation, parole, or release pending judicial proceedings;
- c. seeking the arrest of another person in connection with the offense;
- d. causing a criminal prosecution, or a proceeding for the revocation of a parole or probation; or
- e. performing and enjoying the rights and benefits under this Act or attempts to do so, shall be fined not more than three thousand pesos (P3,000.00) or suffer imprisonment of not less than six (6) months but not more than one (1) year, or both, and he shall also suffer the penalty of perpetual disqualification from holding public office in case of a public officer.

### **Article 7. Organizing, directing, aiding or otherwise enabling the commission of an offence**

1. Any person who intentionally organizes or directs the commission of an offence to which this [Act/Law/Chapter ...] applies commits an offence punishable by [*insert penalty appropriate for taking a leading role in such an offence*].
2. Any person who intentionally aids, abets, facilitates, counsels or procures the commission of an offence to which this [Act/Law/Chapter ...] applies commits an offence punishable by [*insert penalty appropriate for taking a supporting role in an offence*].

### **Explanatory notes**

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#### *Relevant provisions of the Organized Crime Convention: article 5, paragraph 1 (b)*

Article 7 of these Model Legislative Provisions, which reflects obligations under article 5, paragraph 1 (b), of the Organized Crime Convention, extends criminal liability to persons who lead or support the commission of an offence to which these Model Legislative Provisions apply. This includes, on the one hand, persons taking a leading role in such offences (that is, “intentionally organizing or directing”) (para. 1), and, on the other, persons taking a supporting role such as “aiding, abetting, facilitating, counselling or procuring” the commission of such offences (para. 2). Article 7, paragraph 1, of the Model Legislative Provisions is intended to ensure the liability of leaders of organized criminal groups who give orders relating to, but do not themselves engage in,

the commission of the actual offences.<sup>17</sup> “Aiding, abetting, facilitating counselling or procuring” under article 7, paragraph 2, covers secondary parties and accomplices who are not themselves principal offenders.<sup>18</sup>

Article 7 of the Model Legislative Provisions suggests that drafters may make a separate provision for persons “organizing and directing”, as distinct from “aiding, abetting, facilitating, counselling or procuring”, as these categories represent different levels of influence on and oversight over the planning and execution of such offences, thus different penalties should reflect the different levels of culpability of each category.

It is also important for drafters to consider whether provisions extending criminal liability to persons who organize, direct, aid, abet, facilitate, counsel or procure the commission of an offence already exist in general criminal laws. As with article 5 of the Convention, article 7 of the Model Legislative Provisions has to be read together with article 11, paragraph 1, of the Convention, which provides that offences under the Convention must be liable to sanctions that take into account the gravity of the offence.

### *Example: Canada*

*Section 467.13 of the Criminal Code [R.S.C., 1985, c. C-46] [Canada] – Instructing commission of offence for criminal organization*

(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.

#### Prosecution

(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.

[...]

<sup>17</sup> Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, para. 100.

<sup>18</sup> *Ibid.*

### *Example: Tonga*

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#### *Section 82 of the Counter Terrorism and Transnational Organised Crime Act 2013 (Tonga) – Aiding, abetting, counselling and procuring the commission of an offence*

(1) A person who intentionally aids, abets, counsels or procures the commission of an offence under this Act by another person is taken to have committed the offence and is punishable as if the offence had been committed by that person.

(2) A person does not commit an offence under subsection (1) if, before the offence was committed, the person –

- (a) terminated his involvement; and
- (b) took all reasonable steps to prevent the commission of the offence.

#### *Section 83 of the Counter Terrorism and Transnational Organised Crime Act 2013 (Tonga) – Incitement to commit an offence*

(1) A person who intentionally urges the commission of an offence under this Act commits an offence.

(2) A person commits an offence under subsection (1) even if committing the offence incited is impossible.

(3) Any person who commits an offence under subsection (1) shall be liable upon conviction to the same penalty as for the commission of the offence under this Act.

### *Example: Ireland*

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#### *Section 71A of the Criminal Justice Act 2006 (Ireland) – Offence of directing a criminal organisation*

(1) In this section –

(a) ‘directs’, in relation to activities, means—

- (i) controls or supervises the activities, or
- (ii) gives an order, instruction or guidance, or makes a request, with respect to the carrying on of the activities;

(b) references to activities include references to –

- (i) activities carried on outside the State, and
- (ii) activities that do not constitute an offence or offences.

(2) A person who directs, at any level of the organisation’s structure, the activities of a criminal organisation is guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.

(3) Any statement made orally, in writing or otherwise, or any conduct, by the defendant implying or leading to a reasonable inference that he or she was at a material time directing the activities of a criminal organisation shall, in proceedings for an offence under this section, be admissible as evidence that the defendant was doing such at that time.



(4) In proceedings under this section, the court or the jury, as the case may be, in determining whether an offence under this section has been committed, may, in addition to any other relevant evidence, also consider —

(a) any evidence of a pattern of behaviour on the part of the defendant consistent with his or her having directed the activities of the organisation concerned at the material time, and

(b) without limiting paragraph (a) or subsection (3) —

(i) whether the defendant has received any benefit from the organisation concerned, and

(ii) evidence as to the possession by the defendant of such articles or documents or other records as would give rise to a reasonable suspicion that such articles, documents or other records were in his or her possession or control for a purpose connected with directing the activities of the organisation concerned.

(5) Any document or other record emanating or purporting to emanate from the organisation concerned from which there can be inferred —

(a) either —

(i) the giving, at the time concerned, of an instruction, order or guidance by the defendant to any person involved in the organisation, or

(ii) the making, at that time, by the defendant of a request of a person so involved,

or

(b) the seeking, at that time, by a person so involved of assistance or guidance from the defendant,

shall, in proceedings for an offence under this section, be admissible as evidence that the defendant was directing the activities of the organisation concerned at the material time.

(6) In this section ‘document or other record’ has the same meaning as it has in section 71B

### *Example: Luxembourg*

#### *Article 324 ter of the Criminal Code (Luxembourg)*

(1) Any person who intentionally and knowingly takes part actively in the criminal organization mentioned in the preceding article shall be punished by imprisonment for a period from two to five years and a financial penalty of between €2,500 and €12,500, or by only one of these penalties, even if he or she does not intend to commit an offence under the aegis of that organization or to become involved in the offence as a perpetrator or accomplice.

(2) Any person who takes part in the planning or execution of any licit activity of that criminal organization while knowing that such participation supports the organization’s objectives, these being specified in the preceding article, shall be punished by imprisonment for a period from one to three years and a financial penalty of between €2,500 and €12,500, or by only one of these penalties.

(3) Any person who takes part in any decision-making process related to the criminal organization's activities while knowing that such participation supports the organization's objectives, these being specified in the preceding article, shall be punished by rigorous imprisonment for a period from five to ten years and a financial penalty of between €12,500 and €25,000 euros, or by only one of these penalties.

(4) Any leader of the criminal organization shall be punished by rigorous imprisonment for a period from ten to fifteen years and a financial penalty of between €25,000 and €50,000, or by only one of these penalties.

(5) Conduct of the type referred to in paragraphs 1 to 4 of this article that has taken place within the national territory shall be prosecuted under the legislation of Luxembourg, regardless of where the criminal organization is based or where it operates.

## Part B. Criminal liability

Part B of this chapter, comprising articles 8 and 9, sets out several general matters relating to criminal liability for the specific offences under articles 5, 6 and 7 of the Model Legislative Provisions. These matters are meant to complement general principles of criminal law and criminal liability under domestic law if they are not already addressed in the domestic law.

### Article 8. Proof of mens rea

For offences under this [Act/Law/Chapter ...], proof of a person's intention, knowledge, aim or purpose may be inferred from objective factual circumstances.

#### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 5, paragraph 2*

Proving the subjective mental elements (mens rea) of a criminal offence can be difficult, unless the person concerned confesses. Against this background, article 5, paragraph 2 (and also article 6, paragraph 2 (f)), of the Organized Crime Convention, as well as article 8 of these Model Legislative Provisions, makes it possible to use circumstantial evidence to establish the mens rea element of criminal offences in legal systems where principle of mens rea is not already established in domestic criminal law.

#### *Example: United Kingdom of Great Britain and Northern Ireland*

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*Section 8 of the Criminal Justice Act 1967 (United Kingdom) – Proof of criminal intent*

A court or jury, in determining whether a person has committed an offence,

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

## Article 9. Liability of legal persons

1. Legal persons [other than the State] may be criminally liable for offences to which this [Act/Law/Chapter ...] applies.
2. The liability of any legal person does not preclude liability of any natural person.
3. In this [Act/Law/Chapter ...]:
  - (a) “Legal persons” include [bodies corporate, companies, firms, associations, society, partnerships, local governments, trade unions, municipalities and public bodies].
  - (b) “Senior officer” means an employee, agent or officer of the legal person with duties of such responsibility that his or her conduct may fairly be assumed to represent the legal person’s policy [, including persons exercising de facto management or control].
4. A legal person is liable for an offence where a senior officer of the legal person [, or persons under the senior officer’s supervision or management,] acting on behalf or for the benefit of the legal person:
  - (a) Commits the offence;
  - (b) [Knowingly authorizes or permits the commission of the offence;] or
  - (c) [Knowing an offence is to be committed on behalf of or for the benefit of the legal person, or is wilfully blind [or reckless] to that fact, fails to take reasonable steps and to adopt and effectively implement an appropriate organizational and managerial model to prevent the commission of the offence].
5. A legal person found guilty of an offence to which this [Act/Law/Chapter ...] applies shall be subject to one or more of the following sanctions:
  - (a) A fine not exceeding:
    - (i) [Maximum amount]; or
    - (ii) [x] times the total value of the benefit obtained or damage caused that is reasonably attributed to the offence; or
    - (iii) [If the court cannot determine the total value of the benefit or damage,] [x] per cent of the annual income of the legal person during the 12-month period prior to the commission of the offence;
  - (b) Confiscation of proceeds of crime;
  - (c) Order the legal person to publish the judgment by the court including, as appropriate, the particulars of the offence and the nature of any penalty imposed;
  - (d) Order the legal person to carry out stated activities or establish or carry out a stated project for the public benefit;

- (e) Order that the legal person be placed under judicial supervision for a maximum period of [x] years;
- (f) Subject the legal person to a review by an independent monitor appointed by the court for the purpose of reporting to the court on the legal person's efforts to implement a culture of lawfulness;
- (g) Prohibit the exercise, whether directly or indirectly, of one or more professional activities [permanently] [for a period not exceeding [x] years];
- (h) Order the [temporary] [permanent] closure of the establishment, or one or more of the establishments, of the legal person used to commit the offences in question;
- (i) Order that the legal person be [temporarily] [permanently] disqualified from public bidding, from entitlement to public benefits or aid, [and/or] from participation in public procurement;
- (j) Disqualify the legal person [temporarily] [permanently] from the practice of other commercial activities [and/or] from the creation of another legal person;
- (k) If the activity of the legal person involved entirely or predominantly the carrying out of criminal offences or if the legal person was created to commit an offence to which this [Act/Law/Chapter ...] applies, order that the legal person be dissolved; or
- (l) Further orders as the court considers just.

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 10*

Those involved in transnational organized crime may seek to hide behind the cover of legal persons, such as companies, charities or other associations. This can present serious challenges to criminal justice efforts to counter organized crime. Legal persons that were not initially established for criminal purposes, including, inter alia, online intermediaries, may also become involved in organized crime if they intentionally or knowingly participate in an organized criminal group, conspire to commit a serious crime involving an organized criminal group, or aid or abet the commission of a serious crime involving an organized criminal group.

Liability of legal persons for offences covered by the Organized Crime Convention is mandatory under article 10 of the Convention. The Convention recognizes that States have different approaches to the issue of liability of legal persons. It provides that States shall adopt such measures as may be necessary, consistent with their legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the commission of the offences established under articles 5, 6, 8 and 23 of the Convention. As provided for in article 10, paragraph 2, of the Convention, such liability may be in the form of criminal, civil or administrative liability. In other words, criminal liability of legal persons as set out in article 9 of these Model Legislative Provisions is not a mandatory requirement.

Article 9, paragraph 2, of these Model Legislative Provisions, which reflects article 10, paragraph 3, of the Convention, obliges States parties to ensure that the liability of legal persons is without prejudice to the criminal liability of the natural persons who have committed the offences.

Article 9, paragraph 3, of the Model Legislative Provisions defines the terms “legal person” and “senior officer”. The list of legal persons in paragraph 3 (a) [also referred to as juristic or juridical persons in some jurisdictions] is not exhaustive. The forms of legal personality and their status vary considerably among jurisdictions and careful consideration should be given to the range of entities that may be subject to liability. Article 9, paragraph 3 (b), defines the term “senior officer”. Drafters should ensure that this definition is broad enough to focus on the person’s role within the organization, not just on their title or official position.

Article 9, paragraph 4, sets out the circumstances in which a legal person becomes liable for offences associated with senior officers of that legal person, reflecting the so-called attribution or identification doctrine of liability of legal persons that can be found in a range of jurisdictions. It states three different ways in which the legal person can be liable for the conduct of senior officers. In addition to circumstances in which the senior officer committed the offence (subpara. (a)), it includes circumstances in which the senior officer knowingly authorized or permitted the commission of the offence (subpara. (b)). While these two forms of liability require some active steps on the part of the senior officer, subparagraph (c) imposes liability where there has been a failure of supervision. Such provisions introduce a measure of organizational fault by not focusing purely on the acts of senior personnel, but also on their failure to supervise and to prevent the commission of offences.

Article 9, paragraph 5, sets out a non-exhaustive list of sanctions that may be imposed, individually or in combination, against legal persons found guilty of an offence. The types of sanctions listed in subparagraphs (a) to (l) range from monetary penalties, confiscation of proceeds of crime, adverse publicity, probation-style sanctions, and disqualifications, to the disestablishment of the legal person. This provision reflects article 10, paragraph 4, of the Convention, which provides that States parties shall, in particular, ensure that legal persons are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. This obligation is in addition to that set out in article 11, paragraph 1, of the Convention, which applies to both legal and natural persons, to ensure that offences established in accordance with articles 5, 6, 8 and 23 of the Convention are liable to sanctions that take into account the gravity of that offence.

### *Example: Singapore*

#### *Section 76 of the Organised Crime Act 2015 [Singapore] – Offences by bodies corporate etc.*

(1) Where an offence under this Act committed by a body corporate is proved —

(a) to have been committed with the consent or connivance of an officer of the body corporate; or

(b) to be attributable to any neglect on his or her part,

the officer as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director of the body corporate.

(3) Where an offence under this Act committed by a partnership is proved —

(a) to have been committed with the consent or connivance of a partner; or

(b) to be attributable to any neglect on his or her part,

the partner as well as the partnership shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(4) Where an offence under this Act committed by an unincorporated association (other than a partnership) is proved —

(a) to have been committed with the consent or connivance of an officer of the unincorporated association or a member of its governing body; or

(b) to be attributable to any neglect on the part of such an officer or member,

the officer or member as well as the unincorporated association shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(5) In this section —

“body corporate” includes a limited liability partnership which has the same meaning as in section 2(1) of the *Limited Liability Partnerships Act* (Cap. 163A);

“officer” —

(a) in relation to a body corporate, means any director, partner, member of the committee of management, chief executive, manager, secretary or other similar officer of the body corporate and includes any person purporting to act in any such capacity; or

(b) in relation to an unincorporated association (other than a partnership), means the president, the secretary, or any member of the committee of the unincorporated association, or any person holding a position analogous to that of president, secretary or member of such a committee and includes any person purporting to act in any such capacity;

“partner” includes a person purporting to act as a partner.

(6) The Minister may make regulations to provide for the application of any provision of this section, with such modifications as the Minister considers appropriate, to a body corporate or an unincorporated association formed or recognised under the law of a territory outside Singapore.

### *Example: France*

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#### *Article 121-2 of the Penal Code (France)*

Legal 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.

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 any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

### *Example: Italy*

*Article 5 of the Regulation of the administrative liability of legal persons, companies and associations, including those without legal personality (Legislative Decree No. 231/2001 of 8 June 2001) (Italy) – Liability of the agency*

1. The entity is liable for crimes committed in its interest or to its advantage:
  - a) by persons who have functions of representation, administration or management of the entity or one of its organizational units with financial and functional autonomy as well as persons who exercise, even de facto, the management and control thereof
  - b) by persons subject to the management or supervision of one of the persons referred to in lit. a).
2. The entity is not liable if the persons indicated in paragraph 1 have acted in their own exclusive interest or that of third parties.

### *Example: Switzerland*

*Article 102 of the Swiss Criminal Code of 21 December 1937 (Switzerland) – Liability of the company – Liability*

- <sup>1</sup> If a felony or misdemeanour is committed in an undertaking in the exercise of commercial activities in accordance with the objects of the undertaking and if it is not possible to attribute this act to any specific natural person due to the inadequate organisation of the undertaking, then the felony or misdemeanour shall be attributed to the undertaking. In such cases, the undertaking shall be liable to a fine not exceeding 5 million francs.
- <sup>2</sup> If the offence committed falls under articles 260 ter, 260 quinquies, 305 bis, 322 ter, 322 quinquies or 322 septies paragraph 1 or 322 octies, the undertaking shall be penalised irrespective of the criminal liability of any natural persons, provided the undertaking is responsible for failing to take all the reasonable organisational measures that were required in order to prevent such an offence.
- <sup>3</sup> The court shall assess the fine in particular in accordance with the seriousness of the offence, the seriousness of the organisational inadequacies and of the loss or damage caused, and based on the economic ability of the undertaking to pay the fine.
- <sup>4</sup> Undertakings within the meaning of this title are:
  - a. any legal entity under private law;
  - b. any legal entity under public law with exception of local authorities;
  - c. companies;
  - d. sole proprietorships.

*Example: Tuvalu**Section 85 of the Counter Terrorism and Transnational Organized Crime Act 2009 (Tuvalu) – Liability of a company*

- (1) This Act applies to a company in the same way as it applies to an individual and a company may be found guilty of any of the offences set out in this Act, in addition to the liability of any person for the same offence.
- (2) For an offence under this Act, the conduct or state of mind of an employee, agent or officer of a company is taken to be attributed to the company if that person is acting:
  - (a) within the scope of the person's employment; or
  - (b) within the scope of the person's actual or apparent authority; or
  - (c) with the consent or agreement (express or implied) of a director, servant or agent of the company, and giving that consent is within the actual or apparent authority of the director, servant or agent.
- (3) A reference to this section to the state of mind of a person includes the person's knowledge, intention, opinion, belief or purpose, and the person's reasons for that intention, opinion, belief or purpose.

*Example: Romania**Article 135 of the Criminal Code (Law No. 286/2009) (Romania) – Conditions for the criminal liability of legal entities*

- (1) Legal entities, except for state and public authorities, shall be held criminally liable for offenses perpetrated in the performance of the object of activity of legal entities or in their interest or behalf.
- (2) Public institutions shall not be held criminally liable for offenses perpetrated in the performance of activities that cannot be the object of the private domain.
- (3) Criminal liability of legal entities does not exclude the criminal liability of the individual participating in the perpetration of the same act.

*Article 136 of the Criminal Code (Law No. 286/2009) (Romania) – Penalties applicable to legal entities*

- (1) The penalties applicable to legal entities include main penalties and complementary penalties.
- (2) The main penalty is represented by fines.
- (3) The complementary penalties are:
  - (a) dissolution of legal entities;
  - (b) suspension of the activity or of one of the activities performed by the legal entity, for a term between three months and three years;



- (c) closure of working points of the legal entity for a term between three months and three years;
- (d) prohibition to participate in public procurement procedures for a term between one and three years;
- (e) placement under judicial supervision;
- (f) display or publication of the conviction sentence.



## CHAPTER III.

# SPECIAL INVESTIGATIVE TECHNIQUES, LAW ENFORCEMENT COOPERATION AND JOINT INVESTIGATIONS

The present chapter sets out measures to facilitate the investigation of organized crime offences required to be established pursuant to the Organized Crime Convention. It addresses three separate but overlapping issues that are covered in articles 19, 20 and 27 of the Convention: special investigative techniques (that is, techniques for gathering information in such a way as not to alert the targeted persons, applied by law enforcement officials and judicial authorities for the purpose of detecting and investigating crimes and suspects), international law enforcement cooperation and joint investigations.

There are many different types of special investigative techniques. Three types are specifically noted in article 20 of the Organized Crime Convention: controlled deliveries, undercover operations (involving the use of assumed identities) and electronic surveillance. The interpretative note on article 20 of the Convention contained in the *Travaux Préparatoires* confirms that article 20, paragraph 1, does not imply an obligation on States parties to make provisions for the use of all the forms of special investigative techniques noted.<sup>19</sup> The Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime explains that:

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 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.

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<sup>19</sup> Interpretative note on article 20 (see A/55/383/Add.1, para. 44), cited in *Travaux Préparatoires*, p. 206.

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.<sup>20</sup>

The present chapter contains various discrete special investigative techniques, each of which has different levels of risk and different implications. Some of these techniques can be particularly intrusive and thus require a careful balancing of a suspect's right to privacy with the need to investigate serious criminality. Special investigative techniques will typically require a legislative basis, without which they may not be authorized by law. Special investigative techniques also raise specific concerns about privacy and human rights. Provisions on special investigative techniques should fully take into account the rights of the suspect and third parties. The decisions of international human rights bodies and courts on the permissibility of special investigative techniques and the parameters of these measures should be taken into consideration when drafting relevant provisions.

As a result of these concerns about privacy and human rights, most jurisdictions require a number of strict safeguards against abuse, including the requirement that the offence be of a serious nature, that the use of the technique be vital to the case and that essential evidence may not be secured by less intrusive means. The model legislative provisions for special investigative techniques in this chapter include a requirement that the authorizing authority must be satisfied on reasonable grounds that the nature and extent of the criminal activity justify the use of the special investigative technique. This requires the authorizing authority to consider the necessity and proportionality of the undercover investigation in assessing the application for use of the technique.

Oversight of the use of special investigative techniques by judicial or other independent authorities is common practice in most jurisdictions and is required under international human rights law. The appropriate safeguards for special investigative techniques may vary depending on the technique in question. It may be appropriate, for example, for a controlled delivery to be authorized by senior law enforcement officials, whereas electronic surveillance usually requires judicial authorization and supervision. Accordingly, each type of special investigative technique is addressed in a separate article in this chapter so that an appropriate regime can be established for each type.

In general, for each type of special investigative technique, drafters will need to consider the following issues:

- The mechanism for approving the technique
- The threshold for the granting of approval

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<sup>20</sup> Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, paras. 443–445.

- Conditions on use of the technique
- The extent to which officials using special investigative techniques are protected from civil and criminal liability
- The use of evidence obtained through the technique
- The extent to which the information obtained can be disseminated
- Supervision, review and oversight mechanisms
- International cooperation
- The possible impact on third parties

Lastly, the provisions set forth in this chapter are intended to operate in addition to existing laws and regulations concerning investigative powers of law enforcement and other agencies. It is thus vital for national drafters to consider the operation of these provisions alongside other national laws, including laws relating to police powers generally, criminal procedure law, privacy laws and laws on other forms of international cooperation, in particular mutual legal assistance and extradition.

### Article 10. Controlled delivery

1. For the purpose of this article, “controlled delivery” means the technique of allowing illicit or suspect consignments to pass into, within, through or out of the territory of [*insert name of State*] with the knowledge and under the supervision of [*insert competent authority*], with a view to the investigation and the identification of persons involved in offences to which this [Act/Law/Chapter ...] applies.
2. A controlled delivery is only lawful if it has been authorized in accordance with this article.
3. A controlled delivery may be authorized by [*insert designated position holder or office, such as head and deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge*] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].
4. An application to conduct a controlled delivery can be made by [*insert means by which the application is to be submitted*]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application to conduct a controlled delivery must state:
  - (a) All available information regarding the consignment and its destination;
  - (b) Whether the matter has been the subject of a previous application; and
  - (c) [*Insert additional requirements as appropriate/required*].

6. After considering the application, the authorizing authority may:
  - (a) Authorize the controlled delivery unconditionally;
  - (b) Authorize the controlled delivery subject to conditions, including as to the type and extent of substitution of the consignment; or
  - (c) Refuse the application to conduct the controlled delivery.
7. The authorizing authority must not approve the application unless satisfied, on reasonable grounds, that:
  - (a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed;
  - (b) The nature and extent of the suspected criminal activity are such as to justify the conducting of the controlled delivery;
  - (c) Any unlawful activity will be limited to the minimum necessary to achieve the objectives of the controlled delivery;
  - (d) The controlled delivery will be conducted in a way that ensures that, to the greatest extent possible, any illicit goods involved in the controlled delivery will be under the control of a law enforcement official at the end of the controlled delivery;
  - (e) The controlled delivery will not be conducted in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and
  - (f) Any conduct involved in the controlled delivery will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
8. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
9. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
10. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.
11. The authorizing authority shall report annually to [Parliament/a parliamentary committee/the public] on the number of applications received under this article, and the respective numbers of authorizations that were approved, refused, revoked and cancelled under this article.

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 20 and article 2, subparagraph (i)*

In accordance with article 20, paragraph 1, of the Organized Crime Convention, States parties shall, if permitted by the basic principles of their national legal systems, allow for the appropriate use of controlled delivery for the purpose of combating organized crime.

The definition of “controlled delivery” used in the article 10, paragraph 1, of these Model Legislative Provisions is based on the definition of the same term in article 2, subparagraph (i), of the Convention. Controlled delivery can be both passive (in the sense of not stopping a delivery) but also active (in the sense of actively facilitating the onward movement of the delivery). For this reason, in defining this term, States may find it useful to include a reference to “facilitating” the onward movement of illicit or suspect consignments to allow for these more active forms of controlled delivery.

Article 10, paragraphs 2, 3, 6 and 7, of these Model Legislative Provisions set out the requirements for the authorization of a controlled delivery.

Article 10, paragraph 3, specifies the agency or official that can authorize a controlled delivery. Different jurisdictions require different levels of authorization, depending on the intrusiveness and type of the special investigative technique, which could involve a law enforcement agency, prosecutors or judges. Some States may wish to establish a higher level of oversight, for example, by the judiciary. This must be balanced with the need to ensure that controlled deliveries can be authorized swiftly and at any time of the day or night. A balance could be struck by permitting the initial authorization to be given by the senior law enforcement official (enabling a quick response), which would then need to be reviewed and extended by a judicial body after a short period of time (such as seven days).

Article 10, paragraphs 4 and 5, state certain requirements for applications for authorization of a controlled delivery. Paragraph 5 specifies the minimum content required to apply for authorization to conduct such a delivery. The depth and volume of information needed will vary among jurisdictions but should involve, at a minimum, a summary of the investigated facts, the manner and type of the investigation, the name, identity and location of the investigated person or persons, and the anticipated itinerary and destination of the consignment from the point of substitution or intervention. Further requirements may also be added as required by constitutional and legislative frameworks or as deemed appropriate by legislators.

Article 10, paragraph 6, sets out the content of the decision made by the authorizing authority. When contemplating the use of controlled deliveries, it is important to consider the possibility of substituting illicit consignments with licit or fake material in order to prevent the risk of losing illicit consignments in the course of delivery.

Article 10, paragraph 7, sets out a number of safeguards and conditions that must be considered when authorizing a controlled delivery. If the controlled delivery involves multiple jurisdictions or foreign law enforcement officials, the authorizing authority should, in addition, ensure that arrangements for international cooperation and coordination are adequate and meet these minimum requirements.

It is important that special investigative techniques such as controlled deliveries be subject to a certain level of scrutiny. Article 10, paragraph 11, provides that the authorizing authority be required to report annually to parliament, a relevant parliamentary committee or another equivalent entity on the number of applications received and the number of authorizations approved, refused, revoked and cancelled. Some legal systems require additional scrutiny, for instance through

reporting and review by an independent oversight body. If this is the case, it will likely be necessary to have two levels of review: the first, which involves a full review, including access to sensitive operational information, by an independent review body with a specific legislative mandate; and the second, which is a public review, for example, by parliament, that does not disclose operational information such as methods and sources.

### *Example: Argentina*

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*Articles 15 and 16 of Law No. 27319 Investigation, Prevention and Combat of Complex Crimes – Tools. Powers. (Argentina) – Controlled delivery*

ARTICLE 15. — The judge, ex officio or at the request of the Public Prosecutor's Office, in a unilateral hearing, may authorize the postponement of the detention of persons or the seizure of property when he considers that the immediate execution of said measures may compromise the success of the investigation.

The judge may even suspend the interception in Argentine territory of an illegal consignment and allow them to enter, circulate or leave the national territory, without interference from the competent authority and under its control and surveillance, in order to identify the participants, gather information and elements of conviction necessary for the investigation as long as it is certain that it will be monitored by the judicial authorities of the destination country. This measure must be ordered by informed resolution.

ARTICLE 16. — The judge may order at any time, the suspension of the controlled delivery and order the arrest of the participants and the seizure of the elements related to the crime, if the proceedings endanger the life or integrity of the persons or the Subsequent apprehension of the participants in the crime without prejudice to the fact that, if that danger arises during the proceedings, the public officials in charge of controlled delivery apply the detention standards established for flagrante delicto cases.

### *Example: Australia*

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*Section 15 GD of the Crimes Act 1914 (Commonwealth) (Australia) – Meaning of controlled operation and major controlled operation*

(1) A *controlled operation* is an operation that:

- (a) involves the participation of law enforcement officers; and
- (b) is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence or a serious State offence that has a federal aspect; and
- (c) may involve a law enforcement officer or other person in conduct that would, apart from section 15HA, constitute a Commonwealth offence or an offence against a law of a State or Territory.

Note: Section 15GN specifies when a controlled operation begins and ends.



- (2) A major controlled operation is a controlled operation that is likely to:
- (a) involve the infiltration of an organised criminal group by one or more undercover law enforcement officers for a period of more than 7 days; or
  - (b) continue for more than 3 months; or
  - (c) be directed against suspected criminal activity that includes a threat to human life.

Note: Section 15GN specifies when a controlled operation begins and ends.

*Section 15 GF of the Crimes Act 1914 [Commonwealth] (Australia) – Meaning of **authorising officer** etc.*

- (1) Any of the following is an *authorising officer* for a controlled operation:
- (a) if the operation is a major controlled operation and the investigation of the offence to which the controlled operation relates is within the functions of the Australian Federal Police— the Commissioner or a Deputy Commissioner;
  - (b) if the operation is not a major controlled operation, but the investigation of the offence to which the controlled operation relates is within the functions of the Australian Federal Police— any AFP authorising officer;
  - (c) if the investigation of the offence to which the controlled operation relates is within the functions of the ACC [Australian Crime Commission]—any ACC authorising officer;
  - (d) if the controlled operation relates to the investigation of a corruption issue (within the meaning of the Law Enforcement Integrity Commissioner Act 2006)—any ACLEI [Australian Commission for Law Enforcement Integrity] authorising officer.
- (2) The following are *AFP authorising officers*:
- (a) the Commissioner;
  - (b) a Deputy Commissioner;
  - (c) a senior executive AFP employee who is a member of the Australian Federal Police and who is authorised in writing by the Commissioner for the purposes of this paragraph.
- (3) The following are *ACC authorising officers*:
- (a) the Chief Executive Officer of the ACC;
  - (b) a member of the staff of the ACC who is an SES employee and who is authorised in writing by the Chief Executive Officer of the ACC for the purposes of this paragraph.
- (4) The following are *ACLEI authorising officers*:
- (a) the Integrity Commissioner;
  - (b) the Assistant Integrity Commissioner;
  - (c) a member of the staff of the ACLEI who is an SES employee and is authorised in writing by the Integrity Commissioner for the purposes of this paragraph.

## Article 11. Undercover investigation

1. For the purposes of this article, “undercover investigation” means an investigation that makes use of one or more law enforcement officials [or other persons authorized by *[insert law enforcement agency]*] who, for the purpose of investigating an offence to which this [Act/Law/Chapter ...] applies, neither disclose nor reveal their official position or their mandate.
2. An undercover investigation is only lawful if it has been authorized in accordance with this article.
3. Undercover investigations can be authorized by *[insert designated position holder or office, such as head and deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge]* (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].
4. An application to conduct an undercover investigation can be made by *[insert means by which the application is to be submitted]*. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application to conduct an undercover investigation must state:
  - (a) The duration for which the authorization is sought;
  - (b) Whether the matter has been the subject of a previous application; and
  - (c) *[Insert additional requirements as appropriate/required]*.
6. After considering the application, the authorizing authority may:
  - (a) Authorize the undercover investigation unconditionally;
  - (b) Authorize the undercover investigation subject to conditions; or
  - (c) Refuse the application to conduct the undercover investigation.
7. The authorizing authority must not approve the application unless satisfied, on reasonable grounds, that:
  - (a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed;
  - (b) The nature and extent of the suspected criminal activity are such as to justify an undercover investigation;
  - (c) Any unlawful activity will be limited to the minimum necessary to achieve the objectives of the undercover investigation;
  - (d) The undercover investigation will not be conducted in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and

(e) Any conduct involved in the undercover investigation will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.

8. The authorization must specify the time period for which the undercover investigation is authorized, which shall in any case not be longer than [*insert appropriate time period*]. The authorization may be renewed on application.

9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.

10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.

11. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be criminally or civilly liable for that conduct.

12. The authorizing authority shall report annually to [Parliament/a parliamentary committee/the public] on the number of applications received under this article, and the respective numbers of authorizations that were approved, refused, revoked and cancelled under this article.

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 20*

Under article 20, paragraph 1, of the Organized Crime Convention, States parties are required, if permitted by the basic principles of their national legal systems and where appropriate, to allow for the use of undercover operations in their territory for the purpose of combating organized crime.

Article 11, paragraph 1, of these Model Legislative Provisions defines the term “undercover investigations” for the purposes of this provision.

Article 11, paragraphs 1 and 11, include optional references to “another person authorized by the relevant law enforcement agency” to enable persons other than law enforcement officials to participate in or assist in undercover investigations. Whether this inclusion is permissible under domestic law will differ among jurisdictions. Many jurisdictions exclude or expressly prohibit the use of civilian informants in undercover investigations owing to the dangers involved.

Article 11, paragraphs 2, 3, 6, 7 and 8, of these Model Legislative Provisions set out the requirements for the authorization of an undercover investigation.

Article 11, paragraph 3, specifies the agency or official that can authorize an undercover investigation. Different jurisdictions require different levels of authorization, depending on the intrusiveness and type of the special investigative technique, which could involve a law enforcement agency, prosecutors or judges. Some States may wish to establish a higher level of oversight, for example, by the judiciary. This must be balanced with the need to ensure that undercover investigations can be authorized swiftly and at any time of the day or night. A balance could be struck by permitting the initial authorization to be given by the senior law enforcement official (enabling a quick response), which

would then need to be reviewed and extended by a judicial body after a short period of time (such as seven days).

Article 11, paragraphs 4 and 5, state certain requirements for applications for authorization of an undercover investigation. Paragraph 5 specifies the minimum content required to apply for such authorization. The depth and volume of the information needed to grant an authorization will vary between jurisdictions but should involve, at a minimum, a summary of the investigated facts, the manner and type of the investigation, and the name, identity and location of the investigated person or persons. Further requirements may also be added as required by constitutional and legislative frameworks or as deemed appropriate by legislators.

Article 11, paragraph 6, sets out the content of the decision made by the authorizing authority. Article 11, paragraph 7, sets out a number of safeguards and conditions that must be considered when authorizing an undercover investigation.

It is important that special investigative techniques such as undercover investigations be subject to a certain level of scrutiny. Article 11, paragraph 12, provides that the authorizing authority be required to report annually to parliament, a relevant parliamentary committee or another equivalent entity on the number of applications received and the number of authorizations approved, refused, revoked and cancelled. Some legal systems require additional scrutiny through, for instance, reporting and review by an independent oversight body. If this is the case, it will likely be necessary to have two levels of review: the first, which involves a full review, including access to sensitive operational information, by an independent review body with a specific legislative mandate; and the second, which is a public review, for example, by parliament, that does not disclose operational information such as methods and sources.

In addition to the process for applying for and authorizing undercover investigations set out here, it is vital for drafters to consider the issue of whether evidence obtained through undercover investigations can be adduced in court, and, if so, whether the undercover investigator must reveal his or her real identity or whether the undercover investigator may testify by special means in order to protect his or her real identity.

### *Example: Austria*

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#### *Section 129 of the Code of Criminal Procedure (Austria) – Definitions*

‘undercover investigation’ means the use of officials of the criminal investigation authority or of other persons commissioned by the criminal investigation authority who neither disclose nor reveal their official position or their mandate

#### *Section 131 of the Code of Criminal Procedure (Austria) – Undercover investigations*

(1) Undercover investigations are permissible if they appear to be necessary to make inquiries about a criminal offence.

(2) Systematic undercover investigations conducted over a longer period of time are only permissible if the inquiry about a criminal offence committed intentionally and punishable by imprisonment for more than one year or the prevention of a criminal offence planned as part of a criminal association, terrorist association, or criminal organization (§§ 278 to 278b Criminal Code [Strafgesetzbuch [StGB]]) would otherwise be significantly obstructed. If this is vital for the inquiry or the prevention, it is

also permissible pursuant to § 54a of the National Security Police Act [Sicherheitspolizeigesetz (SPG)] to produce legal documents that conceal the identity of an entity of the criminal investigation authority and use these documents in legal transactions for the purpose of meeting the objectives of the investigation.

(3) Undercover investigators must be led and continuously monitored by the criminal investigation authority. The use of undercover investigators and the circumstances of their investigation as well as information and notifications received from them must be recorded in a report or an official note (§ 95) if they may be of importance for the inquiry.

(4) Dwellings and other places protected by domiciliary rights may only be entered by undercover investigators with the consent of the owner. Consent must not be obtained by pretending that an authority to enter exists.

### *Example: Germany*

#### *Section 110a of the Code of Criminal Procedure (Germany) – Undercover Investigators*

(1) Undercover investigators may be used to clear up criminal offences where there are sufficient factual indications showing that a criminal offence of substantial significance has been committed

1. in the sphere of illegal trade in drugs or weapons, of counterfeiting money or official stamps;
2. in the sphere of national security (sections 74a and 120 of the Courts Constitution Act);
3. on a commercial or habitual basis; or
4. by a member of a gang or in some other organized way.

Undercover investigators may also be used to clear up felonies where certain facts substantiate the risk of a repetition. Their use shall only be admissible where other means of clearing up the serious criminal offence would offer no prospect of success or be much more difficult. Undercover investigators may also be used to clear up felonies where the special significance of the offence makes the operation necessary and other measures offer no prospect of success.

(2) Undercover investigators shall be officials in the police force who carry out investigations using a changed and lasting identity (legend) which is conferred on them. They may take part in legal transactions using their legend.

(3) Where it is indispensable for building up or maintaining a legend, relevant documents may be drawn up, altered and used.

#### *Section 110b of the Code of Criminal Procedure (Germany) – Consent of the Public Prosecution Office; Consent of the Court; Non-Disclosure of Identity*

(1) The use of an undercover investigator shall be admissible only after the consent of the public prosecution office has been obtained. In exigent circumstances and if the decision of the public prosecution office cannot be obtained in time, such decision shall be obtained without delay; the measure shall be terminated if the public

prosecution office does not give its consent within three working days. Consent shall be given in writing and for a specified period. Extensions shall be admissible providing the conditions for the use of undercover investigators continue to apply.

(2) Use of undercover investigators

1. concerning a specific accused, or
2. which involve the undercover investigator entering private premises which are not generally accessible

shall require the consent of the court. In exigent circumstances consent of the public prosecution office shall suffice. Where the decision of the public prosecution office cannot be obtained in time, such decision shall be obtained without delay. The measure shall be terminated if the court does not give its consent within three working days. Subsection (1), third and fourth sentences, shall apply *mutatis mutandis*.

(3) The identity of the undercover investigator may be kept secret even after the operation has ended. The public prosecution office and the court responsible for the decision whether to consent to the use of the undercover investigator may require the identity to be revealed to them. In all other cases, maintaining the secrecy of the identity in criminal proceedings shall be admissible pursuant to Section 96, particularly if there is reason to fear that revealing the identity would endanger the life, limb or liberty of the undercover investigator or of another person, or would jeopardize the continued use of the undercover investigator.

*Example: Argentina*

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*Articles 3 to 4 of Law No. 27319 Investigation, Prevention and Combat of Complex Crimes – Tools. Powers. (Argentina)*

Undercover agent

ARTICLE 3 – An undercover agent is any highly qualified official of the authorized security forces who gives his consent and conceals his identity, infiltrates or introduces himself into criminal organizations or criminal associations, in order to identify or detain the authors, participants or accessories, to prevent the consummation of a crime, or to gather information and evidence necessary for the investigation, with judicial authorization.

ARTICLE 4 – Once the action is ordered by the judge, *ex officio* or at the request of the Public Prosecutor’s Office, its appointment and the necessary instrumentation for its protection will be in charge of the Ministry of Security, with judicial control. The Ministry of National Security will be in charge of the selection and training of the personnel destined to fulfil such functions. Designated members of the security or police forces may not have a criminal record.

## Article 12. Assumed identity

1. For the purpose of this article, “assumed identity” means a false or altered identity created, acquired and/or used by law enforcement officials [or other persons authorized by *[insert law enforcement agency or judicial authority]*] to, for the purpose of investigating an

offence to which this [Act/Law/Chapter ...] applies, establish contact and build a relationship of trust with another person or infiltrate a criminal network.

2. The creation, acquisition and use of an assumed identity is only lawful if it has been authorized in accordance with this article.

3. The creation, acquisition and use of an assumed identity may be authorized by [*insert designated position holder or office, such as head and deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge*] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].

4. An application to create, acquire and use an assumed identity can be made by [*insert means by which application is to be submitted*]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.

5. An application to create, acquire and use an assumed identity must state:

- (a) Details of the proposed assumed identity;
- (b) The duration for which the authorization is sought;
- (c) Whether the matter has been the subject of a previous application; and
- (d) [*Insert additional requirements as appropriate/required*].

6. After considering the application, the authorizing authority may:

(a) Authorize the creation, acquisition and use of an assumed identity unconditionally;

(b) Authorize the creation, acquisition and use of an assumed identity subject to conditions; or

(c) Refuse the application to create, acquire and use an assumed identity.

7. The authorizing authority must not approve the application unless satisfied on reasonable grounds that:

(a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed;

(b) The nature and extent of the suspected criminal activity are such as to justify the use of an assumed identity;

(c) The assumed identity will not be used in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and

(d) Any conduct involved in the use of the assumed identity will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.

8. The authorization must specify the time period for which the creation, acquisition and use of the assumed identity is authorized, which shall in any case not be longer than [*insert appropriate time period*]. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A person acting under an authorization to create, acquire or use an assumed identity may request assistance from relevant officials or agencies to obtain evidence of an assumed identity, including identity and other supporting documents, that has been approved under this article. Notwithstanding any other laws, an official or agency may create or provide evidence of an assumed identity in response to a request under this article.
12. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.
13. The authorizing authority shall report annually to [Parliament/a parliamentary committee/the public] on the number of applications received under this article, and the respective numbers of authorizations that were approved, refused, revoked and cancelled under this article.

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 20, paragraph 1*

Under article 20, paragraph 1, of the Organized Crime Convention, States parties are required, if permitted by the basic principles of their national legal systems and where appropriate, to allow for the use of special investigative techniques in their territory for the purpose of combating organized crime. In addition to the techniques expressly mentioned, this may also include the use of assumed identities.

Article 12, paragraph 1, of these Model Legislative Provisions defines the term “assumed identity” for the purpose of this provision. In some jurisdictions, the term “altered identity” or “legend” is used in this context.

Article 12, paragraph 1, includes an optional reference to “another person authorized by the relevant law enforcement agency” to enable persons other than law enforcement officials to acquire or use an assumed identity. Whether this inclusion is permissible under domestic law will differ among jurisdictions. Many jurisdictions exclude or expressly prohibit the use of civilian informants owing to the dangers involved.

Article 12, paragraphs 2, 3, 6, 7 and 8, of these Model Legislative Provisions set out the requirements to authorize the creation, acquisition or use of an assumed identity.

Article 12, paragraph 3, specifies the agency or official that can authorize an assumed identity. Different jurisdictions require different levels of authorization depending on the intrusiveness



and type of the special investigative technique, which could involve a law enforcement agency, prosecutors or judges. Some States may wish to establish stronger oversight, for example, by the judiciary.

Article 12, paragraphs 4 and 5, state certain requirements for applications for authorization to create, acquire and use an assumed identity. Paragraph 5 specifies the minimum content required to apply for such authorization. Further requirements may also be added as required by constitutional and legislative frameworks or as deemed appropriate by legislators.

Article 12, paragraph 6, sets out the content of the decision made by the authorizing authority. Article 12, paragraph 7, sets out a number of safeguards and conditions that must be considered when authorizing an assumed identity.

It is important that the creation and use of assumed identities be subject to a certain level of scrutiny. Article 12, paragraph 13, recommends that the authorizing authority be required to report annually to parliament, a relevant parliamentary committee or another equivalent entity on the number of applications received and the number of authorizations approved, refused, revoked and cancelled. Some legal systems require additional scrutiny through, for instance, reporting and review by an independent oversight body. If this is the case, it will likely be necessary to have two levels of review: the first, which involves a full review, including access to sensitive operational information by an independent review body with a specific legislative mandate; and the second, which is a public review by, for example, parliament, that does not disclose operational information such as methods and sources.

In addition to the matters addressed in article 12, legislators should also give consideration to how law enforcement officials or other authorized persons using an assumed identity can provide testimony in criminal trials. In particular, the procedure regarding the giving of testimony should ensure that testimony can be given in a manner which provides appropriate protection to the identity of the official or other authorized person and which is not prejudicial to the conduct of any ongoing investigations, while still respecting the rights of the defence and, in particular, the right to a fair trial.

### *Example: Switzerland*

#### *Articles 285a to 297 of the Criminal Procedure Code (Switzerland) – Section 5: Undercover Investigations*

##### Art. 285a Definition

Undercover investigation occurs when members of the police or people who are temporarily employed for police tasks, using a false identity (legend) secured by documents, establish contact with people through deceptive behavior with the aim of building a relationship of trust and entering a criminal environment intrude to solve particularly serious crimes.

##### Art. 286 Requirements

1. The public prosecutor may order an undercover investigation if:
  - a. it is suspected that an offence listed in paragraph 2 has been committed;
  - b. the seriousness of the offence justifies the covert investigation; and
  - c. previous investigative activities have been unsuccessful or the enquiries would otherwise have no prospect of success or be made unreasonably complicated.

[...]

**Art. 287 Requirements for the persons deployed**

1. The following persons may be deployed as undercover investigators:
  - a. members of a Swiss or foreign police force;
  - b. persons employed temporarily on police duties even if they have not received police training.
2. Only members of a police force may be deployed as command staff.
3. If members of a foreign police force are deployed, they are normally led by their regular commander.

**Art. 288 Cover and guarantee of anonymity**

1. The police may provide undercover investigators with a cover that gives them an identity that differs from their true identity.
2. The public prosecutor may guarantee to undercover investigators that their true identity will not be disclosed even if they appear in court proceedings as persons providing information or witnesses.
3. If undercover investigators commit an offence while deployed, the compulsory measures court shall decide on the identity under which criminal proceedings are brought.

**Art. 289 Authorisation procedure**

1. The deployment of an undercover investigator requires the authorisation of the compulsory measures court.
2. The public prosecutor shall submit the following documents to the compulsory measures court within 24 hours of ordering the undercover investigation:
  - a. the order;
  - b. a statement of the reasons and the case documents relevant for authorisation.
3. The compulsory measures court shall decide and provide a brief statement of the reasons within 5 days of the undercover investigation being ordered. It may grant authorisation subject to a time limit or other conditions, or request further information or investigations.
4. The authorisation shall expressly state whether it is permitted:
  - a. to produce or alter official documents in order to create or maintain a cover;
  - b. to guarantee anonymity;
  - c. to deploy persons with no police training.
5. The compulsory measures court shall grant authorisation for a maximum of 12 months. Authorisation may be extended on one or more occasions for a maximum of 6 months at a time. If an extension is required, the public prosecutor shall file an application for the extension, stating the reasons therefor, before expiry of the current authorisation.
6. If authorisation is not granted or no authorisation has been obtained, the public prosecutor shall terminate deployment immediately. All records must be destroyed immediately. Findings made by means of the undercover investigation may not be used.

#### Art. 290 Briefing before deployment

The public prosecutor shall brief the commanding officer and the undercover investigator before deployment.

#### Art. 291 Commanding officer

1. During deployment, the undercover investigator is subject to the direct instructions of the commanding officer. During deployment, any contact between the public prosecutor and the undercover investigator shall take place exclusively via the commanding officer.
2. The commanding officer has the following duties in particular:
  - a. he or she shall brief the undercover investigator in detail and continuously on the assignment and powers and on how to deal with the cover story.
  - b. he or she shall instruct and advise the undercover investigator and continually assess the risk situation.
  - c. he or she shall keep a written record of oral reports made by the undercover investigator and a full dossier on the operation.
  - d. he or she shall inform the public prosecutor regularly and in full on the operation.

#### Art. 292 Duties of undercover investigators

1. Undercover investigators shall carry out their operation in accordance with their duties and in line with their instructions.
2. They shall report to their commanding officer regularly and in full on their activities and their findings.

#### Art. 293 Scope of influence permitted

1. Undercover investigators may not generally encourage others to commit offences or incite persons already willing to commit offences to commit more serious offences. They must limit their activities to substantiating an existing decision to commit an offence.
2. Their activities may only be of minor significance in the decision to commit a specific offence.
3. If required in order to bring about the main transaction, they may make trial purchases or provide evidence of their ability to pay.
4. If the undercover investigator exceeds the remit of the authorised operation, the court must take due account of this in assessing the sentence imposed on the person subject to the investigator's influence, or may dispense with imposing any sentence.

#### Art. 294 Deployment in investigations under the Narcotics Act

Undercover investigators may not be convicted of an offence under Articles 19 and 20–22 of the Narcotics Act of 3 October 1951 if they are acting in the course of an authorised undercover investigation.

**Art. 295 Money for simulated transactions**

1. At the request of the public prosecutor, the Confederation may provide sums of money via the National Bank in the required amounts, forms and denominations for the purpose of simulated transactions and to provide evidence of an ability to pay.
2. The request must be submitted to the Federal Office of Police together with a summary of the facts of the case.
3. The public prosecutor shall take the precautions required to protect the money provided. In the event of loss, the Confederation or the canton to which public prosecutor belongs is liable.

**Art. 296 Accidental finds**

1. Where evidence of an offence other than that named in the investigation order comes to light in the course of an undercover investigation, the evidence may be used provided the ordering of a covert investigation would have been permitted in order to investigate the offence newly disclosed.
2. The public prosecutor shall order an undercover investigation immediately and begin the authorisation procedure.

**Art. 297 Conclusion of the operation**

1. The public prosecutor shall terminate the operation immediately if:
  - a. the requirements are no longer met;
  - b. authorisation or an extension thereof is refused; or
  - c. the undercover investigator or the commanding officer fails to follow instructions or fails to carry out his or her duties in some other way, in particular by wilfully providing false information to the public prosecutor.
2. In cases under paragraph 1 letters a and c, the public prosecutor shall notify the compulsory measures court of the termination of the operation.
3. When terminating an operation, it must be ensured that neither the undercover investigator nor any third parties involved in the investigation are exposed to any avoidable risks.

**Art. 298 Notice**

1. The public prosecutor shall give notice to the accused at the latest on conclusion of the preliminary proceedings that he or she has been the subject of an undercover investigation.
2. Notice may be deferred or dispensed with, subject to the consent of the compulsory measures court, if:
  - a. the findings are not used as evidence; and
  - b. deferring or dispensing with notice is necessary to protect overriding public or private interests.
3. Persons who have been the subject of an undercover investigation may file an objection in accordance with Articles 393—397. The period for filing the objection begins on receipt of notice of the investigation.

### Example: Austria

#### Section 54a of the National Security Police Act [Sicherheitspolizeigesetz (SPG)] (Austria) – Assumed identity

(1) Insofar as federal agencies, statutory entities that are agencies of indirect federal administration, and public law entities or mayors are authorized by law to issue legal documents, they are at the request of the Federal Minister of the Interior obliged to produce legal document that falsely assume the identity of a person for the purpose of preventive protection of persons under § 22 para. 1 subpara. 5 and for the purpose of undercover investigations (§ 54 para. 3).

(2) The documents may only be used in legal dealings insofar as this is necessary to achieve the purposes set out in para. 1. The Federal Minister of the Interior must determine the purpose of issuing the documents and their scope of use in a deployment order. The National Security agencies must document any use of the documents in legal dealing and must retract them in case they are misused or if they are no longer needed to fulfil the purposes; documents for the preventive protection of persons under § 22 para. 1 subpara. 5 must, depending on the circumstances of the individual case, be retracted by the Federal Minister of the Interior for a set period. Prior to issuing an assumed identity, the Federal Minister of the Interior must inform the person concerned about the use of the documents and about the fact that will be retracted in case of misuse.

(3) Documents that falsely assume the identity of a persons must further be produced at the request of the Federal Minister of the Interior by the authorities named in para. 1 for the purpose of preparing and supporting the execution of surveillances (§ 54 para. 2) and for the purpose of undercover investigations. Entities of the National Security agencies may use such documents in legal dealings to acquire and manage equipment. Paragraph 2 applies to the determination of deployment orders and the duty to record.

## Article 13. Surveillance of persons

1. For the purpose of this article, “surveillance of persons” means the observation of persons, by law enforcement officials, for the purposes of investigating an offence to which this [Act/Law/Chapter ...] applies that has been, is being or may be committed.
2. Surveillance of persons is only lawful if it has been authorized in accordance with this article.
3. The surveillance of persons may be authorized by [*insert designated position holder or office, such as head and deputy head of competent law enforcement agency; prosecutor, investigative judge or preliminary investigation judge*] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].
4. An application to conduct surveillance of persons can be made by [*insert means by which application is to be submitted*]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.

5. An application for authorization of surveillance of persons must state:
  - (a) The duration for which the authorization is sought;
  - (b) Whether the matter has been the subject of a previous application; and
  - (c) *[Insert additional requirements as appropriate/required]*.
6. After considering the application, the authorizing authority may:
  - (a) Authorize the surveillance of persons unconditionally;
  - (b) Authorize the surveillance of persons subject to conditions; or
  - (c) Refuse the application for the surveillance of persons.
7. The authorizing authority must not authorize the surveillance of persons unless satisfied on reasonable grounds that:
  - (a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed;
  - (b) The nature and extent of the suspected criminal activity are such as to justify the surveillance of persons; and
  - (c) Any conduct involved in the surveillance of persons will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
8. The authorization must specify the time period for which the surveillance of persons is authorized, which shall in any case not be longer than *[insert appropriate time period]*. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.

## Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 20*

Under article 20, paragraph 1, of the Organized Crime Convention, States parties are required, if permitted by the basic principles of their national legal systems and where appropriate, to allow for the use of surveillance of persons in their territory, for the purpose of combating organized crime.

Article 13, paragraph 1, of these Model Legislative Provisions defines the term “surveillance of persons” for the purpose of this provision.

Article 13, paragraphs 2, 3, 6 to 8, of these Model Legislative Provisions set out the requirements for the authorization of surveillance of persons.

Article 13, paragraph 3, specifies the agency or official that can authorize the surveillance of persons. Different jurisdictions require different levels of authorization depending on the intrusiveness and type of the special investigative technique, which could involve a law enforcement agency, prosecutors or judges.

Article 13, paragraphs 4 and 5, state certain requirements for applications for authorization to conduct surveillance of persons. Paragraph 5 specifies the minimum content required to apply for such authorization. Further requirements may also be added as required by constitutional and legislative frameworks or as deemed appropriate by legislators.

Article 13, paragraph 6, sets out the content of the decision made by the authorizing authority. Article 13, paragraph 7, sets out a number of safeguards and conditions that must be considered when authorizing the surveillance of persons.

*Example: Liechtenstein*

*§ 104a of the Code of Criminal Procedure (Liechtenstein)*

(1) The National Police is authorized to secretly monitor the activities of a person [surveillance] at its own initiative if this supports inquiries about a criminal offence or to establish the whereabouts of an accused.

(2) In support of a surveillance it is permissible, if the surveillance would otherwise be ineffective or significantly impeded, to

1. covertly use devices used to record or transmit images of publicly accessible spaces, and
2. covertly use devices which by of transmission of signals enable the determination of a location in which a person is present and to open vehicles and compartments for the purpose of installing such devices.

(3) A surveillance

1. supported by the use of devices under para. 2 or
2. to be carried out for a period exceeding 48 hours

is only permitted if there is reason to suspect that an intentionally committed offence punishable by imprisonment of more than one year and if because of specific material facts it is believed that the person under surveillance has committed the crime or will make contact with the person accused or if the surveillance can serve to establish the whereabouts of a fugitive or absent accused.

(4) At the request of the prosecution service, the investigative judge authorizes the surveillance under para. 3 for period believed to be necessary to fulfil its purpose but in any event for no more than three months. Requests to conduct the surveillance must be directed at the National Police Force [§ 10]. In the event of imminent danger,

the National Police Force is authorized to initiate the surveillance at its own initiative; but must inform the prosecution service without delay; the prosecution service must then request authorization from the court unless the surveillance has already ended. A renewed authorization is only permissible if the prerequisites continue to exist and if because of specific material facts it is believed that further surveillance will be effective. Parties and other participants in the criminal proceedings must not be informed at this point.

(5) Surveillance must be terminated if the prerequisites cease to exist, if its purpose has been achieved or if it is believed that the purpose can no longer be achieved or if the investigation judge orders the termination. Following the termination of a surveillance under para. 3, the accused and other persons affected, insofar as their identities are known or can be established without major effort must be notified that a surveillance has taken place. Such notification may be delayed if it would jeopardize the purpose of the investigation in this or other proceedings.

## Article 14. Electronic surveillance

1. For the purpose of this article, “electronic surveillance” means:

(a) The monitoring, interception, copying or manipulation of messages, data or signals transmitted by electronic means; or

(b) The monitoring or recording of activities by electronic means;

for the purposes of investigating an offence to which to which this [Act/Law/Chapter ...] applies that has been, is being or may be committed.

2. Electronic surveillance is only lawful if it has been authorized in accordance with this article.

3. Electronic surveillance of persons can be authorized by [*insert designated position holder or office, such as head and deputy head of competent law enforcement agency; prosecutor, investigative judge or preliminary investigation judge*] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].

4. An application to conduct electronic can be made by [*insert means by which application is to be submitted*]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.

5. The application for authorization for electronic surveillance must state:

(a) The type of electronic surveillance for which authorization is sought;

(b) The duration for which the authorization is sought;

(c) The nature of the information that it is expected to be collected;

(d) The individuals, locations or devices that are the target of the surveillance;



- (e) The measures that are in place to ensure that the privacy and other human rights of individuals are protected as far as possible;
  - (f) Whether the matter has been the subject of a previous application; and
  - (g) *[Insert additional requirements as appropriate/required]*.
6. After considering the application, the authorizing authority may:
- (a) Authorize the electronic surveillance unconditionally;
  - (b) Authorize the electronic surveillance subject to conditions; or
  - (c) Refuse the application for electronic surveillance.
7. The authorizing authority must not authorize the electronic surveillance unless satisfied on reasonable grounds that:
- (a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed; and
  - (b) The nature and extent of the suspected criminal activity are such as to justify the type of electronic surveillance for which authorization is sought.
8. The authorization must specify the time period for which the electronic surveillance is authorized, which shall in any case not be longer than *[insert appropriate time period]*. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.
12. Information obtained through electronic surveillance must not be disseminated outside the *[insert name of the relevant law enforcement agency or other competent authority]* without the approval of *[insert name of the head of the law enforcement agency or other competent authority or their delegate]*. Such approval may be given only for the purposes of:
- (a) Preventing or prosecuting an offence to which this [Act/Law/Chapter ...] applies;
  - (b) Enhancing international cooperation on the prevention or prosecution of [serious] crime; or
  - (c) Ensuring proper oversight of the activities of the agency.

13. The [*insert name of the head of the law enforcement agency*] must ensure that information which has been collected through electronic surveillance authorized under this article but which is not relevant to the prevention or prosecution of an offence to which this [Act/Law/Chapter ...] applies is destroyed as soon as practicable, and no later than [six] months after the expiry of the authorization.

14. The authorizing authority shall report annually to [Parliament/a parliamentary committee/the public] on the number of applications received under this article, and the respective numbers of authorizations that were approved, refused, revoked and cancelled under this article.

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 20*

Under article 20 paragraph 1 of the Organized Crime Convention, States parties are required, if permitted by the basic principles of their national legal systems and where appropriate, to allow for the use of electronic surveillance for the purpose of combating organized crime. Electronic surveillance involving the interception of communications is particularly useful where an organized criminal 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 must be subject to strict judicial control and numerous statutory safeguards to prevent abuse.<sup>21</sup>

Article 14, paragraph 1, of these Model Legislative Provisions defines the term “electronic surveillance” for the purpose of this provision. When defining electronic surveillance in national law, it is important to use a formulation that is technologically neutral to capture current and future capacities and equipment used by law enforcement agencies. For this reason, article 14, paragraph 1, refers to “messages, data and signals transmitted by electronic means”. If specifying any list of technologies, it is important to use inclusive language (for example, “such as ...”), to allow for future advances in technology.

Article 14, paragraphs 2, 3, 6, 7 and 8, of these Model Legislative Provisions set out the requirements for the authorization of electronic surveillance.

Article 14, paragraph 3, specifies the agency or official that can authorize electronic surveillance. Different jurisdictions require different levels of authorization depending on the intrusiveness and type of the special investigative technique, which could involve a law enforcement agency, prosecutors or judges.

Article 14, paragraphs 4 and 5, state certain requirements for applications for authorization of electronic surveillance. Paragraph 5 specifies the minimum content required to apply for such authorization. Further requirements may also be added as required by constitutional and legislative frameworks or deemed appropriate by legislators. The “type of electronic surveillance” referred to in paragraph 5, subparagraph (a), may include:

- Audio surveillance (by such means as phone tapping, voice over Internet protocol and listening devices);

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<sup>21</sup> Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, para. 445.

- Video surveillance (including by means of hidden video surveillance devices, in-car video systems, body-worn video devices and thermal imaging/forward-looking infrared devices, as well as closed-circuit television and automatic number-plate recognition systems);
- Tracking surveillance (including by means of global positioning systems/transponders, silent short message services and other mobile telephone tracking technologies, radio frequency identification devices and biometric information technologies such as retinal scanners);
- Data surveillance (including both interception of content and traffic data and the use of means such as computer and Internet spyware and “cookies”, mobile telephones and keystroke monitoring).

Article 14, paragraph 6, sets out the content of the decision made by the authorizing authority. Article 14, paragraphs 7 and 8, set out a number of safeguards and conditions that must be considered when authorizing electronic surveillance. Article 14, paragraph 12, contains additional safeguards to ensure that information obtained through electronic surveillance is not disseminated outside the respective law enforcement agency, except upon approval and for selected purposes only; paragraph 13 seeks to ensure that information that is not relevant for the prevention and prosecution of offences under the Model Legislative Provisions is destroyed properly and in a timely manner.

It is important that electronic surveillance be subject to a certain level of scrutiny. Article 14, paragraph 14, recommends that the authorizing authority be required to report annually to parliament, a relevant parliamentary committee or another equivalent entity on the number of applications received and the number of authorizations approved, refused, revoked and cancelled. Some legal systems require additional scrutiny through, for instance, reporting and review by an independent oversight body. If this is the case, it will likely be necessary to have two levels of review: the first, which involves a full review, including access to sensitive operational information, by an independent review body with a specific legislative mandate; and the second, which is a public review, for example, by parliament, that does not disclose operational information such as methods and sources.

### *Example: United Kingdom*

#### *Section 15 of the Investigatory Powers Act 2016 (United Kingdom) – Warrants that may be issued under this Chapter*

(1) There are three kinds of warrant that may be issued under this Chapter—

- (a) targeted interception warrants (see subsection (2)),
- (b) targeted examination warrants (see subsection (3)), and
- (c) mutual assistance warrants (see subsection (4)).

(2) A targeted interception warrant is a warrant which authorises or requires the person to whom it is addressed to secure, by any conduct described in the warrant, any one or more of the following—

- (a) the interception, in the course of their transmission by means of a postal service or telecommunication system, of communications described in the warrant;

(b) the obtaining of secondary data from communications transmitted by means of a postal service or telecommunication system and described in the warrant (see section 16);

(c) the disclosure, in any manner described in the warrant, of anything obtained under the warrant to the person to whom the warrant is addressed or to any person acting on that person's behalf.

[...]

(5) A targeted interception warrant or mutual assistance warrant also authorises the following conduct (in addition to the conduct described in the warrant)—

(a) any conduct which it is necessary to undertake in order to do what is expressly authorised or required by the warrant, including—

- (i) the interception of communications not described in the warrant, and
- (ii) conduct for obtaining secondary data from such communications;

(b) any conduct by any person which is conduct in pursuance of a requirement imposed by or on behalf of the person to whom the warrant is addressed to be provided with assistance in giving effect to the warrant;

(c) any conduct for obtaining related systems data from any postal operator or telecommunications operator.

(6) For the purposes of subsection (5)(c)—

“related systems data”, in relation to a warrant, means systems data relating to a relevant communication or to the sender or recipient, or intended recipient, of a relevant communication (whether or not a person), and

“relevant communication”, in relation to a warrant, means—

- (a) any communication intercepted in accordance with the warrant in the course of its transmission by means of a postal service or telecommunication system, or
- (b) any communication from which secondary data is obtained under the warrant.

(7) For provision enabling the combination of targeted interception warrants with certain other warrants or authorisations (including targeted examination warrants), see Schedule 8.

## Article 15. International law enforcement cooperation

1. Notwithstanding relevant data protection and privacy laws and other confidentiality provisions applicable to personal data, [*insert name of national law enforcement agency or agencies*] may provide to a foreign law enforcement agency or an international or regional law enforcement agency information concerning all aspects of offences to which this [Act/Law/Chapter ...] applies [including links with other criminal activities].

2. [*Insert name of national law enforcement agency or agencies*] may cooperate with a foreign law enforcement agency or an international or regional law enforcement agency, with regard to:

(a) Conducting inquiries concerning:

- (i) The identity, whereabouts and activities of persons suspected of involvement in offences to which this [Act/Law/Chapter ...] applies 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;

(b) Providing items, substances, documents or records for analytical or investigative purposes;

(c) Seconding or exchanging personnel, including by posting liaison law enforcement officials or liaison magistrates and by making experts available;

(d) Exchanging information on specific means and methods used by organized criminal groups, including routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;

(e) [Joint investigations;]

(f) Witness protection, including relocation of a protected witness; and

(g) Other administrative assistance.

[3. [*Insert name of national law enforcement agency*] may enter into an agreement with a foreign law enforcement agency or an international or regional organization to enhance law enforcement cooperation to prevent, identify and combat the offences to which this [Act/Law/Chapter ...] applies.]

## Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 27*

Article 27, paragraph 1, of the Organized Crime Convention requires States parties to cooperate 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 the Convention. Article 27, paragraph 1, further requires States parties to take more specific measures with regard to:

- Establishing or enhancing channels of communication between their competent authorities, agencies and services to facilitate the fast and secure exchange of information (subpara. (a));

- Cooperation with regard to the identification and location of suspects, proceeds and instrumentalities of crime (subpara. *(b)*).

While article 27, paragraph 1, of the Convention refers only to combating the offences covered by the Convention, in line with the preventive focus of the Convention (see art. 1 of the Convention), article 15, paragraph 1, of these Model Legislative Provisions enables law enforcement agencies to cooperate with their counterparts to prevent, identify and combat offences covered by these model legislative provisions.

Article 15, paragraph 2, of these Model Legislative Provisions covers cooperation regarding information exchange. The purpose here is to allow cooperation on all of the items listed more specifically in article 27, paragraph 1 *(b)*, of the Convention.

Article 27, paragraph 2, of the Convention encourages States parties to conclude bilateral agreements to facilitate law enforcement cooperation generally (to combat the offences covered by these model legislative provisions) and with regard to:

- Establishing or enhancing 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 these model legislative provisions;
- Promoting the exchange of personnel and other experts, including the posting of liaison officers;
- Exchanging information on specific means and methods used by organized criminal groups, including routes and conveyances, and the use of false identities, altered or false documents or other means of concealing their activities.

For States in which national law enforcement agencies are themselves vested with the competency to enter into agreements with foreign law enforcement agencies or international or regional organizations, article 15, paragraph 3, of these Model Legislative Provisions provides a basis for the conclusion of such agreements in relation to the offences to which these Model Legislative Provisions apply. Legislative drafters may also wish to consider how communication of requests for cooperation and exchange of information is to be carried out, such as through the I-24/7 system of the International Criminal Police Organization (INTERPOL) or any regional channels.

### *Example: Australia*

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#### *Section 8(1) of the Australian Federal Police Act 1979 (Commonwealth) (Australia) – Functions*

The functions of the Australian Federal Police are:

[...]

(b) the provision of police services and police support services for the purposes of assisting, or cooperating with, an Australian or foreign:

- (i) law enforcement agency; or
- (ii) intelligence or security agency; or
- (iii) government regulatory agency; [...]

### *Example: United Kingdom*

*Section 8(3) of the Crime and Courts Act 2013 (United Kingdom) – Part 1: The National Crime Agency – Other functions etc.*

The Director General may provide assistance to—

- (a) a government in a country or territory outside the British Islands, or
- (b) another overseas body exercising functions of a public nature in a country or territory outside the British Islands, if the government, or the body, requests assistance to be provided.

*Section 16 of the Crime and Courts Act 2013 (United Kingdom) – Interpretation of Part 1*

[...]

“permitted purpose” means any of the following purposes—

- (a) the prevention or detection of crime, whether in the United Kingdom or elsewhere;
- (b) the investigation or prosecution of offences, whether in the United Kingdom or elsewhere;
- (c) the prevention, detection or investigation of conduct for which penalties other than criminal penalties are provided under the law of any part of the United Kingdom or the law of any country or territory outside the United Kingdom;

[...]

- (f) compliance with an order of a court or tribunal (whether or not in the United Kingdom);

## Article 16. Joint investigations

1. For the purpose of investigating offences to which this [Act/Law/Chapter ...] applies, the [*insert the name of relevant national law enforcement agency and/or prosecution or judicial authority as appropriate*] may, in relation to matters that are the subject of investigations [or prosecutions or judicial proceedings] in one or more States, conclude agreements or arrangements with one or more foreign law enforcement agencies [or prosecution or judicial authorities] or relevant international or regional law enforcement or judicial cooperation organizations regarding either or both of the following:

- (a) The establishment of a joint investigative body;
- (b) The undertaking of joint investigations on a case-by-case basis.

2. Where an agreement or arrangement under paragraph 1 has been made, the [*insert name of law enforcement agency or public prosecution or judicial authority*] may engage in joint investigations with the relevant State, international or regional law enforcement or judicial cooperation organizations.

3. Evidence collected outside of the territory of [*insert name of State*] pursuant to a joint investigation under this article shall be admissible in judicial proceedings as if such evidence had been collected within the territory of [*insert name of State*].

## Explanatory notes

### *Relevant provisions of the Organized Crime Convention: article 19*

The term “joint investigation” encompasses a range of collaborative efforts in the investigation of crime. Such efforts may generally be classified as either joint parallel investigations, joint investigative teams or joint investigative bodies. Joint parallel investigations refer to non-co-located but closely coordinated investigations undertaken in two or more States with a common goal. Joint investigative teams are teams of law enforcement authorities, prosecutors, judges or investigative judges that are established pursuant to an agreement between the competent authorities of two or more States for a limited duration and for the specific purpose of carrying out criminal investigations in one or more of the States involved.<sup>22</sup> Joint investigative teams may further be classified as passively or actively integrated joint investigative teams.<sup>23</sup> A passively integrated team could be, for example, one in which a foreign law enforcement officer is integrated with officers from the host State in an advisory or consultancy role or in a supportive role based on the provision of technical assistance to the host State. An actively integrated team would include officers from at least two jurisdictions with the ability to exercise equivalent operational powers, or at least some operational powers, under host State control in the territory or jurisdiction where the team is operating.<sup>24</sup>

Joint investigative bodies are a concept introduced by the Organized Crime Convention. Article 19 of the Organized Crime Convention requires that States parties consider concluding agreements or arrangements to establish joint investigative bodies in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States.<sup>25</sup> Neither the text of the Convention nor the *Travaux Préparatoires* define what is to be understood as a joint investigative body, but the text of article 19 of the Convention juxtaposes agreements or arrangements to establish joint investigative bodies with, in the absence of such agreements or arrangements, joint investigations undertaken by agreement on a case-by-case basis. Thus, joint investigative bodies could be understood to include structures that, for example, focus on investigating a particular crime type over a longer period of time, rather than investigating particular criminal cases within a more limited period of time.<sup>26</sup>

<sup>22</sup> See further, Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, art. 20; Council Framework Decision of 13 June 2002 on joint investigative teams; and Council of the European Union resolution 2010/C 70/1 of 26 February 2010 on a model agreement for setting up a joint investigation team, annex.

<sup>23</sup> CTOC/COP/WG.3/2020/2, paras. 6–8.

<sup>24</sup> *Ibid.*, para. 51.

<sup>25</sup> An identical provision is contained in article 49 of the United Nations Convention against Corruption. Furthermore, in its resolution 10/4, the Conference of the Parties to the Organized Crime Convention invited States parties to consider establishing joint investigation bodies that make use of modern technologies (CTOC/COP/2020/10, resolution 10/4, para. 11).

<sup>26</sup> CTOC/COP/WG.3/2020/2, para. 9; UNODC, Regional Programme Office for South-Eastern Europe, *Trafficking in Persons and Smuggling of Migrants: Guidelines of International Cooperation* (February 2010); p. 41.



Article 16 of these Model Legislative Provisions seeks to provide the legal basis for a relevant national authority to conclude agreements or arrangements to conduct joint investigations, either through the establishment of a joint investigative body or through the undertaking of joint investigations on a case-by-case basis. The domestic laws of most States already permit such joint activities and for those few States whose laws do not so permit, this provision will be a sufficient source of legal authority for case-by-case cooperation of this sort.

Various legal impediments have been identified relating to the establishment of joint investigations, including:

- The lack of a clear legal framework or specific enabling legislation dealing with the establishment of joint investigations
- Lack of clarity regarding operational control, e.g. in relation to undercover officers
- Liability for costs of the joint investigation

Legislators should consider such issues in drafting provisions relating to joint investigations. Legislation will also likely be required for the establishment of actively integrated joint investigative teams and/or joint investigative bodies, as this involves the operational deployment of officers from foreign jurisdictions. Legislation would be needed to deal with, *inter alia*:

- Equivalence of powers for foreign law enforcement officers
- Who has responsibility for operational control
- Gathering of evidence by foreign law enforcement officers and its admissibility in any proceedings
- The possibility for a team member to gather evidence in his or her home jurisdiction for use in the joint investigation without the need to submit a mutual legal assistance request
- The civil and criminal liabilities of foreign law enforcement officers
- The exchange of operational information and control over such information once exchanged

### *Example: Ireland*

*Section 3 of the Criminal Justice [Joint Investigation Teams] Act 2004 (Ireland) — Request to other Member State or States to establish joint investigation team*

(1) Where the Competent Authority is satisfied that—

(a) either—

(i) an offence has been committed, or there are reasonable grounds for suspecting that an offence has been committed, in the State and the investigation of the offence or suspected offence has links with another Member State or States, or

(ii) conduct which would constitute an offence if it occurred in the State has occurred, or there are reasonable grounds for suspecting that such conduct has occurred, partly in the State and partly in another Member State or States,

and

(b) there are reasonable grounds for believing that it is in the public interest, having regard to the benefit likely to accrue to the investigation of the offence or suspected offence concerned or into the conduct concerned, to establish a joint investigation team with that other Member State or those other Member States because—

- (i) part of the investigation is being, or it is anticipated that it will be, conducted in that other Member State or those other Member States, or
  - (ii) the investigation requires coordinated and concerted action by the Member States (including the State) concerned,
- the Competent Authority may request the competent authority or authorities of that other Member State or those other Member States to establish a joint investigation team to investigate the offence, suspected offence or conduct concerned.

(2) A request under subsection (1) shall specify the following:

- (a) the competent authority making the request,
- (b) the purpose of the request,
- (c) the conduct to be investigated,
- (d) the identity and nationality (if known) of the person or persons whose conduct is to be investigated,
- (e) proposals in respect of the membership of a joint investigation team, and
- (f) the period for which a joint investigation team is required.

(3) The Competent Authority shall furnish to the other competent authority or authorities concerned such other information (if any) as is specified to the Competent Authority and is reasonably required by that authority or those authorities to decide whether or not to agree to establish a joint investigation team.

(4) Where any of the competent authorities concerned accedes to a request under subsection (1), the Competent Authority may, subject to this Act, agree with that authority and any other competent authority concerned to establish a joint investigation team to investigate the offence, suspected offence or conduct concerned.

(5) The Competent Authority and the competent authority or authorities concerned may, pursuant to an agreement under subsection (4), establish a joint investigation team.

*Section 4 of the Criminal Justice [Joint Investigation Teams] Act 2004 (Ireland) — Request from other Member State or States to establish joint investigation team*

(1) Where the Competent Authority receives a request specifying the matters mentioned in section 3 (2) from one or more competent authorities of other Member States to establish a joint investigation team, the Competent Authority shall consider the request.

(2) The Competent Authority may seek from the competent authority or authorities concerned such other information (if any) as is specified to that authority or those

authorities and is reasonably required by the Competent Authority to decide whether or not to agree to establish a joint investigation team.

(3) The Competent Authority may, subject to this Act, agree with the competent authority or authorities concerned to establish a joint investigation team to investigate certain conduct if the Competent Authority is satisfied that—

(a) either—

(i) the conduct which would constitute an offence if it occurred in the State has occurred, or there are reasonable grounds for suspecting that such conduct has occurred, partly in the State and partly in another Member State or States, or

(ii) the conduct which would constitute an offence if it occurred in the State has occurred, or there are reasonable grounds for suspecting that such conduct has occurred, in another Member State or States and the investigation of it has links with the State,

and

(b) there are reasonable grounds for believing that it is in the public interest, having regard to the benefit likely to accrue to the investigation into the conduct concerned, to agree to the establishment of a joint investigation team with the other Member State or States concerned because—

(i) part of the investigation is being, or it is anticipated that it will be, conducted in the State, or

(ii) the investigation requires coordinated and concerted action by the Member States (including the State) concerned.

(4) The Competent Authority and the competent authority or authorities concerned may, pursuant to an agreement under subsection (3), establish a joint investigation team.

*Section 8 of the Criminal Justice [Joint Investigation Teams] Act 2004 (Ireland) — Agreements to establish joint investigation teams*

(1) An agreement under section 3(4) or 4(3) to establish a joint investigation team shall be in writing and shall specify the following:

(a) the parties to the agreement;

(b) the purposes for which the team is established;

(c) the identity and nationality (if known) of the person or persons whose conduct is to be investigated;

(d) the membership of the team, including the identity (if known) of the member of it who is to be the team leader in each of the Member States (including the State) establishing the team and in which it or a part of it is to operate;

(e) the period for which the team is to operate;

(f) the financial arrangements for the team, including arrangements for the payment to its members of remuneration and allowances for expenses (if any) incurred by them and the payment of other expenses that may be incurred by it in the performance of its functions;

(g) the participants (if any) in the team and whether section 7(5) is to apply to such participants; and

(h) such other terms and conditions (if any) as are agreed by the Competent Authority and the other competent authority or authorities concerned.

(2) If the period for which a joint investigation team is to operate is extended under section 5(1), the agreement under subsection (1) to establish the team shall be amended accordingly.

(3) If the Competent Authority agrees under section 5(3) with the other competent authority or authorities concerned to amend the agreement establishing a joint investigation team, the agreement under subsection (1) to establish the team shall be amended accordingly.

(4) If the State pursuant to an agreement under subsection (4) of section 5 joins a joint investigation team, the agreement to establish the team concerned, as amended by the agreement under that subsection, shall insofar as is reasonably practicable be in accordance with subsection (1).

(5) If another Member State pursuant to an agreement under section 5(5) joins a joint investigation team, the agreement under subsection (1) to establish the team concerned shall be amended to take account of that agreement under section 5(5).

### *Example: Romania*

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#### *Article 26 of Law No. 39/2003 (Romania) – International cooperation*

(1) Upon request of Romanian qualified authorities or those of other states, on the territory of Romania can take place joint investigations, to the purpose of preventing and combating transnational offenses committed by organized criminal groups.

(2) The joint investigations stipulated in paragraph (1) shall take place according to the bilateral or multilateral conventions signed by the qualified authorities.

(3) The representatives of the Romanian qualified authorities may take part in joint investigations taking place on other states' territories, while abiding by the legislation of these states.

## **Article 17. Conferral of powers on foreign officials in joint investigations**

1. Where [*insert name of State*] has an agreement covering conferral of powers in joint investigations with a foreign State, [*insert competent authority*] may confer upon law enforcement officials [or public prosecutors or investigative judges] of that State one or more of the following powers, which they can then exercise in [*insert name of State*], subject to the law of [*insert name of State*]:

(a) [The power to receive information and take statements, in accordance with the law of the foreign State];

(b) [The power to record charges in the official record, including in a form required by their national law]; and

(c) [The authority to undertake surveillance of persons and/or undercover operations].

2. An official to whom any of the powers specified under paragraph 1 has been conferred shall be entitled to the same protections as an equivalent official of [*insert name of State*] under the law of [*insert name of State*].

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 19*

Article 19 of the Organized Crime Convention requires States parties to consider concluding bilateral and multilateral agreements or arrangements with regard to joint investigative bodies. In the absence of such agreements or arrangements, article 19 provides that 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.

While not strictly required by article 19 of the Convention, as a practical matter, States wanting to engage in joint investigations may need to consider a way of ensuring that foreign law enforcement officials or, where appropriate, public prosecutors or investigative judges, can lawfully participate in local operations. Conferring powers for a short period of time may be a useful option. This is reflected in article 17, paragraph 1, of these Model Legislative Provisions.

Additional considerations include:

- Ensuring clarity with respect to supervision, and the roles and responsibilities of seconded officers;
- Ensuring limits on which activities seconded officers can perform.

A further issue is whether officials who engage in conduct authorized by a joint investigation are criminally or civilly liable for that conduct. Article 17, paragraph 2, of these Model Legislative Provisions suggests taking account of this by conferring certain protections on seconded foreign officials, equivalent to those enjoyed by the corresponding national officials.

### *Example: France*

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#### *Article 695-2 of the Criminal Procedure Code (France) – Section 2: Joint Investigation teams*

(Inserted by Law No. 2004-204 of 9 March 2004, art. 17, I Official Journal of 10 March 2004)

Where there is need to carry out, in the context of a French prosecution, either complex inquiries involving the mobilisation of extensive resources and which concern other member states or where several member states are carrying out inquiries into offences which call for coordinated and concerted action between the member states concerned, with the prior agreement of the Minister of Justice and the consent of the member state or states concerned, the competent judicial authority may create a joint investigation team.

Foreign agents seconded by another member state to a joint investigation team may, within the limits of the powers conferred on them by their role, and under the supervision of the competent judicial authorities, have as their mission, as appropriate, over the whole of the national territory:

1° the establishment of any felonies, misdemeanours or petty offences, and to record these in an official record, if necessary in the forms provided for by the law of their state;

2° the reception of the official reports of any statements made to them by any person liable to provide information on the facts in question, if necessary in the forms provided for by the law of their state;

3° the secondment of French judicial police officers in the exercise of their duties;

4° the carrying out of any surveillance and, if they are authorised for this purpose, infiltration, under the conditions provided for by articles 706-81 onwards, and which is necessary for the application of articles 694-7 and 694-8.

Foreign officers attached to a joint investigation team may carry out these missions subject to the consent of the member state which has implemented their secondment.

These officers may only carry out the operations for which they have been designated. None of the powers which are the preserve of the French judicial police officer who is in charge of the team may be delegated to them.

The original copy of the official records which they prepare, and which must be drafted or translated into French, is attached to the case file.

*Article 695-3 of the Criminal Procedure Code (France) – Section 2: Joint Investigation teams*

(Inserted by Law No. 2004-204 of 9 March 2004, art. 17, I Official Journal of 10 March 2004)

In the context of a joint investigation team, French judicial police officers and agents attached to a joint investigation team may carry out operations ordered by the head of the team, over the whole of the territory of the State in which they are operating, within the limit of the powers conferred on them by the present Code.

Their tasks are defined by the authorities of the Member State competent to direct the joint investigation team in the territory where the team is working.

They may receive statements and record offences in the forms provided for by the present Code, subject to the consent of the State in whose territory they are operating.

## CHAPTER IV.

# PROSECUTION AND PROCEDURE

The present chapter includes provisions that are intended to address some of the procedural matters that arise in the prosecution of offences under the Organized Crime Convention. This includes model legislative provisions concerning discretion to prosecute and the granting of immunity in certain circumstances, as well as provisions that provide a legal basis for the special procedural and evidentiary rules that can facilitate the effective prosecution of transnational organized crime, such as allowing an extended time to commence prosecutions and rules on the admission of evidence obtained through special investigative techniques.

One emerging issue worth noting in this context is the collection, use and admissibility of electronic evidence in criminal proceedings. Electronic (or digital) evidence is any probative information stored or transmitted in digital form. The collection, use and admissibility of such information requires legislation beyond the model legislative provisions proposed here. This may also involve the storage and preservation of data; international cooperation, such as mutual legal assistance, involving electronic evidence; and the real-time collection of such data. To meet the challenges posed by electronic evidence and its international dimension and to give law enforcement, prosecutors and the judiciary adequate tools to address them, it is necessary to adapt domestic laws and international cooperation measures. Such tools must, however, be subject to strong mechanisms protecting fundamental rights and freedoms.

### Article 18. Exercise of discretion to prosecute

Any discretionary legal powers relating to the prosecution of persons for offences to which this [Act/Law/Chapter/...] applies must be exercised to maximize the effectiveness of the criminal justice response in respect of those offences and with due regard to the need to deter the commission of such offences.

#### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 11, paragraph 2*

Article 11, paragraph 2, of the Organized Crime Convention requires that States endeavour to ensure that any discretionary powers under domestic law relating to the prosecution of persons for offences covered by the Convention are exercised to maximize the effectiveness of law enforcement

measures and with due regard to the need to deter the commission of such offences. This requirement is reflected in article 18 of these model legislative provisions.

Prosecutors may exercise discretionary powers in relation to several aspects of prosecution. In some States, prosecutors have discretion as to when to prosecute, whereas in others, prosecution is mandatory. Even where prosecution is mandatory, however, prosecutors may also exercise discretionary powers in relation to plea bargains, requests for pretrial measures restricting personal freedom, and managing and prioritizing their case load.

In States where prosecutorial discretion is available, it is critical to implement guidelines or other measures to ensure consistency in decision-making and ensure that each decision about whom to charge and what charges are to be laid is made carefully, with full consideration of the facts and due regard for what is required in the public interest, in relation to any offence covered by these Model Legislative Provisions.

### *Example: The Netherlands*

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#### *Article 167(2) of the Code of Criminal Procedure (Netherlands) – Chapter Five. Decisions on Prosecution*

A decision not to prosecute may be taken on grounds of public interest. The Public Prosecution Service may, subject to specific conditions to be set, postpone the decision on prosecution for a period of time to be set in said decision.

The “grounds of public interest” are specified by national prosecution guidelines issued by the Board of Prosecutors General. While there are almost one hundred such instructions, “[t]he main reasons for applying the expediency principle are that measures other than penal sanctions are preferable (e.g., administrative and private law measures) and that the prosecution will be disproportionate, unjust, or ineffective. The latter ground might apply because:

- the crime is of a minor nature;
- the suspect’s contribution to the crime was minor;
- the crime has a low degree of punishability;
- the crime is old;
- the suspect is too young or too old;
- the suspect has recently been sentenced for another crime;
- the crime has negatively affected the suspect himself (i.e., he is the victim of his own crime);
- the suspect has a health condition;
- the rehabilitation prospects of the suspect are good;
- there has been a change of circumstances in the life of the suspect;
- the suspect cannot be traced;
- the case involves corporate criminal liability;



- the person in control of the unlawful behavior is prosecuted;
- the suspect has paid compensation;
- the victim contributed to the crime; and/or
- there is a close relationship between the victim and the suspect, and prosecution would be contrary to the interests of the victim.”<sup>27</sup>

### Article 19. [Immunity from prosecution/ Decision not to prosecute]

1. [Subject to paragraph 3 of this article,] the [*insert competent authority*] may [grant immunity from prosecution to/decide not to prosecute] a person who has voluntarily cooperated in the investigation or prosecution of offences to which this [Act/Law/Chapter/...] applies if that cooperation proved to be effective to identify, apprehend or prove the participation of a participant in an organized criminal group, to locate victims or to recover, in whole or in part, proceeds of the crime, or otherwise amounted to substantial cooperation.
2. This article applies irrespective of whether the cooperation given by the person was in relation to an investigation or prosecution in [*insert name of State*] or in any other State.
- [3. Immunity from prosecution shall not be granted to persons suspected of organizing or directing the commission of a serious crime involving an organized criminal group or who were the leaders of the organized criminal group.]

### Explanatory notes

#### *Relevant provisions of the Organized Crime Convention: article 26, paragraph 3*

The investigation of organized crime can be greatly assisted by the cooperation of members of and other participants in the criminal group. The same considerations apply in the context of preventing organized crime: a tip-off from an insider can prevent the occurrence of a planned criminal act. To encourage the cooperation of insiders, article 26, paragraph 3, of the Organized Crime Convention requires States parties to consider the options of granting immunity to persons who provide substantial cooperation. The purpose of granting witnesses immunity from prosecution in exchange for testimony is to make it easier to prosecute higher echelon criminals through the testimony of less important figures. This is reflected in article 19 of the Model Legislative Provisions.

Article 19, paragraph 1, gives the competent authority the power to grant immunity and/or decide not to prosecute a person providing substantial cooperation. When considering the issue of immunity from prosecution, there are a number of considerations for drafters to bear in mind. In most countries where it can be granted, immunity is conditional or delimited in some way. For example, there may be a requirement that the cooperation extended reflects honestly held views (even if the information

<sup>27</sup> Peter J.P. Tak, The Dutch prosecutor: a prosecuting and sentencing officer”, in *The Prosecutor in Transnational Perspective*, Erik Luna and Marianne Wade, eds. (New York, Oxford University Press, 2012), pp. 147–148. Tak cites the guidelines as Staatscourant 2009, No. 12653, available at <https://zoek.officielebekendmakingen.nl/stcrt-2009-12653.pdf>.

turns out to be incorrect) or a requirement of a link between the crime for which immunity is granted and the crime in relation to which the suspect testifies. Different responses may be needed depending on the value of the suspect's evidence and its actual impact (for example, stopping or preventing a crime from occurring). Granting immunity to witnesses raises a number of concerns, such as potential misuse by overzealous prosecutors and a lack of protection from civil law suits. Some view immunity as an inducement to give evidence that taints the quality of the evidence and, that way, is less convincing to judges or juries at trial. Procedural safeguards may need to be introduced to address these concerns.

Article 19, paragraph 2, provides the possibility of granting immunity under paragraph 1 to cooperation given in relation to investigations and prosecutions abroad.

Under article 19, paragraph 3, persons who organized or directed the commission of a serious crime (as defined in article 3, subparagraph *(b)*, of the Model Legislative Provisions) involving an organized criminal group (art. 3, subpara. *(a)*) are not eligible for immunity under paragraph 1. Such persons may, however, be eligible for a mitigation of their sentence pursuant to article 20 of the Model Legislative Provisions.

### *Example: United Kingdom*

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#### *Section 71 of the Serious Organized Crime and Police Act 2005 (United Kingdom) — Assistance by offender: immunity from prosecution*

(1) If a specified prosecutor thinks that for the purposes of the investigation or prosecution of an indictable offence or an offence triable either way it is appropriate to offer any person immunity from prosecution for any offence, he may give the person a written notice under this subsection (an "immunity notice").

(2) If a person is given an immunity notice, no proceedings for an offence of a description specified in the notice may be brought against that person in England and Wales or Northern Ireland except in circumstances specified in the notice.

(3) An immunity notice ceases to have effect in relation to the person to whom it is given if the person fails to comply with any conditions specified in the notice.

[...]

## Article 20. Mitigation of sentence

When a person has voluntarily cooperated in the investigation or prosecution of offences to which this [Act/Law/Chapter/...] applies, the sentencing judge may decide to reduce the sentence if that cooperation proved to be effective to identify, apprehend or prove the participation of a participant in an organized criminal group, to locate victims or to recover, in whole or in part, proceeds of the crime, or otherwise amounted to substantial cooperation.

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 26, paragraph 2*

The investigation of organized crime can be greatly assisted through the cooperation of members of and other participants in the criminal group. The same considerations apply in the context of preventing organized crime: a tip-off from an insider can prevent a planned criminal act from occurring. To encourage the cooperation of insiders, article 26, paragraph 2, of the Organized Crime Convention requires States parties to consider the option of mitigating sentences for those who provide substantial cooperation. Article 20 of the Model Legislative Provisions gives sentencing judges the discretion to mitigate sentences for persons convicted of offences but who have provided substantial cooperation.

### *Example: Austria*

#### *§ 41a of the Criminal Code (Austria) – Special mitigation if the perpetrator cooperates with law enforcement authorities*

(1) If a person reveals his or her knowledge to any law enforcement authority over facts concerning any offence under §§ 277 [criminal conspiracy], 278 [criminal association], 278a [criminal organization] or 278b [terrorist association] or any offence connected to such an agreement, association, or organization, and if this information contributes substantially to

1. eliminating or reducing any danger arising from the agreement, association or organization;
2. the discovery of such an offence beyond the contribution of that person; or
3. tracing another person who has contributed to or has been involved in the agreement, association, or organization in a leading capacity,

a sentence below the statutory minimum penalty may be imposed within the parameters of § 41, if the significance of the disclosed facts is proportionate to the culpability of that person. § 41 para. 3 applies accordingly.

(2) Paragraph 1 also applies to a participant in an agreement, association or organization that is criminalized under the Act Prohibiting Organizations Associated with National Socialism [Verbotsgesetz], and to any person who is associated with such an agreement, association or organization.

(3) If the person's knowledge relates to offences committed outside the scope of application of Austrian criminal law, paragraph 1 is nevertheless applicable if mutual legal assistance would be permissible [in these circumstances].

#### *§ 209a of the Code of Criminal Procedure (Austria) – Withdrawal of the prosecution because of cooperation with the prosecution authority*

(1) The perpetrator of a criminal offence

[...]

3. under §§ 277, 278, 278a, or 278b of the Criminal Code, or a crime connected to such an agreement, association, or organisation,

has, subject to paras. 2 and 3, the right to demand a course of action pursuant to §§ 199, 200 to 203, and 205 to 209 if the accused freely approaches the prosecution authority, provides a remorseful confession (§ 34 para. 1 subpara. 17 Criminal Code) about his or her contribution to the crime and reveals his or her knowledge concerning new material facts or pieces of evidence, and if the information about these material facts or pieces of evidence make a substantial contribution to support a comprehensive inquiry into any of the offences set out in subparagraphs. 1 to 3 beyond the contribution of the accused, or to trace a person who took a leading part in such an agreement or a leading role in such an association or organisation (subpara. 3).

(2) So long as the perpetrator has not been questioned as an accused (§§ 48 para. 1 subpara. 2, 164, 165) because of his or her knowledge about the crimes set out in para. 1 and so long as no coercion has been used against him or her, the prosecution authority must provisionally withdraw from the prosecution of this person's criminal offences, unless it is clear from the outset that the conditions under para. 1 are not met.

(3) Once it has been established that the conditions under para. 1 are met and that no punishment appears to be warranted to prevent the perpetrator from committing criminal offences, taking into account the significance of the information provided to the inquiry or ascertainment, relative to the nature and scale of his or her contribution to the crime, the prosecution must instruct the accused, applying, *mutatis mutandis*, the provisions under §§ 200 to 203 and 205 to 209, to provide the services designated by these provisions and to continue the cooperation in the inquiries. Contrary to § 200, para. 2, the sum of money to be paid may be equivalent to 360 penalty units. If the conditions [under para. 1] are not met, the prosecution authority must resume the proceedings and, if the requirements of § 41a of the Criminal Code are met, apply to use § 41a of the Criminal Code and must notify the accused accordingly.

[...].

### *Example: Italy*

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#### *Article 416 bis. 1 Criminal Code (Italy) – Aggravating and mitigating circumstances for crimes related to mafia activities*

1. For crimes punishable with a penalty other than life imprisonment and committed making use of the conditions set out in article 416 bis or in order to facilitate the activities of the associations provided for in the same article, the penalty is increased by one third to one half.

2. [...]

3. For the crimes referred to in article 416 bis and for those committed making use of the conditions provided for by the aforementioned article or in order to facilitate the activity of mafia-type associations, against the accused who, by dissociating himself from the others, does his best to avoid that the criminal activity is brought to further consequences also by concretely helping the police authority or the judicial authority in the collection of decisive evidence for the reconstruction of the facts and for the identification or arrest of the perpetrators of the crimes, the penalty of life

imprisonment is replaced by that of imprisonment from twelve to twenty years and the other penalties are reduced from one third to one half.

*Example: United Kingdom*

*Section 71 of the Serious Organized Crime and Police Act 2005 (United Kingdom)*

*– Assistance by defendant: reduction in sentence*

(1) This section applies if a defendant—

(a) following a plea of guilty is either convicted of an offence in proceedings in the Crown Court or is committed to the Crown Court for sentence, and

(b) has, pursuant to a written agreement made with a specified prosecutor, assisted or offered to assist the investigator or prosecutor in relation to that or any other offence.

(2) In determining what sentence to pass on the defendant the court may take into account the extent and nature of the assistance given or offered.

(3) If the court passes a sentence which is less than it would have passed but for the assistance given or offered, it must state in open court—

(a) that it has passed a lesser sentence than it would otherwise have passed, and

(b) what the greater sentence would have been.

(4) Subsection (3) does not apply if the court thinks that it would not be in the public interest to disclose that the sentence has been discounted; but in such a case the court must give written notice of the matters specified in paragraphs (a) and (b) of subsection (3) to both the prosecutor and the defendant.

(5) Nothing in any enactment which—

(a) requires that a minimum sentence is passed in respect of any offence or an offence of any description or by reference to the circumstances of any offender (whether or not the enactment also permits the court to pass a lesser sentence in particular circumstances), or

(b) in the case of a sentence which is fixed by law, requires the court to take into account certain matters for the purposes of making an order which determines or has the effect of determining the minimum period of imprisonment which the offender must serve (whether or not the enactment also permits the court to fix a lesser period in particular circumstances),

affects the power of a court to act under subsection (2).

(6) If, in determining what sentence to pass on the defendant, the court takes into account the extent and nature of the assistance given or offered as mentioned in subsection (2), that does not prevent the court from also taking account of any other matter which it is entitled by virtue of any other enactment to take account of for the purposes of determining—

(a) the sentence, or

(b) in the case of a sentence which is fixed by law, any minimum period of imprisonment which an offender must serve.

[...]

*Example: Argentina*

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*Article 41 ter of the Criminal Code (Argentina)*

The sentencing ranges may be reduced to those applicable to attempted commission in the case of accomplices or perpetrators for any of the offences listed below in this article if, during the proceedings to which they are party, they provide accurate, verifiable and credible information or data.

The proceedings in relation to which data or information are provided must have to do with one of the following offences:

(a) Offences involving the production, trafficking, transport, cultivation, storage and marketing of narcotics, chemical precursors or any other raw material required for their production or manufacture as established in Act No. 23.737, or in any future law that supersedes it, and the organization and financing of such offences;

(b) Offences established in Part I, section XII, of the Customs Code;

(c) All cases in which article 41 quinquies of the Criminal Code is applicable;

(d) Offences established in articles 125, 125 bis, 126, 127 and 128 of the Criminal Code;

(e) Offences established in articles 142 bis, 142 ter and 170 of the Criminal Code;

(f) Offences established in articles 145 bis and 145 ter of the Criminal Code;

(g) Offences committed as defined in articles 210 and 210 bis of the Criminal Code;

(h) Offences established in Part XI, chapters VI, VII, VIII, IX, IX bis and X, and in article 174, paragraph 5, of the Criminal Code;

(i) Offences established in Book Two, Part XIII, of the Criminal Code.

For this legal benefit to apply, the data or information provided must help to avoid or prevent the beginning, permanence or consummation of an offence; shed light on the facts of the case being investigated or on related facts; reveal the identity or whereabouts of the perpetrators, coperpetrators and instigators of, or accomplices in, the actions being investigated or related actions; offer sufficient data to enable significant progress to be made in the search for the victims of an offence involving deprivation of liberty, or indicate the whereabouts of such victims; establish the fate of the instruments, assets, objects, proceeds of, or profits from, the offence; or indicate the sources of funding of criminal organizations involved in the commission of the offences established in this article.

If the offence with which the defendant is being charged is punishable by imprisonment and/or life imprisonment, the penalty may only be reduced to a minimum of 15 years of imprisonment.

Reduction of penalty is not applicable to penalties consisting in debarment or fines.

## Article 21. Penalties and sentencing considerations

1. In sentencing a person convicted of an offence to which this [Act/Law/Chapter/...] applies, a court may take into account any prior convictions of that person in another State for [a serious crime/an offence which, if committed on the territory of [*insert name of State*], would be an offence to which this [Act/Law/Chapter/...] applies].
2. In sentencing a person for an offence to which this [Act/Law/Chapter/...] applies and in addition to any other penalty provided in this [Act/Law/Chapter/...] or any other [Act/Law/Chapter...], the sentencing judge may make an order for one or more of the following:
  - (a) Prohibiting the person from exercising, directly or indirectly, one or more professional activities [permanently/for a maximum period of [...] years], including occupying a public office;
  - (b) Excluding the person from public bidding [and/or] from entitlement to public benefits or aid;
  - (c) [Temporarily/permanently] disqualifying the person from participation in public procurement;
  - (d) [Temporarily/permanently] disqualifying the person from acting as a director of legal persons incorporated in [*insert name of State*];
  - (e) [Temporarily/permanently] disqualifying the person from practice of other commercial activities;
  - (f) [Temporarily/permanently] disqualifying the person from practice as a lawyer, notary public, tax consultant or accountant;
  - (g) To publicize the decision; and
  - (h) [Any other non-custodial measures as appropriate].
3. The provisions of this article shall be without prejudice to the criminal liability of any legal person.

### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 11, paragraph 1; and article 31, paragraph 2*

Article 11, paragraph 1, of the Organized Crime Convention requires that States parties make the commission of an offence under articles 5, 6, 8 and 23 of the Convention liable to sanctions that take into account the gravity of that offence. By extension, this also requires States parties to make an effort to ensure that any discretionary powers they have under domestic law are used to effectively deter the offences covered by the Convention.

Article 31, paragraph 2, of the Organized Crime Convention requires States parties to endeavour, in accordance with fundamental principles of their domestic law, to reduce the opportunity for

organized criminal groups to participate in lawful markets. Article 31, paragraph 2, provides that these measures should focus on, among other things: preventing the misuse of public tender proceedings; the prevention of the misuse of legal persons; and the disqualification of persons convicted of offences under the Convention from acting as directors of legal persons incorporated in their jurisdiction.

Reflecting these obligations, article 21, paragraph 2, of these Model Legislative Provisions offers a range of sanctions that may be imposed in addition to other sanctions, such as imprisonment or fines.

### *Example: France*

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*Article 450-5 of the Penal Code (France) – Title V. Participation in a Criminal Association (Modified by Act No. 2012-409 of 27 March 2012, article 12 (V))*

Natural and legal persons convicted of the offences set out under the second paragraph of article 450-1 and article 321-6-1 also incur the additional penalty of confiscation of all or part of their assets, whether these assets are their property or, are subject to the rights of the owner in good faith, of which they have free disposal, whatever their nature, movable or immovable, severally or jointly owned.

## Article 22. Limitation period

1. Subject to paragraph 2, the limitation period for criminal proceedings for offences to which this [Act/Law/Chapter/...] applies is [*insert number of years*] after the commission of the offence.
2. Where a person suspected of an offence to which this [Act/Law/Chapter ...] applies deliberately seeks to evade the administration of justice, the limitation period in paragraph 1 shall not run for the duration of such evasion.

### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 11, paragraph 5*

States have different approaches to the issue of time limits on the commencement of prosecutions. Some States have statutes of limitations that prescribe the time limit within which prosecutions must be commenced. Other States do not have such limits. Under article 11, paragraph 5, of the Organized Crime Convention, each State party shall, where appropriate, establish under its domestic law a long limitation period in which to commence proceedings for any offence covered by the Convention. Article 11, paragraph 5, does not operate so as to require States without a statute of limitations to establish one.<sup>28</sup> This is reflected in article 22, paragraph 1, of these Model Legislative Provisions.

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<sup>28</sup> Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, paras. 323–325.



When an alleged offender evades the administration of justice, article 11, paragraph 5, of the Organized Crime Convention requires that a longer limitation period be set. This is reflected in article 22, paragraph 2, of these Model Legislative Provisions. The longer period is regarded as necessary in cases where accused offenders take actions to flee or otherwise evade criminal justice proceedings. In this context, it should be noted that in many States trial in absentia is not permitted. Therefore, it is crucial that a long statute of limitation is established to ensure the defendant faces trial.<sup>29</sup>

### *Example: Austria*

#### *§ 57 of the Criminal Code (Austria) – Statute of limitation for criminal liability*

(1) For offences punishable by imprisonment between 10 and 20 years or by imprisonment for life and for offences under Division Twenty-five [of this Code] there is no statute of limitation. However, after a period of 20 years, a penalty of imprisonment for life is substituted with imprisonment between 10 and 20 years. Paragraph 2 and § 58 apply to this period accordingly.

(2) Criminal liability for all other offences is subject to a statute of limitation. The time limitation commences with completion of the offence or with the cessation of the criminalized conduct.

(3) The statute of limitation is

20 years

— for offences punishable by more than 10 years of imprisonment but that are not punishable by imprisonment for life;

10 years

— for offences punishable by imprisonment for more than five years and a maximum of 10 years;

five years

— for offences punishable by imprisonment for more than one year and a maximum of five years;

three years

— for offences punishable by imprisonment for more than six months and a maximum of one year;

one year

— for offences punishable by imprisonment for a period not exceeding six months or by a fine.

(4) Forfeiture and preventative measures are not permissible once the statutory limitation period expires.

<sup>29</sup> Ibid., para. 327.

### *Example: Finland*

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#### *Section 1 of the Criminal Code 39/1189 (Finland) – Chapter 8: Statute of limitations, Section 1: Time-barring of the right to bring charges*

The right to bring charges for an offence for which the most severe sentence is life imprisonment does not become time-barred.

The right to bring charges is time-barred if charges have not been brought

(1) within twenty years, if the most severe penalty provided for the offence is fixed-term imprisonment for over eight years,

(2) within ten years, if the most severe penalty is imprisonment for more than two years and at most eight years,

(3) within five years, if the most severe penalty is imprisonment for over a year and at most two years, and

(4) within two years, if the most severe penalty is imprisonment for at most a year, or a fine or a summary penal fee.

The most severe penalty refers to the maximum penalty provided for the offence in the applicable provision.

The minimum period during which the right to bring charges for offences in office becomes time-barred, however, is five years. The minimum period during which the right to bring charges for impairment of the environment, an environmental offence and a building protection offence becomes time-barred is ten years. The right to bring charges for impairment of the environment, aggravated impairment of the environment, an environmental infraction and negligent impairment of the environment by a foreign vessel in the Finnish economic zone referred to in Chapter 13, section 3 of the Maritime Environmental Protection Act, becomes time-barred in three years. The minimum period during which the right to bring charges for a fishing offence committed from a foreign vessel in the Finnish economic zone becomes time-barred is three years.

The right to bring charges for sexual abuse of a child and aggravated sexual abuse of a child becomes time-barred at the earliest when the complainant reaches the age of twenty-eight years. The same applies to rape, aggravated rape, coercion into sexual intercourse, coercion into a sexual act, sexual abuse, pandering, aggravated pandering, trafficking in persons and aggravated trafficking person, directed at a person below the age of eighteen years. In the case of enticement of a child for sexual purposes referred to in Chapter 20, section 8 (b), the right to bring charges becomes time-barred when the person who was the object of the offence reaches the age of twenty-three years.

### *Example: Germany*

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#### *§ 78 of the Criminal Code (Germany) – Statute of Limitation*

The imposition of punishment and measures (§ 11(1) subpara. 8) shall be excluded on expiry of the limitation period. § 76a(2) 1st sentence subpara. 1 remains unaffected.

Felonies under section 211 (murder under specific aggravating circumstances) are not subject to the statute of limitations.

To the extent that prosecution is subject to the statute of limitations, the limitation period shall be thirty years in the case of offences punishable by imprisonment for life;

twenty years in the case of offences punishable by a maximum term of imprisonment of more than ten years;

ten years in the case of offences punishable by a maximum term of imprisonment of more than five years but no more than ten years;

five years in the case of offences punishable by a maximum term of imprisonment of more than one year but no more than five years;

three years in the case of other offences.

The period shall conform to the penalty provided for in the law defining the elements of the offence, irrespective of aggravating or mitigating circumstances provided for in the provisions of the General Part or of aggravated or privileged offences in the Special Part.

### *Example: Italy*

*Article 157 of the Criminal Code (Italy) – Period of limitation. Time required for the limitation period to run out.*

1. The running out of the limitation period extinguishes an offence after a period of time corresponding to the maximum penalty prescribed by law and in any case a period of time of not less than six years for major offences and four years for minor offences, even if only punished by a fine.

[...]

6. The periods of limitation set forth in the paragraphs above shall be doubled for [...] offences as per Article 51, paragraphs 3 bis and 3 quater, of the Code of Criminal Procedure. [...]

[...]

8. The period of limitation shall not extinguish offences punished by life imprisonment, as well as offences punished by a penalty that becomes life imprisonment when aggravating circumstances apply.

## Article 23. Transfer of criminal proceedings

1. With respect to accepting the transfer of criminal proceedings from a foreign jurisdiction:

(a) The [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice...] may decide to accept the transfer of the prosecution of an offence to which this [Act/Law/

Chapter/...] applies which is prosecuted in a foreign jurisdiction and for which [national courts have jurisdiction/the law of [*insert name of State*] applies], when it is considered to be in the interests of the proper administration of justice; and

(b) The taking over of a prosecution is not possible in respect of a person for whom prosecution would be prohibited by the rule against double jeopardy.

2. With respect to transferring criminal proceedings to a foreign jurisdiction:

(a) The [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice...] may decide to transfer the prosecution of an offence to which this [Act/Law/Chapter/...] applies to a foreign jurisdiction when the [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice...] considers this to be in the interests of the proper administration of justice and when it is so requested by the authorities of the foreign jurisdiction. The transfer of criminal proceedings may be limited to specific facts, offences or persons [suspects, accused, ...];

(b) The transfer of a prosecution shall be decided before [*insert the stage of the proceedings after which it is not reasonable to transfer a case, for example, indictment*];

(c) The [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice ...] shall allow the accused to present his or her views on the alleged offence and on the intended transfer of criminal proceedings to a foreign jurisdiction;

(d) The [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice ...] shall, if practicable, allow victims of the alleged offence to present their views on the alleged offence and on the intended transfer of criminal proceedings to a foreign jurisdiction to ensure that their rights are not affected negatively or unjustifiably;

(e) The decision to transfer criminal proceedings to a foreign jurisdiction suspends the prosecution without prejudice to the resumption of the prosecution if the transfer is not accepted, further investigations and mutual legal assistance; and

(f) The prosecution shall be closed when the [Prosecutor, General Prosecutor, Central Authority, Ministry of Justice ...] is informed that the foreign jurisdiction has definitively disposed of the transferred case.

## Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 15, paragraph 5; and article 21*

Situations may arise where it is possible for more than one State to commence and maintain an investigation and prosecution of the same offence. Article 21 of the Organized Crime Convention requires States parties to consider the possibility of transferring proceedings from one jurisdiction to another, where such transfer is considered in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to consolidating or concentrating the prosecution.

As a practical matter, in order to effectively transfer the criminal proceedings to another jurisdiction, several steps may be required. First, there would need to be consultation between the two States on

matters including sharing and transfer of information and evidence. Article 15, paragraph 5, of the Convention provides that where two States are involved in the investigation, prosecution or judicial proceedings with respect to the same conduct, they shall, as appropriate, consult one another with a view to coordinating actions. Second, if the matter had already reached the courts, it would be necessary for the court to “stay” or suspend the prosecution, pending resolution in another country.

Article 23 of these Model Legislative Provisions is intended to facilitate this process.<sup>30</sup> It is also important to note that the disposal of the case, mentioned in paragraph 2, subparagraph (f), includes acquittal, conviction and dismissal of charges.

In the context of transferring criminal proceedings, the issue of double jeopardy (also known as *ne bis in idem*) may become relevant. The principle of double jeopardy is part of international law, including international human rights law. Article 14, paragraph 7, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex) provides that:

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Double prosecution and punishment can be avoided or minimized by careful drafting of relevant legislation. For example, the Revised Manual on the Model Treaty on Extradition in its paragraph 52 recommends that in preparing legislation to give effect to the double jeopardy principle:

States may wish to consider what criteria and evidentiary information are appropriate and necessary to measure whether a second prosecution is for the same offence, particularly in complex and continuing group crimes.

### *Example: Ukraine*

#### *Article 595 of the Criminal Procedure Code (Ukraine) – Procedure and conditions for takeover of criminal proceedings from foreign States*

1. A request of competent authorities of foreign States for taking over of criminal proceedings by Ukraine shall be considered by the Central authority of Ukraine for international legal assistance or the authority authorised to maintain relations under paragraph 3 of Article 545 of this Code, within twenty days of its receipt.
2. Criminal proceedings, in which judicial authorities of a foreign State have not rendered a sentence, may be taken over by Ukraine under the following conditions:
  - 1) the person who is prosecuted is a national of Ukraine and stays in its territory;
  - 2) the person who is prosecuted is a foreigner or stateless person and stays in the territory of Ukraine, and his extradition under this Code or the appropriate international treaty of Ukraine is impossible, or his extradition was refused;
  - 3) the requesting State has given guarantees that, if a sentence is passed in Ukraine in respect of the prosecuted person, the latter will not be prosecuted on behalf of the State in the requesting State for the same criminal offence;

<sup>30</sup> See also the Model Treaty on the Transfer of Proceedings in Criminal Matters (General Assembly resolution 45/118, annex).

- 4) the action to which request is related, is a criminal offence under Ukraine's law on criminal liability.
3. If criminal proceedings are taken over, the Prosecutor-General's Office of Ukraine shall assign as prescribed in this Code, the conduct of pre-trial investigation to an appropriate public prosecutor, and shall inform the requesting State thereon.
4. If taking over criminal proceedings is refused, the Prosecutor-General's Office of Ukraine shall return materials to the appropriate foreign authorities, with reasons for the refusal.

*Article 596 of the Criminal Procedure Code (Ukraine) – Impossibility to take over criminal proceedings*

1. Criminal proceedings may not be taken over if:
  - 1) provisions of part two of Article 595 of this Code or of the international treaty of Ukraine to which the Verkhovna Rada [Supreme Council/parliament] of Ukraine has given its consent to be bound by, are not complied with;
  - 2) a judgment of acquittal was delivered in Ukraine in respect of the same person and in connection with the same criminal offence;
  - 3) a condemnatory sentence was delivered in Ukraine in respect of the same person and in connection with the same criminal offence, the punishment of which already served or being served;
  - 4) a decision to close criminal proceedings or to release from serving punishment in connection with pardon or amnesty, was taken in respect of the same person and in connection with the same criminal offence;
  - 5) proceedings in respect of the criminal offence concerned may not be conducted because of expiry of the period of limitation.

*Article 597 of the Criminal Procedure Code (Ukraine) – Keeping a person in custody before the receipt of the request to take over criminal proceedings*

1. Upon request of another State's competent authority, the person in whose respect a request to take over criminal proceedings will be sent may be kept in custody in the territory of Ukraine for a period not exceeding forty days.
2. Keeping in custody shall be applied in a procedure and according to rules stipulated in Article 583 of this Code.
3. If after the expiry of the time limit referred to in part one of this Article, the request to take over criminal proceedings is not submitted, the person concerned shall be released from custody.

*Article 598 of the Criminal Procedure Code (Ukraine) – The procedure of criminal proceedings which have been taken over from another State*

1. Criminal proceedings which have been taken over from a foreign competent authority, shall begin with the stage of pre-trial investigation, and shall be conducted as prescribed in this Code.
2. Information contained in materials obtained by appropriate competent authorities of another State in its territory and in accordance with laws of the latter before

criminal proceedings have been taken over, may be found admissible during trial in Ukraine unless this breaches the principles of judicial proceedings laid down in the Constitution of Ukraine and this Code, and unless such materials have been obtained with violations of human rights and fundamental freedoms. Information recognized by court admissible does not require any legalization.

3. After criminal proceedings have been taken over, investigator, public prosecutor may conduct any procedural actions specified in this Code.
4. If sufficient grounds for notifying of suspicion are present, a notice of suspicion should be served in accordance with Ukraine's law on criminal liability and as prescribed in this Code.
5. Punishment imposed by court shall not be more severe than punishment provided for by law of the requesting State for the same criminal offence.
6. A copy of the final procedural decision which has entered into legal force shall be sent to the competent authority of the requesting State.

*Article 599 of the Criminal Procedure Code (Ukraine) – Procedure and conditions for takeover of criminal proceedings by a competent authority of a foreign State*

1. The designated (central) authority of Ukraine shall consider a request of investigator as approved by the public prosecutor, that of a public prosecutor or court, to transfer criminal proceedings to a competent authority of another State, within twenty days after such request has been received.
2. Unfinished criminal proceedings may be transferred to another State on condition that extradition of the person subject to prosecution is impossible, or if extradition of such person to Ukraine was refused.
3. Investigator, public prosecutor or court, upon request of the competent (central) authority of Ukraine, resumes criminal proceedings, extends, if allowed by this Code, time limits for investigation or keeping in custody, taking into account the time needed for the competent authority of the foreign State to take over criminal proceedings.

*Article 600 of the Criminal Procedure Code (Ukraine) – Contents and form of the request to transfer criminal proceedings to another State*

1. Contents and form of the requests to transfer criminal proceedings to another State shall comply with provisions of this Code and the relevant international treaties of Ukraine.
2. A request to transfer criminal proceedings to another State shall contain the following:
  - 1) name of the authority which conducts criminal proceedings;
  - 2) reference to the appropriate international treaty on provision of legal assistance;
  - 3) name of the criminal proceedings to be transferred;
  - 4) description of the criminal offence which is the subject of criminal proceedings and legal qualification of such criminal offence;

- 5) last name, first name and patronymic of the individual in whose respect criminal proceedings are conducted, date and place of his birth, place of residence or whereabouts, and other information thereon.
3. The following documents shall be attached to the request:
  - 1) records of criminal proceedings;
  - 2) text of the Article of Ukraine's law on criminal liability under which the criminal offence is qualified and criminal proceedings are conducted;
  - 3) information on the person's nationality.
4. Available physical evidence are transferred with the request and the documents specified in part three of this Article.
5. Copies of materials shall be retained in the agency which conducted criminal proceedings in Ukraine.

*Article 601 of the Criminal Procedure Code (Ukraine) – Consequences of the transfer of criminal proceedings to the competent authority of another State*

1. From the moment the competent authority of another State has taken over criminal proceedings, the appropriate Ukrainian authorities shall not have the right to conduct any procedural action with regard to the person, in connection with the criminal offence the criminal proceedings in which respect has been taken over, other than on the grounds of a request for international legal assistance from the State which has taken over criminal proceedings.
2. Where criminal proceedings transferred from Ukraine are closed by the competent authority of a foreign State at the stage of pre-trial investigation, it shall preclude resumption of proceedings in Ukraine and further investigation under the rules of this Code unless otherwise provided for by an international treaty to which the Verkhovna Rada of Ukraine consented to be bound.

## Article 24. Pretrial detention

1. Where a person has been charged with an offence to which this [Act/Law/Chapter/...] applies, the court may order pretrial detention if one of the grounds listed in paragraph 2 exists.
2. The court may order pretrial detention if it is satisfied that there are serious indications of the accused's guilt and that there is an unacceptable risk that the person may, if not detained:
  - (a) Fail to appear at subsequent criminal proceedings;
  - (b) Influence a witness, tamper with evidence or otherwise obstruct the course of justice;
  - (c) Commit a further offence; or
  - (d) Endanger the life, health or safety of a person who is claimed to be a victim of the offence with which the person is charged or any other person.



3. An order for the pretrial detention of a person under this article must not exceed a period of *[insert time limit]*. The court may extend the period of pretrial detention under paragraph 2 of this article on the application of a prosecutor. The total period of pretrial detention must not exceed *[insert time limit]*.

4. Pretrial detention must not be ordered, maintained or extended if the objectives of the detention may be achieved through less severe means. In lieu of pretrial detention, the court may impose conditions on the *[person/accused]* pending trial or appeal to ensure their presence at the subsequent criminal proceedings and to ensure the administration of justice, including:

- (a) *[Seizure/confiscation]* of travel or other identity documents of the person;
- (b) Notification of the relevant authorities at border control points;
- (c) Holding of a surety bond;
- (d) Restrictions on the movement of the person, such as home confinement or electronic monitoring of movements;
- (e) Other measures considered by the court to be necessary and proportionate to prevent the person from influencing witnesses, tampering with evidence or otherwise obstructing the course of justice.

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 11, paragraph 3*

Article 11, paragraph 3, of the Organized Crime Convention requires that, with respect to the offences established under the Convention, each State party takes appropriate measures, in accordance with its domestic law and with due regard for 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.

The illegal operations in which organized criminal groups engage may generate substantial profits such that large sums of money may be available to suspects and accused to the effect that they can post bail and avoid detention before their trial or their appeal. Thus, article 11, paragraph 3, of the Convention and article 24 of these Model Legislative Provisions encourage the prudent use of pretrial detention by requiring that States parties take appropriate measures consistent with their respective laws and the rights of suspects and accused to ensure that they do not abscond.

While not expressly required by the Convention, the capacity of the suspect to influence witnesses, tamper with evidence, or take other steps to undermine the administration of justice may need to be considered in decision-making concerning pretrial release or detention. Accordingly, these factors are mentioned for consideration in this model legislative provision.

*Example: Austria**§ 173 of the Code of Criminal Procedure (Austria) – permissibility of remand*

(1) Imposition and extension of remand of a person are only permissible at the request of the prosecution authority and are only permissible if the accused is under a strong suspicion of a particular criminal offence, if the accused has been questioned by the court in relation to the matter and the requirements of remand, and if one of the grounds for remand listed in para. 2 exists. Remand must not be imposed or extended if this is disproportionate to the significance of the matter or to the anticipated sentence, or if the objective of remand can be achieved by using more menial means (para. 5).

(2) Grounds for remand exist if particular material facts give rise to a risk that the accused, if left free,

1. may abscond or go into hiding because of the type and scale of the anticipated impending sentence or for other reasons,

2. may seek to influence witnesses, expert witnesses, or co-accused, remove traces of the crime, or otherwise obstruct the investigation of the truth,

3. irrespective of the criminal proceedings against the accused for a criminal offence punishable by imprisonment for more than six months,

a. may commit an offence involving grave consequences that concerns the same legally protected interest as the criminal offence involving grave consequences the accused is alleged to have committed,

b. may commit an offence with more than merely trivial consequences that concerns the same legally protected interest as the offence the accused is alleged to have committed if the accused has either previously been convicted for such an offence or if the accused has now been charged with repeated or continuing conduct,

c. may commit an offence punishable by imprisonment for more than six months which, like the offence the accused has been charged with, concerns the same legally protected interest as criminal offences for which the accused has been previously convicted twice, or

d. carry out the attempted or threatened crime [§ 74 para. 1 subpara. 5 Criminal Code [Strafgesetzbuch (StGB)]] the accused has been charged with.

(3) There is, in any case, no reason to assume a risk of absconding if the accused is suspected of having committed a criminal offence punishable by no more than five years imprisonment, if the circumstances of the accused's life are in good order, and if the accused has a permanent place of residence in Austria, unless the accused has already made preparations to abscond. In assessing the risk under para. 2, subpara. 3, that the accused may commit an offence, particular weight has to be given to any danger to limb and lives of persons created by the accused or to the risk that the accused may commit a felony as part of a criminal organization or a terrorist association. Apart from that, when assessing this ground for remand, consideration must be given to what extent the risk has been mitigated by a change of the circumstances in which the crime the accused has been charged with was committed.

(4) Remand must not be imposed, maintained or extended if the objectives of remand may also be achieved through simultaneous penal custody or another form of detention. In cases of penal custody, the prosecution authority must issue directions for those variations of the enforcement that are essential for the purposes of remand. If remand is nevertheless imposed, the enforcement of the sentence is suspended.

(5) The following may be used as more menial means:

1. the pledge not to abscond, go into hiding or leave the place of residence without permission by the prosecution authority until the legally binding conclusion of the criminal proceedings,
2. the pledge not to make any attempt to obstruct the investigations,
3. in cases involving domestic violence (§ 38a National Security Police Act [Sicherheitspolizeigesetz (SPG)], the pledge to refrain from any contact with the victim, not to enter a particular dwelling and its immediate vicinity, or not to violate any restraining order pursuant to § 38a para. 2 of the National Security Police Act or any interlocutory injunction pursuant to § 382b of the Foreclosure Regulations [Exekutionsordnung (EO)], along with removal of all keys to the dwelling,
4. a directive to reside in a particular place, with a particular family, to avoid a particular dwelling, particular places, or particular contact, to refrain from consuming alcoholic substances or other drugs, or to pursue regular employment,
5. a directive to give notice of any change of residence or to report to the criminal investigation authority or other offices at regular intervals,
6. temporary removal of identity documents, motor vehicle documents, or other licences,
7. provisional probation assistance under § 179,
8. furnishing of a security under §§ 180 and 181,
9. a directive, with the consent of the accused, to undergo withdrawal treatment, other medical treatment or psychotherapy (§ 51 para. 3 Criminal Code [Strafgesetzbuch (StGB)]), or other health-related measures (§ 11 para. 2 Controlled Substances Act [Suchtmittelgesetz (SMG)]).

(6) Remand must be imposed if a felony with a statutory mandatory minimum sentence of ten years is involved, unless particular material facts give reason to believe that the existence of all of the grounds for remand listed in para. 2 can be excluded.

### *Example: Italy*

#### *Article 275 (3) of the Code of Criminal Procedure (Italy) – Selection criteria for precautionary measures*

Pre-trial detention in prison can only be ordered when other coercive or interdictive measures, even if applied cumulatively, are inadequate. When there are serious indications of guilt in relation to the crimes provided for in articles 270, 270 bis and 416 bis of the criminal code, pre-trial detention in prison is applied, unless elements

are acquired which show that there are no precautionary needs. Without prejudice to the provisions of the second sentence of this paragraph, when there are serious indications of guilt in relation to the crimes referred to in Article 51, paragraphs 3 bis and 3 quater, of this Code as well as in relation to the crimes provided for in Articles 575, 600 bis, first paragraph, 600 ter, except for the fourth paragraph, 600 quinquies and, if no mitigating circumstances apply, 609 bis, 609 quater, 609 octies of the criminal code, pre-trial detention in prison is applied, unless elements are acquired which show that there are no precautionary needs or that, in relation to the specific case, the precautionary needs can be met with other measures.

### Article 25. Consideration of prior conviction

In any proceeding for an offence to which this [Act/Law/Chapter/...] applies, a court may [take into consideration/admit evidence of] any prior conviction in [any State/any State party to the United Nations Convention against Transnational Organized Crime], [where the probative value of that evidence outweighs the likely prejudicial effect that that evidence may have on the proceeding].

#### Explanatory notes

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##### *Relevant provisions of the Organized Crime Convention: article 22*

Article 22 of the Organized Crime Convention provides that States parties may adopt measures which would allow them to take into consideration an alleged offender's previous convictions in another State. Article 22 of the Organized Crime Convention leaves relevant States parties discretion in establishing the appropriate terms and purposes under which this type of information may be used, which may include, depending on the legal system in question, the prosecution or sentencing of an offence.

Article 21, paragraph 1, of the Model Legislative Provisions addresses the use of information about prior convictions in the sentencing of an offender. Article 25 of the Model Legislative Provisions seeks to further implement article 22 of the Organized Crime Convention by enabling courts to take into consideration any prior conviction in a proceeding for an offence covered by the Model Legislative Provisions.<sup>31</sup>

Article 25 of the Model Legislative Provisions includes the possibility of admitting evidence of a prior conviction. It must be stressed that evidence of prior convictions has a highly prejudicial effect. A record of previous offending can lead the court or jury to assume that, because the individual committed another crime, they therefore must have committed the present crime as well. This assumption is unfair to the alleged offender, and a conviction based upon such an assumption undermines the proper administration of justice. For this reason, some legal systems restrict the circumstances in which such evidence may be admitted. Where evidence of a prior conviction is sought to be admitted, the probative value of the evidence will need to be carefully weighed against the likely prejudicial effect that the evidence may have on the defendant's right to a fair trial.<sup>32</sup> These considerations are specifically noted in article 25 of the Model Legislative Provisions. Legislators may also wish to

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<sup>31</sup> Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, para. 460.

<sup>32</sup> *Ibid.*, para. 461.

consider whether further elaboration of the circumstances in which such evidence may be admitted is necessary to safeguard the proper administration of justice.

As a practical matter, it may be necessary for States to put in place an administrative procedure whereby information about prior convictions can be obtained from other States. This could be undertaken through the mutual legal assistance process, or it may also be efficient to consider establishing another process for this to be undertaken.

*Example: European Union*

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*Article 6 of European Union Council Framework decision 2009/315/JHA of 26 February 2009, on the organization and content of the exchange of information extracted from the criminal record between Member States (European Union) – Request for information on convictions*

1. When information from the criminal record of a Member State is requested for the purposes of criminal proceedings against a person or for any purposes other than that of criminal proceedings, the central authority of that Member State may, in accordance with its national law, submit a request to the central authority of another Member State for information and related data to be extracted from the criminal record.

[...]



## CHAPTER V. WITNESSES AND VICTIMS

The issue of witness and victim protection is particularly salient in the context of prosecutions of organized criminal groups, which often have the means and the motivation to intimidate or silence potential witnesses in order to prevent them from cooperating with law enforcement authorities or testifying in judicial proceedings.

Article 24 of the Organized Crime Convention requires States parties to take appropriate measures within their means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by the Convention, and, as appropriate, for their relatives and other persons close to them. As provided in article 24, paragraph 4, the provisions of article 24 also apply to victims insofar as they are also witnesses.

Article 24, paragraph 2, of the Convention gives two examples of the measures contemplated by paragraph 1: firstly, procedures that focus on providing physical protection through police protection or formal witness protection programmes, and secondly, evidentiary rules that permit witnesses to give evidence safely. There are many other strategies that may be useful beyond this. Chapter V, articles 26 to 28, of these Model Legislative Provisions give various examples of legislative strategies that could be used.

Article 29 of the Model Legislative Provisions also includes provisions to assist States in implementing article 25, paragraph 2, of the Organized Crime Convention, which requires States parties to establish appropriate procedures to provide access to compensation and restitution for victims of offences under the Convention.

### Article 26. Assistance to and protection of victims

1. For the purpose of this chapter, “victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through the offences to which this [Act/Law/Chapter...] applies.
2. The [insert relevant authorities] shall take appropriate measures to ensure that a victim of an offence to which this [Act/Law/Chapter...] applies is provided adequate assistance

and protection if that person's safety is at risk. This includes measures to protect that person from intimidation and retaliation by suspects, offenders and their associates.

3. The [*insert competent authorities*] shall also take the measures specified in paragraph 2 as appropriate in relation to the victim's relatives [and domestic or de facto partner, ...].

4. Persons to whom this provision applies shall have access to any existing victim assistance and protection measures or programmes.

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 25, paragraph 1*

Article 25, paragraph 1, of the Organized Crime Convention requires States parties to take appropriate measures to provide assistance and protection to victims of offences covered by the Convention, in particular in cases of threat of retaliation or intimidation.

The term "victim" is not defined in the Convention, but it may be useful to define the term in national law. The definition set out in article 26, paragraph 1, of these Model Legislative Provisions is based on paragraph 1 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power [General Assembly resolution 40/34, annex]. Paragraph 2 of the Declaration notes that under the Declaration, a person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.

While the obligation under article 25, paragraph 1, of the Convention to take measures to provide effective protection for victims from retaliation or intimidation is mandatory, this is subject to what is reasonable within the means of the country in question. Article 26, paragraph 2, of these Model Legislative Provisions serves as a simple legislative basis to provide adequate assistance and protection to victims whose safety is at risk. Paragraph 3 extends such assistance and protection to relatives of the victim (as well as the victim's domestic or de facto partner and other persons to be particularized in domestic law).

The purpose of paragraph 4 is to ensure that victims of offences under these Model Legislative Provisions have access to any existing victim assistance and protection measures or programmes. It is intended (and common practice) that the details and parameters of any such measures or programme would be set out in other statutes (such as Codes of Criminal Procedure or designated victim protection legislation) or supplementary regulations/subordinate law.

In providing assistance or protection to victims, different victims may have different needs that should be addressed. Victims who have suffered physical and emotional trauma and certain groups of victims, such as children, the disabled and the elderly, may require additional support, such as psychological, social or medical assistance. Assistance and protection measures or programmes should also take into account the gender of victims. Furthermore, it needs to be emphasized that consent should always be obtained from a victim and, where relevant, from their relatives, when assistance and protection measures are afforded to them.

Victims who are also witnesses of an offence to which these Model Legislative Provisions apply have access to the additional protection set out in article 27.



### Example: Austria

#### § 65(1) of the Code of Criminal Procedure (Austria) – Definitions

For the purpose of this Code

1. 'victim' refers to

- a. any person who, through an intentionally committed criminal offence, might have been exposed to violence or dangerous threats, or might have been violated in their sexual integrity or sexual self-determination, or whose personal dependency might have been exploited by such an offence,
- b. the spouse, registered partner, domestic partner, relatives in a direct ancestral line, siblings, and other dependants of a person, whose death might have been caused by a criminal offence, or other relatives who were witnesses of the crime,
- c. any other person who might have suffered damage or whose legal interests protected by criminal law might have been violated through a criminal offence.

### Article 27. Protection of witnesses

1. For the purpose of this chapter, "witness" shall include any person that has given, has agreed to give or is required to give evidence or make a statement in investigation, prosecution or adjudication proceedings of an offence to which this [Act/Chapter/Law ...] applies.
2. The [*insert relevant authorities*] shall take appropriate measures to ensure that a witness is provided adequate protection if that person's safety is at risk. This includes measures to protect that person from intimidation, harm and retaliation by suspects, offenders and their associates.
3. The [*insert relevant authorities*] shall, as appropriate, further take the measures specified in paragraph 2 in relation to the witness' relatives [and domestic and de facto partners, ...].
4. Persons to whom this provision applies shall have access to any existing witness protection measures or programmes under [*specify relevant Act/provisions/...*].

### Explanatory notes

#### *Relevant provisions of the Organized Crime Convention: article 24*

Article 24 of the Organized Crime Convention requires States parties to take certain measures with regard to the protection of witnesses who give testimony in proceedings concerning offences covered by the Convention. The measures envisaged include physical protection, the relocation and non-disclosure, or limitations on the disclosure, of the identity and whereabouts of the witness and the introduction of evidentiary rules to permit testimony to be given in a manner that ensures the witness's safety. States parties are to consider entering into agreements or arrangements with other States for the relocation of witnesses (para. 3). The provisions of the article also apply to victims insofar as they are witnesses (para. 4).

The term “witness” is not defined in the Convention but is commonly used to refer to persons who give evidence by oath or signature or who give oral testimony or make other relevant statements in criminal justice proceedings, especially in criminal trials. A witness may include victims, innocent bystanders and experts, as well as insider witnesses who cooperate with authorities (also referred to as collaborators of justice). The UNODC publication *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* defines “witness” (or “participant”) as “any person, irrespective of his or her legal status (informant, witness, judicial official, undercover agent or other), who is eligible, under the legislation or policy of the country involved, to be considered for admission to a witness protection programme”. It is the function of the witness—as a person in possession of information important to the judicial or criminal proceedings—that is relevant, rather than his or her status or the form of testimony.

National drafters need to consider whether domestic law already contains a suitable definition of “witness” that can be referred to in provisions on witness protection and assistance for cases involving offences to which these Model Legislative Provisions apply.

The definition of the term “witness” in article 27, paragraph 1, of these Model Legislative Provisions is sufficiently broad to capture a range of persons who give evidence or make statements in criminal justice proceedings relating to an offence under these Provisions. Given the important role that witness intimidation can play in undermining the administration of justice, it is suggested that the definition of “witness” should be drafted broadly in order to include people who assist not only by giving evidence in court but also by, for example, giving information that assists an investigation.

While the obligation under article 24, paragraph 1, of the Convention to take measures to provide effective protection for witnesses from retaliation or intimidation is mandatory, this is subject to what is reasonable within the means of the respective country. Article 27 of these Model Legislative Provisions is intended simply to establish the requirement that witnesses (and persons close to them) be given access to witness protection where required. It is intended (and common practice) that the details and parameters of any such measures or programme would be set out in other statutes (such as codes of criminal procedure or designated victim protection legislation) or supplementary regulations/subordinate law.

In some jurisdictions, protective measures are afforded to a wider class of people than just those who will provide testimony and may include persons who have information pertaining to an investigation or police informants, as required by the Convention. In this context, it is important to consider whether protections exist for personnel such as court staff, interpreters, transcribers, court reporters, judges and jurors. In most countries, it is only in exceptional circumstances that judges, prosecutors, undercover agents, expert witnesses and interpreters are included in witness protection programmes. Intimidation or threats against their lives are considered to relate to their posts and the performance of their duties. The laws of some States also mention journalists and human rights defenders as classes of persons who are entitled to protection when they come under serious threat due to the information they possess related to a criminal matter. Persons in these categories can qualify for special police protection, but their protection may differ in nature from the measures intended for at-risk witnesses.

It needs to be emphasized that consent should always be obtained from a witness, as well as from others who are at risk, due to their relationship with the witness. As a practical matter, most protective measures will not be effective without a willing (consenting) witness.

Witnesses who are also victims of an offence to which these Model Legislative Provisions apply have access to the additional assistance and protection set out in article 26.

*Example: Australia**Section 3 of the Witness Protection Act 1994 (Commonwealth) – Interpretation*

[...]

witness means:

(a) a person who has given, or who has agreed to give, evidence on behalf of the Crown in right of the Commonwealth or of a State or Territory in:

(i) proceedings for an offence; or

(ii) hearings or proceedings before an authority that is declared by the Minister by notice in the *Gazette* to be an authority to which this paragraph applies; or

(b) a person who has given, or who has agreed to give, evidence otherwise than as mentioned in paragraph (a) in relation to the commission or possible commission of an offence against a law of the Commonwealth or of a State or Territory; or

(c) a person who has made a statement to the Australian Federal Police or an approved authority in relation to an offence against a law of the Commonwealth or of a State or Territory; or

(d) a person who, for any other reason, may require protection or other assistance under the National Witness Protection Programme; or

(e) a person who, because of his or her relationship to, or association with, a person referred to in paragraph (a), (b), (c) or (d) may require protection or other assistance under the National Witness Protection Programme.

*Example: Kenya**Section 3 of the Witness Protection Act (Kenya) – Meaning of “witness”*

(1) For the purposes of this Act, a witness is a person who needs protection from a threat or risk which exists on account of his being a crucial witness, who—

(a) has given or agreed to give, evidence on behalf of the State in—

(i) proceedings for an offence; or

(ii) hearings or proceedings before an authority which is declared by the Minister by Order published in the *Gazette* to be an authority to which this paragraph applies;

(b) has given or agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence against a law of Kenya;

(c) has made a statement to—

(i) the Commissioner of Police or a member of the Police Force; or

(ii) a law enforcement agency, in relation to an offence against a law of Kenya;

(d) is required to give evidence in a prosecution or inquiry held before a court, commission or tribunal outside Kenya—

- (i) for the purposes of any treaty or agreement to which Kenya is a party; or
- (ii) in circumstances prescribed by regulations made under this Act.

(2) A person shall be a protected person for the purpose of this Act if that person qualifies for protection—

- (a) by virtue of being related to a witness; or
- (b) on account of a testimony given by a witness; or
- (c) for any other reason which the Director may consider sufficient.

### Article 28. Protection of witnesses in judicial proceedings

A court hearing matters relating to an offence to which this [Act/Chapter/Law...] applies may, without prejudice to the rights of the defendant, make orders to protect a witness before, during and after the proceedings, including orders to:

- (a) Conduct proceedings in camera;
- (b) Permit evidence to be given from behind a screen or other barrier;
- (c) Permit evidence to be given via video link or other remote means;
- (d) Suppress the identity of the witness;
- (e) Distort the voice or disguise the face of the witness;
- (f) Permit the use of translators and interpreters;
- (g) Permit support persons of the witness to attend;
- (h) Provide professional support to the witness;
- (i) Seal records of the trial; and
- (j) Make any other arrangements the court considers appropriate in the circumstances for the purpose of witness protection.

### Explanatory notes

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#### *Relevant provisions of the Organized Crime Convention: article 24*

Participating as a witness in judicial proceedings can be intimidating in any case, but particularly so in proceedings against organized criminal groups, their participants and associates. The critical importance to protect and support witnesses during the trial process is expressly recognized in article 24, paragraph 2, of the Organized Crime Convention. This can be accomplished in various ways, including through legislative provisions enabling witnesses to participate in judicial proceedings in a manner that takes into account their specific needs, supports the truth-seeking function of the courts and, importantly, in no way compromises the rights of the defendant, which are expressly recognized in this provision of the Convention. Whatever procedural measures are used, due consideration should be given to balancing the witness's legitimate expectation of physical safety against the defendant's rights to a fair trial, which, in some jurisdictions, includes constitutional guarantees to the right of confrontation.

Article 28 of these Model Legislative Provisions identifies a number of areas where legislation could be pursued; it is likely, however, that such areas will require more detailed legislative language and national drafters need to consider and comply with any pre-existing domestic law relating to criminal procedure.

Procedural or in-court protections are actions aimed primarily at diminishing the fear of intimidation of victim witnesses in particular, that can be taken by the court *sua sponte* (on its own motion) or at the request of the prosecutor or investigating officials. Measures to reduce fear through avoidance of face-to-face confrontation with the defendant or the public may include the use of pretrial statements in lieu of in-court testimony, having the witness testify behind a screen or a two-way mirror, having the defendant view the witness's testimony via a video link in an adjacent room or having the witness provide testimony via audio visual links.

In the event that the court does not already have the discretion to provide "in court" protections to witnesses in proceedings involving offences to which these Model Legislative Provisions apply, article 28 of these Model Legislative Provisions provides a set of basic measures to protect the victim's identity and safety in judicial proceedings. This provision is expressed broadly and non-exhaustively to ensure that the court has the discretion to do whatever it considers necessary to protect witnesses. The term "witness" is further defined in article 27, paragraph 1, of these Model Legislative Provisions.

#### *Whistle-blower protection*

Beyond the protection of persons who partake in judicial proceedings or collaborate with law enforcement, States may wish to consider other forms of protection for reporting persons, otherwise known as whistle-blowers, which could further contribute to the detection of criminal conduct. While there is no universal definition of the term, a "whistle-blower" may be broadly defined as a member of an organization who reports an illegal, unethical or illegitimate practice under the control of the organization to individuals or institutions that may be able to respond or to the public. This means that whistle-blower protection has, inter alia, a workplace-related focus and covers persons who report internally, to a competent authority or, under specific circumstances, to the public or media. Whistle-blower protection seeks to protect such persons from retaliation such as workplace-related retaliation. It is a broad concept which is limited to neither the reporting of criminal conduct nor the involvement in judicial proceedings.

States may also wish to consider protecting whistle-blowers from unjustified treatment.<sup>33</sup> The UNODC *Resource Guide on Good Practices in the Protection of Reporting Persons* offers further information and suggestions on these points.<sup>34</sup>

While it is of paramount importance to appreciate the difference between witness protection and whistle-blower protection, they are connected insofar as both are aimed at encouraging persons to speak up. In some instances, the two can overlap as circumstances may arise where a whistle-blower reporting criminal misconduct to a law enforcement agency may require witness protection, especially if they are required to testify in court. The examples below relate to witness protection, not whistle-blower protection.

<sup>33</sup> See also article 33 of the United Nations Convention against Corruption.

<sup>34</sup> See also Marie Terracol, *A Best Practice Guide for Whistleblowing Legislation* (Berlin, Transparency International, 2018).

*Example: Russian Federation*

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*Article 6(1) of Federal Law No. 119-FZ ("On State Protection of Victims, Witnesses and Other Participants of Criminal Proceedings") of 2004 (Russian Federation) – Safety measures*

1. Several or one of the following security measures can be applied simultaneously to the protected person:
  - 1) Providing for personal security and security for the dwelling and property;
  - 2) Granting special measures of individual protection, communications and danger warning;
  - 3) Providing for confidentiality of information about the protected person;
  - 4) Moving to another place of residence;
  - 5) Changing of documents;
  - 6) Changing of appearance;
  - 7) Changing the place of work (service) and education;
  - 8) Temporarily placing in a safe location;
  - 9) Applying additional security measures in respect of the protected person who is kept in custody or is in the place of serving his sentence, including transfer from one place of custody or a place of serving punishment to another one.

*Example: Switzerland*

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*Article 5 of the Federal Act on the Protection of Witnesses outside Proceedings (Switzerland)*

- The protection programme may include, in particular, the following measures to be taken outside proceedings:
- (a) Housing the individual in question at a secure location;
  - (b) Changing his or her job and place of residence;
  - (c) Making assistive devices available;
  - (d) Preventing the disclosure of data regarding the individual in question;
  - (e) Providing the individual with a new identity for as long as protection is required;
  - (f) Providing financial support.

*Example: Italy**Article 147 bis of the Implementation Rules of the Criminal Procedure Code (Italy)*

*– Examination of undercover operators, persons who cooperate with justice and persons accused in joined proceedings (...)*

1. The examination at trial of persons admitted, according to the law, to protection programmes or measures, even of an urgent or temporary nature, takes place with the precautions necessary for their protection, determined by the judge or, in cases of urgency, by the president of the court or of the assize court, ex officio or upon request by a party or by the authority that ordered the protection programme or measures.

1 *bis*. The examination at trial of judicial police officers and agents, also belonging to foreign police bodies, auxiliaries and intermediary persons, who have carried out undercover activities pursuant to Article 9 of Law No. 146 of 16 March 2006, and subsequent amendments, always takes place with the precautions necessary for the protection and confidentiality of the person under examination and with methods determined by the judge or, in cases of urgency, by the president, in any case suitable to avoid that the face of such subjects is visible.

2. Where suitable technical tools are available, the judge or the president, having heard the parties, may order, even ex officio, that the examination be carried out remotely, by means of an audiovisual link that ensures the contextual visibility of the people present in the place where the person under examination is located. In this case, an auxiliary authorized to assist the judge at the hearing, designated by the judge or, in case of urgency, by the president, is present in the place where the person being examined is located and certifies his/her personal details, acknowledging the observance of the provisions contained in this paragraph, as well as the precautions taken to ensure the regularity of the examination with reference to the place where he is. The auxiliary prepares a report of the operations carried out pursuant to article 136 of the code.

3. Unless the judge deems the presence of the person to be examined absolutely necessary, the examination is carried out remotely according to the procedures set out in paragraph 2 in the following cases:

a) when the examination concerns persons admitted to the provisional protection programme provided for in Article 13, paragraph 1, of the Decree-Law No. 8 of 15 January 1991, converted, with modifications, by the law No. 82 of 15 March 1991, and subsequent amendments, or to the special protection measures referred to in the aforementioned article 13, paragraphs 4 and 5, of the same decree-law;

a *bis*) when the examination or other investigative act concerns persons admitted to the provisional plan or the definitive programme for the protection of witnesses of justice;

b) when the decree for the change of personal details provided for in Article 3 of Legislative Decree No. 119 of 29 March 1993 has been issued with regards to the person being examined; in this case, in proceedings where the examination takes place, the judge or the president acts in compliance with the provisions of article 6, paragraph 6, of the same legislative decree and arranges suitable precautions to prevent the person's face from being visible;

c) when, in the context of a trial for one of the crimes provided for by article 51, paragraph 3 bis, or by article 407, paragraph 2, letter a), No. 4, of the code of criminal procedure, the persons indicated in article 210 of the code must be examined for one of the crimes provided for by article 51, paragraph 3 bis or by article 407, paragraph 2, letter a), No. 4, of the code, even if there has been separation of proceedings;

c bis) when judicial police officers or agents, including those belonging to foreign police bodies, as well as auxiliaries and intermediaries, must be examined in relation to the activities they carried out during the undercover operations referred to in article 9 of the law No. 146 of 16 March 2006, and subsequent amendments. In such cases, the judge or the president shall take appropriate precautions to prevent the face of such subjects from being visible.

### Article 29. Restitution and compensation of victims

1. Where an offender is convicted of an offence to which this [Act/Chapter/Law...] applies, the court may order the offender to pay restitution or compensation to the victims, in addition to or in lieu of any other punishment ordered by the court.

2. The aim of an order for restitution shall be the restoration of the victim to the position they were in prior to the commission of the offence. An order for restitution may include one or more of the following forms of restitution:

(a) The return to the victim of property taken by the convicted person;

(b) The return to the victim of the value of the wrongful gain taken by the convicted person; or

(c) Habitat restoration for damages caused to the environment.

3. The aim of an order for compensation shall be to compensate the victim for any injury, loss or damage caused by the offender. This may include payment for or towards:

(a) Costs of medical, physical, psychological or psychiatric treatment incurred or to be incurred by the victim;

(b) Costs of physical and occupational therapy or rehabilitation incurred or to be incurred by the victim;

(c) Costs of necessary transportation, temporary childcare, temporary housing or the movement of the victim to a place of temporary safe residence;

(d) Lost income and due wages incurred by the victim according to national law and regulations regarding wages;

(e) Legal fees and other costs or expenses incurred by the victim, including costs related to the participation of the victim in the criminal investigation and prosecution process;



(f) Physical or psychological injury, emotional distress, or pain and suffering endured by the victim as a result of the crime committed against him or her; and

(g) Any other costs or losses incurred by the victim as a direct result of the conduct of the offender and that the court considers to be reasonable in the circumstances.

4. When making an order for compensation or restitution, the court shall take into account the convicted person's means and ability to pay compensation or restitution [and shall give priority to a restitution or compensation order over a fine].

5. The immigration status or the return of the victim to his or her country of nationality or habitual residence or other absence of the victim from the jurisdiction shall not prevent the payment of compensation and/or restitution under this article.

6. If the compensation or restitution cannot be paid by the sentenced person, the victim shall be eligible for compensation from [*insert name of national compensation fund*].

7. Where the convicted person is a public official whose actions constituting an offence to which this [Act/Chapter/Law...] applies were carried out under actual or apparent State authority, the court may order the State to pay restitution or compensation to the victim [in accordance with [*insert relevant national legislation*]]. An order for State compensation under this article may include payment for or towards any or all of the items under paragraph 3 subparagraphs (a)–(g).

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 25, paragraph 2*

Article 25, paragraph 2, of the Organized Crime Convention requires that States parties establish, at a minimum, some appropriate procedures to provide access to compensation or restitution. While domestic definitions and descriptions may vary, for the purposes of these Model Legislative Provisions, restitution is understood to refer to measures which seek to restore a victim or victims to the situation they were in before the crime occurred, whereas compensation is understood to refer to payment for damage or loss.

Article 29 of these Model Legislative Provisions is intended to provide guidance on the matters that States may wish to consider when developing laws on both restitution and compensation for victims of organized crime. Provisions on ensuring access to both restitution and compensation need to be included only if appropriate procedures for ensuring compensation and restitution in proceedings covered by these Model Legislative Provisions are not already available under national laws.

Article 29, paragraph 1, provides that courts may make an order for restitution or compensation independent of other sentences imposed on the convicted person and independent of a request being made by the prosecutor. While this model provision does not require the court to consider or order restitution or compensation, such approaches are possible. The model proposed by article 29 ensures that victims are not required to seek compensation through other legal proceedings, such as civil proceedings, which may not be viable for many victims.

Paragraphs 2 and 3 of this model provision state the different aims of restitution and compensation and provide non-exhaustive lists of the content of the court's restitution and compensation orders. These provisions reflect the spirit and content of paragraphs 8 to 13 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Paragraph 4 seeks to ensure that the courts gives due consideration to the means and ability of the convicted person when making a restitution or compensation order. National drafters may choose to prioritize payment of restitution or compensation over payment of any fines. Paragraph 6 states that, if the offender is unable to pay, State-funded compensation may be necessary.

*Example: United Kingdom*

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*Section 130(1) of the Powers of Criminal Courts (Sentencing) Act, 2000 (United Kingdom)  
– Compensation orders against convicted persons*

A court by or before which a person is convicted of an offence, instead of or in addition to dealing with him in any other way, may, on application or otherwise, make an order (in this Act referred to as a "compensation order") requiring him—

to pay compensation for any personal injury, loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining sentence; or

to make payments for funeral expenses or bereavement in respect of a death resulting from any such offence, other than a death due to an accident arising out of the presence of a motor vehicle on a road; but this is subject to the following provisions of this section and to section 131 below.

## CHAPTER VI.

# TRANSFER OF SENTENCED PERSONS

Article 17 of the Organized Crime Convention encourages States parties to consider entering into agreements and arrangements for the transfer of persons sentenced for offences covered by the Convention.

There are many pragmatic reasons to support the transfer of sentenced persons. In particular, persons who serve their sentences in their home countries can be better rehabilitated, resocialized and integrated back into the community. Imprisonment in a foreign country, away from family and friends, may also be counterproductive, as families can provide prisoners with social capital and support, which improve the likelihood of successful resettlement and reintegration.<sup>35</sup> The transfer of sentenced persons has a strong basis in international human rights law. For example, article 10, paragraph 3, of the International Covenant on Civil and Political Rights specifies that the “essential aim” of a penitentiary system is the “reformation and social rehabilitation” of sentenced persons. Furthermore, the rehabilitation of persons sentenced for offences under the Convention is also a stated objective of the Organized Crime Convention, which provides in article 31, paragraph 3, that “States parties shall endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention”.

In addition, the transfer of sentenced persons can also serve a number of other diplomatic and practical purposes. For example, it can ease the diplomatic tension that may arise when one country imprisons the national of another country. Transfer is also a mechanism that States can use to secure the return of their nationals who may be imprisoned in harsh or inhumane conditions. Also, transfer eases the practical burdens attendant in incarcerating foreign nationals, arising from, for example, language barriers and the need to accommodate the religious, cultural and dietary needs of foreign inmates.

Many States have acceded to multilateral schemes and concluded bilateral agreements that facilitate the transfer of sentenced persons.<sup>36</sup> Even though much of the framework around the transfer of sentenced persons will be found in relevant treaties, as with other forms of international cooperation, domestic legislation can operate to complement and ensure the

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<sup>35</sup> UNODC, *Handbook on the International Transfer of Sentenced Persons*, Criminal Justice Handbook Series (Vienna, 2012), pp. 9–11.

<sup>36</sup> *Ibid.*, pp.17–24.

efficient administration of transfer of sentenced persons. Furthermore, a domestic statutory framework assigns authority, ensures clarity in relation to the principles behind the transfers and gives legality to the transfer process.<sup>37</sup>

To ensure the efficiency of the transfer of sentenced persons, national laws should address the following issues at a minimum: definitions of all critical terms; identifying and designating a central authority to receive and respond to requests; enumerating the basic requirements for transfer (such as consent, dual criminality, finality of judgment and sentence and other factors determining whether a person is eligible for a transfer); ensuring clarity of application and other procedures; and the steps and procedures that a country is to follow in administering the programme, processing applications and making transfer decisions. Other relevant considerations include: whether the sentenced persons are entitled to be represented by counsel, and, if so, at what stage of the proceeding; whether juveniles and mentally ill persons are eligible for transfer, and, if so, whether special procedures and protections apply; the transferability of sentenced persons on parole, probation or other forms of conditional release; the impact that transfer has on the civil, political or civic rights of returning nationals and the immigration status of transferred sentenced persons; the identification of limitations on subsequent prosecutions of conduct forming the basis of the transferred offence; and any specific reporting requirements of the sentencing and administering countries.

In sum, the transfer of sentenced persons is a complex issue likely requiring both the conclusion of bilateral or other agreements and supporting domestic legislation. The present chapter includes the basics of what might need to be addressed in a national law on this issue. This could form the basis of a stand-alone law on transfer of sentenced persons, or this could be incorporated into existing criminal laws.

### Article 30. Purpose

The purpose of this chapter is to set forth the procedures to effect the transfer to or from [*insert name of State*] of sentenced persons subject to a final criminal sentence for an offence to which this [Act/Law/Chapter ...] applies who satisfy the prerequisites of transfer set forth herein.

#### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 17*

A statement of objectives may be useful in guiding the interpretation of provisions on transfer of sentenced persons.

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<sup>37</sup> Ibid., p. 58.

*Example: Australia**Section 3 of the International Transfer of Prisoners Act 1997 (Commonwealth) (Australia) – Objects of Act*

The objects of this Act are:

- (a) to facilitate the transfer of prisoners between Australia and certain countries with which Australia has entered agreements for the transfer of prisoners so that the prisoners may serve their sentences of imprisonment in their countries of nationality or in countries with which they have community ties; and
- (b) to facilitate the transfer of prisoners to Australia from countries in which prisoners are serving sentences of imprisonment imposed by certain war crimes tribunals.

*Example: Ukraine**Article 605 of the Criminal Procedure Code (Ukraine) – Grounds for considering the issue of the transferring and taking over of sentenced persons for serving their sentences*

1. Request of the designated authority of the foreign State, application of the sentenced person, his legal representative or close relatives or family members, as well as other circumstances specified by Ukrainian law or international treaty of Ukraine to which the Verkhovna Rada [Supreme Council/Parliament] of Ukraine consented to be bound, may be a ground for considering the issue of adopting a decision to transfer the sentenced person concerned.
2. The provisions of Articles 605–612 of this Code may apply in deciding the issue of transferring a person who is subject to compulsory medical measure by court decision.

*Article 606 of the Criminal Procedure Code (Ukraine) – Conditions for transfer of sentenced persons and taking over thereof for serving their sentences*

1. A person sentenced by a court of Ukraine, may be transferred to another State for serving the sentence imposed, while a national of Ukraine sentenced by foreign court, may be taken over for serving the sentence imposed, only provided that:
  - 1) the person concerned is a national of the Administering State;
  - 2) the sentence has entered into legal force;
  - 3) at the time of receipt of the request for transfer, the sentenced person has at least six months of the punishment left to serve, or if the person concerned was sentenced to imprisonment for uncertain term;
  - 4) the sentenced person or, accounting for his age or physical or mental state, his legal representative gives consent to the transfer;
  - 5) the criminal offence, as a result of commission of which the sentence was delivered, is a crime under law of the administering State, or would have been a crime if committed in its territory, the commission of which is punishable by imprisonment;
  - 6) material damage caused by the criminal offence, has been repaired, as well as procedural expenses, if any;

7) the sentencing State and the administering State agree to the transfer of the sentenced person.

2. Before deciding on the issue of transferring a sentenced person for serving the sentence imposed on him, from Ukraine to a foreign State, the latter shall be required to provide guarantees that the sentenced person will not be subjected to torture or another inhuman or degrading treatment or punishment.

3. Consent of the sentenced person or of his legal representative shall be required to be given in written form, with full understanding of all legal consequences of such consent. The sentenced person or his legal representative shall have the right to obtain legal assistance in the form of legal advice with regard to the consequences of their consent. Consent of the sentenced person shall not be required if, at time the issue is disposed under the provisions of this Chapter, he stays in the territory of the State of his nationality.

4. Whenever even a single condition out of those specified in paragraphs 1 through 3 of this Article is not met, the Ministry of Justice of Ukraine may refuse to transfer or admit the sentenced person, unless this Code or the relevant international treaty of Ukraine provide otherwise.

5. If in deciding on the issue of transferring a national of a foreign State sentenced in Ukraine, it was established that the laws of the administering State are in compliance with the conditions of paragraph 5 of part one of this Article, but the maximum envisaged term of punishment in the form of imprisonment for this type of action is shorter than the term of punishment imposed in the sentence, the transfer of the sentenced person shall be possible only after actual serving by the sentenced of a part of sentence determined in accordance with part three of Article 81 of the Criminal Code of Ukraine. Same rule may be applied if the legislation of the administering State is not in compliance with the conditions of paragraph 5 of part one of this Article as regards the type of punishment.

6. If a decision is adopted to refuse the transfer of a sentenced person for further serving of punishment, grounded reasons for such decision shall be stated.

7. A sentenced person who consented to the transfer to the foreign State for further service of punishment may refuse to be transferred at any time before he has crossed Ukrainian border, as prescribed in Article 607 of this Code. Having received information on such refusal, the Ministry of Justice of Ukraine shall immediately discontinue the consideration of the issue of the transfer or, as the case may be, take measures to discontinue the transfer.

8. In cases provided for in paragraphs 4 and 7 of this Article, a new consideration of the issue of transferring a sentenced person shall not be possible before the lapse of three years after the refusal to transfer, or the sentenced person's refusal to be transferred.

*Article 607 Criminal Procedure Code (Ukraine) – Procedure and time limits for deciding the issue of the transfer of persons sentenced by Ukrainian courts, for serving their sentences in foreign States*

1. The issue of the transfer of persons sentenced by Ukrainian courts to imprisonment, for serving the sentence in the State of their nationality, shall be decided on by the Ministry of Justice of Ukraine.
2. Whenever the sentenced person is a national of a foreign State that is a party to the international treaty on the transfer of persons sentenced to imprisonment, for serving the sentence in the State of his/her nationality, the authority in charge of execution of sentences, shall advise the sentenced person of his right to apply to the Ministry of Justice of Ukraine or the competent authority of the State of his nationality, with a request to be transferred to this State for serving the sentence there, on the grounds and according to the procedure prescribed in this Code. Provisions of this part do not preclude sentenced nationals of other States from applying for the transfer to the State of their nationality to continue serving their sentence.
3. Having studied and examined materials, the Ministry of Justice of Ukraine, if such materials are duly drawn up and if grounds specified by this Code or by the relevant international treaty exist, shall take a decision to transfer the person sentenced by Ukrainian court to imprisonment, for him to continue serving the sentence in the State of his nationality, and shall send information thereon to the appropriate foreign authority and to the person upon whose initiative the issue of such transfer of the sentenced person was considered.
4. Upon receiving from the competent authority of the foreign State of information on the consent to admit the sentenced person for serving his punishment, the Ministry of Justice of Ukraine shall send to the Ministry of Internal Affairs of Ukraine, the assignment to make arrangements regarding the place, time, and procedure for the transfer, and to organize the transfer of the person concerned from the relevant institution of the Ukrainian penitentiary system to the foreign State.
5. Transfer of a sentenced national of a foreign State for further serving of punishment as prescribed in this Article, shall not deprive him of the right to raise the issue of his release on parole, commutation of the remaining part of the sentence to a less severe one, within time limits specified in the Criminal Code of Ukraine, as well as of pardon, in a procedure established by Ukrainian law. Any documents or information required for consideration of the issue in Ukraine shall be required to be demanded and obtained from the competent authorities of the administering State through the Ministry of Justice of Ukraine.
6. The Ministry of Justice of Ukraine shall inform the sentencing court of the decision to transfer the sentenced person, as well as shall ensure that the court is informed on how the sentence has been executed in the foreign State concerned.
7. Whenever an amnesty is declared in Ukraine, the court which received information on the decision to transfer a sentenced person as provided for in this Article, shall consider the issue of applying amnesty to such sentenced person. If necessary, the court may apply to the Ministry of Justice of Ukraine seeking to receive from the competent authorities of the administering State, the information necessary for the consideration of the issue of applying amnesty.

8. The authority which has adopted the decision as prescribed in parts five and seven of this Article, based on results of consideration of parole, commutation of the remaining part of the sentence to a less severe one, pardon or amnesty issues, shall forward a copy of the relevant decision to the Ministry of Justice of Ukraine, for providing the appropriate information to the administering State.

### Article 31. Use of terms

In this chapter:

(a) “Transfer” shall mean a transfer of an offender for the purpose of executing in one country of a sentence imposed by the courts of another country;

(b) “Sentence” shall mean any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a determinate or indeterminate period in the exercise of its criminal jurisdiction;

(c) “Sentenced person” shall mean a person who is serving a sentence of imprisonment or a form of conditional release;

(d) “Imprisonment” shall mean a penalty imposed by a court under which the individual is confined to a penal institution;

(e) “Sentencing State” shall mean the State that imposed the sentence of imprisonment;

(f) “Administering State” shall mean the State agreeing to administer or enforce the transferred sentence;

(g) “Finally sentenced”, in relation to a sentenced person, shall mean that the person has been convicted and sentenced, has no pending appeals against conviction or sentence, and the period for such appeals has expired.

### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 17*

Article 31 of these Model Legislative Provisions sets out the definitions for several key terms used throughout this chapter.

#### *Example: Australia*

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*Section 4 of the International Transfer of Prisoners Act 1997 (Commonwealth) (Australia)  
– Definitions*

(1) In this Act, unless the contrary intention appears:

[...]



prisoner means a person (however described) who is serving a sentence of imprisonment and includes:

- (a) a mentally impaired prisoner; and
- (b) a person who has been released on parole.

[...]

sentence of imprisonment means any punishment or measure involving:

- (a) deprivation of liberty; or
- (b) potential deprivation of liberty, if the punishment or measure relates to a conviction for a non-Tribunal offence;

ordered by a court or tribunal for a determinate or indeterminate period in the exercise of its criminal jurisdiction, and includes any direction or order given or made by the court or tribunal with respect to the commencement of the punishment or measure.

### *Example: Mauritius*

#### *Section 2(1) of the Transfer of Prisoners Act 2001 (Mauritius) – Interpretation*

In this Act—

[...]

“imprisonment” includes—

- (a) placement of a juvenile in a place of detention referred to in section 25 of the Juvenile Offenders Act;
- (b) confinement following an order issued pursuant to section 115 of the Criminal Procedure Act;
- (c) any other similar form of restraint of liberty that applies in a designated country;

[...]

“offender” —

(a) means a person who —

(i) is a citizen of Mauritius or a person whose transfer appears to the Minister to be appropriate having regard to any close ties that person may have with Mauritius; and

(ii) has been convicted and sentenced in a designated country to —

(A) a term of imprisonment of which the unexpired portion at the time that an application is made is not less than 6 months; or

(B) an indeterminate period of imprisonment;

(b) includes an offender released on licence from such sentence;

“prisoner” means a foreign offender or an offender;

## Article 32. Requirements for transfer

A sentenced person is eligible for transfer to or from [*insert name of State*] if:

(a) The person is a national of the administering State [or has significant ties to the administering State]; and

(b) Each the following conditions are met:

(i) The person has been finally sentenced in the sentencing State;

(ii) The sentencing State, the administering State and the sentenced person each consent to the transfer;

[(iii) The acts or omissions constituting the offence for which he or she has been sentenced would, if they had occurred in the administering State at the time of the transfer, have constituted an offence in the administering State;] and

(iv) Six months or more remain to be served on the sentence.

### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 17*

Article 32 of these Model Legislative Provisions set out the basic requirements relating the eligibility of a sentenced person for the transfer to another jurisdiction. Article 32, paragraph (a), establishes, as a condition for eligibility, that the person be a national of the administering State. States are also provided with the option of extending eligibility to persons with significant ties to the administering State. Significant ties are not further defined for the purposes of these Model Legislative Provisions but could include, as considered appropriate by legislators, the presence of close family members, a history of prior residence, educational or work history, ownership of property or the holding of professional licences in the administering State.

These options reflect differing approaches taken by States to this issue under domestic law. In many countries, it is a requirement that the transferred person be a national of the administering State. In others, transfer is also possible for persons who are ordinarily resident in the administering State or otherwise have close/significant ties to the administering State. For example, the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released, adopted by the General Assembly, does not require that the sentenced person be a national of the administering State for transfer and allows the transfer of persons ordinarily resident in the administering State.<sup>38</sup>

Article 32, paragraph (b), establishes further requirements for eligibility for transfer. Subparagraph (ii) provides that the consent of the sentencing State, the administering State and the sentenced persons is necessary for transfer. As noted in the *Handbook on the International Transfer of Sentenced Persons*, historically, the consent of the sentenced person has always been a precondition for international transfers. The *Handbook* notes the following:

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<sup>38</sup> General Assembly resolution 45/119, annex, art. 7 (a).

The requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners or as a means of disguised extradition. Moreover, since prison conditions vary considerably from country to country, and the prisoner may have very personal reasons for not wishing to be transferred, it seems preferable to base the transfer agreements on the consent requirement. It is also usually the case that the social rehabilitation of a prisoner is better served by transferring only sentenced persons who consent to such transfer.<sup>39</sup>

Consent of the sentenced person must be informed and given voluntarily. In order for a determination to be made whether the sentenced person's consent is voluntary and informed, the sentenced person needs to be able to consult with legal counsel.

Article 32, paragraph (b), subparagraph (iii), of these Model Legislative Provisions, an optional requirement, establishes dual criminality as a pre-condition to transfer. Dual criminality is a common, but not universally applicable, requirement for transfer of sentenced persons. In some cases, States may wish to waive the dual criminality requirement for humanitarian reasons. An administering State may decide that it would rather have a national serve his or her sentence in a "home" prison rather than leave him or her in the sentencing State, even though the conduct for which the sentence was passed is not a crime in the administering State. Accordingly, national legislation in some States does not automatically require dual criminality, thus leaving scope for such exceptions. In other States, the administration of a sentence from another State for conduct not criminalized under domestic law would not be lawful and would entitle the prisoner to release.

### *Example: Russian Federation*

*Articles 469, 470 and 471 of the Criminal Procedure Code (Russian Federation) – Chapter 55. Handing Over the Person Sentenced to the Deprivation of Freedom, for Serving the Sentence in the State of Which He Is a Citizen*

#### Article 469. Grounds for Handing Over the Person Sentenced to Deprivation of Liberty

Seen as the grounds for handing over the person sentenced by a court of the Russian Federation to deprivation of freedom, for serving the sentence in the State of which he is a citizen, as well as for handing over a citizen of the Russian Federation sentenced by a court of a foreign State to the deprivation of liberty, for serving the sentence in the Russian Federation, shall be the court decision based on the results of considering the proposal of the federal executive body authorised in the sphere of the execution of penalties or the application of the convict or a representative thereof, as well as of the competent authority of a foreign State in compliance with an international treaty of the Russian Federation or an agreement in writing between the competent authority of the Russian Federation and the competent authority of the foreign State on the basis of the principle of reciprocity.

#### Article 470. Procedure for Considering by Court the Issues Connected with Handing Over a Person Sentenced to Deprivation of Liberty

1. The proposal of the federal executive body authorised in the sphere of the execution of penalties, as well as an application of the convict, a representative thereof, or

<sup>39</sup> UNODC, *Handbook on the International Transfer of Sentenced Persons*, (2012), p. 34.

the competent authority of a foreign State on handing over a person sentenced to deprivation of liberty for serving his/her sentence in the State of which this person is a citizen, shall be considered by the court in the procedure and within the time period which are established by Articles 396, 397 and 399 of this Code subject to the requirements of this Article and Articles 471 to 472 of this Code.

2. Where it is impossible for the court to consider the issue of handing over the convict due to the incompleteness or absence of required data, the judge shall be entitled to postpone its consideration and to request for missing data or to direct the convict's application without consideration thereof to the competent authority of the Russian Federation for collecting required information in compliance with regulations of an international treaty of the Russian Federation, as well as for the preliminary coordination of the issue on the convict's handing over with the competent authority of a foreign State.

#### Article 471. Reasons for the Refusal to Hand Over the Person Sentenced to Deprivation of Liberty for Serving Punishment in the State of Which He/She Is a Citizen

Handing over of the person sentenced to deprivation of liberty by a court of the Russian Federation for serving the term in the State of which he/she is a citizen may be refused in cases, when:

- 1) none of the deeds for which the person is convicted is recognized as a crime in accordance with the legislation of the State of which he is a citizen;
- 2) the punishment cannot be executed in the foreign State as a result of:
  - a) the expiry of the term of legal limitation or for other grounds, stipulated by the legislation of this State;
  - b) non-recognition by a court or other competent authority of a foreign State of the sentence passed by a court of the Russian Federation without establishing the procedure for, and terms of, the convict's serving punishment on the territory of the foreign State;
  - c) incompatibility of the terms of, and procedure for, serving punishment by the convict determined by a court or other competent authority of the foreign State;
- 3) guarantees of execution of the sentence in the part of the civil claim have not been received from the convict or from the foreign State;
- 4) no consensus is reached on handing over the convict on the terms, stipulated by an international treaty of the Russian Federation;
- 5) the convict has a permanent place of residence in the Russian Federation.

#### *Example: United Republic of Tanzania*

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##### *Section 5 of the Transfer of Prisoners Act 2004 (United Republic of Tanzania) – Request for transfer*

[...]

(4) Where an application for transfer of a prisoner to Tanzania has been made by a prisoner or consent for transfer to Tanzania has been given by another person on

behalf of a prisoner, then, if that prisoner is habitual resident of Tanzania Zanzibar, the Minister shall before making any decision, consult with the Minister responsible for the custody of offenders in the Revolutionary Government of Zanzibar regarding the application, and, where there is consensus in the affirmative, the provisions of this Act shall, *mutatis mutandis*, apply to such transfer.

(5) In determining the request for transfer made under subsection (1), the Minister shall not agree to a transfer where the prisoner has less than six months of the sentence remaining to be served except on exceptional circumstances.

### Article 33. Notification of right to apply for transfer from *[insert name of State]*

The *[insert relevant authority]* shall notify a sentenced person who is a national of a State with which an agreement or other arrangement exists for the transfer of sentenced persons and who is eligible for transfer of their eligibility to apply for transfer within *[insert reasonable time period]* after the judgment and sentence become final.

#### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 17*

It is important that foreign sentenced persons who may be eligible for transfer are made aware of this process and how they might seek to apply for transfer.

### Article 34. Application for transfer from *[insert name of State]*

1. A person sentenced in *[insert name of State]* or a State to which the sentenced person is eligible for transfer under article 32 may apply to *[insert name of competent national authority for transfer of sentenced persons]* to request the transfer of a sentenced person to that State.
2. The application shall include:
  - (a) The name of the State to which transfer is requested;
  - (b) Information regarding the nationality of the sentenced person [or ties to the administering State].

#### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: article 17*

Article 34, paragraph 1, of the Model Legislative Provisions provides that a sentenced person or a State to which they are eligible for transfer may apply to request their transfer to that State. Article 34, paragraph 2, sets out the requirements for such an application. The requirements of an application will vary according to the criteria for transfer.

### *Example: France*

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*Articles 728-2 to 728-8 of the Criminal Code of Procedure (France) – Chapter V: Of the transfer of sentenced persons*

Article 728-2 (Inserted by Law No. 2004-204 of 9 March 2004, art. 162, I IV, *Official Journal* of 10 March 2004, in force 1 January 2005).

Where, pursuant to an international Convention or agreement, a person detained for the execution of a sentence imposed by a foreign court is transferred to French territory to serve in France the remainder of the sentence, the execution of the penalty is carried out in accordance with the provisions of the present Code, and in particular the present Chapter.

Article 728-3 (Inserted by Law No. 2004-204 of 9 March 2004, art. 162, I, *Official Journal* of 10 March 2004, in 1 January 2005).

As soon as he arrives on French soil, the detained convicted person is presented to the district prosecutor of the place of arrival, who then interrogates him as to his identity and drafts an official record thereof. However, if the interrogation cannot take place immediately, the convicted person is sent to the remand prison, where he may not be detained for more than twenty-four hours. At the end of this period, the prison governor, acting on his own motion, brings him before the district prosecutor.

Upon seeing the documents establishing the agreement of the States for the transfer and the consent of the person concerned, as well as the original or a copy of the foreign sentence accompanied, if necessary, by an official translation, the district prosecutor orders the immediate incarceration of the convicted person.

Article 728-4 (Inserted by Law No. 2004-204 of 9 March 2004, art. 162, I, *Official Journal* of 10 March 2004, in force 1 January 2005).

The penalty imposed on the foreigner is directly and immediately enforceable on the French national territory in respect of the part remaining to be served in the foreign State, in consequence of the international Convention or agreement.

However, where the penalty imposed is more severe in kind or in length than the penalty provided by French law for the same offence, the correctional court of the place of detention, to which the district prosecutor or the convicted person refers the case, replaces it with the closest-corresponding penalty in French law, or reduces this penalty to the enforceable legal maximum. It determines the type and, within the limit of the period that still remained to be served in the foreign State, the length of the sentence to be executed.

Article 728-5 (Inserted by Law No. 2004-204 of 9 March 2004, art. 162, I, *Official Journal* of 10 March 2004, in force 1 January 2005).

The court decides in open court, after hearing the public prosecutor, the convicted person and, if applicable, the advocate chosen by him or appointed ex officio upon his request. The judgment is immediately enforceable despite the filing of any appeal.

Article 728-6 (Inserted by Law No. 2004-204 of 9 March 2004, art. 162, I, *Official Journal* of 10 March 2004, in force 1 January 2005).

The time taken for the transfer is deducted in its entirety from the length of the sentence executed in France.

Article 728-7 (Inserted by Law No. 2004-204 of 9 March 2004, art. 162, I, *Official Journal* of 10 March 2004, in force 1 January 2005).

Any procedural objections made in respect of the execution of the remainder of the custodial sentence to be served in France are filed before the correctional court of the place of detention.

The provisions of article 711 of the present Code are applicable.

Article 728-8 (Inserted by Law No. 2004-204 of 9 March 2004, art. 162, I, *Official Journal* of 10 March 2004, in force 1 January 2005).

The enforcement of the sentence is governed by the provisions of the present Code.

### Article 35. Enforcement of sentence of persons transferred to and from *[insert name of State]*

1. For the purposes of this article:

(a) “Continued enforcement” shall mean the enforcement, by the administering State, of a sentence imposed by the sentencing State as if that sentence had been imposed by a court of the administering State; and

(b) “Conversion of sentence” shall mean the conversion of a sentence imposed by the sentencing State into a sentence of the administering State by a court in the administering State applying the law of the administering State to determine the sentence that would have been imposed had the offence or offences for which the sentence was imposed been committed in the administering State.

2. The enforcement of the sentence of a person transferred from *[insert name of State]* under this [Act/Law/Chapter ...] may be by either continued enforcement or conversion of sentence.

3. The enforcement of the sentence of a person transferred to *[insert name of State]* under this [Act/Law/Chapter ...] may be by either continued enforcement or conversion of sentence.

4. Prior to the transfer of a sentenced person to *[insert name of State]*, the *[insert relevant authority]* must inform the sentencing State of the applicable method of sentence enforcement under paragraph 3 of this article.

5. In respect of a sentenced person transferred to *[insert name of State]* under this [Act/Law/Chapter ...],

(a) The full period of deprivation of liberty served by that person in the sentencing State, including any periods of pretrial detention, and any credits toward service of the sentence received by the sentenced person shall be deducted from the length of the sentence to be served, regardless of whether the sentence is to be enforced by continued enforcement or conversion of sentence;

(b) Neither continued enforcement nor conversion of sentence may result in the imposition of a sentence that exceeds the term of the sentence imposed by the sentencing State; and

(c) Neither the conviction of, nor the sentence imposed upon, that person in the sentencing State shall be subject to any appeal or any form of review in [*insert name of State*].

## Explanatory notes

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### *Relevant provisions of the Organized Crime Convention: article 17*

Legislation is required to ensure that any sentence imposed in another country can be lawfully recognized and enforced in the country receiving the sentenced person. As noted in the UNODC *Handbook on the International Transfer of Sentenced Persons*, there are two modes of recognition/enforcement of foreign sentences: continued enforcement and conversion. As explained in the *Handbook*:

Continued enforcement refers to a process whereby, through a court or administrative order, the sentence imposed by the sentencing State is enforced by the administering State. The sentence is not normally altered by the administering State. If, however, the sentence is by its nature or duration incompatible with the law of the administering State, or if its law so requires, the administering State may adapt the sentence to a punishment prescribed by its own law for a similar offence. The adapted sentence must, as far as possible, correspond with the initial sentence. It must not aggravate, by its nature or duration, the sanction imposed in the sentencing State, nor exceed the maximum sentence prescribed by the law of the administering State. In practice, this means that, where the process of continued enforcement is followed, the powers of the administering State to change the initial sentence are quite limited.<sup>40</sup>

The process of converting a foreign sentence is also explained in the *Handbook*:

Conversion of the sentence refers to a process whereby the administering State, through a judicial or administrative procedure, imposes a new sentence based on the factual findings of the court in the sentencing State. The administering State is bound by these facts but imposes a new sentence within the terms of its national law. Such a sentence may be less severe than that imposed initially by the sentencing State, but it may not be more severe. There are usually further restrictions as well. For example, article 11, paragraph 1, of the European Convention [on the Transfer of Sentenced Persons] provides that the administering State may not convert a sanction involving deprivation of liberty to a pecuniary sanction and that it must deduct the full period of deprivation of liberty served from

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<sup>40</sup> Ibid., pp. 6–7.



the new sentence. Pursuant to that same article, the administering State is not bound by its own minimum sentences for similar offences. The administering State may, however, adapt a sentence for a particular offence by reducing it to the national statutory maximum for that offence.<sup>41</sup>

Article 35 of these Model Legislative Provisions addresses the enforcement of sentences of persons transferred both to and from the country and addresses both continued enforcement and conversation of sentence. These terms are defined for the purposes of this article in paragraph 1.

Article 35, paragraph 2, of these Model Legislative Provisions provides that the enforcement of the sentence of a persons transferred from the State to an administering State may be by either continued enforcement or conversion of sentence.

Article 35, paragraph 3, addresses the enforcement of sentence of persons transferred to the State. It is drafted broadly to allow for both continued enforcement or conversion of sentence. In practice, both possibilities will not always be available. They may be limited by the particular international agreement under which a transfer is undertaken, by the national law of the administering State, or even by the negotiations surrounding the transfer of an individual.<sup>42</sup> Where both possibilities are available, States will need to determine for themselves the circumstances under which one or the other method should be applied.

It is important that any sentenced person transferred receive the benefit of any time already served and that the sentence in the administering State not exceed that imposed by the sentencing State. These matters are addressed, in respect of transfers to the legislating State, in article 35, paragraph 5 (a) and (b), of these Model Legislative Provisions, respectively.

In keeping with article 4 of the Organized Crime Convention, article 35, paragraph 5 (c), of these Model Legislative Provisions clarifies that neither the conviction of, nor the sentence imposed upon, a person in the sentencing State shall be subject to any appeal or review in the administering State. This does not exclude the rights of the sentenced person to bring any application for review or appeal against a decision in relation to his or her imprisonment and the conditions thereof in the administering State.

### *Example: Australia*

#### *Section 42 of the Australian International Transfer of Prisoners Act 1997 (Commonwealth) (Australia) – Sentence enforcement in Australia*

The Attorney-General may direct that a sentence of imprisonment imposed on a prisoner by a court or tribunal of a transfer country, or on a Tribunal prisoner by a Tribunal, be enforced on transfer of the prisoner to Australia under this Act:

(a) without any adaptation of the duration of the sentence of imprisonment or its legal nature, or with only such adaptations to the duration of the sentence or its legal nature as the Attorney General considers are necessary to ensure that enforcement of the sentence is consistent with Australian law (in this Act called the *continued enforcement method*); or

<sup>41</sup> Ibid., p. 7.

<sup>42</sup> Ibid., pp. 48–50.

(b) by substituting a different sentence of imprisonment for that imposed by the transfer country or Tribunal (in this Act called the *converted enforcement method*).

*Example: Canada*

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*Sections 13, 14 and 15 of the International Transfer of Offenders Act (S.C. 2004, c. 21) (Canada) – Continued Enforcement and Adaptation*

Continued enforcement

13. The enforcement of a Canadian offender's sentence is to be continued in accordance with the laws of Canada as if the offender had been convicted and their sentence imposed by a court in Canada.

Adaptation

14. Subject to subsection 17(1) and section 18, if, at the time the Minister receives a request for the transfer of a Canadian offender, the sentence imposed by a foreign entity is longer than the maximum sentence provided for in Canadian law for the equivalent offence, the Canadian offender is to serve only the shorter sentence.

Equivalent offence

15. For the purposes of the application of any Act of Parliament to a Canadian offender, the Minister shall identify the criminal offence that, at the time the Minister receives their request for a transfer, is equivalent to the offence of which the Canadian offender was convicted.

*Example: Mauritius*

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*Section 6 of the Transfer of Prisoners Act 2001 (Mauritius) – Effect of transfer*

(1) Where an offender is transferred to Mauritius, a conviction and sentence recorded by the court in the designated country from which he was transferred shall, subject to subsection (2), be deemed for all purposes to be a conviction recorded and a sentence imposed by a court of competent jurisdiction in Mauritius.

(2) Subject to subsection (3), the conviction of, and the sentence imposed upon, a transferred offender shall not be subject to any appeal or to any form of review in Mauritius.

(3) Where a sentence imposed upon a transferred offender is by its nature or duration, incompatible with the law of Mauritius, he may apply to the Judge in Chambers for a variation of the sentence to accord with the law of Mauritius, and the Judge shall, after hearing the application, grant such relief as he considers appropriate having regard to all the circumstances.

(4) Where the Judge in Chambers decides to vary the sentence imposed –

(a) he shall be bound by the findings of facts as they appear from the judgment imposed in the designated country;

- (b) he shall not convert a sanction involving deprivation of liberty to a pecuniary sanction;
- (c) he shall deduct the full period of deprivation of liberty served by the offender;
- (d) he shall not be bound by any minimum term of imprisonment which the law of Mauritius provides for the offence or offences committed.

*Example: Ukraine*

*Articles 602, 603 and 604 Criminal Procedure Code (Ukraine) – Chapter 46. Recognition and Execution of Judgments of Courts of Foreign States and Transfer of Sentenced Persons*

Article 602. Grounds and procedure for enforcement of judgments of courts of foreign States

1. A sentence delivered by a court of a foreign State may be recognised and enforced in the territory of Ukraine in cases and in the scope prescribed in the international treaty of Ukraine to which the Verkhovna Rada [Supreme Council/parliament] of Ukraine has given its consent to be bound by.
2. In absence of an international treaty, provisions of this Chapter may be applied in deciding on an issue of the transfer of a sentenced person for further serving of punishment.
3. Request on execution of foreign State's court sentence, except a request to transfer a sentenced, person, shall be considered by the Ministry of Justice of Ukraine within thirty days after receipt of the request. If the request and additional materials has been received in a foreign language, this time limit shall be extended to three months.
4. When considering a request for the enforcement of a sentence delivered by a foreign court in accordance with part three of this Article, the Ministry of Justice of Ukraine shall determine whether grounds for granting request for the enforcement of a sentence exist under the appropriate international treaty of Ukraine. For this purpose, the Ministry of Justice of Ukraine may demand and obtain the necessary materials and information in Ukraine or from the competent authority of the foreign State concerned.
5. Having established that the request for recognition and enforcement is consistent with the provisions of the international treaty of Ukraine, the Ministry of Justice of Ukraine shall forward request for recognition and enforcement of the sentence of the court of foreign State to a court of first instance and transfer the obtained materials thereto.
6. If the request is refused, the Ministry of justice of Ukraine shall inform the requesting foreign authority thereon, with explanation of reasons for refusal.
7. Sentences delivered in absentia, i.e. without participation of the person concerned in criminal proceedings, by courts of foreign States, except when the sentenced person was served a copy of the sentence and given the possibility to challenge the sentence, shall not be enforced in Ukraine. A request for execution of a sentence imposed by a foreign court may be refused if such execution contradicts any obligations of Ukraine under her international treaties.

8. The issue of recognition and enforcement of a sentence delivered by a court of foreign State in part of a civil claim shall be disposed as prescribed in the Code of Civil Procedure of Ukraine.

9. In cases provided for by the international treaty of Ukraine to which the Verkhovna Rada [Supreme Council/parliament] of Ukraine has given its consent to be bound by, if a sentence of foreign court decreed a punishment in the form of imprisonment, the Ministry of Justice of Ukraine shall send a certified copy of the request as specified in this Article, to a public prosecutor to request an investigating judge to impose a restraint measure until the execution of the sentence of a foreign court is decided.

#### Article 603. Consideration by court of the issue of enforcement of a sentence of foreign State's court

1. The Ministry of Justice of Ukraine's application for execution of a sentence of foreign State's court shall be considered within one month of the day of its receipt by a court of first instance within whose territorial jurisdiction has the place of residence, or the last known place of residence of the convicted person, or in the place where the property of such person is located or, where none of the above is present, the location of the Ministry of Justice of Ukraine.

2. The person in whose respect the sentence was delivered shall be informed on the date of court hearing, if such person stays in the territory of Ukraine. Such person may have the benefit of a counsel. The hearing shall be held with the participation of a public prosecutor.

3. When considering the application of the Ministry of Justice of Ukraine for enforcement of a sentence of foreign State's court, the court shall verify whether requirements of the international treaty of Ukraine to which the Verkhovna Rada [Supreme Council/parliament] of Ukraine has given its consent to be bound by, were complied with. At that, the court shall not verify the factual circumstances established in the sentence of foreign State's court, and shall not decide on the issue of the person's guilt.

4. Based on results of the trial, the court shall deliver a ruling to:

1) enforce the sentence of the foreign State's court in full or in part. At that, the court shall determine what part of the punishment may be enforced in Ukraine, guided by provisions of the Criminal Code of Ukraine that establish criminal liability for the crime in connection with which the sentence was delivered, and shall decide on the issue of applying a measure of restraint until the ruling enters into legal force;

2) refuse the enforcement of the judgment sentence of the foreign State's court.

5. If an additional verification is necessary, the court may deliver a ruling to postpone the trial and to obtain supplementary materials.

6. The period spent by the person in custody in Ukraine in connection with the consideration of the request to enforce a sentence of the foreign State's court, shall be credited to the total term of punishment as determined in accordance with paragraph 1 of part four of this Article.

7. When taking a decision to enforce the foreign sentence, the court may simultaneously take a decision on measure of restraint as to the person concerned.

8. A copy of the ruling shall be sent by court to the Ministry of Justice of Ukraine and served on the person convicted by the sentence of foreign State's court.

9. A court decision on enforcement of a sentence of foreign State's court may be appealed in an appellate procedure by the requesting body, the person in whose respect the relevant issue has been decided, or by the public prosecutor.

#### Article 604. Enforcement of the sentence of foreign State's court

1. A ruling to enforce a sentence of a foreign State's court shall be enforced as prescribed by this Code.

2. The Ministry of Justice of Ukraine shall inform the requesting Party in the results of enforcement of the sentence of the foreign State's court.

#### *Example: United States of America*

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##### *18 U.S.C. 306 § 4105 (United States of America) – Transfer of offenders serving sentence of imprisonment*

(a) Except as provided elsewhere in this section, an offender serving a sentence of imprisonment in a foreign country transferred to the custody of the Attorney General shall remain in the custody of the Attorney General under the same conditions and for the same period of time as an offender who had been committed to the custody of the Attorney General by a court of the United States for the period of time imposed by the sentencing court.

[...]



## CHAPTER VII. NATIONAL COORDINATION AND PREVENTION

It is vital that criminal justice responses to crime be underpinned by an equally strong focus on preventing those crimes from happening in the first place.

The objective of preventing transnational organized crime from ever occurring is at the heart of the Organized Crime Convention. As article 1 of the Convention states, “the purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively”. “Crime prevention” comprises strategies and measures that seek to reduce the risk of crimes occurring, and their potential harmful effects on individuals and society, including fear of crime, by intervening to influence their multiple causes.<sup>43</sup>

States parties should endeavour to include a substantial proactive crime prevention component in their legislation, policies and programmes relating to organized crime and should not limit themselves to just reactive or security-related measures.

The Guidelines for the Prevention of Crime, annexed to Economic and Social Council resolution 2002/13, sets out seven basic principles that are fundamental to effective crime prevention, as follows.

*Government leadership.* All levels of government should play a leadership role in developing effective and humane crime prevention strategies and in creating and maintaining institutional frameworks for their implementation and review.

*Socioeconomic development and inclusion.* Crime prevention considerations should be integrated into all relevant social and economic policies and programmes, including those addressing unemployment, education, health, housing and urban planning, poverty, social marginalization and exclusion.

*Cooperation and partnership.* These should be an integral part of crime prevention, given the wide-ranging causes of crime and the skills and responsibilities needed to address them.

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<sup>43</sup> Economic and Social Council resolution 2002/13, annex, para. 3.

*Sustainability and accountability.* Crime prevention requires adequate resources, including funding for structures and activities, in order to be sustained.

*Knowledge base.* Crime prevention strategies and policies should be based on a broad, multidisciplinary foundation of knowledge about crime problems, their multiple causes and promising and proven practices.

*Human rights, rule of law and a culture of lawfulness.* The human rights recognized in international legal instruments to which States are parties must be recognized and respected in all aspects of crime prevention.

*Interdependency.* National crime prevention diagnoses and strategies should take into account the links between local criminal problems and transnational organized crime.

The following model legislative provisions reflect these basic principles by suggesting the establishment of a national committee for the purpose of coordinating anti-organized crime measures (art. 36) and systematic collection and analysis of data pertaining to the levels and characteristics of organized crime and the laws and practical measures employed to prevent and combat organized crime (art. 37).

### Article 36. National coordinating committee

1. The [*insert relevant Minister*] shall establish a national coordinating committee to be comprised of officials from [*insert relevant agencies*] and representatives from [*insert other relevant organizations and non-governmental organizations and/or service providers*].
2. The national coordinating committee shall develop, coordinate, monitor and evaluate the national response to preventing all forms of organized crime, including through data collection, analysis and exchange, the development of prevention programmes, education and training, as well as facilitate inter-agency and multidisciplinary cooperation between the various government agencies, international organizations, and relevant non-governmental organizations.
3. The national coordinating committee will report annually to [the relevant Minister/Parliament] on its activities.

### Explanatory notes

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*Relevant provisions of the Organized Crime Convention: articles 28, 29, 30 and 31*

The Guidelines for the Prevention of Crime recommend as a priority the establishment of a permanent central authority responsible for the implementation of crime prevention policy, a recommendation further elaborated in the *Handbook on the Crime Prevention Guidelines: Making Them Work*:

At the national level, countries may choose to place responsibility for crime prevention within a ministry such as one responsible for justice or public security, or a group of ministries, or to establish a separate body at a high level. The role of the permanent central



authority is to provide leadership, working with other government sectors, other levels of government and civil society to develop a national plan, and to implement and monitor it. The central authority facilitates action at lower levels of government. In some cases, countries have chosen to enact legislation to support a national plan and require other sectors to work together with the central authority. In all cases, resources will be needed for the implementation of plans.<sup>44</sup>

Article 36 of these Model Legislative Provisions suggests that a similar approach of establishing a central national coordinating committee or body be considered in the context of implementing the Organized Crime Convention. Article 31 of the Convention requires States parties to take certain concrete steps directed at preventing organized crime. Implementing these obligations will require action across government and civil society, as well as a considerable degree of coordination and cooperation. It is envisaged that these specific measures would fall within the broader remit of a national coordinating committee or body. That committee or body would have the main responsibility for coordinating the actions of the various stakeholders, ensuring that relevant information is shared appropriately, avoiding duplication of efforts and monitoring the impact and effectiveness of crime prevention activities. It may also be necessary for the national coordinating committee or body to work towards coordinating with other established bodies such as those tasked with implementing one or more of the three Protocols to the Organized Crime Convention.

#### *Example: Canada*

In Canada, the National Coordinating Committee (NCC) and its five Regional/Provincial Coordinating Committees (RCCs) work at different levels to create a link between law enforcement agencies and public policymakers to combat organized crime.

The National Coordinating Committee is responsible for the identification of national public policy issues, developing national strategies and initiatives to combat organized crime and advising the federal, provincial and territorial Deputy Ministers Steering Committee on Organized Crime on the nature, scope and impact of organized crime. It provides a national forum where the interests and concerns of Canada's law enforcement community can be brought to the attention of people who deal with law, policy and the administration of justice.

The RCCs have a regional and operational focus. They identify issues and develop strategies to counter organized crime and advise on the nature, scope and impact of organized crime in their respective jurisdictions, as well as liaise with the National Coordinating Committee. The RCCs communicate operational and enforcement needs and concerns to the National Coordinating Committee, acting as a bridge between enforcement agencies and officials, as well as public policymakers.

For further information, see [www.publicsafety.gc.ca](http://www.publicsafety.gc.ca).

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<sup>44</sup> *Handbook on the Crime Prevention Guidelines: Making Them Work*, Criminal Justice Handbook Series (United Nations publication, 2010), p. 30.

### Article 37. Data collection and analysis

The national coordinating committee shall establish a programme of research, including collection and publication of statistics, other data and information on issues relating to its mandate under article 36, paragraph 2. This includes, but is not limited to:

- (a) Diagnostic studies of the root causes of organized crime;
- (b) The structure, organization, membership and reach of organized criminal groups;
- (c) The offences committed by or otherwise associated with organized criminal groups;
- (d) Threat assessments, local safety audits and victimization surveys;
- (e) The number of prosecutions and convictions brought under the offences to which this [Act/Law/Chapter...] applies;
- (f) The assets recovered and proceeds confiscated in relation to the offences to which this [Act/Law/Chapter...] applies;
- (g) The professional groups and technologies involved in organized crime;
- (h) The effectiveness and efficiency of existing national and international laws, policies and measures to prevent and respond to organized crime; and
- (i) Compliance with international obligations, including human rights standards; and
- (j) Data on the financial and human resources used to detect, suppress and prevent organized crime, including training of law enforcement officials.

### Explanatory notes

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#### *Relevant provisions of the Organized Crime Convention: article 28*

Efforts to effectively prevent and suppress organized crime are severely hampered by the lack of data collection and analysis. The absence of comprehensive data on the levels and characteristics of organized crime has a direct impact on the ability of those charged with enforcing current legislation. Data collection and analysis are vital for evaluating the impact and efficiency of policy, legislation and enforcement programmes, and for providing feedback to policymakers and legislators. If the scale and nature of the problem are not known, it is unlikely that the appropriate measures and resources can be allocated to prevent and suppress organized crime. Without accurate information and analysis, prevention strategies cannot be identified, and suppression activities are compromised because insufficient information will not lead to effective prosecution of offenders.

Article 28 of the Organized Crime Convention recognizes that information collection and exchange are essential to developing sound, evidence-based policy on preventing and responding to transnational organized crime. Article 37 of these Model Legislative Provisions recommends that the national coordinating committee established pursuant to article 36 set up and oversee a programme of research to collect and analyse data and other information on a range of organized

crime related issues, ranging from the levels and manifestations of such crime to its victims and the laws and other measures adopted to counter organized crime. The list in subparagraphs (a)-(j) is not exhaustive and may be expanded depending on the scale and types of organized crime.

In addition, a number of States have research institutes that are a focal point for national-level research not only on the causes of crime but also on the prevention of crime. While establishing a research institute may be beyond the resources of some States, it may be possible to achieve a similar outcome (that is, the availability of key data to inform crime prevention efforts) through, for example, partnerships between the State and existing research institutions such as universities.

*Example: The Netherlands*

In The Netherlands, the Research and Documentation Centre (WODC) is the knowledge centre operating under the auspices of the Ministry of Justice and Security. The Centre carries out independent scientific research for policy and implementation purposes by itself, or the Centre commissions the research. For further information, see <https://english.wodc.nl>.

The Netherlands Institute for the Study of Crime and Law Enforcement (NSCR) conducts fundamental scientific research into crime and law enforcement and operates at the interface of theory, policy and practice. For further information, see <https://nscr.nl/en/>.



# ANNEX

The present annex reproduces the text of the Model Law on Witness Protection, developed by the United Nations Office on Drugs and Crime in 2008.<sup>1</sup> The Model Law on Witness Protection was not revised during the revision of the Model Legislative Provisions against Organized Crime.

## Model Law on Witness Protection (2008)

### Article 1 Scope

The purpose of the law is to provide the conditions and procedures for ensuring special protection on behalf of the State to persons in possession of important information who face a potential risk or intimidation arising from their cooperation with the prosecution.

### Article 2 Witness Protection Authority and Protection Unit

1. A Witness Protection Programme is hereby established (“the Programme”). The Programme shall be administered by the Witness Protection Authority (“the Protection Authority”).
2. A specialized covert protection unit shall be established to provide protection to persons included in the Programme (“the Protection Unit”).
3. The Protection Authority, among other responsibilities, shall:
  - (a) Decide on admissions to and removals from the Programme;
  - (b) Decide on the type of protection measures to be applied, taking into consideration any recommendation of the Protection Unit;
  - (c) Make budgetary submissions for the Programme’s financing;
  - (d) Prepare an annual report on the Programme’s general operations, performance and effectiveness in a manner which does not prejudice the effectiveness or security of the Programme;

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<sup>1</sup> Republished in CTOC/COP/WG.2/2013/2, annex I.

- (e) Perform any other activity necessary for the implementation of the Programme.
4. The Protection Authority shall be independent in adopting appropriate decisions and applying protection measures.

### Article 3 Other protected persons

In addition to persons protected under article 1, this law also applies to family members or other persons whose life or safety is at risk because of his/her relationship to or close association with the protected person.

### Article 4 Confidentiality

1. All aspects relating to the Programme shall be handled with the highest level of confidentiality.
2. The Protection Authority, the Protection Unit and any other agency or individual who possesses knowledge of the protection measures or has participated in the preparation, issuance or execution thereof shall keep the records confidential. This includes the restriction of information transfers to other public or private bodies.
3. Disclosure of any information relating to the Programme or the protection measures shall be punishable as a serious crime except as authorized and necessary to provide protection to the person.

### Article 5 Cooperation with institutions

1. State institutions shall cooperate with the Protection Authority about any matter relating to implementing and administering the Programme and are obligated to afford the Protection Authority the most expeditious and effective cooperation for the Programme's establishment and execution.
2. In implementing the Programme, the Protection Authority may enter into agreements with individuals, the private sector, private institutions and non-governmental organizations to make use of their services.

## Article 6 Admission procedure

1. Admission to the Programme is initiated by a request from the investigator, prosecutor or investigative judge.
2. The request shall be forwarded without delay to the Protection Authority with all the information required under article 7 and a detailed opinion on the need, or lack thereof, for admission to the Programme.
3. The Protection Authority shall process the request and reach a decision without undue delay.

## Article 7 Admission criteria

Admission to the Programme shall be based on the following factors:

- (a) The seriousness of the crime for which the cooperation of the protected person is solicited;
- (b) The importance of the protected person's testimony where there is no alternative source of that evidence for the investigation or prosecution of the crime;
- (c) The gravity of the threat to the security of the protected person;
- (d) The protected person's ability to adjust to the Programme having regard to his or her maturity, judgment and other personal characteristics and the family relationships of the protected person.

## Article 8 Decision for admission

1. Admission to the Programme shall be decided solely by the Protection Authority and requires the informed consent of the witness.
2. Admission to the Programme shall not be used to reward the protected person's cooperation in criminal investigations and prosecutions or to obtain financial benefits.

## Article 9 Protection measures

1. Protection measures decided by the Protection Authority shall be proportional to the level of risk and may include:
  - (a) Physical protection;
  - (b) Relocation;
  - (c) A change of identity;
  - (d) Any other measure necessary to ensure the safety of the protected person.
2. In support of the Programme, the Protection Authority may request the courts to implement protection measures during court testimony, such as closed sessions, the use of pseudonyms and videoconferences to allow the witness to testify from a more secure location or obscure or distort the witness's face or voice.
3. The Protection Authority may also decide on the provision of support measures to enable the witness to integrate in the Programme.

## Article 10 Memorandum of understanding

1. Protected persons shall be admitted to the Programme upon signing a memorandum of understanding with the Protection Authority.
2. The memorandum of understanding is not a legally binding contract and cannot be challenged in judicial proceedings.
3. The memorandum of understanding provides notice of voluntary conditions that will apply in the Programme, and it shall detail at a minimum:
  - (a) The terms and/or conditions for inclusion to the Programme;
  - (b) All the general categories of protection measures described in article 9, paragraph 1, that are authorized;
  - (c) Financial and other material support;
  - (d) An agreement by the witness to comply with all directions given by the Protection Authority, including physical and psychological examinations;
  - (e) An agreement by the protected person not to compromise the Programme's integrity or security;
  - (f) An agreement by the protected person to disclose all legal liabilities and financial obligations along with an agreement by the protected person as to how those obligations and liabilities shall be satisfied;



(g) An agreement by the protected person to disclose to the Protection Authority any prior or pending criminal, civil or bankruptcy proceedings, as well as knowledge of any such proceedings that may arise once he or she is accepted into the Programme;

(h) The conditions allowing the Protection Authority to remove the protected person from the Programme.

## Article 11 Removal from the Programme

1. The Protection Authority shall remove the protected person from the Programme under the following conditions:

(a) The protected person renounces in writing any further protection;

(b) The need for protection measures ceases to exist.

2. The Protection Authority may remove the protected person from the Programme under the following conditions:

(a) The protected person has violated the terms of the memorandum of understanding;

(b) The protected person has knowingly given false or misleading information to the investigation, prosecution or the Protection Authority;

(c) The protected person engages in conduct that jeopardizes the Programme's integrity or fails to follow the Programme's rules or comply with all reasonable requests and instructions of the protection unit, that is, the requests and instructions of officers and employees of the Government who are providing protection to the protected person;

(d) The protected person commits a crime;

(e) The protected person refuses to cooperate with the judicial process and publicly testify, whenever required, completely and truthfully.

## Article 12 Emergency measures

1. In the case of an imminent threat or danger to the protected person, the Protection Authority may adopt the measures described in article 9 on a provisional basis. The urgent character of a case needs to be substantiated.

2. These measures shall cease after the cessation of the emergency or a decision by the Protection Authority that the witness is ineligible for admission to the Programme.

3. The adoption of emergency measures does not imply admission to the Programme.

### Article 13

#### International cooperation

The Protection Authority or the Protection Unit is authorized to enter into confidential agreements with relevant foreign authorities, international criminal courts or tribunals and other regional or international entities relating to the relocation of protected persons and other protection measures.

### Article 14

#### Budget

The State shall include in the national budget the necessary allocations for funding and operating the Programme.

### Article 15

#### Grievance Procedure

A confidential procedure for filing and resolving grievances of protected persons and staff of the protection unit shall be instituted.

### Article 16

#### Non-liability

The Protection Authority, Protection Unit or any institution provided under article 5 or its employees shall not be liable for any action, suit or proceedings in respect of an act done or omitted to be done in good faith in the exercise of a power conferred by this law.





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