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

Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the United Nations Convention against Transnational Organized Crime

I. Introduction

1. The present document contains interpretative notes which were discussed by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime throughout the process of negotiation of the draft Convention. These notes will be included in the official records of the negotiation process, which the Secretariat will prepare in accordance with standard practice. The Ad Hoc Committee was informed of the nature of the official records of the negotiation and of the practice regarding their elaboration and compilation by the Secretariat in document A/AC.254/33. The present document is provided to the General Assembly for information purposes only. The Ad Hoc Committee took no formal action on these notes and none is expected of the General Assembly at its fifty-fifth session.

II. Interpretative notes

Article 2

Subparagraph (a)

2. The *travaux préparatoires* will indicate that the inclusion of a specific number of persons would not prejudice the rights of States Parties pursuant to article 34, paragraph 3.
3. The *travaux préparatoires* should indicate 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.

Subparagraph (c)

4. The *travaux préparatoires* should indicate that the term “structured group” is to be used in a broader sense so that it would include both groups with hierarchical or other elaborate structure and non-hierarchical groups where the roles of the members of the group need not be formally defined.

Subparagraph (f)

5. The *travaux préparatoires* should indicate that the term “freezing” or “seizure” as defined in article 2, subparagraph (f), can be found in articles 12 and 13 of this Convention. The term “search and seizure” appearing in article 18 should not be confused with “seizure” in article 2. “Search and seizure” refers to the use of intrusive compulsory measures by law enforcement authorities to obtain evidence for use in a criminal case. The term “freezing” in article 18 is used to cover the concept defined as “freezing” or “seizure” in article 2 and should be understood more broadly to include not only property but also evidence.

Subparagraph (g)

6. The *travaux préparatoires* should indicate 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 this definition.

Article 3

7. During the negotiations of the United Nations Convention against Transnational Organized Crime, the Ad Hoc Committee noted with deep concern the growing links between transnational organized crime and terrorist crimes, taking into account the Charter of the United Nations and the relevant resolutions of the General Assembly. All States participating in the negotiations expressed their determination to deny safe havens to those who engaged in transnational organized crime by prosecuting their crimes wherever they occurred and by cooperating at the international level. The Ad Hoc Committee was also strongly convinced that the Convention would constitute an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage, and the growing links between transnational organized crime and terrorist crimes. Finally, the Ad Hoc Committee was of the view that the Ad Hoc Committee established by the General Assembly in its resolution 51/210 of 17 December 1996, which was then beginning its deliberations with a view to the development of a comprehensive convention on international terrorism, pursuant to Assembly resolution 54/110 of 9 December 1999, should take into consideration the provisions of the Convention.

Paragraph 2 (d)

8. The *travaux préparatoires* should indicate that the term “substantial effects” is intended to cover situations where an offence has had a substantial consequential adverse effect on another State Party, for example where the currency of one State Party is counterfeited in another State Party and the organized criminal group has put the counterfeit currency into global circulation.

Article 6

9. The *travaux préparatoires* should indicate that the terms “laundering of proceeds of crime” and “money-laundering” are understood to be equivalent.

Paragraphs 1 (a) and (b)

10. The *travaux préparatoires* will show that the words “concealing or disguising” and “concealment or disguise” should be understood to include preventing the discovery of the illicit origins of property.

Paragraph 2 (b)

11. The *travaux préparatoires* will include a note to the effect that the words “associated with organized criminal groups” are intended to indicate criminal activity of the type in which organized criminal groups engage.

Paragraph 2 (e)

12. In the *travaux préparatoires* it will be stated that subparagraph (e) takes into account legal principles of several States where prosecution or punishment of the same person for both the predicate offence and the money-laundering offence is not permitted. Those States confirmed that they did not refuse extradition, mutual legal assistance or cooperation for purposes of confiscation solely because the request was based on a money-laundering offence the predicate offence of which was committed by the same person.

Article 7

Paragraph 1 (a)

13. The *travaux préparatoires* should indicate that the words “other bodies” may be understood to include intermediaries, which in some jurisdictions may include stockbroking firms, other securities dealers, currency exchange bureaux or currency brokers.

14. The *travaux préparatoires* should indicate that the words “suspicious transactions” may be understood to include unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer’s business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general.

Paragraph 1 (b)

15. The *travaux préparatoires* should indicate that the establishment of a financial intelligence unit called for by this subparagraph is intended for cases where such a mechanism does not yet exist.

Paragraph 3

16. The *travaux préparatoires* should indicate that, during the negotiations, the words “relevant initiatives of regional, interregional and multilateral organizations” were understood to refer in particular to the forty recommendations of the Financial Action Task Force on Money Laundering, as revised in 1996, and, in addition, to other existing initiatives of regional, interregional and multilateral organizations against money-laundering, such as the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group, the European Union and the Organization of American States.

Article 8

Paragraph 1

17. The *travaux préparatoires* should indicate that the obligation under this article was not intended to include the actions of a person who acted under such a degree of duress or undue influence as to constitute a complete defence to the crime.

Paragraph 4

18. The *travaux préparatoires* should indicate that the concept of a person who provides a public service applies to particular legal systems and that the incorporation of the concept into the definition is intended to facilitate cooperation between States Parties with that concept in their legal systems.

Article 11

Paragraph 4

19. The *travaux préparatoires* should indicate that paragraph 4 would not oblige States Parties to provide for early release or parole of imprisoned persons if their legal systems did not provide for early release or parole.

Article 12

20. The *travaux préparatoires* should indicate that the interpretation of article 12 takes into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State. Furthermore, the *travaux préparatoires* should indicate that it is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations.

Paragraph 1 (b)

21. The *travaux préparatoires* should indicate that the words “used in or destined for use in” are meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a crime.

Paragraph 5

22. The *travaux préparatoires* should indicate that the words “other benefits” are intended to encompass material benefits, as well as legal rights and interests of an enforceable nature, that are subject to confiscation.

Article 13

23. The *travaux préparatoires* should indicate that references in this article to article 12, paragraph 1, should be understood to include reference to article 12, paragraphs 3-5.

Article 14

24. The *travaux préparatoires* should indicate that, when feasible, States Parties would examine whether it would be appropriate, in conformity with individual guarantees embodied in their domestic law, to use confiscated assets to cover the costs of assistance provided pursuant to article 24, paragraph 2.

Article 15

Paragraph 2 (a)

25. The *travaux préparatoires* should reflect the understanding that States Parties should take into consideration the need to extend possible protection that might stem from the establishment of jurisdiction to stateless persons who might be habitual or permanent residents in their countries.

Paragraph 5

26. The *travaux préparatoires* should indicate that an example of how useful coordination between States Parties would be was the need to ensure that time-sensitive evidence was not lost.

Article 16

Paragraph 2

27. The *travaux préparatoires* should indicate that the purpose of paragraph 2 is to serve as an instrument for States Parties wishing to avail themselves of the facility it provides. It is not intended to broaden the scope of the article unduly.

Paragraph 8

28. The *travaux préparatoires* should indicate that this paragraph should not be interpreted as prejudicing in any way the fundamental legal rights of the defendant.

29. The *travaux préparatoires* should indicate that one example of implementation of this paragraph would be speedy and simplified procedures of extradition, subject to the domestic law of the requested State Party for the surrender of persons sought for the purpose of extradition, subject to the agreement of the requested State Party and the consent of the person in question. The consent, which should be expressed voluntarily and in full awareness of the consequences, should be understood as being in relation to the simplified procedures and not to the extradition itself.

Paragraph 10

30. The *travaux préparatoires* should reflect the general understanding that States Parties should also take into consideration the need to eliminate safe havens for offenders who commit heinous crimes in circumstances not covered by paragraph 10. Several States indicated that such cases should be reduced and several States stated that the principle of *aut dedere aut judicare* should be utilized.

Paragraph 12

31. The *travaux préparatoires* should indicate that the action referred to in paragraph 12 will be taken without prejudice to the principle of double jeopardy (*ne bis in idem*).

Paragraph 14

32. The *travaux préparatoires* should indicate that the term “sex” is referring to male and female.

33. The *travaux préparatoires* should indicate that at the informal consultations held during the eighth session of the Ad Hoc Committee, the delegation of Italy proposed the insertion after paragraph 8 of the following provision:

“Without prejudice to the use of other grounds for refusal, the requested State may refuse to extradite on the ground that a decision has been issued in absentia only

if it is not proved that the case has been tried with the same guarantees as when a defendant is present and he or she, having knowledge of the trial, has deliberately avoided being arrested or has deliberately failed to appear at the trial. However, when such proof is not given, extradition may not be refused if the requesting State gives assurance, deemed satisfactory by the requested State, that the person whose extradition is sought shall be entitled to a new trial protecting his or her rights of defence.”

In the discussion that followed, several delegations expressed serious concerns about whether this provision would be compatible with the fundamental principles of their legal systems. The delegation of Italy withdrew its proposal at the ninth session of the Ad Hoc Committee on the understanding that, when considering a request for extradition pursuant to a sentence issued in absentia, the requested State Party would take into due consideration whether or not the person whose extradition was sought had been sentenced following a fair trial, e.g., whether or not the defendant had been assured the same guarantees as he or she would have enjoyed had he or she been present at the trial and had voluntarily escaped from justice or failed to appear at the trial, or whether or not he or she was entitled to a new trial.

Paragraph 16

34. The *travaux préparatoires* should indicate that the words “where appropriate” in article 16, paragraph 16, shall be understood and interpreted in the spirit of full cooperation and shall not affect, to the extent possible, the obligatory nature of the paragraph. The requested State Party shall, when applying this paragraph, give full consideration to the need to bring offenders to justice through extradition cooperation.

Article 18

Paragraph 2

35. The *travaux préparatoires* should indicate that the term “judicial proceedings” in article 18, paragraph 2, refers to the matter for which mutual legal assistance is requested and is not intended to be perceived as in any way prejudicing the independence of the judiciary.

Paragraph 5

36. The *travaux préparatoires* should indicate that: (a) when a State Party is considering whether to spontaneously provide information of a particularly sensitive nature or is considering placing strict restrictions on the use of information thus provided, it is considered advisable for the State Party concerned to consult with the potential receiving State beforehand; (b) when a State Party that receives information under this provision already has similar information in its possession, it is not obliged to comply with any restrictions imposed by the transmitting State.

Paragraph 8

37. The *travaux préparatoires* should indicate that this paragraph is not inconsistent with paragraphs 17 and 21 of this article.

Paragraph 10 (b)

38. The *travaux préparatoires* should indicate that, among the conditions to be determined by States Parties for the transfer of a person, States Parties may agree that the

requested State Party may be present at witness testimony conducted in the territory of the requesting State Party.

Paragraph 13

39. The *travaux préparatoires* should indicate that a central authority may be different at different stages of the proceedings for which mutual legal assistance is requested. Further, the *travaux préparatoires* should indicate that this paragraph is not intended to create an impediment to countries having a central authority as regards receiving requests or to a different central authority as regards making requests.

Paragraph 18

40. The *travaux préparatoires* should indicate that the delegation of Italy made a proposal on the matter covered by this paragraph (see document A/AC.254/5/Add.23). During the debate on the proposal, it was pointed out that the following part of it, not reflected in the text of the Convention, could be used by States Parties as guidelines for the implementation of article 18, paragraph 18:

“(a) The judicial authority of the requested State Party shall be responsible for the identification of the person to be heard and shall, on conclusion of the hearing, draw up minutes indicating the date and place of the hearing and any oath taken. The hearing shall be conducted without any physical or mental pressure on the person questioned;

“(b) If the judicial authority of the requested State considers that during the hearing the fundamental principles of the law of that State are infringed, he or she has the authority to interrupt or, if possible, to take the necessary measures to continue the hearing in accordance with those principles;

“(c) The person to be heard and the judicial authority of the requested State shall be assisted by an interpreter as necessary;

“(d) The person to be heard may claim the right not to testify as provided for by the domestic law of the requested State or of the requesting State; the domestic law of the requested State applies to perjury;

“(e) All the costs of the video conference shall be borne by the requesting State Party, which may also provide as necessary for technical equipment.”

Paragraph 21 (d)

41. The *travaux préparatoires* should indicate that the provision of paragraph 21 (d) of this article is not intended to encourage refusal of mutual assistance for any reason, but is understood as raising the threshold to more essential principles of domestic law of the requested State. The *travaux préparatoires* should also indicate that the proposed clauses on grounds for refusal relating to the prosecution or punishment of a person on account of that person's sex, race, religion, nationality or political opinions, as well as the political offence exception, were deleted because it was understood that they were sufficiently covered by the words “essential interests” in paragraph 21 (b).

Paragraph 28

42. The *travaux préparatoires* should indicate that many of the costs arising in connection with compliance with requests under article 18, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature. Further, the *travaux préparatoires* will indicate the understanding that developing countries may encounter difficulties in

meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.

Article 20

Paragraph 1

43. The *travaux préparatoires* should indicate that this paragraph does not imply an obligation on States Parties to make provisions for the use of all the forms of special investigative technique noted.

Article 22

44. The *travaux préparatoires* should indicate that the term “conviction” should be understood to refer to a conviction no longer subject to any appeal.

Article 23

Subparagraph (a)

45. The *travaux préparatoires* should indicate that the term “proceeding” is intended to cover all official governmental proceedings, which may include the pre-trial stage of a case.

46. The *travaux préparatoires* should indicate that it was understood that some countries may not cover cases where a person has the right not to give evidence and an undue advantage is provided for the exercise of that right.

Article 25

47. The *travaux préparatoires* should indicate that, while the purpose of this article is to concentrate on the physical protection of victims, the Ad Hoc Committee was cognizant of the need for protection of the rights of individuals as accorded under applicable international law.

Article 26

Paragraph 2

48. The *travaux préparatoires* should indicate that the term “mitigating punishment” might include not only prescribed but also de facto mitigation of punishment.

Article 27

Paragraph 1

49. The *travaux préparatoires* should indicate that the words “consistent with their respective domestic legal and administrative systems” provides States Parties with flexibility regarding the extent and manner of cooperation. For example, this formulation enables States Parties to deny cooperation where it would be contrary to their domestic laws or policies to provide the assistance requested.

Paragraph 1 (a)

50. The *travaux préparatoires* should indicate that States Parties will make their own determination as to how best to ensure the secure and rapid exchange of information. Many delegations endorsed the use of direct communication between their different domestic law

enforcement agencies and foreign counterparts. However, States Parties that may feel it more advisable to establish a central point of contact to ensure efficiency would not be precluded from doing so.

Paragraph 3

51. The *travaux préparatoires* should indicate that the forms of modern technology referred to in article 27, paragraph 3, include computers and telecommunications networks.

Article 28

Paragraph 2

52. The *travaux préparatoires* should indicate that the mention of international and regional organizations is intended to refer to all relevant organizations, including the International Criminal Police Organization (Interpol), the Customs Cooperation Council (also called the World Customs Organization) and the European Police Office (Europol).

Article 29

Paragraph 4

53. The *travaux préparatoires* should indicate that the mention of international and regional organizations is intended to refer to all relevant organizations, including Interpol, the World Customs Organization and Europol.

Article 31

Paragraph 3

54. The *travaux préparatoires* should indicate that, in line with constitutional principles of equality, there is no distinction intended between persons convicted of offences covered by the Convention and persons convicted of other offences.

Article 32

Paragraph 2

55. The *travaux préparatoires* should indicate that, in developing rules concerning payment of its expenses, the Conference of the Parties to the Convention should ensure that voluntary contributions are considered a source of funding.

Paragraph 3

56. The *travaux préparatoires* should state that, in discharging its tasks, the Conference of the Parties should give due regard to the need to preserve the confidentiality of certain information, given the nature of the fight against transnational organized crime.

Paragraph 5

57. The *travaux préparatoires* should show that the Conference of the Parties should take into account the need to foresee some regularity in the provision of the information. The *travaux préparatoires* should also indicate that the term “administrative measures” is understood to be broad and to include information about the extent to which legislation, policies and other relevant measures have been implemented.

Article 34

Paragraph 2

58. The *travaux préparatoires* should state that the purpose of this paragraph 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. The paragraph is intended to indicate to States Parties that, when implementing the Convention, they do not have to include in their criminalization of laundering of criminal proceeds (article 6), corruption (article 8) or obstruction of justice (article 23) the elements of transnationality and involvement of an organized criminal group, nor in the criminalization in an organized criminal group (article 5) the element of transnationality. This provision is furthermore intended to ensure clarity for States Parties in connection with their compliance with the criminalization articles of the Convention and is not intended to have any impact on the interpretation of the cooperation articles of the Convention (articles 16, 18 and 27).

Article 35

Paragraph 1

59. The *travaux préparatoires* should state that the term “negotiation” is to be understood in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies.

Article 36

60. The *travaux préparatoires* should indicate that, while the Convention has no specific provision on reservations, it is understood that the Vienna Convention on the Law of Treaties of 1969 applies regarding reservations.
