

INTERNATIONAL COOPERATION IN THE DRAFT UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL CRIME

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I. SYSTEM OF COOPERATION

A complete system of international cooperation in criminal matters consists of the following forms:

1. extradition;
2. mutual legal assistance;
3. transfer of criminal proceedings;
4. recognition of foreign criminal judgments;
5. enforcement of foreign criminal sentences:
 - (a) transfer of prisoners,
 - (b) transfer of supervision of persons conditionally sentenced or conditionally released;
 - (c) enforcement of other sanctions;
6. search, seizure and confiscation of proceeds of crime.

The draft Convention against Transnational Crime (hereinafter the "TOC Convention") will likely be the most comprehensive instrument of international cooperation in criminal matters as it will contain and regulate all of the above forms, except for the transfer of supervision. On the other hand, the degree of specificity of the relevant provisions varies significantly. The most general terms which are void of any measure of obligation, have been used to define the transfer of sentenced persons (Article 10 bis) . It provides that States Parties "*may consider*" entering into bilateral or multilateral agreements, either ad hoc or general, on the transfer to their territory of persons sentenced to

imprisonment or other forms of deprivation of liberty, in order that they may complete their sentences there.

Similarly, Article 16 foresees merely a possibility of the transfer of criminal proceedings: States Parties shall give considerations to the possibility of transferring to one another proceedings for the criminal prosecution of an offence covered by the Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where more jurisdictions are involved, with the view to concentrating the prosecution.

Nevertheless, it should be pointed out that the TOC Convention has a chance to become the most modern instrument, for its drafters, while relying on solutions adopted in the existing multilateral conventions, make efforts to take into consideration and, wherever possible, to include new ideas, options and measures. Of particular interest are provisions on extradition and mutual legal assistance. These two forms of cooperation have been elaborated to the point that while Article 10 can be called a "mini extradition treaty", Article 14 has become a "comprehensive MLAT within the TOC Convention".

As opposed to offences covered by the Convention, the category of "offences established under the Convention" is limited to the following four offences: (i) participation in an organized criminal group as well as organizing, directing, aiding, abetting, facilitating or counselling

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the commission of serious crime involving an organized criminal group (Article 3); (ii) laundering offences (Article 4); (iii) corruption in the context of organized crime (Article 4 ter); (iv) obstruction of justice (Article 17 bis).

II. WHAT'S NEW IN THE TOC CONVENTION?

Extradition:

- simplified extradition;
- strengthening of the principle *aut dedere aut judicare*;
- principle *aut dedere aut poenam persequi*;

Mutual legal assistance:

- extended scope of application, covering legal persons;
- mechanism of a spontaneous communication of information;
- bank secrecy - no bar to granting assistance;
- limited scope of dual criminality;
- transfer of persons in custody;
- modern techniques of transmission of requests;
- legal regime of the execution of requests;
- video-link and modern means of communication;
- rule of speciality;
- confidentiality of requests;
- political and fiscal offences;
- consultations.

III. COMPREHENSIVE SYSTEM OF COOPERATION IN THE TOC CONVENTION

Another reason why the draft TOC Convention has a potential to “make a difference” in the international system of cooperation is its comprehensiveness. The Convention is not limited to the traditional forms of cooperation. Instead, it will include

the methods, forms and measures in the following areas (levels):

- I. judicial cooperation,
- II. law enforcement cooperation,
- III. technical cooperation and assistance.

In addition to that, the TOC Convention will address the problem of prevention and the cooperation of its signatories in this area.

The effectiveness of the new Convention as a tool in the fight against organized crime will depend to a large degree on whether the provisions on law enforcement cooperation will really enable, facilitate and encourage police and other agencies to undertake cooperative initiatives. Article 19 provides that the Convention may be considered by its Parties as the basis for mutual law enforcement cooperation in respect of any offence covered by this instrument. Moreover, whenever appropriate, its signatories should make full use of agreements or arrangements, including international (such as INTERPOL) or regional organizations (such as EUROPOL or BALTCOM), to enhance this cooperation.

One of the forms and manifestations of such cooperation are joint investigations. However, in view of the diverging opinions among delegations on the appropriateness of such “ventures”, the drafters of the TOC Convention had to proceed with caution. They only managed to encourage States Parties to consider, on a reciprocal basis, concluding bilateral or multilateral agreements or understandings for this purpose; any form of obligation or even a stronger language were not acceptable.

Based on such agreements or arrangements, in cases where criminal proceedings are being carried out in one or more countries, the judicial authorities

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concerned may, where necessary with police authorities, after informing the central authority established for the purpose of mutual legal assistance, act together within joint investigative bodies. In the absence of such agreements or understandings, the joint investigations may be undertaken by agreement on a case-by-case basis. In carrying out such joint operations, the states involved will have to ensure that the sovereignty of the state in whose territory the investigation takes place is fully respected.

Another area and example of law enforcement cooperation envisioned by the TOC Convention are special investigative techniques, such as controlled delivery, electronic or other forms of surveillance or undercover operations. Here, again, States Parties are encouraged to make appropriate bilateral or multilateral arrangements for using such techniques in the context of international level. Such arrangements have to comply with and be carried out in accordance with the principle of sovereign equality of states. It was agreed that decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the states concerned.

Additionally, the States Parties shall adopt effective measures to enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services as well as to cooperate with one another in conducting inquiries concerning the identity, whereabouts and activities of persons suspected of involvement in organized criminal groups, the movement of proceeds or property derived from the commission of such offences, and the

movement of instrumentalities used or intended for use in the commission of such offences. For this purpose, in appropriate cases and if not contrary to domestic law, the States Parties should establish joint teams, taking into account the need to protect the security of persons and operations.

Finally, the TOC Convention provides that States Parties shall assist one another in planning and implementing research and training programmes designed to share expertise in various areas, such as collection of evidence, modern law enforcement equipment and techniques, methods used in combating transnational organized crime committed through the use of computers, telecommunications networks or other forms of modern technology, detecting and monitoring of the methods used for the transfer, concealment or disguise of proceeds derived from such offences.

States Parties shall promote training and technical assistance that will facilitate extradition and mutual assistance. Such training and technical assistance may include language training, secondments and exchanges between personnel in central authorities or relevant agencies. States Parties may conclude bilateral or multilateral agreements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by the Convention to be effective and for the prevention and control of transnational organized crime.

States Parties shall make concrete efforts to the extent of their capacities and in coordination with international agencies to establish a special United Nations fund for technical cooperation in order to provide technical assistance to developing countries and countries with economies in

transition to assist them in meeting their needs for the implementation of the TOC Convention. States shall endeavour to make adequate and regular voluntary contributions to the fund. States Parties shall also consider, in accordance with their domestic legislation, contributing to the fund a percentage of the money or of the corresponding value of illicit assets confiscated in accordance with the provisions of the Convention.

An importance of the proposed provisions on technical cooperation and assistance cannot be overestimated. Their significance derives from the fact that one of the weakest links in the system of tools and measures to fight organized crime is the education and training at the local level. Public administrators who are aware that organized crime exists in their community, are not spending sufficient time on educating and training citizens, law enforcement officers and other members of the criminal justice system. Consequently, local persons with interest in curbing organized crime are left to their own resources in securing information about those engaged in organized crime. There are three modus for transmitting information to those concerned with organized crime control. These are: (1) education in academic institutions; (2) specialized training for law enforcement officers; and (3) greater public cooperation. Ideally, all three of them should be developed as a harmonious system.

IV. SHORTCOMINGS, GAPS AND RESTRICTIONS

A. Extradition

- no provision on concurrent requests;
- no provision on the extradition of persons sentenced *in absentia*;
- rejected proposal on political and fiscal offence exceptions - according to

the proposal, the offences established under the Convention would not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political offence, nor as a fiscal offence;

- rejected jurisdictional clause - it was proposed that the offences established under the Convention be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the state that have jurisdiction in accordance with the provisions adopted in the Convention;
- rejected proposal aimed at extending the scope of application of Article 10;
- provision on accessory extradition;
- rejected proposal regarding consultation between the requesting state and the requested state before the latter refuses to surrender the person sought;
- unclear scope of the principle *aut dedere aut judicare*.

B. Mutual legal assistance

- repetition of clauses referring to domestic legal system (legislation) as well as clauses designed to protect state sovereignty;
- lack of harmonization with some other articles of the Convention (e.g. with Article 24: *Relation with other conventions*);
- possible practical difficulties in the implementation of the Article 14 caused by the abolition of the dual criminality rule;
- unclear final version of the provision on the temporary transfer of persons in custody;
- controversies over the functions of central authority;
- traditional provision on the contents of a request for mutual legal

assistance;

- unclear final version of the provision on video link;
- extended catalogue of grounds for refusal, e.g. anti-discriminatory clause and political offence;
- unwillingness of delegations to abolish the fiscal offence exception;
- unclear final version of the provision on the disclosure of government records, documents or information, available to the general public.

V. PROPOSALS ADOPTED AT THE XVIth CONGRESS OF AIDP

The last Congress of the Association Internationale de Droit Penal (International Association of Penal Law), which was held in September 1999 in Budapest, Hungary, was devoted to the fight against organized crime. Its Section IV debated international cooperation in this area. Below are the most pertinent resolutions which were not only adopted, but also addressed to the UN Ad Hoc Committee for the elaboration of the TOC Convention for its consideration.

A. Concurrent jurisdiction

- Where more than one state has jurisdiction to prosecute an offender for the same offence, the choice of the forum should be made by an international pre-trial chamber. This new body should also have jurisdiction to decide in cases of transnational organized crime where two or more states have jurisdiction and the authorities of one of those states wish to settle the case by means of an out-of-court settlement.

B. Judicial cooperation

- Dual criminality as a condition of extradition should be retained. For mutual legal assistance, it should be maintained in so far as the assistance is requested for coercive measures.
- States should adopt the “transformative interpretation method” in interpreting this requirement.
- In order to make judicial assistance effective, the collecting of evidence in the requested state should satisfy the requirements of the requesting state, as long as this is not incompatible with the fundamental principles recognized in the requested state and the basic rights of the defendants.
- Direct contact between the judicial authorities of the requesting and of the requested state is recommended.
- New technologies, such as video-links to take evidence abroad, should be encouraged.
- Where appropriate, it should be possible for judges to transport themselves to other states, not only in the pre-trial stage of proceedings, but also during trial. The practice of “travelling national courts” should be encouraged.

C. Police cooperation

- Police cooperation should be formalized through international conventions regulating recent developments in this area, such as new communication channels (e.g. liaison officers), new investigative activities (e.g. joint investigative teams), and new technologies and techniques (e.g. international wiretapping, cross border observation by satellite).

- International proactive policing should abide by the principles of legality¹, proportionality² and subsidiarity³. Such activities should be monitored by the authorities in charge of criminal investigations at the national level of the countries the participating police officers belong to.
- Unilateral actions on the territory of another state (i.e. investigative or operational actions undertaken by police officers without authorisation of the local authorities) should be prohibited. Evidence obtained in violation of the local rules and/or without proper authorisation of the competent local authorities should be excluded only if the *lex forum* would also require the exclusion of evidence obtained in this manner in a purely domestic manner.
- When police officers operate or act in whatever capacity on foreign soil, this should take place only on the condition that the foreign officers will be under an obligation to testify in court should they be called on to give evidence. Foreign police officers should have the same obligations and privileges in proceedings before the courts in which they are acting as the police officers of that country.

1 That means, proactive techniques must be based on pronouncements.

2 That means, such actions may only be undertaken and measures used if there is sufficient reason to suspect that serious and determined offences relating to organized crime will occur in the near future.

3 That means, proactive techniques may not be used if alternative means of obtaining evidence can be applied to detect and investigate such offences.