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108TH CONGRESS, 2d Session | SENATE | TREATY DOC. 108–16

U.N. CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (THE "CONVENTION"), AS WELL AS TWO SUPPLEMENTARY PROTOCOLS: (1) THE PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, AND (2) THE PROTOCOL AGAINST SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, WHICH WERE ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY ON NOVEMBER 15, 2000. THE CONVENTION AND PROTOCOLS WERE SIGNED BY THE UNITED STATES ON DECEMBER 13, 2000, AT PALERMO, ITALY

FEBRUARY 23, 2004.—The Convention was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

U.S. GOVERNMENT PRINTING OFFICE
29–118 WASHINGTON : 2004

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *February 23, 2004.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the United Nations Convention Against Transnational Organized Crime (the "Convention"), as well as two supplementary protocols: (1) the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, and (2) the Protocol Against Smuggling of Migrants by Land, Sea and Air, which were adopted by the United Nations General Assembly on November 15, 2000. The Convention and Protocols were signed by the United States on December 13, 2000, at Palermo, Italy.

Accompanying the Convention and Protocols are interpretative notes for the official records (or "travaux preparatoires") that were prepared by the Secretariat of the Ad Hoc Committee that conducted the negotiations, based on discussions that took place throughout the process of negotiations. These notes are being submitted to the Senate for information purposes. I also transmit the report of the Department of State with respect to the Convention and Protocols.

The Convention and Protocols are the first multilateral treaties to address the phenomenon of transnational organized crime. Their provisions are explained in the accompanying report of the Department of State. The report also sets forth proposed reservations and understandings that would be deposited by the United States with its instruments of ratification. With these reservations and understandings, the Convention and Protocols will not require implementing legislation for the United States.

The Convention and Protocols will be effective tools to assist in the global effort to combat transnational organized crime in its many forms, such as trafficking and smuggling of persons. They provide for a broader range of cooperation, including extradition, mutual legal assistance, and measures regarding property, in relation to serious crimes committed by an organized group that has a transnational element.

The Convention also imposes on the States Parties an obligation to criminalize, if they have not already done so, certain types of conduct characteristic of transnational organized crime. For the Convention, these are: participation in an organized criminal group (i.e., conspiracy), money laundering, bribery of domestic public officials, and obstruction of justice. The Protocols require parties to criminalize trafficking in persons and smuggling of migrants. These provisions will serve to create a global criminal law standard for these offenses, several of which (e.g., trafficking in persons) cur-

rently are not criminal in many countries. The Trafficking Protocol also includes important provisions regarding assistance to and protection of victims of trafficking.

I recommend that the Senate give early and favorable consideration to the Convention and Protocols, and that it give its advice and consent to ratification, subject to the reservations and understandings described in the accompanying report of the Department of State.

GEORGE W. BUSH.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, January 22, 2004.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to its transmittal to the Senate for advice and consent to ratification, the United Nations Convention Against Transnational Organized Crime ("the Convention"), as well as two supplementary protocols, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children ("Trafficking Protocol"), and the Protocol Against Smuggling of Migrants by Land, Sea and Air ("Migrant Smuggling Protocol"), which were adopted by the United Nations General Assembly on November 15, 2000, and signed by the United States on December 13, 2000 at Palermo. I recommend that the Convention and Protocols be transmitted to the Senate for its advice and consent to ratification.

Accompanying the Convention and Protocols are interpretative notes for the official records of the negotiations (or "*travaux preparatoires*"). They were prepared by the Secretariat of the Ad Hoc Committee that conducted the negotiations, based on discussions that took place throughout the process of negotiations. These notes would be submitted to the Senate for its information.

As of December 29, 2003, 147 countries have signed the Convention; 117 countries the Trafficking Protocol; and 112 the Migrant Smuggling Protocol. The Convention, which has been ratified by 59 countries, entered into force among those countries on September 29, 2003. The Trafficking Protocol, which has been ratified by 45 countries, entered into force on December 25, 2003, and the Migrant Smuggling Protocol, which has been ratified by 40 countries, will enter into force on January 28, 2004.

The Convention and these two Protocols are the first multilateral law enforcement instruments designed to combat the phenomenon of transnational organized crime. They establish a treaty-based regime of obligations to provide mutual assistance which is analogous to those contained in other law enforcement treaties to which the United States is a party. They thus would enhance the United States' ability to render and receive assistance on a global basis in the common struggle to prevent, investigate and prosecute transnational organized crime.

The Convention and Protocols will not require implementing legislation for the United States. As further discussed below, subject to the proposed reservations and understandings, the existing body of federal and state law and regulations will be adequate to satisfy the requirements for legislation. The following is an article-by-arti-

cle description of the forty-one articles of the Convention, followed by similar descriptions for each Protocol.

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

Article 1 ("Statement of Purpose") states that the Convention is intended to promote cooperation to prevent and combat transnational organized crime more effectively. Article 2 ("Use of terms") defines ten key concepts utilized in the Convention. In particular, the defined terms "organized criminal group", "serious crime", and "structured group" are crucial to understanding the scope of the Convention.

An "organized criminal group" means 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 serious crimes or offenses established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit. The requirement that the group's purpose be financial or other material gain encompasses, for example, groups which trade in child pornography materials. A terrorist group would fall within the scope of this definition if it acts in part for a financial or other material benefit. A "structured group" is a group that is not randomly formed for the immediate commission of an offense; it need not have formally defined roles for its members, continuity of membership, or a developed structure. This definition is flexible enough to accommodate the ever-evolving forms that organized criminal groups take. "Serious crime" is any offense punishable by at least four years' imprisonment.

Article 3 ("Scope of Application") elaborates the ambit of the Convention. In general, the Convention applies to the prevention, investigation, and prosecution of the offenses established in accordance with Articles 5, 6, 8, and 23 (participation in an organized criminal group, money laundering, corruption of domestic public officials, and obstruction of justice) and to serious crime (as defined above), so long as the offense is transnational in nature and involves an organized criminal group. Transnationality is a broad concept, meaning an offense which is committed in more than one State, committed only in one State but substantially prepared, planned, directed or controlled in another, committed in one State with the involvement of an organized criminal group that engages in criminal activities in multiple States, or committed in one State but substantially affecting another. As discussed further below, this general scope for the Convention varies with respect to several different types of obligations it contains.

Article 4 ("Protection of Sovereignty") sets forth two standard provisions in United Nations instruments stating that States Parties respect each other's sovereign equality and territorial integrity and providing that the Convention does not authorize a Party to undertake in another State's territory the exercise of jurisdiction and performance of functions reserved for the authorities of that State by its domestic law.

With respect to the articles of the Convention which require the establishment of criminal offenses (5, 6, 8, and 23), it should be noted preliminarily that these obligations apply at the national

level, as is customary in international agreements. However, existing U.S. federal criminal law has limited scope, generally covering conduct involving interstate or foreign commerce or another important federal interest. Under our fundamental principles of federalism, offenses of a local character are generally within the domain of the states, but not all forms of conduct proscribed by the Convention are criminalized by all U.S. states (for example, a few states have extremely limited conspiracy laws). Thus, in the absence of a reservation, there would be a narrow category of such conduct that the United States would be obliged under the Convention to criminalize, although under our federal system such obligations would generally be met by state governments rather than the federal government. In order to avoid such obligations, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America reserves the right to assume obligations under this convention in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to the conduct addressed in the Convention. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, serves as the principal legal regime within the United States for combating organized crime, and is broadly effective for this purpose. Federal criminal law does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or another federal interest. There are a small number of conceivable situations involving such rare offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Convention. The Government of the United States of America therefore reserves to the obligations set forth in the Convention to the extent they address conduct which would fall within this narrow category of highly localized activity. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other Parties as contemplated in the Convention.

Furthermore, in connection with this reservation, I recommend that the Senate include the following understanding in its resolution of advice and consent:

> The United States understands that, in view of its federalism reservation, the Convention does not warrant the enactment of any legislative or other measures; instead, the United States will rely on existing federal law and applicable state law to meet its obligations under the Convention.

Article 5 ("Criminalization of participation in an organized criminal group") is the first of four articles that require States Parties to adopt criminal legislation regarding specified offenses. The defi-

nition of participation in an organized criminal group set out in this Article may be satisfied either by a conspiracy law of the type embodied in U.S. law or by a criminal association law of the kind utilized in many other countries of the world. For U.S. law, the key components of this Article are: agreeing with one or more persons to commit a serious crime for financial or other material benefit, and an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group. It is also recommended that the United States take a partial reservation to this obligation, noted above, to enable its implementation consistent with the existing distribution of criminal jurisdiction under our federal system.

In addition, the United States, as a State Party that requires in many instances an act in furtherance of the conspiracy as a prerequisite to criminal liability, is obliged under Article 5, paragraph 3, to notify the Secretary-General of the United Nations of this requirement. Accordingly, upon U.S. ratification of the Convention, the Department of State will, by diplomatic note, provide the depositary with the following notification:

> Pursuant to Article 5, paragraph 3, the Government of the United States of America informs the Secretary-General of the United Nations that, in order to establish criminal liability under United States law with respect to the offense described in Article 5, paragraph 1(a)(i), the commission of an overt act in furtherance of the agreement is generally required.

A second criminalization obligation follows in Article 6 ("Criminalization of the laundering of proceeds of crime"). This provision mandates the adoption of criminal law provisions, in accordance with the fundamental principles of a Party's domestic law, punishing the conversion, transfer, concealment or disguise of property with knowledge that it is the proceeds of crime. Subject to the basic concepts of its legal system, a state also must criminalize the acquisition, possession, or use of property with knowledge that it is the proceeds of a crime, along with participation in, association with, conspiracy to commit, or attempts to aid, abet, facilitate or counsel the commission of covered offenses.

The predicate offenses for money laundering must include, in the case of a country such as the United States whose laws enumerate them by list, a comprehensive range of offenses associated with organized criminal groups. Among the range of offenses must be some relating to the laundering of the proceeds of foreign crimes. States Parties also must furnish the UN Secretary-General with copies of its laws giving effect to this Article and of any subsequent changes to such laws. Article 6 is of crucial importance to global anti-money-laundering efforts because it for the first time imposes an international obligation on States Parties to expand the reach of their laundering laws to predicate offenses associated with organized criminal activities other than those related to narcotics trafficking that are addressed in the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. As noted above, it is recommended that the United States take a partial reservation to this obligation to enable its implemen-

tation consistent with the existing distribution of criminal jurisdiction under our federal system.

Article 7 ("Measures to combat money-laundering") mandates a series of anti-money-laundering measures in the realm of financial regulation rather than criminal law. As part of a comprehensive regime, States Parties must impose customer identification ("know your customer") and suspicious transaction reporting requirements, and must ensure that specialized financial intelligence authorities exist to exchange information with foreign counterparts. Article 7 further calls upon States Parties, in establishing their domestic regulatory regimes, to be guided by existing international standards, which the negotiating record makes clear would include the principles elaborated by the Financial Action Task Force and its regional counterparts.

Article 8 ("Criminalization of corruption") requires a State Party to have in place laws criminalizing the giving or receipt of bribes by its domestic public officials, along with participation as an accomplice in such offices, and to consider criminalizing such conduct when it involves a foreign public official or an international civil servant. The former provision is mandatory because corruption of domestic public officials was regarded as a core activity of organized criminal groups. The latter, however, was treated as a recommendation in deference to the separate United Nations Convention Against Corruption, which focuses on corruption generally rather than solely as it relates to organized crime. As noted above, it is recommended that the United States take a partial reservation to this obligation to enable its implementation consistent with the current distribution of criminal jurisdiction under our federal system.

Measures against corruption other than criminalization are the subject of Article 9 ("Measures against corruption"). This provision obliges a State Party to adopt, to the extent appropriate and consistent with its legal system, legislative, administrative or other effective measures to promote integrity and to deter, detect, and punish corruption of domestic public officials. Among these are measures to enable domestic anti-corruption authorities to act independently.

Article 10 ("Liability of legal persons") compels States Parties to fill what historically has been a loophole in the ability of many states to combat organized crime—their inability to hold not only natural persons but also legal ones liable for illegal conduct. This provision requires the creation of criminal, civil or administrative liability, and accompanying sanctions, for corporations that participate in serious crimes involving an organized criminal group or in the offenses covered by the Convention (i.e., serious crimes generally as well as the offenses criminalized). Such corporate liability is without prejudice to the criminal liability of the natural persons who committed the offenses.

Article 11 ("Prosecution, adjudication and sanctions") identifies a series of important considerations for States Parties in pursuing prosecutions relating to offenses within the scope of the Convention. They range from ensuring that criminal law sanctions are sufficiently serious to minimizing defendants' risk of flight. Article 11(6) makes clear, however, that nothing in the Convention shall

affect the principle that the description of the offenses established in the Convention and of the applicable legal defenses or other legal principles controlling the lawfulness of conduct are reserved to the domestic law of a State Party.

Confiscation, seizure, and disposal of proceeds of crime, along with related international cooperation, are the subject of Articles 12–14. Article 12 ("Confiscation and seizure") requires a State Party to adopt measures, to the greatest extent possible within its legal system, to enable confiscation of proceeds of, property of equivalent value, or property used in or destined for use in, offenses covered by the Convention (*i.e.*, serious crimes generally as well as the offense criminalized by the Convention). Each State Party's courts or other competent authorities shall be empowered to order that bank and other records be made available to enable confiscation proceedings to go forward, and bank secrecy may not be invoked in this context.

Article 13 ("International cooperation for purposes of confiscation") goes on to elaborate procedures for international cooperation in confiscation matters. A State Party which receives a request must take measures to identify, trace, and freeze or seize proceeds of crime for purposes of eventual confiscation. Such requests are to follow the general mutual assistance procedures specified in Article 18 of the Convention, with several additional specifications. Decisions on requests for cooperation in respect of confiscation must be made in accordance with the law of the Requested State, and any treaty or arrangement it has with the Requesting State. States Parties are required to furnish to the UN Secretary-General copies of their laws and regulations giving effect to such cooperation.

Article 14 ("Disposal of confiscated proceeds of crime or property") addresses international cooperation insofar as it relates to disposal of assets. It provides that States Parties must consider returning confiscated proceeds to a requesting State for use as compensation to crime victims or restoration to legitimate owners. Additionally, a State Party may consider concluding an agreement or arrangement whereby proceeds may be contributed to the United Nations to fund technical assistance activities under the Convention or shared with other States Parties that have assisted in their confiscation.

Article 15 ("Jurisdiction") lays out the jurisdictional principles governing the Convention's four criminalization provisions generally. A State Party must establish jurisdiction in respect of offenses established under the Convention when committed in its territory or on board a vessel flying its flag or an aircraft registered under its laws. The latter jurisdiction (*i.e.*, on board a vessel or aircraft) is not expressly extended under current U.S. law to these four offenses—participation in an organized criminal group, money laundering, corruption of domestic public officials, and obstruction of justice—although certain cases can be pursued on other jurisdictional bases. For example, in some situations, U.S. federal jurisdiction may extend over such offenses occurring outside the United States, either through an express statutory grant of authority (*e.g.*, Title 18, United States Code, Section 1512(g), or through application of principles of statutory interpretation. However, since under current U.S. law we cannot always ensure our ability to exercise

jurisdiction over these offenses if they take place outside our territory on such vessels or aircraft, a reservation will be required for those cases in which such jurisdiction is not available. Accordingly, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America reserves the right not to apply in part the obligation set forth in Article 15, paragraph 1(b) with respect to the offenses established in the Convention. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. However, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. Accordingly, the United States shall implement paragraph 1(b) to the extent provided for under its federal law.

A State Party is permitted, but not required, to establish jurisdiction over these four offenses when committed against one of its nationals, or by one of its nationals or residents. (Nationality and passive personality jurisdiction is limited under United States' laws, but common in European countries and other civil law jurisdictions.) Permissive jurisdiction is likewise envisioned over the offenses of participation in an organized criminal group or money laundering, as defined in the Convention, where they are committed outside a State's territory with a view to the commission of certain offenses within its territory.

Article 15 further requires a State to establish its jurisdiction when it refuses to extradite an offender for offenses covered by the Convention solely because the person is one of its nationals. The United States extradites its nationals, so this provision will impose no new requirements on our legal system. It will, however, help ensure that countries that do not extradite their nationals take steps to ensure that organized crime participants face justice there even for crimes committed abroad.

Article 16 ("Extradition") elaborates a regime for extradition of persons for offenses criminalized under the Convention, and for serious crimes generally which involve an organized criminal group, so long as the offense is criminal under the laws of the requesting and the requested State Party. For the United States, the principal legal effect of this Article would be to deem the offenses covered by the Convention to be extraditable offenses under U.S. bilateral extradition treaties. The result would be to expand the scope of older treaties which list extraditable offenses and were concluded at a time when offenses such as money laundering did not yet exist.

Thus, for the United States, the Convention does not provide a substitute international legal basis for extradition, which will continue to be governed by U.S. domestic law and applicable bilateral extradition treaties, including their grounds for refusal. As such a state the United States is obliged by Article 16(5) to so notify the UN Secretary-General. Accordingly, upon ratification of the Convention, the Department of State will, by diplomatic note, provide the depositary with the following notification:

> Pursuant to Article 16, paragraph 5, the United States of America informs the Secretary-General of the United Nations that it will not apply Article 16, paragraph 4.

For numerous other States Parties that do not make extradition conditional on the existence of a separate extradition treaty, however, the Convention can, with regard to the offenses it covers, afford that international legal basis *inter se*.

Article 16(10) requires a State Party that does not extradite its nationals, if requested by another State Party seeking extradition of such a national for offenses covered by the Convention, to submit the case for purposes of domestic prosecution and to conduct the proceedings in the same manner as it would for purely domestic offenses of similar gravity. (This provision is the substantive obligation to which the above-mentioned jurisdictional provision in Article 15 relates.) A State Party may satisfy this obligation instead by temporarily surrendering its national for trial in the state that sought extradition, on the condition that he be returned to serve the resulting sentence.

Article 16 also contains non-mandatory provisions designed to facilitate extradition, including, for example, a mechanism for provisional arrest in urgent circumstances, as well as an exemption from the obligation to extradite in a case where the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of sex, race, religion, nationality, ethnic origin or political opinions, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Under Article 17 ("Transfer of sentenced persons"), States Parties may consider entering into bilateral or multilateral agreements or arrangements to enable the transfer to their territory of incarcerated persons who have been convicted abroad for offenses covered by the Convention, in order that they may complete their prison sentences in their countries of nationality.

Pursuant to Article 18 ("Mutual legal assistance"), States Parties are obligated to afford each other the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offenses within the scope of the Convention, provided that the state seeking assistance demonstrates that it has reasonable grounds to suspect that the offense is transnational in nature and involves an organized criminal group. Pursuant to paragraph 6 of Article 18, where other international agreements governing mutual legal assistance exist between States Parties, they shall be utilized, and the Convention does not affect their provisions. This is so for the United States in many instances, due to our extensive network of bilateral and regional mutual legal assistance treaties (MLATs). It is anticipated, however, that the United States will make and receive requests for mutual assistance under this Convention in a number of transnational organized crime cases involving states with which we lack an applicable bilateral or regional agreement.

Consequently, Article 18 provides a framework for mutual legal assistance of comparable nature to U.S. MLATs. It identifies the range of purposes for which mutual assistance may be requested, the requirements for the content of requests for assistance, and

states that, even absent a request, one State Party also may spontaneously transmit to another information relating to criminal matters that it believes could assist inquiries or proceedings there. Detained persons may be transferred for purposes of providing evidence in another State Party as well.

One departure from United States MLATs, set forth in paragraph 9 of Article 18, is that States Parties may—although they are encouraged not to—decline to render mutual legal assistance on the ground of an absence of dual criminality. U.S. MLATs typically require dual criminality only for certain intrusive types of assistance, *e.g.,* search and seizure requests by a foreign country. It is unclear to what extent States Parties to the Convention may insist upon dual criminality and whether this provision will constrain the utility of this Article to any significant degree.

As previously noted, Article 18 establishes certain modern procedures for mutual assistance that apply in the absence of another treaty between the Parties concerned. These include a requirement to designate central authorities to handle requests. The Department of Justice, Criminal Division, Office of International Affairs, would serve as the Central Authority for the United States. Each State Party is obliged by Article 16(5) to notify the UN Secretary-General of its designated Central Authority. Accordingly, upon ratification of the Convention, the Department of State will, by diplomatic note, provide the depositary with the following notification:

> Pursuant to Article 18, paragraph 13, the United States of America informs the Secretary-General of the United Nations that the Office of International Affairs, United States Department of Justice, Criminal Division, is designated as its central authority for mutual legal assistance under the Convention.

Under Article 18, paragraph 14, a Party must specify the language in which mutual assistance requests to it shall be made. Accordingly, upon ratification of the Convention, the Department of State will, by diplomatic note, provide the depositary with the following notification:

> Pursuant to Article 18, paragraph 14, the United States of America informs the Secretary-General of the United Nations that requests for mutual legal assistance under the Convention should be made in, or accompanied by, a translation into the English language.

In addition, Article 18 encourages the use of videoconferencing as an alternative to taking of evidence in person. The Article also incorporates provisions found in a number of U.S. bilateral MLATs generally precluding a requesting State Party from using information or evidence in investigations, prosecutions or judicial proceedings other than those identified in the request, unless the requested State Party consents. In addition, a requested State Party may be obliged to keep confidential the fact and substance of a request, except to the extent necessary to execute it, or where the information or evidence provided is exculpatory to an accused person.

Article 18 specifies four grounds for refusing mutual legal assistance: (a) If the request does not conform to the requirements of the

Convention; (b) if the requested State Party considers that execution is likely to prejudice its sovereignty, security, *ordre public* or other essential interests; (c) if domestic law in the requested State Party would prohibit the action requested with regard to any similar offense under its own jurisdiction; or (d) if granting the request would be contrary to the legal system of the requested State Party relating to mutual legal assistance. These grounds for refusal are broader than those generally included in U.S. MLATs, and, in view of the large number of countries that may become Party to the Convention, will serve to ensure that our mutual assistance practice under the Convention corresponds with sovereign prerogatives.

As is the case for extradition, Article 18, paragraph 22 provides that assistance may not be refused on the sole ground that the offense involves a fiscal matter or on the ground of bank secrecy. Moreover, if a request could be refused, or postponed on the ground that it interferes with an ongoing domestic investigation, prosecution or judicial proceeding, the States Parties involved shall consult to consider whether it may be granted subject to terms and conditions. If the requesting State Party accepts assistance subject to conditions, it is bound to comply with them.

Finally, Article 18 addresses several other aspects of mutual assistance that are relevant in the absence of another MLAT in force between the States Parties concerned. There is a procedure for providing safe conduct guarantees to a person who travels to a requesting State Party in order to give evidence. Ordinary costs of executing mutual assistance requests are, as a rule, to be borne by the requested State Party, but if substantial or extraordinary expenses are entailed the requesting and requested States Parties shall consult on their allocation. States Parties also may rely on the mutual assistance mechanism of the Convention to obtain from another State Party government records, documents or information on the same terms as they are available to the general public under domestic law; if not available to the general public, however, their access to a requesting State Party is discretionary.

In order better to combat organized criminal activities which span borders, Article 19 ("Joint investigations") encourages States Parties to reach agreements or arrangements, either general or case-specific, to conduct joint investigations.

Article 20 ("Special investigative techniques") in turn contemplates that, if permitted by the basic principles of its domestic legal system, law enforcement authorities be given the ability to use controlled delivery, electronic surveillance and undercover operations. Use of these techniques at the international level would be regulated by the states involved through general or case-specific agreements or arrangements.

The possibility of transferring criminal proceedings between States Parties is envisioned in Article 21 ("Transfer of criminal proceedings"). This Article calls on States Parties to consider the possibility of transferring proceedings, recognizing that transfer can be considered to be efficient in cases where several jurisdictions are involved with different aspects of a pattern of transnational organized criminal conduct.

Article 22 ("Establishment of criminal record") urges States Parties to consider adopting measures enabling an offender's previous

conviction in one State to be taken into consideration in another State Party's subsequent criminal proceeding relating to transnational organized crime offenses.

The fourth and final criminalization obligation established by the Convention—obstruction of justice in criminal proceedings within the scope of the Convention—appears in Article 23 ("Criminalization of obstruction of justice"). As defined, the offense has two variants: first, the intentional use of force, threats or intimidation, or the promise, offering or giving of an undue advantage, in order to induce false testimony or to interfere in the giving of testimony or the production of evidence; and, second, the intentional use of force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official. As noted above, it is recommended that the United States take a partial reservation to this obligation to enable its implementation consistent with the current distribution of criminal jurisdiction under our federal system.

A related concern that organized crime not undermine judicial processes is addressed in Article 24 ("Protection of witnesses"). This provision obliges a State Party to take appropriate measures within its means to protect witnesses and, as appropriate, their relatives and other persons close to them, from retaliation or intimidation when they testify in organized crime proceedings. Among the measures a State Party may, in its discretion, implement are witness protection programs and evidence-taking techniques that ensure the safety of witnesses, for example, video link from a remote location. Under this Article, States Parties also are encouraged to consider assisting one another in providing witness protection. This Article permits the exercise of discretion in particular cases, and therefore can be implemented by the United States under current statutes and regulations governing the protection of witnesses.

Article 25 ("Assistance to and protection of victims") elaborates a series of measures to aid those victimized by transnational organized crime. States Parties must take appropriate measures within their means to assist and protect them, particularly in cases of threat of retaliation or intimidation; provide them access to compensation and restitution; and, subject to domestic law and in a manner not prejudicial to the rights of the defense, enable their views to be considered during criminal proceedings.

Pursuant to Article 26 ("Measures to enhance cooperation with law enforcement authorities"), a State Party must take appropriate measures to encourage participants in organized criminal groups to assist law enforcement investigations. In so doing, States Parties are to consider reducing criminal penalties or granting immunity from prosecution for those who cooperate substantially. This Article also envisages that States Parties consider arrangements with one another to apply these inducements to persons located in one State who can assist an investigation into organized criminal activity in another.

The importance of police-to-police cooperation, as distinct from formal mutual legal assistance, is highlighted by Article 27 ("Law enforcement cooperation"). States Parties must cooperate, consistent with their respective domestic legal and administrative sys-

tems, to enhance effective action among their law enforcement authorities, *inter alia,* by sharing information on persons, groups, and property involved in organized crime offenses. A counterpart provision is Article 28 ("Collection, exchange and analysis of information on the nature of organized crime"), which recommends that States Parties, together with their scientific and academic communities, undertake analytical studies of organized crime and share the resulting expertise.

Training and technical assistance are dealt with in Articles 29 ("Training and technical assistance") and 30 ("Other measures: implementation of the Convention through economic development and technical assistance"). Article 29 requires States Parties, to the extent necessary, to train domestic law enforcement personnel on transnational organized crime matters and to work with one another to devise training that promotes international cooperation. Article 30 focuses on the particular needs of developing countries for technical assistance in implementing the provisions of the Convention. States Parties are encouraged to make voluntary financial contributions for this purpose to a United Nations account established, as directed by the UNGA in its resolution approving the Convention, under the auspices of the Center for International Crime Prevention (CICP) of the UN Office for Drug Control and Crime Prevention.

Article 31 ("Prevention") recognizes that preventive measures are a component of the fight against transnational organized crime. It encourages States Parties to develop projects and best practices with this goal. Among the measures urged are cooperation with private industry and relevant professions, and measures to avoid organized crime subverting public procurement procedures. Paragraph 6 of this Article requires each Party to identify to the Secretary-General the governmental authority to which requests for assistance in developing preventive measures should be directed. The Department of Justice, Office of Justice Programs, National Institute of Justice, would serve as the point of contact for the United States on prevention matters arising under the Convention. Accordingly, upon ratification of the Convention, the Department of State will, by diplomatic note, provide the depositary with the following notification:

> Pursuant to Article 31, paragraph 6, the Government of the United States of America informs the Secretary-General of the United Nations that requests for assistance on developing measures to prevent transnational organized crime should be directed to the United States Department of Justice, Office of Justice Programs, National Institute of Justice.

Article 32 ("Conference of the Parties to the Convention") establishes a structure for promoting and reviewing the implementation of the Convention. A Conference of Parties (COP) is to be convened within a year after the Convention's entry into force, initially for the purpose of adopting rules of procedure, rules governing payment of expenses, and rules governing the activities with which it is charged. The negotiating history of this Article reflects that sources of funding for the COP shall include voluntary contribu-

tions, which takes into account U.S. law provisions on funding framework treaty-based organizations.

Among the most important tasks assigned to the COP are facilitating technical assistance and information exchange among States Parties and reviewing periodically the implementation of the Convention. The latter will entail scrutiny of information supplied by States Parties themselves on their programs and legislative and administrative measures. The COP also may develop other supplemental review mechanisms.

To support the COP, Article 33 ("Secretariat") states that the United Nations Secretary-General shall provide the necessary secretariat services. The United Nations General Assembly resolution adopting the Convention and Protocols in turn requested that the Vienna-based CICP be designated for this purpose.

Article 34 ("Implementation of the Convention") provides that the offenses to be criminalized in accordance with Articles 5, 6, 8, and 23 of the Convention must be established in the domestic law of each State Party without transnationality or the involvement of an organized criminal group being required elements of the offense (except with respect to the offense of participation in an organized criminal group). This provision ensures that States Parties adopt laws of general applicability to these serious crimes rather than excessively narrow ones that would omit coverage of an offense such as money laundering when it is done in a purely domestic context or without the involvement of an organized group. It also clarifies that the Convention does not preclude either the adoption of stricter measures to combat transnational organized crime or the application of fundamental legal principles in its implementation.

Article 35 ("Settlement of Disputes") establishes a mechanism for States Parties to settle disputes concerning the interpretation or application of the Convention. If a dispute cannot be settled within a reasonable time through negotiation, a State Party may refer it to arbitration, or to the International Court of Justice if the Parties are unable to agree on the organization of the arbitration. A State Party may, however, opt out of dispute settlement mechanisms other than negotiation by making a declaration to that effect. In keeping with recent practice, the United States should do so. Accordingly, I recommend that the following reservation be included in the U.S. instrument of ratification:

> In accordance with Article 35, paragraph 3, the Government of the United States of America declares that it does not consider itself bound by the obligation set forth in Article 35, paragraph 2.

Articles 36–41 contain the final clauses. Article 36 ("Signature, ratification, acceptance, approval and accession") provides that the Convention is open for signature by all states, and by regional economic integration organizations (REIOs) such as the European Union where at least one of its member states has signed. REIOs which become party to the Convention also are required to declare the extent of their competence with respect to matters covered by the Convention. The Convention is subject to ratification, acceptance, approval, or accession, with instruments thereof to be deposited with the Secretary-General of the United Nations.

The relationship between the Convention and its supplementary Protocols is elaborated in Article 37 ("Relation with protocols"). In order to become a Party to a supplementary Protocol, a State or REIO must also be a Party to the Convention. But a State Party to the Convention must separately become a Party to a Protocol in order to be bound by the Protocol. Protocols are to be interpreted together with the Convention itself.

Pursuant to Article 38 ("Entry into force"), the Convention shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession. For a state ratifying or otherwise consenting to be bound thereafter, the Convention shall take legal effect thirty dates from that step.

Amendment of the Convention is governed by Article 39 ("Amendment"), which establishes procedures for proposal, consideration, and decision on amendments with the involvement of the Conference of the Parties. Adoption of proposed amendments requires consensus or, as a last resort, a two-thirds majority of the States Parties present and voting at the COP. The voting rights of REIOs are addressed in a way that is standard in international instruments. Any adopted amendment is subject to ratification, acceptance or approval by States Parties, and binds only those States Parties that have expressed their consent to be so bound.

Article 40 ("Denunciation") states that any State Party may denounce the Convention by written notification to the Secretary-General of the United Nations. The Convention shall cease to be in force for the denouncing State one year after receipt of such notification. Denunciation of the Convention also entails denunciation of any protocols thereto.

Article 41 ("Depositary and languages") designates the Secretary-General of the United Nations as depositary for the Convention, and specifies that the original of the Convention is equally authentic in each of the six United Nations languages (Arabic, Chinese, English, French, Russian and Spanish).

Finally, the terms of the Convention, with the suggested reservations and understandings, are consonant with U.S. law. To clarify that the provisions of the Convention, with the exceptions of Articles 16 and 18, are not self executing, I recommend that the Senate include the following declaration in its resolution of advice and consent:

> The United States declares that the provisions of the Convention (with the exception of Articles 16 and 18) are non-self-executing.

Article 16 and Article 18 of the Convention contain detailed provisions on extradition and legal assistance that would be considered self-executing in the context of normal bilateral extradition practice. It is therefore appropriate to except those provisions from the general understanding that the provisions of the Convention are non-self-executing.

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The Trafficking Protocol consists of a preamble and 20 articles, which are divided into four chapters: I ("General provisions"), II ("Protection of victims of trafficking in persons"), III ("Prevention, cooperation and other measures") and IV ("Final provisions"). To the extent practicable, the wording of key phrases and the structure of the Trafficking and Migrant Smuggling Protocols are consistent with each other and are modeled on the structure and wording of the Convention. As noted above, subject to the reservations and understandings recommended herein, the Protocol would not require implementing legislation for the United States.

I. General provisions

Article 1 ("Relation with the United Nations Convention against Transnational Organized Crime") is structurally a key provision of the Trafficking Protocol. Rather than repeating in the Protocol every provision of the Convention that is also applicable to the Protocol, and rather than explicitly referencing every provision in the Convention that is also applicable to the Protocol, this Article provides that all provisions of the Convention shall apply, "*mutatis mutandis*," to the Protocol unless otherwise provided. The negotiating record to the Protocol explains that the phrase in quotations means "with such modifications as circumstances require" or "with the necessary modifications," and that the provisions of the Convention would thus be interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention. Article 1 further clarifies this concept by providing that the offences established in Article 5 of the Protocol (the criminalization article) shall be regarded as offences established in accordance with the Convention. Thus, wherever in the Convention it is stated that a particular provision applies to "offences established in accordance with the Convention," that provision will also apply, for States Parties to this Protocol, to the trafficking in persons offences established in accordance with Article 5 of the Protocol.

The obligations in the Convention that are to be applied to the offenses are all consistent with current U.S. law, with one exception. With respect to the obligation to establish criminal jurisdiction set forth in Article 15 of the Convention, a partial reservation will be required for Trafficking Protocol offenses committed outside the United States on board ships flying a U.S. flag or aircraft registered under U.S. law. I therefore recommend that the U.S. instrument of ratification include the following reservation:

> The Government of the United States of America reserves the right not to apply in part the obligation set forth in Article 15, paragraph 1(b), of the United Nations Convention against Transnational Organized Crime with respect to the offenses established in the Trafficking Protocol. The United States does not provide for plenary jurisdiction over offenses that are committed on board ships flying its flag or aircraft registered under its laws. How-

> ever, in a number of circumstances, U.S. law provides for jurisdiction over such offenses committed on board U.S.-flagged ships or aircraft registered under U.S. law. Accordingly, the United States shall implement paragraph 1(b) of the Convention to the extent provided for under its federal law.

In addition, for clarity, an understanding is recommended with respect to the application of Article 6 of the Convention, regarding criminalization of the laundering of proceeds of crime, to the Protocol offenses. Article 6(2)(b) of the Convention entitles States Parties to set out, in legislation, a list of money laundering predicate offenses, provided that the list includes a comprehensive range of offenses associated with organized criminal groups. Although current U.S. law does not designate all conduct punishable under the Protocol as money laundering predicate offenses, it so designates a comprehensive range of offenses associated with trafficking. To make clear that the U.S. understands its existing comprehensive list of money laundering predicate offenses as sufficient to implement the Article's obligation with respect to the Protocol offenses, I recommend that the following understanding be included in the U.S. instrument of ratification:

> The Government of the United States of America understands the obligation to establish the offenses in the Protocol as money laundering predicate offenses, in light of Article 6, paragraph 2(b) of the United Nations Convention against Transnational Organized Crime, as requiring States Parties whose money laundering legislation sets forth a list of specific predicate offenses to include in such list a comprehensive range of offenses associated with trafficking in persons.

Finally, it should be noted that the previously described notifications to be made by the United States with respect to Articles 16, 18, and 31 of the Convention also apply to the Protocol. No additional notification in this regard is necessary with respect to the Trafficking Protocol.

Article 2 ("Statement of purpose") describes the purposes of the Protocol, which are to prevent and combat trafficking in persons, particularly women and children, to protect and assist the victims of such trafficking, and to promote cooperation among States Parties to meet these objectives.

Article 3 ("Use of terms") defines "trafficking in persons" for the first time in a binding international instrument. This key definition may be divided into three components: conduct, means and purpose. The *conduct* covered by "trafficking in persons" is the recruitment, transportation, transfer, harboring or receipt of persons *by means of* the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person *for the purpose of* exploitation. Exploitation includes, at a minimum, exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs. Ar-

ticle 3 further provides that once any of the means set forth above has been used, the consent of the victim to the intended exploitation is irrelevant. Finally, with respect to children, the Article makes it clear that any of the conduct set forth above, when committed for the purpose of exploitation constitutes "trafficking" even if none of the means set forth above are used.

It should be noted that the negotiating record sets forth six statements intended to assist in the interpretation of the definition of "trafficking in persons." One of those statements makes clear that the Protocol is without prejudice to how States Parties address prostitution in their respective domestic laws.

Article 4 ("Scope of application") is modeled on the analogous article in the Convention. It is one of many provisions in the Protocol that have an analogous provision in the Convention. In all cases, the goal was to make the language in the Protocol consistent with the language in the Convention. Article 4 thus states that the Protocol applies, except as otherwise provided therein, to the prevention, investigation and prosecution of trafficking in persons, when the offence is transnational in nature and involves an organized criminal group (virtually identical language is used in the "Scope" article in the Convention), and to the protection of trafficking victims.

Article 5 ("Criminalization") is modeled on the analogous articles in the Convention. Article 5(1) requires States Parties to criminalize the conduct defined in Article 3 of the Protocol as "trafficking in persons," when committed intentionally. Article 5(2) requires States Parties to criminalize, subject to basic concepts of their legal systems, attempts to commit the trafficking offenses described, and to criminalize participating as an accomplice and organizing or directing others to commit such conduct. As confirmed by Article 11(6) of the Convention, there is no requirement that the offenses under U.S. law implementing this obligation be identical to the text of the Protocol. As described in more detail below, existing federal statutes in Title 18, United States Code, Chapters 77, 110 and 117, combined with state laws, and general accessorial liability principles of U.S. law, are sufficient to implement the requirements of Article 5, provided that a reservation is deposited with respect to trafficking for the purpose of removal of organs, and certain attempted trafficking offenses. With this reservation, no new implementing legislation will be required for the United States.

With respect to the obligation to criminalize trafficking and attempted trafficking for the purpose of "forced labour or services, slavery or practices similar to slavery, servitude," current U.S. federal slavery, peonage, involuntary servitude and forced labor laws found in Chapter 77 of Title 18, which apply nationwide, are sufficient to implement the requirement to criminalize trafficking for these purposes, independent of state law.

It should also be noted, with respect to the obligation to criminalize trafficking for the purpose of "practices similar to slavery," that in the course of negotiations on the Protocol representatives of the United States and other countries stated, without dissent, that we understand this term to mean practices set forth in the 1956 UN Supplementary Convention on the Abolition of Slavery, to

which the United States is a party without reservation. These practices include forced marriage, serfdom, debt bondage, and the delivery of a child for the purpose of exploitation. These practices are generally criminalized under U.S. law by prohibitions against forced labor and slavery (including forced marriage, which, as defined in the 1956 Convention, involves elements of ownership and control prohibited under the Thirteenth Amendment). With respect to the delivery of a child for the purpose of exploitation, the forms of exploitation for which U.S. law provides criminal sanction are slavery, peonage, forced labor, involuntary servitude and, as further described below, sexual exploitation.

With respect to the obligation to criminalize trafficking and attempted trafficking for the purpose of "the exploitation of the prostitution of others," U.S. federal law prohibits instances where a person is transported in interstate or foreign commerce, or induced or coerced to do so, with the intent that the person engage in prostitution, 49 states prohibit all prostitution, and Nevada prohibits prostitution derived from force, debt bondage, fraud, and deceit. While the Protocol requires criminalization of a range of conduct antecedent to the actual engaging in prostitution, this requirement is met by state procurement or promotion of prostitution laws, or as in Nevada's case, the above-described trafficking law.

The Protocol also requires criminalization of trafficking for the purpose of "other forms of sexual exploitation." Federal law prohibits interstate travel or transportation of a person, and enticement or inducement for the purpose of committing any criminal sexual act. In addition, state laws proscribe a variety of forms of sexual abuse, as well as attempted commission of such offenses. These federal and state laws meet the obligation to criminalize trafficking in persons for the purpose of other forms of sexual exploitation.

With respect to the obligation to criminalize attempted trafficking for the purpose of other forms of sexual exploitation, the federal laws described above are consistent with this requirement. However, with respect to state laws, some forms of conduct that are required to be criminalized as attempts would be too remote from completion to be punished under the attempted sexual abuse laws of a particular state. To address that narrow range of attempted trafficking for sexual exploitation offenses that do not rise to the level of attempted sex abuse offenses under federal or state laws, it will be necessary to reserve the right to apply the obligation set forth in Article 5, Paragraph 2(a), of the Protocol only to the extent that such conduct is punishable by the laws of the state concerned.

In addition, the Protocol requires States Parties to prohibit trafficking and attempted trafficking in persons for the purpose of the removal of organs (which the negotiating record makes clear does not prohibit organ removal for legitimate medical reasons). The most closely analogous federal criminal statute, 42 U.S.C. 274e, penalizes only the sale of organs in interstate and foreign commerce. While that statute, along with federal fraud, kidnapping, aiding and abetting and conspiracy laws, likely covers most instances of such trafficking that could arise, the express obligation under the Protocol is nonetheless broader. Similarly, states generally do not

have statutes specifically treating as crimes trafficking or attempted trafficking in persons for the purpose of the removal of organs, although in a manner similar to federal law, such conduct may be punishable as murder, assault, kidnapping, fraud or similar offenses, depending on the circumstances of the crime.

Accordingly, to avoid undertaking obligations with respect to the two areas discussed above, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The Government of the United States of America reserves the right to assume obligations under this Protocol in a manner consistent with its fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to conduct addressed in the Protocol. U.S. federal criminal law, which regulates conduct based on its effect on interstate or foreign commerce, or another federal interest, such as the Thirteenth Amendment's prohibition of "slavery" and "involuntary servitude," serves as the principal legal regime within the United States for combating the conduct addressed in this Protocol, and is broadly effective for this purpose. Federal criminal law does not apply in the rare case where such criminal conduct does not so involve interstate or foreign commerce, or otherwise implicate another federal interest, such as the Thirteenth Amendment. There are a small number of conceivable situations involving such rare offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under the Protocol. The Government of the United States of America therefore reserves to the obligations set forth in the Protocol to the extent they address conduct which would fall within this narrow category of highly localized activity. This reservation does not affect in any respect the ability of the United States to provide international cooperation to other Parties as contemplated in the Protocol.

I also recommend that the Senate include the following understanding in its resolution of advice and consent:

> The United States understands that, in view of its reservations, the Protocol does not warrant the enactment of any legislative or other measures; instead, the United States will rely on existing federal law and applicable state law to meet its obligations under the Protocol.

II. Protection of victims of trafficking, in persons

Article 6 ("Assistance to and protection of victims of trafficking in persons") recognizes that protection of victims is as important as prosecuting traffickers. It calls on States Parties to make available to victims of trafficking in persons certain protections and assistance. Among the protections included are protection of the privacy and identity of the victim by making legal proceedings confidential and protection of the physical safety of victims. The types of assistance to be offered include assistance during legal proceedings against the trafficker, and assistance to provide for victims' phys-

ical, psychological and social recovery. This Article also calls on States Parties to take into account the age, gender and special needs of victims. In recognition of the fact that legal systems and available resources will affect how States Parties implement their obligations under this Article, the Article includes language providing appropriate discretion and flexibility. For example, States Parties are, required to "consider" taking certain of the measures called for, and are required to take certain other measures "in appropriate cases and to the extent possible under its domestic law." States Parties, however, are required to ensure the possibility for the victim to obtain compensation for damages suffered.

Article 7 ("Status of victims of trafficking in persons in receiving States") calls on States Parties to consider providing temporary or permanent residency to victims of trafficking in appropriate cases.

Paragraph 1 of Article 8 ("Repatriation of victims of trafficking in persons") states that Parties must facilitate and accept the return of their nationals and permanent residents who are trafficking victims. This is consistent with the customary international law principle that a country is obligated to accept the return of any of its nationals. Article 8(2) provides that such return shall be with due regard for the safety of the victim and the status of legal proceedings against the trafficker, and shall preferably be voluntary. Paragraphs 3 and 4 provide measures to facilitate the return of trafficking victims. They require a State Party to verify whether a trafficking victim is its national or permanent resident, and to issue whatever travel or other documents are need to enable the person to return to its territory. Article 8 (5) states that Article 8 is without prejudice to any right afforded trafficking victims by the domestic law of the receiving State Party. For example, nothing in Article 8 would interfere with a trafficking victim's right to apply for asylum in the United States. Finally, Article 8 (6) contains the important statement that the Article will not prejudice any other applicable agreement or arrangement, be it bilateral or multilateral, that governs the return of trafficking victims. This was included to ensure that the Protocol did not interfere with other agreements or arrangements that a State Party may have worked out with another State Party on this subject.

III. Prevention, cooperation and other measures

Paragraph 1 of Article 9 ("Prevention of trafficking in persons") obligates States Parties to take measures to prevent and combat trafficking in persons and to protect victims from revictimization. The remaining four paragraphs of the Article elaborate on that obligation. Article 9(2) calls on States Parties to take measures, including research and mass media campaigns, to prevent and combat trafficking. Article 9(3) states that the actions taken in accordance with this Article must include appropriate cooperation with non-governmental organizations. Article 9(4) requires States Parties to take or strengthen measures to alleviate the factors that make persons vulnerable to trafficking, such as poverty and lack of equal opportunity. Finally, Article 9(5) requires States Parties to adopt or strengthen measures to discourage the demand that fosters all forms of exploitation of persons, and consequently leads to trafficking.

Article 10 ("Information exchange and training") requires States Parties to exchange information, in accordance with their domestic law, in order to enable them to determine (1) whether persons crossing international borders with suspicious or no travel documents are perpetrators or victims of trafficking; and (2) the means and methods used by trafficking gangs, including, for example, means of recruitment and transportation of victims, and trafficking routes. Article 10 further requires States Parties to provide training for relevant government officials in the prevention of trafficking in persons, and elaborates on what that training should include. Finally, Article 10 provides that a State Party receiving information under this Article shall comply with any restriction placed on its use by the State Party that transmitted the information. As this Article relates to police cooperation, it does not affect mutual legal assistance relations, which are instead governed by treaties for that purpose, and by provisions such as Article 18 of the Convention itself.

Article 11 ("Border measures") provides that States Parties shall strengthen border controls as necessary to prevent and detect trafficking in persons without prejudice to international commitments to the free movement of people. It then goes on to set forth particular measures that states must take in order to strengthen border controls. These include measures to prevent commercial carriers from being used in the commission of trafficking offenses; obliging commercial carriers to ascertain that passengers are in possession of required travel documents, providing for sanctions against carriers who do not comply with the requirement to check their passengers' travel documents, and denying or revoking visas to persons involved in the commission of trafficking crimes. All of these provisions include discretionary language (e.g., that States Parties "shall consider" adopting certain measures, or that they shall do so "where appropriate," "to the extent possible," or "in accordance with [their] domestic law"), so as to provide flexibility to States Parties.

Under Article 12 ("Security and control of documents"), States Parties are obliged to take measures, within available means, to ensure that their travel and identity documents are of such a quality that they cannot easily be misused and cannot readily be falsified, altered, replicated or issued, and to ensure the security and integrity of such documents so that they cannot be unlawfully created, issued or used.

Article 13 ("Legitimacy and validity of documents") is related to Article 12. It requires a State Party to verify within a reasonable time the legitimacy and validity of travel documents that appear to have been issued in its name and to have been used for trafficking in persons.

IV. Final provisions

Article 14 ("Saving clause") is extremely important in setting appropriate balance in the Protocol between law enforcement and protection of victims. It reaffirms that the Protocol does not affect rights, obligations, and responsibilities of States and individuals under international law, in particular international humanitarian law as well as the 1951 Convention and the 1967 Protocol relating

to the Status of Refugees and the principle of non-refoulement as contained therein. (The negotiating record explicitly states that the Protocol does not deal one way or the other with the status of refugees.) Moreover, this Article provides that the Protocol must be applied in a way that does not discriminate against persons on the ground that they are victims of trafficking in persons and that the Protocol shall be interpreted and applied in a manner consistent with internationally recognized principles of non-discrimination (e.g., no distinction based on race, religion, nationality, membership in a particular social group or political opinion.)

Article 15 ("Settlement of disputes") and Article 16 ("Signature, ratification, acceptance, approval and accession"), are identical to the analogous provisions (Articles 35 and 36) of the Convention, except that the word "Protocol" is substituted for "Convention." As with the analogous article of the Convention, the United States intends to exercise its right to reserve with regard to the dispute resolution mechanism set forth in the Protocol. Accordingly, I recommend that the following reservation be included in the U.S. instrument of ratification:

> In accordance with Article 15, paragraph 3, the Government of the United States of America declares that it does not consider itself bound by the obligation set forth in Article 15, paragraph 2.

Article 17 ("Entry into force") is identical to Article 38 of the Convention, except that (1) the word "Protocol" is substituted for "Convention"; and (2) Article 17 provides that the Protocol shall not enter into force before the entry into force of the Convention.

Article 18 ("Amendment") is identical to Article 39 of the Convention, except that (1) the word "Protocol" is substituted for "Convention"; and (2) Article 18 provides that the States Parties to the Protocol meeting at the Conference of the Parties (rather than the entire Conference of the Parties) approve any amendment to the Protocol. This change was necessary so that decisions regarding amendment to the Trafficking Protocol would be made only by States Parties to the Protocol, and not by parties to the Convention who were not also parties to the Protocol.

Article 19 ("Denunciation") is identical to Article 40 of the Convention except that (1) the word "Protocol" is substituted for "Convention"; and (2) Article 19 does not contain the final paragraph of Article 40 (which states that a State Party that denounces the Convention must denounce any Protocols to which that State is a Party as well).

Article 20 ("Depositary and languages") is identical to Article 41 of the Convention except that the word "Protocol" is substituted for "Convention."

Finally, the terms of the Protocol, with the suggested reservations and understandings, are consonant with U.S. law. To clarify that the provisions of the Protocol, with the exceptions of those implemented through Articles 16 and 18 of the Convention, are not self-executing, I recommend that the Senate include the following declaration in its resolution of advice and consent:

> The United States declares that the provisions of the Protocol (with the exception of those implemented through

Articles 16 and 18 of the Convention) are non-self-executing.

Article 16 and Article 18 of the Convention (which are applicable to the Protocol by virtue of Article 1 thereof) contain detailed provisions on extradition and legal assistance that would be considered self-executing in the context of normal bilateral extradition practice. It is therefore appropriate to except those provisions from the general understanding that the provisions of the Convention are non-self-executing.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

The Migrant Smuggling Protocol consists of a preamble and 25 articles, which are divided into four chapters: I ("General provisions"), II ("Smuggling of migrants by sea"), III ("Prevention, cooperation and other measures") and IV ("Final provisions"). To the extent practicable, the wording of key phrases and the structure of the Trafficking and Migrant Smuggling Protocols are consistent with each other and are modeled on the structure and wording of the Convention. While there was never any concern, in the context of the Trafficking Protocol negotiations, that the Protocol might be used to punish the victims, there was great concern, especially on the part of "sending" countries (i.e., states from which migrants are smuggled), that the "receiving" countries (i.e., states to which migrants are smuggled) might use the Migrant Smuggling Protocol to punish the smuggled migrants. It was necessary to address this concern, and develop a Protocol that balances law enforcement provisions with protection of the rights of smuggled migrants, in order to reach consensus. Thus, this Protocol contains a number of migrant-protection provisions. As noted above, subject to the reservations and understandings recommended herein, the Protocol would not require implementing legislation for the United States.

I. General provisions

Article 1 ("Relation with the United Nations Convention against Transnational Organized Crime") is structurally a key provision of the Migrant Smuggling Protocol. Rather than repeating in the Protocol every provision of the Convention that is also applicable to the Protocol, and rather than explicitly referencing every provision in the Convention that is also applicable to the Protocol, this Article provides that all provisions of the Convention shall apply, "*mutatis mutandis,*" to the Protocol unless otherwise provided. The negotiating record to the Protocol explains that the phrase in quotations means "with such modifications as circumstances require" or "with the necessary modifications," and that the provisions of the Convention would thus be interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention. Article 1 further clarifies this concept by providing that the offences established in Article 6 of the Protocol (the criminalization article) shall be regarded as offences established in accordance with the Convention. Thus, wherever in the Convention it is stated that a particular provision applies to "offences established in accordance

with the Convention," that provision will also apply for States Parties to this Protocol to the migrant smuggling offences established in accordance with Article 6 of the Protocol.

The obligations set forth in the Convention that are to be applied to offenses established in the Migrant Smuggling Protocol are all consistent with current U.S. law. In contrast to the Convention and the Trafficking Protocol, no reservation will be required with respect to the establishment of jurisdiction over Protocol offenses committed on board ships flying a U.S. flag or aircraft registered under U.S. law. This difference between the Migrant Smuggling Protocol and the other instruments arises because, as discussed further within, the Migrant Smuggling Protocol requires the United States to criminalize only the smuggling of migrants into the United States, and travel and identity document offenses in conjunction therewith. U.S. law provides for jurisdiction over such conduct occurring outside the United States, which would include on board ships flying a U.S. flag or aircraft registered under U.S. law.

Similarly, since U.S. federal law covers any migrant smuggling into United States territory, and travel and identity document offenses in conjunction therewith, a federalism reservation is not required.

As with respect to the Trafficking Protocol, to make clear that the U.S. understands its existing comprehensive list of money laundering predicate offenses as sufficient to implement the Article's obligation with respect to the Protocol offenses, I recommend that the following understanding be included in the U.S. instrument of ratification:

> The Government of the United States of America understands the obligation to establish the offenses in the Protocol as money laundering predicate offenses, in light of Article 6, paragraph 2(b) of the United Nations Convention against Transnational Organized Crime, as requiring States Parties whose money laundering legislation sets forth a list of specific predicate offenses to include in such list a comprehensive range of offenses associated with smuggling of migrants.

Finally, it should be noted that the previously described notifications to be made by the United States with respect to Articles 16, 18, and 31 of the Convention also apply to this Protocol. No additional notification in this regard is necessary with respect to the Migrant Smuggling Protocol.

Article 2 ("Statement of purpose") describes the purpose of the Protocol, which are to prevent and combat the smuggling of migrants, and to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Article 3 ("Use of terms") defines four terms used in the Protocol, including the key term "smuggling of migrants." "Smuggling of migrants" means "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident." The language that requires the purpose of the smuggling to be financial or other material gain is taken

from the definition of "organized criminal group" in the main Convention. The negotiating record explains that the inclusion of this language was meant to emphasize that the Protocol did not cover the activities of those providing support to smuggled migrants for humanitarian reasons or on the basis of close family ties. "Illegal entry" means crossing borders without complying with the requirements for legal entry into the receiving State. "Fraudulent travel or identity document" means a travel or identity document that has been falsely made or altered without proper authorization, that has been improperly issued or obtained, or that is being used by someone other than the rightful holder. "Vessel" means any type of water craft capable of being used-as a means of transportation on water, except for Government vehicles being used for governmental, non-commercial service. Thus, naval vessels being used for military purposes are not covered by the Protocol, but government vessels being used for services that might in other countries be provided by non-governmental, commercial entities are covered.

Article 4 ("Scope of application") is modeled on the analogous article in the Convention. It is one of many provisions in the Protocol that have an analogous provision in the Convention. In all cases, the goal was to make the language in the Protocol consistent with the language in the Convention. Article 4 thus states that the Protocol applies, except as otherwise provided therein, to the prevention, investigation and prosecution of the offenses established in the Protocol, "where the offenses are transnational in nature and involve an organized criminal group" (virtually identical language is used in the "Scope" article in the Convention), and to the protection of the rights of persons who have been the object of such offenses.

Article 5 ("Criminal liability of migrants") states that migrants must not be subject to criminal prosecution under the Protocol merely because they are the objects of conduct set forth in Article 6 (criminalization). This Article was the key to getting the support of the "sending" countries for this Protocol. It makes perfectly clear that the Protocol does not call for the punishment of the migrant merely because he or she has been smuggled. However, as is made explicit later in the Protocol (Article 6(4)), nothing in Article 5 or anywhere else in the Protocol prevents a State Party from taking measures against a smuggled migrant under its domestic law. Also, Article 5 would not apply to a case where the smuggled migrant was also part of the organized criminal group that conducted the smuggling—in such a case the criminalization obligation of the Protocol would apply to the migrant not because of the migrant's status as a smuggled migrant, but because of his or her participation in the smuggling operation as a smuggler.

Article 6 ("Criminalization") was modeled on the analogous articles in the Convention. It requires States Parties to criminalize three distinct types of conduct: (1) "smuggling of migrants," (2) document fraud when committed for the purpose of enabling the smuggling of migrants, and (3) enabling a person to reside illegally in a State by means of document fraud or any other illegal means. As confirmed by Article 11(6) of the Convention, there is no requirement that the criminal offenses by which the U.S. will implement this obligation be denominated in terms identical to those

used in the Protocol, provided the requisite conduct is a criminal offense under U.S. law.

With respect to the first category (smuggling of migrants), each State Party is obligated to criminalize the conduct described in the definition set forth in Article 3(a), i.e., "the procurement . . . of the illegal entry of a person into a State Party of which the person is not a national or permanent resident." This definition is consistent with the United States' interpretation that the Protocol requires the United States to criminalize the smuggling of migrants *into* its country, an obligation that can be implemented under current U.S. law.

Within the second category (document fraud enabling the smuggling of migrants), the Protocol requires Parties to criminalize producing, procuring, providing, or possessing fraudulent travel or identity documents. Although U.S. criminal statutes relating to false or fraudulent passports, visas, other travel documents, and identity documents are not couched in these precise terms, the conduct that must be prohibited under the Protocol is covered, either through these statutes or through those prohibiting the inducement or encouragement of migrant smuggling. U.S. law relating to identity documents requires that the conduct covered be done with the intent to defraud the United States. Since, as noted above, the Protocol is understood by the United States to require it to criminalize smuggling into the United States, this intent requirement is consistent with our obligation under the Protocol.

The third type of offense (enabling illegal residence) requires some explanation. Until the last round of negotiations, the text of the entire Protocol was developed on the assumption that the definition of "smuggling of migrants" in Article 3 would cover both illegal entry *and* illegal residence. In other words, criminal groups that knowingly, intentionally and for profit, provided false documents, transportation, housing, etc. to persons who were present in a country illegally in order to enable those persons to continue to reside in the country, would be guilty of "smuggling of migrants," even if the group had nothing to do with the initial entry of the persons into the country, and even if the persons' initial entry was legal. The "sending" countries were concerned that this definition was too broad, and could cover the activities of family members or others who helped illegal migrants remain in a country for humanitarian reasons. The eventual compromise was to limit the definition of "smuggling of migrants" to illegal entry, and to have a separate criminalization requirement for enabling illegal residence that was limited to false documents, and did not cover other support, such as transportation or housing, which might be given to illegal migrants to enable them to remain in a country. In any event, current U.S. law prohibiting the harboring of illegal aliens covers the obligation set forth in this category.

As with the Trafficking Protocol, Article 6 obliges States Parties to criminalize attempts to commit the offenses described in paragraph 1, subject to the basic concepts of their respective legal systems, as well as participation as an accomplice (subject to the basic concepts of their respective legal systems, with respect to procuring, providing, or possessing fraudulent travel or identity documents) or organizing or directing others to commit the offenses.

Participating as an accomplice and ordering or directing migrant smuggling offenses are criminalized under general accessorial liability principles of U.S. law. U.S. law prohibits most, but not all, attempts to engage in the described conduct. For example, U.S. law does not always criminalize attempted possession of fraudulent travel or identity documents. Accordingly, I recommend that the following reservation be included in the U.S. instrument of ratification:

> The United States of America criminalizes most but not all forms of attempts to commit the offenses established in accordance with Article 6, paragraph 1 of this Protocol. With respect to the obligation under Article 6, Paragraph 2(a), the Government of the United States of America reserves the right to criminalize attempts to commit the conduct described in Article 6, paragraph 1(b), to the extent that under its laws such conduct relates to false or fraudulent passports and other specified identity documents, constitutes fraud or the making of a false statement, or constitutes attempted use of a false or fraudulent visa.

Article 6 also calls on States Parties to adopt measures to establish as aggravating circumstances those circumstances that endanger, or are likely to endanger, the life or safety of the migrants, or entail inhuman or degrading treatment with respect to the offenses described above. U.S. Federal Sentencing Guidelines provide enhanced penalties when the offense of smuggling, harboring, encouraging or inducing illegal entry to or residence in the United States involves the intentional or reckless creation of a substantial risk of death or serious bodily injury. In the case of production of false or fraudulent documents, an enhanced penalty would of necessity only apply to situations in which the documents are provided to a migrant under such circumstances. Such conduct constitutes "encouraging" or "inducing" alien smuggling under U.S. law, and is thereby subject to enhanced penalties under the Sentencing Guidelines. The Sentencing Guidelines further provide enhanced penalties for circumstances that entail inhuman or degrading treatment, such as subjecting migrants to inhumane conditions, or to circumstances in which they are likely to be forced into involuntary servitude.

Finally, as a balance to Article 5's guarantee that migrants shall not be punished under the Protocol for the mere fact of having been smuggled, Article 6 clarifies that nothing in the Protocol prevents a State Party from taking measures against a smuggled migrant whose conduct constitutes an offense under its domestic law.

II. Smuggling of migrants by sea

Article 7 ("Cooperation") requires States Parties to cooperate to the fullest extent possible to prevent and suppress migrant smuggling by sea in accordance with the international law of the sea.

Article 8 ("Measures against the smuggling of migrants by sea") establishes procedures for interdicting suspect vessels at sea. This Article is based on long-standing international law principles of flag State jurisdiction on the high seas, universal jurisdiction over ships without nationality, and the right of approach and visit. Paragraph 1 provides that the flag State may take direct action

against its own flag vessels, as well as stateless vessels, and may request the assistance of other States Parties to suppress migrant smuggling by sea. Paragraph 2 provides for the boarding and searching of foreign flag vessels, with flag State consent, based on reasonable grounds to suspect that the vessel is engaged in migrant smuggling. The flag State must be promptly notified of any action taken against one of its vessels (paragraph 3). Paragraph 4 provides that the flag State must respond expeditiously to a request for confirmation of registry and request for authorization to take appropriate measures with regard to one of its vessels. Paragraph 5 allows the flag State to condition its authorization with respect to the boarding, searching and taking of measures against one of its flag vessels, as mutually agreed between the flag State and the requesting State. The requesting State may not take any additional actions without the express authorization of the flag State, except those necessary to relieve imminent danger to the boarding party or to other persons on board, or as otherwise authorized by bilateral or multilateral agreements.

Paragraph 6 requires States Parties to designate an authority or authorities to receive reports and respond to requests for assistance, confirmation of registry or authorization to take appropriate measures. The Operations Center, Department of State, would serve as such authority for the United States. States Parties are obliged by Article 8(6) to notify the UN Secretary-General of their designated authority or authorities within one month of the designation. Accordingly, upon ratification of the Convention, the Department of State will, by diplomatic note, provide the depositary with the following notification:

> Pursuant to Article 8, paragraph 6 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, the United States of America notifies the other States Parties through the Secretary-General of the United Nations that the Operations Center, U.S. Department of State, is designated as its authority to receive and respond to requests under the above-referenced paragraph of the Protocol.

Paragraph 7 provides for universal jurisdiction over stateless vessels, by allowing all States Parties to board and search stateless vessels.

Article 9 ("Safeguard Clauses") requires States Parties taking measures against a vessel engaged in migrant smuggling to ensure the safety and humanitarian handling of the persons on board and, within available means, that any actions taken with regard to the vessel are environmentally sound. States Parties shall also take due account of the need not to endanger the security of the vessel or its cargo, as well as the need not to prejudice the commercial or legal interests of the flag State or any other interested State. If it is subsequently proven that the suspect vessel was not engaged in the smuggling of migrants, the vessel shall be compensated for any loss or damage that it may have sustained, provided that the vessel has not committed any act justifying the measures taken. Similar provisions are in other international instruments related to

the law of the sea. Existing claims procedures in place under current law would be used in the processing and adjudication of any such claims. Any measure taken, adopted or implemented under this chapter must also take due account of the need not to interfere with the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea, as well as the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessels. Any action taken against vessels pursuant to this chapter must be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

III. Prevention, cooperation and other measures

Article 10 ("Information") calls for States Parties, consistent with their domestic legal and administrative systems, to exchange among themselves certain types of information for the purpose of achieving the Protocol's objectives. The information called for includes information on such matters as embarkation and destination points, as well as routes and means of transportation used by smugglers, and the identify and organization of smuggling groups. This information exchange is in addition to that called for in Articles 27 ("Law enforcement cooperation") and 28 ("Collection, exchange and analysis of information on the nature of organized crime") of the Convention and is analogous to that contemplated in Article 10 of the Trafficking Protocol. Finally, Article 10 provides that States Parties that receive information shall comply with any restrictions on its use imposed by the State Party that transmitted the information.

Article 11 ("Border measures") provides that States Parties shall strengthen border controls as necessary to prevent and detect the smuggling of migrants, without prejudice to international commitments to the free movement of people. It then goes on to set forth particular measures that states should take in order to strengthen border controls. These include measures to prevent commercial carriers from being used in the commission of migrant smuggling offenses; obliging commercial carriers to ascertain that passengers are in possession of required travel documents, providing for sanctions against carriers who do not comply with the requirement to check their passengers' travel documents, and denying or revoking visas to persons involved in the commission of migrant smuggling crimes. All of these provisions include discretionary language (e.g., States Parties "shall consider" adopting certain measures, or that they shall do so "where appropriate," "to the extent possible," or "in accordance with domestic law") so as to provide flexibility to States Parties.

Under Article 12 ("Security and control of documents"), States Parties are obliged to take measures, within available means, to ensure that their travel and identity documents are of such a quality that they cannot easily be misused (and cannot readily be falsified or unlawfully altered, replicated or issued), and to ensure the security and integrity of such documents so that they cannot be unlawfully created, issued or used.

Article 13 ("Legitimacy and validity of documents") is related to Article 12. It requires a State Party to verify within a reasonable time the legitimacy and validity of travel documents that appear to have been issued in its name and to have been used for smuggling of migrants.

Article 14 ("Training and technical cooperation") requires States Parties to provide or strengthen various types of law enforcement training for their relevant officials in order to prevent the conduct set forth in Article 6 and to provide humane treatment to the smuggled migrants. It further requires States Parties to cooperate with each other, and with international and nongovernmental organizations to make sure that such training is adequate. Finally, this Article provides that States Parties shall consider providing assistance to other States that are frequently countries of origin or transit for smuggled migrants.

Article 15 ("Other prevention measures") deals with nonlaw-enforcement prevention techniques. It requires States Parties to provide public awareness programs to ensure that the public is aware of the criminal nature of migrant smuggling and the risks it poses to the migrants. The last paragraph of this Article, which was very important to the "sending" countries, requires States Parties to promote or strengthen, as appropriate, development programs at the national, regional and international levels, to combat the root socio-economic causes of the smuggling of migrants.

Article 16 ("Protection and assistance measures"), requires States Parties, consistent with their obligations under international law, to take appropriate measures to preserve and protect the rights of smuggled migrants, in particular the right to life, and the right not to be subjected to torture or other cruel, inhuman or degrading treatment. As discussed above under Article 6, neither this Article nor Article 5 preclude the United States from prosecuting a smuggled person if he or she has engaged in other criminal activity. Article 16 also obliges States Parties to take appropriate measures to protect smuggled migrants from violence, and to assist smuggled migrants whose lives or safety are endangered. It further requires States Parties to take into account the special needs of women and children in implementing this Article. Finally, it obliges States Parties, when a smuggled migrant has been detained, to comply with its obligations under the Vienna Convention on Consular Relations ("VCCR"), including those concerning consular notification and access. This last requirement creates no new obligations or interpretations; it merely states that States Parties must comply with their obligations under the VCCR, whatever those obligations may be.

Article 17 ("Agreements and arrangements") encourages States Parties to conclude bilateral or regional agreements or arrangements to implement the Protocol. This was an important Article to the United States, as we have bilateral migration agreements with a number of countries.

Article 18 ("Return of smuggled migrants") is one of the key articles in the Protocol. Paragraph 1 requires a State Party to facilitate and accept the return of smuggled migrants who are its nationals or permanent residents at the time of return. The Protocol is the first binding international instrument to codify this customary international law principle. Paragraph 2 calls on a State Party to

consider accepting the return of smuggled migrants who were permanent residents at the time they entered the receiving State. Thus paragraph 1 deals with cases where a person is a national or has the right of permanent residence at the time of return. Paragraph 2 is supplementary to paragraph 1 and deals with the case of a person who had the right of permanent residence at the time of entry, but no longer has it at the time of return. The remainder of the Article deals with means of facilitating and implementing the return of smuggled migrants. Some countries refuse to acknowledge that a person is their national or permanent resident, or refuse to issue necessary travel documents to enable the smuggled migrant's return. This Article requires States Parties to do both. It also requires States Parties to carry out returns in an 7s orderly manner with due regard for the safety and dignity of the person. This Article does not affect any rights afforded to smuggled migrants by the law of the receiving State Party (e.g., the right to seek asylum); nor does it affect obligations entered into any other applicable agreement or arrangement governing the return of smuggled migrants.

IV. Final provisions

Article 19 ("Saving clause") is extremely important in setting appropriate balance in the Protocol between law enforcement and protection of victims. It reaffirms that the Protocol does not affect rights, obligations, and responsibilities of States and individuals under international law, in particular international humanitarian law as well as the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein. (The negotiating record explicitly states that the Protocol does not deal one way or the other with the status of refugees.) Moreover, this Article provides that the Protocol must be interpreted and applied in a way that does not discriminate against persons on the ground that they were smuggled and that the Protocol shall be applied in a manner consistent with internationally recognized principles of non-discrimination (e.g., no discrimination on the basis of race, religion, nationality, membership in a particular social group or political opinion).

Article 20 ("Settlement of disputes") and Article 21 ("Signature, ratification, acceptance, approval and accession"), are identical to the analogous provisions (Articles 35 and 36) of the Convention, except that the word "Protocol" is substituted for "Convention." As in the Convention and the Trafficking Protocol, and as contemplated in paragraph 3 of Article 20, I recommend that the following reservation with respect to paragraph 2 (which would otherwise require the United States to submit to binding arbitration of disputes) be included in the U.S. instrument of ratification:

> In accordance with Article 20, paragraph 3, the Government of the United States of America declares that it does not consider itself bound by the obligation set forth in Article 20, paragraph 2.

Article 22 ("Entry into force") is identical to Article 38 of the Convention, except that (1) the word "Protocol" is substituted for

"Convention"; and (2) Article 22 provides that the Protocol shall not enter into force before the entry into force of the Convention.

Article 23 ("Amendment") is identical to Article 39 of the Convention, except that (1) the word "Protocol" is substituted for "Convention"; and (2) Article 23 provides that the States Parties to the Protocol meeting at the Conference of the Parties (rather than the entire Conference of the Parties) approve any amendment to the Protocol. This change was necessary so that decisions regarding amendment to the Migrant Smuggling Protocol would be made only by States Parties to the Protocol, and not by parties to the Convention who were not also parties to the Protocol.

Article 24 ("Denunciation") is identical to Article 40 of the Convention except that (1) the word "Protocol" is substituted for "Convention"; and (2) Article 24 does not contain the final paragraph of Article 40 (which states that a State Party that denounces the Convention must denounce any Protocols that that State is a Party to as well).

Article 25 ("Depositary and languages") is identical to Article 41 of the Convention except that the word "Protocol" is substituted for "Convention."

Finally, the terms of the Protocol, with the suggested reservations and understandings, are consonant with U.S. law. To clarify that the provisions of the Protocol, with the exceptions of those implemented through Articles 16 and 18 of the Convention, are not self-executing, I recommend that the Senate include the following declaration in its resolution of advice and consent:

> The United States declares that the provisions of the Protocol (with the exception of those implemented through Articles 16 and 18 of the Convention) are non-self-executing.

Article 16 and Article 18 of the Convention (which are applicable to the Protocol by virtue of Article 1 thereof) contain detailed provisions on extradition and legal assistance that would be considered self-executing in the context of normal bilateral extradition practice. It is therefore appropriate to except those provisions from the general understanding that the provisions of the Convention are non-self-executing.

It is my belief that the Convention and the Trafficking and Migrant Smuggling Protocols would be advantageous to the United States and, subject to the reservations and understandings proposed in this Report, would be consistent with existing U.S. legislation. The Department of Justice joins me in recommending that the Convention and the Protocols be transmitted to the Senate at an early date for its advice and consent to ratification, subject to the reservations and understanding described above.

Respectfully submitted,

COLIN L. POWELL.

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

UNITED NATIONS
2000

UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

Article 1
Statement of purpose

The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.

Article 2
Use of terms

For the purposes of this Convention:

(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 serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

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

(c) "Structured group" shall 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;

(d) "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(f) "Freezing" or "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;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

(h) "Predicate offence" shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention;

(i) "Controlled delivery" shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or

more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence;

(j) "Regional economic integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it; references to "States Parties" under this Convention shall apply to such organizations within the limits of their competence.

Article 3
Scope of application

1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:

(a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and

(b) Serious crime as defined in article 2 of this Convention;

where the offence is transnational in nature and involves an organized criminal group.

2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

(a) It is committed in more than one State;

(b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

(c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or

(d) It is committed in one State but has substantial effects in another State.

Article 4
Protection of sovereignty

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention entitles a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

Article 5
Criminalization of participation in an organized criminal group

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

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 6
Criminalization of the laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

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

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

Article 7
Measures to combat money-laundering

1. Each State Party:

(a) Shall institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer identification, record-keeping and the reporting of suspicious transactions;

(b) Shall, without prejudice to articles 18 and 27 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

4. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

Article 8
Criminalization of corruption

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

(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.

3. Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.

4. For the purposes of paragraph 1 of this article and article 9 of this Convention, "public official" shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.

Article 9
Measures against corruption

1. In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials.

2. Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.

Article 10
Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with articles 5, 6, 8 and 23 of this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Article 11
Prosecution, adjudication and sanctions

1. Each State Party shall make the commission of an offence established in accordance with articles 5, 6, 8 and 23 of this Convention liable to sanctions that take into account the gravity of that offence.

2. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences covered by this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

3. In the case of offences established in accordance with articles 5, 6, 8 and 23 of this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to 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.

4. Each State Party shall ensure that its courts or other competent authorities bear in mind the grave nature of the offences covered by this Convention when considering the eventuality of early release or parole of persons convicted of such offences.

5. Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence covered by this Convention and a longer period where the alleged offender has evaded the administration of justice.

6. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

Article 12
Confiscation and seizure

1. States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention.

2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. If proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

4. If proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

5. Income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted or from property with which proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

6. For the purposes of this article and article 13 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. States Parties shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article 13
International cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with article 12, paragraph 1, of this Convention insofar as it relates to proceeds of crime, property,

equipment or other instrumentalities referred to in article 12, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence covered by this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 12, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 18 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 18, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral treaty, agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. Cooperation under this article may be refused by a State Party if the offence to which the request relates is not an offence covered by this Convention.

8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

9. States Parties shall consider concluding bilateral or multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this article.

Article 14
Disposal of confiscated proceeds of crime or property

1. Proceeds of crime or property confiscated by a State Party pursuant to articles 12 or 13, paragraph 1, of this Convention shall be disposed of by that State Party in accordance with its domestic law and administrative procedures.

2. When acting on the request made by another State Party in accordance with article 13 of this Convention, States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State Party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.

3. When acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on:

(a) Contributing the value of such proceeds of crime or property or funds derived from the sale of such proceeds of crime or property or a part thereof to the account designated in accordance with article 30, paragraph 2 (c), of this Convention and to intergovernmental bodies specializing in the fight against organized crime;

(b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures.

Article 15
Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

(a) The offence is committed in the territory of that State Party; or

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party;

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is:

(i) One of those established in accordance with article 5, paragraph 1, of this Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;

(ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory.

3. For the purposes of article 16, paragraph 10, of this Convention, each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that one or more other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 16
Extradition

1. This article shall apply to the offences covered by this Convention or in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

2. If the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences.

3. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

4. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

5. States Parties that make extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of their instrument of ratification, acceptance, approval of or accession to this Convention, inform the Secretary-General of the United Nations whether they will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If they do not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

6. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

7. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

8. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

9. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

10. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

11. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition

that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 10 of this article.

12. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting Party, consider the enforcement of the sentence that has been imposed under the domestic law of the requesting Party or the remainder thereof.

13. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

14. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

15. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

16. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

17. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Article 17
Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences covered by this Convention, in order that they may complete their sentences there.

Article 18
Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial

proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance where the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1 (a) or (b), is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 10 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

(a) Taking evidence or statements from persons;

(b) Effecting service of judicial documents;

(c) Executing searches and seizures, and freezing;

(d) Examining objects and sites;

(e) Providing information, evidentiary items and expert evaluations;

(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving

State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply these paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. States Parties may decline to render mutual legal assistance pursuant to this article on the ground of absence of dual criminality. However, the requested State Party may, when it deems appropriate, provide assistance, to the extent it decides at its discretion, irrespective of whether the conduct would constitute an offence under the domestic law of the requested State Party.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally, but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requested State Party shall respond to reasonable requests by the requesting State Party on progress of its handling of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

Article 19
Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, 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.

Article 20
Special investigative techniques

1. If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, 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 Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part.

Article 21
Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

Article 22
Establishment of criminal record

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence covered by this Convention.

Article 23
Criminalization of obstruction of justice

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public officials.

Article 24
Protection of witnesses

1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

Article 25
Assistance to and protection of victims

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Article 26
Measures to enhance cooperation with law enforcement authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in organized criminal groups:

(a) To supply information useful to competent authorities for investigative and evidentiary purposes on such matters as:

(i) The identity, nature, composition, structure, location or activities of organized criminal groups;

(ii) Links, including international links, with other organized criminal groups;

(iii) Offences that organized criminal groups have committed or may commit;

(b) To provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence covered by this Convention.

4. Protection of such persons shall be as provided for in article 24 of this Convention.

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

Article 27
Law enforcement cooperation

1. States Parties shall cooperate closely 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 this Convention. Each State Party shall, in particular, adopt effective measures:

(a) To enhance and, where necessary, to establish 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 this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences 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;

(c) To provide, when appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(e) To exchange information with other States Parties on specific means and methods used by organized criminal groups, including, where applicable, routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the Parties may consider this Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to transnational organized crime committed through the use of modern technology.

Article 28
Collection, exchange and analysis of information on the nature of organized crime

1. Each State Party shall consider analysing, in consultation with the scientific and academic communities, trends in organized crime in its territory, the circumstances in which organized crime operates, as well as the professional groups and technologies involved.

2. States Parties shall consider developing and sharing analytical expertise concerning organized criminal activities with each other and through international and regional organizations. For that purpose, common definitions, standards and methodologies should be developed and applied as appropriate.

3. Each State Party shall consider monitoring its policies and actual measures to combat organized crime and making assessments of their effectiveness and efficiency.

Article 29
Training and technical assistance

1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this Convention. Such programmes may include secondments and exchanges of staff. Such programmes shall deal, in particular and to the extent permitted by domestic law, with the following:

(a) Methods used in the prevention, detection and control of the offences covered by this Convention;

(b) Routes and techniques used by persons suspected of involvement in offences covered by this Convention, including in transit States, and appropriate countermeasures;

(c) Monitoring of the movement of contraband;

(d) Detection and monitoring of the movements of proceeds of crime, property, equipment or other instrumentalities and methods used for the transfer, concealment or disguise of such proceeds, property, equipment or other instrumentalities, as well as methods used in combating money-laundering and other financial crimes;

(e) Collection of evidence;

(f) Control techniques in free trade zones and free ports;

(g) Modern law enforcement equipment and techniques, including electronic surveillance, controlled deliveries and undercover operations;

(h) Methods used in combating transnational organized crime committed through the use of computers, telecommunications networks or other forms of modern technology; and

(i) Methods used in the protection of victims and witnesses.

2. States Parties shall assist one another in planning and implementing research and training programmes designed to share expertise in the areas referred to in paragraph 1 of this article and to that end shall also, when appropriate, use regional and international conferences and seminars to promote cooperation and to stimulate discussion on problems of mutual concern, including the special problems and needs of transit States.

3. States Parties shall promote training and technical assistance that will facilitate extradition and mutual legal assistance. Such training and technical assistance may include language training, secondments and exchanges between personnel in central authorities or agencies with relevant responsibilities.

4. In the case of existing bilateral and multilateral agreements or arrangements, States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities within international and regional organizations and within other relevant bilateral and multilateral agreements or arrangements.

Article 30
Other measures: implementation of the Convention through economic development and technical assistance

1. States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of organized crime on society in general, in particular on sustainable development.

2. States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organizations:

(a) To enhance their cooperation at various levels with developing countries, with a view to strengthening the capacity of the latter to prevent and combat transnational organized crime;

(b) To enhance financial and material assistance to support the efforts of developing countries to fight transnational organized crime effectively and to help them implement this Convention successfully;

(c) To provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism. States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to the aforementioned account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention;

(d) To encourage and persuade other States and financial institutions as appropriate to join them in efforts in accordance with this article, in particular by providing more training programmes and modern equipment to developing countries in order to assist them in achieving the objectives of this Convention.

3. To the extent possible, these measures shall be without prejudice to existing foreign assistance commitments or to other financial cooperation arrangements at the bilateral, regional or international level.

4. States Parties may conclude bilateral or multilateral agreements or arrangements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by this Convention to be effective and for the prevention, detection and control of transnational organized crime.

Article 31
Prevention

1. States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime.

2. States Parties shall endeavour, in accordance with fundamental principles of their domestic law, to reduce existing or future opportunities for organized criminal groups to participate in lawful markets with proceeds of crime, through appropriate legislative, administrative or other measures. These measures should focus on:

(a) The strengthening of cooperation between law enforcement agencies or prosecutors and relevant private entities, including industry;

(b) The promotion of the development of standards and procedures designed to safeguard the integrity of public and relevant private entities, as well as codes of conduct for relevant professions, in particular lawyers, notaries public, tax consultants and accountants;

(c) The prevention of the misuse by organized criminal groups of tender procedures conducted by public authorities and of subsidies and licences granted by public authorities for commercial activity;

(d) The prevention of the misuse of legal persons by organized criminal groups; such measures could include:

(i) The establishment of public records on legal and natural persons involved in the establishment, management and funding of legal persons;

(ii) The introduction of the possibility of disqualifying by court order or any appropriate means for a reasonable period of time persons convicted of offences covered by this Convention from acting as directors of legal persons incorporated within their jurisdiction;

(iii) The establishment of national records of persons disqualified from acting as directors of legal persons; and

(iv) The exchange of information contained in the records referred to in subparagraphs (d) (i) and (iii) of this paragraph with the competent authorities of other States Parties.

3. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences covered by this Convention.

4. States Parties shall endeavour to evaluate periodically existing relevant legal instruments and administrative practices with a view to detecting their vulnerability to misuse by organized criminal groups.

5. States Parties shall endeavour to promote public awareness regarding the existence, causes and gravity of and the threat posed by transnational organized crime. Information may be disseminated where appropriate through the mass media and shall include measures to promote public participation in preventing and combating such crime.

6. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that can assist other States Parties in developing measures to prevent transnational organized crime.

7. States Parties shall, as appropriate, collaborate with each other and relevant international and regional organizations in promoting and developing the measures referred to in this article. This includes participation in international projects aimed at the prevention of transnational organized crime, for example by alleviating the circumstances that render socially marginalized groups vulnerable to the action of transnational organized crime.

Article 32
Conference of the Parties to the Convention

1. A Conference of the Parties to the Convention is hereby established to improve the capacity of States Parties to combat transnational organized crime and to promote and review the implementation of this Convention.

2. The Secretary-General of the United Nations shall convene the Conference of the Parties not later than one year following the entry into force of this Convention. The Conference of the Parties shall adopt rules of procedure and rules governing the activities set forth in paragraphs 3 and 4 of this article (including rules concerning payment of expenses incurred in carrying out those activities).

3. The Conference of the Parties shall agree upon mechanisms for achieving the objectives mentioned in paragraph 1 of this article, including:

(a) Facilitating activities by States Parties under articles 29, 30 and 31 of this Convention, including by encouraging the mobilization of voluntary contributions;

(b) Facilitating the exchange of information among States Parties on patterns and trends in transnational organized crime and on successful practices for combating it;

(c) Cooperating with relevant international and regional organizations and non-governmental organizations;

(d) Reviewing periodically the implementation of this Convention;

(e) Making recommendations to improve this Convention and its implementation.

4. For the purpose of paragraphs 3 (d) and (e) of this article, the Conference of the Parties shall acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the Parties.

5. Each State Party shall provide the Conference of the Parties with information on its programmes, plans and practices, as well as legislative and administrative measures to implement this Convention, as required by the Conference of the Parties.

Article 33
Secretariat

1. The Secretary-General of the United Nations shall provide the necessary secretariat services to the Conference of the Parties to the Convention.

2. The secretariat shall:

(a) Assist the Conference of the Parties in carrying out the activities set forth in article 32 of this Convention and make arrangements and provide the necessary services for the sessions of the Conference of the Parties;

(b) Upon request, assist States Parties in providing information to the Conference of the Parties as envisaged in article 32, paragraph 5, of this Convention; and

(c) Ensure the necessary coordination with the secretariats of relevant international and regional organizations.

Article 34
Implementation of the Convention

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.

Article 35
Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 36
Signature, ratification, acceptance, approval and accession

1. This Convention shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Convention shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Convention in accordance with paragraph 1 of this article.

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 37
Relation with protocols

1. This Convention may be supplemented by one or more protocols.

2. In order to become a Party to a protocol, a State or a regional economic integration organization must also be a Party to this Convention.

3. A State Party to this Convention is not bound by a protocol unless it becomes a Party to the protocol in accordance with the provisions thereof.

4. Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.

Article 38
Entry into force

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Convention after the deposit of the fortieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument.

Article 39
Amendment

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Convention and any earlier amendments that they have ratified, accepted or approved.

Article 40
Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Convention when all of its member States have denounced it.

3. Denunciation of this Convention in accordance with paragraph 1 of this article shall entail the denunciation of any protocols thereto.

Article 41
Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Convention.

2. The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

UNITED NATIONS
2000

PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONALORGANIZED CRIME

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights,

Taking into account the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons,

Concerned that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing trafficking in women and children,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument for the prevention, suppression and punishment of trafficking in persons, especially women and children, will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions

Article 1

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 5 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2
Statement of purpose

The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;

(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and

(c) To promote cooperation among States Parties in order to meet those objectives.

Article 3
Use of terms

For the purposes of this Protocol:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) "Child" shall mean any person under eighteen years of age.

Article 4
Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.

Article 5
Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

II. Protection of victims of trafficking in persons

Article 6
Assistance to and protection of victims of trafficking in persons

1. In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:

(a) Appropriate housing;

(b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;

(c) Medical, psychological and material assistance; and

(d) Employment, educational and training opportunities.

4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education and care.

5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 7
Status of victims of trafficking in persons in receiving States

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

Article 8
Repatriation of victims of trafficking in persons

1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

2. When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary.

3. At the request of a receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who is a victim of trafficking in persons is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the State Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving State Party shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. This article shall be without prejudice to any right afforded to victims of trafficking in persons by any domestic law of the receiving State Party.

6. This article shall be without prejudice to any applicable bilateral or multilateral agreement or arrangement that governs, in whole or in part, the return of victims of trafficking in persons.

III. Prevention, cooperation and other measures

Article 9
Prevention of trafficking in persons

1. States Parties shall establish comprehensive policies, programmes and other measures:

(a) To prevent and combat trafficking in persons; and

(b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 10
Information exchange and training

1. Law enforcement, immigration or other relevant authorities of States Parties shall, as appropriate, cooperate with one another by exchanging information, in accordance with their domestic law, to enable them to determine:

(a) Whether individuals crossing or attempting to cross an international border with travel documents belonging to other persons or without travel documents are perpetrators or victims of trafficking in persons;

(b) The types of travel document that individuals have used or attempted to use to cross an international border for the purpose of trafficking in persons; and

(c) The means and methods used by organized criminal groups for the purpose of trafficking in persons, including the recruitment and transportation of victims, routes and links between and among individuals and groups engaged in such trafficking, and possible measures for detecting them.

2. States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in

preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues and it should encourage cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

3. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11
Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12
Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13
Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in persons.

IV. Final provisions

Article 14
Saving clause

1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 15
Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 16
Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 17
Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 18
Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 19
Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 20
Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

UNITED NATIONS
2000

PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME

Preamble

The States Parties to this Protocol,

Declaring that effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels,

Recalling General Assembly resolution 54/212 of 22 December 1999, in which the Assembly urged Member States and the United Nations system to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned, and encouraged, where relevant, interregional, regional and subregional mechanisms to continue to address the question of migration and development,

Convinced of the need to provide migrants with humane treatment and full protection of their rights,

Taking into account the fact that, despite work undertaken in other international forums, there is no universal instrument that addresses all aspects of smuggling of migrants and other related issues,

Concerned at the significant increase in the activities of organized criminal groups in smuggling of migrants and other related criminal activities set forth in this Protocol, which bring great harm to the States concerned,

Also concerned that the smuggling of migrants can endanger the lives or security of the migrants involved,

Recalling General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing illegal trafficking in and transporting of migrants, including by sea,

Convinced that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument against the smuggling of migrants by land, sea and air will be useful in preventing and combating that crime,

Have agreed as follows:

I. General provisions

Article 1

Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.

3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention.

Article 2

Statement of purpose

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Article 3

Use of terms

For the purposes of this Protocol:

(a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

(b) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

(c) "Fraudulent travel or identity document" shall mean any travel or identity document:

(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or

(ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder;

(d) "Vessel" shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

Article 4

Scope of application

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

Article 5

Criminal liability of migrants

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

Article 6

Criminalization

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document;

(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;

(b) Participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article;

(c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article

and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

(a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or

(b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

II. Smuggling of migrants by sea

Article 7

Cooperation

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

Article 8

Measures against the smuggling of migrants by sea

1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

(a) To board the vessel;

(b) To search the vessel; and

(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

Article 9

Safeguard clauses

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

(a) Ensure the safety and humane treatment of the persons on board;

(b) Take due account of the need not to endanger the security of the vessel or its cargo;

(c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

(d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

III. Prevention, cooperation and other measures

Article 10

Information

1. Without prejudice to articles 27 and 28 of the Convention, States Parties, in particular those with common borders or located on routes along which migrants are smuggled, shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:

(a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in conduct set forth in article 6 of this Protocol;

(b) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;

(c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;

(d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;

(e) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and

(f) Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the conduct set forth in article 6 of this Protocol and to prosecute those involved.

2. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

Article 11

Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent

possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Article 12

Security and control of documents

Each State Party shall take such measures as may be necessary, within available means:

(a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

Article 13

Legitimacy and validity of documents

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.

Article 14

Training and technical cooperation

1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.

2. States Parties shall cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6 of this Protocol and to protect the rights of migrants who have been the object of such conduct. Such training shall include:

(a) Improving the security and quality of travel documents;

(b) Recognizing and detecting fraudulent travel or identity documents;

(c) Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;

(d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and

(e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.

3. States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.

Article 15

Other prevention measures

1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

Article 16

Protection and assistance measures

1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

Article 17

Agreements and arrangements

States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at:

(a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or

(b) Enhancing the provisions of this Protocol among themselves.

Article 18

Return of smuggled migrants

1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct

set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.

2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.

3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.

4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.

6. States Parties may cooperate with relevant international organizations in the implementation of this article.

7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.

8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.

IV. Final provisions

Article 19

Saving clause

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they

are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Article 20

Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 21

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 22

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession, except that it shall not enter into force before the entry into force of the Convention. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Protocol enters into force pursuant to paragraph 1 of this article, whichever is the later.

Article 23

Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party to the Protocol may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The States Parties to this Protocol meeting at the Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties to this Protocol present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the

date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 24

Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 25

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.

United Nations A/55/383/Add.1

General Assembly

Distr.: General
3 November 2000

Original: English

Fifty-fifth session
Agenda item 105
Crime prevention and criminal justice

Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions

Addendum

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

I. Introduction

1. The present document contains interpretative notes that 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 by the Secretariat in document A/AC.254/33 of the nature of the official records of the negotiation and of the practice regarding their drafting and compilation. The present document is submitted 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 Assembly at its fifty-fifth session.

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II. Interpretative notes

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

Article 2: Use of terms

Subparagraph (a)

2. The *travaux préparatoires* should 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 broad sense so as to 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 terms "freezing" or "seizure" as defined in article 2, subparagraph (f), can be found in articles 12 and 13 of the United Nations Convention against Transnational Organized Crime. 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 purposes of 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: Scope of application

7. During the negotiation of the Convention, 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 5: Criminalization of participation in an organized criminal group

9. The *travaux préparatoires* should indicate that the "other measures" mentioned in articles 5, 6, 8 and 23 are additional to legislative measures and presuppose the existence of a law.

Article 6: Criminalization of the laundering of the proceeds of crime

10. 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)

11. The *travaux préparatoires* should show that the terms "concealing or disguising" and "concealment or disguise" should be understood to include preventing the discovery of the illicit origins of property.

Paragraph 2 (b)

12. The *travaux préparatoires* should 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)

13. In the *travaux préparatoires* it should 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: Measures to combat money-laundering

Paragraph 1 (a)

14. 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.

15. 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)

16. 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

17. 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: Criminalization of corruption

Paragraph 1

18. 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

19. 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: Prosecution, adjudication and sanctions

Paragraph 4

20. 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: Confiscation and seizure

21. The *travaux préparatoires* should indicate that interpretation of article 12 should take 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)

22. 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

23. 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: International cooperation for purposes of confiscation

24. 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: Disposal of confiscated proceeds of crime or property

25. 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: Jurisdiction

Paragraph 2 (a)

26. 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

27. 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: Extradition

Paragraph 2

28. 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

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

30. 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

31. 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 followed.

Paragraph 12

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

Paragraph 14

33. The *travaux préparatoires* should indicate that the term "sex" refers to male and female.

34. 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 respective 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, for example, 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

35. The *travaux préparatoires* should indicate that the words "where appropriate" in article 16, paragraph 16, are to be understood and interpreted in the spirit of full cooperation and should 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: Mutual legal assistance

Paragraph 2

36. 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

37. 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

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

Paragraph 10 (b)

39. 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

40. 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

41. 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)

42. 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

43. 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* should 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: Special investigative techniques

Paragraph 1

44. 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: Establishment of criminal record

45. 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: Criminalization of obstruction of justice

Subparagraph (a)

46. 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.

47. 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: Assistance to and protection of victims

48. 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: Measures to enhance cooperation with law enforcement authorities

Paragraph 2

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

Article 27: Law enforcement cooperation

Paragraph 1

50. The *travaux préparatoires* should indicate that the words "consistent with their respective domestic legal and administrative systems" provide 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)

51. 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 feel it more advisable to establish a central point of contact to ensure efficiency would not be precluded from doing so.

Paragraph 3

52. 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: Collection, exchange and analysis of information on the nature of organized crime

Paragraph 2

53. 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: Training and technical assistance

Paragraph 4

54. 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: Prevention

Paragraph 3

55. 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: Conference of the Parties to the Convention

Paragraph 2

56. 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

57. 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

58. 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 required. 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: Implementation of the Convention

Paragraph 2

59. 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: Settlement of disputes

Paragraph 1

60. 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: Signature, ratification, acceptance, approval and accession

61. 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[1] applies regarding reservations.

B. Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

Chapter I. General provisions

Article 1: Relation with the United Nations Convention against Transnational Organized Crime

Paragraph 2

62. The *travaux préparatoires* should indicate that this paragraph was adopted on the understanding that the words "mutatis mutandis" meant "with such modifications as circumstances require" or "with the necessary modifications". Provisions of the United Nations Convention against Transnational Organized Crime that are applied to the Protocol under this article would consequently be modified or interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention.

Article 3: Use of terms

Subparagraph (a)

63. The *travaux préparatoires* should indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.

64. The *travaux préparatoires* should indicate that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms "exploitation of the prostitution of others" or "other forms of sexual exploitation" are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.

65. The *travaux préparatoires* should indicate that the removal of organs from children with the consent of a parent or guardian for legitimate medical or therapeutic reasons should not be considered exploitation.

66. The *travaux préparatoires* should indicate that where illegal adoption amounts to a practice similar to slavery as defined in article 1, paragraph (d), of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,[2] it will also fall within the scope of the Protocol.

Subparagraph (b)

67. The *travaux préparatoires* should indicate that this subparagraph should not be interpreted as restricting the application of mutual legal assistance in accordance with article 18 of the Convention.

68. The *travaux préparatoires* should indicate that subparagraph (b) should not be interpreted as imposing any restriction on the right of accused persons to a full defence and to the presumption of innocence. They should also indicate that it should not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law. Further, the *travaux préparatoires* will refer to article 11, paragraph 6, of the Convention, which preserves applicable legal defences and other related principles of the domestic law of States Parties.

Article 5: Criminalization

69. The *travaux préparatoires* should indicate that the "other measures" mentioned here are additional to legislative measures and presuppose the existence of a law.

Paragraph 2

70. The *travaux préparatoires* should indicate that references to attempting to commit the offences established under domestic law in accordance with this subparagraph are understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law.

Chapter II. Protection of victims of trafficking in persons

Article 6: Assistance to and protection of victims of trafficking in persons

Paragraph 3

71. The *travaux préparatoires* should indicate that the type of assistance set forth in this paragraph is applicable to both the receiving State and the State of origin of the victims of trafficking in persons, but only as regards victims who are in their respective territory. Paragraph 3 is applicable to the receiving State until the victim of trafficking in persons has returned to his or her State of origin and to the State of origin thereafter.

Article 8: Repatriation of victims of trafficking in persons

Paragraph 1

72. The *travaux préparatoires* should indicate that the words "permanent residence" in this paragraph mean long-term residence, but not necessarily indefinite residence. The paragraph should be understood as being without prejudice to any domestic legislation regarding either the granting of the right of residence or the duration of residence.

Paragraph 2

73. The *travaux préparatoires* should indicate that the words "and shall preferably be voluntary" are understood not to place any obligation on the State Party returning the victims.

Paragraph 3

74. The *travaux préparatoires* should indicate the understanding of the Ad Hoc Committee that a return under this article shall not be undertaken before the nationality or right of permanent residence of the person whose return is sought has been duly verified.

Paragraph 4

75. The *travaux préparatoires* should indicate that the words "travel documents" include any type of document required for entering or leaving a State under its domestic law.

Paragraph 6

76. The *travaux préparatoires* should indicate that the references to agreements or arrangements in this paragraph include both agreements that deal specifically with the subject matter of the Protocol and more general readmission agreements that include provisions dealing with illegal migration.

77. The *travaux préparatoires* should indicate that this paragraph should be understood as being without prejudice to any other obligations under customary international law regarding the return of migrants.

Chapter III. Prevention, cooperation and other measures

Article 10: Information exchange and training

Paragraph 1

78. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law.

Article 11: Border measures

Paragraph 2

79. The *travaux préparatoires* should indicate that victims of trafficking in persons may enter a State legally only to face subsequent exploitation, whereas in cases of smuggling of migrants, illegal means of entry are more generally used. This may make it more difficult for common carriers to apply preventive measures in trafficking cases than in smuggling cases and legislative or other measures taken in accordance with this paragraph should take this into account.

Paragraph 4

80. The *travaux préparatoires* should indicate that measures and sanctions applied in accordance with this paragraph should take into account other international obligations of the State Party concerned. It should also be noted that this article requires States Parties to impose an obligation on common carriers only to ascertain whether or not passengers have the necessary documents in their possession and not to make any judgement or assessment of the validity or authenticity of the documents. It should further be noted that this paragraph does not unduly limit the discretion of States Parties not to hold carriers liable for transporting undocumented refugees.

Article 12: Security and control of documents

81. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity documents" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

82. The *travaux préparatoires* should indicate that the words "falsified or unlawfully altered, replicated or issued" should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents. They should also indicate that the intention was to include both documents that had been forged and genuine documents that had been validly issued but were being used by a person other than the lawful holder.

Article 13: Legitimacy and validity of documents

83. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity documents" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

Chapter IV. Final provisions

Article 14: Saving clause

Paragraph 1

84. The *travaux préparatoires* should indicate that the Protocol does not cover the status of refugees.

85. The *travaux préparatoires* should indicate that this Protocol is without prejudice to the existing rights, obligations or responsibilities of States Parties under other international instruments, such as those referred to in this paragraph. Rights, obligations and responsibilities under another instrument are determined by the terms of that instrument and whether the State concerned is a party to it, not by this Protocol. Therefore, any State that becomes a party to this Protocol but is not a party to another international instrument referred to in the Protocol would not become subject to any right, obligation or responsibility under that instrument.

Article 16: Signature, ratification, acceptance, approval and accession

86. The *travaux préparatoires* should indicate that, while the Protocol has no specific provisions or reservations, it is understood that the Vienna Convention on the Law of Treaties of 1969[1] applies regarding reservations.

C. Interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Protocol against Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime

Chapter I. General provisions

Article 1: Relation with the United Nations Convention against Transnational Organized Crime

Paragraph 2

87. The *travaux préparatoires* should indicate that this paragraph was adopted on the understanding that the words "mutatis mutandis" meant "with such modifications as circumstances require" or "with the necessary modifications". Provisions of the Convention that are applied to the Protocol under this article would consequently be modified or interpreted so as to have the same essential meaning or effect in the Protocol as in the Convention.

Article 3: Use of terms

Subparagraph (a)

88. The *travaux préparatoires* should indicate that the reference to "a financial or other material benefit" as an element of the definition in subparagraph (a) was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.

Subparagraph (c)

89. The *travaux préparatoires* should indicate that the term "travel document" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity document" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

90. The *travaux préparatoires* should indicate that the words "falsely made or altered" should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents. They should also indicate that the intention was to include both documents that had been forged and genuine documents that had been validly issued but were being used by a person other than the lawful holder.

Article 6: Criminalization

91. The *travaux préparatoires* should indicate that the "other measures" mentioned here are additional to legislative measures and presuppose the existence of a law.

Paragraph 1

92. The *travaux préparatoires* should indicate that the offences set forth in article 6 should be seen as being part of the activities of organized criminal groups. In this article, the Protocol follows the precedent of the Convention (art. 34, para. 2). The *travaux préparatoires* should also indicate that the reference to "a financial or other material benefit" as an element of the offences set forth in paragraph 1 was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.

93. The *travaux préparatoires* should indicate that paragraph 1 (b) was adopted on the understanding that subparagraph (ii) would only apply when the possession in question was for the purpose of smuggling migrants as set forth in subparagraph (a). Thus, a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included.

94. The *travaux préparatoires* should indicate that the words "any other illegal means" in paragraph 1 (c) refer to illegal means as defined under domestic law.

Paragraph 2

95. The *travaux préparatoires* should indicate that references to attempting to commit the offences established under domestic law in accordance with paragraph 2 (a) are understood in some countries to include both acts perpetrated in preparation for a criminal offence and those carried out in an unsuccessful attempt to commit the offence, where those acts are also culpable or punishable under domestic law.

Paragraph 3

96. The *travaux préparatoires* should indicate that the words "inhuman or degrading treatment" in subparagraph (b) were intended, without prejudice to the scope and application of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, to include certain forms of exploitation.

Paragraph 4

97. The *travaux préparatoires* should indicate that in this paragraph the word "measures" should be interpreted broadly to include both criminal and administrative sanctions.

Chapter II. Smuggling of migrants by sea

98. The *travaux préparatoires* should indicate that it is understood that the measures set forth in chapter II of the Protocol cannot be taken in the territorial sea of another State except with the permission or authorization of the coastal State concerned. This principle is well established in the law of the sea and did not need to be restated in the Protocol. The *travaux préparatoires* should also indicate that the international law of the sea includes the United Nations Convention on the Law of the Sea[3] as well as other relevant international instruments. References to the United Nations Convention on the Law of the Sea do not prejudice or affect in any way the position of any State in relation to that Convention.

Article 7: Cooperation

99. The *travaux préparatoires* should indicate that this Protocol is without prejudice to the existing rights, obligations or responsibilities of States Parties under other international instruments, such as those referred to in this article. Rights, obligations and responsibilities under another instrument are determined by the terms of that instrument and whether the State concerned is a party to it, not by this Protocol. Therefore, any State that becomes a party to this Protocol but is not a party to another international instrument referred to in the Protocol would not become subject to any right, obligation or responsibility under that other instrument.

Article 8: Measures against the smuggling of migrants by sea

100. The *travaux préparatoires* should indicate that the word "engaged" in paragraphs 1, 2 and 7 of this article and in paragraph 1 of article 10 should be understood broadly as including vessels "engaged" both directly and indirectly in the smuggling of migrants. Of particular concern was the inclusion of both vessels actually found to be carrying smuggled migrants and vessels ("mother ships") that transport smuggled migrants on open ocean voyages but are sometimes not apprehended until after the migrants have been transferred to smaller local vessels for landing purposes.

Chapter III. Prevention, cooperation and other measures

Article 10: Information

Paragraph 1

101. The *travaux préparatoires* should indicate that the obligation to exchange relevant information under this paragraph was adopted on the understanding that this would be done in accordance with both the Protocol and any other applicable treaties, agreements or arrangements that might exist between the States involved.

102. The *travaux préparatoires* should indicate that the word "engaged" in this paragraph and in paragraphs 1, 2 and 7 of article 8 should be understood broadly as including vessels "engaged" both directly and indirectly in the smuggling of migrants. Of particular concern was the inclusion of both vessels actually found to be carrying smuggled migrants and vessels ("mother ships") that transport smuggled migrants on open ocean voyages but are sometimes not apprehended until after the migrants have been transferred to smaller local vessels for landing purposes.

Article 11: Border measures

Paragraph 2

103. The *travaux préparatoires* should indicate that measures and sanctions applied in accordance with this paragraph should take into account other international obligations of the State Party concerned. It should also be noted that this paragraph requires States Parties to impose an obligation on commercial carriers only to ascertain whether or not passengers have the necessary documents in their possession and not to make any judgement or assessment of the validity or authenticity of the documents. It should further be noted that this paragraph does not unduly limit the discretion of States Parties not to hold carriers liable for transporting undocumented refugees and that article 19 preserves the general obligations of States Parties under international law in this regard, making specific reference to the 1951 Convention[4] and 1967 Protocol[5] relating to the Status of Refugees. Article 11 was also adopted on the understanding that it would not be applied in such a way as to induce commercial carriers to impede unduly the movement of legitimate passengers.

Article 12: Security and control of documents

104. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity documents" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

105. The *travaux préparatoires* should indicate that the words "falsified or unlawfully altered, replicated or issued" should be interpreted as including not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents. They should also indicate that the intention was to include both documents that had been forged and genuine documents that had been validly issued but were being used by a person other than the lawful holder.

Article 13: Legitimacy and validity of documents

106. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law and that the term "identity documents" includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.

Article 16: Protection and assistance measures

Paragraph 1

107. The *travaux préparatoires* should indicate that, in accordance with articles 3 and 4, the words "persons who have been the object of conduct set forth in article 6 of this Protocol" refers only to migrants who have been smuggled as set forth in article 6. It is not intended to refer to migrants who do not fall within the ambit of article 6. This is clearly set forth in article 19 ("Saving clause"), which provides that nothing in the Protocol shall affect the rights of individuals under international law, including humanitarian law and international human rights law.

108. The *travaux préparatoires* should indicate that the intention in listing certain rights in this paragraph was to emphasize the need to protect those rights in the case of smuggled migrants, but that the provision should not be interpreted as excluding or derogating from any other rights not listed. The words "consistent with its obligations under international law" were included in the paragraph to clarify this point further.

109. The *travaux préparatoires* should indicate that this paragraph should not be understood as imposing any new or additional obligations on States Parties to this Protocol beyond those contained in existing international instruments and customary international law.

Paragraph 2

110. The *travaux préparatoires* should indicate that the words "by individuals or groups" were intended to refer to individuals or groups under the jurisdiction of the State Party concerned.

Article 18: Return of smuggled migrants

111. The *travaux préparatoires* should indicate that this article is based on the understanding that States Parties would not deprive persons of their nationality contrary to international law, thereby rendering them stateless.

112. The *travaux préparatoires* should indicate that the term "permanent residence" is understood throughout this article as meaning long-term, but not necessarily indefinite residence. This article is understood not to prejudice national legislation regarding the granting of the right to residence or the duration of residence.

113. The *travaux préparatoires* should indicate the understanding of the Ad Hoc Committee that a return under this article shall not be undertaken before the nationality or right of permanent residence of the person whose return is sought has been duly verified.

Paragraph 2

114. The *travaux préparatoires* should indicate that there is no inconsistency between paragraphs 1 and 2 of this article. Paragraph 1 deals with the case of a person who is a national or has the right of permanent residence at the time of return. Paragraph 2 is supplementary to paragraph 1 and deals with the case of a person who had the right of permanent residence at the time of entry, but no longer has it at the time of return.

Paragraph 4

115. The *travaux préparatoires* should indicate that the term "travel documents" includes any type of document required for entering or leaving a State under its domestic law.

Paragraph 8

116. The *travaux préparatoires* should indicate that the references to treaties, agreements or arrangements in this paragraph include both agreements that deal specifically with the subject matter of the Protocol and more general readmission agreements that include provisions dealing with illegal migration.

Chapter IV. Final provisions

Article 19: Saving clause

117. The *travaux préparatoires* should indicate that the Protocol does not cover the status of refugees.

118. The *travaux préparatoires* should indicate that this Protocol is without prejudice to the existing rights, obligations or responsibilities of States Parties under other international instruments, such as those referred to in this article. Rights, obligations and responsibilities under another instrument are determined by the terms of that instrument and whether the State concerned is a party to it, not by this Protocol. Therefore, any State that becomes a party to this Protocol but is not a party to another international instrument referred to in the Protocol would not become subject to any right, obligation or responsibility under that other instrument.

Article 21: Signature, ratification, acceptance, approval and accession

119. The *travaux préparatoires* should indicate that, while the Protocol has no specific provisions on reservations, it is understood that the Vienna Convention on the Law of Treaties of 1969[1] applies regarding reservations.

Notes

[1] United Nations, *Treaty Series*, vol. 1155, No. 18232.

[2] Ibid., vol. 266, No. 3822.

[3] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

[4] United Nations, *Treaty Series*, vol. 189, No. 2545.

[5] Ibid., vol. 606, No. 8791.