

COMMENTARY
ON THE
UNITED NATIONS CONVENTION
AGAINST ILLICIT TRAFFIC
IN NARCOTIC DRUGS AND
PSYCHOTROPIC SUBSTANCES
1988

Done at Vienna on 20 December 1988



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New York, 1998**

NOTE

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E/CN.7/590

UNITED NATIONS PUBLICATION
Sales No. E.98.XI.5
ISBN 92-1-148106-6

PREFACE

The present *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*, was prepared at the request of the Economic and Social Council and comes at a most appropriate time. The tenth anniversary of the adoption of the Convention—the latest in a continuum of drug abuse control treaties—falls in the same year as the General Assembly's special session devoted to international efforts to fight drug abuse and drug trafficking.

This work is one of a long and distinguished series of commentaries on international drug control conventions dating back to the time of the League of Nations. While the States parties to any treaty may be its final authoritative interpreters, it would be fair to say that these commentaries have been well received as helpful in furthering a mutual understanding of the contents and objectives of the conventions. They have certainly added an international perspective to what might otherwise have represented a more restricted and parochial—not to say partisan—vision.

In the case of this *Commentary*, at the request of the Commission on Narcotic Drugs and the Economic and Social Council the usual legal exegesis of the text has been supplemented by a section on the practical implementation of the Convention. I hope this additional feature will make the *Commentary* particularly useful.

The twentieth special session of the General Assembly, held in New York from 8 to 10 June 1998, provided a welcome opportunity for the international community to review the harmful effects of drug abuse and trafficking on the individual, on society, on the economy and on the body politic. It also gave all nations an opportunity to reaffirm their commitment to confronting those problems and to identify measures and priorities at the community, national, regional and global levels.

It is my hope that this *Commentary* will be a useful tool in helping us rise to that challenge.



- Kofi A. Annan
Secretary-General
of the United Nations

New York, June 1998

FOREWORD

Origin of the Commentary

Recalling that the earlier commentaries—on the Single Convention on Narcotic Drugs of 1961, on the 1972 Protocol amending that Convention and on the Convention on Psychotropic Substances of 1971—were of considerable value to a number of Governments as a guide in framing legislative and administrative measures for the application of those conventions, the Economic and Social Council, in its resolution 1993/42 requested the Secretary-General to prepare a commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, which had then been in force for almost three years. In similar requests for the earlier commentaries, the Council had underlined their potential usefulness in ensuring a more uniform interpretation of the treaties. In its request for the present *Commentary*, the Council specified that the work should be of assistance to States not only in their interpretation of the 1988 Convention but also in their effective implementation of it. The present *Commentary*, therefore, has been organized along somewhat different lines than its predecessors, and the drafting procedure also called for a different approach.

The body of most of the text was first prepared by four principal drafters: Henri Mazaud, former Assistant Director of the Division of Human Rights of the United Nations Secretariat in charge of international instruments and procedures, and John F. Scott, former Director of the Office of Legal Counsel and Deputy Director to the Under-Secretary-General for Legal Affairs of the United Nations Secretariat, both of whom had acted as legal consultants to the plenipotentiary conference that adopted the Convention, William C. Gilmore, Professor of International Criminal Law at the University of Edinburgh, and David McClean, Q.C., Professor, Department of Law of the University of Sheffield. Their invaluable contribution to this *Commentary* is hereby acknowledged with thanks.

The evolving texts on various technical articles were routinely submitted for comment and evaluation to a broad cross-section of government experts from all geographical regions, many of whom had participated in the drafting process of the Convention and had attended the plenipotentiary conference. In addition, particularly with regard to the comments on articles 12, 13 and 16, the views of the secretariat of the International Narcotics Control Board were greatly appreciated.

The multidisciplinary approach adopted, required by the very nature of the contents of the Convention, was further enhanced at a number of expert review groups that were convened by the Legal Affairs Section of the United Nations International Drug Control Programme, which constantly revised and completed the manuscript. The Legal Affairs Section also liaised throughout the drafting process with the Treaty Section of the Office of Legal Affairs of the United Nations Secretariat.

Overall coordination of the project and supervision of the manuscript was ensured by Paulsen K. Bailey, the former Secretary of the Commission on Narcotic Drugs for many years who had served as Secretary of the Conference and of its General Committee and Committee I.

Lastly, thanks are due to all others—too numerous to mention individually—who contributed in various ways to the successful completion of the long and meticulous task of drafting and reviewing the *Commentary* and preparing it for publication.

Structure of the Commentary

The *Commentary* is divided into five functional parts in addition to the “Introduction”, which gives an overview of the genesis of the 1988 Convention from its conception by the General Assembly in December of 1984 to its adoption at the plenipotentiary conference in December of 1988.

“Part One”, entitled “General Provisions”, covers the Preamble, article 1 (“Definitions”) and article 2 (“Scope of the Convention”). Although the Preamble of the Convention is not of the same legal significance as one of its articles, its perusal, together with that of article 2, provides a sound background for an understanding of the objectives of the Convention and, with article 1, a general introduction to its subject matter.

The titles of the remaining four parts are self-explanatory. Thus, “Part Two”, entitled “Substantive Provisions”, covers articles 3-19, the substantive or technical articles, many of which are self-contained mini-treaties on particular topics. The roles of the Commission on Narcotic Drugs and the International Narcotics Control Board and the reporting requirements of parties, to ensure proper implementation of the Convention, are the subjects of “Part Three”, entitled “Implementation Provisions”. “Part Four”, entitled “Final Clauses”, explains the standard provisions included in many multilateral conventions to regulate such technicalities as becoming a party to or amending the Convention.

The annex to the Convention, which lists the substances governed by the provisions of article 12, is the subject of “Part Five”.

Background information on the “final clauses” as adopted and on the matter of reservations to and territorial application of the Convention (issues not explicitly dealt with) is included in two annexes to the *Commentary*.

A particular and distinctive feature of the present *Commentary* arises from the request of the Economic and Social Council that it should be directly useful to parties in their effective implementation of the provisions of the Convention. This has led, in addition to the exegesis of the final text as adopted, a standard feature in legal commentaries, to the inclusion, where appropriate, of a section or sections entitled “Implementation considerations”. These considerations reflect government practices with respect to the matter under examination or examples of practical application measures in use or recommended by various government agencies or authoritative international bodies. Because of the nature of the contents of the articles, such considerations are limited to articles 3-19, i.e. “Part Two”, on “Substantive Provisions”. Depending on the internal content of each article, the consideration may apply to an article as a whole or to various subsections.

Finally, the paragraph numbering system used in this *Commentary* calls for a brief explanation. Each chapter begins with a new series of paragraph numbers, the first digit or digits of which reflect the article number (for example, the chapter on article 7 begins with paragraphs 7.1, 7.2 etc., and the chapter on article 19 runs from paragraph 19.1 to paragraph 19.24). This facilitates reference to any given paragraph by obviating the need to refer to a section or chapter and immediately identifies the article in question. To accommodate this general system, some exceptions needed to be made: the paragraphs in the “Introduction” are numbered 1, 2 etc.; the paragraphs in the “Preamble” are numbered 0.1, 0.2 etc.; and the section entitled “Attestation clause and concluding paragraph” and “Part Five”, on Table I and Table II, annexed to the Convention, use, respectively, 35 and 36 as prefix digits in the paragraph numbers (since the last numbered article is article 34). The annexes follow a similar system. It is hoped that the reader and those reviewing or commenting on the content matter of the *Commentary* will find the system helpful and easy to use.

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EXPLANATORY NOTES

The following acronyms are used in this publication:

Interpol	International Criminal Police Organization
OAS	Organization of American States
UPU	Universal Postal Union
WHO	World Health Organization

The following short titles are used in this publication:

“Assembly” for the General Assembly of the United Nations.

“Board” for the International Narcotics Control Board.

“Commission” for the Commission on Narcotic Drugs of the Economic and Social Council.

“Conference” for the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, held at Vienna from 25 November to 20 December 1988.

“Council” for the Economic and Social Council of the United Nations.

“Schengen Convention” for the Convention applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders.

“Secretary-General” for the Secretary-General of the United Nations.

The following abbreviated forms have been used for publications and other references occurring frequently in the text:

“1912 Convention” for the International Opium Convention, signed at The Hague on 23 January 1912, reproduced in League of Nations, *Treaty Series*, vol. VIII, p. 187.

“1925 Convention”, for the International Opium Convention signed at Geneva on 19 February, reproduced in League of Nations, *Treaty Series*, vol. LXXXI, p. 317.

“1931 Convention” for the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed at Geneva on 13 July 1931, reproduced in League of Nations, *Treaty Series*, vol. CXXXIX, p. 301.

“1936 Convention” for the Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, signed at Geneva on 26 June 1936, reproduced in League of Nations, *Treaty Series*, vol. CXCVIII, p. 299.

“1948 Protocol” for the Protocol Bringing under International Control Drugs Outside the Scope of the Conventions of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs as Amended by the Protocol signed at Lake Success, New York, on 11 December 1946, signed in Paris on 19 November 1948, reproduced in United Nations, *Treaty Series*, vol. 44, p. 277.

“1953 Protocol”, for the Protocol Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, signed at New York on 23 June 1953, reproduced in United Nations, *Treaty Series*, vol. 456, p. 3.

“1961 Convention” for the Single Convention on Narcotic Drugs, 1961, done at New York on 30 March 1961, reproduced in United Nations, *Treaty Series*, vol. 520, No. 7515, p. 204.

“1961 Convention as amended” for the Single Convention on Narcotic Drugs, 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961, done at New York on 8 August 1975, reproduced in United Nations, *Treaty Series*, vol. 976, No. 14152, p. 105.

“1971 Convention” for the Convention on Psychotropic Substances, Done at Vienna on 21 February 1971, reproduced in United Nations, *Treaty Series*, vol. 1019, No. 14956, p. 175.

“1972 Protocol” for the Protocol amending the single Convention on Narcotic Drugs, 1961, done at Geneva on 25 March 1972, reproduced in United Nations, *Treaty Series*, vol. 976, No. 14151, p. 3.

“1988 Convention” for the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988.

“Commentary on the 1961 Convention” for Commentary on the Single Convention on Narcotic Drugs, 1961 (*Prepared by the Secretary-General in accordance with paragraph 1 of Economic and Social Council resolution 914 D (XXXIV) of 3 August 1962*) (United Nations publication, Sales No. E.73.XI.1).

“Commentary on the 1971 Convention” for *Commentary on the Convention on Psychotropic Substances, Done at Vienna on 21 February 1971* (United Nations publication, Sales No. E.76.XI.5).

“Commentary on the 1972 Protocol” for *Commentary on the Protocol Amending the Single Convention on Narcotic Drugs, 1961, Done at Geneva on 25 March 1972* (United Nations publication, Sales No. E.76.XI.6).

“Official Records, vol. I ...,” for *Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988*, vol. I (United Nations publication, Sales No. E.94.XI.5).

“Official Records, vol. II ...,” for *Official Records of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 25 November-20 December 1988*, vol. II (United Nations publication, Sales No. E.91.XI.1).

* * *

Countries are referred to by the names that were in official use at the time.

The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

* * *

INTRODUCTION

Origin of the Convention

1. In reviewing the situation and trends in drug abuse and illicit trafficking since the entry into force of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention,¹ both the Commission on Narcotic Drugs, in its deliberations and resolutions, and the International Narcotics Control Board, in its annual reports, noted with deep concern that the situation was steadily and rapidly deteriorating. On the basis of information available from States Members of the United Nations during the early 1980s, it was becoming evident that drug abuse and illicit traffic had reached unprecedented dimensions. The General Assembly, in its resolution 36/168, by which it adopted the International Drug Abuse Control Strategy in 1981, also noted that “the scourge of drug abuse” had reached “epidemic proportions in many parts of the world”.

2. Illicit drug traffic menaced the health and well-being of individuals, spread corruption, abetted criminal conspiracy, and subverted public order. It threatened the sovereignty and security of States and disrupted the economic, social and cultural structures of society. In particular circumstances, it generated or supported other serious forms of organized crime.

3. Faced with a problem of this magnitude, Governments, acting in isolation, could not be expected to counter and suppress the consequences of widespread and highly organized drug trafficking. The existing drug control treaties, which continued to provide a sound international legal framework for the regulation of a number of specific narcotic drugs and psychotropic substances, were no longer alone adequate because they had been devised to respond to a situation that had since changed dramatically. Moreover, their criminal law provisions for suppressing the illicit traffic were limited in scope.

4. In the 1980s, the international community at large and specifically States parties to the international drug control treaties were more convinced than ever that the time had come to move forward and take new initiatives not only to intensify efforts and coordinate strategies within the existing framework, but also to conceive and elaborate another instrument, which would enable them to

¹The names of these and other conventions and publications mentioned frequently in the present *Commentary* are listed in full in the explanatory notes at the beginning of this publication.

attack more forcefully, through cooperation and concerted action, the complex problem of drug trafficking and all its implications.

5. Several aspects of the problem of the illicit traffic had attracted the attention of the relevant United Nations bodies and consideration had been given to the development of possible countermeasures. Two expert groups met in 1982 to study the functioning, adequacy and enhancement of the 1961 Convention and the 1971 Convention. Their reports (E/CN.7/1983/2/Add.1 and 2) touched upon such topics as the possibility of merging the two conventions or introducing new provisions concerning extradition procedures or measures aimed at depriving drug traffickers of the proceeds of their illicit activities. An expert group meeting on the forfeiture of the proceeds of drug crimes, convened by the Commission on Narcotic Drugs, met twice in 1983 and 1984. At its second meeting, it produced a set of suggestions (MNAR/1984/13) for including, in a relevant international instrument, elements or clauses that would supplement the sanctions concerning deprivation of liberty following conviction for serious drug-related offences that already existed in the conventions in force. At the Eleventh Meeting of the Operational Heads of National Narcotics Law Enforcement Agencies, Far East Region,² in November 1984, the opinion was expressed that any new convention "might very usefully address means of streamlining mutual judicial and other assistance in order to facilitate the tracing, freezing and forfeiture of the proceeds of drug crimes at the international level" (E/CN.7/1985/9). Attention was also directed to extradition procedures, with a view to including appropriate provisions in any future convention. A major study was undertaken by the Division of Narcotic Drugs; it examined existing extradition practices for drug-related offences, suggested guidelines for use in concluding extradition treaties, and identified areas for possible concrete action.³ Consideration was also given to related topics, such as the establishment of closer control measures over some chemicals that are essential for the manufacture of illicit drugs and are readily available on the licit market, as well as the interdiction of drug smuggling in aircraft and vessels, the use of the law enforcement technique of controlled delivery, and cooperation across frontiers to enable drug law enforcement agencies to collect and exchange information and evidence on identified drug trafficking groups and operations.

²The name was changed in 1986 to Heads of National Drug Law Enforcement Agencies, Asia and the Pacific.

³The study was later issued as *Extradition for Drug-Related Offences* (United Nations publication, Sales No. E.85.XI.6).

6. The urgent need for decisive action and for a comprehensive approach that would embrace all aspects of the traffic prompted several Governments of Latin American countries to adopt two solemn declarations, which were transmitted in 1984 to the General Assembly for consideration at its thirty-ninth session. The Quito Declaration against Traffic in Narcotic Drugs (A/39/407, annex)⁴ called for international legislative action that would be capable of directing an effective campaign against the illicit traffic beyond national frontiers and would impose penalties on offenders, wherever they might be, and proposed that drug trafficking should be considered a crime against humanity, with all the implicit legal consequences. In the New York Declaration against Drug Trafficking and the Illicit Use of Drugs (A/39/55 and Corr.1 and 2, annex),⁵ the United Nations was urged to convene as soon as possible a special conference to consider the legal and institutional problems involved, adopt an international plan of action against drug trafficking, and consider declaring drug trafficking to be a crime against humanity.

7. At its thirty-ninth session, the General Assembly had on its agenda an item entitled "International campaign against traffic in drugs". The discussions on that item led to the adoption of three significant resolutions. First, in its resolution 39/142, the Assembly adopted a Declaration on the Control of Drug Trafficking and Drug Abuse, in which it declared, *inter alia*, that drug trafficking had become "an international criminal activity demanding urgent attention and maximum priority". Secondly, in its resolution 39/143, the Assembly requested the Economic and Social Council, through the Commission on Narcotic Drugs, "to consider the legal, institutional and social elements relevant to all aspects of combating drug trafficking, including the possibility of convening a specialized conference".

8. Thirdly, in its resolution 39/141, the Assembly, bearing in mind the Quito Declaration and the New York Declaration, expressed its conviction that the wide scope of the illicit drug traffic and its consequences made it necessary to prepare a convention which would consider the various aspects of the problem as a whole and, in particular, those not envisaged in existing international instruments. It accordingly requested that the preparation of such a convention should be initiated, as a matter of priority, by the Commission on Narcotic

⁴Signed on behalf of Bolivia, Colombia, Ecuador, Nicaragua, Panama, Peru and Venezuela.

⁵Signed on behalf of Argentina, Bolivia, Brazil, Ecuador, Peru and Venezuela.

Drugs and, to that end, transmitted to it, as a working paper, the text of a draft convention annexed to the resolution.

Preliminary elaboration of the draft Convention

9. The draft Convention transmitted to the Commission as a working paper covered, in 18 articles, a wide range of issues. It specified, in particular, that illicit trafficking constituted “a grave international crime against humanity”, that the offences enumerated in the Convention would not be subject to any statute of limitations and that they should not be considered as political crimes for the purpose of extradition. Stringent criminal penalties should be meted out to individuals responsible for the illicit activities enumerated in the Convention. Trial of offenders by a competent international tribunal was also envisaged, and disputes relating to the interpretation, application or fulfilment of the Convention would be submitted to the International Court of Justice. A fund would be established to assist developing countries affected by the illicit traffic.

10. At its thirty-first session, the Commission responded to the request of the General Assembly and its members exchanged preliminary views on what the substantive content of the new instrument should be and on how it should be produced. It was generally recognized that the new instrument should not duplicate the provisions of, or derogate from the obligations in, the conventions already in force, but should concentrate on concrete and innovative elements complementary in substance and closely linked to the existing drug control treaties. To make it really effective, it should be formulated in such a way that its provisions would be acceptable to the greatest possible number of States, thus facilitating universal adherence. To that end, and to accommodate the interests of all countries, its provisions should, as far as possible, be compatible with the various constitutional and legal systems and consistent with the generally accepted principles of criminal law. Respect for the sovereignty of States should be ensured.

11. With respect to the procedure to be followed to carry out its mandate, the Commission, realizing that the drafting of the new instrument would represent a complex undertaking requiring high-level expertise, decided that the first step would be to seek from Governments comments and proposals on the elements they would like to see incorporated in the draft Convention.

12. In its resolution 1 (XXXI),⁶ the Commission therefore requested the Secretary-General to circulate for that purpose, to Member States and States parties to the existing drug control treaties, a set of 17 documents comprising the text of the draft Convention annexed to General Assembly resolution 39/141 and of the Quito and New York Declarations and other relevant reports and notes. The Secretary-General was asked to compile and consolidate the comments received from Governments, as well as other relevant studies, and to prepare a report that would identify elements to be considered for inclusion in the draft Convention. In his report (E/CN.7/1986/2 and Corr.1 and 2 and Add.1-3), which contained a systematic analysis of the replies from Governments and of other relevant material, the Secretary-General identified the elements that were generally considered to be worth including in the draft Convention, as well as other elements that needed more consideration before a decision could be reached on whether or not to include them. A series of other elements, namely the qualification of drug trafficking as a crime against humanity, the exclusion of drug trafficking from any statute of limitations, the creation of an international criminal tribunal, the establishment of a new assistance fund⁷ and compulsory jurisdiction of the International Court of Justice, set out in the draft Convention transmitted to the Commission as a working paper, met with strong opposition from many of the Governments that replied. Their inclusion did not seem to meet the standard of acceptability considered essential if the Convention was to become an effective instrument.

13. Governments did not dispute in their replies the need for, or the desirability of, the proposed new instrument but they did emphasize that, since it would be limited to only one aspect of drug control, namely illicit traffic, it would be important to ensure that States not already parties to the existing conventions would accede to those instruments. As to the form of the proposed instrument, some Governments expressed a definite preference for the adoption of a protocol or additional instrument amending and supplementing the existing conventions. In view, however, of the legal difficulties that such a formula would involve, the idea was not pursued and the proposal to draft a distinct instrument prevailed.

⁶*Official Records of the Economic and Social Council, 1985, Supplement No. 3 (E/1985/23), chap. IX, sect. A.*

⁷There was already a United Nations Fund for Drug Abuse Control, established by the Economic and Social Council in its resolution 1559 (XLIX) of 11 November 1970 with a view to assisting Governments and international organizations in their efforts to reduce drug abuse and suppress illicit trafficking. With the creation of the United Nations International Drug Control Programme in 1990, the Fund and the Programme were merged.

14. At the fortieth session of the General Assembly, satisfaction was expressed with the support that the Assembly's initiative had encountered worldwide, not only from Governments but also from international, regional and non-governmental organizations concerned with the drug problem. In particular, it was noted with appreciation that the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders had recommended in its resolution 2⁸ that the preparation of a new international instrument against illicit traffic should be considered an absolute priority. In its resolution 40/122, the Assembly, after referring to the common concern regarding the "awesome and vicious effects of drug abuse and illicit trafficking", in pursuance of a proposal made by the Secretary-General earlier in the year, decided to convene at Vienna, in 1987, an International Conference on Drug Abuse and Illicit Trafficking at the ministerial level. The Conference was given the mandate to adopt a comprehensive multidisciplinary outline of future activities in drug abuse control,⁹ which would focus on concrete and substantive issues directly relevant to the problems of drug abuse and illicit traffic and, *inter alia*, support the elaboration of a convention against illicit traffic.

15. In its resolution 40/120, the Assembly expressed its appreciation to Member States for their response to the request of the Secretary-General for their comments on the proposed draft instrument and requested the Economic and Social Council to instruct the Commission on Narcotic Drugs, following consideration at its ninth special session of the report of the Secretary-General, to decide on the elements that could be included in the Convention, and to request the Secretary-General to prepare a draft on the basis of those elements.

16. At its ninth special session, in February 1986, on the basis of its consideration of the report of the Secretary-General, the Commission adopted resolution 1 (S-IX), entitled "Guidance on the drafting of an international

⁸*Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. E.

⁹The Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control ultimately adopted by the Conference (*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A) is referred to in article 14, paragraph 4, of the Convention as one of the bases on which parties might be ready to adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances.

convention to combat drug trafficking".¹⁰ In that resolution, the Commission recommended 14 elements for inclusion in an initial draft Convention, namely: definitions, as required for the purpose of the Convention; identification, tracing, freezing and forfeiture of the proceeds of drug trafficking; strengthening of the obligations concerning extradition for offences relating to drug trafficking; measures to monitor or control specific chemicals, solvents and precursors used in the illegal processing or manufacture of controlled drugs; measures to ensure that commercial carriers are not used to transport illicit narcotic drugs and psychotropic substances, including the development of a system of sanctions; means of cooperation among countries, particularly among law enforcement agencies, for the exchange of information, as well as the establishment of joint communications links, training assistance and the exchange of expertise, including the posting of drug liaison officers as needed, taking into consideration the special problems of transit States; strengthening of cooperation among countries to provide mutual legal and judicial assistance in cases relating to drug trafficking, and promotion of mutual legal assistance in investigative and prosecutorial matters; controlled delivery; adequacy of sanctions for offences relating to drug trafficking; strengthening of mutual cooperation among States in the suppression of illicit drug trafficking on the high seas; measures to curtail the illicit and uncontrolled cultivation of narcotic plants, including prevention, crop substitution and eradication; extension of controls in free trade zones and free ports; prevention of the receipt, possession and transfer of equipment for the purpose of illegal manufacturing, compounding or processing of narcotic drugs and psychotropic substances; and prevention of the use of the mails for the illegal transport of narcotic drugs and psychotropic substances. The Commission also requested the Secretary-General to prepare a preliminary draft of a convention containing those specified elements and to circulate the draft to members of the Commission and other interested Governments for their comments or proposed textual changes.

17. In pursuance of the request by the Commission, the Secretary-General prepared a draft text consisting of 14 articles corresponding to the elements recommended for inclusion by the Commission and elaborating their substantive contents.¹¹ This preliminary draft text, as well as a compilation of the comments or textual changes submitted by Governments (E/CN.7/1987/2/Add.1), were considered by the Commission at its thirty-second session. The draft did not

¹⁰*Official Records of the Economic and Social Council, 1986, Supplement No. 3 (E/1986/23), chap. X, sect. A.*

¹¹*Official Records, vol. I ..., document E/CN.7/1987/2.*

contain any preambular provisions or articles dealing with implementation measures and mechanisms or final clauses, the formulation of which was considered to be premature at that stage and to require further guidance from the Commission.

Work of the open-ended intergovernmental expert group

18. After a general debate on the approach and content of the draft and a discussion of it article by article, the Commission came to the conclusion that, in order to expedite the elaboration of the Convention so that it might enter into force as soon as possible, as the General Assembly had requested in its resolution 41/26, it was necessary to establish an open-ended intergovernmental expert group whose sole task would be to review a working document to be prepared for that purpose by the Secretary-General. The document in question would consolidate the draft prepared by the Secretary-General, the comments made by the Governments and members of the Commission participating in the thirty-second session, in February 1987, and the results of discussions at that session, as well as those of the informal working group that had examined the article on definitions during the session. It would also contain a draft preambular part, a section on the implementation mechanisms, and draft final clauses. States were invited to submit comments for consideration by the expert group. The Economic and Social Council endorsed the decisions of the Commission in its resolution 1987/27 and confirmed that the established expert group should meet, if necessary, twice during 1987.

19. The expert group accordingly held two sessions in 1987, the first from 29 June to 10 July, the second from 5 to 16 October. It had before it a working document (DND/DCIT/WP.1) prepared by the Secretary-General. Over a total of 39 plenary meetings, the expert group covered all 14 articles included in the draft and held a preliminary exchange of views on the preamble, implementation measures and final clauses.

20. At its forty-second session, the General Assembly gave further instructions for speeding up the preparation of the draft Convention.¹² In its resolution 42/111, the Assembly, noting that the time available to the expert

¹²In the Declaration adopted on 26 June 1987 by the International Conference on Drug Abuse and Illicit Trafficking (*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. B), the Conference had called for urgent finalization of the draft Convention to ensure its entry into force at the earliest possible date and to complement existing international instruments.

group had not permitted thorough consideration of all articles, requested the Secretary-General to consider convening a third session of the intergovernmental expert group to continue the work on the draft Convention prior to the tenth special session of the Commission in February 1988. It also requested the Commission to consider and, if possible, approve the draft Convention at its tenth special session and to prepare recommendations on measures to be taken with a view to concluding the preparation of the draft Convention, including the possibility of convening a plenipotentiary conference in 1988 for its adoption.

21. A third session of the open-ended intergovernmental expert group was convened from 25 January to 5 February 1988, at which 15 plenary meetings were held. The expert group continued to base its discussions on the working document it had had before it at its first and second sessions. The expert group completed its discussion of a number of articles, approved some revised texts and indicated variants when complete agreement could not be reached. It did not have time to deal with definitions, preambular provisions, implementation articles and final clauses.

Work of the review group

22. The reports of the three sessions of the intergovernmental expert group¹³ were before the Commission at its tenth special session, held from 8 to 19 February 1988. The Commission conducted a detailed review of the draft articles emerging from the expert group and of the other drafts made available to it and decided that certain articles on which a large measure of agreement had been reached should be transmitted to the projected Conference. Other articles, however, the substance of which constituted the core of the instrument, required further examination. They concerned definitions; penal provisions and adequacy of sanctions; identification, tracing, freezing, seizure and forfeiture of the proceeds of illicit traffic; extradition; mutual legal assistance; and law enforcement cooperation and training. On the recommendation of the Commission, the Council, in its resolution 1988/8, therefore decided to convene a group to review the draft texts of those articles, with a view to submitting them to the Conference; in addition, the review group might review the draft Convention as a whole, in order to achieve consistency. The review group was also to consider organizational matters relating to the Conference and the draft provisional rules of procedure to be prepared by the Secretary-General.

¹³*Official Records*, vol. I ..., documents E/CN.7/1988/2 (Part II) and (Part IV).

23. The review group met from 27 June to 8 July 1988 and held 19 plenary meetings, in the course of which it discussed the articles of the draft referred to it for consideration and organizational matters relating to the Conference.¹⁴ The review group agreed to transmit to the Conference the text of those articles on which a consensus had emerged and, for those articles where no agreement could be reached, their text with variants. These texts, together with the texts approved for transmittal to the Conference by the Commission at its tenth special session, were submitted to the Conference as the basic proposal.¹⁵ A number of further proposals put forward by the review group, relating to the text of the draft Convention, were also forwarded for consideration by the Conference.¹⁶

The Conference

24. Acting on the recommendation of the Commission, the Council, by its resolution 1988/8, decided “to convene, in accordance with article 62, paragraph 4, of the Charter of the United Nations and within the provisions of General Assembly resolution 366 (IV) of 3 December 1949, a conference of plenipotentiaries for the adoption of a convention against illicit traffic in narcotic drugs and psychotropic substances”.

25. In accordance with Council resolution 1988/8, the Conference was held at Vienna from 25 November to 20 December 1988. Representatives from 106 States participated in the Conference. It was also attended by representatives of national liberation movements, specialized agencies of the United Nations system, intergovernmental organizations and interested United Nations organs and related bodies, and by observers from non-governmental organizations. The Conference set up a General Committee, a Credentials Committee and a Drafting Committee. It established two Committees of the Whole (Committee I and Committee II) and divided between them the articles contained in the draft Convention. The preamble and articles 1-5 in the text originally submitted to the Conference¹⁷ were referred to Committee I and the remaining articles to Committee II. It was decided that the Conference would work by consensus. For each article, the relevant committee had before it the

¹⁴Ibid., document E/CONF.82/3.

¹⁵Ibid., annex II.

¹⁶Ibid., annex IV.

¹⁷These later became articles 1-8 in the final text.

basic proposal submitted to the Conference and the amendments to that proposal submitted on behalf of Governments. When discussion on specific provisions ended in a deadlock, informal consultations were held to find a compromise between conflicting views and propose a new draft. In some instances, informal working groups were set up, in particular to reach an agreement on the drafting of the complex provisions of article 3, on offences and sanctions, or to elaborate the set of final clauses. Informal consultations and the proceedings of informal working groups, although not reflected in detail in the official records, played a crucial role in advancing consensus on the draft provisions. The Committees of the Whole, after agreeing upon a text for a particular article, referred it to the Drafting Committee. The Committees of the Whole reported to the Conference on the outcome of their work and the Drafting Committee submitted to the Conference a complete text of the draft Convention. That text was adopted by the Conference on 19 December 1988 as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Convention consists of a preamble and 34 articles, together with an annex containing two lists of substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances, which are amended from time to time by the Commission on Narcotic Drugs in accordance with article 12. The Convention was opened for signature on 20 December 1988 and, in accordance with the provisions of article 26, remained open for signature until 20 December 1989. The necessary number of ratifications and accessions having been reached as provided for in article 29, the Convention entered into force on 11 November 1990.

PART ONE

GENERAL PROVISIONS

PREAMBLE AND ARTICLES 1-2

PREAMBLE

General comments

0.1 The preamble of a treaty does not, in itself, have a binding force; it nevertheless has a recognized legal significance and constitutes, in accordance with article 31 of the Vienna Convention on the Law of Treaties,¹⁸ one of the elements to be taken into consideration for the purpose of interpretation.

0.2 The preamble of the 1988 Convention is longer and more wide-ranging than the preambular parts of the previous drug control treaties. It not only sets out the intentions of the parties and the purpose of the instrument they agreed to conclude but also expounds general guidelines underlying, if not all, at least several provisions of the Convention. Although selective in this respect and somewhat unsystematic, inasmuch as it does not follow the sequence of the articles in the Convention, it provides a useful insight into some of those articles and throws light on their meaning in the overall context of the Convention.

¹⁸United Nations, *Treaty Series*, vol. 1155, p. 331.

0.3 It should be noted that the draft preamble forwarded to the Conference by the Commission on Narcotic Drugs¹⁹ did not give rise to any major objections or divergent opinions when it was considered by Committee I. It was subject only to a limited number of amendments, largely of an editorial nature, and to a few additions.²⁰ The draft, which had been prepared by the Secretary-General at the request of the Commission, was based essentially on language used in preambular parts of resolutions adopted earlier by United Nations organs dealing with the drug problem, namely the General Assembly, the Economic and Social Council and the Commission, and was therefore not open to controversy.

Opening

The Parties to this Convention,

Commentary

0.4 The “Parties” referred to in the opening of the preamble include the entities specifically designated in articles 26 and 27 of the Convention as having competence to sign and ratify, accept, approve or formally confirm the Convention, or accede thereto.²¹ They comprise not only States formally recognized at the time and Namibia,²² but also regional economic integration organizations with competence to negotiate, conclude and apply international agreements in matters covered by the Convention.²³

¹⁹*Official Records*, vol. I ..., document E/CONF.82/3, annex II, pp. 74-75.

²⁰*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 33rd meeting, paras. 22-168.

²¹See below, comments on articles 26-28.

²²For the special status of Namibia at the time of the Conference, see paragraphs 26.3, 26.6 and 26.9 below.

²³Regional economic integration organizations are specifically referred to in articles 26-29.

First paragraph

Deeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society,

Commentary

0.5 The concern expressed in the first preambular paragraph reflects the very considerations that had led the General Assembly to initiate the preparation of a draft convention against illicit traffic. In its resolution 39/141, the Assembly voiced its concern “at the increasing damage which the illicit drug traffic causes to public health, the economic and social development of peoples, and young people in particular”. The magnitude and extent of the drug problem worldwide and its harmful consequences had been noted in the Quito Declaration against Narcotic Drugs and the New York Declaration against Drug Trafficking and the Illicit Use of Drugs, which prompted the Assembly to take its decision.²⁴ Similar concerns regarding the human suffering, loss of life and social disruption brought about by drug abuse and its effects on the economic, social, political and cultural structures of States were expressed in the Declaration adopted in 1987 by the International Conference on Drug Abuse and Illicit Trafficking.²⁵ The annual reports of the International Narcotics Control Board, as well as the resolutions adopted over the years by the Commission on Narcotic Drugs, abounded in similar findings and expressions of concern.

0.6 In its preamble, the 1961 Convention recognized that “addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind”, while in the 1971 Convention the parties noted “with concern the public health and social problems resulting from the use of certain psychotropic substances”. The language used in the 1988 Convention embraces the entire range of the drug problem; it covers narcotic drugs and psychotropic substances and targets illicit traffic as well as illicit production and demand. As regards the meaning to be attributed to “illicit

²⁴See “Introduction”, paragraphs 6 and 8.

²⁵*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I.

traffic”, reference must be made to the definition given in article 1, namely “the offences set forth in article 3, paragraphs 1 and 2, of this Convention”.

Second paragraph

Deeply concerned also by the steadily increasing inroads into various social groups made by illicit traffic in narcotic drugs and psychotropic substances, and particularly by the fact that children are used in many parts of the world as an illicit drug consumers market and for purposes of illicit production, distribution and trade in narcotic drugs and psychotropic substances, which entails a danger of incalculable gravity,

Commentary

0.7 The text of the second preambular paragraph did not appear in the basic proposal before Committee I. It was introduced during the discussion of the preamble and was sponsored by 18 delegations. In view of the importance attached to its content, it was decided to place it towards the beginning of the preamble. The subject of the paragraph, namely the involvement of children in drug trafficking, was considered to be a matter of the gravest concern.²⁶

0.8 This concern for children finds substantive expression in article 3, paragraph 5, which provides that certain factual circumstances, such as the victimization or use of minors, or the fact that an offence established in accordance with paragraph 1 of that article is committed in an educational institution or in its immediate vicinity or in other places to which schoolchildren resort for educational, sports and social activities, make the commission of the offence particularly serious. Moreover, in paragraph 7, it is stipulated that parties should ensure that their courts or other competent authorities bear in mind the serious nature of these offences and of such factual circumstances “when considering the eventuality of early release or parole of persons convicted of such offences”.

²⁶See the detailed statement by the representative of Peru (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 33rd meeting, paras. 151 and 152).

Third paragraph

Recognizing the links between illicit traffic and other related organized criminal activities which undermine the legitimate economies and threaten the stability, security and sovereignty of States,

Commentary

0.9 The need to recognize the links between illicit traffic and other forms of organized criminal activities and the disrupting and destabilizing effect of those activities was emphasized at an early stage of the preparatory work.²⁷ It was later suggested that appropriate reference to that problem should also find a place in the preamble of the Convention.

0.10 There was some discussion on whether the third preambular paragraph should be couched in general terms or should enumerate the related criminal activities that were being targeted. It was finally agreed that it should be as general as possible and should not single out specific criminal activities. Drawing from other authoritative sources,²⁸ it may be inferred that illegal smuggling and traffic in firearms, subversion and international terrorism fall in the category of the activities in question. Economic and commercial frauds may also be considered relevant. The use of the word “international” to qualify these activities was deliberately avoided in order to indicate that they were very often of a local nature, especially in their initial stages. It was understood, however, and put on record²⁹ that the expression “organized criminal activities” covers “all forms of criminal activities including international criminal activities”.

0.11 Two articles in the Convention require parties to consider taking specific action in relation to other criminal activities. Under article 3, paragraph 5, subparagraphs (a) and (b), the involvement in an offence established under paragraph 1 of the article of an organized criminal group to which the offender belongs, or the involvement of the offender in other international

²⁷These links were recognized in paragraph 5 of the Declaration of the International Conference on Drug Abuse and Illicit Trafficking (see footnote 25 above).

²⁸See, for instance, Commission on Narcotic Drugs resolution 3 (S-VIII) and General Assembly resolution 40/121.

²⁹*Official Records*, vol. I ..., document E/CONF.82/11, “Preamble” (E/CONF.82/C.1/L.18/Add.8), para. 8.

organized criminal activities, may constitute aggravating circumstances. Under article 9, paragraph 1, subparagraph (a), “the secure and rapid exchange of information concerning all aspects of offences established in accordance with article 3, paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities”, is to be facilitated.

Fourth paragraph

Recognizing also that illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority,

Commentary

0.12 The fourth paragraph uses very general wording to characterize illicit traffic as an “international criminal activity”. The General Assembly, in its resolution 39/42, had used the same expression in the Declaration on the Control of Drug Trafficking and Drug Abuse, adopted in 1984. More precise wording was purposely avoided in the Convention. The expression “crime against humanity”, which had been used in the first draft of the proposed Convention, annexed to the General Assembly resolution,³⁰ was considered objectionable by many States and not suitable in the context of an instrument aimed specifically at the suppression of illicit drug trafficking.

0.13 Although the criminal activity of illicit traffic has a recognized international dimension, it is left to each party to decide what type of offence it may constitute under that party’s criminal law. In article 3, paragraph 11, it is clearly stated that nothing in the article shall affect the principle that the “description” of the offences to which it refers is reserved to the domestic law of each party.

Fifth and sixth paragraphs

Aware that illicit traffic generates large financial profits and wealth enabling transnational criminal organizations to penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business, and society at all its levels,

³⁰See “Introduction”, paragraphs 9 and 12.

Determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing,

Commentary

0.14 The fifth and sixth paragraphs are closely related and should be read as an introduction to article 5, on confiscation, and article 3, as it relates to money-laundering.³¹ The factual observations in the fifth paragraph are the basis for the determination expressed in the sixth paragraph to deprive persons engaged in illicit traffic of the proceeds of their activities, leading in turn to the adoption of the measures set out in article 5. The confiscation of proceeds derived from the commission of offences established in accordance with article 3, paragraph 1, is also one of the sanctions envisaged in article 3, paragraph 4, subparagraph (a).

Seventh paragraph

Desiring to eliminate the root causes of the problem of abuse of narcotic drugs and psychotropic substances, including the illicit demand for such drugs and substances and the enormous profits derived from illicit traffic,

Commentary

0.15 Although the subject of the Convention is illicit traffic, it was considered necessary to introduce in the preamble a paragraph pointing to the connection between drug abuse and illicit traffic. As there was no such provision in the original draft, a proposal to that effect was made in Committee I. The paragraph serves as an introduction to article 14, paragraph 4, in which parties are required to adopt appropriate measures “aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic”.

0.16 The reference to the “root causes” of drug abuse gave rise to some discussion in view of the divergent views held by States on the subject. It is, however, generally accepted that social, economic and cultural factors must be taken into account, particularly lack of education, unemployment and poor

³¹See also the comments on article 3, paragraph 1, subparagraphs (a), clause (v), and (b).

housing. In many resolutions adopted by the General Assembly, the Economic and Social Council and the Commission, States have been requested to inquire into the many possible causes of drug abuse and to take appropriate action to eliminate them or at least the most serious of them. The two causes specifically referred to in the paragraph, namely illicit demand and profits derived from illicit traffic for which measures of confiscation are provided, are dealt with respectively in article 14, paragraph 4, and article 5.

Eighth paragraph

Considering that measures are necessary to monitor certain substances, including precursors, chemicals and solvents, which are used in the manufacture of narcotic drugs and psychotropic substances, the ready availability of which has led to an increase in the clandestine manufacture of such drugs and substances,

Commentary

0.17 The eighth paragraph serves as an introduction to article 12. It lists some categories of substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances and which are regulated by that article: precursors,³² chemicals and solvents.

0.18 The proposed addition of a new paragraph “recognizing the necessity to avoid any adverse effect on the legitimate activities of chemical and pharmaceutical industries” was not accepted.³³ It was considered that the restrictive import of the sentence would have introduced a kind of safeguard clause out of place in the preamble and without equivalent in any other preambular paragraph.

³²See paragraph 12.8 below.

³³*Official Records*, vol. I ..., document E/CONF.82/11, “Preamble” (E/CONF.82/C.1/L.18/Add.8), sect. II, pp. 94-95, para. 3 (“Seventh paragraph”).

Ninth paragraph

Determined to improve international co-operation in the suppression of illicit traffic by sea,

Commentary

0.19 The ninth paragraph constitutes a recognition of the need to improve international cooperation in the suppression of illicit traffic by sea. While article 108 of the 1982 United Nations Convention on the Law of the Sea³⁴ imposed a general obligation on States to cooperate in this area, it was considered necessary to elaborate more detailed provisions in the specific context of the 1988 Convention. This concern is dealt with primarily in article 17.³⁵

Tenth paragraph

Recognizing that eradication of illicit traffic is a collective responsibility of all States and that, to that end, co-ordinated action within the framework of international co-operation is necessary,

Commentary

0.20 The fact that eradication of illicit traffic is “the collective responsibility of all States” was expressly stated in the Declaration on the Control of Drug Trafficking and Drug Abuse, adopted by the General Assembly in its resolution 39/142. In the Declaration, States were also called upon to coordinate strategies to achieve that objective. Coordinated action within the framework of international cooperation is the essential ingredient of the Convention. It finds formal expression and confirmation in article 2 and permeates all subsequent substantive articles.³⁶

³⁴*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.62/121, annex I.

³⁵See also comments on article 4, paragraph 1, subparagraphs (a), clause (ii), and (b), clause (ii).

³⁶See below, comments on article 2.

0.21 In affirming in this regard the collective responsibility of all States and not only, or even especially, those affected by problems relating to illicit production, traffic or abuse, the preamble places the Convention in the category of multilateral treaties responding to general concerns or interests affecting all States within the international community in a similar manner. The General Assembly repeatedly invites States, to the extent they are able to do so, to apply provisionally the measures set forth in the Convention, pending its entry into force for each of them.³⁷ Moreover, article 21, subparagraph (f), of the Convention enables the Commission to draw the attention of non-parties to decisions and recommendations which it adopts under the Convention, with a view to their considering taking action in accordance therewith.

Eleventh paragraph

Acknowledging the competence of the United Nations in the field of control of narcotic drugs and psychotropic substances and desirous that the international organs concerned with such control should be within the framework of that Organization,

Commentary

0.22 The 1961 Convention, the 1961 Convention as amended, and the 1971 Convention contain a similar preambular paragraph.

0.23 The competence of the United Nations in the field of drug control originates in the 1946 Protocol, which transferred to the United Nations the functions previously exercised in that field by the League of Nations.

0.24 The international drug control organs within the framework of the United Nations include, under the authority of the General Assembly, the Economic and Social Council, which is responsible for coordinating drug control activities and preparing draft international conventions for submission to the Assembly; it supervises their implementation and makes relevant recommendations to Governments. The Council is assisted and advised in its task by the Commission on Narcotic Drugs as the principal United Nations policy-making body on drug control issues. The International Narcotics Control Board carries out the functions assigned to it by the drug control treaties in force

³⁷See, for example, General Assembly resolutions 44/140, S-17/2, annex, and 45/146.

and promotes compliance with their provisions. The Secretary-General also fulfils the treaty functions entrusted to him under the various instruments. He is assisted in this capacity by the United Nations International Drug Control Programme, established pursuant to General Assembly resolution 45/179.

0.25 The 1988 Convention assigns specific functions to the Economic and Social Council, in article 22; the Commission on Narcotic Drugs, in articles 12, 20, and 21; the International Narcotics Control Board, in articles 12, 22, 23 and 32; the Secretary-General, in articles 5, 7, 12, 17, 20, 23, 27 to 31 and 34; and the International Court of Justice, in article 32.

Twelfth paragraph

Reaffirming the guiding principles of existing treaties in the field of narcotic drugs and psychotropic substances and the system of control which they embody,

Commentary

0.26 The guiding principles of the existing treaties in the field of narcotic drugs and psychotropic substances reaffirmed in the twelfth paragraph are outlined in the preambles of the 1961 Convention, the 1961 Convention as amended, and the 1971 Convention. The system of control established under their substantive articles to put these principles into effect is analysed in detail and clarified in the commentaries on these conventions. In the course of the preparatory work on the 1988 Convention, it was repeatedly stressed that formal acknowledgement of those guiding principles should be made in the new instrument. It was also emphasized that the 1988 Convention should in no way derogate from the provisions of the previous treaties. The clear intent of the parties was that, taken together, the four instruments would form an integral system based on common concepts and principles and would constitute a comprehensive legal framework for international action. The 1988 Convention does not modify the provisions or affect the operation of the pre-existing conventions.³⁸

³⁸See below, comments on article 25.

Thirteenth paragraph

Recognizing the need to reinforce and supplement the measures provided in the Single Convention on Narcotic Drugs, 1961, that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, and the 1971 Convention on Psychotropic Substances, in order to counter the magnitude and extent of illicit traffic and its grave consequences,

Commentary

0.27 Articles 35 and 36 of the 1961 Convention and the 1961 Convention as amended, and articles 21 and 22 of the 1971 Convention, provide for action to be taken to combat illicit traffic and contain penal provisions to punish drug offences. The view was taken that these provisions were no longer sufficient to tackle effectively illicit traffic as it had developed and diversified since those conventions had been adopted. It was therefore found necessary to expand those provisions and to adjust them to the distinct requirements of an instrument directed specifically against illicit traffic.

Fourteenth paragraph

Recognizing also the importance of strengthening and enhancing effective legal means for international co-operation in criminal matters for suppressing the international criminal activities of illicit traffic,

Commentary

0.28 The fourteenth paragraph was proposed in Committee I as an additional paragraph. It originally described in detail the legal means of cooperation that were envisaged, enumerating, as examples, the areas in which international cooperation in criminal matters for suppressing illicit traffic should be strengthened, namely confiscation, extradition, mutual legal assistance and controlled delivery. It was, however, considered inappropriate in a preamble to be too specific about the forms that such cooperation might take. Moreover, a list of specific forms of cooperation might have been called into question as being incomplete. As indicated below, several articles, including articles 5, 6, 7 and 11, respond to the considerations expressed in this paragraph.

Fifteenth paragraph

Desiring to conclude a comprehensive, effective and operative international convention that is directed specifically against illicit traffic and that considers the various aspects of the problem as a whole, in particular those aspects not envisaged in the existing treaties in the field of narcotic drugs and psychotropic substances,

Commentary

0.29 The wording of the fifteenth paragraph is borrowed from General Assembly resolution 39/141, in which the Assembly initiated the preparation of the Convention. As reflected below in the comments on each article, the Convention satisfies the criteria set forth in this preambular paragraph. It is specific in the sense that the objective of combating illicit traffic and its adverse consequences is central to its substantive content in accord with its title. It is comprehensive in that it covers the various aspects of the problem of illicit traffic as defined in article 1, subparagraph (*m*), and in particular, as mentioned above in the comments on the thirteenth paragraph, those aspects not envisaged in the existing treaties. It is designed to be effective and operative inasmuch as it sets out in detail the obligations of parties to take concrete and appropriate measures to achieve its purposes and institutes procedures for monitoring the proper implementation of its provisions.

Close

Hereby agree as follows:

Commentary

0.30 The Convention was adopted by the Conference on 19 December 1988 and opened for signature the following day.³⁹ Of the 106 States⁴⁰ participating in the Conference, 43 signed the Convention on 20 December 1988.⁴¹

³⁹*Official Records*, vol. I ..., document E/CONF.82/14, para. 21; see also "Introduction", para. 25.

⁴⁰For the complete list, see the Final Act (*Official Records*, vol. I ..., document E/CONF.82/14, para. 7).

⁴¹Afghanistan, Algeria, Argentina, Bahamas, Bolivia, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Cyprus, Denmark, Egypt, Ghana, Guatemala, Holy See, Honduras, Iran (Islamic Republic of), Israel, Italy, Jordan, Malaysia, Mauritania, Mauritius, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Senegal, Spain, Suriname, Sweden, Turkey, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America, Venezuela, Yemen, Yugoslavia, Zaire.

ARTICLE 1

Definitions

General Comments

1.1 Some of the terms listed under article 1 of the 1988 Convention had already been defined under the 1961 Convention or the 1971 Convention. Such definitions were usually carried over verbatim in article 1 of the 1988 Convention, except when the Conference agreed that there was a specific reason not to do so, as, for example, in the case of the definition of “illicit traffic” (see paragraph 1.14 below).

1.2 Other terms defined under the earlier conventions, although used in the 1988 Convention, are not covered in article 1. This is, for instance, the case with the terms “cultivation”, “exportation”,⁴² “importation”,⁴³ “manufacture”, and “production” which appear in article 3, paragraph 1, subparagraph (a), of the 1988 Convention, listing acts which should be established as criminal offences.⁴⁴ In such cases, definitions in the earlier conventions apply to the terms used in the 1988 Convention, all the more so since article 3, paragraph 1, subparagraph (a), clause (i), establishes an explicit link with the provisions of the 1961 and 1971 Conventions.

1.3 It should be noted that the present *Commentary* elaborates on the definition of terms listed in article 1 when analysing certain substantive articles. Thus, for example, a further examination of the meaning of “Confiscation” will be found in the section on article 5, “Controlled delivery” under article 11, and “Transit State” under article 10. Moreover, the *Commentary* proposes definitions of terms used in the Convention but not defined under article 1 or under the previous conventions. These include, for instance, the terms “brokerage” (paragraph 3.25), “chemicals” (paragraph 12.1), “conversion or transfer of property” (paragraphs 3.47-3.49), “delivery” (paragraph 3.24), “dispatch” (paragraph 3.26), “distribution” (paragraph 3.22), “extraction” (paragraph 3.16), “equipment” (paragraph 5.11 and 13.1), “free ports” and “free trade zones”

⁴²The 1961 and 1971 Conventions used the term “export”.

⁴³The 1961 and 1971 Conventions used the term “import”.

⁴⁴These terms are examined in paragraphs 3.14, 3.15, 3.28 and 3.29 below.

(paragraph 18.1), “incitement” and “inducement” (paragraphs 3.72-3.75), “instrumentalities” (paragraph 5.11), “management” (paragraph 3.33), “materials” (paragraphs 5.11 and 13.1), “offering” and “offering for sale” (paragraphs 3.19-3.21), “organization” (paragraph 3.33), “ordre public” (paragraph 7.50), “precursors” (paragraph 12.1), “preparations” (paragraphs 3.17-3.18 and 12.43-12.45), “solvents” (paragraph 12.1) and “transport” (paragraph 3.27).

Introductory part and subparagraph (a)

Except where otherwise expressly indicated or where the context otherwise requires, the following definitions shall apply throughout this Convention:

(a) “Board” means the International Narcotics Control Board established by the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961;

Commentary

1.4 The International Narcotics Control Board was established⁴⁵ by the 1961 Convention, which contains detailed provisions regarding the composition and functions of the Board,⁴⁶ the terms of office and remuneration of its members,⁴⁷ its rules of procedure,⁴⁸ steps the Board is required to take in administering the control systems established by that Convention,⁴⁹ and reports to be prepared by the Board.⁵⁰ These provisions were considerably amended by the 1972 Protocol,

⁴⁵The International Narcotics Control Board replaced two organs established by earlier treaties in the narcotics field: the Permanent Central Board and the Drug Supervisory Body.

⁴⁶1961 Convention, art. 9.

⁴⁷Ibid., art. 10.

⁴⁸Ibid., art. 11.

⁴⁹Ibid., arts. 12-14.

⁵⁰Ibid., art. 15.

notably by increasing the size of the Board from 11 to 13 members,⁵¹ lengthening the term of office from three to five years,⁵² and adding and amending provisions as to the Board's functions.⁵³ The 1988 Convention makes further provisions regarding the functions⁵⁴ and reports⁵⁵ of the Board.

Subparagraph (b)

(b) "Cannabis plant" means any plant of the genus Cannabis;

Commentary

1.5 The definition of "cannabis plant", in common with the definitions of narcotic drugs and psychotropic substances, was determined by the Drafting Committee of the Conference on the advice of the chairman of Committee II.⁵⁶ The definition is the same as in the 1961 Convention,⁵⁷ in which "cannabis"⁵⁸ and "cannabis resin"⁵⁹ are also defined. The latter definitions are not repeated in the text of the 1988 Convention the relevant provisions of which⁶⁰ are concerned with the cultivation of the plant as a whole. The genus Cannabis

⁵¹1961 Convention as amended, art. 9, para. 1.

⁵²1961 Convention as amended, art. 10, para. 1.

⁵³1961 Convention as amended, art. 9, paras. 4 and 5, and arts. 12, 14 and 14 *bis*.

⁵⁴1988 Convention, art. 22.

⁵⁵*Ibid.*, art. 23.

⁵⁶*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 34th meeting, para. 89.

⁵⁷1961 Convention, art. 1, subpara. (c).

⁵⁸Defined as the "flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated" (1961 Convention, art. 1, subpara. (b)). The 1925 Convention used the term "Indian hemp".

⁵⁹Defined as "the separated resin, whether crude or purified, obtained from the cannabis plant" (1961 Convention, art. 1, subpara. (d)).

⁶⁰See article 3, paragraph 1, subparagraph (a), clause (ii), and article 14, paragraph 2.

consists of the single species *Cannabis sativa* L., the scientific name used in the 1925 Convention for the Indian hemp plant.

Subparagraph (c)

(c) “Coca bush” means the plant of any species of the genus *Erythroxylon*;

Commentary

1.6 This definition again reproduces that of the 1961 Convention,⁶¹ where a definition of “coca leaf”, not required for the 1988 Convention, is also provided.⁶² There are some 200 species of the genus *Erythroxylon*, of which two, *Erythroxylon coca* Lamarck and *Erythroxylon novaranatense* (Morris) *Hieronymus*, are of importance for present purposes as their leaves contain cocaine and other ecgonine derivatives.

Subparagraph (d)

(d) “Commercial carrier” means any person or any public, private or other entity engaged in transporting persons, goods or mails for remuneration, hire or any other benefit;

Commentary

1.7 The definition of “commercial carrier” is above all relevant to article 15, since commercial carriers are the subject of the article. The definition covers natural and legal persons, and entities under both public and private law, whatever legal form the relevant business association may take.⁶³ Similarly the concluding reference to “remuneration, hire or any other benefit” is intended to cover every form of reward, whether pecuniary or not. The provisions of article 15, which cover, *inter alia*, a commercial carrier’s principal place of business and personnel, make it clear that the article is concerned with entities

⁶¹1961 Convention, art. 1, subpara. (e).

⁶²1961 Convention, art. 1, subpara. (f).

⁶³For the discussion of this definition in Committee II, see *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 3rd meeting, paras. 56-91.

regularly involved in transport, as opposed to a person carrying goods for reward on an isolated occasion; the words “engaged in transporting” convey this meaning.

Subparagraph (e)

(e) “Commission” means the Commission on Narcotic Drugs of the Economic and Social Council of the United Nations;

Commentary

1.8 In pursuance of Article 68 of the Charter of the United Nations, the Commission is a functional commission of the Economic and Social Council established in 1946 by its resolution 9 (I) which also sets out the mandate of the Commission. That mandate was later enlarged in 1991 by Economic and Social Council resolution 1991/38 and General Assembly resolution 46/185 C, section XVI. The 1961, 1971 and 1988 Conventions also confer functions on the Commission⁶⁴ but contain no provisions relating to its membership or procedure; these are governed by the Economic and Social Council or the General Assembly.

Subparagraph (f)

(f) “Confiscation”, which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority;

Commentary

1.9 This definition is primarily of importance in relation to article 5, which deals with confiscation.⁶⁵ Reference is made to “forfeiture” in order to meet the needs of some national legal systems, in which this was a more appropriate term than “confiscation”. The French and Spanish versions do not have the phrase “which includes forfeiture where applicable”, since the terms “*confiscation*” in French and “*decomiso*” in Spanish were deemed to be the only appropriate ones. It was stressed, in particular, that in Spanish the use of the term “*confiscación*”

⁶⁴In the 1988 Convention, for example, see articles 12, 20, 21 and 23.

⁶⁵See also article 3, paragraph 4, subparagraph (a).

should be avoided in the context of article 5. Committee I placed on record its understanding that the word “property” as used in this definition also included “proceeds” and that the word “permanent” indicated that confiscation, being the end result of a legal process, was distinct from provisional measures.⁶⁶

Subparagraph (g)

(g) “Controlled delivery” means the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in Table I and Table II annexed to this Convention, or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences established in accordance with article 3, paragraph 1 of the Convention;

Commentary

1.10 The substantive provisions regarding controlled delivery are in article 11, the text of which makes it clear that decisions to use the technique are to be made on a case-by-case basis.⁶⁷ For that reason, it was possible to agree on a broad definition in article 1. It was thought that some States might be reluctant to agree to use controlled delivery in respect of substances used in the illicit manufacture of narcotic drugs and psychotropic substances despite the usefulness of the technique, *inter alia*, in discovering clandestine laboratories. Therefore, the substantive provisions as adopted ensure that no State is obliged to agree to the use of controlled delivery in cases where its use is judged inappropriate for any reason. The reference to “suspect” consignments ensures that the technique can also be used in the case of consignments of substances that are only suspected of being intended for illicit use.⁶⁸ The technique, under this definition, does not apply to consignments of currency or equipment (see paragraph 11.28 below).

⁶⁶*Official Records*, vol. I ..., document E/CONF.82/11, “Article 3” (E/CONF.82/C.1/L.18/Add.2), sect. III, p. 116, para. 50.

⁶⁷Art. 11, para. 2.

⁶⁸See *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 10th meeting, paras. 1-7.

Subparagraphs (h), (i) and (j)

(h) “1961 Convention” means the Single Convention on Narcotic Drugs, 1961;

(i) “1961 Convention as amended” means the Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961 ;

(j) “1971 Convention” means the Convention on Psychotropic Substances, 1971;

Commentary

1.11 These definitions provide useful short titles for the earlier texts.⁶⁹ Short titles of earlier conventions do not appear in the 1961 and 1971 Conventions.

Subparagraph (k)

(k) “Council” means the Economic and Social Council of the United Nations;

Commentary

1.12 The Economic and Social Council was constituted under Article 61 of the Charter of the United Nations. The Council has a number of functions under the Convention; for example, it receives the reports of the International Narcotics Control Board⁷⁰ and, at the request of a party, it reviews any decision of the Commission under article 12 amending the contents of Table I or Table II.⁷¹ In the latter case, the Council may confirm or reverse any such decision.

⁶⁹See the explanatory notes at the beginning of this *Commentary*.

⁷⁰Art. 23, para. 7.

⁷¹Art. 12, para. 7.

Subparagraph (l)

(l) “Freezing” or “seizure” means 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 a competent authority;

Commentary

1.13 In the draft text submitted to the Conference, separate definitions (each with two variants) were given for the terms “freezing” and “seizure”.⁷² Different national legal systems may use one or both of these terms, which in the provisions of article 5 are used as alternatives.⁷³ It was therefore decided to combine the definitions, including for both terms reference to the temporary nature of the action taken. This decision was also seen as helping reduce the translation difficulties presented by each term standing alone. Similarly, “custody” and “control” are both used, as they may have different connotations in the legal usage of different States.

Subparagraph (m)

(m) “Illicit traffic” means the offences set forth in article 3, paragraphs 1 and 2, of this Convention;

⁷²Freezing (variant A) means prohibiting the transfer, conversion, disposition or movement of proceeds by order of a court or other appropriate authority; freezing (variant B) means temporarily prohibiting the transfer, conversion disposition or movement of property. Seizure (variant A) means assuming custody or control of proceeds as directed by order of a court or other appropriate authority; seizure (variant B) means assuming custody or control of property by a competent authority (*Official Records*, vol. I ..., document E/CONF.82/3, annex, pp. 75-76).

⁷³An exception is in article 5, paragraph 3, where only “seized” is used; the context, however, is that of bank, financial or commercial records rather than of property or proceeds. In article 7, paragraph 2, subparagraph (c), in the context of mutual legal assistance, “seizure” alone is used in the familiar term “searches and seizures”.

Commentary

1.14 The term “illicit traffic”⁷⁴ features in the title of the Convention, in the great majority of the preambular paragraphs, and in several articles throughout the Convention. In the draft submitted to the Conference it was a key term in the substantive provisions, with a lengthy definition.⁷⁵ The Conference finally decided to define “illicit traffic” by reference to offences under article 3, paragraphs 1 and 2. Many of the detailed provisions of the Convention, however, do not use the term “illicit traffic” with its broad definition but refer instead to “offences established in accordance with article 3, paragraph 1”. This formulation was used to limit obligations arising under those provisions to more serious offences, as opposed to offences of possession, purchase or cultivation for personal consumption, which were recognized as less serious in nature. The term “illicit traffic” is found in article 10 (International co-operation and assistance for transit States), article 17 (Illicit traffic by sea), article 18 (Free trade zones and free ports), article 19 (The use of the mails), article 20 (Information to be furnished by the Parties), and article 24 (Application of stricter measures than those required by this Convention). In the last of these, it would seem that the term must be given a wider meaning than that specified in the definition, for the stricter measures may well go beyond the limits set in article 3, paragraphs 1 and 2. The expression “illicit traffic in and abuse of

⁷⁴The term “illicit traffic” was included among the definitions of article 1 of the 1961 Convention (subpara.1 (l)) and of article 1 of the 1971 Convention (subpara. (j)). It was defined under the 1961 Convention as “cultivation or trafficking in drugs contrary to the provisions of this Convention” and under the 1971 Convention as “manufacture of or trafficking in psychotropic substances contrary to the provisions of this Convention”.

⁷⁵“‘Illicit traffic’ means [includes] [*inter alia*] the [sowing] cultivation, [harvesting] production, [fabrication] manufacture, extraction, preparation, [conditioning] offering, offering for sale, distribution, [possession] [supply] [storage] purchase, [acquisition] sale, [prescription] delivery on any terms whatsoever, brokerage, dispatch, dispatch through the mails, dispatch in transit, transport, importation and exportation [and the traffic in any other form] of any narcotic drugs or psychotropic substances contrary to the provisions of the Single Convention on Narcotic Drugs, 1961, of that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, and of the Convention on Psychotropic Substances, 1971. [Illicit traffic also includes the possession of any narcotic drugs or psychotropic substances for the purpose of any of the foregoing activities] [as well as the consumption or improper use of such substances]. [It also includes traffic in substances in List A and List B contrary to article 8 of the present Convention]. The organization, management, financing or facilitating of the aforementioned operations or activities are also considered as illicit traffic for the purposes of this Convention” (*Official Records*, vol. I ..., document E/CONF.82/3, annex, p. 75). List A and List B in the basic proposal before the Conference correspond to Table I and Table II of the Convention as later adopted.

narcotic drugs and psychotropic substances” occurs in article 5, paragraph 5, subparagraph (b), clause (i), but in the context of identifying intergovernmental bodies which might receive a share in the value of confiscated property.

Subparagraph (n)

(n) “Narcotic drug” means any of the substances, natural or synthetic, in Schedules I and II of the Single Convention on Narcotic Drugs, 1961, and that Convention as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961 ;

Commentary

1.15 This definition reproduces in substance that of the 1961 Convention. The text of the 1961 Convention, as opposed to its title, did not use the term “narcotic drug” but contained a definition of the term “drug” having the same import as the one now used in the 1988 Convention. It should be noted that the opium poppy, coca bush and cannabis plant are not within the definition, although they are identified in article 14, paragraph 2, of the 1988 Convention as examples of the category of “plants containing narcotic or psychotropic substances”. Although certain provisions of the 1961 Convention apply only to natural as opposed to synthetic drugs, this distinction, while repeated in the definition in the 1988 Convention, is not material for the purposes of the latter.

Subparagraph (o)

(o) “Opium poppy” means the plant of the species *Papaver somniferum* L;

Commentary

1.16 The definition “opium poppy” follows that given in the 1961 Convention, rather than that given in the 1953 Protocol, which also includes any other species of *Papaver* which may be used for the production of opium. The position under the 1988 Convention is that the offence established in accordance with article 3, paragraph 1, subparagraph (a) (ii), is limited to the opium poppy as defined in article 1. The obligation created under article 14, paragraph 2, however, is to “take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic [...] substances, such as opium poppy”. If a plant considered not to be a variety of the species *Papaver somniferum* L. but

of another species of the genus *Papaver* were found to yield narcotic substances, it would then also fall within the category of plants subject to that obligation.

Subparagraph (p)

(p) “Proceeds” means any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1;

Commentary

1.17 In the text submitted to the Conference, the proposed definition of “proceeds” was in fact a variant of the definition of “property”, both being listed under the common heading “Property”.⁷⁶ Neither draft definition contained any reference to the source or derivation of the property. The decision to include such a reference made it important that “proceeds” and “property” should be separately defined.

1.18 The inclusion of the words “directly or indirectly” proved controversial. A number of representatives registered their doubts on this point,⁷⁷ and the inclusion of those words may have contributed to what one representative described as a “logical incoherence” between the definition and the substantive text.⁷⁸ In two instances the wording of the Convention fails to relate clearly to the definition set out in article 1, subparagraph (p). The first is found in article 3, where, at a number of points,⁷⁹ the text uses the phrase “property [...] derived from” an offence; the second occurs in the text of article 5, paragraph 1, subparagraph (a), which requires each party to adopt such measures as may be necessary to enable confiscation of “proceeds derived from offences established in accordance with article 3, paragraph 1”. It appears that the words “derived from” in article 5, paragraph 1, incorporate the sense of the definition of

⁷⁶*Official Records*, vol. I ..., document E/CONF.82/3, annex II, p. 76. The only difference between the two variants was that the definition of “property” also contained a reference to “assets”.

⁷⁷*Official Records*, vol. I ..., document E/CONF.82/11, “Article 3” (E/CONF.82/C.1/L.18/Add.2), sect. III, para. 50; and *Official Records*, vol. II ..., Summary records of plenary meetings, 6th plenary meeting, paras. 64-66.

⁷⁸*Official Records*, vol. II ..., Summary records of plenary meetings, 6th plenary meeting, para. 66.

⁷⁹Art. 3, para. 1, subparas. (b), clauses (i) and (ii), and (c), clause (i).

proceeds and so mean “derived from or obtained, directly or indirectly, through”. In the context of article 3, where the word “proceeds” as such is not used, the position is less clear (see paragraph 3.46 below).

Subparagraph (q)

(q) “Property” means 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;

Commentary

1.19 In the earliest drafts of the Convention, this was the definition of the term “proceeds”,⁸⁰ but it became clear that two definitions were needed, one (that of “property”) serving to emphasize that assets of every possible kind were included and the second (that of “proceeds”) referring to the derivation of the property. The language used is apt for the various classifications of property to be found in national legal systems. In some systems the legal documents of title to property are not merely evidence but have value in themselves, and this is catered for in the definition.

Subparagraph (r)

(r) “Psychotropic substance” means any substance, natural or synthetic, or any natural material in Schedules I, II, III and IV of the Convention on Psychotropic Substances, 1971;

Commentary

1.20 This reproduces the definition used in the 1971 Convention. The categorization of the relevant substances as natural or synthetic substances or as natural material has no legal significance in the context of the present Convention.⁸¹

⁸⁰See *Official Records*, vol. I ..., document E/CN.7/1987/2, sect. II.

⁸¹It had virtually none in the 1971 text (see Commentary on the 1971 Convention, comments on article 1, subparagraph (e)).

Subparagraph (s)

(s) “Secretary-General” means the Secretary-General of the United Nations;

Commentary

1.21 As in the 1961 and 1971 Conventions, the Secretary-General of the United Nations has two types of function under the 1988 Convention. The first concerns the operation of the substantive provisions of the Convention, as in article 5 (reception of texts of laws and regulations, which implies a duty to make the information available as appropriate),⁸² article 7 (reception of various types of information needed in the practical working of mutual legal assistance),⁸³ article 12 (duties relating to the work of the Board, the Commission and the Council in relation to Table I and Table II⁸⁴ and also in the activation of provisions regarding information on exports),⁸⁵ article 17 (reception of designations of authorities to respond to requests relating to steps to be taken in cases of illicit traffic by sea),⁸⁶ article 20 (reception of various types of information furnished by the parties)⁸⁷ and article 23 (distribution of the reports of the Board).⁸⁸ The second type of function relates to the duties as depositary of the Convention. The Secretary-General is given this role by article 34 and has related duties under other final clauses.⁸⁹

⁸²Art. 5, para. 4, subpara. (e).

⁸³Art. 7, para. 8 (designated authorities) and para. 9 (translation requirements).

⁸⁴Art. 12, paras. 3, 6 and 7.

⁸⁵Art. 12, para. 10.

⁸⁶Art. 17, para. 7.

⁸⁷Art. 20, para. 1.

⁸⁸Art. 23, para. 2.

⁸⁹See articles 27-32.

Subparagraph (t)

(t) “Table I” and “Table II” mean the correspondingly numbered lists of substances annexed to this Convention, as amended from time to time in accordance with article 12;

Commentary

1.22 The draft before the Conference referred to “List A” and “List B”. These terms were altered to “Schedule I” and “Schedule II” in the course of the negotiations, using the terms consecrated in the 1961 and 1971 Conventions, and in the end became “Table I” and “Table II” on the suggestion of the Drafting Committee. (See comments on article 12 in paragraph 12.8 below for details on the type of substances listed in Table I and Table II and the use of the term “precursor”.)

Subparagraph (u)

(u) “Transit State” means a State through the territory of which illicit narcotic drugs, psychotropic substances and substances in Table I and Table II are being moved, which is neither the place of origin nor the place of ultimate destination thereof.

Commentary

1.23 The background to the provisions in the 1988 Convention regarding transit States, and some discussion of the appropriateness of the definition is to be found in the commentary on article 10 below (see in particular paragraphs 10.3 and 10.4).

ARTICLE 2

Scope of the Convention

General comments

2.1 In the course of the discussions at various stages of the preparatory work, the point was made that, in order to produce an instrument that could prove acceptable to as many States as possible, it would be advisable to include in several articles, if not in all of them, appropriate safeguard clauses, taking into account the existence of the different national legal systems and the domestic laws of the States concerned. The idea was also put forward that, in addition to including such safeguard clauses, it would be desirable to devise a separate article of general application, covering the whole Convention, which would ensure that the obligations assumed by parties would in no way infringe universally recognized legal principles such as the sovereign equality and territorial integrity of States. This was considered particularly important in view of the far-reaching and, in many instances, innovative character of the penal provisions of the Convention.

2.2 A formal proposal to introduce a new article in that sense was made by the representative of Mexico in the review group on the draft Convention.⁹⁰ The proposed text was submitted for consideration to Committee I as article 1 *bis*.⁹¹ In view of the strong objections that some representatives had expressed informally, however, it was not discussed in its original form. A revised, more concise and less controversial formulation was presented after consultations among delegations.⁹² The revised formulation became the framework of the final text of article 2 as later adopted.

⁹⁰*Official Records*, vol. I ..., document E/CONF.82/3, chap. III, para. 120.

⁹¹*Ibid.*, document E/CONF.82/11, "Article 1 *bis*" (E/CONF.82/C.1/L.18/Add.6), sect. III, para. 3, p. 97.

⁹²The revised proposal (*Official Records*, vol. I ..., document E/CONF.82/11 "Article 1 *bis*" (E/CONF.82/C.1/L.18/Add.6), sect. III, para. 3, p. 98) was sponsored by 42 delegations.

2.3 In order to dispel doubts about the need for such an article in view of the numerous safeguard clauses included throughout the Convention⁹³ and to answer possible fears that it might be interpreted as a sweeping escape clause enabling parties to evade their obligations, the representative of Canada, as one of the sponsors, explained the rationale for the revised proposal.⁹⁴ He pointed out that none of the principles enunciated in the proposed article went beyond those contained in the other articles of the draft Convention and that it was useful to emphasize such general principles at the beginning of the instrument so that there could be no misunderstanding. If such an article, which had no equivalent in the 1961 and 1971 Conventions, was considered necessary, it was because the present instrument was significantly broader in scope, particularly with regard to its penal provisions. It had to be clearly understood, however, that the article “was not intended to derogate from obligations assumed pursuant to the Convention and was not meant to go beyond those principles of international law that were well established and universally accepted”.⁹⁵

2.4 The revised proposal was further amended to give a more positive tone to the wording. A redraft⁹⁶ emphasizing the obligations of the parties under the Convention was ultimately adopted without objection or reservation on the part of any delegation. It now constitutes article 2.

2.5 Article 2 is a distinctive feature of the 1988 Convention. Although not conceived as an overriding safeguard clause governing all the articles of the Convention, whether or not they themselves contain a safeguard clause, article 2 has the import of a statement of guiding principles for a correct interpretation and proper implementation of the substantive articles of the Convention. The choice of the word “Scope” for its title is in itself an indication of its role. It suggests that its purport is to define the object and ultimate design of the

⁹³The 1988 Convention stipulates a variety of safeguard or qualifying clauses (see article 3, paragraphs 1, 2, 5 and 10; article 5, paragraph 7; article 6, paragraphs 8 and 10; article 7, paragraph 4; article 9, paragraph 1, subparagraph (c); article 11, paragraph 1; and the comments below on these articles). By comparison, the 1961 Convention as amended and the 1971 Convention contained safeguard clauses in three articles (articles 35, 36 and 38 *bis*) and two articles (articles 21 and 22), respectively.

⁹⁴*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 24th meeting, paras. 86-93.

⁹⁵*Ibid.*, para. 93.

⁹⁶*Official Records*, vol. I ..., document E/CONF.82/11, “Article 1 *bis*” (E/CONF.82/C.1/L.18/Add.6), sect. II, para. 3, and sect. IV, para. 13.

Convention while indicating the legal context within which parties are to fulfil their obligations.

Paragraph 1

1. The purpose of this Convention is to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension. In carrying out their obligations under the Convention, the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems.

Commentary

2.6 In choosing to enunciate the “purpose” of the Convention in article 2, the parties have elevated to the level of a binding article a statement that it would be more customary to find in the preambular part of a treaty. In substance and language, it sums up the intentions of the parties as stated in the preamble, more specifically in the tenth paragraph, where it is recognized that eradication of illicit traffic requires “co-ordinated action within the framework of international co-operation”, and in the fourteenth paragraph, where “the importance of strengthening and enhancing effective legal means for international co-operation in criminal matters for suppressing the international criminal activities of illicit traffic” is also recognized.

2.7 The key word in the first sentence is “co-operation”. The whole Convention is framed with this purpose in view. It may be noted that the words “co-operation” or “co-operate” appear in a number of articles. Even where they are not expressly used, they may be considered implicit; there is hardly any article that could be effectively and fully implemented without some form of international cooperation at the bilateral or multilateral level. In the original draft of the proposed article, the Convention was said to constitute “an instrument of international co-operation”. Although the formula was not retained in the final text of the article, the characterization remains valid, and parties are expressly invited, in several articles, to conclude bilateral and multilateral agreements to

enhance the effectiveness of the international cooperation called for pursuant to those articles.⁹⁷

2.8 It may be inferred from the preparatory work that the language used in the second sentence does not mean that obligations assumed by parties under the Convention are subject to domestic law. It was emphasized on behalf of the sponsors of the text originally considered in Committee I, which was not substantially different from the adopted draft, that “the sentence was not in any way to be interpreted as a derogation from specific obligations assumed by Parties. Rather, it was to clarify that while Parties assumed obligations, it was up to each of them to decide what laws they would require and what institutions they would need to establish to meet such obligations”.⁹⁸

2.9 The sentence is a factual statement to the effect that parties are bound to take measures in order to introduce in the form they deem appropriate the kind of legislation that will satisfy the exigencies of the Convention. Such measures, whatever their nature or designation may be in the respective legal systems of the parties (they may consist of statutes, regulations or other formal enactments), are to be taken “in conformity with the fundamental provisions of [the Parties’] respective domestic legislative systems”.⁹⁹ This formula is to be understood as referring to the legislative organs and law-making process established in each State by the basic law of the land. It covers institutions as well as procedure.

2.10 Other provisions of the Convention contain similar phrases, to the effect that the measures that parties are required to adopt will assume various forms according to those parties’ legal systems and that parties are free to exercise discretion regarding the implementation modalities of those measures. Such phrases can be found, for instance, in article 3, paragraph 9, concerning the cautious use by a party of bail or pre-trial release “consistent with its legal system”; in article 3, paragraph 11, regarding the prosecution or punishment of offences “in conformity with [each Party’s domestic] law”; or in article 9,

⁹⁷See articles 5, 6, 7, 9, 11, 14 and 17.

⁹⁸*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 24th meeting, para. 88.

⁹⁹The wording in the French text, “*compatibles avec*”, might seem more restrictive than “in conformity with”, used in the English text. There was, however, no indication during the discussion of any intention to that effect. In other parts of the Convention, it appears that the terms “in conformity with” and “consistent with” were interchangeable.

paragraph 1, on close international cooperation “consistent with [the Parties’] respective domestic legal and administrative systems”. These formulas should be distinguished from the safeguard clauses,¹⁰⁰ which limit the obligations of parties in case of conflicting constitutional or legislative domestic rules by stipulating that the parties shall adopt certain measures “subject to”, “to the extent permitted by”, or “without prejudice to” the basic principles of their domestic legal systems. In some cases, both types of clauses are combined when a measure is required “if [the Party’s] law so permits and in conformity with the requirements of such law”.¹⁰¹

2.11 The second sentence of paragraph 1 would suggest that no provision in the Convention is considered self-executing. In order to carry out their obligations under the Convention, Parties must incorporate in their domestic law, through appropriate legislative and administrative action, the relevant substantive elements of its provisions.

Paragraph 2

2. The 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.

Commentary

2.12 Paragraph 2 reiterates universally accepted and well-established principles of international law concerning the sovereign equality and territorial integrity of States and non-intervention in the domestic affairs of States. These closely related principles, enshrined in the Charter of the United Nations (Article 2, paragraphs 1 and 7), have been reaffirmed and elaborated upon in subsequent authoritative documents, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly in its resolution 2625 (XXV).

2.13 The rationale for restating these principles in article 2 lies in the fact that the Convention, as already noted above, goes much further than previous drug control treaties in matters of law enforcement and mutual legal assistance.

¹⁰⁰See footnote 93 above.

¹⁰¹See article 6, paragraph 10, and article 5, paragraphs 4 and 9.

2.14 As will be shown in greater detail in the comments on the respective articles, care has been taken throughout the Convention to ensure that disputes or friction between parties do not arise because of a failure to comply strictly with the said principles. Formal requests have to be made, and authorizations granted, for putting in motion certain procedures or operations requiring the express prior consent of parties.

2.15 Special attention has been paid to this problem in a number of articles. Article 9 (Other forms of co-operation and training) requires that parties exercise caution in applying the forms of cooperation that are envisaged. It provides, for instance, for the establishment of joint teams “in appropriate cases and if not contrary to domestic law”. It stresses that officials of any party taking part in such teams “shall act as authorized by the appropriate authorities of the Party in whose territory the action is to take place; in all such cases, the Parties involved shall ensure that the sovereignty of the Party on whose territory the operation is to take place is fully respected”. In all cases, cooperation shall be initiated and conducted “on the basis of bilateral or multilateral agreements or arrangements”. The use of controlled delivery at the international level contemplated in article 11 is also subject to prior agreement or arrangement between the parties.

2.16 The conclusion of formal or informal agreements or arrangements between parties, recommended in several articles as a means of giving practical effect to certain provisions of the Convention and enhancing cooperation, should contribute to fostering respect for the principles of sovereign equality and territorial integrity referred to in paragraph 2.

2.17 Generally speaking, a party has no right to undertake law enforcement action in the territory of another party without the prior consent of that party. The principle of non-intervention excludes all kinds of territorial encroachment, including temporary or limited operations (so-called “in-and-out operations”). It also prohibits the exertion of pressure in a manner inconsistent with international law in order to obtain from a party “the subordination of the exercise of its sovereign rights”.¹⁰² Thus, for instance, the unauthorized undertaking by a party, within the territory of another party, of surveys to detect areas of illicit cultivation of narcotic plants, or the spraying of such areas for purpose of eradication, would not be in order.

¹⁰²Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex), “Principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter”, para. 2.

2.18 It would be futile to attempt to draw up a comprehensive catalogue of possible violations of those principles that might result from an arbitrary, indiscriminate application of specific provisions of the Convention. Occurrences that are open to dispute will have to be approached and resolved on a case-by-case basis in the light of the development of international law, taking into account the particular circumstances of each incident.¹⁰³

2.19 It was emphasized by the sponsors of the proposed text that the reference to the “territorial integrity of States” could in no way be interpreted by parties as a springboard to assert particular claims of rights to lands and waters.¹⁰⁴

Paragraph 3

3. A Party shall not undertake in the territory of another Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Party by its domestic law.

Commentary

2.20 Paragraph 3 is conceptually linked to the preceding paragraph and is complementary to it insofar as practical implications are concerned. Whereas paragraph 2 lays down, in affirmative language, a code of conduct to which parties should conform in fulfilling their obligations under the Convention, paragraph 3 sets out, in negative language, what parties should not do if they are to comply with the accepted customary norms of international law. Exclusive exercise of territorial jurisdiction is a corollary of sovereignty and has the same function as the prohibition of intervention in the domestic affairs of other States and due respect for territorial integrity. Compliance with these principles constitutes in fact a guarantee of the independent exercise of jurisdiction and performance of functions that a State considers to be within its own *domaine réservé*.

2.21 Nevertheless, by agreeing to be bound by the obligations imposed by the Convention in matters that otherwise might be considered to pertain to its *domaine réservé*, a party is precluded, in the absence of a specific safeguard

¹⁰³See article 32 and the comments thereon below.

¹⁰⁴*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 24th meeting, para. 89.

clause, from invoking an exception of exclusive jurisdiction in connection with the implementation of one of its provisions. A broad interpretation that domestic law should prevail in all cases would defeat the object and purpose of the Convention.

2.22 The conditions governing the establishment by parties of prescriptive jurisdiction are regulated in detail in article 4, which envisages the establishment of such jurisdiction on either a territorial or an extraterritorial basis. The establishment of prescriptive extraterritorial jurisdiction, widely accepted under international law, must be distinguished from the power to exercise jurisdiction and take enforcement action abroad, which, as emphasized by article 2, paragraph 3, is prohibited under international law save when undertaken with the consent of the State concerned.

2.23 The conduct of inquiries or investigations, including covert operations, on the territory of another State without its consent, in relation to criminal offences established in accordance with article 3, is not permissible. The conditions for taking action on the basis of cooperation are clearly set out in articles 7 (Mutual legal assistance), 9 (Other forms of co-operation and training) and 17 (Illicit traffic by sea).

2.24 Similarly, there is no general right of hot pursuit across land boundaries. Such a right may be the object of specific agreements between neighbouring States, as for instance between the Benelux countries since 1962, and between the parties to the Schengen agreements since 1990. It should be noted that in these instances an offender arrested following the exercise of the right to hot pursuit will have to be handed over to the competent local authorities, which may keep him under arrest pending the initiation of extradition procedures. It should also be borne in mind that, as affirmed by international case law, the generality and exclusivity that characterize territorial sovereignty and its implications as regards jurisdiction and functions, have a counterpart in the obligation for a State to protect within its territory the rights of other States and, more specifically, the “duty not to allow knowingly its territory to be used for acts contrary to the rights of other States”.¹⁰⁵

¹⁰⁵International Court of Justice reports, 1949, p. 18.

PART TWO

SUBSTANTIVE PROVISIONS

ARTICLES 3-19

ARTICLE 3

Offences and sanctions

General comments

3.1 Article 3 is central to the promotion of the goals of the Convention as set out in the preamble¹⁰⁶ and to the achievement of its primary purpose, stated in article 2, paragraph 1, “to promote co-operation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension”.¹⁰⁷ Towards that end, it requires parties to legislate as necessary to establish a modern code of criminal offences relating to the various aspects of illicit trafficking and to ensure that such illicit activities are dealt with as serious offences by each State’s judiciary and prosecutorial authorities.

3.2 The underlying philosophy embodied in article 3 is that improving the effectiveness of domestic criminal justice systems in relation to drug trafficking is a precondition for enhanced international cooperation. While, however, the decision was taken to deal in article 3, paragraph 2, with offences of possession, purchase and cultivation aimed at personal consumption, it was recognized that for various reasons, including considerations of expense and administrative practicality, the obligations imposed in certain key areas such as extradition

¹⁰⁶See above, comments on the preamble.

¹⁰⁷See also above, comments on article 2, paragraph 1.

(article 6), confiscation (article 5) and mutual legal assistance (article 7) would be restricted to the more serious trafficking offences established in accordance with paragraph 1. As has been pointed out elsewhere: “The article focuses and imposes the greatest international obligations on those offences which have the most international impact”.¹⁰⁸

3.3 At a practical level it was appreciated that, given the scope and ambition of article 3 and the nature of the obligations imposed, especially in respect of offences, many States wishing to become parties to the Convention would be faced with the need to enact complex implementing legislation in order to be in a position to comply fully with its terms. While it is important to stress that the Convention seeks to establish a common minimum standard for implementation, there is nothing to prevent parties from adopting stricter measures than those mandated by the text should they think fit to do so,¹⁰⁹ subject always to the requirement that such initiatives are consistent with applicable norms of public international law, in particular norms protecting human rights. Furthermore, it is important not to lose sight of the fact that those involved in trafficking activity frequently breach laws other than those directly related to drugs. As was noted in the 1987 Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control: “The illicit traffic in drugs not only violates national drug laws and international conventions, but may in many cases also involve other antisocial activities, such as organized crime, conspiracy, bribery, corruption and intimidation of public officials, tax evasion, banking law violations, illegal money transfers, criminal violations of import or export regulations, crimes involving firearms, and crimes of violence.”¹¹⁰ Thus the adequacy of other relevant parts of the criminal justice system may have an important bearing on the effectiveness of drug law enforcement efforts.

¹⁰⁸“Report of the United States Delegation to the United Nations Conference for the adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 101st Congress, Senate, Exec. Rept. 101-15, p. 26.

¹⁰⁹See below, comments on article 24; see also article 39 of the 1961 Convention and article 23 of the 1971 Convention, both of which adopt a similar approach to this issue.

¹¹⁰*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A, para. 223.

Paragraph 1, introductory part

1. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally:

Commentary

3.4 The criminalization and punishment of illicit traffic is one of the basic features of the Convention, and action under paragraph 1 is mandatory on all parties.

3.5 The corresponding provisions in the articles of the 1961 Convention, the 1961 Convention as amended, and the 1971 Convention dealing with penal provisions¹¹¹ contain the safeguard clause “Subject to its constitutional limitations”. This clause was judged inappropriate in the 1988 Convention, although a similar phrase is used in the particular context of article 3, paragraph 1, subparagraph (c), as the authors of the Convention were anxious to make the present text fully mandatory, allowing parties no loopholes. In the context of the 1961 Convention, the United Nations Secretariat had placed on record the fact that it was not aware of any constitutional limitations which would have the effect of preventing a party to that Convention from implementing the relevant provisions of the Convention,¹¹² so the safeguard clause was almost certainly unnecessary.

3.6 The obligation of a party is to take the necessary measures to establish certain “criminal offences under its domestic law”. This phrase, which makes no reference to any categorization of offences (for example as “felonies”) which may be found in a particular legal system, was chosen in order to accommodate the various approaches found in domestic laws on illicit traffic and drug offences. Where a distinction is drawn in a particular legal system between criminal offences and regulatory infractions,¹¹³ the Convention refers to the former category.

¹¹¹1961 Convention, art. 36, para. 1; 1961 Convention as amended, art. 36, para. 1, subpara. (a); 1971 Convention, art. 22, para. 1, subpara. (a).

¹¹²Commentary on the 1961 Convention, paragraph 13 of the comments on article 36.

¹¹³For example, the German *Ordnungswidrigkeiten*.

3.7 The various types of conduct listed in article 3, paragraph 1, are required to be established as criminal offences only “when committed intentionally”; unintentional conduct is not included. It accords with the general principles of criminal law that the element of intention is required to be proved in respect of every factual element of the proscribed conduct. It will not be necessary to prove that the actor knew that the conduct was contrary to law. Proof of the element of intention is the subject of a specific provision in article 3, paragraph 3. It is, of course, open to individual parties to provide in their domestic law that reckless or negligent conduct should be punishable, or indeed to impose strict liability without proof of any fault element.

Paragraph 1, subparagraph (a), clause (i)

- (a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;**

Commentary

3.8 In paragraph 1, subparagraph (a), clause (i), as in some other parts of article 3,¹¹⁴ express reference is made to the provisions of the earlier conventions. It was argued by some that the text of the 1988 Convention should in this respect be self-contained and independent of the earlier treaties, a point seen as of special relevance to States which might become parties to the 1988 Convention without ever having been parties to the earlier ones. The majority view, however, favoured an explicit linkage: the earlier conventions, in setting up the international drug control system, provided standards against which the illicit nature of the activities listed in the new convention could be gauged, and a consistent treatment was considered highly desirable.¹¹⁵ The resulting reference in the text serves to identify the relevant categories of

¹¹⁴Art. 3, para. 1, subpara. (a), clause (ii), and para. 2.

¹¹⁵*Official Records*, vol. I ..., document E/CONF.82/3, chap. III, para. 35.

narcotic drugs and psychotropic substances and to distinguish between licit and illicit uses.

3.9 Regarding the description of certain types of conduct as “contrary to the provisions of” the earlier conventions, it should be noted that those conventions, operating necessarily at the level of public international law, do not in themselves prohibit any conduct by an individual or group of individuals. The 1961 Convention requires parties to adopt measures rendering certain types of conduct punishable offences¹¹⁶ and so could not be a self-executing treaty. As explained by the Legal Adviser to the 1971 Conference, it was in recognition of this fact¹¹⁷ that the language of the 1971 Convention was even less direct: a party is to treat as a punishable offence “any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention”.¹¹⁸

3.10 It seems clear, however, that the reference to the provisions of the earlier conventions was intended to reduce the scope of the otherwise very broad language of the subparagraph. A fair interpretation would seem to be that the types of conduct listed are to be criminalized in the circumstances which would attract the obligations of parties to the earlier conventions. For example, drugs listed in Schedule II of the 1961 Convention are subject to a less demanding regime, which takes account of the existence of a substantial legitimate retail trade in such drugs.¹¹⁹ It was plainly not intended that article 3 of the 1988 Convention should impose any additional requirement that parties make the offering for sale of such drugs a criminal offence. Similarly, under the 1971 Convention a party may give notice prohibiting the import of certain substances from among those listed in Schedule II, Schedule III or Schedule IV of that Convention, and other parties must take measures to ensure that none of the notified substances is exported to the country concerned.¹²⁰ It follows that

¹¹⁶In article 36, paragraph 1, of the 1961 Convention, the relevant types of activity are described as being “contrary to the provisions of this Convention”.

¹¹⁷*Official Records of the United Nations Conference on the Adoption of a Protocol on Psychotropic Substances, Vienna, 11 January 1971-21 February 1971*, vol. II (United Nations publication, Sales No. E.73.XI.4), Summary records of the plenary meetings, 12th plenary meeting, para. 10; and Commentary on the 1971 Convention, paragraph 2 of the comments on article 22, paragraph 1, subparagraph (a).

¹¹⁸1971 Convention, art. 22, para. 1, subpara. (a).

¹¹⁹1961 Convention, art. 2, para. 2, and art. 30, para. 6.

¹²⁰1971 Convention, art. 13.

“exportation” of substances in clause (i) must be interpreted by reference to the provision of article 13 of the 1971 Convention.

3.11 In short, the effect of the references to the earlier conventions is to incorporate by reference the regimes applicable to particular categories of narcotic drugs and psychotropic substances. For this purpose, a party to the 1988 Convention, in implementing its obligation to render prescribed conduct a criminal offence, must have regard to the provisions of the earlier conventions even if it is not a party to them.

3.12 The text of paragraph 1, subparagraph (a), clause (i), is closely modelled upon article 36, paragraph 1, of the 1961 Convention. Of the types of activity listed in that provision, “cultivation”, “possession” and “purchase” are dealt with separately, in paragraph 1, subparagraph (a), clauses (ii) and (iii), and paragraph 2. This presentation facilitates the reference, in the case of cultivation, possession and purchase, to the purpose of these activities and to the specific treatment of such offences for the personal consumption referred to in paragraph 2.

3.13 Some of the types of activity listed in clause (i) are defined in the 1961 Convention; it will be convenient to examine each one in turn.

“Production”

3.14 “Production” is defined in the 1961 Convention¹²¹ as “the separation of opium, coca leaves, cannabis and cannabis resin from the plants from which they are obtained”. The definition is specific as to the products and the plants from which they are obtained and it cannot be generalized because in other international instruments, as well as in many national laws and in the pharmaceutical industry, “production” is usually a synonym for “manufacture”. The term “production” is not used in the 1971 Convention.

“Manufacture”

3.15 “Manufacture” is defined in both the 1961 and 1971 Conventions. The 1961 definition is “all processes, other than production, by which drugs may be obtained and includes refining as well as the transformation of drugs into other drugs”.¹²² In the 1971 Convention, “manufacture” means “all processes by which psychotropic substances may be obtained, and includes refining as well as the

¹²¹1961 Convention, art. 1, para. 1, subpara. (t).

¹²²1961 Convention, art. 1, para. 1, subpara. (n).

transformation of psychotropic substances into other psychotropic substances ... [and] also ... the making of preparations other than those made on prescription in pharmacies".¹²³ These definitions are fully discussed in the commentaries on the earlier conventions.¹²⁴

"Extraction"

3.16 The term "extraction" was used in the 1961 Convention without definition. Extraction is the separation and collection of one or more substances from a mixture by whatever means: physical, chemical or a combination thereof.

"Preparation"

3.17 The 1961 Convention contains a definition of the word "preparation",¹²⁵ but the definition refers to the noun (used in a number of articles of the 1961 Convention)¹²⁶ denoting the result of a process rather than the process itself of preparing something. Accordingly, the definition in the 1961 Convention can be ignored for present purposes.

3.18 "Preparation", also referred to as "compounding", denotes the mixing of a given quantity of a drug with one or more other substances (buffers, diluents), subsequently divided into units or packaged for therapeutic or scientific use. This understanding is supported by the sequence of words used: "preparation" comes immediately before "offering" and "offering for sale".

"Offering" and "Offering for sale"

3.19 The similarity of the terms "offering" and "offering for sale", which makes it convenient to examine them together, may be misleading. In the French text no such similarity appears, and *l'offre* can be contrasted with *la mise en vente*.

3.20 "To offer" something is to hold it out, or make it available, so that another may receive it. Although providing a person with narcotic drugs or

¹²³1971 Convention, art. 1, subpara. (i). "Preparation" is defined in article 1, subparagraph (f); but see the discussion of that word in paragraphs 3.17 and 3.18 below.

¹²⁴Commentary on the 1961 Convention, comments on article 1, paragraph 1, subparagraph (n); and Commentary on the 1971 Convention, comments on article 1, subparagraph (i).

¹²⁵"A mixture, solid or liquid, containing a drug" (1961 Convention, art. 1, para. 1, subpara. (s)).

¹²⁶For example, article 2, paragraphs 3 and 4.

psychotropic substances as a gift is not expressly mentioned in the subparagraph, the process of making the gift will commonly involve “offering” or, if the donee is given no opportunity to refuse, “delivery”.

3.21 “Offering for sale” includes any displaying of goods or other indication that they are available for purchase. It would seem to include any solicitation, for example the question “Would you be interested in buying X?”.

“Distribution”

3.22 Although the term “distribution” can be used when anything is shared out between a number of people, a more apt reference may be to the notion of “distributorship”, the commercial role for ensuring that goods pass from manufacturer or importer to wholesaler or retailer. In other words, it refers to the movement of goods through the chain of supply.¹²⁷

“Sale”

3.23 The word “sale” requires no elaboration. It will be noted, however, that “purchase” is not included in this subparagraph.¹²⁸

“Delivery on any terms whatever”

3.24 The term “delivery” clearly covers the physical delivery of goods to a person or a destination, and it is immaterial whether this is as a result of a sale, a gift, or an arrangement under which the recipient is to carry or transmit the goods to some other place. In some legal systems the transfer of documents of title relating to goods, or of the keys to storage facilities in which the goods are kept, may amount to the “delivery” of the goods themselves. The inclusion of the words “on any terms whatever” suggests that these extended understandings of delivery may properly be included.

“Brokerage”

3.25 A “broker” is an agent employed to make bargains or contracts on behalf of another. He or she acts as a middleman, a negotiator or a “fixer”. In some legal systems, the term is limited to persons who are not themselves in possession of the relevant goods: an agent in possession is a “factor” rather than a “broker”. In other legal systems, a broker will be regarded as having participated in the main offence.

¹²⁷Compare the heading of article 30 of the 1961 Convention, “Trade and distribution”.

¹²⁸See below, comments on article 3, paragraph 1, subparagraph (a), clause (iii).

“Dispatch” and “dispatch in transit”

3.26 The terms “dispatch” and “dispatch in transit” both cover the activity of sending goods on their way, either to a fixed destination known to the sender or to a carrier who will take the goods to a destination of which the sender may be ignorant.

“Transport”

3.27 “Transport” covers carriage by any mode (land, sea or air). It would seem that a contract of carriage is not required; merely gratuitous carriage is within the scope of the paragraph.

“Importation or exportation”

3.28 The terms “importation” and “exportation” are not defined in the 1988 Convention, but the words “import” and “export” were defined in the 1961 Convention.¹²⁹ There they mean “the physical transfer of drugs from one State to another State, or from one territory to another territory of the same State”, the latter part of the definition referring to territories identified as separate entities for the system of certificates and authorizations under article 31 of the 1961 Convention.

Paragraph 1, subparagraph (a), clause (ii)

- (ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;**

Commentary

3.29 Subparagraph (a), clause (ii), covers the actual cultivation of the specified plants¹³⁰ for the purpose of the production of narcotic drugs. The subject of cultivation for personal consumption was dealt with in article 3, paragraph 2. The reference in the present subparagraph to the provisions of the 1961 Convention and of that Convention as amended is important; under those texts some cultivation is licit. Article 22 of the 1961 Convention enables parties to prohibit the cultivation of the opium poppy, the coca bush or the cannabis

¹²⁹1961 Convention, art. 1, para. 1, subpara. (m).

¹³⁰For definitions of “opium poppy”, “coca bush” and “cannabis plant”, see the 1961 Convention, article 1.

plant, but does not require such action in every case. Where cultivation is permitted for licit purposes, a system of controls must be applied.¹³¹ Provision is made under the 1961 Convention for the destruction of illicitly cultivated coca bushes and under the 1961 Convention as amended for the destruction of illicitly cultivated opium poppies and cannabis plants.¹³²

Paragraph 1, subparagraph (a), clause (iii)

- (iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;**

Commentary

3.30 Under subparagraph (a), clause (iii), a party must criminalize the possession of narcotic drugs or psychotropic substances, or their purchase, whether or not the purchaser actually takes possession, where the possession or purchase is for the purpose of an activity established as a criminal offence under article 3, paragraph 1, subparagraph (a), clause (i). This provision does not cover possession or purchase for personal consumption, which is dealt with in article 3, paragraph 2.

Paragraph 1, subparagraph (a), clause (iv)

- (iv) The manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;**

Commentary

3.31 The provision in subparagraph (a), clause (iv), requires the creation of criminal offences and forms a counterpart to the regulatory provisions of

¹³¹See the 1961 Convention, article 23 (opium poppy, as to which see also article 25), article 26 (coca bush and coca leaves, as to which see also article 27) and article 28 (cannabis).

¹³²See article 26, paragraph 2, of the 1961 Convention and article 22, paragraph 2, of the 1961 Convention as amended; for a synopsis of the control measures applicable to the opium poppy, the coca bush and the cannabis plant, see article 2, paragraph 7, of the 1961 Convention as amended.

articles 12 and 13. Article 12 provides that parties must take such measures as they deem appropriate to prevent diversion of substances in Table I and Table II for illicit production or manufacture of narcotic drugs and psychotropic substances. Article 13 deals with trade in and diversion of materials and equipment used in the illicit production of narcotic drugs and psychotropic substances. The present subparagraph makes use of a number of terms, the meaning of which has already been examined.¹³³ It should be compared with article 3, paragraph 1, subparagraph (c), clause (ii), which deals with the possession of equipment, materials and substances as opposed to their manufacture, transport or distribution. The “possession” provision is subject to the safeguard clause in subparagraph (c), but the establishment of offences of manufacture, transport and distribution is mandatory on all parties.

Paragraph 1, subparagraph (a), clause (v)

- (v) The organization, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above;**

Commentary

3.32 The focus of the present provision is the leadership of drug trafficking groups and it was regarded as being of great importance in efforts to disrupt major trafficking networks. Its value was seen to flow from the potential to reach those at the highest levels of the illicit drug trade. This provision, it should be noted, constitutes a strengthening and expansion of the scope of article 36, paragraph 2, subparagraph (a), clause (ii), of the 1961 Convention, which was confined to financial operations in relation to trafficking and where this obligation was also subject to the operation of a limiting chapeau, namely that it was “subject to the constitutional limitations of a Party, its legal system and domestic law”.¹³⁴ A later provision of the Convention, article 3, paragraph 1, subparagraph (c), clause (iv), which is prefaced by a safeguard clause, deals in more general terms with various types of participation in offences, including conspiracy and the facilitation of offences. The present subparagraph makes it mandatory, without any safeguard clause, for parties to create offences

¹³³For “cultivation”, see paragraph 3.29 above; for “distribution”, see paragraph 3.22 above; for “manufacture”, see paragraph 3.15 above; for “production”, see paragraph 3.14 above; and for “transport”, see paragraph 3.27 above.

¹³⁴See Commentary on the 1961 Convention, comments on article 36, paragraph 2, subparagraph (a), clause (i), and paragraphs 6-8 of the comments on article 36, paragraph 2, subparagraph (a), clause (ii).

covering particular types of conduct, some of which might otherwise be considered to fall within the provision of subparagraph (c), clause (iv).

3.33 “Organization” and “management” are not defined, but are apt to describe the activities of those actors in organized crime who keep themselves well away from direct involvement in illicit traffic but who direct the activities of subordinates. “Financing” covers the provision of capital needed for illicit operations and would seem to be narrower than the term “financial operations”, used in the 1961 Convention;¹³⁵ other types of conduct covered by that latter expression will be dealt with under the money-laundering provisions of article 3, paragraph 1, subparagraph (b).

Implementation considerations: paragraph 1, subparagraph (a)

3.34 As was noted above, under paragraph 1, subparagraph (a), each party shall “establish as criminal offences under its domestic law, when committed intentionally”, a fairly comprehensive list of activities that have a major international impact. This subparagraph seeks to reinforce and to supplement the penal measures contained in pre-existing multilateral instruments negotiated under the auspices of the United Nations. Article 36 of the 1961 Convention and of that Convention as amended, and article 22 of the 1971 Convention are particularly relevant in this context. The closeness of the relationship with these instruments is especially evident in the first two subparagraphs, which define the prohibited activities in question by referring to them as being “contrary to the provisions of” the relevant conventions.

3.35 This drafting method ensures that the many States that have become parties to the 1961 Convention as amended and to the 1971 Convention and have effectively implemented them in their domestic legal systems will have in place the basic framework for compliance, including the necessary system to establish which substances are subject to control and for what licit purposes such substances can be manufactured, possessed and transferred. Even for such States, however, it will be necessary to examine closely pre-existing laws in order to ensure full compliance with the obligations contained in subparagraph (a), clauses (i) and (ii). This flows from the fact that those obligations are absolute and, unlike the previous penal provisions, not subject to the limiting effect of safeguard clauses.

¹³⁵1961 Convention, art. 36, para. 2, subpara. (a), clause (ii).

3.36 Becoming a party to, and effectively implementing, the 1961 Convention as amended and the 1971 Convention is a highly desirable step for any State about to become or that has become a party to the 1988 Convention. In the present context the task faced by any State that is not a party to all of the other relevant drug control conventions will be a more complex and demanding one. A close examination of the adequacy of existing domestic laws in relation to the classification and regulation of the licit cultivation, production, manufacture and trading of narcotic drugs, psychotropic substances and the chemical substances used in their manufacture will be required. For any State that determines that its current position is inadequate in this regard, appropriate action will have to be taken. For those contemplating major legislative changes, consideration might be given to the drafting of a single national law in respect of these matters.¹³⁶

3.37 In seeking to ascertain the extent to which existing domestic criminal law complies with the requirements of paragraph 1, subparagraph (a), it should be borne in mind that, following previous practice, the obligations are stated with a deliberate degree of generality. Consequently, each party is left with considerable flexibility in determining how best, in the light of its moral, cultural and legal traditions, to secure the required goal. This important factor is further emphasized in paragraph 11.¹³⁷ Consequently it is not necessary for relevant domestic criminal laws to make specific mention of each distinct category and element mentioned in paragraph 1, subparagraph (a). What is required is that the criminal law of each party, when taken as a whole, should provide comprehensive coverage. The requirement is for the establishment of criminal offences. Resort to the creation of administrative offences in this context would therefore not satisfy the requirements of the Convention.

3.38 One area in which existing law may well be found wanting is that covered by paragraph 1, subparagraph (a), clause (iv). It will be recalled that this new provision requires the criminalization of the intentional manufacture, transport or distribution of equipment, materials and substances listed in Table I and Table II (substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances) knowing that they are to be used in or for the illicit cultivation, production or manufacture of substances controlled under the

¹³⁶See, for example, United Nations International Drug Control Programme, "Model Law on the Classification and Regulation of the Licit Cultivation, Production, Manufacture and Trading of Narcotic Drugs, Psychotropic Substances and Precursors", *Model Legislation* (June 1992), vol. I.

¹³⁷See below, comments on article 3, paragraph 11.

1961 or 1971 Convention. The inclusion here of a specific requirement that the ultimate use of the substances be known in addition to the requirement that the offences be committed intentionally, contained in the preambular wording for subparagraph (a) as a whole, underlines the difficulty of projecting the criminal law into areas in which lawful commercial activity predominates. It is important in developing an appropriate national approach to this subject to note the close relationship with the criminal law measures envisaged in article 3, paragraph 1, subparagraph (c), clause (ii), as well as the regulatory and other measures to be taken by the parties pursuant to the terms of articles 12 and 13.¹³⁸

3.39 A further area that has been the source of difficulty in terms of effective implementation is that covered by subparagraph (a), clause (v), namely the organization, management or financing of any of the serious offences mentioned elsewhere in subparagraph (a).

3.40 In dealing with these matters, some States have been able to rely heavily or exclusively on widely drawn legislative provisions, often in conjunction with the inchoate offence of conspiracy.¹³⁹ In other instances, traditional mechanisms of the criminal law have been supplemented or substituted by new legislative strategies designed specifically to attack the financial and managerial dimensions of drug trafficking or organized crime more generally.¹⁴⁰

Paragraph 1, subparagraph (b)

- (b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the**

¹³⁸See below, comments on articles 12 and 13.

¹³⁹See below, comment on article 3, paragraph 1, subparagraph (c) (see also Italy, Decree No. 309 of 9 October 1990).

¹⁴⁰United States law has created special criminal offences for such activities. The criminal law categories of the continuing criminal enterprise, 21 USC s.848, and racketeer influenced and corrupt organizations, 18 USC s.1961-1964, have been particularly significant. Article 222.34 of the French Penal Code of 1994 has created a specific criminal offence in this regard.

commission of such an offence or offences to evade the legal consequences of his actions;

- (ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;**

Commentary

3.41 The provisions of paragraph 1, subparagraph (b), strike at money-laundering and, like those in subparagraph (a), make the creation of offences mandatory for all parties. Their content and drafting style owe much to the then current legislation of the United States in this area.¹⁴¹ In all cases covered by these provisions, the offence covers only conduct “committed intentionally”.¹⁴² Subparagraph (b) falls into two parts, the first dealing specifically with acts of conversion or transfer of property and the second dealing more broadly with steps taken to conceal or disguise the property and rights and interest in it.

3.42 The text is silent on an issue which in the period after 1988 gave some difficulty to legislators. The language, and particularly the reference to “transfer”, can be applied to the person who commits the original (predicate) offence. Some take the view, however, that money-laundering is distinct from the predicate offence and that the money-laundering offence is essentially committed by another person in aid of the predicate offence. The Convention appears not to bind parties to one view of this matter.

3.43 In all cases the offender must have known that the relevant property was derived either from an offence established in accordance with paragraph 1, subparagraph (a) (or from more than one such offence) or from an act of participation in such an offence (or offences). The interpretation of the references to “an act of participation” in an offence or offences is not free from difficulty. The Convention, in paragraph 1, subparagraph (c), clause (iv), of this article, provides for the creation of offences of participation, but that provision

¹⁴¹18 USC 1956-57, subsequently repealed and replaced.

¹⁴²Art. 3, para. 1, introductory paragraph.

is subject to a safeguard clause so that there may be parties under whose law an act of participation is not itself an offence. The text of the present provision, however, refers to “an act” of participation and not to “an offence” of participation. It appears that a party must create the money-laundering offence in the terms of subparagraph (b), whatever limitations may exist within its own legal system on the creation of offences of participation.

3.44 The offender’s knowledge must relate to an offence (the predicate offence) or an act of participation in an offence. The issue of the location of the predicate offence, or the act of participation, does not seem to have been considered in the course of the negotiations. The issue arises where a person makes a transfer of property in one State, knowing that the property was derived from an offence in another State. Examples of greater complexity can be devised, such as where the transfer of property was between two States or where the predicate offence was in one State but there was also an act of participation in another State. There is no territorial limitation expressed in the text of the provision, and it would accord with recent practice if implementing legislation were to reflect the possibility that the predicate offence was located in a State other than the enacting State.

3.45 The offender’s knowledge must be that the property is derived from “any” of the specified offences. This suggests that he need not be shown to have been aware of the precise offence which had been committed. Knowledge that the property was derived from some ill-defined organized crime or racketeering activity would, however, not suffice. It is, of course, open to parties to define money-laundering as broadly as they choose, for example by extending it beyond the cases in which the predicate offence is one of drug trafficking.

3.46 Most modern legislation in this area uses the term “proceeds” to describe property derived, directly or indirectly, from criminal activity. The word “proceeds” is defined in the 1988 Convention in just this sense, as “any property derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1”.¹⁴³ The decision not to make use of the term “proceeds” in article 3, paragraph 1, subparagraph (b), may well have been in error, but it does raise the question whether the reference to property being “derived from” certain offences can be taken to cover property “obtained directly or indirectly” from those offences. On a broad understanding of “derivation” it would seem possible to include also certain cases of “indirect derivation”.

¹⁴³ Art.1, subpara. (p); see also comments in paragraphs 1.17-1.18 above.

3.47 Subparagraph (b), clause (i), deals with the “conversion or transfer” of property. In the case of a tangible asset, these terms may be used to cover the transfer of the asset to another person in an unchanged state and the conversion of the asset into another form (for example its sale or exchange, so that the property’s value is represented by the money or other asset received). Frequently the property will take the form of money, which may be converted either into another currency or into some other form of property, for example by deposit in a bank or the purchase of shares or bonds. It may, in its new form, be transferred, perhaps electronically, to another jurisdiction.

3.48 The “transfer” of property is commonly thought of as the act of the transferor rather than the transferee, the recipient. In the case of the “conversion” of property (for example by exchange), both parties may be regarded as acting. It would seem, however, from the separate treatment of “acquisition” of property that the recipient is not covered by the present provision.

3.49 An act of conversion or transfer must not only be committed intentionally (see paragraphs 3.7 and 3.41 above) and with the prescribed knowledge (see paragraphs 3.44 and 3.45 above); the act must also be done for one of two purposes set out in the text. It is clear that those purposes overlap to a considerable extent. One is expressed in terms of the property: the purpose of concealing or disguising the illicit origin of the property. Any conversion or transfer of property may have the effect of concealing or disguising the origins of the property; what is required is that it be done for that purpose, with that motivation. The other purpose is expressed in terms of assisting “any person” (and as the text does not speak of “any other person” it is apt to include the offender himself) to evade the legal consequences of his involvement in the commission of the offence or offences. In many cases, both purposes will be evident: the illicit origins of the property will be disguised so that the chances of its confiscation and the offender’s conviction are reduced.

3.50 Subparagraph (b), clause (ii), is more widely drafted, no element of “purpose” being expressly mentioned although it seems implicit in the language used. It covers any intentional acts, done with knowledge of the illicit derivation of the property, which amount to the concealment or disguise of “the true nature, source, location, disposition, movement, rights with respect to, or ownership of” the property. The “source” of property could include its physical origin (for example, the country from which it was imported) as well as its derivation. Some of the other terms plainly overlap in meaning; the movement of goods will commonly involve their location.

Implementation considerations: paragraph 1, subparagraph (b)

3.51 As has been seen, paragraph 1, subparagraph (a), clause (v), of article 3 gives expression to the concept that one of the principal requirements of an effective strategy to counter modern international drug trafficking is the need to provide the law enforcement community with the necessary tools to undermine the financial power of the criminal groups and networks involved. In the late 1980s, a broad consensus emerged within the international community that the criminalization of money-laundering was an essential component of such a strategy. Paragraph 1, subparagraph (b), when viewed in conjunction with paragraph 1, subparagraph (c), clause (i), was designed to satisfy this need, although the term “money-laundering” itself, owing to its relative novelty and problems of translation, was not used in the text. Given the fact that no previous multilateral instrument had dealt with this matter, the concept itself was expressed in some detail.¹⁴⁴ Notwithstanding this fact, parties to the 1988 Convention have considerable flexibility in determining the most appropriate manner through which to satisfy the obligations in question. In practice some have enacted legislation which uses language similar to that found in article 3, paragraph 1, subparagraph (b), while others have found it convenient to use alternative strategies such as the modification of the scope of pre-existing criminal offences. Either approach is acceptable so long as the full range of conduct is criminalized.

3.52 Since the 1988 Convention was formulated, significant advances have been recorded in furthering an understanding of the nature and extent of the money-laundering process and of the threat it poses. In addition, valuable experience has been gained from the practical operation of relevant domestic legislation and from the refinement and further development of countermeasures against money-laundering in a variety of forums.¹⁴⁵ It may be of particular value, therefore, for those charged with the implementation of this significant provision to familiarize themselves with such developments in order to determine whether or not it would be appropriate to take advantage of the flexibility accorded by article 24 in order to adopt more ambitious measures than those strictly required by the Convention.

¹⁴⁴See above, comments on article 3, paragraph 1, subparagraph (b).

¹⁴⁵See W. Gilmore, *Dirty Money: the Evolution of Money Laundering Counter-Measures* (Strasbourg, Council of Europe Press, 1995); and R. Parlour, ed., *Butterworths Guide to Money Laundering Law and Practice* (London, Butterworths, 1995).

3.53 One such issue is the scope to be given to the offence of money-laundering in the implementing legislation. While the obligation contained in paragraph 1, subparagraph (b), is restricted to the criminalization of the laundering of property derived from serious drug trafficking offences, recent years have witnessed the emergence of a trend which favours the extension of the criminal offence beyond the narcotics predicate. Such an approach is, for example, embodied in article 6 of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and encouraged by the fifth of the 40 recommendations adopted by the Financial Action Task Force on Money Laundering in 1990. These international precedents have been increasingly reflected in the content of the criminal law of individual States, some of which have extended the offence on an all-crimes basis while others have elected to do so only in respect of certain specified offences of a serious nature.¹⁴⁶ These domestic and international developments mirror the perception of a number of commentators and law enforcement and other officials that a drug specific approach brings with it a number of disadvantages. For instance, there may be difficulties in proving that particular proceeds are attributable to drug trafficking activities especially when the persons in question are involved in a broad range of criminal activities.¹⁴⁷

3.54 A further question to be considered is whether corporations, as distinct from their employees, should be subject to criminal liability for money-laundering. This is a matter on which both the 1988 Convention and the Council of Europe Convention of 1990 remain silent. There has, however, been some discussion of it at an international level. In 1990, the Financial Action Task

¹⁴⁶For example, as at 28 June 1996, of the 26 member States of the Financial Action Task Force, 25 had legislated to criminalize drug money-laundering and 19 had enacted the offence beyond the drugs predicate (see Financial Action Task Force on Money Laundering, "Annual report, 1995-1996", Paris, 28 June 1996, p. 11). In the light of this trend and other factors, the Financial Action Task Force, as part of a review of its original 40 recommendations, reformulated its position. The new wording, now contained in recommendation 4, reads: "Each country should take such measures as may be necessary, including legislative ones, to enable it to criminalize money-laundering as set forth in the Vienna Convention. Each country should extend the offence of drug money-laundering to one based on serious offences. Each country would determine which serious crimes would be designated as money-laundering predicate offences" (Financial Action Task Force on Money Laundering, "Annual report, 1995-1996", Paris, 28 June 1996, annex I, p. 3).

¹⁴⁷See, for example, "Money-laundering and associated issues: the need for international cooperation" (E/CN.15/1992/4/Add.5) and "Report and recommendations of the International Conference on Preventing and Controlling Money Laundering and the Use of the Proceeds of Crime: A Global Approach" (E/CONF.88/7).

Force, in the seventh of its recommendations, adopted the view that “where possible” such liability should be imposed.¹⁴⁸ A further useful precedent is to be found in article 14 of the Model Regulations concerning Laundering Offences Connected to Illicit Trafficking and Related Offences, which were approved by the General Assembly of the Organization of American States (OAS) in 1992. The creation of a system of corporate criminal liability helps to resolve a number of difficulties that can arise when money-laundering is pursued through legal persons. For example, complex management structures can render the identification of the person or persons responsible for the commission of the offence difficult or impossible. In such cases the imposition of liability on the legal person may be the only option if the activity in question is not to go unpunished. Similarly a sanction imposed on an institution rather than an individual can act as a catalyst for the reorganization of management and supervisory structures to ensure that similar conduct is deterred.

3.55 Given the widely acknowledged fact that many sophisticated money-laundering operations contain conspicuous transnational features, it is generally regarded as being significant for a State to be in a position to prosecute an individual for involvement in such activities even when the underlying criminal activity that generated the proceeds in question took place elsewhere. While the 1988 Convention does not specifically address itself to this issue, it has since become commonplace in international practice to do so. For instance, the definition of money-laundering given in article 1 of the Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering, issued by the Council of Ministers of the European Communities on 10 June 1991, which draws heavily on the approach taken by the 1988 Convention, also provides that money-laundering “shall be regarded as such even when the activities which generated the property to be laundered were perpetrated in the territory of another Member State or in that of a third country”.¹⁴⁹

¹⁴⁸In Iceland, for example, financial institutions are subject to corporate criminal liability for money-laundering (see Financial Action Task Force on Money Laundering, “Annual report, 1994-1995”, Paris, 8 June 1995, p. 9, footnote 3; and *Liability of Enterprises for Offences: Recommendation No. R(88) adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 and Explanatory Memorandum* (Strasbourg, Council of Europe, 1990)).

¹⁴⁹See also article 3 of OAS Model Regulations concerning Laundering Offences Connected to Illicit Trafficking and Related Offences and article 6, paragraph 2, subparagraph (a), of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 1990).

3.56 The money-laundering provisions of the 1988 Convention are confined to securing improvements in national criminal law systems with consequential benefits for the scope and effectiveness of international cooperation. They are not addressed to those elements of the strategy designed to counter money-laundering, which embrace a preventive philosophy. This dimension of the wider international strategy is reflected in a number of international and regional precedents, including the Basle Statement of Principles on prevention of criminal use of the banking system for the purpose of money-laundering, issued in December 1988 by the Basle Committee on Banking Regulations and Supervisory Practices, the 1991 European Communities Directive and the 1992 OAS Model Regulations. The utility of enhancing the role of the financial system in an attempt to create an inhospitable and hostile environment for the money-launderers is also central to the programme elaborated by the Financial Action Task Force. While there are a number of important differences in the scope and ambition of these various initiatives, they reveal the emergence of important common principles. They also underline the extent to which a shared belief has evolved that effective efforts to counter money-laundering require the collective will and commitment of the public and private sectors working together. Given these developments, it would be prudent for those responsible for implementing paragraph 1, subparagraph (b), to consider the extent to which this dimension of modern international practice is acceptable in terms of national policy and appropriate to local circumstances.

3.57. At the heart of the preventive strategy there has been a general acknowledgement of the value of requiring institutions brought within its ambit to take appropriate steps to identify their customers¹⁵⁰ and to retain records of both identity and specific categories of transactions for set periods of time.¹⁵¹ The requirement of customer identification, which is frequently associated with the identification of beneficial owners, gives expression to the belief that the credit, financial or other institution concerned is better placed than law enforcement or other authorities to judge whether a customer or a particular transaction is bona fide.¹⁵² The retention of records is seen as an important complement to the “know your customer” principle in that it ensures that an audit trail exists to assist the authorities in identifying money-launderers and

¹⁵⁰See, for example, article 3 of the European Communities Directive and article 10 of the OAS Model Regulations.

¹⁵¹See, for example, article 4 of the European Communities Directive.

¹⁵²See, for example, J. C. Westerweel and J. L. Hillen, *Measures to Combat Money Laundering in the Netherlands* (The Hague, Ministry of Finance, 1995), p. 4.

tracing the movement of illicit proceeds with a view to their eventual confiscation.¹⁵³

3.58 A second critical element of this approach is to ensure full cooperation between the institutions concerned and the relevant supervisory bodies¹⁵⁴ and those charged with the responsibility of combating money-laundering operations. This philosophy of cooperation frequently extends to informing the latter, on their own initiative, of any fact which might be an indication of money-laundering. All States wishing to give expression to this approach will have to determine the functions and powers of the money-laundering control service that will be authorized to receive such reports. Many States have charged an appropriate law enforcement agency with this task while others have elected to create the national service elsewhere, for example in the ministry of finance. Where the latter practice is followed, those charged with the introduction of this strategy will have to pay particular attention to the establishment of effective links between the reporting service and the relevant national law enforcement authorities. It is common to buttress a system for reporting “suspicious transactions” with a requirement, designed to safeguard the integrity of any subsequent investigation, that the fact that such information has been transmitted to the competent authorities must not be brought to the attention of the customer concerned or to any third party.¹⁵⁵ Frequently, breach of such an obligation attracts criminal sanctions.

3.59 It is appreciated that, in reaching out to and involving credit, financial and other institutions in this way, it is necessary to ensure that they are, in fact, in a position to play this role in a full and effective manner. To this end they are frequently provided with an element of legal immunity from suit for breach of contract or other legal obligations such as those relating to customer confidentiality.¹⁵⁶

3.60 Some countries have taken the view that the law enforcement efforts to combat money-laundering would be enhanced if the appropriate national authority were in a position to be informed of all large cash transactions taking place within their national territory. To that end a minority of States that have

¹⁵³See also below, comments on article 5.

¹⁵⁴See, for example, article 10 of the European Communities Directive.

¹⁵⁵See, for example, article 13, paragraph 3, of the OAS Model Regulations.

¹⁵⁶See, for example, article 8 of the European Communities Directive.

embraced the preventive approach have introduced a system of mandatory and routine reporting of certain transactions above a fixed threshold.¹⁵⁷ No consensus has yet emerged, however, as to the utility and practicality of this approach.¹⁵⁸ More commonly, States have elected to require financial institutions to report suspicious or unusual transactions.

3.61 By way of contrast it has been widely accepted that, if the preventive approach is to be effective, the institutions concerned should establish adequate internal control and communication systems. In addition, it has become a common practice to call upon the institutions concerned to initiate training programmes for their employees in order to make them aware of legal requirements and to help them to recognize transactions that may be related to money-laundering and to instruct them on how best to proceed in such cases.¹⁵⁹

3.62 Given the highly intrusive nature of this dimension to the growing international effort to combat money-laundering, it would be prudent to ensure, as far as possible, that the strategy adopted is sensitive to the commercial realities of the sectors of the economy that are affected. Consequently, it is highly desirable to engage in dialogue and enter into close cooperation with the economic sectors concerned in order to reduce to a minimum any adverse impact on the conduct of legitimate commercial activities.

3.63 In introducing a comprehensive strategy to counter money-laundering, it is to be anticipated that one consequence will be to increase the attractiveness of less regulated jurisdictions. Criminal money managers may, for example, seek to undertake the initial or placement stage of a money-laundering operation in just such a jurisdiction. Resort to such a strategy of geographical displacement creates, in turn, an element of vulnerability, which can be exploited by law enforcement authorities. A growing number of countries have elected to put in place legal structures which permit action to be taken to interdict certain categories of cross-border cash shipments. Some have imposed mandatory reporting of the export or import (or both) of currency above a stipulated threshold. Failure to comply can result in the imposition of penalties and the forfeiture of the currency. In other jurisdictions the relevant law enforcement authorities have been given the right to seize large sums of cash which are being

¹⁵⁷Australia and the United States have adopted this approach.

¹⁵⁸See, for example, "Financial Action Task Force on Money Laundering: report" Paris, 7 February 1990, recommendation No. 24.

¹⁵⁹See, for example, article 11 of the European Communities Directive.

imported or exported in circumstances that give reasonable grounds to believe that the cash represents the proceeds of drug trafficking. Yet others are able to invoke provisions of their exchange control or other similar legislation. In order to limit further the options available to money-launderers, consideration might be given to extending the scope of such measures to include cash-equivalent monetary instruments, precious metals, gems, and other highly liquid valuables.¹⁶⁰

3.64 Irrespective of the outcome of domestic consideration of the nature and scope of the money-laundering offences to be introduced and related matters, many States will face a significant challenge in securing their effective implementation. The law enforcement community will have to consider the adequacy of traditional training methods in the light of what will be, in many countries, a new mandate.¹⁶¹ The development and retention of skills in financial investigation, asset management and international cooperation and coordination of money-laundering investigations are among the many issues that will have to be tackled. In doing so some will wish to obtain training and technical assistance elsewhere. Within the United Nations system of organizations, the task of providing coordinated leadership in this area has been given to the United Nations International Drug Control Programme (see General Assembly resolution 45/179). Acting on its own or in conjunction with other organizations, as appropriate, it responds to requests for various forms of assistance, ranging from the organization of awareness training programmes to the dissemination of manuals and other useful working tools prepared for the use of law enforcement officials (see Economic and Social Council resolution 1991/41).¹⁶²

Paragraph 1, subparagraph (c), introductory part

(c) Subject to its constitutional principles and the basic concepts of its legal system:

¹⁶⁰See, for example, Financial Action Task Force on Money Laundering, "Annual report, 1991-1992", p. 17; and the text of recommendation No. 22 of the Financial Action Task Force on Money Laundering and the interpretative note adopted in respect of the same (Financial Action Task Force on Money Laundering, "Annual report, 1995-1996", Paris, 28 June 1996, annex 1, p. 6, and annex 2, p. 4).

¹⁶¹See below, comments on article 9, paragraph 2.

¹⁶²See also *United Nations Drug Law Enforcement Training Manual: A Guide for Law Enforcement Officials* (Vienna, 1991).

Commentary

3.65 The obligation of parties to create the offences listed in paragraph 1, subparagraphs (a) and (b), is unqualified, but subparagraph (c) opens with this “safeguard clause”. This particular clause represents a narrowing of a similar clause used in article 36, paragraph 2, of the 1961 Convention, which refers to “the constitutional limitations of a Party, its legal system and domestic law”. That phrase was not easy to interpret and the official commentary suggested that it referred to a State’s basic legal principles and the widely applied concepts of its domestic law.¹⁶³ Although some delegations at the Conference expressed dissatisfaction with the new language of the safeguard clause, the text commanded general acceptance.

3.66 The aim of the Conference in including the safeguard clause was to recognize the difficulties some States had with the potential scope of the offences specified in paragraph 1, subparagraph (c). In certain countries, some of these offences, if widely defined, might offend against constitutional guarantees of freedom of expression. It was necessary to go beyond a reference to “constitutional principles” to include a reference to “basic concepts” of the party’s legal system. Those concepts, whether embodied in statute law, judicial decisions or ingrained practice, may be irreconcilable with the approach taken in subparagraph (c) in respect of specific offences. This is particularly the case in respect of conspiracy and related crimes, which are quite unknown in some systems; where they consist of mere agreement to act rather than action, they may be regarded in some States as offending against a fundamental freedom. In some countries, there is an established practice of prosecutorial discretion, which serves to protect those whose innocent conduct might be judged to fall within the scope of a generally worded offence; where such discretion is not allowed, the definitions of offences may need to be more tightly drawn.

Paragraph 1, subparagraph (c), clause (i)

- (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph**

¹⁶³Commentary on the 1961 Convention, paragraph 5 of the comments on article 36, introductory subparagraph to paragraph 2. It should be remembered that constitutional principles and basic concepts can change. The German Government made a declaration to that effect on ratifying the 1988 Convention.

or from an act of participation in such offence or offences;

Commentary

3.67 Reference is made here to the earlier examination of the knowledge which the offender must be shown to possess (see paragraphs 3.43 - 3.45 above).

3.68. In the present context, the specified knowledge must exist “at the time of receipt”. There is no offence in the case of a person who receives goods, whether as a gift or for value, and who continues to use those goods having later come to suspect or know that they were derived from drug offences.

3.69 Although the prohibited conduct is defined as including “acquisition”, “possession” and “use”, it is essential (because of the way in which the knowledge element is defined) that the offender should have received the goods; there must be a “receipt”. If acquisition is to be understood, as it seems it must, as referring to taking possession (as opposed to acquiring ownership of or some other interest in the goods), the references to “possession” and “use” may be, strictly speaking, unnecessary. The offence may come to light because the offender is to be found in possession of, or to be using, the goods; but proof that he or she acquired the goods with the relevant knowledge will itself be sufficient to establish an offence.

Paragraph 1, subparagraph (c), clause (ii)

- (ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;**

Commentary

3.70 As has already been noted (see para. 3.31 above), the criminalization of the manufacture, transport or distribution of the equipment, materials or substances specified in this provision is mandatory under article 3, paragraph 1, subparagraph (a), clause (iv). The mere possession of those things is dealt with in subparagraph (c), with its safeguard clause.

3.71 The acquisition or receipt of goods takes place on a single occasion; possession is a continuing relationship to the goods. It is important, therefore, that in this provision it is not essential that the prescribed knowledge should exist at the moment of first acquisition. Someone who receives equipment innocently, but who later acquires the knowledge that it is intended for use in the production of drugs and remains thereafter in possession of the goods, will commit the offence. In such circumstances, bona fide purchasers of goods may find themselves facing criminal charges; anxiety about such cases was part of the reasoning in support of the safeguard clause in subparagraph (c).

Paragraph 1, subparagraph (c), clause (iii)

(iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;

Commentary

3.72 This widely drawn provision covers a number of different types of activity; it originated in concerns about magazines and films glorifying drug use and promoting a drug culture.¹⁶⁴ Although the English text is not entirely free from ambiguity, it appears that the adverb “publicly” governs both “inciting” and “inducing”. Similar conduct where the public factor is missing might well constitute “counselling” and in some contexts could be subject to criminalization under the terms of paragraph 1, subparagraph (c), clause (iv).

3.73 It is far from clear what the word “publicly” is intended to signify. There may be situations in which the incitement or inducement is addressed to identified persons (though they might be overheard by others); in other cases, as with a radio broadcast or a loudspeaker announcement, the category of hearers is not determined in advance. Another approach would be to ask whether the occasion was a “public” one, distinguishing between a private meeting or gathering and one open to the public. In practice, the word will have to be interpreted in the light both of the particular circumstances of the conduct in question and the analogies to be found in the relevant legal system.

¹⁶⁴Subsequent developments related to use of electronic media, in particular the Internet, to advertise drugs and promote their abuse were not envisaged at the time of the adoption of the Convention, but are covered by the words “by any means”.

3.74 A much-cited South African definition of an inciter is “one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other’s mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity”.¹⁶⁵ Inducement is that form of incitement which involves the offering of money or money’s worth. The presence of the words “by any means” indicates that the terms are to be broadly interpreted. In some legal systems, it may be appropriate to specify the means of incitement in the relevant legislation.

3.75 The conduct incited or induced is either: (a) the commission of any of the offences established in accordance with article 3; or (b) the illicit use of narcotic drugs or psychotropic substances. Illicit use itself is not required to be criminalized under the Convention, but the conduct of the inciter is.

Paragraph 1, subparagraph (c), clause (iv)

(iv) Participation in, association 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.

Commentary

3.76 This provision deals with various forms of participation or involvement in criminal activity, specifically the commission of any offence established in accordance with article 3.

3.77 The various ways in which individuals may involve themselves in criminal activity are classified differently in different national legal systems. Apart from the principal offender, there may be secondary parties or accomplices. They may have a degree of actual participation in the criminal activity (for example, by being present); they may provide some degree of assistance (“aiding and abetting” or “facilitating”); they may join in the devising and planning of the crime (in “association” or “conspiracy”); they may encourage its commission or provide technical advice (“counselling” or “facilitating”); they may actually join in an attempt to carry out the prohibited conduct.

¹⁶⁵J. A. Holmes, *Nkosiyana*, 1966 (4) S.A. 655 at p. 658, A.D.

3.78 Not only are these forms of involvement the subject of different systems of classification, but there is also disagreement among national legal systems as to the appropriate boundary for criminal liability. One illustration of this is in the field of attempts. Many legal systems draw a distinction (necessarily imprecise) between “acts of mere preparation”, which are not punishable, and “attempts” (where outside interference, independent of the will of the actor, prevents the completion of the offence), which do attract criminal liability. Making inquiries about the price of drugs on the illicit market with the intention of making a purchase if the price is acceptable would be an act of mere preparation rather than an attempt to purchase. Making an unsuccessful offer might be regarded as an attempt.¹⁶⁶ The language of the present provision is fuller than that in the corresponding provision of the 1961 Convention, which includes a reference to “preparatory acts”.¹⁶⁷

3.79 As has been noted, these variations in approach were felt to require the inclusion of the safeguard clause in the introduction to subparagraph (c), enabling parties to reconcile the aims of the present provision with the particular approach adopted by their own criminal law.

Implementation considerations: paragraph 1, subparagraph (c)

3.80 Clauses (i) and (ii) of paragraph 1, subparagraph (c), both complement in important ways earlier obligations contained in article 3, paragraph 1. The former treats an economic aspect of crime that should be covered in any comprehensive scheme to combat money-laundering through the use of criminal justice measures.¹⁶⁸ The latter is intended to complete the comprehensive treatment of efforts to prevent the use of equipment, materials and substances in the illicit production of narcotic drugs and psychotropic substances.¹⁶⁹ In framing appropriate legislation or other measures in this sphere, parties have a wide measure of discretion. For instance, through the use of the authority

¹⁶⁶Commentary on the 1961 Convention, paragraph 2 of the general comments on article 36 and paragraphs 2-4 of the comments on article 36, paragraph 2, subparagraph (a), clause (ii).

¹⁶⁷1961 Convention, art. 36, para. 2, subpara. (a), clause (ii).

¹⁶⁸See, for example, “Financial Action Task Force on Money Laundering: report”, Paris, 7 February 1990, sect. II.B; see also Canadian Criminal Code, sect. 354, and French Penal Code, art. 321.1; see also above, comments on article 3, paragraph 1, subparagraph (b).

¹⁶⁹See above, comments on article 3, paragraph 1, subparagraph (a), clause (iv), and below, comments on article 12.

conferred in article 24, those who so wish can consider extending the coverage of subparagraph (c), clause (i), to include treatment of post-acquisition knowledge.

3.81 Clauses (iii) and (iv) of paragraph 1, subparagraph (c), while dealing with very different areas of concern, do have in common the fact that the qualified obligation on parties extends to any of the offences established in accordance with article 3 and not merely to the relatively more serious illicit trafficking offences enumerated in paragraph 1. It therefore includes offences aimed at personal use falling within the scope of paragraph 2. This is a fact of particular importance for those charged with drafting appropriate legislation to ensure compliance with the requirements of the 1988 Convention.

3.82 Paragraph 1, subparagraph (c), clause (iv), deals with various forms of participation or involvement in illicit trafficking, ranging from conspiracy to facilitation. While national legal systems were found to differ so significantly in relation to these matters as to warrant subjecting the obligation to criminalize them to a “safeguard clause”, law enforcement practice has demonstrated the particular utility of such offences in penetrating complex drug trafficking networks. This assists the prosecution of drug kingpins who rarely come into contact with the actual narcotic drugs and psychotropic substances themselves. Subparagraph (c) thus complements subparagraphs (a), clause (v), and (b), which also focus on efforts to disrupt trafficking organizations.

3.83 There is a pressing practical need to ensure as comprehensive a coverage of these preparatory acts as possible, given the constitutional principles and basic concepts of the legal system in question. Those responsible for implementation in States which possess the necessary flexibility, in whole or in part, to address these offences, but where familiarity with concepts such as “attempts”¹⁷⁰ or “conspiracy”¹⁷¹ is not well established, can profitably draw upon the experiences of others where drug-specific approaches to these matters have been adopted.

3.84 All States that are parties to the 1988 Convention must, in any event, treat this issue at least in part. This arises from the nature of the unqualified obligation, contained in paragraph 1, subparagraph (b), to criminalize drug-related money-laundering. The description of that offence uses the wording “or

¹⁷⁰See, for example, Thailand, Act B.E. 2534, 1991, sect. 7.

¹⁷¹See, for example, Italy, Decree No. 309 of 9 October 1990, sect. 74.

from an act of participation in such offence or offences". Parties must create the offence of money-laundering in these terms irrespective of the limitations that may exist in their own legal systems on the creation of offences of participation.¹⁷² It may be, of course, that the commission of a money-laundering offence will itself be deemed to be participation in the commission of the predicate offence.

Paragraph 2

2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

Commentary

3.85 Paragraph 2 deals with the controversial matter of possession, purchase or cultivation for personal consumption. It is necessary to give at this point some account of the position under the earlier conventions to which the paragraph refers.

3.86 Under the 1961 Convention, a party must, "subject to its constitutional limitations", criminalize the cultivation, possession and purchase of drugs.¹⁷³ A number of States have taken the view that "possession" in that paragraph does not include possession for personal consumption; although the issue is usually discussed in the context of "possession", those States adopt a similar interpretation of the term "cultivation". Two other provisions of the 1961 Convention are relevant: article 4, paragraph 1, under which parties "shall take such legislative and administrative measures as may be necessary: ... (c) subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the ... use and possession of drugs"; and article 33, under which parties "shall not permit the possession of drugs except under legal authority" (an article which does not, however, require penal sanctions).

¹⁷²See above, comments on article 3, paragraph 1, subparagraph (b).

¹⁷³1961 Convention, art. 36, para. 1.

3.87 The arguments advanced regarding the position under the 1961 Convention are summarized in the commentary on article 4 of that Convention. The relevant paragraphs, omitting footnotes, are as follows:

“17. The question arises how far and in what way these provisions govern the possession of controlled drugs; do they apply without regard to whether the drugs are held for illegal distribution or only for personal consumption, or do they apply solely to the possession of drugs intended for distribution?”

“18. Article 4, paragraph (c), undoubtedly refers to both kinds of possession; but whether that provision must be implemented by imposing penal sanctions on possession for personal consumption is a question which may be answered differently in different countries. Some Governments seem to hold that they are not bound to punish addicts who illegally possess drugs for their personal use. This view appears to be based on the consideration that the provisions of article 36, which in its paragraph 1 requires Parties, subject to their constitutional limitations, to penalize the possession of drugs held contrary to the provisions of the Single Convention, are intended to fight the illicit traffic, and not to require the punishment of addicts not participating in that traffic. Article 45 of the Third Draft, which served as working document of the Plenipotentiary Conference, enumerated in its paragraph 1, subparagraph (a), ‘possession’ among the actions for which punishment would be required. This paragraph is identical with the first part of paragraph 1 of article 36 of the Single Convention, dealing with ‘possession’ as one of the punishable offences. Article 45 of the Third Draft is included in chapter IX, headed ‘Measures against illicit traffickers’. This would appear to support the opinion of those who believe that only possession for distribution, and not that for personal consumption, is a punishable offence under article 36 of the Single Convention. The Draft’s division into chapters was not taken over by the Single Convention, and this was the only reason why the chapter heading just mentioned was deleted, as were all the other chapter headings. Article 36 is still in that part of the Single Convention which deals with the illicit traffic. It is preceded by article 35, entitled ‘Action against the illicit traffic’, and followed by article 37, entitled ‘Seizure and confiscation’.

“19. Parties which do not share this view, and which hold that possession of drugs for personal consumption must be punished under article 36, paragraph 1, may undoubtedly choose not to provide for imprisonment of persons found in such possession, but to impose only

minor penalties such as fines or even censure. Possession of a small quantity of drugs for personal consumption may be held not to be a ‘serious’ offence under article 36, paragraph 1, and only a ‘serious’ offence is liable to ‘adequate punishment particularly by imprisonment or other penalties of deprivation of liberty’.

“20. Penalization of the possession of drugs for personal consumption amounts in fact also to a penalization of personal consumption.

“21. It has, on the other hand, been pointed out, particularly by enforcement officers, that the penalization of all unauthorized possession of drugs, including that for personal use, facilitates the prosecution and conviction of traffickers, since it is very difficult to prove the intention for which the drugs are held. If Governments choose not to punish possession for personal consumption or to impose only minor penalties on it, their legislation could very usefully provide for a legal presumption that any quantity exceeding a specified small amount is intended for distribution. It could also be stipulated that this presumption becomes irrebuttable if the amount in the possession of the offender is in excess of certain limits. It may also be remarked that constitutional limitations, which can free a Party from all obligation to punish an action mentioned in article 36, paragraph 1, will generally not prevent the penalization of the unauthorized possession of drugs.”¹⁷⁴

3.88 There is a similar uncertainty as to the effect of the relevant provisions of the 1971 Convention. Article 22, which deals with penal provisions, provides in paragraph 1, subparagraph (a), that “subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention”.

3.89 It has been argued that the effect is not to render possession for personal consumption an offence. Apart from the general consideration, also advanced in respect of the 1961 Convention, that the object was to fight illicit traffic and not to require the punishment of abusers of the controlled substances, it has been

¹⁷⁴Commentary on the 1961 Convention, paragraphs 17-21 of the comments on article 4, paragraph 1.

suggested that “possession” is not an “action” and is thus not affected by article 22, paragraph 1, subparagraph (a).¹⁷⁵

3.90 It was against this background that the negotiators of the 1988 Convention tackled the question, and the resulting text reflects compromises on a number of points.

3.91 First, it was agreed to include in article 3, paragraph 2, the safeguard clause referring to constitutional principles and the basic concepts of a party’s legal system.

3.92 Secondly, it was agreed to include the final words requiring the conduct to be “contrary to the provisions of” the earlier conventions. This could be interpreted as enabling the parties to retain the stance that they had adopted regarding the interpretation of those earlier texts.¹⁷⁶ This needs, however, to be balanced by the weight to be given to the express inclusion of the reference to “personal consumption” in the text of paragraph 2. A more consistent reading is that the words “contrary to the provisions” of the earlier conventions incorporate the schedules of controlled substances as well as the distinction under those conventions between licit and illicit consumption.

3.93 Thirdly, the provisions in paragraph 2 were kept separate from those in paragraph 1. The effect is that the references in later provisions of the Convention to the nature of the sanctions to be imposed in respect of offences¹⁷⁷ can readily distinguish offences established in accordance with paragraph 2 from the graver offences created in pursuance of paragraph 1; and the provisions regarding the establishment of extraterritorial jurisdiction,¹⁷⁸ confiscation,¹⁷⁹

¹⁷⁵Commentary on the 1971 Convention, paragraphs 9-16 of the comments on article 22, paragraph 1, subparagraph (a).

¹⁷⁶See the statement by the representative of Bolivia (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 24th meeting, para. 65), who stated that if the 1988 Convention were to go beyond that of 1961 in respect of coca leaf cultivation “whole batches of the population would be in jeopardy and the prisons would be full to overflowing”.

¹⁷⁷Art. 3, para. 4.

¹⁷⁸Art. 4, paras. 1 and 2.

¹⁷⁹Art. 5, para. 1.

extradition¹⁸⁰ and mutual legal assistance¹⁸¹ are limited to offences created in pursuance of paragraph 1. These latter measures of cooperation, expensive and sometimes cumbersome, were judged inappropriate to the relatively minor but very numerous offences established in accordance with paragraph 2.

Implementation considerations: paragraph 2

3.94 As noted above, the view that the Convention should not neglect the issue of personal-use offences prevailed and is reflected in article 3, paragraph 2.¹⁸² Although the definition of illicit traffic contained in article 1 extends to such offences in addition to those established in paragraph 1, there are significant differences in the treatment afforded to the former in the framework of the Convention as a whole. In particular, it was recognized that, in the context of international cooperation, considerations of both expense and administrative practicality required a distinction to be drawn between the two categories. In addition, the division of offences into these two categories facilitated a differentiation in the approach to the closely associated issue of sanctions. Thus, article 3, paragraph 4, subparagraph (d), affords parties a somewhat greater degree of latitude in approaching personal-use offences in this context.¹⁸³ Either in addition or, importantly, as an alternative to conviction or punishment for offences established in accordance with paragraph 2, it provides for the imposition of measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

3.95 It will be noted that, as with the 1961 and 1971 Conventions, paragraph 2 does not require drug consumption as such to be established as a punishable offence.¹⁸⁴ Rather, it approaches the issue of non-medical consumption indirectly by referring to the intentional possession, purchase or cultivation of controlled substances for personal consumption. In contrast to the position under the 1961 and 1971 Conventions, however, paragraph 2 clearly

¹⁸⁰Art. 6, para. 1.

¹⁸¹Art. 7, para. 1.

¹⁸²See also below, paragraph 14.32, regarding the closely associated issue of the elimination of demand for narcotic drugs and psychotropic substances.

¹⁸³A similar approach is adopted in article 3, paragraph 4, subparagraph (c), to the treatment of offences of a minor nature established in accordance with paragraph 1.

¹⁸⁴See articles 4 and 36 of the 1961 Convention and articles 5 and 22 of the 1971 Convention.

requires parties to criminalize such acts unless it would be contrary to the constitutional principles and basic concepts of their legal systems to do so.¹⁸⁵

3.96 In determining an implementation strategy in respect of the range of offences relating to personal use enumerated in paragraph 2, it may be worth examining the practice followed by many States, in which such offences are distinguished from those of a more serious nature by reference to stipulated threshold requirements in terms, for example, of weight. This could be particularly useful in the context of possession for personal consumption.

Paragraph 3

3. 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.

Commentary

3.97 Offences under article 3 require *mens rea*; that is, the Convention does not require the criminalization of acts of negligence. Proof of knowledge or of *mens rea* can present difficulties, whatever system of evidence is adopted in a particular national legal system; in practice a defendant will commonly deny the requisite degree of knowledge, and the tribunal must be satisfied as to the existence of that knowledge by admissible evidence. A rigorous analysis of “knowledge”, for example, has to address circumstances of “wilful blindness”, where the actor “closes his eyes to the obvious”; cases of *dolus eventualis*, where the offender takes an obvious risk; and circumstances in which any person in the actor’s position would have had the requisite knowledge.

3.98 Paragraph 3 does not attempt an exhaustive examination of such issues. It does, however, make it clear that direct proof in the form, typically, of a confession is not essential. The relevant mental element may be inferred from the circumstances surrounding the alleged offender’s conduct. Differences in national law and practice are not, however, eliminated.

3.99 The paragraph deals with the inferences that may be drawn by the court or other trier of factual issues. It does not address, and so requires no changes in, the evidential procedures adopted in national legal systems. It will be noted that paragraph 3 refers to offences established in accordance with article 3,

¹⁸⁵See above, comments on article 3, paragraph 2; see also *Report of the International Narcotics Control Board for 1992* (United Nations publication, Sales No. E.93.XI.1), chap. I.

paragraph 1, and omits reference to paragraph 2 of that article, but triers of fact will commonly draw such inferences in any case where that seems justifiable.

Implementation considerations: paragraph 3

3.100 Paragraph 3 is permissive rather than mandatory. It is intended to clarify the point that the requisite elements of knowledge, intent or purpose contained in the description of the various offences established in accordance with paragraph 1 may be proved circumstantially; that is, they “may be inferred from objective factual circumstances”. This wording, which has been reproduced verbatim in a number of subsequent international texts and treaty instruments,¹⁸⁶ must be read in conjunction with paragraph 11, which provides, *inter alia*, that nothing contained in article 3 “shall affect the principle that the description of the offences to which it refers and of the legal defences thereto is reserved to the domestic law of a Party”.

3.101 In spite of the flexibility provided by paragraph 3, particular problems have been encountered in practice in satisfying the knowledge requirement in cases of money-laundering. This has, in turn, resulted in various discussions at the international level of alternative ways in which to approach the concept of *mens rea* in this context.¹⁸⁷ For example, the definition of laundering in article 2 of the OAS Model Regulations uses the formula “knows, should have known, or is intentionally ignorant” in its treatment of the substantive offences. Article 6, paragraph 3, subparagraph (a), of the 1990 Council of Europe Convention permits, but does not require, the criminalization of negligent laundering. Such concerns now find expression in the relevant domestic laws of a number of jurisdictions.¹⁸⁸ Consequently those charged with drafting enabling legislation with regard to paragraph 1 may wish to consider the desirability and acceptability of using these or other methods to secure the maximum possible effectiveness of national legislative initiatives.¹⁸⁹ In doing so, it is important to

¹⁸⁶See, for example, article 6, paragraph 2, subparagraph (c), of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg, 18 November 1990).

¹⁸⁷See Financial Action Task Force on Money Laundering, “Report, 1996”, annex, recommendation No. 5.

¹⁸⁸See, for example, General Civil Penal Code of Norway, sect. 317.

¹⁸⁹The Australian approach extends to a person who knows “or ought reasonably to know” that the money or property in question was tainted (see Proceeds of Crime Act, 1987, Act No. 87 (1987), 81(3)).

ensure, to the greatest extent possible, that the use of different standards of knowledge does not adversely affect a party's ability or willingness to seek or receive international cooperation and legal assistance.¹⁹⁰

Paragraph 4, subparagraph (a)

4. (a) Each Party shall make the commission of the offences established in accordance with paragraph 1 of this article liable to sanctions which take into account the grave nature of these offences, such as imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.

Commentary

3.102 In the 1961 and 1971 Conventions, the corresponding provisions specify that "serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty".¹⁹¹ The negotiators of the 1988 Convention were determined to strengthen these provisions, going beyond the earlier texts. The structure of paragraph 4 gives priority to the heavier penalties, in subparagraph (a), and, by way of exception or qualification, allows in subparagraph (c) for lesser penalties in "cases of a minor nature".

3.103 In paragraph 4, subparagraph (a), sanctions are required which adequately reflect the "grave nature" of the offences specified in article 3, paragraph 1. The list of types of sanctions is intended to be neither exclusive nor necessarily cumulative. These sanctions, singly or in combination, are among those that should be deployed.

3.104 Under "other forms of deprivation of liberty" are included sentences such as "penal servitude" or confinement in a labour camp as provided for under some legal systems. The phrase may also include some non-custodial measures,

¹⁹⁰See Financial Action Task Force on Money Laundering, "Report, 1996", annex, recommendation No. 33, and the interpretative note on this subject contained in annex 2.

¹⁹¹1961 Convention, art. 36, para. 1; and 1971 Convention, art. 22, para. 1, subpara. (a).

such as house arrest or curfew, which may be combined with other forms of supervision such as electronic monitoring.¹⁹²

3.105 In some national legal systems and in some circumstances, an offender is deprived of the benefit of the proceeds of crime by the imposition of a fine or other pecuniary penalty rather than by the confiscation of specific assets. The drafting is broad enough to cover these varying arrangements.

Paragraph 4, subparagraphs (b), (c) and (d)

(b) The Parties may provide, in addition to conviction or punishment, for an offence established in accordance with paragraph 1 of this article, that the offender shall undergo measures such as treatment, education, aftercare, rehabilitation or social reintegration.

(c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.

(d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.

Commentary

3.106 The 1971 Convention and the 1961 Convention as amended by the 1972 Protocol¹⁹³ include a provision (in identical terms in the two texts) to the effect that when drug abusers have committed offences under the Convention, the parties may provide, either as an alternative to conviction or punishment or

¹⁹²See also General Assembly resolution 45/110, containing the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

¹⁹³1971 Convention, art. 22, para. 1, subpara. (b); and 1961 Convention as amended, art. 36, para. 1, subpara. (b). Note that the provisions regarding alternative measures were introduced into the 1961 Convention by the 1972 Protocol.

in addition to conviction or punishment, that such abusers undergo measures of treatment, education, aftercare, rehabilitation or social reintegration. Paragraph 4, subparagraphs (b), (c) and (d), of the 1988 Convention, while drawing on that earlier provision, widen the scope of application to drug offenders in general, whether drug abusers or not. They also introduce distinctions based on the seriousness of the offence committed: for offences of a grave nature under article 3, paragraph 1, measures of treatment, education etc. may be prescribed only in addition to conviction or punishment; for offences of a minor nature under article 3, paragraph 1,¹⁹⁴ and offences aimed at personal consumption under article 3, paragraph 2, such measures may be prescribed as an alternative to conviction or punishment.¹⁹⁵

3.107 The fact that subparagraphs (b), (c) and (d) do not limit the application of additional or alternative treatment and care measures to drug abusers suggests that such measures may go beyond the context of medical and social problems of drug abusers and may be seen in the wider context of measures for the treatment of offenders in general, designed to reduce the likelihood of their offending again. Drug abusers will, however, in practice naturally constitute the main target group of those measures in the context of drug offences.

3.108 Subparagraphs (b), (c) and (d) refer to “conviction or punishment” as the stages at which additional or alternative measures may be provided for. It should, however, be noted that bridges between the criminal justice system and the treatment system might also be envisaged at other stages of the criminal process, including the prosecution stage (for example, conditional discontinuation of criminal proceedings under condition of attending a treatment programme; treatment order pronounced by a prosecuting magistrate in France) or at the stage of enforcement of a prison sentence (transfer from prison to a treatment institution or therapeutic community in certain circumstances).

3.109 “Treatment” will typically include individual counselling, group counselling or referral to a support group, which may involve out-patient day care, day support, in-patient care or therapeutic community support. A number of treatment facilities may prescribe pharmacological treatment such as methadone maintenance, but treatment referrals are most frequently to drug-free programmes. Further treatment services may include drug education, training in

¹⁹⁴Offences which are “particularly serious” having regard to the factors listed in paragraph 5 will, by definition, not fall within the “minor” category.

¹⁹⁵See the United Nations standards and norms in crime prevention and criminal justice.

behaviour modification, acupuncture, family therapy, relapse prevention training and the development of coping and interpersonal skills. The ability to remain drug-free may also be fostered by rehabilitation and reintegration programmes, such as the provision of further education, job placement and skill training. Therefore measures of treatment, aftercare, rehabilitation, social reintegration and education will in practice often be linked and overlapping. As an alternative measure, treatment is sometimes made a condition for the avoidance of imprisonment. The aim is to take into account the medical condition of the offender while keeping him or her away from an environment where treatment would be minimal and the opportunity for further drug abuse great. Such measures are therefore not necessarily more lenient than imprisonment or much different in concept from punishment. It should be noted that the use of drug treatment as an alternative to punishment and a condition of avoiding a custodial sentence raises controversial issues: questions of whether compulsory treatment may achieve lasting results or whether some amount of willingness and cooperation from the abuser are essential; the relationship between medical practitioners in charge of treatment and judicial authorities; the combination of care and law enforcement roles; and civil rights issues raised by internment for indefinite periods.

3.110 The term “aftercare” is commonly used by penologists to describe the phase of supervision and counselling which follows discharge (especially conditional or early discharge) from a custodial sentence, as the ex-prisoner readjusts to the conditions of normal society. In the present context, this remains a possible interpretation, but it is equally proper to accept the submission made in the commentaries on the earlier texts that it is a stage “which consists mainly of such psychiatric, psychoanalytical or psychological measures as may be necessary after [the abuser] has been withdrawn from the substances that he abused or, in the case of a maintenance programme,¹⁹⁶ after he has been induced to restrict the intake of such substances as required by the programme”.¹⁹⁷

3.111 It is suggested that the word “rehabilitation” covers such measures as may be required to make the former abuser physically, vocationally, mentally and otherwise fit for living a normal life as a useful member of society (cure of

¹⁹⁶That is, programmes under which the abuser’s intake of the relevant substances is reduced to such minimum quantities as are medically justified in the light of his or her personal condition.

¹⁹⁷Commentary on the 1971 Convention, paragraph 4 of the comments on article 20, paragraph 1; and Commentary on the 1972 Protocol, paragraph 4 of the comments on article 38, paragraph 16.

diseases, physical rehabilitation in case of disability, vocational training, supervision accompanied by advice and encouragement, measures of gradual progress to a normal self-reliant life etc.).

3.112 It is particularly difficult to draw a dividing line between “rehabilitation” and “social reintegration”. It is suggested that the term “rehabilitation” mainly refers to measures intended to improve the personal qualities of the abuser (health, mental stability, moral standards, vocational skills), while the term “social reintegration” includes measures intended to make it possible for the abuser to live in an environment that is more favourable to him or her. The term “social reintegration” may thus cover measures such as providing job placement or transitional housing and perhaps also enabling the former abuser to leave his or her former environment and to move to a social atmosphere less likely to foster drug abuse. A change of environment may also be advisable in order to reduce the harm that the social stigma attached to drug abuse may cause the former abuser. Community service, in the form of an obligation to perform a certain number of hours of unpaid work for the good of the community, may be considered as a valid measure of social reintegration, as well as an educational measure, which can be envisaged for minor offences instead of imprisonment.

3.113 “Education” may refer to general education or to specific teaching regarding the harmful consequences of the abuse of narcotic drugs and psychotropic substances. Such education may occur during a period of treatment or during imprisonment and may equally be part of a programme of aftercare, rehabilitation or social reintegration.

3.114 The list of additional measures in subparagraphs (b), (c) and (d) is not exclusive. A party is not precluded from ordering whatever measures are judged, in the context of its national legal system, appropriate to the particular circumstances of the offender.

Paragraph 5, introductory part

5. The Parties shall ensure that their courts and other competent authorities having jurisdiction can take into account factual circumstances which make the commission of the offences established in accordance with paragraph 1 of this article particularly serious, such as:

Commentary

3.115 Although the earlier conventions had made use of the notion of “serious offences”,¹⁹⁸ no attempt was made to identify the aggravating circumstances which pointed to the seriousness of an offence. Paragraph 5 provides such guidance by presenting a non-exhaustive list of relevant factual circumstances. The obligation on parties is to ensure that their courts or other competent authorities (for example, special tribunals used in some States to deal with cases involving drug-related offences) are able to take these circumstances into account in sentencing. Specific legislation will, of course, not be required if the practice of the courts already meets this condition. A party is not required to ensure that the courts or other authorities do in practice avail themselves of this power, nor is there any attempt to state the effect that those circumstances should have on the sanction imposed.

Paragraph 5, subparagraph (a)

(a) The involvement in the offence of an organized criminal group to which the offender belongs;

Commentary

3.116 The important circumstance is that the offence is not committed by an individual acting alone. The text requires not only that the offender should belong to an organized criminal group, but also that the group was actively involved in the offence. As the circumstances listed in paragraph 5 are aggravating circumstances rather than elements in the definition of an offence, it was unnecessary to be more specific regarding the nature of the group’s involvement.

Paragraph 5, subparagraph (b)

(b) The involvement of the offender in other international organized criminal activities;

¹⁹⁸1961 Convention, art. 36, para. 1; and 1971 Convention, art. 22, para. 1, subpara. (a).

Commentary

3.117 The focus here is not upon the relationship of an organized criminal group with the offence that has been committed, but rather upon the fact that the offender is involved in other international organized criminal activities. Those activities must have an international dimension. Although they must be “other” activities, this need not exclude other activities related in some way to illicit traffic in narcotic drugs or psychotropic substances. Two examples given in the course of the negotiations were arms smuggling and international terrorism.

Paragraph 5, subparagraph (c)

(c) The involvement of the offender in other illegal activities facilitated by commission of the offence;

Commentary

3.118 There are many cases in which the profits derived from illicit traffic or other drug-related offences are used to fund other types of criminal or illegal activities. These may include activities involving gambling or prostitution, which in some legal systems may be regarded as illegal (for example, if not subject to official control or supervision) but not criminal; hence the use of the wider adjective “illegal”.

Paragraph 5, subparagraph (d)

(d) The use of violence or arms by the offender;

Commentary

3.119 Although the text of subparagraph (d) does not spell this out, what is plainly meant is that the offender used violence or arms in the commission of the offence itself. It is submitted that “arms” should be understood in the broadest sense although there is reason to assume the authors originally intended that it refer to firearms. The broader interpretation is also supported by the use of the sole term “*armes*” in the French text (instead of the more specific “*armes à feu*”).

Paragraph 5, subparagraph (e)

(e) The fact that the offender holds a public office and that the offence is connected with the office in question;

Commentary

3.120 No definition is given of “public office”, the scope of which must be ascertained by reference to the concepts used in a State’s national legal system. There must be a connection between the office held and the offence; it is not sufficient that the offender holds a public office (though a court is not precluded from treating that as a material consideration, independently of the guidelines laid down in the Convention). The link will commonly take the form of misuse of the powers or influence of the office, but the text does not specify any particular form of connection.

Paragraph 5, subparagraph (f)

(f) The victimization or use of minors;

Commentary

3.121 The intention of subparagraph (f) is clear, and it will be for parties, by reference to the concepts of their national legal system, to define the category of “minors”. “Use” includes, but is not limited to, exploitation of minors. For example, the use of a minor in the role of a messenger might be sufficient for the subparagraph to apply.

Paragraph 5, subparagraph (g)

(g) The fact that the offence is committed in a penal institution or in an educational institution or social service facility or in their immediate vicinity or in other places to which school children and students resort for educational, sports and social activities;

Commentary

3.122 Subparagraph (g) reflects a number of concerns. One is the fact that drug abuse is a problem in many penal institutions, and this is seen as an obstacle to the rehabilitation of offenders who may leave prison with problems

they did not have at the start of their sentence. The other concern is a wish to give the maximum possible protection to children and other groups especially at risk. For that reason, the subparagraph will be properly invoked when the circumstances are such that children, students or persons attending a social service facility are likely to become involved. There is no reference in the text to the possibility that an offence may be committed close to one of the specified institutions but at a time when the institution is closed and no other persons are present; however, it is difficult to see that such geographical proximity alone would be given much weight. The concept of “immediate vicinity” is, in any case, not clearly defined.

Paragraph 5, subparagraph (h)

(h) Prior conviction, particularly for similar offences, whether foreign or domestic, to the extent permitted under the domestic law of a Party.

Commentary

3.123 Many national legal systems expect those imposing penal sanctions to take into account recidivism and other aspects of a convicted person’s record. A notable feature of subparagraph (h) is the express reference to convictions recorded in a foreign country. As there is considerable variation between national legal systems in the way these matters are handled, it was thought essential to include what amounts to an additional safeguard clause in the concluding words of the subparagraph.

Paragraph 6

6. The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article 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.

Commentary

3.124 The origins of what became paragraph 6 lay in a proposal that would require parties to ensure that their prosecution authorities strictly enforced the

law on matters covered by article 3. In some States the absence of discretion produces this effect: prosecution is mandatory. Where discretion does exist, the withdrawal of charges, “plea-bargaining” as to the level of the offence or the likely sanction, or other concessions could be secured by improper means, and prosecution authorities might in some States need a measure of protection from the powerful interests associated with organized crime.

3.125 There are, however, some countervailing considerations. Discretion is commonly given to prosecution authorities in order to facilitate a rational prosecution policy and in recognition of an entirely proper concern to identify priorities in the use of resources. There may well be situations in which the promise of reduced penalties may persuade an accused person to provide information implicating others; an accused person who agreed to be a prosecution witness could be of the greatest value in securing effective law enforcement. Concessions to those involved in the lower echelons of organized crime could enable investigative agencies to identify and prosecute those in the higher echelons.

3.126 The final text reflects a compromise between these two positions. Its inclusion in the Convention points to the dangers inherent in too generous a use of prosecutorial discretion and underlines the fact that due regard must be given to the need to deter the commission of offences. The touchstone, however, is the need to secure what the text refers to as “the effectiveness of law enforcement measures” and this enables the considerations summarized in paragraph 3.125 above to be given appropriate weight.

Paragraph 7

7. The Parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences.

Commentary

3.127. Paragraphs 4 and 5 are concerned with the sanctions that should be imposed on conviction. In paragraph 7, it is recognized that the sanction initially imposed, where that takes the form of imprisonment or other deprivation of liberty, may be substantially affected by a later decision to permit the early

release or parole of the convicted person. Such decisions are common in many States and constitute an integral part of their sentencing practices and policies, though totally prohibited in others. The paragraph exhorts parties to ensure that, where such decisions are to be made within their national legal system, those responsible for making the decision bear in mind the gravity of the relevant offences, and the presence of any of the aggravating circumstances listed in paragraph 5.

Paragraph 8

8. Each Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with paragraph 1 of this article, and a longer period where the alleged offender has evaded the administration of justice.

Commentary

3.128 Many States have no statute of limitations in criminal cases; in many others, a limitations period is prescribed and applied either universally or with strictly limited exceptions. Paragraph 8 has no relevance to parties without such a statute of limitations; hence the phrase “where appropriate”. Parties that do have a statute of limitations are required to establish a “long” period in respect of offences established in accordance with paragraph 1; the word “long” is not further defined. In addition, they must provide for the period to be extended where the alleged offender has evaded the administration of justice. This latter point was introduced having in mind the case of a suspect who had fled the territory of a party, but in the final text this particular case is subsumed in more general language. The result is not easy to interpret: it appears that some positive act by the alleged offender to “evade” prosecution is required, for a statute of limitations becomes meaningless if the mere non-prosecution of the alleged offender (who thus escapes the administration of justice) becomes a ground for extending the limitation period. It needs to be borne in mind that international conventions establishing human rights norms require that, for criminal procedures to be fair, charges must be pressed without undue delay.

Paragraph 9

9. Each Party shall take appropriate measures, consistent with its legal system, to ensure that a person charged

with or convicted of an offence established in accordance with paragraph 1 of this article, who is found within its territory, is present at the necessary criminal proceedings.

Commentary

3.129 An earlier draft of paragraph 9 made particular reference to the grant of bail, drawing attention to the large sums of money commonly available to traffickers. This material was deleted, but the paragraph is, none the less, concerned with just these issues. It does not deal with extradition, the subject of article 6; nor does it preclude trials *in absentia* where the alleged offender is not “found within [a Party’s] territory” and where such trials are permitted in relevant legal systems. Rather, it is designed, as with the preceding paragraphs, to encourage effective law enforcement. Given the sums of money involved and the international dimension of much drug-related crime, incautious use of pre-trial release could seriously jeopardize effective law enforcement.

Paragraph 10

10. For the purpose of co-operation among the Parties under this Convention, including, in particular, co-operation under articles 5, 6, 7 and 9, offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the Parties.

Commentary

3.130 Paragraph 10 is concerned with the sensitive issue of the political and fiscal offences exception, most familiar in the field of extradition. It is a common feature of State practice that assistance is refused where the offence is characterized as political or fiscal in nature. The categories are not self-defining; for example an act carried out in a political context (such as an armed uprising) may not be regarded as political if done for a private or personal reason. In the present context, if parties were allowed to categorize offences established in accordance with article 3 as fiscal or political offences or as politically motivated, there would be an obstacle to the provision of the measures of international cooperation provided for in articles 5 (Confiscation), 6 (Extradition), 7 (Mutual legal assistance) and 9 (Other forms of co-operation and training). This listing of modes of cooperation is not exhaustive. The

safeguard clause in paragraph 10, which uses the term “constitutional limitations and the fundamental domestic law” rather than “basic concepts of [a] legal system” (a drafting difference which does not appear to affect the meaning), is designed to protect, in particular, constitutionally guaranteed rights requiring refusal of extradition requests. The present provision can be compared with article 6, paragraph 6, which expresses a related notion in the extradition context.

Paragraph 11

11. Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.

Commentary

3.131 Paragraph 11 is drawn from article 36, paragraph 4, of the 1961 Convention. It is not intended as an additional safeguard clause. It ensures that no provision in article 3 is considered self-executing. Although it requires parties to create offences, these offences and the sanctions attached to them will be creatures of the national legal system and will use the framework and terminology of that system. This is perhaps of even greater importance in the case of “legal defences”, to which the paragraph also refers.

Implementation considerations: paragraphs 4-11

3.132 Paragraphs 4-11 of article 3 are, for the most part, designed to ensure that illicit trafficking offences, especially those set out in paragraph 1, are treated with appropriate seriousness by the judiciary and prosecutorial authorities of each party. The drafting style used for that purpose leaves to the appropriate authorities of each State considerable scope for the exercise of judgement in determining how best to achieve the relevant goals in the light of different legal, moral and cultural traditions. This inherent flexibility is, in turn, extended by the terms of article 24, which permits the taking of stricter or more severe measures than those mandated by the Convention if deemed desirable or necessary for the prevention or suppression of illicit traffic. This may prove to be of value, for example, in considering the list of aggravating factors contained in paragraph 5. Some parties may wish to supplement it to make reference to such matters as the involvement in relevant offences of certain categories of professional persons

or employees¹⁹⁹ or to the adulteration of the drugs in question with toxic substances.²⁰⁰

3.133 Article 3, paragraph 10, constitutes something of an exception in that it introduces a qualified obligation in relation to matters of both legal substance and political delicacy. It provides that for the purposes of international cooperation under the 1988 Convention “offences established in accordance with this article shall not be considered as fiscal offences or as political offences or regarded as politically motivated ...”. Insofar as political and politically motivated offences are concerned, it will suffice to point to the concern expressed in the Political Declaration adopted by the General Assembly at its seventeenth special session (General Assembly resolution S-17/2, annex) to the growing link between illicit trafficking and terrorist activities. This provision is intended to restrict the possibility of an individual invoking the protection of the so-called political offence exception in these and other like circumstances.²⁰¹ The reference to categorization as a fiscal offence has a somewhat similar purpose. As has been stated elsewhere: “Traditionally several States have not extradited offenders or provided mutual legal assistance for fiscal offences. Thus, by increasing the availability of cooperation in drug money-laundering investigations, this provision is extremely important.”²⁰²

3.134 There is a further connection between the provision of international cooperation and the subject matter of these paragraphs of article 3 that should also be considered by those responsible for implementation. In some countries the decision has been taken to underline the severity of drug trafficking offences by applying to them the ultimate sanction, namely, the death penalty. Many

¹⁹⁹Article 14, paragraph 1, of the OAS Model Regulations reads: “Financial institutions, or their employees, staff, directors, owners or other authorized representatives who, acting as such, participate in illicit traffic or related offences, shall be subject to more severe sanctions.”

²⁰⁰In Italy, Decree No. 309 of 9 October 1990, section 80, paragraph 1 (*e*), provides for penalties to be increased by between one third and one half “if the narcotic and psychotropic substances are adulterated or mixed with others in order to increase the potential hazard”.

²⁰¹For example, article 3, subparagraph (*a*), of the 1990 Model Treaty on Extradition, adopted by the General Assembly in its resolution 45/116; see also, for example, article 3 of the 1957 European Convention on Extradition.

²⁰²“Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 101st Congress, 1st Session, Senate, Exec. Rept. 101-15, p. 32.

other States, however, have adopted the position that they will not provide certain forms of international cooperation in cases involving the death penalty. This practice is particularly well established in relation to extradition²⁰³ and may also be applied in other spheres of cooperative activity such as mutual legal assistance. The difficulty, or impossibility, of obtaining the extradition of fugitives or otherwise using established procedures of international cooperation in the administration of justice in such cases should be weighed in the balance when articulating a sanctions policy in this sphere.²⁰⁴

²⁰³See, for example, article 4, paragraph (d), of the 1990 Model Treaty on Extradition (General Assembly resolution 45/116, annex); see also G. Gilbert, *Aspects of Extradition Law* (London, Martinus Nijhoff, 1991), pp. 99-100.

²⁰⁴Also of relevance are resolutions of the General Assembly and Economic and Social Council concerning safeguards relating to capital punishment (General Assembly resolution 2857 (XXVI)) and Economic and Social Council resolution 1990/29).

ARTICLE 4

Jurisdiction

General comments

4.1 Following the general approach adopted in earlier multilateral conventions dealing with crimes of international concern, it was not judged sufficient merely to require States, in article 3, to criminalize drug trafficking activity. Given the uncertainty and controversy surrounding the issue of the limits imposed by rules of customary international law on the right of States to legislate with extraterritorial effect,²⁰⁵ it was felt that it would be appropriate to regulate the issue of prescriptive jurisdiction in a specific treaty provision. This is the function of article 4.

4.2 Article 4, the reach of which is confined to the most serious international drug trafficking offences enumerated in article 3, paragraph 1, establishes two types of jurisdiction: obligatory and discretionary. It is concerned only with the establishment of jurisdiction and does not impose obligations as to its exercise. The latter issue, that of enforcement jurisdiction, is treated elsewhere in the Convention.²⁰⁶

4.3 A number of bases of jurisdiction have become well recognized in the doctrine of public international law. They include “territorial” jurisdiction, the principle that a State has jurisdiction over crimes committed on its territory; extended “quasi-territorial” jurisdiction over crimes committed on ships or aircraft registered in the State; and “personal” jurisdiction, typically over a State’s nationals. In the earlier conventions dealing with narcotic drugs and psychotropic substances, there was also provision for the trial of serious offences by a party in whose territory the offender was found, in cases in which

²⁰⁵See, for example, M. N. Shaw, *International Law*, 3rd ed. (Cambridge, Grotius Publications, 1991), pp. 400-419.

²⁰⁶See, for example, below, comments on article 6, paragraph 9. But see also above, comments on article 3, paragraph 11, in which it is affirmed that nothing contained in article 3 “shall affect the principle ... that such offences shall be prosecuted and punished in conformity” with domestic law.

extradition was not available.²⁰⁷ It was against this background that the Conference addressed the issue.

4.4 The recognition of the validity of multiple grounds for the establishment of jurisdiction raises the possibility of the conduct in question being subject to the criminal law of two or more States. This is particularly likely in the area of drug trafficking, which is inherently transnational in nature. While concurrent claims to jurisdiction will inevitably arise within the context of the 1988 Convention, the text does not seek to solve the problem of what priority to give to such competing assertions. Similarly, there is no adequate solution to this matter in the corpus of existing norms of customary international law. Partial coverage is often provided in relation to the principle of *ne bis in idem* (or the prevention or prohibition of double jeopardy), albeit normally in the negative sense of constituting a ground for refusing to grant various forms of legal assistance.²⁰⁸

Paragraph 1, subparagraph (a)

1. Each Party:

(a) Shall take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:

(i) The offence is committed in its territory;

²⁰⁷1961 Convention, art. 36, para. 2, subpara. (a), clause (iv), and 1971 Convention, art. 22, para. 2, subpara. (a), clause (iv).

²⁰⁸See, for example, paragraph 10(4) of the Commonwealth Scheme for the Rendition of Fugitive Offenders (*Commonwealth Schemes of Mutual Assistance in the Administration of Justice* (London, Commonwealth Secretariat, 1991)); and article 3, subparagraph (d), of the 1990 Model Treaty on Extradition, adopted by the General Assembly in its resolution 45/116. Article 16 of the latter deals with the issue of concurrent requests for extradition (see also European Committee on Crime Problems, *Extraterritorial Criminal Jurisdiction* (Strasbourg, Council of Europe, 1990), pp. 33-35; and R. S. Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at their Implementation* (Philadelphia, University of Philadelphia Press, 1994), p. 208, footnote 52). A treaty on the application of the principle of *ne bis in idem* has been produced by the Judicial Co-operation Group working under the auspices of the Ministers of Foreign Affairs of Member States of the European Communities.

- (ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed;**

Commentary

4.5 Paragraph 1, subparagraph (a), which is mandatory on parties, deals with jurisdiction on a “territorial” or “quasi-territorial” basis. In the practice of States, such jurisdiction is virtually universally established, but it was judged appropriate to include it specifically so that article 4 could contain a comprehensive set of provisions.

4.6 In common with other international treaties and conventions, the text requires jurisdiction to be “established”. It is not necessarily the case that it will always be “exercised”, and the latter word was deliberately omitted from article 4. For example, there may be cases where it is more appropriate for an alleged offender, the major part of whose criminal activities have been carried out in another State, to be extradited to stand trial in that State.

4.7 The text does not attempt to deal with the well-known problem of deciding in which State an offence, elements of which are located in more than one State, should be deemed to have been committed. It will be for each national legal system to determine whether what occurred on its territory satisfies the definition of the relevant offence created by its own law.

4.8 It should be noted that the 1988 Convention does not contain a provision equivalent to that found in article 36, paragraph 2, subparagraph (a), clause (i), of the 1961 Convention, whereby each of the offences mandated by paragraph 1 thereof, if committed in different countries, “shall be considered as a distinct offence”. This provision, which was heavily influenced by the terms of article 4 of the 1936 Convention, is intended “to give to the courts of a country the necessary territorial jurisdiction in cases where they might not otherwise possess it, and in particular to ensure that a country shall have territorial jurisdiction over accessory acts even though the principal acts were not committed in its territory and even though it in general assigns jurisdiction over accessory acts in the courts in whose districts the principal acts were committed”.²⁰⁹ The provision of the 1961 Convention, as with article 22, paragraph 2, subparagraph (a), clause (i), of the 1971 Convention, which is to like effect, is made subject to a

²⁰⁹Commentary on the 1961 Convention, paragraph 2 of the comments on article 36, paragraph 2, subparagraph (a) (see also paragraph 4.7, above).

safeguard clause; namely “subject to the constitutional limitations of a Party, its legal system and domestic law”.

4.9 The word “vessel” was preferred in the English text of the 1988 Convention to the word “ship”; there seems to be no significant difference between these terms, even in the context of such vehicles as hovercraft. The expression “flying its flag” is the customary one and is, of course, not to be taken literally; the absence of the flag from its accustomed pole does not extinguish the jurisdiction of the State of registry.²¹⁰ In a few national legal systems, however, a ship registered in a State may be permitted, for a limited period, to fly the flag of another State; in such a case, the text gives jurisdiction to the latter State.

4.10 Aircraft are registered in a similar way, but the language of the “flag” is not used. There is a growing number of aircraft owned by a group of airlines established in different countries,²¹¹ but the practice is that each individual aircraft is on the register of only one of the States involved. The Council of the International Civil Aviation Organization, in a controversial resolution,²¹² allowed for the establishment of joint or international registration, the effect of which would be to give the aircraft dual or multiple nationality, and for present purposes to give jurisdiction to several States.

4.11 The reference to the time of the offence can be critical in some aviation contexts. Interchange agreements between airlines sometimes provide for the temporary transfer of an aircraft from the register of one State to that of another for a part of an international flight. In such cases, care would need to be taken to identify the actual time of the offence so as to discover the State of registration at that time.

Implementation considerations: paragraph 1, subparagraph (a)

4.12 Paragraph 1, subparagraph (a), deals with the mandatory establishment of prescriptive jurisdiction by parties.

²¹⁰See article 91 of the United Nations Convention on the Law of the Sea (*The Law of the Sea: United Nations Convention on the Law of the Sea* (United Nations publication, Sales No. E.83.V.5)).

²¹¹Examples are the Scandinavian Airlines System and Air Afrique.

²¹²International Civil Aviation Organization document 8743-C/978, p. 26.

4.13 The authority of a State to establish jurisdiction over acts which take place within its own territory is an uncontested norm of public international law of long standing. Indeed, all members of the international community afford the territorial principle of jurisdiction a central position in their legal systems. Thus, compliance with this obligation will be automatic.

4.14 Notwithstanding this fact, many jurisdictions do not always take full advantage of the flexibility of the rule of international law in the drafting of their criminal law statutes. That rule encompasses both the subjective and objective principles of territoriality: that is, where the act was commenced and where it was completed. This flexibility can be particularly valuable in relation to drug trafficking and other transnational offences where the constituent elements of the crime are frequently committed in more than one jurisdiction. In some common-law countries, for example, it has been traditional to assume jurisdiction only when the final element of the offence was committed within national territory.²¹³ The resulting gap in coverage is not the result of any limitation imposed by international law and could thus be remedied by appropriate legislative action. An obvious focus for consideration is presented by the offences enumerated in article 3, paragraph 1, subparagraph (c), clause (iv), when they are committed in another State.

4.15 It should be recalled that, in addition to its land territory, each coastal State possesses sovereignty over its territorial sea and superjacent airspace by virtue of rules of international law, both customary and conventional.²¹⁴ In order to eliminate possible loopholes that could be used by traffickers, and given the practical importance of eliminating trafficking by sea,²¹⁵ parties should consider whether existing legislation adequately covers offences committed upon vessels

²¹³See, for example, G. Williams, "Venue and the ambit of the criminal law" (Part 3), *Law Quarterly Review*, No. 81, 1965, p. 158.

²¹⁴See, for example, article 2 of the United Nations Convention on the Law of the Sea (*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.62/1221, annex I).

²¹⁵See below, comment on article 17, which does not extend to trafficking activities within the territorial sea.

in their territorial sea.²¹⁶ Such legislation can, of course, only be enforced against foreign flag vessels in accordance with the international law of the sea.²¹⁷

4.16 The imposition of the obligation contained in paragraph 1, subparagraph (a), clause (ii), to establish prescriptive jurisdiction over offences committed on board flag vessels and registered aircraft is also uncontroversial at the international level. While an examination of the adequacy of existing law in relation to this matter would be prudent, few countries will be likely to find a pressing need for new legislation in this area.²¹⁸ On the other hand, it should be recalled that issues relating to concurrent jurisdiction can arise in this as well as other areas covered by article 4. As the European Committee on Crime Problems of the Council of Europe has noted: "Competing claims to jurisdiction occur in cases where ships are sailing in the territorial waters of another State at the time of the commission of the offence or where aircraft are over or in such territory: there is no evidence of general rules of international law for allocating competence among States, one of whom claims flag jurisdiction".²¹⁹ As was noted above, the 1988 Convention does not seek to resolve the problems flowing from competing assertions of jurisdiction.²²⁰ It is therefore left to be determined by domestic law and policy or to be dealt with in the context of other multilateral and bilateral mechanisms, agreements or arrangements.

Paragraph 1, subparagraph (b), clause (i)

(b) May take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when:

²¹⁶See, for example, article 113-2 of the French Penal Code. In the United Kingdom of Great Britain and Northern Ireland, reliance is placed primarily on the relevant provisions of the Customs and Excise Management Act, 1979; see also article 6, paragraph 1, subparagraph (b), of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (*International Legal Materials*, No. 207, 1988, p. 676).

²¹⁷See, in particular, article 27 of the United Nations Convention on the Law of the Sea.

²¹⁸In Australia, just such a review identified a gap in legislative coverage which was subsequently eliminated by section 11 of the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990 (Act No. 97 of 1990).

²¹⁹European Committee on Crime Problems, op. cit., p. 12.

²²⁰See above, general comments on article 4.

- (i) The offence is committed by one of its nationals or by a person who has his habitual residence in its territory;**

Commentary

4.17 It seems clear that each part of paragraph 1, subparagraph (b), creates a separate basis for the optional establishment of jurisdiction.²²¹

4.18 Subparagraph (b), clause (i), deals with jurisdiction on the “personal” basis, sometimes referred to as the active personality principle. Unlike subparagraph (a), it is optional rather than mandatory. This reflects the diversity of State practice, many States establishing extraterritorial jurisdiction on the basis of nationality, rather fewer also asserting such jurisdiction in the case of habitual residence, and some making no use of the “personal” basis of jurisdiction.

4.19 No attempt is made to define the concepts of nationality and habitual residence. In cases of dual or multiple nationality, each State of which the alleged offender is a national may establish jurisdiction on that basis. “Habitual residence” is commonly regarded as a purely factual notion. A resolution of the Committee of Ministers of the Council of Europe suggests that “in determining whether a residence is habitual, account is to be taken of the duration and the continuity of the residence as well as other facts of a personal or professional nature which point to durable ties between a person and his residence”.²²²

Paragraph 1, subparagraph (b), clause (ii)

- (ii) The offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to article 17, provided that such jurisdiction shall be exercised only on the basis of agreements or arrangements referred to in paragraphs 4 and 9 of that article;**

²²¹The alternative view, that the requirements of clauses (i), (ii) and (iii) were cumulative so that all had to be met in a single case before a State could take jurisdiction (see *Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 22), cannot be supported; it was not suggested in the discussions of the draft, where each item was examined separately.

²²²Committee of Ministers resolution 72(1), annex.

Commentary

4.20 The second permissive basis for establishment of jurisdiction, contained in paragraph 1, subparagraph (b), clause (ii), relates to the consensual interdiction of a foreign flag vessel while exercising freedom of navigation beyond the territorial sea. This provision is concerned with the situation in which one party seeks the authorization of the flag state of a vessel that is suspected to be involved in illicit traffic in order to take appropriate enforcement measures in regard to that vessel and the persons and cargo on board. It is examined below in the context of illicit traffic by sea, which is the subject of article 17.

Paragraph 1, subparagraph (b), clause (iii)

(iii) The offence is one of those established in accordance with article 3, paragraph 1, subparagraph (c)(iv), and is committed outside its territory with a view to the commission, within its territory, of an offence established in accordance with article 3, paragraph 1.

Commentary

4.21 Article 3, paragraph 1, subparagraph (c), clause (iv), deals with participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with that article.

4.22 The case of a conspiracy in a party's territory intended to lead to action in another State, whether or not a party to the Convention, falls within the mandatory jurisdiction referred to under paragraph 1, subparagraph (a), clause (i). The effect of the present provision is to allow States to establish jurisdiction where one of those preparatory offences was committed outside its territory but "with a view to" the commission, within its territory, of an offence established in accordance with article 3, paragraph 1. An example would be a conspiracy formed in one State to effect the distribution of narcotic drugs in another State. The latter State could establish jurisdiction over that conspiracy, whether or not it actually led to the distribution of drugs on its territory. If, however, the agreement between the conspirators had reached a stage at which criminal activity was envisaged in a region embracing several States but the selection of the location of the activity awaited further information, no State within that region could rely on the present provision as a basis for jurisdiction;

it could not be shown that what had already taken place was “with a view to” the commission of an offence there.

Implementation considerations: paragraph 1, subparagraph (b)

4.23 Paragraph 1, subparagraph (b), enumerates three permissive grounds for establishing prescriptive jurisdiction. The first of these relates to offences committed extraterritorially by nationals and habitual residents. In this case, the legal acceptability of the assumption of jurisdiction on the basis of the nationality of the offender (sometimes known as the active personality principle) is universally acknowledged. Indeed, in some multilateral conventions dealing with crimes of international concern, such an assumption of jurisdiction has been made mandatory.²²³

4.24 Many States, particularly those with a civil-law tradition, use the nationality principle either as a matter of course or with considerable frequency. In France, for instance, a citizen can be prosecuted for any *crime* and many *délits* committed abroad.²²⁴ Most common-law countries, by way of contrast, have only sparingly applied their criminal laws on the basis of the nationality of the offender. Some may wish, however, in the light of the serious nature of the offences concerned, to consider creating a further exception in relation to offences established in accordance with article 3, paragraph 1. Australia, for example, has taken this step. The Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act, 1990²²⁵ was drafted so as to apply “to Australian nationals who, outside Australia, engage in conduct that is dealing in drugs, which is an offence against the law of a foreign country and which would also be an offence against the law in force in a State or Territory if [it] were engaged in by the person in that State or Territory. If the person is subsequently present in Australia he or she is liable to be charged with an offence under this provision.”²²⁶

²²³See, for example, article 6, paragraph 1, subparagraph (c), of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (*International Legal Materials*, No. 27, 1988, p. 676).

²²⁴French Code of Criminal Procedure, art. 689.

²²⁵Act No. 97 of 1990, s.12.

²²⁶*Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1989: Explanatory Memorandum* (Canberra, Parliament of the Commonwealth of Australia, House of Representatives, 1989), p. 6.

4.25 The assumption of jurisdiction on the basis of the habitual residence of an individual rather than on his or her nationality is less firmly established in international practice²²⁷ and less frequently invoked in domestic legislation.²²⁸ Thailand, for example, is among those States which have taken advantage of this option.²²⁹

4.26 In considering this and other permissive grounds for jurisdiction, attention should be paid to the effect that any such assertion of jurisdiction is likely to have in areas of international cooperation, such as extradition and mutual assistance in criminal matters. For example, in the law and practice of extradition it is not uncommon for cooperation to be excluded where the requested country does not provide for the prosecution of extraterritorial offences in like circumstances.²³⁰ Some jurisdictions, however, have concluded that it is in the interests of justice to be able to surrender fugitives in respect of a broader range of circumstances, such as where the requesting country bases its jurisdiction on the nationality of the offender.²³¹

4.27 While the second basis for the establishment of jurisdiction, contained in paragraph 1, subparagraph (b), clause (ii), is framed in permissive terms, there is no doubt that the assumption of prescriptive jurisdiction will in fact be necessary if effective use is to be made of the potential afforded by article 17. This conclusion flows from the fact that there will be little point in boarding and searching a foreign vessel in international waters, which may be crewed exclusively by foreign nationals, unless a prosecution can be entertained in

²²⁷An alternative formulation restricts this basis for the establishment of prescriptive jurisdiction to stateless persons who are habitual residents (see, for example, article 6, paragraph 2, subparagraph (a), and article 5, paragraph 1, subparagraph (b), of the 1979 International Convention against the Taking of Hostages (General Assembly resolution 34/146, annex)).

²²⁸But see *Restatement of the Law Third: The Foreign Relations Law of the United States* (St. Paul, Minnesota, American Law Institute Publishers, 1987), vol. 1, pp. 239-240.

²²⁹See section 5(1) of the 1991 Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics.

²³⁰See, for example, article 7, paragraph 2, of the European Convention on Extradition of 1957, reproduced in *Explanatory Report on the European Convention on Extradition* (Strasbourg, Council of Europe, 1985); and article 4, subparagraph (e), of the 1990 Model Treaty on Extradition (General Assembly resolution 45/116, annex).

²³¹See, for example, United Kingdom of Great Britain and Northern Ireland, Extradition Act 1989, c.33, s.2.

instances where illicit drugs are found.²³² To date, however, relatively few States have enacted legislation of this kind. In some cases, as with Ireland²³³ and the United Kingdom of Great Britain and Northern Ireland,²³⁴ the relevant statutory provisions are available for use only in respect of other parties to the 1988 Convention. There may, however, be some merit in considering a formulation not specific to the 1988 Convention,²³⁵ given the fact that international law permits any flag State to waive its exclusive jurisdiction and to consent to enforcement action by another member of the international community against its ships. This would permit the extension of this form of cooperation in respect of States that have yet to become parties to this important international instrument.

4.28 While article 4 treats both the issue of a party's jurisdiction in respect of offences taking place on board its own flag vessels and on those of other parties, it remains silent about the assumption of legislative powers over stateless vessels involved in the international traffic in narcotic drugs and psychotropic substances. The absence of specific treatment of this topic is somewhat curious, given the fact that article 17, paragraph 2, concerns requests for assistance in suppressing the use of such vessels when engaged in illicit trafficking. Subsequent international practice has identified this as a matter requiring attention, given the extent to which stateless vessels have, in fact, been used by trafficking networks.²³⁶ Thus, article 3, paragraph 3, of the 1995 Council of Europe Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, requires each participating State to "take such measures as may be necessary to establish its jurisdiction over the relevant

²³²It is of interest to note that, in article 3, paragraph 2, of the 1995 Council of Europe Agreement on Illicit Traffic by Sea, implementing article 17 of the 1988 Convention (European Treaty Series, No. 156), the establishment of such jurisdiction is made mandatory.

²³³Ireland, Criminal Justice (International Co-operation) Act No. 15 of 1994, sects. 34-36.

²³⁴United Kingdom, Criminal Justice (International Co-operation) Act 1990, c.5, sects. 19-21.

²³⁵This is the position taken in the United States Maritime Law Enforcement Act (see 46 USC 1903).

²³⁶See recommendation 13 of the Working Group on Maritime Cooperation, endorsed by the Commission on Narcotic Drugs in its resolution 8 (XXXVIII) (*Official Records of the Economic and Social Council, 1995, Supplement No. 9 (E/1995/25), chap. XII, sect. A*).

offences committed on board a vessel which is without nationality, or which is assimilated to a vessel without nationality under international law”.

4.29 It is also relevant to recall that article 17 contains a non-derogation provision in paragraph 11, in respect of the exercise of coastal State jurisdiction in accordance with the international law of the sea. It would be prudent, therefore, for those responsible for effective implementation of the 1988 Convention to examine the adequacy of existing law in relation to the exercise of jurisdiction over relevant offences within any contiguous or customs zone, as well as rules of domestic law relating to other independent law of the sea powers including the right of hot pursuit.²³⁷

4.30 The final discretionary ground for the establishment of extraterritorial prescriptive jurisdiction for which specific treatment is afforded in paragraph 1, subparagraph (b), is the so-called “effects” principle.²³⁸ This principle, which has been the source of some controversy in other contexts, is strictly limited in its application to the offences enumerated in article 3, paragraph 1, subparagraph (c), clause (iv), when committed outside the territory of a party with a view to the commission within that territory of an offence established in accordance with article 3, paragraph 1. While there is therefore a clear nexus between the act complained of and the territory of the State, the effects principle, as expressed in this context, is wider than the territorial principle envisaged in paragraph 1, subparagraph (a), clause (i). This is because, in this instance, the offence is committed outside the State’s territory, and there may indeed have been no overt act in the territory of the State. In other words the principle may extend to intended but as yet unrealized effects within State territory.

4.31 For many countries, taking full advantage of the possibilities created by this provision will require legislative action.²³⁹ That being said, the judiciary in

²³⁷The right of hot pursuit can also be used in relation to certain “mother ship” drug smuggling operations. Certain domestic courts have determined that this right also extends to so-called “extended constructive presence operations” (see, for example, *Re Pulos*, *International Law Reports*, vol. 77, No. 587 (Italy); and *R. v. Sunila and Soleyman* (1986) 28 D.L.R. (4th) 450 (Canada)).

²³⁸See article 4, paragraph 1, subparagraph (b), clause (iii).

²³⁹See, for example, Thailand, Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, section 5(2). It reads as follows: “Any person who commits an offence relating to narcotics, despite the fact that an offence is committed outside the Kingdom, shall be punished in the Kingdom, if it appears that: ... (2) the offender is an alien and intends its consequence to occur within the Kingdom or the Thai Government is the injured person”.

certain common-law jurisdictions has, in recent years, adopted a supportive view of the reach of existing common-law rules in this context. In the 1990 case of *Liangsiriprasert v. United States Government and Another*²⁴⁰ the Judicial Committee of the Privy Council held that “a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong”.²⁴¹ In the subsequent case of *Regina v. Sansom and Others*,²⁴² which also concerned an extraterritorial narcotics conspiracy, the English Court of Appeal confirmed the above view of the common-law rule and extended it to the interpretation of statutory provisions.²⁴³

Paragraph 2, subparagraph (a)

2. Each Party:

(a) Shall also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party on the ground:

- (i) That the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or**
- (ii) That the offence has been committed by one of its nationals;**

Commentary

4.32 Following the general scheme adopted in many other multilateral agreements dealing with crimes of international concern, article 4, paragraph 2, uses the concept of the vicarious administration of justice as expressed in the

²⁴⁰[1990] 2 All E.R., p. 866.

²⁴¹*Ibid.*, p. 878.

²⁴²[1991] 2 All E.R., p. 145.

²⁴³*Ibid.*, p. 150.

principle *aut dedere aut judicare*. In essence, this concept requires that when an alleged offender is present in the territory of the party and that State does not extradite the individual concerned, it should have established jurisdiction allowing it to initiate a prosecution.

4.33 The text of paragraph 2 as a whole can be compared with that of article 36, paragraph 2, subparagraph (a), clause (iv), of the 1961 Convention. In the 1961 text, unlike the present provision, there is a safeguard clause referring to the constitutional limitations of a party, its legal system and domestic law. The Commentary on the 1961 Convention, which was published in 1973, contained the suggestion that “in view of the deterioration of the international drug situation since 1961 ..., the Governments concerned may at present find the prosecution of serious offences of illicit traffic committed abroad much less objectionable on grounds of principle than they did then”.²⁴⁴ That prophetic suggestion is in some measure vindicated in the text of paragraph 2.

4.34 Where the extradition is refused on one of two grounds listed in subparagraph (a), clauses (i) and (ii), action by a party to establish its jurisdiction is mandatory. The grounds listed in subparagraph (a), clause (i), depend upon the territorial principle, with its extension to cover ships and aircraft; in all these cases each party will necessarily have established jurisdiction under paragraph 1, subparagraph (a).

4.35 The situation is not the same in cases covered by subparagraph (a), clause (ii), where the offence has been committed by one of the party's nationals. The text at this point needs to be compared with that of paragraph 1, subparagraph (b), clause (i), which enables but does not require a party to establish jurisdiction in certain cases, including the case in which the offence is committed by one of its nationals. The effect of the present provision is that jurisdiction over offences committed by nationals, which is in general optional, becomes mandatory where extradition is refused on that basis. It will be noted that there is no reference in the present provision to offences committed by a person habitually resident in the territory of a party; any refusal on the ground of the habitual residence of the alleged offender does not fall within the present provision.

²⁴⁴See also 1961 Convention, article 36, paragraph 3, and Commentary on the 1961 Convention, comments on article 36, paragraph 2, subparagraph (a), clause (iii).

Paragraph 2, subparagraph (b)

(b) May also take such measures as may be necessary to establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another Party.

Commentary

4.36 If the grounds upon which extradition is, or would be, refused are other than those stated in subparagraph (a), there is no obligation upon the requested party to establish its own jurisdiction. So, for example, if the extradition of an alleged offender for an offence²⁴⁵ committed in one State is sought from another State, where the alleged offender is present but of which he or she is not a national, and extradition is refused on the ground of possible racial prejudice,²⁴⁶ the offender may well escape prosecution, as the requested State is under no duty to establish its own jurisdiction, and indeed the case does not fall within the provisions of paragraphs 1 and 2 dealing with optional grounds for the establishment of jurisdiction. When such optional jurisdiction has been established and an alleged offender is not extradited, article 6, paragraph 9, subparagraph (b), requires that the case be submitted to its “competent authorities for the purpose of prosecution unless otherwise requested by the requesting Party for the purpose of preserving its legitimate jurisdiction”.²⁴⁷

Implementation considerations: paragraph 2

4.37 Article 4, paragraph 2, subparagraph (a), which is framed in mandatory terms, requires a party to establish jurisdiction where extradition is refused either because the offence was committed on its territory or on board one of its vessels or aircraft or because it was committed by one of its nationals.²⁴⁸ In the latter case, civil-law jurisdictions, unlike those in the common-law tradition, are

²⁴⁵Ignoring, for this purpose, the possible case of an offence established in accordance with article 3, paragraph 1, subparagraph (c), clause (iv) (see article 4, paragraph 1, subparagraph (b), clause (iii), and paragraphs 4.21-4.22 above).

²⁴⁶See article 6, paragraph 6.

²⁴⁷See below, comments on article 6, paragraph 9, subparagraph (b).

²⁴⁸See below, comments on article 6, paragraph 9, subparagraph (a).

normally prevented for constitutional, legal or policy reasons from extraditing their own citizens.²⁴⁹ As noted above, however, the same civil-law countries also tend to make very extensive use of the nationality principle and thus normally have a legal basis for bringing prosecutions against their nationals charged with offences committed abroad. Any State intending to become a party to the 1988 Convention that faces impediments to the extradition of its nationals must therefore ensure that it has invoked the option provided in paragraph 1, subparagraph (b), clause (i), to cover its obligations in such cases.

4.38 Use of the optional provision of article 4, paragraph 2, subparagraph (a), provides a further opportunity to eliminate gaps in the cover afforded to offences established in accordance with article 3, paragraph 1, which might otherwise result in individuals who have committed drug-trafficking offences abroad escaping justice. Among those States that have taken advantage of this opportunity is Australia. In section 12 of the Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act of 1990,²⁵⁰ extraterritorial jurisdiction is established over certain drug offences by a non-Australian who is subsequently present in Australia. Two situations are envisaged: first, where no request for extradition has been received from the country where the offence took place; and secondly, where extradition has been sought but has been refused. As the *Explanatory Memorandum* prepared under the authority of the Commonwealth Attorney-General noted: "Circumstances in which this might occur would be, for example, where the Attorney-General determines that the person should not be surrendered because the requesting country refused to give satisfactory undertakings as to the non-imposition or non-execution of the death penalty."²⁵¹

Paragraph 3

3. This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.

²⁴⁹See, for example, article 16, paragraph 2, of the German Basic Law; see also G. Gilbert, *Aspects of Extradition Law* (London, Martinus Nijhoff Publishers, 1991), pp. 95-99.

²⁵⁰Act No. 97 of 1990.

²⁵¹*Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Bill 1989: Explanatory Memorandum* (Canberra, Parliament of the Commonwealth of Australia, House of Representatives, 1989), p. 7; see also Thailand, Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, 1991, section 5(3).

Commentary

4.39 The Convention requires or encourages parties to establish jurisdiction in certain types of case. Where a party has established jurisdiction on some basis not included among those referred to in article 4, nothing in the Convention prevents the continued exercise of such jurisdiction.

Implementation considerations: paragraph 3

4.40 It is important that the final paragraph of article 4 should not be taken to mean that States are to regard themselves as being entirely free to establish any kind of extraterritorial jurisdiction that may have commended itself on policy or practical grounds. The issue of the proper limits of extraterritorial prescriptive jurisdiction is governed by the rules of customary international law and members of the international community have traditionally been sensitive to unreasonable or exorbitant claims to such jurisdiction. If consideration is being given to the use of bases for jurisdiction not specifically authorized elsewhere in article 4, it would be prudent for those responsible for implementation to seek appropriate specialist advice.

ARTICLE 5

Confiscation

General comments

5.1 The drafting of article 5 proved difficult, partly because of the different forms of confiscation used in national laws (see paragraph 5.7 below) and partly because of the varying concepts of confiscation to be found in national legal systems, some treating it as a preventive measure, others as a sanction. It can be noted that confiscation is expressly referred to as a sanction in article 3, paragraph 4, subparagraph (a), where the context is the need to make the commission of offences liable to sanctions which take into account the grave nature of the relevant offences.

5.2 In considering article 5 as a whole, it is important to recall the state of legal development in 1988. It was only during the 1980s that States began to develop comprehensive domestic legislation dealing with the confiscation of the proceeds of drug trafficking and other crimes, and with related matters such as money-laundering. In the latter part of that decade there was a new emphasis on the international coordination of enforcement efforts.²⁵² The Commonwealth Scheme for Mutual Assistance in Criminal Matters was adopted in 1986 and provisions on the proceeds of crime were included only at the final drafting stage. This was, therefore, an area in which many States had little experience, and even legislation already enacted, such as that in the United States, was at something of an experimental stage.

5.3 As a result, there was some initial uncertainty about the amount of detail that would be appropriate in dealing with this matter. The preliminary draft of the Convention, published in June 1986, went into very considerable detail as to the precise content of each party's domestic law, the types of order its courts should be empowered to make, and their effects and duration.²⁵³ Later drafts were produced in a more flexible style, so as to facilitate implementation in different national legal systems.

²⁵²See, for example, "Report of a Committee of Enquiry of the European Parliament", working document of the European Parliament 1986-87, document A2-114.

²⁵³*Official Records*, vol. I ..., document E/CN.7/1978/2, sect. II, art. 3.

Paragraph 1, introductory part and subparagraph (a)

1. Each Party shall adopt such measures as may be necessary to enable confiscation of:

(a) Proceeds derived from offences established in accordance with article 3, paragraph 1, or property the value of which corresponds to that of such proceeds;

Commentary

5.4 The introductory wording of paragraph 1 makes it clear that action by parties is mandatory: each party must do whatever is required to provide within its national legal system for confiscation as dealt with in this paragraph. The paragraph as drafted, read in conjunction with paragraph 9 (see paragraph 5.58 below), gives each party some discretion as to the nature of the measures that are necessary. It will be noted that the obligation is to “enable” confiscation; a party is not obliged to make confiscation mandatory in all or even specific cases.

5.5 The word “confiscation” used in this paragraph is defined as follows in article 1, subparagraph (f): “‘Confiscation’, which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority”. There is no international consistency in the use of the terms “confiscation” and “forfeiture”. One or the other term is used in different legal systems to refer to the same, or a virtually identical, concept; in some legal systems, both terms appear in different senses.²⁵⁴ The drafting is designed to prevent any arid dispute regarding terminology from obstructing the purposes of the provision. Priority was given to the term “confiscation” partly because it was used in the earlier conventions, where there are limited provisions, not entirely clear in their effect, that certain substances and equipment “shall be liable to seizure and confiscation”.²⁵⁵

5.6 Subparagraph (a) deals with the confiscation of “proceeds”, defined in article 1, subparagraph (p), as the property²⁵⁶ derived from or obtained, directly or indirectly, through the commission of an offence established in accordance with article 3, paragraph 1. Property obtained directly will include, for example,

²⁵⁴See Australia, Proceeds of Crime Act 1987, part II, s.14.

²⁵⁵1961 Convention, art. 37; and 1971 Convention, art. 22, para. 3.

²⁵⁶Itself defined in the widest possible terms (see article 1, subparagraph (q)).

money actually paid for a consignment of narcotic drugs; property indirectly derived from an offence may include, for example, a valuable painting or other asset bought with the money so received. In every case, there will be a chain of transactions connecting the property in question with the relevant offence.²⁵⁷

5.7 Subparagraph (a) also allows the device of “substitution of assets” or “value-confiscation”. In some States, under confiscation legislation, property may be seized that represents the assessed value of gains made by the offender from the offences of which he is convicted, rather than the actual property received or derived from those offences. The effect is similar to the enforcement of a money-judgement by execution against a person’s property. This approach may be found alongside and as an alternative to the direct forfeiture of identified property. There are circumstances in which direct forfeiture is impracticable or impossible or raises complex issues regarding the position of innocent third parties: an example used in the course of the discussion of the draft involved the purchase by an offender of a one-eighth share in a racehorse, the other shares being held by innocent third parties. The confiscation of the value of that share, represented for this purpose by other assets held by the offender, was cited as a satisfactory solution in such a case. “Value-confiscation” is indeed often found to be the more efficient method of enforcement.

5.8 It seems that the intention of this provision is that each party must take the measures necessary to provide either for the confiscation of proceeds, or for the confiscation of property of corresponding value. A State may, but is not required to, adopt both forms of confiscation; but each party must be able to cooperate with other States, whether or not they adopt the same approach to confiscation.

5.9 The text is not intended to cover every question that may arise in the context of legislation. Some further relevant material is found in paragraphs 6-8, considered below, but many other issues are left to the national legislator. One example is the method by which the value of property is assessed under a “value-confiscation approach”, including such questions as whether proceeds are “gross” or “net”, and the effect of inflation between the date of the offence and that of the eventual confiscation order by the court or other competent authority. Indeed the provision has been carefully drafted to avoid specifying whether a court order is needed and what legal processes must be carried out. In particular,

²⁵⁷It follows that the fact that a particular property may be an “indirect” representation of the original gains from the offence does not mean that there is any less suspicion of the persons involved, or proof of their involvement.

no reference is made to the use of criminal as opposed to civil forms of confiscation proceeding; in some States, both will be available, predicated in each case on the main offence.

5.10 The question whether a conviction must have been recorded, or whether it is sufficient to prove (in some systems, perhaps on a standard of proof lower than that required in criminal cases) that the property was derived from conduct which falls within the definition of an offence, is left to the national legislator to answer; the text does not prevent forms of confiscation that require no conviction.

Paragraph 1, subparagraph (b)

(b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with article 3, paragraph 1.

Commentary

5.11 “Narcotic drugs” and “psychotropic substances” have the meaning given in article 1,²⁵⁸ the other terms in this subparagraph are not defined in the 1988 Convention. It seems clear that the phrase “materials and equipment or other instrumentalities” should be given the broadest possible meaning. The 1961 Convention used the term “equipment”, and it was not clear whether that would include vehicles such as ships and aircraft, especially if they had been used without the consent of their owner. The present text, however, contains the additional term “instrumentalities”,²⁵⁹ which is plainly broad enough to include any vehicle used or intended to be used in the commission of the offence. The inclusion of the words “in any manner” emphasizes the breadth of the concept of instrumentalities, a concept apt to meet the developing ingenuity of offenders.

²⁵⁸See above, comments on article 1.

²⁵⁹The term “instrumentalities” is not defined in the 1988 Convention and there are distinct differences in national approaches to this issue. In some countries real property can be so regarded, while in others this is not the case. By virtue of paragraph 4, subparagraph (c), and paragraph 9, the law of the requested State will apply. Article 1, subparagraph (c), of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime defines the term to mean “any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences”.

5.12 The text refers to items “used in or intended for use in” the commission of an offence. The text does not specify whose intention need be proved; it will be for the national legislator to determine whether confiscation should be limited to items held by the person who himself intends to use them in his future commission of an offence or whether it would be sufficient to prove that he held them intending them to be used by someone else in the commission of an offence.

Paragraph 2

2. Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article, for the purpose of eventual confiscation.

Commentary

5.13 “Freezing” or “seizure” is defined in article 1, subparagraph (I), as “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 a competent authority”.²⁶⁰

5.14 Nothing is said in the text about the location of the assets in question. In many circumstances, State authorities will only be able to take practical steps to identify and trace assets situated within their own territory. A State may wish, however, to make a freezing order having extraterritorial effect, but will require the assistance of competent authorities in the State where the assets are located; no provision is made for such orders to be given effect under the Convention.²⁶¹

Paragraph 3

3. In order to carry out the measures referred to in this article, each Party shall empower its courts or other competent authorities to order that bank, financial or commercial records

²⁶⁰In some legal systems, both terms may be used, “freezing” being associated with the first part of the definition in article 1, subparagraph (I), and “seizure” implying physical restraint such as that covered by the latter part of that definition.

²⁶¹See article 5, paragraph 4, subparagraph (b).

be made available or be seized. A Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

Commentary

5.15 As is made clear in the second sentence of paragraph 3, the main purpose of this provision is to deprive offenders of the advantages offered by bank secrecy. Its scope is, however, wider. It covers other “financial” records, a category that has increased enormously in size and importance with the growth of financial service industries; and “commercial” records such as those of shipping lines, freight forwarders and insurers. A party must ensure that these records can be made available (for examination, which in the case of records held as computer data will include the “interrogation” of that data), if necessary through production orders, or seized on the order of a court or other competent authorities as defined in national law (such as prosecutors, customs authorities or other special investigatory agencies).

5.16 The obligation on parties under this provision is imposed “in order to carry out the measures referred to in this article”. These include the measures referred to in paragraph 4, dealing with international cooperation. There must be power to secure production or to order the seizure of bank and other records in response to requests from other parties, and not merely for the domestic purposes of the State in which the records are to be found.

5.17 The second sentence, with its reference to bank secrecy, prevents a party from asserting that, because of its laws, it cannot comply with the provisions of paragraph 3. That paragraph, in any event, contains no safeguard clause. Although the Convention does not require any party to abolish its bank secrecy laws, it does require appropriate exceptions to the principle of bank secrecy or confidentiality to enable action in cases involving illicit drug traffic. The application of those exceptions will be a matter for the courts or other competent authorities.²⁶²

²⁶²See also below, comments on paragraph 9.

Paragraph 4

General comment

5.18 Paragraph 4 deals with assistance provided by one party to another in the context of confiscation. The subject matter is closely related to the more general issues of mutual legal assistance dealt with in article 7, and many of the provisions of the latter article are applied expressly to cases within the scope of paragraph 4.

Paragraph 4, subparagraph (a)

4. (a) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the Party in whose territory proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article are situated shall:

- (i) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, give effect to it; or**
- (ii) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by the requesting Party in accordance with paragraph 1 of this article, in so far as it relates to proceeds, property, instrumentalities or any other things referred to in paragraph 1 situated in the territory of the requested Party.**

Commentary

5.19 Paragraph 4, subparagraph (a), deals with the situation in which the authorities of one State request the confiscation of proceeds, property, instrumentalities or other things falling within the scope of paragraph 1, and those assets are located in the territory of another State. It creates an obligation on the State party in which the assets are located to submit the substance of the request to its competent authorities. What the subparagraph does not do is oblige that party to grant the assistance requested, for there might be circumstances in

which that would not be possible under the internal law of that party.²⁶³ An example might be a case in which the requesting State had created an offence in accordance with article 3, paragraph 1, subparagraph (c),²⁶⁴ but the requested State had not done so.

5.20 If assistance is to be given, there are two different ways in which the matter might be approached. One is for the authorities of the party seeking assistance to obtain a domestic order in the courts of the requested State, supplying whatever documentary or other evidence is required under the law of that State and seeking the assistance of the authorities of that State in facilitating what is often an extremely urgent application. The other is for the competent authorities of the requesting State to obtain, generally from their courts, an order for the confiscation of specified property (or the property of a named person up to a certain value), which order purports to apply to the relevant property wherever it may be found. If the property is in fact in another State, the authorities of that State will be asked to enforce the order, a process that might involve *exequatur* procedures or the confirmation of the order by the courts of that latter State in accordance with the procedures of its national law.

5.21 Both approaches are envisaged in paragraph 4, subparagraph (a): the first is incorporated in clause (i); the second, in clause (ii). Each approach (and especially the first) may encounter significant legal difficulties, where for example the property is vested in a person who has not been convicted of any offence in the requested State (or elsewhere). Where the property is land, registered in the name of a citizen of the requested State, it may be impossible to enforce a foreign court order for its confiscation on the basis of the conviction of some other person in the foreign country.

5.22 Some of these difficulties have diminished in scale as the ideas reflected in the present paragraph have become more familiar; but they remain formidable. For that reason, subparagraph (c), considered below, contains what is in effect a substantial safeguard clause, subordinating the obligation to provide

²⁶³See below, comments on article 5, paragraph 4, subparagraph (c); see also the point of principle that constitutional provisions might preclude the confiscation of property not integrally connected to the perpetration of a specific crime (and that might mean a crime under the law of the requested State) and *Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 35.

²⁶⁴It will be recalled that this part of article 3 is subject to a safeguard clause, and to that extent the establishment of offences is not mandatory; see paragraphs 3.65 and 3.66 above.

assistance to domestic legal requirements and bilateral or multilateral agreements on cooperation in this field.

Paragraph 4, subparagraph (b)

(b) Following a request made pursuant to this article by another Party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the requested Party shall take measures to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of this article for the purpose of eventual confiscation to be ordered either by the requesting Party or, pursuant to a request under subparagraph (a) of this paragraph, by the requested Party.

Commentary

5.23 Subparagraph (a) dealt with international cooperation in effecting confiscation; subparagraph (b) deals with the earlier stage, in which steps need to be taken to identify, trace, freeze or seize²⁶⁵ the various types of property which may ultimately become liable to confiscation.²⁶⁶

5.24 The subparagraph imposes an obligation on the requested party to take measures in response to a request from another party having jurisdiction over the relevant offence, being one established in accordance with article 3, paragraph 1. It may be that the courts or other authorities of the requesting party will have issued some sort of tracing or freezing order dealing with property and purporting to have extraterritorial effect. The Convention does not provide for any procedure by which such an order could be transmitted for enforcement in another State party, a procedure that would be akin to that applying in respect of confiscation orders under paragraph 4, subparagraph (a), clause (ii) (see paragraph 5.20 above). It provides for a request to be made and responded to, drawing no distinction between cases in which there is, and those in which there is not, a court or other order in the requesting party.

²⁶⁵For the meaning of these terms, see paragraph 5.13, above, and article 1, subparagraph (l).

²⁶⁶That is, the proceeds, drugs, substances, materials, equipment and instrumentalities listed in paragraph 1.

5.25 The measures to be taken in response to the request are “for the purpose of eventual confiscation”. If proceeds are frozen as a result of a request, that does not necessarily preclude their confiscation by the requested party on some basis other than that which prompted the request; for example the proceeds of an offence over which the requesting party had jurisdiction may also be instrumentalities of a further offence in the territory of the requested party.

5.26 The obligations under subparagraph (b), like those under subparagraph (a), are subject to the safeguard clause in subparagraph (c).

Paragraph 4, subparagraph (c)

(c) The decisions or actions provided for in subparagraphs (a) and (b) of this paragraph shall be taken by the requested 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 Party.

Commentary

5.27 It was clear from the discussions in the various preparatory meetings²⁶⁷ that some representatives were concerned, for various reasons, about the mandatory nature of the provisions proposed for inclusion in what was to become article 5. These included the unfamiliarity of the concepts and the absence of appropriate provisions in domestic legal systems, especially in respect of the enforcement of foreign orders, and some anxieties about the relationship between the draft article and the emerging body of bilateral and regional agreements. Paragraph 4, subparagraph (c), meets these concerns.

5.28 The decisions and actions required by the earlier provisions of paragraph 4 are to be taken by the requested party not only “in accordance with” but also “subject to”²⁶⁸ a range of legal instruments. These include its domestic law and, included out of an abundance of caution, its procedural rules, and relevant bilateral or multilateral treaties, agreements and arrangements. Given

²⁶⁷See, especially, the reports of the third session of the open-ended intergovernmental expert group (*Official Records*, vol. I ..., document E/CN.7/1988/2 (Part IV), p. 33).

²⁶⁸The final text is more emphatic than that submitted to the Drafting Committee (see *Official Records*, vol. I ..., document E/CONF.82/11, “Preamble” (E/CONF.82/C.1/L.18/Add.2), sect. IV, para. 70 (art. 3, para. 4, subpara. (c))).

the general understanding of “arrangements” as denoting relatively informal understandings, the subjection of the obligation under the Convention to such arrangements is striking.

Paragraph 4, subparagraph (d)

(d) The provisions of article 7, paragraphs 6 to 19 are applicable *mutatis mutandis*. In addition to the information specified in article 7, paragraph 10, requests made pursuant to this article shall contain the following:

- (i) In the case of a request pertaining to subparagraph (a)(i) of this paragraph, a description of the property to be confiscated and a statement of the facts relied upon by the requesting Party sufficient to enable the requested Party to seek the order under its domestic law;**
- (ii) In the case of a request pertaining to subparagraph (a)(ii), a legally admissible copy of an order of confiscation issued by the requesting Party upon which the request is based, a statement of the facts and information as to the extent to which the execution of the order is requested;**
- (iii) In the case of a request pertaining to subparagraph (b), a statement of the facts relied upon by the requesting Party and a description of the actions requested.**

Commentary

5.29 The point has already been made (see paragraph 5.18 above) that the provisions in paragraph 4 dealing with international cooperation in confiscation cases could well have been dealt with in the Convention under the general heading of mutual legal assistance. The result of the separation of the material is seen in the comprehensive cross-reference in the opening words of subparagraph (d). The provisions made applicable under article 7 are considered in detail below; they deal with the following matters:

- (a) The preservation of obligations under an applicable mutual assistance treaty, the provisions of article 7, paragraphs 8-19, applying if the parties in question are not bound by such a treaty;²⁶⁹
- (b) The designation of authorities to handle requests;²⁷⁰
- (c) The language, form and contents of requests for assistance;²⁷¹
- (d) The execution of the requests, and the use of information obtained;²⁷²
- (e) Grounds for refusal of assistance, or its postponement;²⁷³
- (f) Immunity of persons giving evidence in the requesting party;²⁷⁴
- (g) The costs of executing the request.²⁷⁵

5.30 Only a few points need to be made here. The first concerns the omission from the material made applicable under article 7, paragraph 5, which provides that mutual legal assistance may not be refused on the ground of bank secrecy. It was not necessary to apply that provision in the confiscation context, the same principle being expressly adopted in article 5, paragraph 3 (see paragraph 5.17 above).

5.31 The second point concerns the costs of executing requests. This matter is fully examined in the context of article 7, paragraph 19, but it is relevant to note that, in the context of confiscation, the confiscated property may be made

²⁶⁹Art. 7, paras. 6 and 7.

²⁷⁰Art. 7, para. 8.

²⁷¹Art. 7, paras. 9-11; paragraph 10 is supplemented by the provisions of article 5, subparagraph 4 (d).

²⁷²Art. 7, paras. 12-14.

²⁷³Art. 7, paras. 15-17.

²⁷⁴Art. 7, para. 18.

²⁷⁵Art. 7, para. 19.

available to meet those costs. This could be the subject of an agreement under paragraph 5, considered below.

Paragraph 4, subparagraph (e)

(e) Each Party shall furnish to the Secretary-General the text of any of its laws and regulations which give effect to this paragraph and the text of any subsequent changes to such laws and regulations.

Commentary

5.32 The drafting of subparagraph (e) caused some difficulty. It replaced an earlier draft under which a party would have been required to notify the Secretary-General of which of the two approaches to international cooperation available under paragraph 4, subparagraph (a),²⁷⁶ it would adopt. That was judged to be unduly restrictive of States' freedom of action in a new field. There was, however, agreement that there was a need for some provision that would enable the Secretary-General to have full information so that a clearing-house facility for the texts of relevant laws and regulations could be provided.²⁷⁷ After a prolonged discussion, it was agreed to make the provision mandatory upon parties and not merely facultative.²⁷⁸

5.33 The duty of parties is a continuing one, imposed with a view to providing the Secretary-General with a comprehensive collection of relevant legal texts. The reference to "regulations" indicates that all written law, whether in the form of acts or subordinate legislation (including, where appropriate the legislation of parts of federal or composite States), is included.

5.34 It is clearly desirable that this provision should be interpreted in the broadest possible sense. For example, information on administrative regulations governing procedures in respect of confiscation helps to secure the smooth operation of the measures for international cooperation set out in this article.

²⁷⁶That is, the enforcement of a foreign order or the making of a domestic order on the basis of data provided by the requesting party (see paragraphs 5.20-5.22 above).

²⁷⁷*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 7th meeting, paras. 37-42 (see also the more general obligations under article 20, paragraph 1, subparagraph (a)).

²⁷⁸*Ibid.*, 9th meeting, paras. 1-41.

Paragraph 4, subparagraph (f)

(f) If a Party elects to make the taking of the measures referred to in subparagraphs (a) and (b) of this paragraph conditional on the existence of a relevant treaty, that Party shall consider this Convention as the necessary and sufficient treaty basis.

Commentary

5.35 Paragraph 4, subparagraph (f), deals with a specific difficulty created by the insistence in some national legal systems on a treaty basis for the provision of assistance of the sort contemplated in subparagraphs (a) and (b). The Convention must be accepted as providing such a treaty basis. The present text provides that the relevant party “shall” consider the Convention as a treaty basis. This contrasts with the corresponding provision in article 6, on extradition, where the Convention “may” be considered a sufficient legal basis.²⁷⁹ A party cannot refuse assistance under article 5, paragraph 4, on the ground of the absence of a treaty basis; its obligations, however, are always subject to the provisions of its domestic laws (see paragraph 5.28 above).

Paragraph 4, subparagraph (g)

(g) The Parties shall seek to conclude bilateral and multilateral treaties, agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article.

Commentary

5.36 This provision is purely exhortatory. It was timely in 1988, given the relative paucity of mutual cooperation in the field of confiscation of the proceeds of crime and the novelty of the required procedures for many States. It remains important as a means of enhancing the effectiveness of the Convention.

²⁷⁹Art. 6, para. 3.

Paragraph 5

5. (a) Proceeds or property confiscated by a Party pursuant to paragraph 1 or paragraph 4 of this article shall be disposed of by that Party according to its domestic law and administrative procedures.

(b) When acting on the request of another Party in accordance with this article, a Party may give special consideration to concluding agreements on:

- (i) Contributing the value of such proceeds and property, or funds derived from the sale of such proceeds or property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances;**
- (ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.**

Commentary

5.37 Paragraph 5 deals with the destination of property that has been confiscated. In subparagraph (a), the principle is clearly established that property confiscated by a party shall be disposed of in accordance with the domestic law and procedures of that party. They will govern, for example, the sale of assets not in monetary form, the transfer of assets to the treasury or other government fund, and the availability of assets to fund national drug enforcement agencies or to reward individuals who have contributed to a successful prosecution.

5.38 "Property" should be given the widest possible meaning, to cover all types of property (including narcotic drugs, psychotropic substances, materials, equipment and instrumentalities) confiscated in accordance with article 5.

5.39 The principle also applies where the confiscation is in response to a request from another party. There is a possible ambiguity in relation to cases falling within the scope of paragraph 4, subparagraph (a), clause (ii), of article 5, where an order of confiscation is made in the territory of one party, the requesting party, and given effect to in another, the requested party. It could be argued that the property is “confiscated by” the requesting party, whose order is, in effect, enforced elsewhere. The tenor of the discussions, however, strongly supports the view that what is meant is that property is to be disposed of in accordance with the domestic law of the country in which it is found when effective confiscation occurs. The nature of the legal steps that led up to that effective confiscation should not affect the basic principle.

5.40 In a number of States, the general principles of the legal system will require that the disposal of the confiscated assets is to be effected in one particular manner. Other States have greater flexibility, and in subparagraph (b) parties are enabled, but not required, to conclude agreements (which could be with other parties or with a relevant intergovernmental body) adopting either or both of the procedures specified in the text. One involves contributing the value of the property, or a substantial part thereof, to intergovernmental bodies specializing in the fight against illicit traffic in and abuse of narcotic drugs and psychotropic substances. This would further the purpose of the Convention as set out in article 2: the promotion of cooperation among the parties to deal more effectively with the various aspects of illicit traffic. For this reason, although the provision is not mandatory on parties, they are encouraged to “give special consideration to” the conclusion of agreements.

5.41 The other possibility is that a party may adopt the practice of sharing with other parties the value of the property that has been confiscated. As the text makes clear, this could be adopted as a regular practice or be operated on a case-by-case basis, which could reflect the relative contributions made by the investigative and enforcement agencies of the requesting and requested parties and could also take account of the costs incurred in giving effect to the confiscation. In every case, any action would be in accordance with the party’s domestic law and administrative procedures or with bilateral or multilateral agreements entered into for this purpose and binding upon the party concerned.²⁸⁰

²⁸⁰There is some tautology in the text. Parties are to give special consideration to concluding agreements to share proceeds in accordance, *inter alia*, with agreements entered into for the purpose; but the meaning is clear.

Paragraph 6, subparagraph (a)

6. (a) If proceeds have been transformed or converted into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

Commentary

5.42 Despite the existence of comprehensive definitions of “proceeds” and “property” (see paragraph 5.6 above), it was felt necessary to deal with a number of specific issues that might otherwise raise doubts as to the identity of the assets liable to confiscation.

5.43 The first case is that of the transformation or conversion of property. “Conversion” is also used in article 3, paragraph 1, subparagraph (b), clause (i). It has already been submitted (see paragraph 3.47 above) that in that context it refers to the conversion of the asset into another form (for example its sale or exchange, so that the property’s value is now represented by the money or other asset received). The word “transformation” clearly has a similar meaning. It was accepted in the course of the discussions at the Conference that this subparagraph applied whether the proceeds were still in the hands of the offender or had been passed on to another natural or juridical person.²⁸¹

5.44 This provision is a useful clarification, but the cases it concerns are already within the concept of “proceeds”, which includes property derived “directly or indirectly” from an offence.²⁸²

Paragraph 6, subparagraph (b)

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

²⁸¹ *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 11th meeting, para. 6. The provision was at that stage subparagraph (b) of the draft.

²⁸² Art. 1, subpara. (p).

Commentary

5.45 The second issue is that of intermingled property, where, for example, a luxury yacht is bought partly with proceeds derived from illicit trafficking and partly with the profits of a legitimate business. Where a party frames its domestic law in terms of confiscating the value of illicit proceeds, this case presents no special difficulties. Where, however, the domestic law is based on the confiscation of identified assets, there is a risk of what might be described as “over-confiscation” through the forfeiture of valuable assets, only a fraction of the value of which is derived, even indirectly, from illicit traffic.

5.46 The approach adopted in subparagraph (b) is to allow the confiscation of the identified property (in the example given above, the yacht), but only up to the assessed value of the intermingled proceeds. In practice, assets may have to be sold in order that this approach can be put into effect.

5.47 In many cases, the intermingling of proceeds with other property, legitimately obtained, will involve third parties. To continue the example of the luxury yacht, the offender might have entered a consortium with a group of entirely honest friends in order to make the purchase. The provisions of the subparagraph protect their interests, for their shares in the yacht are not subject to confiscation. This is further underlined by the express protection of bona fide third parties in paragraph 8, considered below.

5.48 The subparagraph uses the wording “without prejudice to any powers relating to seizure or freezing”. This ensures that the property, the yacht in the example used above, can be seized under paragraph 2 of this article for the purpose of eventual confiscation. The freezing or seizure of property is almost always undertaken as a matter of urgency, and it is impracticable to explore the full nature of the interests in the property before action is taken. The provision does not deal with some of the practical issues that arise, given that the asset may have to be held for some time pending eventual confiscation, and in such a way as not to prejudice the rights of bona fide third parties.

5.49 The text refers to the “assessed value” of the intermingled proceeds. This would seem to mean the value at the time the intermingling takes place (in the example the amount invested in the purchase of the yacht). There may be considerable difficulties in interpreting the provision where the intermingling cannot be dated so precisely, for example when illicit funds are used, with other funds, to finance a whole series of transactions over a long period of time.

Paragraph 6, subparagraph (c)

(c) Income or other benefits derived from:

(i) Proceeds;

(ii) Property into which proceeds have been transformed or converted; or

(iii) Property with which proceeds 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.

Commentary

5.50 The various types of property listed in subparagraph (c), all of which are liable to confiscation, can in many cases be deployed so as to produce income or other benefits. Examples are illicit profits placed on deposit, proceeds invested in shares on which dividends are paid, winnings on lottery tickets bought with the proceeds of drug crime, agricultural produce from land bought with illicit proceeds, or the offspring of a thoroughbred mare. It is possible to argue that these benefits are all derived from lawful transactions and are in no sense tainted by criminality, but this view is rejected in the subparagraph. What emerges instead is that gains derived from the tainted property are themselves tainted; the offender is not allowed to keep the benefit of his use of illicit proceeds.

5.51 Under the terms of this subparagraph, derivative proceeds are liable to confiscation to the same extent as all other proceeds. If there are such derivative benefits from intermingled proceeds (the case covered by subparagraph (b)), subparagraphs (b) and (c) would seemingly need to be read together, the effect being that, in such a case, the power to confiscate would apply to the derivative benefits in the proportion that the original proceeds bore to the property acquired from legitimate sources.

5.52 The above discussion omits one further complicating factor. Assets may appreciate significantly in value (see paragraph 5.49 above). It has been suggested that such an event would not serve to increase the amount which may be confiscated under subparagraph (b), which must reflect the assessed value of the intermingled proceeds. The enhancement in the value of the property, even

if unrealized, could be regarded as a “benefit” and so liable to confiscation under this subparagraph.

Paragraph 7

7. Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

Commentary

5.53 The provision in paragraph 7 imposes no obligation on parties: it merely allows them, if they so wish, to consider certain possibilities. In effect, it draws attention to an approach that has been adopted in some national legal systems, though in others it would be regarded as an unacceptable diminution of the protection properly given to accused persons. To reflect the position of parties in the latter group of States, the text emphasizes that any contemplated action must be consistent with the principles of the party’s domestic law and with the nature of the judicial or other proceedings involved.

5.54 What is suggested in the paragraph is a reversal of the onus of proof in respect of the lawful origin of the proceeds. The phrase is perhaps more appropriate to national legal systems in which criminal procedure is based on an adversarial model, but is capable of being applied under any procedural model. The court or other authority empowered to consider confiscation may be required or enabled to presume, in the absence of proof to the contrary, that assets alleged to be proceeds of illicit trafficking or other property liable to confiscation were indeed acquired illicitly. It will be for the person whose property is under threat of confiscation to establish the lawful origins of the assets. The national legislator will have to determine how, and to what standard of proof, this must be done. It is probable that legislation adopting this approach will be considered compatible with international human rights norms, provided that there is a sufficient opportunity for the accused person to rebut the presumption.²⁸³

²⁸³See the Salabiaku case before the European Court of Human Rights, Judgement of 7 October 1988 (Chamber) (Series A, No. 141.A).

5.55 The paragraph applies whether the assets are still held by the offender or have been transferred into other hands, so long as the assets are liable to confiscation.

Paragraph 8

8. The provisions of this article shall not be construed as prejudicing the rights of *bona fide* third parties.

Commentary

5.56 The detailed discussion of the various paragraphs of article 5 has demonstrated that a number of provisions, notably those in paragraphs 1 and 6, can place at risk the rights of bona fide third parties. Paragraph 8 establishes the important principle that those rights are to be protected and that the earlier paragraphs are not to be construed in such a way as to offend against that principle.

5.57 As was pointed out during the negotiation of the Convention,²⁸⁴ it is common for proceeds of trafficking to be transferred to allegedly bona fide third parties in the form of gifts to relatives, payments to traffickers' own companies or transfers between entities owned or controlled by the same persons. There is often, therefore, an acute conflict as to the bona fides of the current holder of assets potentially liable to confiscation. The text does not address itself to the issue, leaving the resolution of this conflict to national legal systems.

Paragraph 9

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 Party.

Commentary

5.58 Paragraph 9 closely parallels article 3, paragraph 11, considered above. It can be read as ensuring that nothing in article 5 shall be taken to be self-executing, or it can be relied on as a form of additional safeguard clause.

²⁸⁴ *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 11th meeting, para. 6.

Implementation considerations: article 5 as a whole

5.59 For the purposes of implementation, article 5 can be divided into those provisions which require or permit measures to be taken at the domestic level and those which focus primarily on international cooperation. There is, however, a close relationship between the two in that the goal of effective cooperation can only be met if domestic legislation is sufficiently sensitive to the practical requirements of the international dimension. There is also a degree of overlap between the two. Thus, the requirements set out in paragraph 6 have to be met satisfactorily both domestically and internationally. For ease of exposition, however, paragraphs 1, 2, 3, 6, 7 and 8 will be examined in the domestic context.

Measures to be taken at the domestic level

5.60 As noted above, the decision to include detailed treatment of the confiscation of the proceeds and instrumentalities of serious drug trafficking offences in the 1988 Convention was without precedent in a formal and binding international agreement of global reach. Indeed, while many legal systems had for long used concepts such as restitution and compensation to assist victims of crime, there was relatively little familiarity with the concept of confiscation as expressed in article 5. This accounts, in large measure, for the decision, reflected in the first three paragraphs, to leave each State party a wide measure of discretion as to how best to achieve the desired result. The importance of confiscation to the strategy of undermining the financial power of those involved in often highly lucrative illicit drug trafficking activities is, however, underlined by the fact that these broadly stated obligations are free from any limitations or safeguard clauses.

5.61 Those faced with the task of ensuring full and effective implementation of these obligations can derive substantial benefit from an examination of the experiences of a large number of countries that have already taken this step. Texts of the laws and regulations enacted by parties, along with any subsequent amendments, must be furnished by them to the Secretary-General pursuant to paragraph 4, subparagraph (e). In addition, various model laws on the confiscation of the proceeds of drug offences have been developed and may prove helpful.²⁸⁵ While many of these models base confiscation on the securing

²⁸⁵See model laws in this area developed by the United Nations International Drug Control Programme, for example: *Model Law on Money-Laundering and Confiscation in relation to Drugs (November 1995)* (for civil-law countries); and *Draft Model Drugs for Dependence Bill 1995*, part IV, *Confiscation* (for common-law systems).

of a criminal conviction, other approaches, sometimes used in combination, have also been resorted to. These include both *in rem* procedures and administrative measures.

5.62 In approaching this complex task, a number of basic decisions will have to be taken which will, in turn, help to define the overall nature and extent of the process. For example, in paragraph 1, subparagraph (a), each party is allowed the option of deciding between the two principal approaches that had evolved in domestic legislative practice at the time the Convention was adopted: namely, confiscation of property and value-confiscation. There is, however, nothing to prevent a State from using both. A form of value-confiscation must, under paragraph 6, subparagraph (b), be made available to deal with proceeds that have been intermingled with property acquired from legitimate sources.²⁸⁶ In many instances legislation has been enacted which contains elements of both approaches. For example, a State which elects to rely primarily on property confiscation may wish to make the alternative approach available to cater for circumstances in which the property in question cannot be reached. This may be helpful where the property cannot be located, has been transferred to a third party, has been removed from the jurisdiction, has been rendered worthless or substantially diminished in value, and in other like circumstances.²⁸⁷

5.63 In assessing the various options available in this context, the close connection between confiscation and the mandatory enactment of the criminal offence of drug-related money-laundering should be borne in mind.²⁸⁸ The effect of the latter is to reduce the practical differences between the two approaches, particularly where one is seeking to reach property held by third parties. In some instances the third party may well be subject to prosecution for money-laundering and liable to confiscation proceedings.²⁸⁹

5.64 A second basic decision will be whether to introduce legislation to permit only the confiscation of the proceeds of drug trafficking, as required by

²⁸⁶See above, comments on article 5, paragraph 6, subparagraph (b).

²⁸⁷See, for example, Canadian Criminal Code, *Revised Statutes of Canada 1985*, C.C-46, s.462.37(3).

²⁸⁸See above, comments on article 3, paragraph 1, subparagraph (b).

²⁸⁹See J. D. McClean, *International Judicial Assistance* (Oxford, Clarendon Press, 1992), p. 216.

the Convention, or to extend the measure to embrace the proceeds derived from other or all profit-generating crimes. Since 1988, a trend has been developing in the latter direction. This is reflected in the domestic legislation of a growing number of countries and has been encouraged in several international instruments and declarations. This is, for example, the basic approach of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.²⁹⁰ As the official *Explanatory Report* states: "One of the purposes of the Convention is to facilitate international cooperation as regards investigative assistance, search, seizure and confiscation of the proceeds from all types of criminality, especially serious crimes, and in particular drug offences, arms dealing, terrorist offences, trafficking in children and young women ... and other offences which generate large profits."²⁹¹ It is interesting to note that an increasing number of bilateral and multilateral agreements also envisage the provision of confiscation assistance beyond the area of drug trafficking. Before 1988, for example, this approach had been taken in the Commonwealth Scheme.²⁹² It has since been followed in multilateral mutual assistance treaties formulated by OAS²⁹³ and the Economic Community of West African States.²⁹⁴ Assistance in relation to the confiscation of proceeds on an "all-crimes" basis was also included in the Optional Protocol to the 1990 Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/116, annex). While a decision on this important matter is entirely within the discretion of each party, it is increasingly accepted that an "all-crimes" approach has certain practical advantages, especially in the evidentiary sphere. Parties possess a similar level of flexibility in determining how best to give effect to the requirements of paragraph 2. The enumerated measures constitute the preliminary steps necessary to ensure the ultimate effectiveness of the confiscation regime. The ability to freeze or seize property, proceeds and

²⁹⁰See, for example, article 2. For an overview of this instrument, see H. Nilsson, "The Council of Europe laundering convention: a recent example of a developing criminal law", *Criminal Law Forum*, No. 2, 1991, pp. 419-441.

²⁹¹See *Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (Strasbourg, Council of Europe, 1991), p. 6.

²⁹²Now represented by paragraphs 26-29 of the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (as amended in 1990).

²⁹³Inter-American Convention on Mutual Assistance in Criminal Matters, 1992, arts. 13-15.

²⁹⁴Convention on Mutual Assistance in Criminal Matters, 1992, arts.18-20.

instrumentalities is necessary in order to prevent their removal or dissipation in advance of eventual confiscation. Here speed and confidentiality are essential.

5.65 Experience has also demonstrated the pressing need to provide a coherent and adequately financed asset-management regime to deal with property subject to provisional measures and with confiscated property. It will be necessary for the appropriate authority to have the necessary power to take possession and control of, and to manage or otherwise deal with, the property in question. This might include the need, for example, to run restrained businesses, ranging from restaurants to ski resorts, to dispose of perishable or rapidly depreciating property, and to compensate innocent creditors.²⁹⁵

5.66 The taking of measures that will make it possible to identify and trace proceeds and property relates directly to the investigative demands that derive from the introduction of this innovative criminal justice measure. As with money-laundering, confiscation of the proceeds of crime requires the development and retention of skills which may be unfamiliar to the law enforcement community in many countries.²⁹⁶ For that reason, in article 9, paragraph 2, each party is required, to the extent necessary, to initiate, develop or improve specific training programmes dealing with, *inter alia*, the detection, monitoring of the movement of, and methods used for the transfer, concealment or disguise of proceeds, property and instrumentalities.²⁹⁷ Parties are to assist one another in the planning and implementation of such training programmes.²⁹⁸

5.67 The task faced by the law enforcement community is greatly facilitated in many countries by the removal of bank secrecy as a barrier to action in this sphere. In paragraph 3 it is also mandated that appropriate powers be taken to secure access to bank, financial and commercial records, which are often invaluable in the identification and tracing of proceeds. In many countries, the thrust of paragraph 3 has been reinforced by criminal justice provisions which

²⁹⁵See, for example, Canada, Seized Property Management Act, 1993, and the associated Seized Property Disposition Regulations, 1994.

²⁹⁶These might include, *inter alia*, skills in conducting reviews and audits of complex financial records, and preparing estimates of the net worth of individuals.

²⁹⁷See below, comments on article 9, paragraph 2, subparagraphs (d) and (e).

²⁹⁸See article 9, paragraph 3.

penalize those who prejudice an investigation by “tipping off” a suspect that his or her affairs are being subjected to official scrutiny.²⁹⁹

5.68 It is interesting to note that parties to the 1990 Council of Europe Convention are to consider the adoption of a number of special investigative techniques to facilitate the work of the law enforcement community in this area of concern. Monitoring orders, observation, interception of telecommunications, access to computer systems and orders to produce certain documents are all specifically mentioned in article 4, paragraph 2, of that convention. It is clear, however, that this list was not intended to be exhaustive. The permissive wording is sufficiently flexible to encompass other investigative tools that commend themselves because of their utility in this new and complex sphere of policing.

5.69 Paragraph 6 constitutes the exception to the general approach of leaving it to each party to determine the content of the appropriate domestic measures to enable confiscation within the bounds of paragraph 1 to take place. National flexibility is restricted to the extent that such measures must include adequate coverage of the matters contained in the three subparagraphs of paragraph 6. As noted above, subparagraphs (a) and (b) are concerned with issues that might otherwise raise doubts as to the identity of assets liable to confiscation. The practical need to focus on the treatment of transformed, converted and intermingled property flows from the sophistication and complexity of known money-laundering techniques. In subparagraph (c), it is acknowledged that tainted property and proceeds will frequently be deployed to produce income or other benefits, which must, in turn, be made liable to confiscation and related measures.

5.70 The Convention is silent on an associated issue that has emerged as a matter of concern in some countries. This issue arises when an individual involved in illicit trafficking activities has been able to conceal from the court or other appropriate authority the existence of proceeds or property and the fact comes to light only after a confiscation order has been made. Consideration might be given, in legal systems where this would be possible, to the inclusion of a power to take account of such subsequently discovered property or proceeds. One circumstance in which such a problem may arise is where assets are located in the territory of a State which is not a party to the Convention and thus is not subject to the obligations of international cooperation, to be discussed

²⁹⁹See, for example, article 8 of the European Communities Directive on Prevention of the Use of the Financial System for the Purpose of Money Laundering of 10 June 1991.

below, in the area of confiscation. Even in the absence of such an obligation of cooperation, the existence of such property or proceeds may be revealed in the course of the investigation. Here, a power to compel the individual, to the extent consistent with international law, to bring these within reach of the domestic confiscation power can be very useful. Consideration might also be given to ensuring that, in cases where the individual failed to comply with such an order, the assets in question would remain perpetually vulnerable to confiscation. The number of States that are parties either to the 1988 Convention or to other international instruments which make provision for confiscation assistance is constantly increasing and such developments may eventually bring the assets within reach. Another approach, adopted by the Netherlands,³⁰⁰ consists in a separation of the conviction and the confiscation stages of the procedure, allowing for independent time stages in these procedures.

5.71 In many cases relating to confiscation, it will be difficult to prove that the assets in question are tainted. As has been stated elsewhere: "It is almost inevitable that funds illegally obtained will be mixed, perhaps inextricably mixed, with funds obtained by more orthodox means; it is most unlikely that clear and accurate accounts will be maintained, so that proof of the source of property will often be difficult and may need to be supported by statutory presumptions or reversal of the normal burden of proof".³⁰¹ One such measure, the reversal of the onus of proof regarding the lawful origins of assets, is permitted but not required under paragraph 7. A number of countries have taken up this option in their domestic legislative arrangements. As was to be expected in a provision of this kind, the associated issue of the standard or level of proof which should be required was not treated. That is a matter to be determined by each party in the light of the basic concepts of its legal system and other factors that it considers relevant. In some common-law countries that apply the system of post-conviction confiscation, support has emerged for the view that it would be appropriate to reduce the normal burden on the prosecution when seeking to prove that the convicted trafficker had derived benefit from his other illicit activities.³⁰² Most such countries have not, however, elected to follow this approach. In some legal traditions, where it is for the courts to ensure the

³⁰⁰ Act of 10 December 1992, amending the Enforcement of Criminal Judgements (Transfer) Act in the interests of international cooperation in confiscating the proceeds of crime.

³⁰¹ J. D. McClean, *op. cit.*, p. 215.

³⁰² See, for example, *The Home Office Working Group on Confiscation: Report on the Drug Trafficking Offences Act 1986* (London, Home Office, May 1991), pp. 3-6.

sufficiency and accuracy of the facts, the burden of proof for the prosecutor is not an issue.

5.72 It is clear from the various provisions of article 5, and particularly from the terms of paragraph 6, that confiscation will frequently involve or affect the rights of third parties. Thus, in paragraph 8 it is stated that the provisions of this important article shall not affect the rights of bona fide third parties. The nature and extent of the rights in question are, however, to be defined by domestic law. It is also important to include treatment of property and proceeds held, gifted or otherwise transferred to others who do not fall within the category of innocent third parties.³⁰³

5.73 The system of confiscation constitutes a serious interference with the rights of individuals and with their economic interests. It is deliberately Draconian in character. For this reason, particular care must be taken to ensure compliance with relevant constitutional protections and applicable international human rights norms. A broad range of issues, from the protection of property rights to the payment of legal fees by persons subsequently convicted of relevant offences for which confiscation is either permitted or required, may arise for consideration.³⁰⁴ Similarly, in the introduction of legislative and other measures to provide for confiscation it is necessary to consider whether norms in such areas as the prohibition of retroactive criminal legislation have not been inadvertently infringed.³⁰⁵

Measures to be taken to further international cooperation

5.74 As has been shown, the drafters of the Convention were determined to make the innovative criminal justice measure represented by confiscation available on an international basis, and the terms of article 5, paragraph 4, are designed to achieve that goal. The task is made easier by the mandatory wording used and, importantly, by the terms of subparagraph (f), where it is stipulated that, when a treaty nexus with the requesting State is required, “that

³⁰³See Malaysia, Drugs (Forfeiture of Property) Act, 1988, for a detailed statutory treatment of this issue.

³⁰⁴For a discussion of matters that have arisen in a European context, see, for example, W. Gilmore, *Dirty Money: The Evolution of Money Laundering Counter Measures* (Strasbourg, Council of Europe Press, 1995), pp.149-160.

³⁰⁵See, for example, *Welch v. The United Kingdom*, European Court of Human Rights, 1995.

Party shall consider this Convention as the necessary and sufficient treaty basis". This contrasts with the permissive approach adopted to the same issue in article 6, paragraph 3, in the extradition context. Parties are also encouraged to conclude bilateral and multilateral agreements and arrangements to enhance the effectiveness of international cooperation in confiscation matters³⁰⁶ and a significant number of such instruments have been concluded in the years since 1988. As noted above, assistance is to be provided in accordance with and subject to the provisions of the domestic legal system of the requested party and the requirements of applicable international agreements and arrangements.³⁰⁷

5.75 Subparagraphs (a) and (b) of paragraph 4 are central to the approach adopted. The former requires that each State be in a position to provide, upon request, assistance to all other parties effecting confiscation. In this regard it has two options: (a) to submit the request to its competent authorities for the purpose of obtaining a local confiscation order; or (b) to seek to give effect to a confiscation order issued by the requesting party. The Convention is not concerned with instances in which a party receives a plurality of requests in respect of the same assets.³⁰⁸ Subparagraph (b) obligates each party to take the provisional measures referred to in the subparagraph for the purpose of eventual confiscation. Unlike the Commonwealth Scheme, the 1988 Convention makes no specific mention of seeking or providing assistance in assessing the value of assets.³⁰⁹ No positive decision appears to have been taken to exclude assistance of this kind in the drafting of either this provision or paragraph 2, subparagraph (g), of article 7, on mutual legal assistance, which is closely related to it.³¹⁰ Consequently parties may wish to consider providing this valuable form of international cooperation to others.

5.76 Articles 5 and 7 of the 1988 Convention follow the preponderant international practice of tying the provision of assistance to a specific request. The procedures and rules set out in article 7, paragraphs 6-19, are applicable,

³⁰⁶See article 5, paragraph 4, subparagraph (g).

³⁰⁷See above, comments on article 5, paragraph 4, subparagraph (c).

³⁰⁸But see article 29 of the 1990 Council of Europe Convention for one approach to this matter.

³⁰⁹Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (as amended in 1990), para. 26(1).

³¹⁰See below, comments on article 7, paragraph 2.

mutatis mutandis, to requests for assistance in matters relating to confiscation.³¹¹ As has been shown, however, article 5, paragraph 4, subparagraph (*d*), requires that certain additional information be provided for requests made in this context.³¹² The spontaneous provision of information is not, however, contemplated. By way of contrast, article 10 of the 1990 Council of Europe Convention does deal with this issue. It reads: "Without prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on instrumentalities and proceeds, when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings or might lead to a request by that Party under this chapter." Those with responsibility for implementing confiscation measures may wish to consider whether or not to provide for the spontaneous provision of information and, if so, subject to what restrictions or limitations.³¹³

5.77 Given the unparalleled ambition and intrusiveness of this new form of international cooperation, it was to be expected that it would give rise in practice to difficulties and inefficiency. A number of these difficulties relate to problems concerning the interface between countries that have adopted differing approaches to confiscation.

5.78 The first such difficulty arises out of the decision, reflected in paragraph 1, subparagraph (*a*), and paragraph 4, subparagraph (*a*), not to impose a single mandatory approach to confiscation. As has been seen, parties may select between property and value-confiscation systems. Alternatively there may be no bar to using both. Problems may arise when a request from a country with one system is directed at a State using the other unless the domestic law of the requested party has been framed in a sufficiently flexible manner. In this regard, it is interesting to note that article 7, paragraph 2, subparagraph (*a*), of the 1990 Council of Europe Convention requires that each party or participating State³¹⁴ be in a position to respond to both types of request. In this and other provisions

³¹¹Art. 5, para. 4, subpara. (*d*); see also below, comments on article 7.

³¹²See above, comments on article 5, paragraph 4, subparagraph (*d*).

³¹³See, for example, article 33 of the 1990 Council of Europe Convention.

³¹⁴The Convention is open, under certain circumstances, to participation by non-member States (see article 36, paragraph 1, and article 37).

the drafters sought to place both systems on a fully equal footing.³¹⁵ A growing number of countries have included in their domestic legislation provisions designed to accommodate this complexity.³¹⁶

5.79 It will be recalled that, in paragraph 4, subparagraph (a), in giving effect to international confiscation assistance, two basic options are recognized: (a) to seek a domestic order; or (b) to give effect to an order made by the competent authorities of the requesting State. The former reflects the position of States that are disinclined to enforce foreign criminal judgements. There is, however, growing recognition of the fact that such enforcement, where constitutionally possible, produces major gains in speed and efficiency, and it is being used with ever greater frequency in domestic confiscation law. In such international cases, it is necessary to clarify the status that will be accorded to a final judicial order issued in the requesting State which provides for confiscation - a matter left untreated in article 5. Here article 18, paragraph 3, of the OAS Model Regulations provides that such a foreign order “may be recognized as evidence that the property ... may be subject to forfeiture in accordance with the law”. Article 14, paragraph 2, of the 1990 Council of Europe Convention is somewhat different in thrust. It provides that, in procedures for the granting of *exequatur* to foreign confiscation orders: “The requested Party shall be bound by the findings as to the facts in so far as they are stated in a conviction or judicial decision ... or in so far as such conviction or judicial decision is implicitly based on them.” Here, the requested State’s courts cannot make any independent assessment of the evidence. This does not apply to the legal consequences that flow from such facts or to the hearing of new evidence if such was not available for some valid reason in the original hearings.³¹⁷

5.80 A further source of difficulty may arise in practice when a State that has put in place a conviction-based confiscation system receives a request from a State that has adopted a civil or administrative confiscation procedure. In most jurisdictions, there is no possibility of giving full faith and credit to foreign confiscation orders which do not follow upon a conviction for a relevant offence. In certain other countries, which themselves use conviction-based systems, the decision has been taken to frame the domestic law so as to cater for the provision

³¹⁵See *Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (Strasbourg, Council of Europe, 1991), p. 11.

³¹⁶See, for example, Australia, Mutual Assistance in Criminal Matters Act, 1987.

³¹⁷See *Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (Strasbourg, Council of Europe, 1991), pp. 31-32.

of assistance in relation to foreign civil confiscation proceedings. In the 1990 Council of Europe Convention it was decided to formulate a text that would be sensitive to the reality of civil but not of administrative confiscation.³¹⁸ Under article 18, paragraph 4, subparagraph (*d*), of that instrument, however, the fact that the request does not relate to a prior conviction constitutes an optional ground for refusal of confiscation assistance. The articulation of a policy to govern this matter is an important component of an overall implementation exercise.

5.81 Paragraph 5 is concerned with the important issue of the disposition of the property and proceeds that are eventually confiscated as a result of domestic proceedings or arising out of the provision of international confiscation assistance. The basic rule adopted, which reflects the preponderant approach in international practice,³¹⁹ is that the matter is to be resolved according to the domestic law and administrative procedures of the party in which the confiscation actually takes place.

5.82 The 1988 Convention does not establish any constraints on the discretion of States as to the manner in which they elect to deal with this matter and no consensus has emerged within the international community in the years since 1988. Given, however, the very substantial sums that may be involved, it is essential for a policy to be developed and any necessary changes to domestic law and practice to be put in place in order to give effect to it. These considerations should be extended to the disposition of the illicit substances, materials, equipment and instrumentalities subject to confiscation under paragraph 1, subparagraph (*a*), of this article. These can include such valuable and highly useful items as automobiles, boats and aircraft.³²⁰

5.83 The requisite authority will be required in some countries to destroy narcotic drugs, psychotropic substances or other property that may be harmful to the public. Indeed, parties may, pursuant to paragraph 5 of article 14, wish to take appropriate measures for the early destruction or lawful disposal of narcotic drugs, psychotropic substances and substances listed in Table I and Table II of the 1988 Convention and to provide for the admissibility as evidence

³¹⁸Ibid., pp. 26-27.

³¹⁹To the same effect see, for example, paragraph 28 of the Commonwealth Scheme and article 15 of the 1990 Council of Europe Convention.

³²⁰See, for example, Italy, Decree No. 309 of 9 October 1990, sect. 100.

of duly certified samples of such substances.³²¹ At a practical level, problems have arisen in certain countries concerning the final disposition of substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances.³²² At the Caribbean Drug Money Laundering Conference, held in Aruba from 4 to 10 June 1990, participating countries called for international cooperation with a view to seeking appropriate solutions in this area.³²³

5.84 In many countries, the funds realized as a consequence of the confiscation process are used to supplement general government revenues. In a growing number of cases, however, the decision has been taken either to retain the property and devote it to some specified form of official use or to sell the property (by public tender, public auction or otherwise) and transfer the proceeds from such sale to support identified priorities. For example, the Caribbean Financial Action Task Force has recommended that confiscation measures may provide that all or part of any property confiscated be transferred directly for use by competent authorities, or be sold and the proceeds of such sales deposited into a fund dedicated to the use by competent authorities in anti-narcotics and anti-money-laundering efforts.³²⁴ One device worth considering in this context is the establishment of a special fund administered by a board of trustees or a specially nominated committee. Among the countries that have adopted variants of this approach are Colombia,³²⁵ Egypt³²⁶ and Thailand.³²⁷ Others have sought to achieve similar purposes in other ways.³²⁸

³²¹See below, comments on article 14, paragraph 5.

³²²See also below, comments on article 12.

³²³See, for example, W. Gilmore, ed., *International Efforts to Combat Money Laundering* (Cambridge, Grotius Publications, 1992), p. 27.

³²⁴Reproduced in A. Smellie, "The work of the Caribbean Regional Division of the Financial Action Task Force", *Action against Transnational Criminality: Papers from the 1993 Oxford Conference on International and White Collar Crime* (London, Commonwealth Secretariat, 1994), p. 32.

³²⁵Law No. 30 of 1986, art. 97; and Decree No. 3788 of 31 December 1986, art. 43.

³²⁶Law No. 122 of 1989, art. 37 *bis* (d).

³²⁷1991 Act on Measures for the Suppression of Offenders in an Offence Relating to Narcotics, chap. III.

³²⁸See, for example, Italy, Decree No. 309 of 9 October 1990, sect. 101.

5.85 In some countries, the fruits of confiscation are reinvested, in whole or in part, in law enforcement activities, domestic and international. There is no doubt that such funding can both reinforce the effectiveness of existing programmes and permit initiatives to take place that might not otherwise have been possible. In 1994, for instance, the Financial Action Task Force on Money Laundering established an Asia Secretariat, funded by advances out of the Australian confiscated assets fund. There are, however, obvious dangers that can arise from any lax management of this new law enforcement tool. In particular, steps may need to be taken to ensure that the anticipation of benefits to be derived from sharing procedures does not have the effect of altering law enforcement priorities in unacceptable ways.

5.86 In formulating and implementing policy in this area it is not uncommon to distinguish between confiscation in a purely domestic setting and that resulting from international cooperation and this is the approach embodied in paragraph 5, subparagraph (b). This permits “special consideration” to be given to the conclusion of agreements on contributing confiscated proceeds to intergovernmental bodies specializing in efforts to counter trafficking and drug abuse and on sharing confiscated proceeds and property with other parties. Since 1988, practice has tended to focus on the latter. The flavour of that practice is captured by article 7, subparagraph (d), of the OAS Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Related Offenses, which contemplates the transfer of the “object of the forfeiture or the proceeds from its sale to any other country which participated directly or indirectly in the freezing, seizure, or forfeiture of the property, if such a transfer is authorized by an international agreement”. Much of the resulting treaty practice has been bilateral in nature and has been designed to facilitate asset-sharing on a case-by-case basis. The 1993 United Kingdom Model Agreement to Supplement and Facilitate the Operation of the Convention of the Council of Europe on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime is a good illustration of this approach. Article 6 reads: “Agreements to depart from the rule that confiscated property shall be disposed of by the requested Party in accordance with its domestic law, shall be made on a case by case basis and exclusively between the Central Authorities of the Parties under article 2 of this Agreement.”³²⁹

5.87 Countries wishing to participate in international asset-sharing need to ensure that domestic law provides the necessary authority and establishes any

³²⁹Reproduced in W. Gilmore, ed., *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge, Cambridge University Press, 1995), p. 264.

relevant conditions. For instance, in the United States there are three statutory provisions authorizing the Attorney General and/or the Secretary of the Treasury to transfer confiscated property to a foreign country.³³⁰ In Canada, the Seized Property Management Act creates a statutory regime for international asset-sharing based on prior reciprocal agreements.³³¹ The terms of the subsequent Forfeited Property Sharing Regulations of 1995 provide the necessary detail to make the scheme operational. This includes coverage of such matters as the determination of the amount available for sharing, the time at which any sharing will take place, and the rules by which, and the grounds upon which, the respective contributions of the jurisdictions in question will be assessed.

5.88 In some cases, Governments have adopted different policies on the disposition of confiscated funds based on whether or not the case which generated them possessed an international dimension. For example, in the United Kingdom, funds derived from purely domestic cases are added to general State revenues. Those confiscated as a result of the operation of international agreements, plus gifts received from overseas Governments in recognition of British cooperation in international investigations, are paid into a Seized Assets Fund. This Fund is used for specific one-time projects to help in the fight against drug abuse in the United Kingdom and elsewhere. A policy of this kind has the merit of being sensitive to the fact that certain countries may be unable or unwilling to share assets unless some direct benefit will accrue to those involved in anti-drug activities. For policy or other reasons, not all countries are prepared to adopt this level of flexibility. In Canada, for example, the Forfeited Property Sharing Regulations specifically require that asset-sharing agreements with foreign countries shall “provide that there will be no conditions in respect of the use of any monies received under the agreement”.³³²

³³⁰See 18 USC, s.981(i)(1), 19 USC, s.1616a(c)(2), and 21 USC, s.881(e)(1)(E).

³³¹See section 11, S.C. 1993, c.37.

³³²See section 4(1)(c) of the Regulations.

ARTICLE 6

Extradition

General comments

6.1 Extradition, the oldest and most firmly established mechanism for the provision of inter-State cooperation in criminal matters, is a process with which all members of the international community are familiar. Indeed, because extradition for drug-related offences was already the object of special provisions in the 1961 Convention and that Convention as amended and the 1971 Convention,³³³ many States have gained considerable experience with its operation in a drug-specific context. Unlike some of the other cooperative arrangements provided for in the 1988 Convention, such as confiscation, which deal with areas that were new to many countries at the time the Convention was adopted, implementation of the obligations relating to extradition will, for the great majority, take place primarily within an already well-developed legislative framework and administrative structure.

6.2 This is not to say, however, that compliance with the letter and spirit of article 6 can be assumed to be automatic. As will be seen in the paragraphs that follow, the 1988 Convention both differs from and improves upon the multi-lateral precedents in the sphere of drug control. Under article 6, also, extradition may be used in combination with other, less well-entrenched, cooperative methods, such as the transfer of the enforcement of sentences³³⁴ and the transfer of sentenced persons³³⁵ in order to address particular difficulties that had been encountered in previous international practice.

6.3 Unlike the Convention's approach to confiscation (article 5) and mutual legal assistance (article 7), the provisions of article 6 are not intended to

³³³See 1961 Convention as amended, article 36, paragraph 2, subparagraph (b), and 1971 Convention, article 22, paragraph 2, subparagraph (b). The relevant subparagraph of the 1961 Convention was amended and considerably broadened and strengthened by article 14 of the 1972 Protocol (see also *Extradition for Drug-Related Offences* (United Nations publication, Sales No. E.85.XI.6)).

³³⁴See below, comments on article 6, paragraph 10.

³³⁵See below, comments on article 6, paragraph 12.

produce a detailed mini-treaty in relation to extradition. As is the case with the 1961 Convention as amended and the 1971 Convention, they rely heavily on past and future international agreements and arrangements between the parties and on the domestic laws of each party.³³⁶

Paragraph 1

1. This article shall apply to the offences established by the Parties in accordance with article 3, paragraph 1.

Commentary

6.4 As with certain of the other key provisions of the 1988 Convention, paragraph 1 limits the scope of the conduct covered to the relatively more serious trafficking offences enumerated in article 3, paragraph 1. These include both intentional acts of money-laundering³³⁷ and the manufacture, transport or distribution of equipment, materials and substances listed in Table I and Table II of the Convention in the knowledge that they are to be used for illicit purposes.³³⁸ Neither of these forms of conduct were prohibited by the previous multilateral drug conventions and they were new criminal offences for many States when the Convention was adopted. Given the pivotal role played in extradition law and practice by the concept of dual criminality (that is, the requirement that the act forming the basis of the request must constitute a criminal offence under the laws of both requesting and requested States), these offences had been largely beyond the reach of international cooperation through extradition. The modernization of the law which this represents has been regarded as one of the most notable achievements of the 1988 Convention.³³⁹

³³⁶See, for example, J. Schutte, "Extradition for drug offences: new developments under the 1988 U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", *Revue internationale de droit pénal*, No. 62, 1991, p. 137.

³³⁷See above, comments on article 3, paragraph 1, subparagraph (b).

³³⁸See above, comments on article 3, paragraph 1, subparagraph (a), clause (iv).

³³⁹See, for example, "Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", 101st Congress, 1st Session, Senate, Exec. Rept. 101-15, p. 49.

Paragraph 2

2. 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 Parties. The Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

Commentary

6.5 The text of paragraph 2 is virtually identical to that of article 36, paragraph 2, subparagraph (b), clause (i), of the 1961 Convention as amended by the 1972 Protocol. The text of this part of the 1961 Convention was much weaker: it made no amendment to existing extradition treaties and merely indicated that it was “desirable” that the relevant offences be included in future treaties between the parties.³⁴⁰ In keeping with the preponderant modern multilateral treaty practice concerning crimes of international concern,³⁴¹ the 1972 Protocol amended article 36, paragraph 2, of the 1961 Convention, and the present text closely follows that adopted in 1972. In the 1972 text, however, the whole of paragraph 2 is subject to a safeguard clause referring to “the constitutional limitations of a Party, its legal system and domestic law”; no such safeguard clause applies in the 1988 text.

6.6 Article 3, paragraph 2, of the 1988 Convention amends, as a matter of public international law, prior extradition treaties to which the parties are subject so as to include within their scope offences established in accordance with article 3, paragraph 1. This applies to multilateral as well as bilateral treaties insofar as they bind the parties to the present Convention.³⁴²

³⁴⁰See Commentary on the 1961 Convention, comments on article 36, paragraph 2, subparagraph (b); and Commentary on the 1971 Convention, comments on article 22, paragraph 2, subparagraph (b), which is couched in similar terms.

³⁴¹See, for example, article 10, paragraph 1, of the 1979 International Convention against the Taking of Hostages (United Nations, *Treaty Series*, vol. 1316, p. 205).

³⁴²See Commentary on the 1972 Protocol, paragraph 3, footnote 2, of the comments on article 14, paragraph 2, introductory paragraph, subparagraph (a), and subparagraph (b), clause (i), drawing attention to the requirements of the 1969 Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, p. 331) regarding the amendment to article 36 of the 1961 Convention.

6.7 Parties are also obligated to include offences established in accordance with article 3, paragraph 1, as extraditable offences in future extradition agreements to be concluded between them.

Paragraph 3

3. If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention as the legal basis for extradition in respect of any offence to which this article applies. The Parties which require detailed legislation in order to use this Convention as a legal basis for extradition shall consider enacting such legislation as may be necessary.

Commentary

6.8 In paragraphs 3 and 4 the existence of two distinct traditions in the field of extradition law and practice is recognized. In international law it is accepted that a State has no duty to extradite in the absence of a treaty obligation to that effect. It is equally clear, however, that there is no rule of customary international law to preclude extradition where no treaty exists between the requesting and requested States. Many States have made provision in their domestic law to permit extradition even in the absence of an applicable treaty obligation. Others, including some common-law countries, have made extradition conditional on the existence of a treaty relationship between the requesting and requested States.³⁴³ The former group is treated in paragraph 4 while the position of the latter is covered in paragraph 3.

6.9 The text of the first sentence of paragraph 3 is based on that of the corresponding sentence in paragraph 2, subparagraph (b), clause (ii), of the 1961 Convention as amended by the 1972 Protocol. It imposes no obligation on the parties and merely makes available an option (which would exist even if there were no such provision in the text).³⁴⁴ At the Conference, and in the preparatory

³⁴³Others have adopted a mixed approach. For example, even prior to its 1989 legislation making provision for ad hoc extradition, the United Kingdom did not require, for various historical legal and policy reasons, subsisting treaties with Commonwealth countries or Ireland.

³⁴⁴The text of the 1961 Convention as amended by the 1972 Protocol underlines this by using the wording "may at its option".

meetings, there was a great deal of discussion regarding the possibility of making this provision mandatory,³⁴⁵ thus bringing it into line with the mandatory nature of paragraph 4 of the article. This was opposed on the grounds that some States had a fixed policy whereby extradition was to be negotiated bilaterally, and were the paragraph to be mandatory it would in effect operate as a multi-lateral extradition treaty. It was for this reason that corresponding provisions in other multilateral treaties were non-mandatory.³⁴⁶ The eventual decision was to keep the word “may”, and thus the non-mandatory nature of the first sentence of the paragraph, but to add a second sentence in which the word “shall” was used.

6.10 In fact, however, the second sentence of paragraph 3 is exhortatory. It encourages, but does not require, parties which might be able to use the 1988 Convention as a legal basis for extradition (but whose domestic legal tradition is such that detailed provisions are customary) to ensure that their domestic legislation is adjusted appropriately. It is mandatory for such parties to consider taking action, but there is no requirement that such consideration should lead to action.

Paragraph 4

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

Commentary

6.11 In respect of parties which may extradite in the absence of a treaty, paragraph 4 (based on the text of article 36, paragraph 2, subparagraph (b), clause (iii), of the 1961 Convention as amended by the 1972 Protocol) requires that offences established in accordance with article 3, paragraph 1, be regarded as extraditable in relation to other parties to the Convention. The provision is

³⁴⁵*Official Records*, vol. I ..., document E/CN.7/1987/2 (Part IV), chap. II (“Article 3”), p. 36, paras. 59-61; *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 13th meeting, paras.100-105; *ibid.*, 15th meeting, para.1; *ibid.*, 17th meeting, paras. 1, 2 and 21; and *ibid.*, 27th meeting, paras.13-32.

³⁴⁶For example, 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 2; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 2; and 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 11, para. 2.

mandatory. As one representative at the 1988 Conference has since noted, however, this “only requires such States to create for themselves the legal possibility to extradite, but does not affect their discretion in granting or even dealing with extradition requests from other Parties”.³⁴⁷

Paragraph 5

5. Extradition shall be subject to the conditions provided for by the law of the requested Party or by applicable extradition treaties, including the grounds upon which the requested Party may refuse extradition.

Commentary

6.12 Article 6, paragraph 5, establishes the general rule that extradition in respect of relevant offences under the 1988 Convention remains subject to the domestic law of the requested party and applicable obligations in bilateral or multilateral extradition agreements. This concept is specifically applied, out of caution, to the critical sphere of the grounds upon which requests for extradition may be refused. The decision was, however, taken to insert in paragraph 6 reference to one specific group of optional grounds for refusal.

6.13 The Conference discussed at length the issue of the refusal of extradition on the ground of nationality. Many States have a constitutional principle against, or strongly held objection to, the extradition of their nationals, but the Conference had before it a draft paragraph with many optional formulations, which would exclude, limit or at least discourage the refusal of extradition on the ground of nationality (or of habitual residence).³⁴⁸ In the end the whole draft paragraph was rejected. The case of nationals whose extradition is not possible is further dealt with in article 4, paragraph 2, subparagraph (a), which requires parties to establish jurisdiction over offences committed by a national when extradition is refused on the basis of nationality, and in article 6, paragraphs 9 and 10, which reflect the *aut dedere aut judicare* principle and are designed to

³⁴⁷J. Schutte, loc. cit., p. 138.

³⁴⁸For the text, see *Official Records*, vol. I ..., document E/CONF.82/11, article 4 (E/CONF.82/C.1/L.18/Add.3), sect. I. For the discussion, see *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 15th meeting, paras. 7-102; *ibid.*, 16th meeting, paras. 41-78; *ibid.*, 17th meeting, paras. 1-32; and *ibid.*, 25th meeting, paras. 67-72.

ensure that in general such persons will be brought to trial or will serve the sentence imposed upon them.

Paragraph 6

6. In considering requests received pursuant to this article, the requested State may refuse to comply with such requests where there are substantial grounds leading its judicial or other competent authorities to believe that compliance would facilitate the prosecution or punishment of any person on account of his race, religion, nationality or political opinions, or would cause prejudice for any of those reasons to any person affected by the request.

Commentary

6.14 The form of protection referred to in paragraph 6 with respect to the individual whose extradition is sought is variously known as a “non-discrimination”, “fair trial” or “asylum” clause. Its purpose is to enable a requested State to refuse extradition where it is determined that the request is discriminatory in its purpose or that the individual concerned might be prejudiced upon his or her return on one or more of the specified grounds. Provisions intended to achieve a similar protective result have been included in numerous international agreements and arrangements, such as the Commonwealth Scheme for the Rendition of Fugitive Offenders³⁴⁹ and the European Convention on Extradition.³⁵⁰ The inclusion of the paragraph in article 6 was expressly inspired by the Commonwealth Scheme.³⁵¹ It was the subject of a strong objection by the United States,³⁵² directed to the phrase “judicial or other competent authorities”. In many States, extradition decisions are made by, or at least involve, the judiciary, but the United States position was that its legal system vested the power of decision in the executive branch of government. The United States view was that paragraph 6 did not oblige it to make any change in this practice, the phrase “judicial or other competent

³⁴⁹Commonwealth Scheme for the Rendition of Fugitive Offenders, para. 10(2).

³⁵⁰European Convention on Extradition, art. 3, para. 2.

³⁵¹*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 27th meeting, para. 2.

³⁵²*Ibid.*, Summary records of plenary meetings, 7th plenary meeting, paras. 39-44.

authorities” being one which each party could interpret in the light of the practice in its own legal system.

Implementation considerations: paragraphs 1-6

6.15 The formula used in paragraph 1 excludes offences defined in article 3, paragraph 2, from the scope of article 6.³⁵³ Parties are, however, free to depart from this restriction in their own law and practice should they so wish.³⁵⁴ This can be achieved either directly, as with the domestic law and relevant treaty definitions of extraditable offences, or indirectly, through the treatment of the subject of “accessory extradition”.³⁵⁵

6.16 As has been noted, the principle of dual criminality plays a pivotal role in extradition. While the impact of the dual criminality rule has been reduced in relation to offences established in accordance with article 3, paragraph 1, it has not necessarily been eliminated. Care should be taken to ensure that technical differences in the approaches adopted by different countries in giving expression to their obligations to criminalize the enumerated types of prohibited conduct do not unintentionally come to constitute obstacles to extradition. Modern international practice provides support for the view that, for the purposes of satisfying this requirement, differences in terminology should be disregarded and the operation of the dual criminality rule should be based on a consideration of all of the acts or omissions rather than a mere comparison of offences.³⁵⁶ The adoption of such an approach, however, would still not dispose of all possible difficulties in this sphere. For example, the obligation to criminalize the activities enumerated in article 3, paragraph 1, subparagraph (c), is subject to a safeguard provision. Consequently, there are likely to be considerable differences among parties in the extent to which, and the manner in which, these matters are dealt with in domestic law.

³⁵³See above, comments on article 3, paragraph 2. This approach is in contrast to that adopted in article 36, paragraph 2, subparagraph (b), of the 1961 Convention. The latter, however, contains the specific discretion “to refuse to effect the arrest or grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious”, a point unaffected by the amendments made in the 1972 Protocol.

³⁵⁴See below, comments on article 24.

³⁵⁵See, for example, 1990 Model Treaty on Extradition (General Assembly resolution 45/116, annex), article 2, paragraph 4.

³⁵⁶See, for example, 1990 Model Treaty on Extradition, article 2, paragraph 2.

6.17 Consideration should be given to the question whether the *ex post facto* amendment of existing treaty obligations effected as a matter of public international law by paragraph 2 would be regarded as effective in domestic law.³⁵⁷ If not, it would be necessary for corrective action to be taken by amending domestic law to reflect the requirements of the Convention.

6.18 Much modern international treaty practice in the field of extradition is not drug-specific but deals with this form of cooperation in relation to crime in general. Such practice, to a growing extent, defines extraditable offences in terms of severity of punishment. This is the procedure used in, among many other instruments, the Commonwealth Scheme on the Rendition of Fugitive Offenders³⁵⁸ and the European Convention on Extradition of 1957.³⁵⁹ It is also the approach recommended in the Model Treaty on Extradition³⁶⁰ approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Havana in 1990, and subsequently adopted by the General Assembly in its resolution 45/116 of 14 December 1990.³⁶¹ Given the nature of the offences established in article 3, paragraph 1, and the injunctions contained in paragraph 4, subparagraph (a), and paragraph 5 of that article, designed to ensure that they attract appropriately severe sanctions, compliance with the requirements of article 6, paragraph 2, is likely to be automatic, provided that the approach of defining extradition offences in terms of severity of punishment is adopted.

6.19 By way of contrast, some international instruments, reflecting domestic law requirements, use the approach of specifically listing offences that are considered to be extraditable. Those charged with the negotiation of any instrument

³⁵⁷See, for example, *Arnbjorndottir-Mendler v. United States*, 721 F.2d 679 (9th Cir. 1983) (extradition to Iceland based on the old treaty between Denmark and the United States and on the 1961 Convention).

³⁵⁸Commonwealth Scheme for the Rendition of Fugitive Offenders (as amended in 1990), para. 2 (Returnable offences).

³⁵⁹*Explanatory Report on the European Convention on Extradition* (Strasbourg, Council of Europe, 1985), pp. 13-14.

³⁶⁰See article 2, paragraph 1.

³⁶¹See also R. Clark, "Crime: the UN agenda on international cooperation in the criminal process", *Nova Law Review*, No. 15, 1991, pp. 485-489; and R. Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at Their Implementation* (Philadelphia, University of Pennsylvania Press, 1994), pp. 210-216.

of this kind in the future must ensure that all of the activities prohibited under article 3, paragraph 1, are so covered. In some instances, to be regarded as an extraditable offence within this tradition the conduct must be listed both in the relevant extradition treaty and within the body of domestic extradition law. In such cases consequential alterations to the domestic law list will also be required.³⁶²

6.20 A number of parties have since taken advantage of the permissive provision in the second sentence of paragraph 3. For example, the United Kingdom elected to legislate so as to add the 1988 Convention to the list of international instruments, contained in section 22 of the Extradition Act, 1989, which may be used as a matter of domestic law for this purpose.³⁶³ Others, for various reasons, have been unable to do so. For example, the United States faces legal constraints in using multilateral conventions as the basis for extradition. Consequently it subjected its ratification of the 1988 Convention to the specific understanding that the United States “shall not consider this convention as a legal basis for extradition of citizens to any country with which the United States has no bilateral extradition treaty in force”. Where the reason for the inability to use the Convention as the legal basis for extradition flows from the absence of detailed domestic legislation, consideration is to be given to the enactment of such measures.

6.21 The subject of “non-discrimination” is often dealt with as a mandatory ground for refusal and this is the approach which has been adopted in article 3, subparagraph (b), of the 1990 Model Treaty on Extradition (General Assembly resolution 45/116, annex). This issue has also been dealt with in the domestic extradition laws of numerous States. Consequently, giving effect to its terms should not be the source of any particular difficulty.

6.22 The non-discrimination clause in paragraph 6 overlaps but does not fully coincide with the traditional extradition practice of precluding the return of individuals if extradition is sought in respect of an offence which is regarded by the requested State as an offence of a political character.³⁶⁴ In instances in which

³⁶²See, for example, United Kingdom, Extradition Act, 1989, sect. 38, and Criminal Justice (International Cooperation) Act, 1990, sect. 22.

³⁶³See United Kingdom, Criminal Justice (International Cooperation) Act, 1990, sect. 22, paras. 2 and 3.

³⁶⁴See J. Young, “The political offence exception in the extradition law of the United Kingdom: a redundant concept?”, *Legal Studies*, No. 4, 1984, pp. 211 ff.

the ambit of the political offence exception is either limited or eliminated, the rule relating to discrimination³⁶⁵ has to be relied upon more heavily than usual. In this regard it will be recalled that in article 3, paragraph 10, participating States are required to ensure that for the purposes of international cooperation, including extradition, offences established in accordance with the 1988 Convention are not considered as political or politically motivated.³⁶⁶ This obligation, which also extends to the categorization of the same acts as “fiscal offences”, another traditional ground for the refusal of extradition, is “without prejudice to the constitutional limitations and the fundamental domestic law of the Parties”. Consideration must therefore be given to whether or not this qualified obligation applies and, if so, how best to implement it in domestic law and practice.

Paragraph 7

7. The Parties shall endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

Commentary

6.23 Paragraph 7, in the form in which it emerged from the Conference,³⁶⁷ is merely an encouragement to parties to achieve more expeditious procedures and to overcome the difficulties which the requirements regarding evidence sometimes present (notably the so-called *prima facie* case requirement) (see also paragraphs 6.25 and 6.26 below).

³⁶⁵See, for example, *Explanatory Report on the European Convention on the Suppression of Terrorism* (Strasbourg, Council of Europe, 1979), pp. 14-15.

³⁶⁶See above, comments on article 3, paragraph 10.

³⁶⁷There is an error in the *Official Records* concerning paragraph 7 and the paragraphs that follow it. The “basic proposal” set out in the report of Committee I (*Official Records*, vol. I ..., document E/CONF.82/11, “Article 4” (E/CONF.82/C.1/L.18/Add.3), para.1) is not in fact the text that was before the Conference, but a much later version. For the text that the participants were discussing, see *Official Records*, vol. I ..., document E/CONF.82/3, annex II, p. 79 (“Article 4”).

Implementation considerations: paragraph 7

6.24 While paragraph 7 is merely “a general hortatory provision encouraging Parties to simplify and expedite extradition procedures”,³⁶⁸ its inclusion can be taken to reflect a widespread dissatisfaction within the international community with traditional approaches to dealing with the threat posed by modern forms of international drug trafficking. The desirability of introducing changes designed to improve the effectiveness of this form of extradition in relation to relevant offences, including money-laundering, has continued to be articulated in various forums since the 1988 Convention was concluded.³⁶⁹

6.25 One source of concern when the Convention was being drafted was the difficulties encountered in many countries, especially those with civil-law jurisdictions, in satisfying requirements to provide the courts of the requested country with adequate evidence of the guilt of the accused before extradition could take place. This rule, commonly known as the *prima facie* case requirement, which plays an important part in the extradition laws of many common-law countries, is frequently regarded as a major barrier to effective cooperation in this sphere. In the light of such views, for example, the United Kingdom has enacted legislation that provides for the progressive abolition of the *prima facie* case rule on a State-by-State basis by Order in Council.³⁷⁰

6.26 Although dissatisfaction with the operation of this requirement is most evident when the requesting State is from the civil-law tradition, there is concern about its effect even when the extradition is between common-law jurisdictions. This is clearly illustrated by the fact that Commonwealth law ministers, meeting in New Zealand in 1990, agreed to make a change to the 1966 Scheme. In essence, the compromise formula that was accepted enables those Commonwealth countries wishing to retain the traditional approach to do so while also providing for bilateral arrangements between pairs of countries wishing to handle this matter in a different fashion. As has been stated elsewhere, the new optional provision “enables countries to negotiate whatever

³⁶⁸“Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 101st Congress, 1st Session, Senate, Exec. Rept. 101-15, p. 52.

³⁶⁹See, for example, Financial Action Task Force on Money Laundering, “Annual report, 1996”, annex, recommendation No. 40.

³⁷⁰Extradition Act 1989, sect. 9(8)(a) (see also, for example, the European Convention on Extradition Order, 1990, No. 1507).

modifications are appropriate in their circumstances, but presents one particular model which many countries might choose to adopt".³⁷¹ The 1988 Convention provides an element of additional momentum to the consideration of changes of this general type.

6.27 Any review of the adequacy of existing extradition procedures and requirements could derive substantial benefit from an examination of developments in other countries and regions. For example, in Europe it has come to be increasingly accepted that reliance on the diplomatic channel for the communication of extradition requests has given rise to unnecessary delays while direct contact between ministries of justice³⁷² or through designated central authorities³⁷³ offered more satisfactory alternatives. A concern with administrative efficiency is also evident in precedents which authorize the use of modern means of communication, such as facsimile transmission,³⁷⁴ in an extradition context.³⁷⁵

6.28 A further development that has commanded attention in recent years is the provision for a summary or simplified procedure to expedite the process when the individual concerned does not intend to contest extradition. This facility has been provided in a number of regional arrangements including the Benelux treaty of 1962, the 1990 Schengen Convention and the 1995 Convention on Simplified Extradition Procedure between the Member States of the European Union, and is covered as well in article 6 of the 1990 Model Treaty on Extradition.

³⁷¹Commonwealth Secretariat, document LMM(90)32.

³⁷²See, for example, the 1978 Second Additional Protocol to the European Convention on Extradition, chap. V.

³⁷³See, for example, article 1 of the Agreement between the Member States of the European Communities for the simplification and the modernization of the ways of transmitting extradition requests, concluded at San Sebastián on 26 May 1989.

³⁷⁴Agreement between the Member States of the European Communities for the simplification and the modernization of the ways of transmitting extradition requests, arts. 2 and 3.

³⁷⁵The 1990 Schengen Convention has made several changes in this sphere (see, for example, articles 64 and 65). Agreements of accession to this Convention have in the meantime been concluded with Greece, Italy, Portugal (in force) and Spain. A further agreement of accession is being concluded with Austria. Negotiations are under discussion with Denmark, Finland and Sweden for accession instruments and with Iceland and Norway for parallel application instruments.

6.29 A review of extradition law and practice can of course be much more ambitious and comprehensive in nature. In recent years, for instance, the member States of the European Union have initiated a process in which many of the major features of this cooperative mechanism have been subject to examination. This has included, *inter alia*, giving consideration to relaxing and standardizing the threshold for extraditable offences, to lessening the severity of the rule prohibiting extradition where, under the law of the requested State, the individual is immune from prosecution or punishment by reason of lapse of time, to refining the scope of operation of the speciality rule (that is, the rule excluding prosecution for offences beyond the scope of the original grant of extradition, save with the consent of the requested State) and to easing restrictions relating to the non-extradition of nationals.

6.30 While changes in many of these areas could only be brought about by legislation and appropriate treaty revision, other significant improvements can be facilitated more simply. In the course of its presidency of the European Communities in 1992, the United Kingdom initiated discussions with other member States which resulted in agreement on several practical steps that could be taken to remove avoidable delays. A number of improvements resulted, including the publication of a guide to the extradition procedures of the States concerned, containing flow charts, a listing of contact points and other valuable information of a practical nature.³⁷⁶ In 1994, the secretariat of the Council of Europe was given the task of extending this text to include all parties to the 1957 European Convention on Extradition. Such initiatives do not necessarily require a regional or subregional framework. For example, the preparation of a practical guide to domestic extradition law and practice could be undertaken unilaterally and subsequently distributed by the central authority to States with which there are existing extradition agreements or to all parties to the 1988 Convention. Furthermore, the availability of such a practical explanatory note would be of value in the preliminary stages of extradition treaty negotiations with States that may have no prior experience of local requirements. The conclusion of such agreements is encouraged in article 6, paragraph 11.

Paragraph 8

8. Subject to the provisions of its domestic law and its extradition treaties, the requested Party may, upon being

³⁷⁶See *Extradition: a Guide to Procedures of EC Member States (Incorporating Contact Points)* (London, Home Office, International Criminal Policy Division, July 1993).

satisfied that the circumstances so warrant and are urgent, and at the request of the requesting 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 presence at extradition proceedings.

Commentary

6.31 Paragraph 8 was inserted in the course of the negotiations at the Conference. It is based on wording found in a number of treaties³⁷⁷ and is designed to promote the effectiveness of extradition arrangements by making provision for the offender to be taken into custody and for other appropriate measures designed to ensure his presence at the extradition proceedings. The safeguard clause was regarded as essential because of the differing requirements of national legal systems regarding provisional arrest and bail procedures and the potential conflict with particular provisions in existing extradition treaties.

6.32 This paragraph deals with the possibility of requests being made in cases of urgency for the provisional arrest of the person sought pending the initiation of formal extradition procedures. It is the norm in bilateral and multilateral treaty practice to provide coverage of this important issue and this is often done in some detail.³⁷⁸ Where such a treaty exists between the requested and requesting State, paragraph 8 will have no relevance. It is mainly intended to assist those parties which make extradition conditional upon the existence of a treaty relationship and are willing, under paragraph 3, to consider the 1988 Convention as providing the required legal basis. Such countries “may also need a Treaty basis to be able to order the provisional arrest of a person with a view to his or her eventual extradition, even prior to the presentation of a formal extradition request”.³⁷⁹

³⁷⁷For example, the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (art. 6, para. 1); the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (art. 6, para. 1); and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (art. 7).

³⁷⁸See, for example, the 1990 Model Treaty on Extradition (General Assembly resolution 46/116, annex), article 9, and the 1957 European Convention on Extradition, article 16.

³⁷⁹J. Schutte, *loc. cit.*, p. 142.

Implementation considerations: paragraph 8

6.33 Those parties which make extradition conditional upon the existence of a treaty relationship and are willing, under paragraph 3, to consider the 1988 Convention as providing the required legal basis may have to enact enabling legislation to govern the proper exercise of this power and to put in place appropriate administrative and other procedures. In doing so it is essential to bear in mind that requests for provisional arrest are, by definition, of an urgent nature and will often require the taking of speedy and efficient action by the requested State. Requirements relating to such matters as the content of provisional arrest requests and the permissible means of communicating the same should be formulated with the need for speed and efficiency clearly in mind.³⁸⁰

6.34 Any examination of the issue of provisional arrest could profitably be expanded to include a review of policy and procedure in respect of the making of requests to other States. It is of importance to ensure that requests are only submitted in cases of sufficient urgency. In the context of the European Convention on Extradition of 1957, for instance, the frequency with which parties have used this procedure has given rise to concern³⁸¹ and there have been a number of calls for restraint.³⁸²

Paragraph 9

9. Without prejudice to the exercise of any criminal jurisdiction established in accordance with its domestic law, a Party in whose territory an alleged offender is found shall:

(a) If it does not extradite him in respect of an offence established in accordance with article 3, paragraph 1, on the grounds set forth in article 4, paragraph 2, subparagraph (a),

³⁸⁰See, for example, paragraph 4(1) of the Commonwealth Scheme for the Rendition of Fugitive Offenders, which provides, *inter alia*, that for the purposes of issuing a provisional warrant for arrest, the competent judicial authority in the territory where the individual is located or is believed to be on his or her way may take cognizance of relevant information contained in the international notices issued by the International Criminal Police Organization (Interpol).

³⁸¹See, for example, H. J. Bartsch, "The Western European approach", *Revue internationale de droit pénal*, No. 62, 1991, pp. 508-509.

³⁸²See, for example, recommendation R(80)7 of the Committee of Ministers of the Council of Europe.

submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the requesting Party;

(b) If it does not extradite him in respect of such an offence and has established its jurisdiction in relation to that offence in accordance with article 4, paragraph 2, subparagraph (b), submit the case to its competent authorities for the purpose of prosecution, unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction.

Commentary

6.35 The discussion of paragraph 9 at the Conference was made difficult by the fact that the text of what was to become article 4, paragraph 2, was not wholly settled when consideration of article 6 began.

6.36 It will be recalled that article 4, paragraph 2, deals with two different types of case. Paragraph 2, subparagraph (a), is mandatory, providing that each party must establish its jurisdiction over the offences it has established in accordance with article 3, paragraph 1, when the alleged offender is present in its territory and it does not extradite him to another party on the ground that the offence has been committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or that the offence has been committed by one of its nationals. Subparagraph (b) is non-mandatory. Each party may establish its jurisdiction over the relevant offences when the alleged offender is present in its territory and it does not extradite him or her to another State party; if the grounds upon which extradition is refused are other than those stated in subparagraph (a), there is no obligation upon the requested party to establish its own jurisdiction.

6.37 Article 6, paragraph 9, approaches the same type of issue but in the context of extradition. It creates certain obligations under public international law which are expressed as being without prejudice to the exercise of any criminal jurisdiction established in accordance with the domestic law of the party from whose territory extradition is sought ("the requested Party"). The obligation, subject to the other conditions set out in the text, is to submit the case to the competent authorities for the purpose of prosecution. This means that the normal procedures of the requested party for making the decision whether or not to prosecute will be set in motion. There is no obligation actually to prosecute,

for that would compromise the autonomy enjoyed by prosecuting authorities in many national legal systems. The Conference decided against including some such phrase as “without undue delay”, but it is clearly intended that delays will be kept to the minimum, and should be not dissimilar to those in a purely domestic case of equal complexity.

6.38 In the cases that fall within the scope of subparagraph (a) of this paragraph (and the corresponding subparagraph in article 4, paragraph 2), where the establishment of jurisdiction by the requested party is mandatory, paragraph 9 makes it a matter of treaty obligation that the case be submitted to the prosecution authorities “unless otherwise agreed with the requesting Party”. This latter phrase makes it clear that the requested party is bound to act unless it secures the requesting party’s consent to refrain from submitting the case.

6.39 In the cases that fall within the scope of subparagraph (b) of this paragraph (and the corresponding subparagraph in article 4, paragraph 2), where the establishment of jurisdiction by the requested party is non-mandatory, the same treaty obligation exists “unless otherwise requested by the requesting Party for the purposes of preserving its legitimate jurisdiction”. This language, arrived at as a compromise after much discussion, means that where the requesting party expresses opposition to the submission of the case to the prosecution authorities of the requested party the treaty obligation is removed. The requested party does, however, remain free, if it so chooses, to exercise criminal jurisdiction in accordance with its domestic law; the requesting party has no absolute right of veto.³⁸³

Implementation considerations: paragraph 9

6.40 As was noted above, paragraph 9 gives expression to the concept of the vicarious administration of justice, which is also commonly referred to as the *aut dedere aut judicare* principle. It has to be read in close conjunction with article 4, subparagraph 2.³⁸⁴ In practice it is likely to have the greatest practical significance in cases where extradition is refused on the ground that the individual whose return is sought is a national of the requested country. While

³⁸³See the statements by the representative of the Netherlands (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 25th meeting, paras. 38-41 and 49) and by the representatives of Austria and France (*Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, paras. 47 and 51).

³⁸⁴See above, comments on article 4, paragraph 2.

the problems and issues regarding effective implementation of these requirements were examined in the context of article 4, it should be stressed that the obligation to submit the case to the competent authorities for the purposes of prosecution is triggered on each separate occasion when extradition is declined in the circumstances envisaged in paragraph 9. It is therefore necessary to ensure compliance even when such circumstances arise infrequently. For example, while there is no constitutional prohibition on the extradition of nationals by the United States, there have been rare instances in which, for technical legal reasons, it was unable to do so.³⁸⁵ For this reason legislation was enacted in order to remove this obstacle to full compliance with the requirements of the 1988 Convention.³⁸⁶

Paragraph 10

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

Commentary

6.41 The purpose of paragraph 10 is to complement the provisions of paragraph 9, which deals with alleged offenders but not with convicted offenders who escape before sentence, or before serving the whole of a sentence. In such cases the offender may be extradited for sentencing, or to serve a sentence, or to complete a sentence already partially served, but extradition may be refused on a number of grounds. Where refusal is on the ground that the offender is a national of the requested State, a situation similar to that set out in paragraph 9 arises. In the cases falling within the scope of paragraph 10, however, it was not appropriate to provide for the submission of the case to the prosecution authorities of the requested State for a new trial, as that could give rise to a plea

³⁸⁵See, for example, "Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", 101st Congress, 1st Session, Senate, Exec. Rept. 101-15, pp. 52-53.

³⁸⁶See *Manual for Compliance with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Washington, D.C., United States Department of Justice, 1992), p. 10.

of double jeopardy.³⁸⁷ In some States a different view might be taken on the double jeopardy point³⁸⁸ or it may be expressly overridden where a prisoner has not served all or any of a sentence imposed by another State,³⁸⁹ but an acceptable international text could not ignore the double jeopardy point. Instead, the possibility is raised of the offender being required to serve the sentence (or the remainder of the sentence) in the territory of the requested State.

6.42 The requested State is required to “consider” such enforcement of the sentence passed in the requesting State but imposes no obligation as to enforcement. Such enforcement of the sentences of foreign courts is not possible in some national legal systems, and a safeguard clause recognizes this fact: the obligation is to consider enforcement if the law of the requested State so permits and in conformity with the requirements of such law.³⁹⁰

Implementation considerations: paragraph 10

6.43 Although the concept of the enforcement of the criminal judgements of third States is not as firmly established in international practice as other forms of cooperation in the criminal sphere, there are a number of precedents to which interested States can turn for guidance.³⁹¹ One recent example is provided in chapter 5 of the 1990 Schengen Convention. This adopts the relatively simple approach of supplementing and extending by analogy the 1983 Council of Europe Convention on the Transfer of Sentenced Persons³⁹² to embrace the

³⁸⁷See the view expressed by the representative of the Netherlands that double jeopardy was in issue (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 26th meeting, para. 69).

³⁸⁸See the view expressed by the representative of the Philippines (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 26th meeting, para. 71).

³⁸⁹See, for example, article 113 of the French Penal Code.

³⁹⁰The final text remained a subject of disquiet because of its innovative nature: see the statement by the representative of the Philippines (*Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 50).

³⁹¹See, for example, the 1991 Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences and the Draft Model Treaty on the Transfer of Enforcement of Penal Sanctions (E/CN.15/1992/4/Add.3 and Corr.1, annex I).

³⁹²See below, comment on article 6, paragraph 12.

transfer of execution of criminal judgements with respect to escaped prisoners. In this connection, it is important to note that, pursuant to article 69 of the Schengen Convention, the transfer of execution of sentence will “not be subject to the consent of the sentenced person”. States wishing to take advantage of this option will have to ensure that domestic law so permits. If the national legal tradition normally requires a pre-existing treaty as a prerequisite for the enforcement of criminal judgements of other States, consideration might be given to regarding the 1988 Convention as providing the necessary basis in this context.

Paragraph 11

11. The Parties shall seek to conclude bilateral and multi-lateral agreements to carry out or to enhance the effectiveness of extradition.

Commentary

6.44 In paragraph 11, which is closely related in its intent to the subject matter of paragraph 7, States are encouraged to conclude various forms of extradition treaties in order to carry out or enhance the effectiveness of this cooperative procedural regime.

Implementation considerations: paragraph 11

6.45 It will be recalled that the 1990 Model Treaty on Extradition was elaborated in order to assist States wishing to negotiate modern extradition agreements.³⁹³

Paragraph 12

12. The Parties may consider entering into bilateral or multilateral agreements, whether *ad hoc* or general, on the transfer to their country of persons sentenced to imprisonment and other forms of deprivation of liberty for offences to which this article applies, in order that they may complete their sentences there.

³⁹³“Manual on the Model Treaty on Extradition and Manual on the Model Treaty on Mutual Assistance in Criminal Matters: an implementation guide”, *International Review of Criminal Policy*, Nos. 45 and 46 (United Nations publication, Sales No. E.96.IV.2), part one.

Commentary

6.46 Paragraph 12 is concerned with the possible transfer of a convicted offender serving a custodial sentence to another State, with a view to the remainder of the sentence being served there. Reference to the concept of prisoner transfer in this context constitutes a recognition of the fact that the transnational nature of modern international drug trafficking has resulted in substantial numbers of nationals of many States being incarcerated abroad. As penal policy in many States has come to place increasing emphasis upon the rehabilitation of offenders, a goal also embraced in article 3, paragraph 4, of the 1988 Convention, it has been recognized that in some instances this can best be facilitated in the offender's home country. In addition, "this policy is also rooted in humanitarian considerations: difficulties in communication by reason of language barriers, alienation from local culture and customs, and the absence of contacts with relatives may have detrimental effects on the foreign prisoner".³⁹⁴

6.47 The State to which the prisoner is transferred will normally be the State of his or her nationality or of origin in some sense, but the drafting of paragraph 12 was deliberately given an open texture at this point. It has not proved easy in international instruments to define the degree of connection which the transferred person should be shown to have with the State to which he or she is to be transferred; the Commonwealth Scheme for the Transfer of Convicted Offenders, for example, speaks of "close ties... of a kind that may be recognized by [the State to which transfer may take place] for the purposes of this Scheme".³⁹⁵ Similarly, although the Conference was aware that a number of States, and international instruments,³⁹⁶ expressly require that the prisoner should consent to the transfer, this was not included in the text of the paragraph but was left to the parties concerned.

6.48 Paragraph 12 imposes no treaty obligation. It merely invites parties to consider entering into agreements on the transfer of prisoners, and those agreements may be bilateral or multilateral, general or ad hoc.

³⁹⁴ *Explanatory Report on the Convention on the Transfer of Sentenced Persons* (Strasbourg, Council of Europe, 1983), p. 7.

³⁹⁵ Commonwealth Scheme for the Transfer of Convicted Offenders, para. 4(1)(a)(ii).

³⁹⁶ For example, Commonwealth Scheme for the Transfer of Convicted Offenders, para. 4(1)(d).

Implementation considerations: paragraph 12

6.49 States wishing to explore the possibility of using this mechanism of international cooperation have a growing body of both multilateral and bilateral practice upon which to draw. In relation to the former, mention might be made of, among others, the Scheme for the Transfer of Convicted Offenders within the Commonwealth (as amended in 1990) and the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, which, by virtue of article 19, is also open to States non-members of the Council under certain circumstances. Insofar as bilateral arrangements are concerned, the 1985 Model Agreement on the Transfer of Foreign Prisoners³⁹⁷ was elaborated in order to facilitate negotiations in this sphere.³⁹⁸

6.50 While existing international instruments deal with matters of underlying philosophy and detail with regard to extradition in somewhat different ways, a broad consensus has emerged in respect of a number of central elements of the process. Importantly, transfer is normally regarded as discretionary and subject to the consent of the individual in question. As has been explained in the context of the 1985 Model Agreement, “the requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners, or as a means of disguised extradition. Moreover, since prison conditions vary considerably from country to country, and the prisoner may have very personal reasons for not wishing to be transferred, it seems preferable to base the proposed model agreement on the consent requirement.”³⁹⁹

6.51 Making appropriate provision for recourse to the transfer of prisoners can have a positive effect on international cooperation more generally. This flows from the possibility of using differing mechanisms in order to remove traditional impediments to such cooperation. One illustration is provided by the approach of the Netherlands to the extradition of its nationals. Here the

³⁹⁷See *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. D, resolution 1, annex I.

³⁹⁸See also, R. Clark, “Crime: the UN agenda on international cooperation in the criminal process”, *Nova Law Review*, No. 15, 1991, pp. 481-485; and R. Clark, *The United Nations Crime Prevention and Criminal Justice Program: Formulation of Standards and Efforts at Their Implementation* (Philadelphia, University of Pennsylvania Press, 1994), pp. 205-210.

³⁹⁹“Formulation and application of United Nations standards and norms in criminal justice: model agreement on the transfer of foreign prisoners and recommendations for the treatment of foreign prisoners” (A/CONF.121/10), para. 14.

traditional severity with which the bar to extradition has been treated has been relaxed as a consequence of a 1983 revision to the Constitution of the Netherlands, taken in combination with a 1988 alteration to its domestic extradition law.⁴⁰⁰ By virtue of the latter, under article 4, paragraph 2, of the Netherlands Extradition Act, a national may now be extradited to a third State if “in the opinion of the Dutch Minister of Justice there is sufficient guarantee that if the national should be sentenced to an unconditional custodial sentence in the requesting State for the offences for which his extradition is granted, the national would be able to serve such sentence in the Netherlands”.⁴⁰¹

⁴⁰⁰D. Paridaens, “The extradition of nationals according to Dutch law”, *Revue internationale de droit pénal*, No. 62, 1991, pp. 515-521.

⁴⁰¹Paridaens, loc. cit., pp. 515 and 516.

ARTICLE 7

Mutual legal assistance

General comments

7.1 The fundamental importance of effective cooperation in investigations and prosecutions through mutual legal assistance⁴⁰² was recognized at an early stage in the drafting of the Convention.⁴⁰³ For that reason the principle of including an article on this topic was uncontroversial. There was room, however, for disagreement on the nature of its contents. Some States already had in place detailed domestic legislation and were parties to a growing network of bilateral, and in some cases multilateral, treaties and arrangements; their representatives were anxious lest the Convention contain material that would conflict with their existing legislation and international obligations.⁴⁰⁴ To other States, the concept and practice of mutual legal assistance was unfamiliar, and detailed provisions in the Convention would be important if major delays were to be avoided at the stage of implementation in national legal systems.

7.2 In the course of discussions at the Conference, the text of article 7 became fuller and more detailed as negotiations proceeded. What emerged was a miniature mutual legal assistance treaty, cast in a form sufficiently flexible to accommodate the variety of procedures available, or to become available, in national legal systems.

7.3 There is a close relationship between article 7 and two other articles of the Convention. The first is article 5, paragraphs 4-6 of which provide for mutual assistance in the matter of confiscation, and which declares applicable in that context, *mutatis mutandis*, many provisions of article 7.⁴⁰⁵ The second is article 9, paragraph 1 of which deals with various forms of mutual assistance which overlap to some extent with those provided for in article 7; insofar as they

⁴⁰²The French text uses the term “*entraide judiciaire*” and the Spanish text “*asistencia judicial reciproca*”, both of which reflect the greater judicial control of investigations in many civil-law countries when compared with the practice in the common-law tradition.

⁴⁰³*Official Records*, vol. I ..., document E/CN.7/1988/2 (Part IV), chap. II, para. 97.

⁴⁰⁴See article 7, paragraph 6, which meets these concerns.

⁴⁰⁵See article 5, paragraph 4, subparagraph (d).

can be separated, article 7 deals with measures of assistance that are more formal than the inter-agency cooperation dealt with in article 9.

Paragraph 1

1. The Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1.

Commentary

7.4 The language of paragraph 1 was modelled upon article 1 of the European Convention on Mutual Assistance in Criminal Matters, agreed in 1959 under the aegis of the Council of Europe. The European Convention was the first regional convention in this field, and the authors were anxious to limit its scope to cases that had reached the stage of judicial proceedings.⁴⁰⁶ There is no such limitation in paragraph 1, article 7, of the 1988 Convention, which applies to investigations and prosecutions as well as to judicial proceedings.

7.5 Mutual legal assistance is available under the terms of the article only in respect of offences established in accordance with article 3, paragraph 1; it is not therefore available in respect of offences of possession, purchase or cultivation for personal consumption established in accordance with article 3, paragraph 2.

7.6 The assistance sought must be in respect of an offence. There seems to be nothing in the text of the Convention that requires the offence to have been committed before a request for assistance may be made. It would appear possible, for example, to seek assistance in obtaining financial records,⁴⁰⁷ which might support other information suggesting that an offence was planned. In practice, unless some formal application must be made to a court to obtain the

⁴⁰⁶Article 1 of the European Convention speaks of “mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting country”. As the expression “judicial authorities” extends to include investigating magistrates, the limitation is not as restrictive as it may at first appear.

⁴⁰⁷See paragraph 2, subparagraph (f).

necessary information, such help will more readily fall within the scope of article 9 (see paragraph 7.3 above).

7.7 The text indicates that parties are to give “the widest measure” of assistance, a phrase intended to encourage them to give a broad and untechnical interpretation to the scope of assistance, including forms of assistance not expressly mentioned in the subsequent paragraphs.⁴⁰⁸ Assistance is, however, to be given “pursuant to this article”, which sets out not only prescribed procedures,⁴⁰⁹ but also grounds upon which a request for assistance may be refused.⁴¹⁰

Paragraph 2: introductory part

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

Commentary

7.8 As the introductory wording indicates, paragraph 2 lists the purposes for which mutual legal assistance may be requested under article 7. The list, however, is not exhaustive and other forms of assistance may be made available.

Paragraph 2, subparagraph (a)

(a) Taking evidence or statements from persons;

Commentary

7.9 Paragraph 2, subparagraph (a), is concerned with testimony from individuals. There was some discussion at the Conference on the meaning of the word “statement”, which, it was suggested, covered testimony given under oath, as is normal in the common-law tradition. In fact, such testimony would often

⁴⁰⁸See *Explanatory Report on the European Convention on Mutual Assistance in Criminal Matters* (Strasbourg, Council of Europe, 1971), commenting on the phrase as it appears in article 1 of that Convention; and article 7, paragraph 3, of the 1988 Convention.

⁴⁰⁹Such as those concerning the language of the request (paragraph 9).

⁴¹⁰Paragraph 15 and, in respect of a postponement of assistance, paragraph 17.

be referred to as “sworn evidence” as opposed to “unsworn statements”, which are allowed in some forms of common-law criminal procedure. Indeed “statement” might suggest a declaration made to a police or other investigating officer, whereas in the context of the article it is intended to signify evidence. The eventual text is to be interpreted as including all forms of testimony by individuals, whatever procedure is used to receive that testimony.

Paragraph 2, subparagraph (b)

(b) Effecting service of judicial documents;

Commentary

7.10 Paragraph 2, subparagraph (b), on the service of judicial documents,⁴¹¹ is brief, especially when compared with article 7 of the European Convention, which contains detailed provisions as to the mode of service and the means by which evidence of service is to be provided. In the context of the 1988 Convention, these issues will be governed, as will many other practical details, by paragraph 10, subparagraph (d), of this article, which allows a requesting party to specify any particular procedure required to satisfy its domestic law, and by paragraph 12, under which a request is to be executed under the domestic law of the requested party and, to the extent not contrary to the domestic law of the requested party and where possible, in accordance with the procedures specified in the request. So, for example, a party may regularly deliver documents, especially those received from foreign sources, by informal modes of transmission (for example, a request to the addressee to call at a local office to collect a document, or simply delivery to his or her address). This practice will be followed, but a more formal mode of notification, for example through an authorized process-server, *huissier de justice* or similarly qualified person, who could produce acceptable evidence that a service had been effected and when, could be used if such action was requested and was not contrary to the law of the requested party.

⁴¹¹“Judicial documents” include witness summonses or subpoenas.

Paragraph 2, subparagraph (c)**(c) Executing searches and seizures;****Commentary**

7.11 Observations similar to those set out in paragraph 7.10 above apply to paragraph 2, subparagraph (c). There will commonly be requirements in the domestic law of the requested party, for example requiring the issue of a judicial warrant to enter private premises, that will govern, and in some cases limit the scope of, the assistance that may be given.

Paragraph 2, subparagraph (d)**(d) Examining objects and sites;****Commentary**

7.12 Although paragraph 2, subparagraph (d), refers simply to the examination of objects and sites, the assistance that will be required will include some form of report. Paragraph 18(2) of the Scheme for Mutual Assistance within the Commonwealth (Commonwealth Scheme) refers to property being inspected, preserved or photographed and to samples being taken and examined. In the drug trafficking context, chemical analysis may well be required, with a detailed report on the results of the analysis and the methods used to conduct it.

Paragraph 2, subparagraph (e)**(e) Providing information and evidentiary items;****Commentary**

7.13 Although the language of paragraph 2, subparagraph (e), especially the word “information”, can be very broadly understood, the subparagraph is intended to cover material available to the authorities of the requested party without their taking action that would fall within the scope of one of the other subparagraphs. For example, it would cover the provision for use in proceedings in the requesting party of material already held and perhaps already used as an exhibit in a trial in the requested party in a related matter. It would not cover objects in the hands of private persons, which might of course be the subject of “search and seizure” under paragraph 2, subparagraph (c).

Paragraph 2, subparagraph (f)

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

Commentary

7.14 Paragraph 2, subparagraph (f), appears to include both documents and records already held by the competent authorities of the requested party and material which will have to be obtained, following a specific request, from banks,⁴¹² financial institutions, or businesses operating in the territory of the requested party. A number of States⁴¹³ indicated through their representatives at the Conference that, as their law then stood, they would be unable to obtain this type of material (and that referred to in subparagraph (g)) unless criminal proceedings had actually commenced.

Paragraph 2, subparagraph (g)

(g) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.

Commentary

7.15 The provision in article 7, paragraph 2, subparagraph (g), complements the provision in article 5, paragraph 4, subparagraph (b), which obliges parties to take, in response to a request by another party, measures to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things referred to in paragraph 1 of that article, for the purpose of eventual confiscation (see paragraphs 5.23-5.26 above). The former provision deals with property required not for the purposes of eventual confiscation but for evidentiary purposes. It is, of course, not inconceivable that property might be required for both types of purpose, in which case the request should refer to both article 5 and the present article. It should be noted that article 5 and article 7 exclude bank secrecy from being a valid ground for declining to render mutual legal assistance.

⁴¹²See below, comments on paragraph 5; assistance may not be refused on grounds of bank secrecy.

⁴¹³Austria, Israel, Jamaica, Mauritius and Saudi Arabia (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 29th meeting, paras. 25 and 26).

Paragraph 3

3. The Parties may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party.

Commentary

7.16 Paragraph 3 merely provides for the optional provision of forms of assistance other than those specified in paragraph 2, where the domestic law of the requested party so allows, for instance requests for the interception of telecommunications, or for a confrontation between the accused and the witnesses. It can be read in conjunction with article 9, in which parties are required to take steps to make arrangements for other forms of cooperation.

Paragraph 4

4. Upon request, the Parties shall facilitate or encourage, to the extent consistent with their domestic law and practice, the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings.

Commentary

7.17 Paragraph 4 covers a number of possible situations in which persons in the territory of the requested party are relevant to investigations or proceedings in the territory of the requesting party.⁴¹⁴ The simplest case would be one in which an investigating authority in one State wishes to interview a person now in another State who may have useful information; the requested party is asked to arrange and provide facilities for such an interview to take place.⁴¹⁵ At the other end of the spectrum would be a case in which a person serving a sentence of imprisonment is required as a witness, and must attend for oral examination, at a trial about to take place in another State; here the authorities of the State in which the person is serving his or her sentence are asked to agree to that

⁴¹⁴The focus of the paragraph appears to be upon the person who is able to give direct assistance; it is possible that legal advisers of such persons could be treated as being within its terms.

⁴¹⁵See paragraph 7.9 above for a discussion of the word “statement” in paragraph 2, subparagraph (a).

person's travel to the requesting State for that purpose. In the latter case, there would be a considerable number of detailed matters to settle, notably the arrangements for the witness's transport, which would have to be in conditions that ensured his or her continued custody, the conditions in which the witness would be held in the requesting State, and the effect of the transfer on the running of time.⁴¹⁶

7.18 Under paragraph 4, parties are obliged to respond to a request, but there are two safeguards. The first, for the requested parties, is that the obligation has to be consistent with their domestic law and practice. The inclusion of the reference to domestic practice is significant, as many of the matters likely to be raised by a request will, in some States, be within the discretion of the administrative or correctional authorities and not regulated by express legal provisions. The second safeguard, for the person concerned, is that nothing may be done under this paragraph without the consent of that person; this applies to those in custody as well as those at liberty. Thus, a person resident in one State may be obliged to attend a hearing in that State to give formal evidence for use in another State, by virtue of a subpoena or witness summons issued in response to a request for the taking of evidence under paragraph 2, subparagraph (a), but is free to decline to attend a hearing in the requesting State.

Paragraph 5

5. A Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy.

Commentary

7.19 Article 7, paragraph 5, originally formed part of a much longer draft text, which would have repeated the obligation in respect of the seizure and making available of bank, financial and commercial records laid down in article 5, paragraph 3, and also in article 7, paragraph 2, subparagraph (f). This repetitious material was eliminated, but it was judged important to state the principle that bank secrecy could not be relied upon as a ground for the refusal of assistance both in the general context of mutual legal assistance in the present article and in the specific context of confiscation in article 5.⁴¹⁷

⁴¹⁶Compare paragraph 24 of the Commonwealth Scheme, which contains detailed provisions governing the transfer of persons in custody.

⁴¹⁷See article 5, paragraph 3, last sentence.

Paragraph 6

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

Commentary

7.20 Paragraph 6 embodies an important provision dealing with potential conflict with existing or future mutual legal assistance treaties. It does not give those treaties a general priority over the provisions of the 1988 Convention. Its effect, instead, is to preserve the obligations incurred under general mutual legal assistance treaties from any diminution as a result of the specific provisions of the Convention. This means that where the Convention requires the provision of a higher level of assistance in the context of illicit trafficking than is provided for under the terms of an applicable bilateral or multilateral mutual legal assistance treaty, the provisions of the Convention will prevail. In the converse case, where the treaty provides for a higher level of assistance, this paragraph comes into play and the treaty provisions will prevail with respect to the extent of the requested party's obligations.

7.21 In considering paragraph 6, attention should also be given to paragraph 7, considered below, and to paragraph 20, where parties are called upon to consider, *inter alia*, the possibility of enhancing the provisions of article 7 through negotiation of mutual legal assistance treaties.

Paragraph 7

7. Paragraphs 8 to 19 of this article shall apply to requests made pursuant to this article if the Parties in question are not bound by a treaty of mutual legal assistance. If these Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the Parties agree to apply paragraphs 8 to 19 of this article in lieu thereof.

Commentary

7.22 Paragraph 7 deals with other aspects of the "conflict of conventions" issue. There were in 1988 a number of bilateral or multilateral mutual legal assistance treaties; their number has since greatly increased. Many of these

treaties contain detailed procedural provisions on such matters as the channels of communication to be used and the language and detailed content of the documentation, as well as more fundamental terms for the grounds upon which a request may be refused. Particularly in the case of bilateral treaties, the provisions will have been negotiated with considerable regard to the principles of the national legal systems of the parties concerned. There are still, however, many States that are not parties to general mutual legal assistance treaties and many circumstances in which no bilateral treaty governs the relationship between the pair of States concerned in a particular matter.

7.23 Paragraph 7 covers these varying situations. Where there is no applicable mutual legal assistance treaty, the Convention supplies the necessary provisions in paragraphs 8-19. Where there is an applicable treaty, its provisions will be followed in place of those set out in paragraphs 8-19; this enables pairs of States to follow the procedures with which they have become familiar in the general context of mutual legal assistance, notwithstanding the illicit trafficking context. Parties to a general mutual legal assistance treaty concerned in a particular matter may, however, choose to agree that the provisions of the Convention should apply in that context.

7.24 There are a number of parties whose general mutual legal assistance practice is governed by some instrument, such as the Commonwealth Scheme, which lacks the formality of a full treaty. The text of paragraph 7 uses the term “a treaty of mutual legal assistance”, and that has become a term of art. It does not appear to include the less formal agreements or arrangements, where the provisions of paragraphs 8-19 will apply for all cases falling within the scope of the Convention,⁴¹⁸ unless the parties agree otherwise.

Paragraph 8

8. Parties shall designate an authority, or when necessary authorities, which shall have the responsibility and power to execute requests for mutual legal assistance or to transmit them to the competent authorities for execution. The authority or the authorities designated for this purpose shall be notified to the Secretary-General. Transmission of requests for mutual legal assistance and any communication related thereto

⁴¹⁸The text does not allow the parties any other option. It may be, however, that they could take advantage of the provisions of paragraph 20 to apply their general mutual assistance arrangements.

shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organization, if possible.

Commentary

7.25 The designation of a central authority to handle the execution, and in some cases the transmission, of requests for mutual legal assistance is a feature of many mutual legal assistance treaties and arrangements.⁴¹⁹ There are great practical advantages in such a system, which enables officers not only to acquire familiarity with the terms of the Convention and of the necessary procedures but also to develop working relationships with their counterparts in other States and to study ways in which the particular requirements of a national legal system can be met by a carefully framed request. This will facilitate the smooth and efficient provision of assistance.

7.26 Although every State may have a number of “competent authorities”, for example in its police and customs services, the authority designated for the purposes of this article will as far as possible be a single authority, which may be within one of those services or another government department or be free-standing. In some national legal systems the power to execute requests implies judicial functions. In this paragraph, parties are allowed, “where necessary”, to designate more than one authority; this provision is designed primarily for use in some federal or composite States or in States responsible for the external relations of dependent territories; it is not intended to encourage an expansion in the number of authorities with different functions or handling different types of case.

7.27 Paragraph 8 specifies that requests and communications relating to requests⁴²⁰ are to be effected between the designated authorities. A party may, however, insist on the use of the diplomatic channel, which in practice often involves not only the embassy staff but also officers of the ministries of justice

⁴¹⁹See, for example, Commonwealth Scheme, paragraph 4. Regional arrangements may permit or encourage direct contact between the relevant judicial authorities (see article 53(1) of the Schengen Convention).

⁴²⁰For example, a request for additional information under article 7, paragraph 11.

and of foreign affairs of the parties concerned and so inevitably leads to delays. Provision is also made for the use in urgent cases, and with the prior agreement of the parties concerned, of the communication channels maintained by Interpol, which are more commonly used for the informal cooperation dealt with in article 9.

Paragraph 9

9. Requests shall be made in writing in a language acceptable to the requested Party. The language or languages acceptable to each Party shall be notified to the Secretary-General. In urgent circumstances, and where agreed by the Parties, requests may be made orally, but shall be confirmed in writing forthwith.

Commentary

7.28 Language is often a sensitive issue. In the Convention, a very practical approach is taken: it is clearly essential that the authorities of the requested party in which action is sought, often urgently, be addressed in a language with which they are familiar. This fact is recognized by the reference in the paragraph to a language “acceptable” to the requested party. The national language of that party will always be acceptable, but practical considerations dictate that in many cases requesting parties should be given a wider choice. The national language may be little known in other countries; it may have a script which cannot readily be handled by word-processing and communication systems commonly used in other States. Accordingly, States are to indicate to the Secretary-General the language or languages acceptable to them, in the hope that the notified languages will include at least some of the languages most commonly used in international communication and indeed in the work of the United Nations. A party may be able to include other languages used in other States within its own geographical region.

7.29 Paragraph 9 also deals with oral requests for assistance. It allows such requests to be made in urgent circumstances and with the agreement of the parties concerned; there is no obligation to accept or act upon an oral request. In practice, the officers responsible for handling requests develop a good understanding with their counterparts in other States, especially neighbouring States or those with which requests are commonly exchanged, as to cases in which oral requests are appropriate. Using a phrase also found in the

Commonwealth Scheme, a request initially made orally “shall be confirmed in writing forthwith”.

Paragraph 10

10. 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 proceeding to which the request relates, and the name and the functions of the authority conducting such investigation, prosecution or proceeding;

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

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

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

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

Commentary

7.30 Paragraph 10 sets out a list of the minimum contents of a request for mutual legal assistance. In many cases the authority making the request will be well advised to include additional information, sometimes for its own administrative convenience (for example, any reference number by which the matter is known), but more often, and much more importantly, for the use of the requested authority to enable it to respond fully and without delay.

7.31 The text of paragraph 10 itself indicates, by the reference in subparagraph (c) to the case of the service of judicial documents, that there are some circumstances in which the request for action to be taken is self-explanatory and the requested authority needs little knowledge of the background to the case. In other contexts, particularly where evidence or statements are to be taken or a site

examined, the requested authority will need considerable help in understanding the context in which it is to act and the precise direction its work is to take. In such cases, the statement of the relevant facts called for in subparagraph (c), together with the material relating to the purpose for which the evidence, information or action is sought (subparagraph (f)), will need to be set out carefully and, if necessary, at some length.

7.32 The reason for requesting mutual legal assistance is to advance the investigation, prosecution or proceeding in the territory of the requesting party. It follows that the procedure followed in the requested State must be such as to make the evidence or other information admissible or usable in the requesting State. It is for this reason that subparagraph (d) enables the requesting authority to give details of any particular procedure it wishes to be followed.⁴²¹ Examples would be the administration of the oath to witnesses, the taking of a verbatim record of questions and answers and not just the minutes of the interview, the manner in which a photograph or analysis should be taken and authenticated, the establishment of the “chain of custody” in cases in which objects have been seized and are transferred to the requesting State, and (especially in urgent cases) the means by which information is to be sent.

7.33 In other respects, the list of items is largely self-explanatory. It was noted at the Conference that the reference to “any person concerned” in subparagraph (e) is to be read literally; it is not confined to the suspected offender.

Paragraph 11

11. The requested 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.

Commentary

7.34 A well-drafted request for assistance should contain all the information thought to be necessary for the execution of the request. In practice, the situation may not be so straightforward. For example, the execution of a search may, under the domestic law of the requested party, require application to a judge for

⁴²¹See article 7, paragraph 12: the procedures specified in the request will be followed “to the extent not contrary to the domestic law of the requested Party and where possible”.

a search warrant, and the legal rules governing that type of application may require a specific piece of information not contained in the request as originally sent. Or circumstances may change: a request for help in identifying or tracing property may prove difficult to execute because of recent developments, such as the departure of persons believed to control the property or transactions affecting the property, and the requested authority may need additional information or more detailed guidance on how it can most helpfully proceed. All these possibilities are covered by the broad language of the paragraph, which points to the importance of close cooperation between the relevant authorities.

Paragraph 12

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

Commentary

7.35 It has been observed (see paragraph 7.32 above) that the reason for requesting mutual legal assistance is to advance the investigation, prosecution or proceedings in the territory of the requesting party and that that has implications for the procedures to be followed. It is, however, equally true that the assistance sought involves acts to be carried out in the territory of the requested party. Its sovereignty and legal system are necessarily involved. The basic principle must therefore be that set out in the opening words of the paragraph, namely that the request is to be executed in accordance with the domestic law of the requested party.

7.36 The remainder of the paragraph qualifies this by pointing to the desirability of complying with the procedures specified in the request (designed, for example, to make evidence obtained for use in criminal proceedings in the requesting party admissible under the rules of criminal evidence in force in the courts of that party). In order to meet this need, parties may be able to adopt procedures that they would not follow in purely domestic cases. As the text makes clear, they are not required to do anything that would be contrary to (as opposed to merely unfamiliar in) their domestic law. There is a further safeguard; they need only comply with the specified procedures “where possible”; for example, the use of a particular language or the involvement of a person possessing a particular qualification might be impossible in another State.

7.37 Although the Convention is silent on the matter, it is highly desirable that whenever there appear to be difficulties in meeting a request for a particular procedure to be adopted, there should be some contact between the requesting and requested authorities to see whether a satisfactory way forward can be found.

7.38 The issue of the rights of private persons, and especially accused persons, in respect of mutual legal assistance was discussed at the Conference. This issue raises a number of questions.

7.39 The first is whether a private person may have access to the facilities afforded by the system of mutual legal assistance: whether, for example, considerations of due process should entitle an accused person to use the Convention to obtain evidence important to his or her defence in the same way as the prosecution had obtained some of its evidence. The tenor of the discussion on that point⁴²² was that in general the Convention was for use by the authorities of the parties and was not designed to confer rights on private persons. That was, however, a matter that each party could take up in the light of its understanding of applicable principles of international law and its own constitutional law. It might be that a court or judicial authority in one party would make a request or direct that a request be made, acting in the interests of an accused person or indeed a third party involved in a confiscation issue. That request would be properly made under the Convention, would be transmitted by the relevant authority as required by article 7, paragraph 8, and its execution would fall under the terms of paragraph 12. A similar approach could be adopted to deal with requests for the presence of counsel during the execution of a request.

7.40 A second question concerns the rights of private persons in either the requesting or requested party to suppress or exclude evidence or to impede the execution of a request for mutual legal assistance. The Conference declined to incorporate a provision which would have declared that the Convention created no new rights of this type, but that does indeed appear to be the position. If, under the law of the requested party, some person or body has a right to intervene, that right is unaffected; the same is true of the processes that may be invoked in the requesting party once the request has been fully executed. No additional rights are, however, to be vested in private persons by virtue of the Convention.

⁴²²*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 32nd meeting, paras. 32 and 33.

Paragraph 13

13. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

Commentary

7.41 Paragraph 13 represents a careful balancing of potentially conflicting interests. A party initiating a request for assistance is required to include in the request information on the subject matter and nature of the investigation, prosecution or proceeding to which the request relates.⁴²³ For example, a request for assistance in obtaining business records might be stated to relate to an investigation of suspected illicit trafficking in specified narcotic drugs which it was thought had been passed under falsified invoices through the books of a company operating in the territory of the requested party; or the taking of specific evidence might be requested and stated to relate to the pending prosecution of a named accused person in the criminal courts of the requesting party. In either example, the authorities of the requesting party may not, at the time the request is made, foresee accurately how matters may develop. The business records may point to much wider illicit trafficking than had originally been suspected. The pending trial may come to involve additional defendants and further charges. In such a context, any rule which might unduly restrict the use to which material obtained in response to the request could be put would greatly limit the effectiveness of the system of mutual legal assistance.

7.42 On the other hand, the requested party also has legitimate interests that need to be protected. A party might, for example, have a strict rule of bank secrecy, which it had set aside in a case of illicit trafficking, as required by the Convention.⁴²⁴ Its surrender of bank records for use in evidence at a trial for drug-trafficking offences should not imply that it was waiving its general rule, thereby permitting those same records to be used, for example, in subsequent proceedings in connection with fraud.

⁴²³Art. 7, para. 10, subpara. (b).

⁴²⁴Art. 7, para. 5.

7.43 The text of the paragraph seeks to meet both sets of concerns. As a matter of principle, the requesting party cannot use information or evidence furnished by the requested party for investigations, prosecutions or proceedings other than those stated in the request; the same principle applies to restriction of the onward transmission of that information or evidence to third parties (even in response to a formal request by another party to the Convention). Such use or transmission is, however, possible with the prior consent of the requested party, which has complete discretion as to whether to grant or withhold its consent. In practice, consent should only be withheld in circumstances in which a request reflecting the changed needs of the requesting party would not have been executed.

Paragraph 14

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

Commentary

7.44 Confidentiality is commonly of the utmost importance, especially at the investigatory stages of a case. The Commonwealth Scheme recognizes the sensitivity of this issue by requiring the competent authorities of both requesting and requested countries to keep the request and its contents confidential. Paragraph 14 is concerned with the same issue, but assumes that the authorities of the requesting party will observe due confidentiality; it is only concerned with the duty of confidentiality as it affects the requested party.

7.45 It is recognized in paragraph 14 that the very act of executing the request may draw attention to what is being done. If, however, there are public procedures in the requested party (such as the publication of lists of relevant types of applications) which constitute a breach of confidentiality greater than that necessary minimum, the requested party must promptly inform the requesting party of that fact, with a view to seeking a decision on whether the request should continue to be executed, in the same or an amended form.

Paragraph 15, introductory part**15. Mutual legal assistance may be refused:****Commentary**

7.46 Paragraph 15 sets out the grounds upon which a party may refuse the requested assistance. It needs to be read in conjunction with article 3, paragraph 10, where it is provided that, for the purpose of cooperation among the parties, including, in particular, cooperation under articles 5, 6, 7 and 9, offences established in accordance with article 3 are not to be considered as fiscal offences or as political offences or regarded as politically motivated, without prejudice to the constitutional limitations and the fundamental domestic law of the parties. This has the effect of excluding possible grounds for refusal that are found in some mutual legal assistance treaties and schemes.⁴²⁵

Paragraph 15, subparagraph (a)

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

Commentary

7.47 No party is obliged to act on a request that is not presented in accordance with the terms of article 7, whether the defect concerns the channel of transmission or the contents of the request. The requested party is, however, free to waive the issue of the lack of conformity if it so wishes.

Paragraph 15, subparagraph (b)

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

Commentary

7.48 Language of this sort is often found in mutual legal assistance treaties, and the present language is taken directly from article 2 (b) of the European

⁴²⁵See, for example, Commonwealth Scheme, paragraph 7(1)(b) (political offences); but see also paragraph 7(4), which gives a narrow definition of such offences.

Convention on Mutual Assistance in Criminal Matters. The *Explanatory Report* on that Convention confines itself to the remarks that the expression “essential interests” refers to the interests of the State, not of individuals, and that economic interests might be covered by the concept.

7.49 In the present context, references to sovereignty and security are most likely to concern the defence, external relations and internal and external security services of the requested State.

7.50 The scope of the notion of *ordre public* may vary from State to State, but the French phrase is used since the actual concept of “public policy” as understood in the common-law tradition may differ. Some guidance as to its potential scope may be gleaned from the discussions of what was to become paragraph 15, and in particular of amendments proposed by the Jamaican delegation but ultimately rejected. These would have prohibited “fishing expeditions” (that is, requests for assistance where it seemed far from clear that any offence had been committed), would have inserted a ground of refusal based on “double jeopardy”, and would have incorporated a provision found in paragraph 7(2)(b) of the Commonwealth Scheme, covering cases where there were substantial grounds for belief that the relevant assistance would facilitate the prosecution of a person on account of his or her race, religion, nationality or political opinions. It was clearly the view of representatives of countries with a civil-law tradition that these concerns could be met by the use of the concept of *ordre public*.⁴²⁶

Paragraph 15, subparagraph (c)

(c) If the authorities of the requested 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 proceedings under their own jurisdiction;

Commentary

7.51 The principle on which mutual legal assistance treaties rest is that the competent authorities of the requested State should as far as possible make available to their counterparts in other parties the powers of investigation and

⁴²⁶*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 32nd meeting, paras. 5-20.

evidence-gathering that they themselves can deploy in purely domestic cases. If the action requested could not be taken in a domestic case, this will be a ground for refusing a request.

Paragraph 15, subparagraph (d)

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

Commentary

7.52 This provision takes account of the fact that States may have established within their national legal systems rules that prohibit the provision of international cooperation in certain circumstances, for example where the offender may be subject to cruel, inhuman or degrading penalties or to capital punishment, or to trial by special ad hoc tribunals. It recognizes the fact that, in some circumstances, such legal provisions will make it impossible to provide certain types of assistance.

Paragraph 16

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

Commentary

7.53 This is plainly desirable in the interests of good relationships and the smooth operation of mutual assistance arrangements.

Paragraph 17

17. Mutual legal assistance may be postponed by the requested Party on the ground that it interferes with an ongoing investigation, prosecution or proceeding. In such a case, the requested Party shall consult with the requesting Party to determine if the assistance can still be given subject to such terms and conditions as the requested Party deems necessary.

Commentary

7.54 In many cases, the exchange of information between parties, encouraged by the provisions of article 9, will ensure that the competent authorities of the respective parties are able to act in a wholly complementary fashion and that the actions of no one authority will interfere with the ongoing work of another. Communication between States, or between different agencies in the same State, is not always perfect, however. Article 7, paragraph 17, deals with the difficulties that arise when a formal request for mutual legal assistance arrives at a time when its execution might prejudice a delicately poised investigation or prejudice a pending trial (by disclosing evidence or in other ways). The text requires consultation between the parties to seek a practical solution, reserving the right of the requested party to postpone the provision of assistance until the difficulties are removed or become inapplicable through the passage of time.

Paragraph 18

18. A witness, expert or other person who consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting Party, shall not be prosecuted, detained, punished or subjected to any other restriction of his personal liberty in that territory in respect of acts, omissions or convictions prior to his departure from the territory of the requested 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 Parties, from the date on which he has been officially informed that his presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory or, having left it, has returned of his own free will.

Commentary

7.55 Paragraph 18, which follows closely the drafting of paragraph 25 of the Commonwealth Scheme, provides persons travelling to the territory of the requesting party in response to a request with a safe conduct or immunity in respect of acts, omissions and convictions prior to the date of departure from the requested party. The safe conduct does not extend to acts or omissions after that

date, so the person concerned is not protected if he or she commits an offence⁴²⁷ while in the territory of the requesting party.

7.56 The text spells out details regarding the expiry of the safe conduct, the 15-day period being judged adequate to enable the person concerned to make the necessary arrangements for return or onward travel. The parties are free to agree to a different period, which may be longer or shorter than the standard 15 days. Although the text does not make this point, it would be essential to communicate the terms of any such agreement to the person concerned before his or her departure from the territory of the requested party.

Paragraph 19

19. The ordinary costs of executing a request shall be borne by the requested Party, unless otherwise agreed by the Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the 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.

Commentary

7.57 Paragraph 19 embodies the general principle that the “ordinary” costs of mutual legal assistance shall be borne by the requested party. This rule makes for simplicity, avoiding the keeping of complex accounts, and rests on the notion that over a period of time there will be a rough balance between States that are sometimes the requesting and sometimes the requested party. In practice, however, that balance is not always maintained, as the flow of requests between particular pairs of parties may prove to be largely in one direction. For this reason, the concluding words of the first sentence enable the parties to agree to a departure from the general rule even in respect of ordinary costs.

7.58 In many cases, for example when assistance is sought to identify and produce relevant business records, a process that may involve a detailed examination of voluminous corporate records by skilled investigators, the costs will be substantial or of an extraordinary nature. In such a case, the paragraph lays down no rule; it requires the parties to consult one another on the detailed execution of the request and the apportionment of the costs. The dividing line

⁴²⁷Which could include perjury committed during the judicial proceedings.

between “ordinary” and “extraordinary” is necessarily imprecise, and the sums of money involved may well be seen very differently by States in different stages of economic development; in practice, the consultations envisaged in the second sentence of the paragraph should take place if either party so requests.

Paragraph 20

20. The 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.

Commentary

7.59 As has already been observed (see paragraph 7.1 above), in 1988 mutual legal assistance was for some States an unfamiliar novelty. It was to be expected that growing experience would lead to a refinement of the emerging system of mutual legal assistance, and the identification of unforeseen problems. Paragraph 20 creates no obligations, but encourages parties to consider the use of bilateral or multilateral agreements or arrangements in the further development of that system.

Implementation considerations: article 7 as a whole

Scope of assistance

7.60 The provision of mutual legal assistance in the investigation and prosecution of the serious offences enumerated in article 3, paragraph 1, and in associated judicial proceedings is central to the realization of the goal, set out in the preamble of the Convention, of “strengthening and enhancing effective legal means for international cooperation in criminal matters for suppressing the international criminal activities of illicit traffic”. To this end, article 7, paragraph 1, mandates that parties shall afford to one another “the widest measure” of such mutual legal assistance. In furtherance of this requirement, parties will need to put in place not only the requisite domestic laws and regulations, but also the associated administrative and policy infrastructure.

7.61 Of particular importance in this regard is an analysis of existing domestic law to ascertain the extent to which the forms of assistance specified in paragraph 2 can be made available upon request to other members of the international community. Any such review could properly and profitably be

expanded to include the satisfaction of the requirements for the provision of international cooperation, pursuant to article 5, in respect of the confiscation of proceeds, property, instrumentalities and like matters.⁴²⁸ Those States approaching the provision of mutual legal assistance on a systematic basis for the first time might also wish to consider whether any resulting legislative and related measures should be restricted to the area of serious drug trafficking offences or be extended to cover other or all forms of criminal activity. It is relevant to note that the great majority of existing multilateral agreements and arrangements in this sphere of international cooperation envisage its application across a broad range of criminal matters.⁴²⁹ A similar philosophy is also evident in the 1990 Model Treaty on Mutual Assistance in Criminal Matters, adopted by the General Assembly in its resolution 45/117.⁴³⁰

7.62 In conducting any examination of the adequacy of existing legislative provisions and discretionary powers it should be borne in mind that the purpose of article 7 will be frustrated unless the cooperation in question can be provided in a manner that is sensitive to the evidentiary and other needs of the requesting party. Similarly, sight should not be lost of the fact that the optimum position is one which also paves the way for the effective use of assistance received from other parties in connection with domestic investigations, prosecutions and judicial proceedings. The complex nature and extent of this process can be seen, for example, in the taking of evidence or statements from persons, a form of assistance provided for in paragraph 2, subparagraph (a). Here it is necessary, in the first instance, to deal with the matter both in cases where the person (or persons) concerned cooperates voluntarily and in a situation in which compulsion is necessary. Domestic law should provide for the conditions under which statements or evidence may be obtained, including any right or obligation to decline to assist.⁴³¹ Sufficient flexibility may be needed to accommodate the

⁴²⁸See above, comments on article 5, paragraph 4, subparagraph (d).

⁴²⁹This is the case, for example, with such multilateral agreements and arrangements as the 1959 European convention on mutual assistance in criminal matters, the 1986 Commonwealth Scheme, the 1992 Inter-American Convention and the 1992 Convention concluded by the Economic Community of West African States. A minority of such instruments are, however, drug-specific (see, for example, article 11 of the 1990 South Asian Association for Regional Cooperation Convention on Narcotic Drugs and Psychotropic Substances).

⁴³⁰For a manual on this instrument, see *International Review of Criminal Policy*, Nos. 45 and 46 (United Nations publication, Sales No. E.96.IV.2).

⁴³¹See, for example, the 1990 Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117, annex).

special requirements of the requesting State. Such matters might include the provision of assistance under oath or affirmation, the involvement and participation of foreign officials and defence lawyers, and the use of non-traditional processes such as questioning by judges or cross-examination. The availability of relevant penalties in respect of such matters as perjury and the provision of appropriate safeguards for persons compelled to provide statements and evidence are also relevant considerations. Domestic law should also make adequate provision for the submission of requests to foreign States for such assistance and for the admissibility in proceedings of evidence thus obtained.

7.63 Similar challenges in elaborating and implementing a sufficiently comprehensive policy arise in other areas specified in paragraph 2, which represents the “core” elements of mutual legal assistance as it has evolved in international practice. For instance, while all legal systems contain the power to execute searches and seizures, subject to certain conditions, some may have had no experience in making these powers available for use on behalf of other States in the absence of any indication of a violation of domestic law. Guidance on the range of matters that may require legislative or other forms of implementation can be gleaned from an examination of the practice of a growing number of States as well as from a growing body of multilateral and bilateral treaties many of which treat this and other issues in greater detail than was possible in article 7. For example, article 7 of the 1990 Model Treaty on Mutual Assistance in Criminal Matters treats the issue of the ultimate disposition of materials provided to a requesting State, while article 17 thereof underlines the necessity of providing for both the delivery to the requesting party of materials acquired pursuant to a search and seizure operation and the appropriate protection of the rights of bona fide third parties in this context.

7.64 It is clear from the drafting history that paragraph 2 was not intended to be an exhaustive enumeration of the forms of mutual legal assistance which can be provided. That it is best considered as an illustrative or basic minimum list is emphasized by paragraph 3, which confirms that parties “may afford one another any other forms of mutual legal assistance allowed by the domestic law of the requested Party”. It would be appropriate, therefore, for those charged with the implementation of article 7 to consider what additional mechanisms available in purely domestic investigations, prosecutions and judicial proceedings, if any, might appropriately be made available to other parties to the Convention to facilitate the fight against illicit traffic. For instance, it was noted in the context of article 5 that special investigative powers and techniques had been developed to assist the complex process of identifying and tracing proceeds

and gathering evidence.⁴³² Such techniques include, among others, the use of monitoring orders, production orders, interception of telecommunications and access to computer systems.⁴³³ Other forms of assistance that could be provided include the transmission of information on sentences imposed on the nationals of other parties.⁴³⁴

7.65 The non-exhaustive nature of paragraph 2 is further emphasized by the terms of paragraph 4, in which States parties to the 1988 Convention are required to facilitate or encourage the presence or availability of consenting individuals in investigations and proceedings. As has been seen, this encompasses such matters as the appearance of witnesses, including persons in custody, in judicial proceedings in the requesting country (see paragraphs 7.17 and 7.18 above).⁴³⁵ This obligation is, however, subject to a number of safeguards for the requested State including, as an important requirement, consistency with its domestic law and practice (see paragraph 7.18 above).

7.66 Parties wishing to position themselves to provide and obtain the widest measure of cooperation in this respect will face a number of issues, particularly in relation to custody cases.⁴³⁶ These include the legal authority of the requested party to transfer the individual to a foreign State on a temporary basis (including his or her release into the custody of foreign law enforcement officers), readmittance to the State of that individual and his or her return to the relevant institution. Any implementing legislation should ensure that the prisoner receives appropriate credit for the time spent in custody abroad. Similarly, a requesting State must have the requisite authority to receive and hold such a person in custody. Furthermore, immigration legislation may need to be amended in some countries which prohibit the entry of convicted persons. At a

⁴³²See above, comments on the implementation of article 5.

⁴³³See also, 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, article 4, paragraph 2, and Letters Rogatory for the Interception of Telecommunications, Recommendation No. R (85) 10, adopted by the Committee of Ministers of the Council of Europe on 28 June 1985.

⁴³⁴See, for example, the Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117, annex), footnote to the title of article 1.

⁴³⁵See, for example, the Commonwealth Scheme, paragraphs 1(3)(f) and (g), and the Model Treaty, article 1, paragraph 2, subparagraph (b).

⁴³⁶The associated issues of safe conduct and costs are treated in article 7, paragraphs 18 and 19, respectively.

more practical level, appropriate procedures will need to be put in place to coordinate such transfers, including the determination of the most appropriate route for them to take place. In instances in which transit through the territory of a third State arises, arrangements will have to be made to obtain the advance consent of the State concerned.

Procedural and related issues

7.67 As has been pointed out elsewhere: “Mutual assistance will never achieve the full results of which it is capable, unless its operation is both quick and easy. Speed is imperative if crime is to be fought successfully.”⁴³⁷ This underlying practical requirement should be kept constantly in mind in designing the administrative infrastructure necessary for the receipt and execution of requests from other parties for assistance and in formulating and transmitting requests to other members of the international community pursuant to the 1988 Convention. Here the establishment of a central authority or authorities pursuant to paragraph 8 is of great importance.

7.68 It is for each country to decide on the location of its central authority and the powers and functions to be entrusted to it. Many States have elected to designate the ministry of justice or home affairs or the office of the attorney-general for this purpose. Some States may wish to consider whether or not the same body should be responsible for receiving and responding to requests under paragraphs 3 and 4 of article 17, relating to illicit traffic by sea.⁴³⁸ Practice on this matter has not been uniform, however.⁴³⁹ It is of great practical importance to note that details of the authorities designated for the purposes of article 7 must be notified to the Secretary-General. Such information, including the address, telephone and facsimile numbers and the office hours, is published on a periodic

⁴³⁷R. Dussaix, “Some problems arising from the practical application, from the judicial point of view, of the European Convention on Mutual Assistance in Criminal Matters”, *Problems Arising from the Practical Application of the European Convention on Mutual Assistance in Criminal Matters* (Strasbourg, Council of Europe, 1971), pp. 51-52.

⁴³⁸See below, comments on article 17, paragraph 7.

⁴³⁹While a number of countries, such as Australia, Brunei Darussalam, Canada and Nigeria, have elected to combine these functions, many others have decided to designate different authorities for these purposes. Those adopting the latter approach include, among others, Austria, Burkina Faso and Oman.

basis by the United Nations.⁴⁴⁰ The published information also indicates whether or not a country permits urgent requests or communications to be made through Interpol channels of communication.

7.69 As noted earlier, the possibility of using the channels of communication available through Interpol, where the parties agree and in cases of urgency, is an exception to the normal expectation that requests and communications relating to them are to be effected between the designated authorities (see paragraph 7.27 above). Although a party is entitled under article 7, paragraph 8, to insist upon the use of the diplomatic channel, experience in the mutual assistance sphere indicates that this is often slow and cumbersome. Because of the need for speed and efficiency, it is becoming increasingly common practice for the central authorities to enter into the kind of direct contact envisaged as the norm in this provision.⁴⁴¹

7.70 An appropriate infrastructure for the central authority will need to be established. While the resource requirements will differ significantly from one party to another and will be dependent upon a wide variety of factors, including the frequency with which it is expected that relevant requests will be made or received, a number of common requirements can be identified. First and foremost is the availability of appropriate technical communication equipment such as telephone and facsimile machines. Whereas, under paragraph 9, requests are to be made in writing, it is also envisaged that in urgent cases, and where agreed, oral requests may be entertained subject to their being subsequently confirmed in written form. Furthermore, practice has demonstrated the usefulness of informal consultations between the staff of the relevant central authorities, where legally permissible, in advance of the formal submission of requests, in order to reduce to a minimum any potential difficulties arising in its eventual execution. This is but one aspect of the widely acknowledged benefits to be derived from the development of regular contacts between central authorities and the accomplishment thereby of good working relationships.⁴⁴² The availability of appropriate communications technology is essential in this context.

⁴⁴⁰See *Competent National Authorities under the International Drug Control Treaties*, issued by the United Nations International Drug Control Programme in the ST/NAR symbol series.

⁴⁴¹See, for example, the 1959 Council of Europe Convention, article 5.

⁴⁴²“Report of the Expert Working Group on Mutual Legal Assistance and Related International Confiscation, Vienna, 15-19 February 1993” (E/CN.7/1993/CRP.13).

7.71 Decisions on the staffing of the designated authority and related training needs will depend upon, among other factors, the decisions taken concerning its nature and function. A key issue here is whether the authority is to be responsible for executing or issuing requests for mutual legal assistance and if so, to what extent. This will have a bearing on the question of the extent to which the staff of the central authority should have relevant legal experience and training. While practice differs in this regard, there are obvious benefits if the central authority is in a position to provide its foreign counterparts with sound practical advice.⁴⁴³ In this context it should be noted that an Expert Working Group on Mutual Legal Assistance and Related International Confiscation, convened at Vienna by the United Nations International Drug Control Programme from 15 to 19 February 1993, stressed the importance of the designated national authority advising its foreign counterparts on its requirements regarding the execution of requests and on the information needed to secure effective action in that regard. To that end, central authorities were encouraged to “prepare guides, preferably multilingual, for distribution to their international counterparts”.⁴⁴⁴

7.72 In addition to the receipt and either the execution or the forwarding of requests to the appropriate executing body, the central authority will be responsible for appropriate follow-up activities and for transmitting the results to the requesting State. Pursuant to article 7, paragraph 17, it will also be involved in relevant consultations with the requesting State in instances where assistance is to be postponed. It is imperative not to lose sight of the important role of this body in transmitting requests to other parties and seeking to ensure that they are properly executed. To that end, steps should be taken to ensure that it is capable of undertaking domestic coordination, including the establishment of appropriate lines of communication. The system of using a designated contact person in each law enforcement agency or prosecutorial or similar body that may generate requests has been widely resorted to in practice. The benefit of having the central authority training the various domestic agencies that will make use of its

⁴⁴³See, for example, *Report of the Oxford Conference on Mutual Legal Assistance, 5-9 September 1994* (London, Commonwealth Secretariat, 1994), p. 4.

⁴⁴⁴“Report of the Expert Working Group on Mutual Legal Assistance and Related International Confiscation, Vienna, 15-19 February 1993”, para. 7 (a). For one example of such a guide, see United Kingdom Central Authority, *International Mutual Assistance in Criminal Matters: United Kingdom Guidelines* (London, Home Office, 1991). In 1995 the Commonwealth Secretariat in London initiated a loose-leaf series entitled “Mutual assistance in criminal matters: guide to national practice and procedure”, designed to provide relevant information in respect of its member States.

services is widely acknowledged.⁴⁴⁵ Another quality control measure worthy of consideration is to provide the central authority with the competence “to review and consider requests to be submitted to a foreign state to ensure that the materials are properly prepared in an acceptable and useful form for the requested state”.⁴⁴⁶

7.73 A further matter of major practical importance to the functioning of a mutual legal assistance system is the availability of adequate language translation facilities. It is essential that arrangements for translation should be in place from the outset. Pursuant to article 7, paragraph 9, each party should designate the language or languages acceptable to it as a requested State and that information should be notified to the Secretary-General. As has been seen, practical considerations suggest that requesting parties should be given as wide a range of choice as possible (see paragraph 7.28 above). This factor, along with the desirability of facilitating personal contacts with other central authorities, may affect staff recruitment. For instance, it may be considered particularly useful to recruit people who are able to function adequately in several languages. It follows, however, that the burden of formal translation falls in principle upon the requesting State. It must be in a position to formulate a request in one of the designated languages of the requested State, and this may cause some delay. Special arrangements could be made, however, whereby the requested State would declare itself willing to undertake any necessary translations at the expense of the requesting State. Furthermore, it is the requesting State that will be required to translate the documents, statements or other written material that it receives in response to a request in order to facilitate the use of that material in domestic investigations, prosecutions and judicial proceedings.

7.74 It is evident from what has been said above that the establishment of a structure for the discharge of obligations under article 7 will involve both start-up and recurrent costs. In assessing the probable financial impact of the system, it is also necessary to bear in mind that under the terms of paragraph 19 the ordinary costs of executing a request shall be borne by the requested party unless some other arrangement is agreed to by those concerned. Special provision has been made for consultation and agreement regarding the meeting of expenses of a substantial or extraordinary nature. While this provision follows the mainstream of international practice in this area, many specialized mutual legal

⁴⁴⁵*Report of the Oxford Conference on Mutual Legal Assistance, 5-9 September 1994* (London, Commonwealth Secretariat, 1994), p. 4.

⁴⁴⁶*Ibid.*, p. 8.

assistance treaties specify further exceptions to this general rule. For instance, article 29 of the 1992 Inter-American Convention identifies the payment of fees for expert witnesses and the travel and other costs relating to the transportation of persons from the territory of one State to another as expenses to be met by the requesting State. Similarly, in paragraph 12(1) of the Commonwealth Scheme it is stated that “the requesting country shall be responsible for the travel and incidental expenses of witnesses travelling to the requesting country, including those of accompanying officials, for fees of experts, and for the costs of any translation required by the requesting country”. No similar specific exceptions are to be found in relevant provisions of article 7.

7.75 For these and other reasons, parties may wish to consider concluding bilateral and/or multilateral agreements or arrangements in the context of which alternative or more detailed provisions could be elaborated in this and other areas of concern or difficulty. This option is encouraged by the terms of paragraph 20. As the Expert Working Group on Mutual Legal Assistance noted in its 1993 report: “Such bilateral and multilateral discussions are also useful to exchange information on legal systems, to adapt the general provisions of the 1988 Convention to suit the particular needs of the individual parties, and to provide a framework for agreement on particular issues such as costs or evidentiary requirements.”⁴⁴⁷ The 1990 Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117, annex) was intended to facilitate such a process and a growing number of national model treaties on mutual legal assistance can also be drawn upon for guidance.⁴⁴⁸

7.76 Several further provisions of article 7 deal with important procedural and related matters. These include, in particular, the specification, in paragraph 10, of the minimum contents of any request for assistance. When the request relates to the provision of cooperation under article 5 of the 1988 Convention, these requirements are supplemented in the manner set out in paragraph 4, subparagraph (d), of that article. In practice, however, many requests will either require, or benefit from, the provision of additional information. The authority of the requested party to request additional information is provided in paragraph 11. From the perspective of the requesting State, examples might include such things as an indication of the time-limit within

⁴⁴⁷“Report of the Expert Working Group on Mutual Legal Assistance and Related International Confiscation, Vienna 15-19 February 1993”, para. 71.

⁴⁴⁸ Several such national models are reproduced in W. Gilmore, ed., *Mutual Assistance in Criminal and Business Regulatory Matters* (Cambridge, Cambridge University Press, 1995).

which compliance with the request is desired.⁴⁴⁹ Any requirements relating to confidentiality within the context of paragraph 14 should, of course, also be intimated at the time of the request.

7.77 Clarity and precision in the formulation of requests are essential. Given the fact that they will often be directed to officials working within an entirely different legal system and tradition, it is also important to avoid the use of overly specialized legal terminology and concentrate on a detached description of the object or goal that is sought rather than the “methodology” for achieving it. In the formulation of requests, guides prepared by national authorities outlining essential procedures, practices and requirements can be invaluable to a requesting authority in this regard. It could be useful for central authorities to consider including model requests in their national guides, as this would make the task of providing a positive, prompt and effective response that much easier.

7.78 The terms of paragraph 12 are also important. They allow the requested party to follow procedures specified in the request which, although not required by the domestic law of the requested party, are not contrary to that law. This provision is of practical significance owing to the wide differences among States concerning procedures that should or must be followed in order to guarantee that the evidence or other assistance obtained pursuant to the request is admissible at trial. As stressed above, such considerations of flexibility should be taken into account in formulating the implementing legislation of each State party.

Provision, postponement and refusal of assistance

7.79 As is common in other spheres of international cooperation in the administration of justice, the obligation to provide assistance under article 7 is not unlimited. Paragraph 15 is of particular importance in that it is designed to safeguard the interests of the requested State by articulating various grounds upon which mutual legal assistance may be refused. Given the fact that, unlike the situation in extradition cases, the liberty of the individual is not directly at issue, these grounds are all formulated in discretionary rather than mandatory terms. For similar reasons, certain principles and practices familiar in an extradition context have in general been abandoned in State practice in this sphere and are not reflected in the wording of paragraph 15. For instance, mutual legal assistance is generally granted even in cases of investigations and prosecutions involving nationals of the requested State.

⁴⁴⁹See, for example, the Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 45/117, annex), article 5, paragraph 1, subparagraph (f).

7.80 This distinction between the nature of extradition and mutual legal assistance should be borne in mind when the relevant domestic legislation in the latter sphere is being formulated. Furthermore, if the decision is taken to legislate for the provision of mutual assistance on an “all-crimes” basis rather than restricting it to the offences enumerated in article 3, paragraph 1, of the 1988 Convention, it will be necessary to ensure that this is done in a manner which permits full compliance with provisions of the Convention. The treatment of political and fiscal offences referred to in article 3, paragraph 10, is especially relevant in this context.⁴⁵⁰

7.81 While the grounds for refusal in article 7, paragraph 15, are formulated in discretionary terms, this does not prevent States parties from establishing mandatory provisions in their domestic laws if such a position is thought necessary to provide appropriate protection for their essential interests. Irrespective of the policy decision in this regard, provision should be made for the identification of the authority or authorities that have a right to accept or refuse a request for assistance. There is an obvious value in designating an official or officials within the central authority for this purpose. Similar considerations apply to the exercise of discretionary powers. In some instances, constitutional, policy or other considerations may require some element of ministerial involvement. The identification of the relevant minister for these purposes may, in turn, have a direct bearing on the issue of where within the governmental system the central authority, to be designated pursuant to paragraph 8, should be situated.

7.82 Grounds for refusal of assistance can be modified in any subsequent bilateral or multilateral treaty negotiations conducted under the mandate provided both by article 7, paragraph 20, and by article 5, paragraph 4, subparagraph (g). In the latter context, it would be particularly valuable to contemplate the reformulation of the grounds for refusal, bearing in mind the special features of international confiscation assistance. The terms of article 18 of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime provide an interesting illustration of such an approach.

⁴⁵⁰See above, comments on article 3, paragraph 10. By virtue of article 7, paragraph 5, however, a party may not refuse to provide assistance on the ground of bank secrecy. In some countries it may be necessary to legislate to override relevant bank secrecy or client confidentiality laws to give effect to this obligation.

7.83 In cases in which a request for assistance is to be refused, article 7, paragraph 16, contains the requirement that reasons be given to the requesting State. In order to minimize any negative effect on the spirit of cooperation aimed at in article 7, it is recommended that the notification to the requesting State should, as far as possible, clearly indicate the basis for refusal and the facts upon which the decision was based. In its 1993 report, the Expert Working Group on Mutual Legal Assistance recommended that “in general, no request should be refused without prior consultation between central authorities. Consultation should always occur where impediments to execution arise from differences between their legal systems, resource difficulties, or lack of information”.⁴⁵¹

7.84 The desirability of consultation in cases of difficulty is specifically embraced in paragraph 17, where the possibility is envisaged of postponing assistance if it interferes with an ongoing investigation, prosecution or proceeding. While application of the concept of the partial or conditional granting of a request is confined to the circumstances described in paragraph 17, it would be within the spirit of article 7 as a whole to give it a more wide-ranging application in practice. Such a posture would be consistent with developing international best practice in this sphere of inter-State activity. This is clearly illustrated by article 4, paragraph 4, of the 1990 Model Treaty on Mutual Assistance in Criminal Matters, which reads: “Before refusing a request or postponing its execution, the requested State shall consider whether assistance may be granted subject to certain conditions. If the requesting State accepts assistance subject to these conditions, it shall comply with them” (see General Assembly resolution 45/117, annex).⁴⁵²

7.85 In instances in which a request for assistance meets with a positive response, the Convention includes a number of specific safeguards which act to limit the freedom of action of the requesting State. Paragraph 13 is central to this aspect of the process. In that paragraph, the widely acknowledged principle of extradition law known as “speciality” is used to impose significant limitations on the use and transmission of the information or evidence that has been furnished. Domestic legislation or other implementing measures, as appropriate, must be formulated so as to permit compliance with such restrictions. Steps should also be taken to ensure that investigators, prosecutors and others who operate in this context are made familiar with this restriction and respect it.

⁴⁵¹“Report of the Expert Working Group on Mutual Legal Assistance and Related International Confiscation, Vienna, 15-19 February 1993”, para. 70 (c).

⁴⁵²See, also, article 20 of the 1990 European Convention.

7.86 Finally, it will be necessary to ensure that domestic law satisfies the safe-conduct obligations in respect of witnesses, experts and other persons, as provided for under paragraph 18. Although the provision of immunity of this kind is a common feature of mutual legal assistance arrangements, it may give rise to sensitive problems. A jurisdiction faced with particular constitutional, legal, policy or other problems in this regard may, of course, consider the possibility of formulating a reservation to its acceptance of its obligations under the Convention in order to protect its position.⁴⁵³ Such a step should not, however, be taken before full consideration is given to the negative effect that it would have on the party's ability to secure, as a requesting State, what could be crucial assistance in its own future investigations, prosecutions and proceedings where the voluntary presence of relevant individuals in its territory is required.

⁴⁵³The United Kingdom has adopted this course of action.

ARTICLE 8

Transfer of proceedings

General comments

8.1 In the context of civil proceedings, many States know the plea of *forum non conveniens*, a means whereby a court which undoubtedly has jurisdiction to hear a case may be asked to decline the exercise of that jurisdiction in favour of a more appropriate forum.⁴⁵⁴ The decision will take into account the interests of the private parties, as well as public interest in the sound administration of justice. In the context of criminal proceedings, the accused person has no right to move for the transfer of his or her case to another State's courts.⁴⁵⁵ In many cases the essentially territorial nature of the crime and of criminal law in general militates against any such possibility. The international nature of many offences within the scope of the 1988 Convention, however, and the plurality of jurisdictions available under article 4 do raise the possibility of the transfer of the criminal proceedings, by the State authorities, to another State which could prove a more appropriate forum.

8.2 Though less well-entrenched than other procedural regimes of co-operation, such as extradition and mutual legal assistance, the transfer of criminal proceedings between members of the international community has become relatively widespread, particularly among countries with a civil-law tradition. It encompasses the situation where the prosecuting or other relevant authority in one State has reached the conclusion that it would be desirable for the criminal proceedings in question to take place in another country. As has been pointed out elsewhere, the requesting State "may ask another State, in which adequate criminal proceedings are possible, to take over the proceedings. If the requested State agrees to this request, a 'transfer of criminal proceedings' is taking place".⁴⁵⁶

⁴⁵⁴See A. V. Dicey and J. H. C. Morris, *The Conflict of Laws*, 12th ed. (London, Sweet and Maxwell, 1993), pp. 395-419.

⁴⁵⁵There may be a right to apply for a change of venue within the same State, for example where local public opinion is so inflamed against the accused that a fair trial cannot be guaranteed.

⁴⁵⁶*Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters* (Strasbourg, Council of Europe, 1985), p. 20.

Single paragraph

The Parties shall give consideration to the possibility of transferring to one another proceedings for criminal prosecution of offences established in accordance with article 3, paragraph 1, in cases where such transfer is considered to be in the interests of a proper administration of justice.

Commentary

8.3 Article 8 imposes no obligation upon parties to transfer proceedings in any particular case. It does, however, require the parties to give consideration to the possibility of using the cooperative mechanism of transfer of proceedings in instances in which it would be in the interests of the proper administration of justice to do so. As is common in relation to the scope of operation of international cooperation in the administration of justice under the 1988 Convention, the obligation is restricted to offences established in accordance with article 3, paragraph 1.

8.4 There are various reasons why a transfer of proceedings might commend itself in any given case.⁴⁵⁷ In particular, it offers a solution to the problem of concurrent jurisdiction and the resulting plurality of proceedings inherent in an activity with such conspicuous transnational features as illicit traffic in drugs.⁴⁵⁸ As has already been noted, no specific solution is articulated in the Convention to the question of the priority to be afforded to parties in instances involving concurrent jurisdiction.⁴⁵⁹

8.5 Transfer of proceedings also permits the consolidation of various criminal proceedings, relating to distinct drug trafficking offences, involving the same individual or individuals, which may have been committed in one or more States and in circumstances where a transfer would be in the interests of effective prosecution. This procedure can even be used in circumstances where

⁴⁵⁷See, for example, article 8 of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters.

⁴⁵⁸See, for example, the 1990 Model Treaty on the Transfer of Proceedings on Criminal Matters (General Assembly resolution 45/118, annex), article 13.

⁴⁵⁹See above, comments on article 4.

the individual concerned has been definitively sentenced in the State wishing to transfer proceedings.⁴⁶⁰

Implementation considerations: article 8

8.6 Parties wishing to place themselves in a position to take advantage of this form of international cooperation have to ensure that their domestic law adequately provides for both the transfer of proceedings to foreign States and the acceptance of transfers from those States.⁴⁶¹ Of central importance in the latter context is the ability to discharge the obligation to prosecute once the transfer of proceedings has been accepted, as is the need to ensure that the necessary legislative measures are in place to allow the party concerned to exercise the necessary jurisdiction in respect of the offences in question.⁴⁶² Among the many other matters to be considered during the phase of domestic law implementation is whether or not to extend the concept of transfer of proceedings to encompass the confiscation of the proceeds of crime.⁴⁶³

8.7 A further issue that must be resolved at the implementation stage is whether or not to require the existence of a bilateral or multilateral treaty on the transfer of proceedings as a condition for cooperation. Even if the transfer of proceedings is not made conditional on the existence of an international treaty, some may consider it desirable to negotiate such instruments on other grounds. It was, for instance, the view of the Committee of Governmental Experts which drew up the 1972 European Convention on the Transfer of Proceedings in Criminal Matters⁴⁶⁴ that, “although the existence of an international convention is not an indispensable condition for the transfer of criminal proceedings, it is

⁴⁶⁰See, for example, article 8, paragraph 2, of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters.

⁴⁶¹See, for example, Netherlands Code of Criminal Procedure, book IV, title X, part 3 (as amended).

⁴⁶²See, for example, article 1, paragraph 2, of the 1990 Model Treaty and article 2 of the 1972 European Convention on the Transfer of Proceedings in Criminal Matters.

⁴⁶³See, for example, the Netherlands Act to amend the Act on the transfer of the enforcement of criminal sentences in the interests of international cooperation to confiscate the proceeds of crime (10 December 1992, Stb.1993, 12); see also above, comments on article 5, paragraph 4.

⁴⁶⁴See, for example, J. D. McClean, *International Judicial Assistance* (Oxford, Clarendon Press, 1992), pp. 146-149.

nevertheless highly desirable. It is only after appropriate procedure has been established for the communication of information etc., that mutual assistance can be developed and intensified".⁴⁶⁵

8.8 For those wishing to enter into the negotiation of international agreements in this sphere there are a number of precedents upon which to draw.⁴⁶⁶ These include⁴⁶⁷ the 1990 Model Treaty on the Transfer of Proceedings in Criminal Matters (General Assembly resolution 45/118, annex).⁴⁶⁸ The Model Treaty treats a comprehensive range of relevant matters, including scope of application, channels of communication, required documents, certification and authentication, decisions on the request, dual criminality, grounds for refusal, the position of the suspected person, the rights of the victim, *ne bis in idem*, the effects of the transfer on the requested State, provisional measures, the plurality of criminal proceedings, and costs. In using the Model Treaty, care would be required in order to ensure full compatibility with relevant obligations contained in other provisions of the 1988 Convention.⁴⁶⁹

⁴⁶⁵*Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters* (Strasbourg, Council of Europe, 1985), pp. 20-21. By virtue of article 39, participation in this Convention is open, under certain conditions, to non-member States of the Council of Europe.

⁴⁶⁶See, for example, the 1990 Convention between the Member States of the European Communities on the Transfer of Criminal Proceedings.

⁴⁶⁷See, for example, R. Clark, "Crime: the U.N. agenda on international cooperation in the criminal process", *Nova Law Review*, No. 15, 1991, pp. 493-495.

⁴⁶⁸See also chapter IV of the Convention on Mutual Assistance in Criminal Matters, concluded in 1992 by the Economic Community of West African States.

⁴⁶⁹For example, the discretionary grounds for refusal in article 7 of the 1990 Model Treaty must be considered in the light of the obligations set out in article 3, paragraph 10, of the 1988 Convention.

ARTICLE 9

Other forms of co-operation and training

General comments

9.1 There are several articles of the 1988 Convention that deal in general terms with international cooperation. Article 7 governs mutual legal assistance; article 9 provides for forms of cooperation between the parties; and further aspects of cooperation are dealt with in article 10, especially as regards transit States. There are a number of distinctions between the forms of cooperation dealt with in article 7 and the subject matter of article 9. Article 7 involves specially designated authorities⁴⁷⁰ in the transmission and reception of requests to carry out acts which are related to specific criminal offences and which, in at least some States parties, will involve judicial personnel. Cooperation under article 9 is more in the nature of general operational assistance between the relevant agencies in each State; it may involve assistance in inquiries or more general cooperation, for example in data collection, which assists in the suppression of offences. In some systems, a distinction between “judicial co-operation” and “police cooperation” is readily understood. In some States, however, the relevant agencies will commonly operate under judicial control, and this language may be unhelpful.

9.2 States differ in the way in which functions are divided up between agencies. This is perhaps most obviously the case in respect of customs authorities. In some States customs authorities have full law enforcement functions and may operate throughout the territory, whereas in other States they may function wholly or mainly at the border and may have to involve the police in law enforcement functions. These points influenced the drafting of article 9, the terms of which are sufficiently general to accommodate the various approaches to be found in the legal and administrative systems of the parties.

Paragraph 1, introductory part

1. The Parties shall co-operate closely with one another, consistent with their respective domestic legal and administrative systems, with a view to enhancing the effectiveness of law enforcement action to suppress the commission of offences established in accordance with article 3, paragraph 1. They

⁴⁷⁰See article 7, paragraph 8.

shall, in particular, on the basis of bilateral or multilateral agreements or arrangements:

Commentary

9.3 The first sentence of article 9, paragraph 1, can be compared with the corresponding language in article 7, paragraph 1, in which the parties are required to afford one another, pursuant to that article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3, paragraph 1. In article 9, the scope of cooperation, though still limited to the offences established in accordance with article 3, paragraph 1, is broadened to cover anything that enhances the effectiveness of law enforcement action. In recognition of the differences in legal and administrative systems already referred to (see paragraph 9.2 above), the obligation of parties is to cooperate in ways that are consistent with their respective systems.

9.4 The introductory paragraph of article 9 sets out a general obligation to cooperate. The specific obligations which follow in subparagraphs (a)-(e) are, however, all governed by the words “on the basis of bilateral or multilateral agreements or arrangements”. That phrase was inserted because of fears that the detailed provisions of those subparagraphs could raise complex problems of national law.⁴⁷¹ It does not nullify the obligatory nature of the following subparagraphs but enables parties to honour their obligations in ways that suit the particular requirements of the pairs of States, or regional or subregional groups of States, concerned. The text refers to “agreements or arrangements”; these words may not be terms of art, but an “agreement” is likely to have been reached expressly and for a particular purpose, while an “arrangement” may reflect practice as it has developed between the relevant parties and their specialist agencies and may include more formal multilateral instruments such as the Scheme for Mutual Assistance in Criminal Matters within the Commonwealth, which lacks full treaty status.

Paragraph 1, subparagraph (a)

(a) Establish and maintain channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all

⁴⁷¹*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 21st meeting, para. 72.

aspects of offences established in accordance with article 3, paragraph 1, including, if the Parties concerned deem it appropriate, links with other criminal activities;

Commentary

9.5 Subparagraph (a) of paragraph 1 is concerned with channels of communication between the relevant “agencies and services” in each State. In English usage, the words “agency” and “service” may be used interchangeably and seem to have no connotation of the degree of autonomy enjoyed by the particular body. What is important is that there should be direct communication between the agencies, for only in that way can the rapid exchange of information referred to in the text be ensured. The need for security in the exchange of information is also stressed in the text, for the leakage of information not only may prejudice the outcome of a particular case but may also destroy the trust between agencies that is so essential for effective cooperation.

9.6 Reference is made in subparagraph (a) to information concerning all aspects of offences. This phraseology is obviously intended to be broadly descriptive; it does not call for a detailed analysis of the component part of the definition of an offence or of degrees of criminality in a particular legal system.

9.7 The primary focus of the Convention is illicit trafficking. Such trafficking is often associated with other types of criminal activity, such as fraud and racketeering. Thus, while they are under no obligation to do so, parties are encouraged in subparagraph (a) to exchange information on activities associated with offences established in accordance with article 3, paragraph 1.

Paragraph 1, subparagraph (b)

(b) Co-operate with one another in conducting enquiries, with respect to offences established in accordance with article 3, paragraph 1, having an international character, concerning:

- (i) The identity, whereabouts and activities of persons suspected of being involved in offences established in accordance with article 3, paragraph 1;**
- (ii) The movement of proceeds or property derived from the commission of such offences;**

(iii) The movement of narcotic drugs, psychotropic substances, substances in Table I and Table II of this Convention and instrumentalities used or intended for use in the commission of such offences;

Commentary

9.8 One of the principal uses of the channels of communication established in accordance with article 9, paragraph 1, subparagraph (a), is the conduct of inquiries of the types enumerated in subparagraph (b) of that paragraph. The reference to the international dimension was inserted to make it clear that the offences in question were not wholly domestic. The offences are the ones established in accordance with article 3, paragraph 1; the text does not insist that the domestic law of the party whose cooperation is sought should have created the relevant offence (and the safeguard clauses in article 3 mean that this will not always be the case).⁴⁷²

9.9 Broadly speaking, subparagraph (b), which identifies the international character of many of the offences established in accordance with article 3, paragraph 1, is concerned with inquiries with respect to those offences, the movements of suspected persons, the proceeds and instrumentalities of criminal activity, and narcotic drugs, psychotropic substances and substances listed in Table I and Table II of the Convention. The present wording, arrived at after discussions at the Conference that led to considerable amplification of the text initially proposed, still presents some difficulty and requires close examination.

9.10 Insofar as the introductory part of subparagraph (b) is concerned, the word “enquiries” in the English text corresponds to the word “*enquêtes*” in the French text. In article 7, paragraph 1, the word “investigations” is also rendered as “*enquêtes*” in French. This again points out the difficulty some States have with the distinction between formal and informal procedures, a problem which led to the provision of careful safeguards in the introductory part of the paragraph (see paragraph 9.2 above).

9.11 Clauses (i), (ii) and (iii) of paragraph 1, subparagraph (b), list the subjects on which various types of inquiry may be carried out. The list is not exhaustive. It is quite conceivable, for example, that useful and proper inquiries

⁴⁷²This is most clearly the case in the context of subparagraph (b), clause (iii), where the inquiry may concern instrumentalities intended for future use (including use in the State seeking cooperation).

may be held on the presence (at the site of one phase of a crime) of features known to be characteristic of the *modus operandi* of a suspected offender which do not correspond exactly to any of the items listed in clauses (i), (ii) and (iii). The view was expressed, however, that the intention had been to include all inquiries concerning the offences prescribed.

9.12 To that effect the representative of the United States said that the word “concerning” in the introductory part of subparagraph (b) could be misinterpreted. The text adopted by Committee II⁴⁷³ had provided for the conduct of inquiries involving offences covered by article 3, paragraph 1, as well as for the separate conduct of inquiries with respect to the items now set out as subparagraph (b), clauses (i), (ii) and (iii). The position of the word “concerning” in the final text could be read as making the conduct of inquiries with respect to clauses (i), (ii) and (iii) conditional on the existence of a distinct offence covered by article 3, paragraph 1, which, in the view of the representative, had not been the intention of Committee II. The ideal solution might have been to number as (i) the words in the introductory part, starting with “offences established in accordance with ...” and to renumber the other clauses accordingly. In the view of the representative, the word “concerning” should be interpreted in that way.⁴⁷⁴

9.13 Subparagraph (b), clause (i), refers to the identity, whereabouts and activities of persons “suspected of being involved in” the offences to which the subparagraph applies. There was some discussion at the Conference about the phrase used to describe the persons who were the subject of inquiries. The original wording was “traffickers”; the phrase “suspected persons” was then considered; and finally the Conference adopted the wording used in the present text. This phrase lacks legal precision and is to be interpreted in a broad sense. The French text, however, is much more strictly formulated.⁴⁷⁵

9.14 Subparagraph (b), clause (ii), refers to the movement of proceeds or property derived from the commission of relevant offences. Given the definition of “proceeds”⁴⁷⁶ as “any property derived from or obtained, directly or indirectly,

⁴⁷³Official Records, vol. I ..., document E/CONF.82/12, “Article 6 (E/CONF.82/C.2/L.13/Add.8), sect. IV, para. 32.

⁴⁷⁴Official Records, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 59.

⁴⁷⁵In the French text, the words “.. *personnes soupçonnées des infractions*” are used.

⁴⁷⁶See article 1, subparagraph (p).

through the commission” of such an offence, the drafting of the subparagraph is tautological.

9.15 The subject of proceeds is dealt with in a number of places in the text of the Convention. Measures to identify, trace, freeze and seize proceeds may be taken as a result of a request under article 5 if the purpose of such measures is eventual confiscation.⁴⁷⁷ Mutual legal assistance under article 7 may include identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes.⁴⁷⁸ The present provision will apply where information is needed on the movement of proceeds but as part of a general investigation and without any immediate intention of using the information in evidence or of initiating proceedings. The provision deals only with information on the “movement” of proceeds,⁴⁷⁹ but that term can be interpreted to include not merely the geographical location of proceeds from time to time but any change in their nature (for example, their conversion into some other form of property).

9.16 Subparagraph (b), clause (iii), is again limited to “the movement” of various types of things, including the substances listed in Table I and Table II⁴⁸⁰ and instrumentalities used or intended for future use in the commission of offences as well as narcotic drugs and psychotropic substances themselves. In terms of instrumentalities, the word “movement” brings to mind motor vehicles, ships and aircraft, but materials and equipment referred to in article 13, for example tableting machines and laboratory equipment, may also be moved across national boundaries.

Paragraph 1, subparagraph (c)

(c) In appropriate cases and if not contrary to domestic law, establish joint teams, taking into account the need to protect the security of persons and of operations, to carry out the provisions of this paragraph. Officials of any Party taking part in such teams shall act as authorized by the appropriate authorities of the Party in whose territory the operation is to

⁴⁷⁷See article 5, paragraph 4, subparagraph (b).

⁴⁷⁸See article 7, paragraph 2, subparagraph (g).

⁴⁷⁹The term does not appear in the earliest draft (see *Official Records*, vol. I ..., document E/CN.7/1987/2, sect. II, “Article 6”).

⁴⁸⁰See below, comments on article 12.

take place; in all such cases, the Parties involved shall ensure that the sovereignty of the Party on whose territory the operation is to take place is fully respected;

Commentary

9.17 The origins of subparagraph (c) can be traced to the work of the intergovernmental expert group that met in 1987 (see Introduction, paragraphs 18-21 above). It was felt desirable to include a provision in the article on cooperation, stressing that operations by the law enforcement personnel of one party should not be conducted on the territory of another party without the explicit consent of the latter party and should always be conducted in ways that did not offend the domestic law of that party.⁴⁸¹ The reference to the joint teams being established “to carry out the provisions of this paragraph” gives very broad scope, for the introductory part of paragraph 1 covers all measures that would enhance the effectiveness of law enforcement action in this field (see paragraph 9.3 above).

9.18 The English text requires the joint teams to act “as authorized by” the party in whose territory they act, which suggests quite specific authorization. The French text, however, is more flexible; the teams are directed to work in conformity with the “*indications des autorités compétentes*”, which suggests operational guidelines rather than detailed instructions, a much more practical approach. In practice, joint teams may carry out part of their operations in the territory of a third State. In such cases, the second sentence remains applicable, *mutatis mutandis*.

Paragraph 1, subparagraph (d)

(d) Provide, when appropriate, necessary quantities of substances for analytical or investigative purposes;

Commentary

9.19 It should be noted that the word “substances” is not qualified in any way; it is not limited to narcotic drugs, psychotropic substances or the substances listed in Table I and Table II. It will include, for example, colourants,

⁴⁸¹See *Official Records*, vol. I ..., document E/CN.7/1988/2 (Part II), paras. 150-154; see also comments on article 2 above.

bulking agents and indeed any substance relevant to an investigation. The text as submitted to the Drafting Committee referred to “controlled substances”.

Paragraph 1, subparagraph (e)

(e) Facilitate effective co-ordination between their competent agencies and services and promote the exchange of personnel and other experts, including the posting of liaison officers.

Commentary

9.20 Subparagraph (e), which at one stage formed a distinct paragraph on its own, is of considerable practical importance, especially in respect of liaison officers. Care has been taken in the drafting to avoid any suggestion that the posting of such officers needs to be on a reciprocal basis; such reciprocity is not found in practice, liaison officers being posted to meet operational needs and not on the basis of some diplomatic analogy. The drafting of the subparagraph emphasizes that the posting of liaison officers is a feature of the cooperation between the competent agencies and services; liaison officers should be drawn from those agencies and services and not from some other source, such as the diplomatic service of a State.

Paragraph 2

2. Each Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement and other personnel, including customs, charged with the suppression of offences established in accordance with article 3, paragraph 1. Such programmes shall deal, in particular, with the following:

(a) Methods used in the detection and suppression of offences established in accordance with article 3, paragraph 1;

(b) Routes and techniques used by persons suspected of being involved in offences established in accordance with article 3, paragraph 1, particularly in transit States, and appropriate countermeasures;

(c) Monitoring of the import and export of narcotic drugs, psychotropic substances and substances in Table I and Table II;

(d) Detection and monitoring of the movement of proceeds and property derived from, and narcotic drugs, psychotropic substances and substances in Table I and Table II, and instrumentalities used or intended for use in, the commission of offences established in accordance with article 3, paragraph 1;

(e) Methods used for the transfer, concealment or disguise of such proceeds, property and instrumentalities;

(f) Collection of evidence;

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

(h) Modern law enforcement techniques.

Commentary

9.21 Paragraph 2 deals with the establishment and (unusually for an international convention) the curriculum of training courses for law enforcement (including customs) personnel engaged in the suppression of illicit traffic. The focus here, in contrast with paragraph 3, is on activities within each party.

Paragraph 3

3. The Parties shall assist one another to plan and implement research and training programmes designed to share expertise in the areas referred to in paragraph 2 of this article and, to this end, shall also, when appropriate, use regional and international conferences and seminars to promote co-operation and stimulate discussion on problems of mutual concern, including the special problems and needs of transit States.

Commentary

9.22 Paragraph 3 deals with the problem of training from the international perspective. Research and training in the areas described in paragraph 2 are sometimes best undertaken at the regional or international level, and parties are required to assist one another in planning and implementing such programmes.

Implementation considerations: article 9 as a whole

9.23 As noted above, article 9, paragraph 1, is designed to foster an ethos of law enforcement cooperation and to enhance its effectiveness among parties to the Convention. It is anticipated that they will conclude bilateral or multilateral agreements or arrangements to that end. In this sense, paragraph 1 constitutes an acknowledgment of the recent trend towards the formalization of international law enforcement cooperation, a development which, in turn, reflects the fact that the domestic laws of a number of countries place significant limits on the disclosure of sensitive information and on the operation of foreign law enforcement officials within their territory in the absence of such an agreement or arrangement. The wording used, however, affords to each party a considerable degree of flexibility in assessing its requirements and formulating its policy in this sphere. In many instances, of course, States will be able to use existing bilateral relationships. Where new initiatives are required, an examination of existing State practice will often be of value. In some instances, model instruments have been developed to facilitate the process of negotiation. For example, the 1967 session of the Customs Co-operation Council approved a Model Bilateral Convention on Mutual Administrative Assistance for the Prevention, Investigation, and Repression of Customs Offences,⁴⁸² which has been used by many members of the international community.

9.24 Furthermore, in a growing number of cases, States have identified the need to create new regional or subregional structures of various kinds in order to deal more effectively with the law enforcement issues they have in common. One recent example of recourse to progressively more complex and ambitious structures at the subregional level is to be found within the context of the European Union⁴⁸³ and, in particular, in the phased creation of a central criminal intelligence office known as Europol. The first stage, regulated by a 1993

⁴⁸²Customs Co-operation Council document 15.625 (69).

⁴⁸³See, M. Anderson and others, *Policing the European Union* (Oxford, Oxford University Press, 1996).

ministerial agreement, took the form of a Europol Drugs Unit in the Netherlands. It was designed "to act as a non-operational team for the exchange and analysis of intelligence in relation to illicit drug trafficking, the criminal organizations involved and associated money laundering activities affecting two or more Member States".⁴⁸⁴ The second stage is reflected in a subsequent agreement to extend the substantive terms of reference of the Unit to certain additional categories of criminal activity of common concern.⁴⁸⁵ The final element in the process will be reached with the entry into force of the 1995 Europol Convention.⁴⁸⁶ This is a highly complex text, which provides, in considerable detail, for all matters deemed to be of relevance to the functioning of this institution, including the communication of data to third States and third bodies. While it is unlikely that this precedent will, as such, be capable of use elsewhere, it and other manifestations of State practice constitute a potentially valuable source of inspiration for those involved in the elaboration of suitable structures in other areas of the world.

9.25 While the focus of this provision is on cooperation between parties, this is not the only way in which the effectiveness of international law enforcement cooperation can be enhanced. In particular, it is important to note the contribution that can be, and consistently is, made by or in conjunction with appropriate international and regional bodies towards the achievement of this goal. That such cooperative activities are fully consistent with the spirit and the object and purpose of article 9, paragraph 1, is evident from, *inter alia*, resolution 1, on the exchange of information, adopted by the 1988 Conference.⁴⁸⁷ In that resolution, the Conference recommended that the widest possible use should be made by police authorities of the records and communications system of Interpol in achieving the goals of the Convention.

9.26 The many examples of the practical utility of such cooperation include the Regional Intelligence and Liaison Office project of the Customs Co-operation Council (also called the World Customs Organization). This has seen

⁴⁸⁴Reproduced in *Action against Transnational Criminality: Papers from the 1993 Oxford Conference on International and White Collar Crime* (London, Commonwealth Secretariat, 1994), p. 156.

⁴⁸⁵See Joint action of 10 March 1995, *Official Journal of the European Communities*, No. L 62.

⁴⁸⁶See Council Act of 26 July 1995, *Official Journal of the European Communities*, No. C 316.

⁴⁸⁷*Official Records*, vol. I ..., E/CONF.82/14, annex.

the creation, in close collaboration with the United Nations International Drug Control Programme, of regional offices throughout the world, including Asia, Africa, Europe and South America. Such Regional Intelligence and Liaison Office projects, in turn, form the core of an administrative structure intended to improve the gathering, analysis and dissemination of drug and other customs-related enforcement intelligence.

9.27 The articulation of the general obligation to cooperate is followed by an enumeration of certain specific areas in which the former must be manifested. The first of these, set out in paragraph 1, subparagraph (a), relates to the establishment and maintenance of channels of communication between the parties' agencies. While it is for each participating country to determine the most appropriate framework in which to meet this obligation, it is evident that the coordination of activities between domestic agencies is as important to the success of international cooperation as is the method adopted to manage the interface with their foreign counterparts. While practice among States has varied, in 1987, in the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, States which had not yet done so were urged "to designate the coordinating agency envisaged in article 35 (a) of the 1961 Convention and article 21 (a) of the 1971 Convention" and to provide it with the necessary authority.⁴⁸⁸ Given the intimate connection between article 9, paragraph 1, and the provision of mutual legal assistance, it is particularly important that close collaboration between the law enforcement community and the designated authority to be created pursuant to article 7, paragraph 8, should be established from the outset.⁴⁸⁹

9.28 What will constitute appropriate channels of communication will very much depend on the context. For example, the individual requirements of cooperation between the national agencies of two or more parties may differ significantly from those needed from a practical perspective to suppress smuggling in a frontier region. In the latter case, operational requirements may necessitate the establishment of a framework for particularly intensive and intimate forms of cooperation. For instance, title III, chapter 1, of the 1990 Schengen Convention makes detailed and ambitious provision for police cooperation. This includes an obligation to establish, especially in such frontier

⁴⁸⁸*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A, para. 233.

⁴⁸⁹See above, comments on article 7, paragraph 8.

zones, “telephone, radio and telex links and other direct connections ...”.⁴⁹⁰ The parties have also agreed to consider a range of further possibilities including: “(a) exchange of equipment or assignment of liaison officers with suitable radio equipment; (b) extending wavebands used in frontier zones; (c) setting up a joint link between the police and customs services operating in the same zones; (d) co-ordination of their procurement programmes for communication equipment in order ultimately to have standardized, compatible communication systems”.⁴⁹¹ Other special cases, such as participation in information exchange networks, may require separate consideration (see paragraph 17.48 below).

9.29 A similar flexibility is afforded to parties in determining the most appropriate manner and form for giving effect to the remaining obligations contained in the subparagraphs of article 9, paragraph 1. In formulating national policy in relation to these areas of cooperation, however, and in ensuring that an adequate legislative and administrative framework is in place to accommodate it, it is important to remember that in practice the need for cooperation will often emerge at relatively short notice and in a fluid and constantly evolving operational environment. Hence, a high degree of flexibility is essential if the overall goal of enhancing the effectiveness of law enforcement action to suppress the commission of offences established in accordance with article 3, paragraph 1, is to be achieved.

9.30 The nature of this challenge is illustrated in article 9, paragraph 1, subparagraph (c), which treats the issue of the establishment of joint teams, a term that is not further defined in the Convention. The kind of cooperative activity potentially within its scope is very broad. It would range from standing arrangements, such as the so-called “ship rider” agreements, whereby the law enforcement officials of one party work alongside those of another in an operational setting on a regular or continuous basis, to occasional or ad hoc arrangements for the coordination of a particular investigation or the provision or receipt of specialized law enforcement skills in relation to an issue of pressing concern. In the latter context, for example, one party may have a need for forensic auditors, specialists in asset identification, or persons with advanced financial investigative experience, in order to handle effectively the needs of a complex money-laundering case. In many such instances, the establishment of a joint team will result in the physical presence of the law enforcement officials of one State within the territory of another, thus potentially giving rise, as

⁴⁹⁰1990 Schengen Convention, art. 44, para. 1.

⁴⁹¹Art. 44, para. 2.

reflected in the wording of subparagraph (c), to a number of particularly sensitive issues. It is important that a framework be created within which such operations can proceed in a manner fully consistent with the perceived needs of the country where the activity is taking place.

9.31 It is also important to formulate national policy in such a manner as to foster a climate conducive to law enforcement cooperation. This can be particularly useful in areas such as the transfer of samples of narcotic drugs and psychotropic substances for analytical and investigative purposes, as envisaged in paragraph 1, subparagraph (d). A number of States, whether as part of formal national programmes or through initiatives on the part of individual forensic laboratories, scientifically profile samples of seized narcotic drugs and/or psychotropic substances. In most cases, such initiatives are aimed at providing wholly strategic intelligence, indicating production or cultivation sources, shifts in trafficking routes, patterns in processing methods and variations in purity levels. The greatest potential for profiling, however, lies in respect of the various forms of amphetamine, where scientific analysis may enable linkages to be established between separate consignments of seized materials. This may help to indicate the true overall scale of illicit production, the levels of involvement on the part of individual criminals and the relationships between criminal organizations and trafficking groups. Ultimately, it may influence the sentences imposed on convicted offenders and extend the scope for confiscation of their assets. Some States also maintain collections of designs, motifs and brand markings from either seized substances or the materials (for example sacking) in which they were contained. From a study of these markings, valuable strategic intelligence is gained and literature may be circulated to enforcement bodies, enabling staff to view for themselves the designs currently associated with particular illicit substances. It is thus highly desirable that the potential gains to be derived from collaboration in this area, as in others, should not be inadvertently frustrated by unintended rigidities in domestic legislation or administrative practice.

9.32 Paragraphs 2 and 3 raise fewer and less complex implementation considerations. As has already been noted, paragraph 2 is concerned with the need to develop or improve training programmes in a non-exhaustive listing of subject areas of relevance to the suppression of modern and sophisticated drug trafficking operations (see paragraph 9.21 above). Pursuant to paragraph 3, parties shall also assist one another in the planning and implementation of both training and research in the same areas. Here there is a pressing need to ensure through coordination, both international and domestic, the effective delivery of these activities. A number of international institutions and bodies are carrying

out this task in relation to the provision of technical and other forms of assistance within their mandates. At the global level, however, a central position in this regard has been accorded the United Nations International Drug Control Programme,⁴⁹² which has often encouraged and facilitated the conclusion of regional or subregional memoranda of understanding that include undertakings by the participating Governments to enhance cross-border cooperation in the field of drug law enforcement.

⁴⁹²See, in particular, Commission on Narcotic Drugs resolution 4 (XXXIV), Economic and Social Council resolution 1991/41 and General Assembly resolutions 45/179, 48/12 and 48/112.

ARTICLE 10

International co-operation and assistance for transit States

General comments

10.1 Under the earlier conventions, no provision concerning the distinct category of transit States was included. At the tenth special session of the Commission on Narcotic Drugs, held at Vienna from 8 to 19 February 1988, the text of the draft Convention was prepared for submission to the Conference. It was argued that the provisions of the draft as it had been developed at that stage were inadequate to meet the needs of transit States. That reflected the evolution of international consensus on the term “transit State”. The Commission accordingly prepared a draft article on the matter.⁴⁹³ The text, with some amendments and the addition of a third paragraph, formed article 10 of the final text.

10.2 Running through the discussions was a strong feeling on the part of transit States that, as the representative of the Bahamas put it, countries were used as transit States because of geography or to suit the convenience of traffickers. In his view, the demand markets should bear a proportionate share of the burden of drug interdiction.⁴⁹⁴ That was only fair because, as stated by the representative of Costa Rica, a transit State was clearly affected by the illicit movement of drugs through its territory: parts of shipments might be consumed locally and, in view of the enormous sums of money involved, the corruption of domestic officials could become a problem. Such illicit shipments, he said, were a threat to the health, economy, national security and moral integrity of the transit State.⁴⁹⁵

10.3 This raises, however, the question of what the term “transit State” means. Article 1, subparagraph (u), defines a transit State as “a State through the territory of which illicit narcotic drugs, psychotropic substances and substances in Table I and Table II are being moved, which is neither the place of origin nor the place of ultimate destination thereof”.

⁴⁹³See *Official Records of the Economic and Social Council, 1988, Supplement No. 3* (E/1988/13), para. 99.

⁴⁹⁴*Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, paras. 61 and 76.

⁴⁹⁵*Ibid.*, para. 76.

10.4 This definition and article 10 itself were drafted on the assumption that there was a group of States that could be identified as lying on the normal route between areas of production and areas of consumption. Many of those States were small or had limited resources; a number were island States with territorial seas sometimes of considerable size. It was felt that assistance to such States was an essential part of the fight against illicit trafficking. To some extent, subsequent events have shown the initial assumption to be false. The ingenuity of traffickers in seeking to outwit drug enforcement agencies has led to a situation in which there are fewer “normal” routes and almost any State can be a transit State in respect of certain substances. The notion of “transit traffic”, aired in the discussions at the Conference but not adopted in the text of the Convention, could be thought to be more apt to reflect the actual realities of changing patterns of illicit traffic. The need for some States to give practical assistance to others continues to exist, however, and the concept of the transit State remains valuable.

10.5 The needs of transit States had already been recognized in article 9, paragraph 3, of the Convention, which provides that the parties must assist one another in planning and implementing research and training programmes for sharing expertise in the areas referred to in paragraph 2 of that article and, to the same end, must also, when appropriate, use regional and international conferences and seminars to promote cooperation and stimulate discussion on problems of mutual concern, including the special problems and needs of transit States. Article 10 goes further, moving from training and discussions at conferences and seminars to the provision of practical and financial assistance.

Paragraph 1

1. The Parties shall co-operate, directly or through competent international or regional organizations, to assist and support transit States and, in particular, developing countries in need of such assistance and support, to the extent possible, through programmes of technical co-operation on interdiction and other related activities.

Commentary

10.6 Paragraph 1 identifies the intended beneficiaries as “transit States and, in particular, developing countries in need of such assistance and support”; the reference to developing countries is important in view of the fact, already noted, that patterns of illicit trafficking have rendered the notion of a transit State less

clear. Parties are required to cooperate, either through bilateral arrangements or through international organizations such as the United Nations itself, or regional organizations such as the Pacific Forum, the Association of South-East Asian Nations, the European Union, the Organization of African Unity or OAS. The forms of cooperation are also specified; the programmes of technical co-operation on interdiction and other related activities are to be supported “to the extent possible”, a phrase which recognizes that different parties will have a greater or lesser capacity to provide financial assistance or technical expertise. In other respects, paragraph 1 is broadly drafted: the final phrase “and other related activities” was included to avoid any suggestion that there should be a narrow limit to the scope of technical cooperation.

Paragraph 2

2. The Parties may undertake, directly or through competent international or regional organizations, to provide financial assistance to such transit States for the purpose of augmenting and strengthening the infrastructure needed for effective control and prevention of illicit traffic.

Commentary

10.7 Paragraph 2 enables parties, without imposing any obligation on them, to provide financial assistance to transit States to augment and strengthen the infrastructure needed for effective control and prevention of illicit traffic. Examples are the provision of equipment, such as X-ray machines for use in detecting drug consignments, and the provision of vehicles and communications equipment, which might have a more general use but are intended for use by the appropriate police, customs or drug law enforcement agencies.

Paragraph 3

3. The Parties may conclude bilateral or multilateral agreements or arrangements to enhance the effectiveness of international co-operation pursuant to this article and may take into consideration financial arrangements in this regard.

Commentary

10.8 Paragraph 3 is one of the exhortatory paragraphs in the Convention. It imposes no obligation on the parties but indicates that progress in developing

international cooperation was not meant to be frozen at the position reached in 1988. There continues to be scope for enhancing the effectiveness of international cooperation of the sort covered by article 10, and it may take the form of bilateral or multilateral agreements or arrangements. The reference to financial arrangements reinforces the reference in paragraph 2 of article 10, an article intended to focus on the need for parties to receive practical assistance.

ARTICLE 11

Controlled delivery

General comments

11.1 Article 11 of the Convention specifically endorses the investigative technique of controlled delivery at the international level.⁴⁹⁶ In article 1, subparagraph (g), controlled delivery is defined as “the technique of allowing illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in Table I and Table II annexed to this Convention, or substances substituted for them, to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences established in accordance with article 3, paragraph 1 of the Convention”.⁴⁹⁷

11.2 Article 11 was the first international text to endorse the practice of controlled delivery. The earlier tradition, reflected, for example, in the 1961 Convention,⁴⁹⁸ was to emphasize the seizure of drugs, if not positively to require their seizure;⁴⁹⁹ the 1988 Convention in that sense departed radically from earlier practice.

11.3 The most obvious attraction of this law enforcement strategy is that it facilitates the identification, arrest and prosecution of the principals, organizers

⁴⁹⁶Since 1988, similar provisions have been included in a number of regional and subregional multilateral instruments (see, for example, article 13, paragraph 2, of the Convention on Narcotic Drugs and Psychotropic Substances, adopted by the South Asian Association for Regional Cooperation Convention in 1990; and article 73 of the 1990 Schengen Convention).

⁴⁹⁷See above, comments on article 1, subparagraph (g).

⁴⁹⁸For example, article 37.

⁴⁹⁹See the discussion on whether article 37 of the 1961 Convention requires parties to have legislation enabling their competent authorities to seize drugs or whether it imposes an obligation to seize (Commentary on the 1961 Convention, paragraph 1 of the comments on article 37). It was the view of the Secretariat that article 37 did not impose an obligation to seize and that controlled delivery was, therefore, compatible with it and with the other relevant articles (see the background paper prepared by the Division of Narcotic Drugs entitled “Controlled delivery in the fight against the illicit drug traffic” (DND.422/2(3-1) of 18 May 1982).

and financiers in the criminal venture in question rather than merely those involved at a lower level. In the words of the 1987 Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, the central purpose of this technique is to bring to justice “the individuals, corporations or other organizations involved in the shipment, transportation, delivery, concealment or receipt of an illicit consignment of controlled substances that might not be detected if the intermediaries or couriers were arrested immediately on identification”.⁵⁰⁰ Such action contributes to the general goal of disrupting and dismantling trafficking organizations.

11.4 Increasing use is being made of this valuable procedure in the international context, where it can be used in a variety of circumstances. It is, for example, particularly useful when a shipment of illicit drugs is detected in unaccompanied freight consignments, in unaccompanied baggage, or in the post. Similarly, controlled delivery can be resorted to when the illicit drugs are accompanied by a courier, either when that individual is unaware that the law enforcement authorities have a prior knowledge and interest or when the operation involves the active cooperation of that individual. In the latter case, for example, a courier who has been apprehended may be persuaded, perhaps in exchange for reduced charges or the promise of a lighter sentence, to continue with the delivery of the consignment so that co-conspirators may be identified or further arrests may be made.

11.5 Individual countries may have to consider requests from other parties for different forms of active participation in these operations. These might include a request to permit a detected shipment or consignment to be exported from or imported into their jurisdiction or to transit through it. The definition of “controlled delivery” in article 1, subparagraph (g), refers to material passing out of, through or into “the territory” of one or more countries, which includes the land territory, the territorial sea and superjacent airspace. It can cover intended transport over land boundaries, by air or by sea. Moreover, in the context of surveillance on the high seas, it was noted in 1995 in the report of the Working Group on Maritime Cooperation that “the technique of controlled delivery usually produces better law enforcement results than does intervention at sea” and it was consequently recommended that, in appropriate circumstances, the

⁵⁰⁰*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.90.XVII.3), chap. I, sect. A, para. 250.

technique should be given preference over interdictions conducted pursuant to article 17.⁵⁰¹

11.6 While the natural focus is on the control of illicit consignments of narcotic drugs and psychotropic substances, the definition contained in article 1, subparagraph (g), also extends to shipments of substances listed in Table I and Table II annexed to the 1988 Convention.⁵⁰² The value of the technique in this context has also been demonstrated by international practice.⁵⁰³ For this reason, the Economic and Social Council, in its resolution 1995/20, requested Governments “to cooperate in controlled deliveries of suspicious shipments in special circumstances if the security of the shipment can be sufficiently ensured, if the quantity and nature of the chemical involved is such that it can be managed feasibly and safely by the competent authorities, and if all States whose cooperation is necessary, including transit States, agree to the controlled delivery”.

Paragraph 1

1. If permitted by the basic principles of their respective domestic legal systems, the Parties shall take the necessary measures, within their possibilities, to allow for the appropriate use of controlled delivery at the international level, on the basis of agreements or arrangements mutually consented to, with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them.

Commentary

11.7 While some countries grant wide discretion to prosecution authorities, in others it is regarded as fundamentally important that a prosecution be

⁵⁰¹Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995 (E/CN.7/1995/13), para. 22. It is essential that the national authority designated pursuant to article 17, paragraph 7, has appropriate lines of communication with its counterparts under article 11 in order to ensure that controlled delivery operations involving its flag vessels are not frustrated by the inadvertent granting of consent for a maritime interdiction to a third party.

⁵⁰²See below, comments on article 12.

⁵⁰³See, for example, *Chemical Action Task Force: Final Report* (Washington, D.C., June 1991), p. 25.

launched whenever there are sufficient grounds for the belief that an offence has been committed within the territory of the State. In those States, the discretion not to prosecute is judged to be one so open to abuse as not to be acceptable. It will be appreciated that States in which a system of mandatory prosecution exists may find it impossible to operate controlled delivery, and the introductory words of paragraph 1 point to this issue.

11.8 In the discussions on article 11, the representative of Mexico emphasized that there was no opposition to the use of controlled delivery where national legislation provided for its use and where the technical means to use it were available; but where the necessary sophisticated police organizations and systems were unavailable, the use of the technique could be counter-productive.⁵⁰⁴ Her Government would have preferred the text to make no reference to controlled delivery, and the agreed text was the result of a compromise that did not fully satisfy all participants in the Conference.⁵⁰⁵

11.9 Representatives of other States, having considerable experience regarding the use and advantages of controlled delivery, emphasized the success of the technique in tracing the ringleaders or organizers who directed the work of individual couriers. In the view of those representatives, it was essential that controlled delivery should have a prominent place in the text of the Convention, even if safeguards had to be in place for those parties for whom there were legal or practical difficulties.⁵⁰⁶

11.10 As a result of the discussions, a redrafted version of the earlier text was produced. It was decided to include two phrases designed to meet the legal and practical difficulties that had been identified. The first was the opening phrase "If permitted by the basic principles of their respective domestic legal systems ...". It was recorded as the opinion of Committee II that that phrase could not be interpreted to mean that controlled delivery operations would require an express provision under national law permitting such operations.

⁵⁰⁴*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 6th meeting, paras. 18, 19 and 70.

⁵⁰⁵See, for example, the statements by the representatives of Canada and the United Kingdom (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 6th meeting, paras. 22-23 and 36).

⁵⁰⁶*Official Records*, vol. I ..., document E/CONF.82/12, "Article 7" (E/CONF.82/C.2/L.13/Add.6), sect. III, para.13; and *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 8th meeting, paras. 1-20.

11.11 The second addition was the phrase “within their possibilities”. It was introduced to avoid any party being under an obligation to engage in controlled delivery operations which the party considered itself to be unable to undertake in view of, for example, the technical and organizational circumstances of its police, customs and other services.

11.12 The result is a qualified obligation on parties to take the necessary measures to allow for the appropriate use of controlled delivery at the international level. What is “necessary”, and when the use of the technique is “appropriate”, is a matter of judgement. The text, accordingly, indicates that the operations are to be on the basis of agreements or arrangements mutually consented to.

11.13 This implies an obligation to inform, and obtain the consent of, any other party through the territory of which the consignment is to pass, even if the route taken by the consignment changes unexpectedly. The cooperation of the authorities of every such party may be essential, for practical reasons or to provide secure evidence that the consignment was under continuous control. The newest methods of electronic tagging, however, are a forcible reminder of a difficulty that has always been inherent in the notion of controlled delivery, namely, whether it can be distinguished from mere surveillance and whether a surveillance operation can be carried out without the consent required under article 11.

11.14 It is difficult to give a clear answer to such questions, given the very fact-specific nature of controlled delivery. It is possible to envisage circumstances in which surveillance of a person suspected of being a courier, for example, might (at least initially) not seem to fall within the definition of controlled delivery. Comity and practical considerations both point to the need for maximum disclosure of information to other relevant parties in all such cases. Parties are under an obligation, subject to the various safeguards set out in article 9, paragraph 1, to cooperate with one another in conducting inquiries on the movement of narcotic drugs, psychotropic substances and substances in Table I and Table II,⁵⁰⁷ and this will cover cases on the fringes of the concept of controlled delivery.

11.15 The Conference considered a proposal that functions in respect of controlled delivery should be entrusted by each party to a designated national authority, which could enter into the necessary discussions with its counterpart

⁵⁰⁷See article 9, paragraph 1, subparagraph (b), clause (iii).

in the other party or parties concerned in a possible operation. This proposal reflected the thinking incorporated in the 1987 Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, in which it was suggested that “in order to ensure that controlled delivery is being effectively co-ordinated at both the national and international levels, States could, if they consider it appropriate, designate an agency or agencies as responsible for such co-ordination”.⁵⁰⁸ The creation of a treaty obligation to this effect would, however, have led to difficulties in States whose police or customs services were not organized on a centralized basis, and the proposal was not pressed.⁵⁰⁹

11.16 According to paragraph 1, controlled delivery operations are to be undertaken “with a view to identifying persons involved in offences established in accordance with article 3, paragraph 1, and to taking legal action against them”. Except for the final clause, the text corresponds to the definition in article 1, subparagraph (g). That clause covers the apprehension of persons involved in illicit traffic; Committee II formally agreed to that interpretation.⁵¹⁰

Paragraph 2

2. Decisions to use controlled delivery 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 Parties concerned.

Commentary

11.17 Paragraph 2 draws upon the experience gained by States in setting up controlled delivery operations. It stresses that each case needs to be given individual consideration. Although the first draft of what was to become article 11 referred to the need to use controlled delivery on a case-by-case basis, it also set out in some detail the obligations of the parties and the consequences

⁵⁰⁸*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.90.XVII.3), chap. I, sect. A, para. 251.

⁵⁰⁹*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 6th meeting, *passim*, and 8th meeting, paras. 48-51.

⁵¹⁰*Ibid.*, 8th meeting, paras. 17 and 18.

in terms of exercise of jurisdiction.⁵¹¹ Those provisions were judged too detailed by the intergovernmental expert group at its second session in October 1987 and were omitted.⁵¹²

11.18 The text does, however, identify two matters in particular (in addition to the obvious operational details) which may need attention. The first of these concerns the financial arrangements, a phrase which may cover a variety of issues. They will include the cost of the operation, bearing in mind not only the resources that need to be deployed but also the needs of each party (for example, for evidence in a particular form). Although there is a link in some cases between controlled delivery and mutual legal assistance, the costs of controlled delivery will not be “ordinary costs” for the purposes of article 7, paragraph 19. “Financial arrangements” will also cover the consequences of any eventual confiscation of the illicit substances (such as measures for their disposal or destruction), which may be postponed and therefore take place in a different State as a result of the decision to resort to controlled delivery. In some States there are established “reward” systems under which enforcement personnel receive special incentive payments, sometimes directly related to the size of a seized consignment; where controlled delivery would effectively prevent the seizure of a consignment, the financial consequences for the personnel concerned may also need to be taken into account. The complexity of these issues makes it desirable that parties have standing arrangements in place wherever possible, as there may be no time for detailed negotiations in an individual case.

11.19 The second matter concerns the exercise of jurisdiction, where again the effect of the controlled delivery operation may create additional bases on which jurisdiction may be founded. For example, the completion of the planned controlled delivery may lead to the commission of offences in a State where no offence would have been committed had the illicit traffic been interrupted at an earlier stage. That State may claim jurisdiction under article 4, paragraph 1, subparagraph (a). It will plainly make for clarity if this possibility is taken into account (if time permits) before any conflicting claims to jurisdiction arise.

⁵¹¹*Official Records*, vol. I ..., document E/CN.7/1987/2, sect. II, art. 7, para. 4.

⁵¹²*Ibid.*, document E/CN.7/1988/2 (Part II), sect. II, para. 162.

Paragraph 3

3. Illicit consignments whose controlled delivery is agreed to may, with the consent of the Parties concerned, be intercepted and allowed to continue with the narcotic drugs or psychotropic substances intact or removed or replaced in whole or in part.

Commentary

11.20 Paragraph 3 was added at the Conference. It reflects the technique that had been promoted by the Customs Co-operation Council (now called the World Customs Organization): controlled delivery effected with the whole or part of the narcotic drugs or psychotropic substances removed, so that, were the operation to fail, there would still be little or no illicit material available to the traffickers.⁵¹³

11.21 There may, of course, be circumstances which make the proposed substitution impracticable. In addition, on this topic, as on many others, national legislation may impose restrictions on what can be done. There may, for example, need to be some narcotic drugs or psychotropic substances left in the consignment, so as to provide evidence of the illicit nature of the consignment when it reaches its intended destination. The removal of some of the consignment may make prosecution difficult, especially in States whose criminal law has no developed concept of criminal conspiracy. For all these reasons, the text allows a variety of techniques to be used and makes none obligatory. Where other material is substituted, replacing the narcotic drug or psychotropic substance, the text imposes no requirements as to what material should be used.⁵¹⁴

11.22 The text uses the phrase “with the consent of the Parties concerned”, which reflects the case-by-case approach emphasized in paragraph 2. The representative of Belgium noted that he understood that phrase as being without

⁵¹³*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 6th meeting, para. 23.

⁵¹⁴In an earlier draft, the words “innocuous substances” were used, but this was judged unsatisfactory, as different legal systems might take different views of what was “innocuous”.

prejudice to independent measures to punish offences on national territory and to maintain public order.⁵¹⁵

11.23 Although paragraph 3 refers only to the substitution of narcotic drugs and psychotropic substances, arrangements for the substitution of other material for precursors could also be made under that paragraph if the circumstances so required (see paragraphs 11.35-11.36 below). The definition of controlled delivery under article 1, subparagraph (g), in fact refers to “illicit or suspect consignments of narcotic drugs, psychotropic substances, substances in Table I and Table II ... , or substances substituted for them”.

Implementation considerations: article 11 as a whole

11.24 Paragraph 1 of article 11 imposes a qualified obligation on States parties to the 1988 Convention to allow for the appropriate use of international controlled delivery (see paragraph 11.12 above). A more robust approach was not deemed to be appropriate, given the significant constitutional and other legal difficulties faced by a number of jurisdictions in authorizing the use of this type of procedure. In recognition of this fact, parties are obliged to facilitate the use of the technique only if such action is “permitted by the basic principles of their respective domestic legal systems”.⁵¹⁶

11.25 The basic precondition for effective action in this area is to ensure that controlled delivery operations are appropriately sanctioned by the domestic legal system. This will be a particularly pressing matter in States that normally use the legality principle in relation to the exercise of the prosecutorial function.⁵¹⁷ As one commentator has noted, in some such States use of controlled delivery “may actually contravene the obligation of authorities not to condone or tolerate known illegal behaviour”.⁵¹⁸ Resort to legislation expressly enabling competent authorities to resort to controlled delivery among States sharing this legal

⁵¹⁵Official Records, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 63.

⁵¹⁶Art. 11, para. 1

⁵¹⁷See, for example, E. Nadelmann, *Cops across Borders: The Internationalization of U.S. Criminal Law Enforcement* (Pennsylvania State University Press, University Park, Pennsylvania, 1993), pp. 237-238.

⁵¹⁸D. Stewart, “Internationalizing the war on drugs: the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, *Denver Journal of International Law and Policy*, No. 18, 1990, p. 400.

tradition has been relatively frequent. By way of contrast, States which traditionally afford a substantial measure of discretion to their prosecutorial authorities will be less likely to require the adoption of specific legislation on controlled delivery. In the latter category, New Zealand provides a rare example of a State that has elected from the outset to place the technique on a statutory basis.⁵¹⁹

11.26 Recent experience demonstrates, however, that any conclusion that enabling legislation is not required should not be reached lightly. For example, in countries where existing law places an unqualified prohibition on the importation of narcotic drugs and psychotropic substances, law enforcement officials, domestic and foreign, cooperating defendants and others involved in giving effect to a controlled delivery operation may find that certain of their actions could be characterized as unlawful. Such a situation places the individuals concerned in an invidious position and may also have an adverse effect in some jurisdictions on the possibility of securing the conviction of the persons who were the target of the operation.⁵²⁰ In circumstances where the position of domestic law is uncertain, prudence would suggest the desirability of having recourse to legislation to place the matter beyond doubt.

11.27 National legislative practice in this regard varies considerably in terms of its nature, scope and complexity. In some instances, as in New Zealand, the requisite authority is bestowed directly on members of the relevant law enforcement agency. Perhaps more commonly, law enforcement officials must seek authority from a specified third party. In Malta, for example, the consent of a magistrate or of the Attorney General is required.⁵²¹ In some instances, it has also been thought appropriate to subject the granting of authorization to specific conditions; in Cape Verde, for example the law stipulates that the Public Prosecutor's office may issue a relevant order to the police at the behest of the foreign country of destination only if: "(a) there is detailed knowledge of the probable itinerary of the carriers and adequate identification of them; (b) the

⁵¹⁹See Misuse of Drugs Amendment Act, 1978, sect. 12(1).

⁵²⁰See, for example, the 19 April 1995 judgement of the High Court of Australia in the case of *Ridgeway v. The Queen*. At the time of writing, new legislation to overcome the difficulties indicated in this instance was under active consideration (see *Crimes Amendment (Controlled Operations) Bill 1995: Explanatory Memorandum* (Canberra, Parliament of the Commonwealth of Australia, House of Representatives, 1995); see also *Regina v. Latif* (1996) 1 All E.R. 353 for a somewhat more typical common-law approach to such matters).

⁵²¹See Dangerous Drugs Ordinance (Amendment) Act 1994, Act. No. VI of 1994, sect. 38(1).

competent authorities in the countries of destination and the transit countries can guarantee that the substances are secure against theft or diversion; (c) the competent judicial authorities in the countries of destination or transit undertake to provide, as a matter of urgency, full details of the outcome of the operation and the activities of the perpetrators of the crimes, particularly those carried out in Cape Verde”.⁵²² In addition to the imposition of conditions, the nature of which will depend upon local circumstances, traditions and other factors, consideration may be given to the coverage of additional matters such as the provision of an appropriate exemption from criminal liability to law enforcement officials when acts are committed for the purposes of authorized controlled delivery operations.⁵²³

11.28 A further issue of great significance is the scope to be afforded to such legislation. Article 1, subparagraph (g), which provides the definition of controlled delivery for the purposes of the Convention, has as its focus operations involving illicit consignments of drugs and substances listed in Table I and Table II. Since the Convention was concluded, however, it has become evident that controlled delivery can also be used in circumstances which were not contemplated by those involved in the negotiation of the 1988 text, for example, in the investigation of money-laundering offences established in accordance with article 3, paragraph 1, subparagraph (b).⁵²⁴ In the view of one specialized intergovernmental body, “the controlled delivery of funds known or suspected to be the proceeds of crime is a valid and effective law enforcement technique for obtaining information and evidence, in particular on international money-laundering operations”.⁵²⁵ Its use may, for example, assist in the identification of all parties involved in the transaction; assets being purchased and sold; companies and institutions which are facilitating the use of tainted funds; and other related transactions. This and other possible relevant applications of the controlled delivery technique, including the delivery of equipment such as tableting machines and laboratory glassware intended for use in the illicit manufacture of controlled substances, are proper subjects for consideration by those charged with ensuring the implementation of article 11 at the domestic level and are certainly within the spirit of the Convention as a whole.

⁵²²Law 78/IV/93 of 12 July 1993, art. 33, para. 2.

⁵²³See French Law 91.1264.

⁵²⁴See above, comments on article 3, paragraph 1, subparagraph (b).

⁵²⁵Financial Action Task Force on Money Laundering, “Annual report, 1995-1996”, Paris, 28 June 1996, annex II, p. 5.

11.29 It is also important that domestic legal rules relevant to other provisions of the Convention should be framed in a manner that is sensitive to the needs of controlled delivery operations. For example, in formulating, pursuant to article 12, paragraph 9, domestic legislation and administrative arrangements to give effect to the obligations for international cooperation in respect of substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances, provision to permit the use of controlled delivery in cases of suspect exports should be included in addition to powers such as seizure or suspension of the transaction. In the area of money-laundering, similar sensitivity is reflected in article 7 of the 1991 Council of Europe Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering, which requires relevant institutions to refrain from carrying out suspicious transactions until they have brought the matter to the attention of the appropriate authorities.⁵²⁶ It is up to such authorities to give instructions on whether or not to execute the transaction. Where, however, “such a transaction is suspected of giving rise to money laundering and where to refrain in such a manner is impossible or is likely to frustrate efforts to pursue the beneficiaries of a suspected money-laundering operation, the institutions concerned shall apprise the authorities immediately afterwards”. It is clear from the drafting history of this article that the decision to give it such a flexible character was a direct response to the perceived needs of the law enforcement community, including the facilitation of controlled money-laundering operations.⁵²⁷

11.30 It should be stressed that the obligation set out in article 11, paragraph 1, is to make provision for cooperation in international controlled delivery operations in appropriate cases and “on the basis of agreements or arrangements mutually consented to”. The centrality of the concept of consent is further emphasized in the remaining provisions of article 11. Similarly, in article 1, subparagraph (g), a defining feature of controlled delivery is that it is undertaken “with the knowledge and under the supervision” of the competent authority of the relevant parties. Failure to obtain such consent would take the operation outside the purview of article 11. If carried out in the territory of a non-consenting State it would carry the serious risk of being characterized as a violation of article 2, paragraph 3, of the Convention.⁵²⁸

⁵²⁶Council Directive 91/308/EEC.

⁵²⁷See W. Gilmore, *Dirty Money: The Evolution of Money Laundering Counter-Measures* (Council of Europe Press, Strasbourg, 1995), p. 167.

⁵²⁸See above, comments on article 2, paragraph 3.

11.31 In paragraph 1, it is anticipated that such consent will be sought and obtained pursuant to agreements and arrangements mutually consented to. This wording is intended to reflect the need for some flexibility in this area. As has been pointed out elsewhere: “‘Arrangements’ denotes the most informal type of interaction, and can include standard practices mutually applied by the competent authorities of each party in such situations, including cooperation among police officials in controlled deliveries without the need for formal written agreements.”⁵²⁹ While it is for each party to formulate its own policy on such matters, it should be kept in mind that the opportunity to conduct a controlled delivery operation may arise unexpectedly in an operational environment leaving little time for the conduct of formalities let alone negotiations. For instance, when drugs are detected in the transit baggage of an airline passenger, the decision whether to seize the drugs and arrest the courier or to arrange for a controlled delivery operation will have to be taken on an urgent basis and with very little time in which to act.⁵³⁰ Indeed, the consent of several States may be necessary. A number of possibilities present themselves for consideration, including the use of administrative arrangements such as memoranda of understanding, the conclusion of bilateral or multilateral agreements, reliance on ad hoc determinations made pursuant to domestic legislative authority, or some combination of the above.⁵³¹ While the conclusion of individual agreements or arrangements with all other parties to the 1988 Convention is not a realistic possibility, there may be merit in doing so with States with which it is likely that the technique will be used with sufficient frequency.⁵³²

11.32 Whether or not requests are considered within the framework of a pre-existing agreement or arrangement or are dealt with on an ad hoc basis, it will be necessary to put in place a policy structure that will permit decisions on a

⁵²⁹“Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 101st Congress, 1st session, Senate, Exec. Rept. 101-15, p. 75.

⁵³⁰See, for example, P. D. Cutting, “The technique of controlled delivery as a weapon in dealing with illicit traffic in narcotic drugs and psychotropic substances”, *Bulletin on Narcotics*, vol. XXXV, No. 4 (1983), pp. 20-21.

⁵³¹For a statutory provision sanctioning the conclusion of such agreements and arrangements, see Saint Lucia, 1993 Drugs (Prevention of Misuse) Act, Act No. 8 of 1993, sect. 9.

⁵³²The Islamic Republic of Iran, Pakistan and Turkey, acting within the context of their Economic Cooperation Organization, have established a Committee on Illicit Traffic and Drug Abuse, the remit of which includes utilizing the technique of controlled delivery.

case-by-case basis, as contemplated in paragraph 2, to be taken quickly. This might include the need to be satisfied that the request emanates from a competent authority, that it is in the form required, that the proposed controls are adequate, that the operational objective justifies the proposed action, and similar matters. Such decisions may also “take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the Parties concerned”.⁵³³ This framework must, in turn, be buttressed by appropriate administrative procedures, including designated lines of authority.

11.33 Detailed advanced planning of how to ensure the smooth and effective administration and control of duly approved operations is also necessary. Here, procedures for domestic interagency cooperation are vital. For example, difficulties and acute embarrassment can result if a controlled delivery operation undertaken by one authority is inadvertently frustrated by action taken by another authority which was unaware that the operation was in progress. Practice has demonstrated the utility for many countries of designating a centralized agency to facilitate coordination and to prevent confusion, confrontation and risk. In jurisdictions in which such a solution would not be appropriate, the creation of an internal, and possibly institutionalized, coordination mechanism may be worthy of serious consideration. Countries whose law enforcement bodies have had little or no prior experience with the use of this investigative tool should institute training programmes, as required by article 9, paragraph 2, subparagraph (h).⁵³⁴

11.34 Resort to this investigative technique is not without risk. For instance, the possibility that the operation might run into difficulties and the shipment might be lost is an important factor to consider in determining whether or not to initiate such an operation or to cooperate in it. Even when an operation is in progress, developments of a practical nature may necessitate its termination at an earlier stage than was originally anticipated. Some States, including Portugal, have taken this possibility into account in their enabling legislation.

⁵³³It is both possible and desirable that the issue of costs be considered in conjunction with that of asset-sharing pursuant to article 5, paragraph 5, subparagraph (b), clause (ii). For a legislative example concerning the exercise of jurisdiction, see Portugal, Decree-Law No. 15/93, article 61, paragraph 2, subparagraph (c); see also “Financial Action Task Force on Money Laundering: report”, Paris, 7 February 1990, recommendation No. 39.

⁵³⁴See above, comments on article 9, paragraph 2, subparagraph (h). Technical assistance may be required, as contemplated in paragraph 3 of the article. Assistance may also be available through the United Nations system and other international bodies. See also, for example, *United Nations Drug Law Enforcement Training Manual*, chap. V.

Article 61(3) of Decree-Law No. 15/93 of Portugal reads as follows: “Even after the authorization mentioned above has been granted, the criminal police shall intervene if there is an appreciable reduction in security margins or if there is an unexpected change of itinerary or any other circumstances that may jeopardize the future seizure of the substances and the arrest of the perpetrators”.⁵³⁵

11.35 These risks are significantly lessened in a variant of this technique commonly known as “clean controlled delivery”. Under this procedure the drugs are removed, in whole or in part, and substances of an innocuous nature are substituted.⁵³⁶ This option, which is incorporated in paragraph 3, is to be resorted to with the consent of the States concerned. Other factors may also indicate the use of this method in particular circumstances. It may, for example, be necessary for evidentiary or other reasons for a seizure to be effected in the country of origin. Such substitution may in turn, however, affect the viability of intended prosecutions in the country of final destination of the consignment. Resort to it thus requires careful prior consideration.⁵³⁷ The use of partial as opposed to complete substitution may, however, pose fewer legal difficulties. Consequently this variant appears to be more favoured in practice.⁵³⁸ In any event, those responsible for implementation of article 11 should examine existing domestic law in order to ascertain whether recourse to legislation would be appropriate in respect of this matter.⁵³⁹

⁵³⁵Article 73, paragraph 3, of the 1990 Schengen Convention also reserves to the territorial State a right to intervene.

⁵³⁶See, for example, *Criminal Justice (International Co-operation) Bill: Explanatory Memorandum on the Proposals to Implement the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (London, Home Office, 1990), p. 30. While article 11, paragraph 3, explicitly contemplates the use of this procedure only in connection with illicit drugs, it has obvious applications in other operational contexts, including, *inter alia*, those involving substances listed in Table I and Table II and bulk cash shipments.

⁵³⁷In some instances, it may be possible for the State of intended destination to bring alternative charges based on concepts such as conspiracy. See above, comments on article 3, paragraph 1, subparagraph (c), clause (iv).

⁵³⁸See, for example, P. D. Cutting, *loc. cit.*, p. 18.

⁵³⁹For the position taken in Portugal, see article 61, paragraph 4, of Decree-Law No. 15/93. It could be useful to combine consideration of this issue with an examination of changes in evidentiary rules and procedures that would be required to make full and effective use of assistance provided pursuant to requests for mutual legal assistance under the terms of article 7.

11.36 In order to improve the opportunities for substitution, in whole or in part, it is important that substitute materials should be available to law enforcement personnel in those locations where the actual process of substitution is most feasible. Sophisticated materials of similar colour, texture, smell and bulk to narcotic drugs and psychotropic substances have been developed. These are most readily available in the developed States which are often the ultimate destination for the drugs. By way of contrast, the relevant authorities in States where the drugs originated and transited, and where substitution could more easily be effected, may be less likely to have immediate access to such substitute substances. Cooperation pursuant to article 9 would be of obvious value in such cases.

ARTICLE 12

Substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances

General comments

12.1 The premise underlying article 12, on substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances, is that the denial of these substances to producers and manufacturers of illicit drugs will result in a reduction in illicit drug manufacture. The substances in question are not defined in the Convention but are listed in Table I and Table II of the Convention (see “Part Five” below). Table I and Table II contain several different types of substances: chemical compounds that are precursors⁵⁴⁰ of narcotic drugs or psychotropic substances; other chemicals used mainly as reagents;⁵⁴¹ and solvents.⁵⁴² In practice the term “precursor” has been used, not entirely accurately, as a shorthand expression for all those substances⁵⁴³ listed in Table I and Table II. Substances not listed in Table I or Table II that can be used in illicit drug manufacture may be covered by the generic term “materials” used in article 13 (see paragraphs 13.1 and 13.4 below).

12.2 For an understanding of article 12, it is necessary to give some account of the scope of the earlier conventions in respect of two types of substances:

⁵⁴⁰A precursor, *stricto sensu*, is a chemical substance that in the manufacturing process becomes incorporated in full or in part into the molecule of a narcotic drug or psychotropic substance. In any given manufacturing process, a precursor is specific and critical to the preparation of the end product, but other precursors may be used to obtain the same end product by other methods. The term “immediate precursor” is usually applied to a precursor which is only one reaction step away from the end product.

⁵⁴¹A reagent is a chemical substance that reacts with, or takes part in a reaction with, another substance (usually a precursor) during the processing or manufacturing of a narcotic drug or psychotropic substance. It does not become part of, or contributes to only a small portion of, the molecular structure of the end product.

⁵⁴²A solvent is a liquid chemical substance that is used to dissolve or disperse one or more substances. It does not itself react with other substances, nor is it incorporated into the molecular structure of the end product. A solvent may also be used to purify the end product.

⁵⁴³It should be noted that names of substances listed in Table I and Table II of the 1988 Convention are simple chemical names. The Tables do not specify which of the isomers, where they exist, should be controlled. It could be argued that the Convention covers all isomeric forms of the substances listed in Table I and Table II, where such isomeric forms exist.

those capable of transformation or conversion into narcotic drugs or psychotropic substances and those other substances commonly used in the illicit manufacture of narcotic drugs or psychotropic substances.

12.3 With respect to the first category of substances, from the 1931 Convention onwards there has been a provision for the international control of certain types of “convertible substances”. Under article 11 of that Convention, control was limited to products obtained from any of the phenanthrene alkaloids of opium or from the ecgonine alkaloids of the coca leaf.⁵⁴⁴ Great advances in chemical synthesis required a fuller treatment in the 1961 Convention.

12.4 Schedule I of the 1961 Convention lists a number of “convertible substances”, for example “ecgonine, its esters and derivatives which are convertible to ecgonine and cocaine”.⁵⁴⁵ Article 3, paragraph 3, subparagraph (iii), of that Convention enables the scope of the system of control under the Convention to be extended to any substance “convertible into a drug”. The range of substances capable of conversion into narcotic drugs is in fact quite large, and the intention of the authors of the 1961 Convention was to deal with substances which illicit traffickers could transform into controlled drugs with relative ease. In this, they were adopting the position taken by the World Health Assembly, which in 1954, in language similar to that of the 1931 Convention, resolved in its resolution WHA 7.7 that “a substance will be considered by the World Health Organization as ‘convertible’ where the ease of conversion and the yield obtained constitute a risk to public health and that in cases where there is uncertainty whether a substance will fall under this definition, the substance will be considered as ‘convertible’ rather than as ‘not convertible’ ”.⁵⁴⁶

12.5 No comparable provision was included, however, in the 1971 Convention. Article 2, paragraph 4, of that Convention makes it possible to extend the control of substances by including substances capable of producing a state of dependence and “central nervous system stimulation or depression,

⁵⁴⁴See 1931 Convention, art. 11, paras. 3, 4 and 6; and 1948 Protocol, art. 1, para. 2.

⁵⁴⁵Other examples are methadone intermediates, pethidine intermediates and thebaine, readily convertible into dependence-producing drugs. On the whole matter, see the explanation by the Chairman of Committee II (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 11th meeting, paras. 8-14).

⁵⁴⁶See Commentary on the 1961 Convention, paragraphs 3-18 of the comments on article 3, subparagraph (iii).

resulting in hallucinations or disturbances in motor function or thinking or behaviour or perception or mood” or “similar abuse and similar ill-effects” as a substance already included in Schedules I to IV of the Convention. This does not, however, include any substances which themselves have no pharmacological effects but are convertible into psychotropic substances, such as lysergic acid, easily convertible into (+)-lysergide.⁵⁴⁷ One of the issues that had to be faced in the preparation of the 1988 Convention was whether and how to fill the gap thus created.

12.6 With respect to the second category of substances referred to in paragraph 12.2 above, the 1961 and 1971 Conventions do contain generally worded provisions on substances which may be used in illicit manufacture. In the 1961 text, it is provided that the parties “shall use their best endeavours to apply to substances which do not fall under this Convention, but which may be used in the illicit manufacture of drugs, such measures of supervision as may be practicable”.⁵⁴⁸ The 1971 Convention contains a similar provision on substances which may be used in the illicit manufacture of psychotropic substances.⁵⁴⁹ These provisions are vague, both in their scope (for it was pointed out during the negotiation of the 1961 Convention that water was a substance that could be used in the illicit manufacture of drugs)⁵⁵⁰ and in their reference to “such measures of supervision as may be practicable”.

12.7 An example of a substance that was widely discussed in this context was that of acetic anhydride, used in the conversion of morphine into heroin but also widely used in the chemical industry for entirely licit purposes. It was submitted that what measures of control were practicable would depend, among other things, on whether a party did or did not have chemical and pharmaceutical industries. If there were no such industries, it might be practicable to subject the

⁵⁴⁷See Commentary on the 1971 Convention, paragraphs 7-9 of the general comments on article 2, paragraphs 16-19 of the comments on article 2, paragraph 1, and paragraphs 1-5 of the comments on article 2, paragraph 4.

⁵⁴⁸1961 Convention, art. 2, para. 8.

⁵⁴⁹1971 Convention, art. 2, para. 9.

⁵⁵⁰Commentary on the 1961 Convention, paragraph 2 of the comments on article 2, paragraph 8.

importation or possession of acetic anhydride to control measures that parties would find impracticable where such industries existed.⁵⁵¹

12.8 There was a further factor complicating the issues dealt with in article 12. Once a precursor has been identified, it is a relevant factor in deciding how best to approach the problem of control that alternative substances can easily be substituted for that precursor. Thus, for example, ephedrine and pseudoephedrine can easily be substituted for 1-phenyl-2-propanone, which is used in the illicit manufacture of methamphetamine. Phenylacetic acid, which is readily available for licit use in the chemical industry, is itself a precursor of 1-phenyl-2-propanone, so the illicit drug manufacturer is not obliged to procure 1-phenyl-2-propanone but can synthesize that compound during the manufacturing process. All this illustrates the difficulty of determining how many and which precursors of the immediate precursors should be controlled.

12.9 The structure of article 12 is quite complex. Paragraphs 1 and 8 impose obligations on parties, principally in the context of their own territory and legal systems.⁵⁵² Paragraphs 9, 10 and 11 focus on international cooperation. Paragraph 14 deals with certain possible exemptions from control. The remaining provisions are procedural, paragraphs 2-7 being concerned with the scheduling or rescheduling of substances in Table I and Table II and paragraphs 12 and 13 with reporting mechanisms.

Paragraph 1

1. The Parties shall take the measures they deem appropriate to prevent diversion of substances in Table I and Table II used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances, and shall co-operate with one another to this end.

⁵⁵¹Commentary on the 1961 Convention, paragraph 3 of the comments on article 2, paragraph 8.

⁵⁵²Since the adoption of the Convention, national responsibilities and requirements have been further defined in the following resolutions: Commission on Narcotic Drugs resolution 5 (XXXIV) (*Official Records of the Economic and Social Council, 1991, Supplement No. 4 (E/1991/24)*, chap. XIV, sect. A) and Economic and Social Council resolutions 1992/29, 1993/40, 1995/20, 1996/29 and 1997/41. The annually published report of the International Narcotics Control Board on the implementation of article 12 provides an updated list of all relevant United Nations resolutions.

Commentary

12.10 The provision of paragraph 1 is mandatory; parties must take measures and cooperate with one another with the goal of suppressing the diversion of substances in Table I and Table II (the term “diversion” is not defined in the Convention, but it clearly refers to the transfer of substances from licit to illicit channels). A large measure of discretion is given to individual parties to decide what measures they “deem appropriate” in the light of the particular circumstances they encounter. In exercising their discretion, the parties will need to reflect upon the practices used by illicit traffickers and the various legal, administrative and procedural means available to combat diversion.

12.11 All substances in Table I and Table II are manufactured by legitimate companies in many countries for licit industrial and commercial uses. Before controls were imposed on these substances, traffickers could purchase them in large quantities from these legitimate chemical sources with minimum scrutiny by law enforcement officials. As controls become established, traffickers must resort to greater subterfuge to divert the substances from legitimate national distribution channels or from international trade; some of their methods are fraudulent, others merely deceptive. They are frequently combined in elaborate schemes. Diversion methods commonly used include the following:

(a) The fact that traffickers are the actual customers in a transaction to purchase chemicals is often concealed through the use of middlemen or brokers, or by resorting to non-existent companies or creating “front” companies, whose business appears to justify the ordering of chemicals;

(b) Traffickers have used existing legitimate companies, which they induce to order chemicals on their behalf or intimidate or coerce into doing so. The company may then order more controlled chemicals than it really needs to make a specific product and sell the surplus to the trafficker; or it may order an amount of controlled chemical necessary for a legitimate product and, in parallel, order a non-controlled chemical from another source which can be used in substitution for the controlled chemical. While all records would thus appear to indicate that the controlled chemical was used in legitimate manufacture, it was in fact sold to the trafficker and the substitute chemical was used for the legitimate product;

(c) A range of documents is involved in the purchase and shipment of precursors: order contracts, bank transfers and other proof of payment, bills of lading, authorizations to import or export etc. Traffickers have been known to

use documents that have been forged or altered, counterfeited, stolen, unlawfully purchased, or issued to another person. Import permits have sometimes been used over and over again to import more than the authorized quantities of chemicals;

(d) Techniques commonly used for smuggling other items have been adapted for the smuggling of chemicals, for example by mislabelling containers, using concealed compartments in containers, and bypassing customs check-points. Traffickers will attempt to use general descriptive names, such as “solvent” or “thinner”, on shipping documents and labels rather than the chemical name that will alert officials to the fact that it is a controlled substance. By shipping chemicals through circuitous routes or processing them through free ports or free trade zones, traffickers have opportunities to repackage chemicals, change documents, and re-route shipments to disguise their identity and obscure the final destination. Bribery of officials at many levels, under a variety of circumstances, is often a related problem.

12.12 Traffickers are quick to take advantage of loopholes in chemical control laws. They can avoid official scrutiny if they can purchase chemicals from sources, or route them through intermediaries, in countries that have not yet placed the chemicals under control. Also, where chemical control regimes have threshold amounts specified for each controlled substance, traffickers can avoid the control measures by purchasing amounts below the threshold level from several sources. There are also many substitute chemicals that can be used in illicit drug laboratories. In many cases, the substitute chemicals are not yet controlled and traffickers can purchase them without too much trouble. When traffickers have sources from which they can divert chemicals, they may obtain considerably more chemicals than required for their immediate needs. By stockpiling the extra chemicals, traffickers can continue to produce illicit drugs at times when diverting chemicals is more difficult or costly.

12.13 In the light of all this, parties must take whatever measures they judge to be necessary to prevent the diversion of the substances under control. This requirement is not automatically satisfied by merely establishing a legal basis for control of these substances. It also requires the establishment of an appropriate administrative framework, working mechanisms and standard operating procedures. The discretion given to each party recognizes that parties are in the best position to assess their particular role and circumstances regarding substances diverted for illicit drug manufacture. Some countries manufacture and export these substances and yet have no illicit drug manufacture within their borders. Others have illicit drug laboratories but manufacture none of the

diverted substances. Yet others are involved only as transit countries in the international trade and movement of the substances. Regardless of their respective roles, however, all countries share the responsibility for preventing diversion. Within geographical regions, in particular, control measures should be harmonized so that weak controls in one country do not jeopardize the efforts of neighbouring countries where controls may be more effective. In its report on the implementation of article 12, the International Narcotics Control Board includes recommendations for action to be taken by Governments in preventing diversion (see paragraph 12.48 below).

12.14 Paragraph 1 refers expressly to international cooperation. Just as the illicit trafficking of narcotic drugs and psychotropic substances is seen as a matter of grave international concern, so the diversion of substances used to produce or manufacture these drugs is of equivalent international concern. Therefore, in determining what diversion-control measures to take, parties must look beyond their national interests and take into account the effects that such diversions have on other countries' efforts and the worldwide diversion situation. In addition, it should be noted that paragraph 8 of article 12, which applies where substances in Table I and Table II are manufactured or distributed within the territory of a party, amplifies the duty to prevent diversion.

Paragraph 2

2. If a Party or the Board has information which in its opinion may require the inclusion of a substance in Table I or Table II, it shall notify the Secretary-General and furnish him with the information in support of that notification. The procedure described in paragraphs 2 to 7 of this article shall also apply when a Party or the Board has information justifying the deletion of a substance from Table I or Table II, or the transfer of a substance from one Table to the other.

Commentary

12.15 The first sentence of paragraph 2 corresponds to article 3, paragraph 1, of the 1961 Convention, a reference to "the Board" replacing the reference to the World Health Organization (WHO). By virtue of this article, the Board has been given new functions relating to possible modification in the scope of control of substances in Table I and Table II.

12.16 The process leading to the modification of Table I and Table II (which in practice is still referred to as the “scheduling” process, the term “schedule” being derived from the text of the 1961 Convention) may be initiated by either a party or the Board when it has information which, in its opinion, may require that a substance be included in Table I or Table II. The same procedure also applies for the deletion of a substance from Table I or Table II,⁵⁵³ or for the transfer of a substance from one Table to the other. To initiate the process, a party, or the Board, notifies the Secretary-General and furnishes him with information in support of that notification.

Paragraph 3

3. The Secretary-General shall transmit such notification, and any information which he considers relevant, to the Parties, to the Commission, and, where notification is made by a Party, to the Board. The Parties shall communicate their comments concerning the notification to the Secretary-General, together with all supplementary information which may assist the Board in establishing an assessment and the Commission in reaching a decision.

Commentary

12.17 In paragraph 3, the procedure to be followed once notification has been received by the Secretary-General is prescribed. In practice, the Secretary-General transmits the notification not only to parties to the 1988 Convention but to all countries.⁵⁵⁴ As the text makes clear, the fullest information should be provided in response to the notification; for the assessment to be undertaken, the Board relies on complete data from as large a geographical area as possible. The process leads, in accordance with the following paragraphs of the article, to an

⁵⁵³Lack of evidence of diversion is not in itself a sufficient basis for the initiation of the process of deletion from Table I or Table II; lack of evidence of diversion may be the result of effective controls.

⁵⁵⁴See “Scheduling of substances under article 12 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances: the role of INCB, and terms of reference, guidelines and rules for the INCB Advisory Expert Group” (INCB/WP.1/Rev.1), para. 3.

assessment by the Board and a decision by the Commission on Narcotic Drugs.⁵⁵⁵

Paragraph 4

4. If the Board, taking into account the extent, importance and diversity of the licit use of the substance, and the possibility and ease of using alternate substances both for licit purposes and for the illicit manufacture of narcotic drugs or psychotropic substances, finds:

(a) That the substance is frequently used in the illicit manufacture of a narcotic drug or psychotropic substance;

(b) That the volume and extent of the illicit manufacture of a narcotic drug or psychotropic substance creates serious public or social problems, so as to warrant international action,

it shall communicate to the Commission an assessment of the substance, including the likely effect of adding the substance to either Table I or Table II on both licit use and illicit manufacture, together with recommendations of monitoring measures, if any, that would be appropriate in the light of its assessment.

Commentary

12.18 In paragraph 4, the Board is required to prepare and send to the Commission an assessment of the substance that is the subject of the notification; the assessment is to include information on the likely effect of adding the substance to either Table I or Table II on both licit use and illicit manufacture. The Board is also required to make recommendations on the monitoring measures, if any, that would be appropriate in the light of its assessment.

12.19 To assist it in making its assessment, the Board has established an Advisory Expert Group to study the substances under review. In its decision 48/26, by which it established the Advisory Expert Group, the Board

⁵⁵⁵See article 12, paragraph 7, on reviewing a decision of the Commission.

referred to “the need for special outside expertise similar to that established by WHO for its scheduling functions under the 1961 and 1971 Conventions”.

12.20 The Board’s guidelines⁵⁵⁶ for the review of substances under article 12, paragraph 4, identify the factors to be considered. When the Advisory Expert Group (and later the Board) makes an assessment to determine whether the volume and extent of illicit manufacture of narcotic drugs or psychotropic substances associated with the substance under review create serious public health or social problems, such as to warrant international control, it must consider the following: the status of international control of the narcotic drug or psychotropic substance; public health and social problems caused by the illicitly manufactured narcotic drug or psychotropic substance, with reference to the scheduling decisions of the Commission on Narcotic Drugs, any evaluation by WHO, and any other more recent information supplementing the reports of the Commission and WHO;⁵⁵⁷ trends in the illicit manufacture and trafficking of the narcotic drug or psychotropic substance since it was placed under control, particularly with reference to the volume, extent, frequency and source of seizures of the narcotic drug or psychotropic substance; and the current status of abuse of the narcotic drug or psychotropic substance.⁵⁵⁸

12.21 On the basis of the findings of the Advisory Expert Group, the Board first establishes, as far as possible on the basis of the information available, the public health or social problems related to the illicitly manufactured narcotic drug or psychotropic substance associated with the substance under review. It must consider whether the volume and extent (including the number of States involved) of illicit manufacture of that narcotic drug or psychotropic substance create a sufficiently serious public health or social problem so as to warrant international action. It must next examine the significance, importance and frequency of use of the substance under review in illicit drug manufacture, also

⁵⁵⁶INCB/WP.1/Rev.1.

⁵⁵⁷The Board is not required to make an entirely new assessment of the public health and social problems but may rely on WHO reviews and the scheduling actions of the Commission, supplemented by current information, if any.

⁵⁵⁸See paragraph 6 of the guidelines (INCB/WP.1/Rev.1).

taking into account the possibility and ease of using alternate substances.⁵⁵⁹ The Board must consider the effect of scheduling on legitimate commercial and industrial use of the substance, as well as on illicit drug manufacture, by examining the extent, importance and diversity of the licit use of the substance under review, and the possibility and ease of using alternate substances for both licit and illicit purposes.

Paragraph 5

5. The Commission, taking into account the comments submitted by the Parties and the comments and recommendations of the Board, whose assessment shall be determinative as to scientific matters, and also taking into due consideration any other relevant factors, may decide by a two-thirds majority of its members to place a substance in Table I or Table II.

Commentary

12.22 After its review, the Board communicates the findings of its assessment to the Commission on Narcotic Drugs. The Commission, taking into account comments submitted by parties and any other relevant factors, then considers the comments and recommendations of the Board. As far as scientific matters are concerned, the Board's assessment is determinative, even as the assessment of WHO is determinative as to medical and scientific matters in respect of scheduling psychotropic substances.⁵⁶⁰ The qualified majority of two thirds for

⁵⁵⁹Factors to be taken into account during the process include, but are not limited to:

(a) The chemical function and suitability as well as the actual use of the substance in the illicit drug manufacturing process;

(b) The number and types of narcotic drugs or psychotropic substances that are illicitly manufactured using the substance and the number of different methods or chemical processes actually used for illicit drug manufacture;

(c) The volume and frequency of seizures, the geographical origin of seizures and seized materials and the diversity of trafficking routes and practices involving the substance under review;

(d) The number and chemical suitability of alternative substances which are available to substitute for the substance under review and which have actually been used to manufacture narcotic drugs or psychotropic substances, the frequency of reports of such usage, and the ease of conversion and actual conversion of alternative substances or chemically related substances to the substance under review.

⁵⁶⁰1971 Convention, art. 2, para. 5.

the Commission to decide to schedule a substance in Table I or Table II is the same as that required for scheduling psychotropic substances.⁵⁶¹ In both cases, the two-thirds majority refers to the total membership of the Commission regardless of how many members participate in the vote.⁵⁶² By way of contrast, in the absence of any special provision in the 1961 Convention, scheduling decisions relating to narcotic drugs are taken by a simple majority of Commission members present and voting, in keeping with rule 58 of the rules of procedure of the functional commissions of the Economic and Social Council.⁵⁶³

Paragraphs 6 and 7

6. Any decision of the Commission taken pursuant to this article shall be communicated by the Secretary-General to all States and other entities which are, or which are entitled to become, Parties to this Convention, and to the Board. Such decision shall become fully effective with respect to each Party one hundred and eighty days after the date of such communication.

7. (a) The decisions of the Commission taken under this article shall be subject to review by the Council upon the request of any Party filed within one hundred and eighty days after the date of notification of the decision. The request for review shall be sent to the Secretary-General, together with all relevant information upon which the request for review is based.

(b) The Secretary-General shall transmit copies of the request for review and the relevant information to the Commission, to the Board and to all the Parties, inviting them to submit their comments within ninety days. All comments received shall be submitted to the Council for consideration.

⁵⁶¹1971 Convention, art. 17, para. 2.

⁵⁶²See Commentary on the 1971 Convention, paragraphs 1-2 of the comments on article 17, paragraph 2.

⁵⁶³E/5975/Rev.1; see Commentary on the 1971 Convention, paragraph 3 of the comments on article 17, paragraph 2.

(c) The Council may confirm or reverse the decision of the Commission. Notification of the Council's decision shall be transmitted to all States and other entities which are, or which are entitled to become, Parties to this Convention, to the Commission and to the Board.

Commentary

12.23 Paragraphs 6 and 7 set out the procedure governing communication of the Commission's decisions and the right of a party to request the review of a decision. Article 3 of the 1961 Convention and article 2 of the 1971 Convention⁵⁶⁴ included similar provisions on the communication of scheduling decisions and requests for review. Under both previous conventions, the Secretary-General was required to communicate the decisions of the Commission to "all States Members of the United Nations, to non-member States Parties to this Convention, to the World Health Organization and to the Board". Paragraph 6 of the present article refers instead to "all States and other entities which are, or which are entitled to become, Parties to this Convention". The expression "other entities" covers the regional economic integration organizations entitled to sign the Convention and become a party to it, through an act of formal confirmation.⁵⁶⁵ Paragraph 7 of article 12 is closely patterned after article 2, paragraph 8, of the 1971 Convention. The commentary on that provision of the 1971 Convention will therefore, *mutatis mutandis*, be relevant. It should be noted that a decision for which review has been requested remains in force until the determination of the review.

Paragraph 8

8. (a) Without prejudice to the generality of the provisions contained in paragraph 1 of this article and the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the Parties shall take the measures they deem appropriate to monitor the manufacture and distribution of substances in Table I and Table II which are carried out within their territory.

⁵⁶⁴See Commentary on the 1961 Convention, comment on article 3, paragraphs 7 and 8; and Commentary on the 1971 Convention, comment on article 2, paragraphs 7 and 8.

⁵⁶⁵See article 27.

- (b) To this end, the Parties may:**
- (i) Control all persons and enterprises engaged in the manufacture and distribution of such substances;**
 - (ii) Control under licence the establishment and premises in which such manufacture or distribution may take place;**
 - (iii) Require that licensees obtain a permit for conducting the aforesaid operations;**
 - (iv) Prevent the accumulation of such substances in the possession of manufacturers and distributors, in excess of the quantities required for the normal conduct of business and the prevailing market conditions.**

Commentary

12.24 It will be recalled that, under paragraph 1 of this article, the parties must take the measures they deem appropriate to prevent diversion of substances in Table I and Table II used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances and are required to cooperate with one another to that end. Paragraph 8 expands on this general responsibility and lists some specific measures that parties may take.

12.25 In paragraph 8, parties are required to take the measures they deem appropriate to monitor the manufacture and distribution⁵⁶⁶ of substances in Table I and Table II which are carried out within their territory.⁵⁶⁷ The purpose of this requirement is to suppress diversion of substances from manufacture and domestic distribution that might be used for the illicit manufacture of drugs within the party's territory or smuggled to other countries for use in illicit laboratories. This will commonly involve the application of regulatory controls on legitimate industry and trade, together with measures to detect existing or potential diversion and provide for appropriate corrective action.

⁵⁶⁶This includes domestic distribution of substances that have been imported.

⁵⁶⁷In paragraph 9, parallel requirements are established to monitor and control international trade in substances in Table I and Table II.

12.26 Paragraph 8 provides a number of options for the control of manufacture and domestic distribution. In the case of some parties, it might be judged unnecessary to have a comprehensive system for licensing manufacture as opposed to distribution; and the requirements for licences for controlling premises and permits for controlling operations may be inappropriate to a given party's administrative system. As in the case of paragraph 1 of the article, however, there is a degree of obligation on the parties, who must take whatever action appears appropriate (see paragraph 12.10 above). Parties should therefore continuously evaluate their actions relating to the diversion of substances in Table I and Table II and modify their controls as appropriate. In accordance with article 3, criminal sanctions should be adopted for intentional commission of offences related to diversion of the substances.

12.27 Regulatory controls should include requirements that chemical operators (including manufacturers, importers, exporters, wholesalers and retailers) identify purchasers, maintain records and make them available to authorities, notify authorities of suspicious orders and of loss or disappearance of substances, and request authorities to issue permits for specific types of transactions. Competent authorities should be authorized to inspect the records and facilities of such chemical operators, to deny or revoke licences and permits on reasonable grounds, to suspend or seize shipments of substances on the basis of evidence of possible diversion, to conduct controlled deliveries of substances, and to employ other investigative measures as appropriate.

12.28 As paragraphs 8 and 9 are in practice closely related, additional detailed comments on possible control measures are also found in the section below.

Paragraph 9

9. Each Party shall, with respect to substances in Table I and Table II, take the following measures:

(a) Establish and maintain a system to monitor international trade in substances in Table I and Table II in order to facilitate the identification of suspicious transactions. Such monitoring systems shall be applied in close co-operation with manufacturers, importers, exporters, wholesalers and retailers, who shall inform the competent authorities of suspicious orders and transactions.

(b) Provide for the seizure of any substance in Table I or Table II if there is sufficient evidence that it is for use in the illicit manufacture of a narcotic drug or psychotropic substance.

(c) Notify, as soon as possible, the competent authorities and services of the Parties concerned if there is reason to believe that the import, export or transit of a substance in Table I or Table II is destined for the illicit manufacture of narcotic drugs or psychotropic substances, including in particular information about the means of payment and any other essential elements which led to that belief.

(d) Require that imports and exports be properly labelled and documented. Commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names, as stated in Table I or Table II, of the substances being imported or exported, the quantity being imported or exported, and the name and address of the exporter, the importer and, when available, the consignee.

(e) Ensure that documents referred to in subparagraph (d) of this paragraph are maintained for a period of not less than two years and may be made available for inspection by the competent authorities.

Commentary

12.29 Unlike the measures listed in paragraph 8, subparagraph (b), the measures listed in paragraph 9 are mandatory on all parties. The paragraph is largely concerned with international trade. It will be noted, however, that subparagraph (b) of paragraph 9, relating to seizures, is couched in altogether general terms and does not contain any requirement that the substance in question should have been the subject of international trade.

12.30 Apart from the provision on seizure in subparagraph (b), paragraph 9 deals with three other matters. The first, dealt with in subparagraph (a), is the establishment of a monitoring system in respect of international trade in any substance in Table I or Table II of the 1988 Convention. The text is formulated in terms of an obligation on manufacturers, importers, exporters, wholesalers and retailers to inform the competent authorities of suspicious orders and

transactions. Since the Convention itself can, of course, only impose obligations upon the parties, what is clearly intended is that the national legislation implementing the Convention should impose such a duty. The text also reflects the fact that an effective monitoring system does indeed require the close cooperation of manufacturers, importers, exporters, wholesalers and retailers. This entails having competent authorities establish and maintain liaison with appropriate elements of the chemical industry through a two-way flow of information, enabling the authorities to familiarize themselves with the nature of the industry and its practices and to provide the industry with information on regulatory requirements and compliance expectations. In this connection, it may be useful to note that the United Nations maintains a list of national manufacturers of narcotic drugs, psychotropic substances, and substances in Table I and Table II of the Convention, which is published annually in the ST/NAR.4 symbol series.

12.31 The competent authorities therefore need to have strategic intelligence on the chemical industry and on the nature and extent of diversion. They need, through surveys, registration requirements or other means, to identify companies involved in the manufacture, distribution, and import and export of the substances, as well as to establish access to data from law enforcement agencies on the amounts and types of diverted substances seized at clandestine laboratories and on other activities, methods of diversion, and illicit drug manufacturing processes.⁵⁶⁸ These requirements are also relevant for the systems of control of manufacture and domestic distribution set out in paragraph 8.

12.32 The authorities of an exporting country have an obligation, derived from paragraph 1 of article 12, to take those measures they deem appropriate to ensure that exports are not diverted into the illicit traffic. This responsibility may go beyond merely notifying the authorities of an importing country of a substance being exported, in accordance with paragraph 9, subparagraph (c). For example, the authorities of the exporting country may wish to make an independent determination that a consignment is legitimate. Other parties may be able to assist by providing information to the authorities of the exporting country on the legitimacy of the consignment. In addition, effective pre-shipment verification and exchange of information at the international level to prevent diversion of chemical substances to the illicit manufacture of narcotic drugs and

⁵⁶⁸See the International Narcotics Control Board "Guidelines for use by national authorities in preventing the diversion of precursors and essential chemicals" and the Board's annual report on the implementation of article 12.

psychotropic substances may be usefully coordinated through recourse to the services of the International Narcotics Control Board.

12.33 The second matter dealt with, in subparagraph (c) of paragraph 9, is a crucial aspect of the international cooperation required under paragraph 1, namely the notification of suspicious transactions to the competent authorities of other parties. That obligation is to notify, as soon as possible,⁵⁶⁹ the competent authorities and services of the parties concerned (including the party into which the substance is imported, or from which it is exported, and transit States along the route it takes) if there is reason to believe that a substance in Table I or Table II being imported, exported or transited is destined for the illicit manufacture of narcotic drugs or psychotropic substances. The obligation is to give notification of that fact, but the subparagraph goes on to specify the provision of certain particular information. In effect the notifying State must state the grounds for its belief that the transaction is for illicit purposes. Importing country authorities should use the information they receive to investigate carefully the importers and consignees who are involved in the importation of the relevant substances and should provide the authorities of the exporting country with any feedback; that is implicit in the general notion of international cooperation.

12.34 The text of subparagraph (c) of paragraph 9 should be read in conjunction with that of paragraph 10, which goes further, but only in respect of substances in Table I; where a particular importing party has so requested, it must be informed of every import to its territory in respect of any such substance, whether or not suspicious circumstances exist. As concerns the informal extension of this requirement to substances in Table II, see paragraph 12.38 below.

12.35 The third matter, dealt with in subparagraphs (d) and (e) of paragraph 9, concerns documentation. Every party must require that imports and exports of substances in Table I or Table II be properly labelled and documented. Insofar as commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents are concerned, subparagraph (d) specifies as essential contents the names, as stated in Table I or Table II, of the substances being imported or exported, the quantity being imported or exported, and the name and address of the exporter, the importer and, when available, the consignee. National legislation may usefully require other information, for

⁵⁶⁹Compare paragraph 10, subparagraph (a), where the information is required to be given prior to the export of the substance.

example the names of any brokers, and the routing of each shipment, including locations and expected dates of export, trans-shipment and import; and Governments may also wish to use the specific codes in the Harmonized System of Customs Nomenclature of the World Customs Organization, introduced to facilitate reference to the substances listed in Table I and Table II. In subparagraph (e), parties are required to ensure that the commercial documents are “maintained” for a period of not less than two years and “may be made available” for inspection by the competent authorities. In the English text, it would have been better to replace the word “maintained” by “retained” or “kept” (in the French text, the word “*conservés*” is used), and the phrase “and may be made available” by “and kept available”, to avoid the suggestion of optionality implicit in the word “may”.⁵⁷⁰

Paragraph 10

10. (a) In addition to the provisions of paragraph 9, and upon request to the Secretary-General by the interested Party, each Party from whose territory a substance in Table I is to be exported shall ensure that, prior to such export, the following information is supplied by its competent authorities to the competent authorities of the importing country:

- (i) Name and address of the exporter and importer and, when available, the consignee;**
- (ii) Name of the substance in Table I;**
- (iii) Quantity of the substance to be exported;**
- (iv) Expected point of entry and expected date of dispatch;**
- (v) Any other information which is mutually agreed upon by the Parties.**

(b) A Party may adopt more strict or severe measures of control than those provided by this paragraph if, in its opinion, such measures are desirable or necessary.

⁵⁷⁰Compare the French text: “*tenus à la disposition des autorités compétentes pour examen*”.

Commentary

12.36 The introductory words of subparagraph (a) originally proposed at the Conference were as follows:

“In addition to the provisions of paragraph 9, each Party from whose territory a substance in [Table I]⁵⁷¹ is to be exported shall ensure that, prior to such export, the following information is supplied by its competent authorities to the competent authorities of the importing country:”

This proposal met with considerable opposition, notably from the member States of the European Economic Community.⁵⁷² The main criticism was levelled at the requirement that information be supplied every time a substance was to be exported, even if there was no reason to suspect that it was to be used for illicit purposes. There was considerable international trade in many of the substances for entirely proper purposes, such as the use of ephedrine in the manufacture of medical drugs. It was suggested that there should be a system of selective information, applying perhaps to substances listed in both Table I and Table II, but only in cases where there was suspicion of intended illicit use. This would, however, have added little if anything to the obligation created under paragraph 9, subparagraph (c).

12.37 After much discussion, the present text was adopted. It will be seen that it is limited to substances listed in Table I and obliges the exporting party to provide information in respect of every export transaction only when requested to do so by the importing country in a communication to the Secretary-General. That ensures that parties that experience difficulties in monitoring imports of substances in Table I and require comprehensive information are able to obtain it. Subparagraph (a), clause (v), reinforces this by enabling the parties concerned to add to the information specified in the subparagraph.

12.38 Subparagraph (b) provides that a party may adopt more strict or severe measures of control than those provided under paragraph 10 if, in its opinion, such measures are desirable or necessary to prevent diversion of substances in Table I. Economic and Social Council resolution 1995/20, on measures to strengthen international cooperation to prevent diversion of substances listed in

⁵⁷¹At that stage referred to as “List A”.

⁵⁷²*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 10th meeting, paras. 8-47, and 11th meeting, paras. 1-25.

Table I, provides for further specific measures related to the exchange of information under paragraph 10. It should also be noted that a party may, pursuant to article 24, adopt more strict measures of control than those provided in article 12. Thus, a party may request that a pre-export notification be sent for some or all substances listed in Table II. A number of States have made such a request and, in such cases, the Secretary-General informs all Governments that, at the request of the notifying Government, a pre-export notification for substances listed in Table II is also required. The annually published report of the Board on the implementation of article 12 lists all States which have made such requests with respect to substances in Table II.

Paragraph 11

11. Where a Party furnishes information to another Party in accordance with paragraphs 9 and 10 of this article, the Party furnishing such information may require that the Party receiving it keep confidential any trade, business, commercial or professional secret or trade process.

Commentary

12.39 Although the Conference rejected a proposal that would have enabled a party to refuse to supply information which would disclose any trade, business, commercial or professional secret or trade process,⁵⁷³ it agreed to allow the parties supplying such information to require the party receiving it to maintain confidentiality. That confidentiality should be maintained in such a way as to facilitate cooperation and not hinder the exchange of information.

Paragraph 12

12. Each Party shall furnish annually to the Board, in the form and manner provided for by it and on forms made available by it, information on:

(a) The amounts seized of substances in Table I and Table II and, when known, their origin;

(b) Any substance not included in Table I or Table II which is identified as having been used in illicit manufacture

⁵⁷³Ibid., 15th meeting, paras. 1-14.

of narcotic drugs or psychotropic substances, and which is deemed by the Party to be sufficiently significant to be brought to the attention of the Board;

(c) Methods of diversion and illicit manufacture.

Commentary

12.40 Paragraph 12 provides that parties submit annual reports to the International Narcotics Control Board and identifies the specific information that must be provided. Parties provide such information by completing a form, entitled “Annual information on substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances”, currently referred to as “form D”. They should provide appropriate additional information, for example on stopped and suspended shipments, voluntarily cancelled shipments, clandestine laboratory seizures and other types of information indicative of diversion. Parties are also requested to provide, on a voluntary basis, data on licit trade in, and use of, substances listed in Table I and Table II. More details on the value of such information can be found in paragraph 12.54 and on practical feedback from the annex to “form D” (“red list”) in paragraph 12.55 below.

Paragraph 13

13. The Board shall report annually to the Commission on the implementation of this article and the Commission shall periodically review the adequacy and propriety of Table I and Table II.

Commentary

12.41 Under the 1961 and 1971 Conventions,⁵⁷⁴ the International Narcotics Control Board submits an annual report on its work to the Economic and Social Council through the Commission on Narcotic Drugs. The first such report was submitted in 1968 and, through the years, it has become customary for the Board’s annual report also to reflect the general trends of the international situation with respect to drug abuse and illicit trafficking, based on the information at the Board’s disposal. The report called for under paragraph 13 of

⁵⁷⁴1961 Convention, art. 15, and 1971 Convention, art. 18.

article 12 of the 1988 Convention is issued as a supplement to that annual report of the Board.⁵⁷⁵

12.42 The duty of the Commission on Narcotic Drugs to review the adequacy and propriety of Table I and Table II arises independently of the procedure followed by the Commission under paragraphs 3-6 of this article with respect to the scheduling process. If in the course of such a review the Commission was of the opinion that adjustments were required to either Table, it could bring that fact to the attention of the Board.⁵⁷⁶ The Board could then decide whether to initiate the process to schedule, reschedule or delete substances as provided for under paragraph 2 of article 12.

Paragraph 14

14. The provisions of this article shall not apply to pharmaceutical preparations, nor to other preparations containing substances in Table I or Table II that are compounded in such a way that such substances cannot be easily used or recovered by readily applicable means.

Commentary

12.43 Earlier conventions contained provisions exempting from at least some measures of control certain preparations containing a controlled substance where

⁵⁷⁵There are currently three supplements to the annual report of the Board concerning, respectively, narcotic drugs, psychotropic substances and precursors. For example, the *Report of the International Narcotics Control Board for 1997* (United Nations publication, Sales No. E.98.XI.1) was supplemented by the following technical reports:

(a) *Narcotic Drugs: Estimated World Requirements for 1998; Statistics for 1996* (United Nations publication, Sales No. E.98.XI.2);

(b) *Psychotropic Substances: Statistics for 1996; Assessments of Medical and Scientific Requirements for Substances in Schedules II, III and IV* (United Nations publication, Sales No. E.98.XI.3);

(c) *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the International Narcotics Control Board for 1997 on the Implementation of Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* (United Nations publication, Sales No. E.98.XI.4).

⁵⁷⁶Subparagraph (c) of article 21, entitled "Functions of the Commission", stipulates that the Commission "may call the attention of the Board to any matters which may be relevant to the functions of the Board".

the substance could not readily be recovered from the preparation.⁵⁷⁷ The early drafts of the 1988 Convention did not contain any similar provision.⁵⁷⁸ As a result of consultations at the open-ended intergovernmental expert group meeting held in June and July 1987, a new paragraph was added to exclude from the control measures of what was to become article 12 “preparations intended for therapeutic use” containing substances in Table I or Table II.⁵⁷⁹ At the second meeting of the expert group, in October 1987, the view was expressed that the exemption should not be limited to preparations intended for therapeutic use “as there were other preparations which also had legitimate industrial uses”.⁵⁸⁰ In broadening the basis for exemption it was agreed to add as a qualification that the non-pharmaceutical preparations should be “compounded in such a way that such substances cannot be easily used or recovered by readily applicable means in sufficient quantity to permit significant illicit processing or manufacture of a narcotic drug or a psychotropic substance”.⁵⁸¹ That text, with the subsequent deletion at the Conference of the last phrase beginning with the words “in sufficient quantity”, was the one finally adopted.⁵⁸²

12.44 Contrary to the case with the 1961 and 1971 Conventions, the term “preparation”, perhaps intentionally, is not defined in the 1988 Convention. If the notion of a pharmaceutical preparation seems clear enough, the use of the same term “preparation” to refer to what might otherwise be known as industrial or commercial products has led to some questioning of the drafters’ intentions. Indeed, the other, non-pharmaceutical preparations cover a spectrum of goods ranging from nail polish removers and paint thinners to commercial blends, solutions and mixtures used for purposes as diverse as water purification systems and industrial cleaning. It has been argued that the qualifying phrase

⁵⁷⁷1961 Convention, art. 3, para. 4, and Schedule III, and 1971 Convention, art. 3, para. 2.

⁵⁷⁸See, for example, the draft of article 8 (later article 12) prepared by the Secretariat for the open-ended intergovernmental expert group (DND/DCIT/WP.1, pp. 93-94).

⁵⁷⁹Interim report of the open-ended intergovernmental expert group meeting on the preparation of a draft convention against illicit traffic in narcotic drugs and psychotropic substances, (DND/DCIT/WP.12), p. 28.

⁵⁸⁰*Official Records*, vol. I ..., document E/CN.7/1988/2 (Part II), para. 196.

⁵⁸¹*Ibid.*, document E/CONF.82/3, p. 83.

⁵⁸²*Ibid.*, document E/CONF.82/12, para. 20; and *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 16th meeting, paras. 28-37.

beginning with the words “compounded in such a way” applies only to these other preparations and not to preparations for therapeutic use. While the drafting history (see paragraph 12.43 above) confirms that the phrase was not present in the original text, which was limited to pharmaceutical preparations, logic would seem to dictate that pharmaceutical preparations for therapeutic use should also be compounded in such a way that the substances in Table I and Table II that they contain cannot be easily or economically recovered.⁵⁸³ As mentioned in paragraph 12.43 above, similar wording is used in a similar context in both the 1961 and 1971 Conventions; and, if at the time of the negotiation of the Convention purchase of such preparations for large-scale diversion was not yet attested to, it has since occurred. It would therefore seem to be more appropriate not to exempt any pharmaceutical preparation containing a substance in Table I or Table II which can be easily used in illicit drug manufacture.

12.45 As already noted, the term “preparation” is not defined in the Convention, but the structure of the text reflects the assumption that a non-pharmaceutical preparation is something “compounded”. Natural products that may contain substances in Table I or Table II⁵⁸⁴ would seem not to be “preparations” in that sense and so would seem not to be within the exclusion created by paragraph 14.

Implementation considerations: article 12 as a whole

General comments

12.46 Article 12 is one of the fundamental building blocks of the effort to combat the illicit traffic in narcotic drugs and psychotropic substances. Its effective implementation by parties is of critical importance and some complexity. As has been pointed out elsewhere: “The procurement of chemicals necessary to manufacture drugs is one of the few points where ... drug trafficking intersects with legitimate commerce. Regulation of legitimate commerce to deny traffickers the chemicals they need is one of our most valuable

⁵⁸³This is also the interpretation of the Board. For a proposal for action that extends the qualifying clause to pharmaceutical preparations, see *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the International Narcotics Control Board for 1995 on the Implementation of Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* (United Nations publication, Sales No. E.96.XI.4), para. 62.

⁵⁸⁴An example is sassafras oil, which contains safrole, a substance listed in Table I.

tools in the battle against drug criminals.”⁵⁸⁵ Even before becoming parties to the 1988 Convention, States should make a positive contribution to global efforts against drug trafficking by applying its terms on a provisional basis, as far as they are able to do so. In that connection, Governments should establish practical working mechanisms and operating procedures to monitor the licit movement of precursors, whether or not they have already in place any comprehensive legislation for the control of substances listed in Table I and Table II. Such working mechanisms and procedures should incorporate the activities of all the relevant regulatory and enforcement authorities involved in precursor control. They should also encompass the work of industry to elicit relevant data from chemical producers, distributors and trade organizations, having due regard for lawful commercial interests.

12.47 In considering the establishment of appropriate and effective legislation, working mechanisms, operating procedures and cooperative measures, it will be important to bear in mind the close relationship between this article and other provisions of the Convention. The obligation to criminalize the relevant activities listed in article 3, paragraph 1, subparagraph (a), clause (iv), and subparagraph (c), clause (ii), is particularly important in this regard.⁵⁸⁶ In addition, under article 5, each party is required to adopt such measures as may be necessary to confiscate, *inter alia*, “materials and equipment or other instrumentalities”⁵⁸⁷ and to provide international cooperation to that end.⁵⁸⁸ Similarly, certain obligations contained in article 9 are directly applicable to this area of concern. These include cooperation between law enforcement agencies and services in conducting inquiries relating to offences with an international dimension relating to the movement of substances listed in Table I and Table II.⁵⁸⁹ Other articles containing explicit treatment of matters arising within

⁵⁸⁵*Chemical Action Task Force: Status Report for the 1992 Economic Summit* (Washington, D.C., June 1992), p. 11.

⁵⁸⁶See above, comments on article 3, paragraph 1, subparagraphs (a), clause (iv), and (c), clause (ii).

⁵⁸⁷See above, comments on article 5, paragraph 1, subparagraph (b).

⁵⁸⁸See above, comments on article 5, paragraph 4.

⁵⁸⁹See above, comments on article 9, paragraph 1, subparagraph (b), clause (iii). See also article 9, paragraph 2, subparagraph (c), establishing a qualified obligation to establish law enforcement training programmes regarding monitoring of the import and export of, *inter alia*, substances in Table I and Table II.

this sphere and directed to parties⁵⁹⁰ are: article 14 (Measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances);⁵⁹¹ article 18 (Free trade zones and free ports),⁵⁹² and article 19 (The use of the mails).⁵⁹³ Those charged with implementation should also be alert and sensitive to the fact that other mechanisms set out in the Convention can also be of critical value and directly relevant to the taking of appropriate measures to combat the diversion of substances listed in Table I and Table II to illicit use. This is perhaps especially so in the context of controlled delivery, an important law enforcement tool dealt with in article 11.⁵⁹⁴ In its resolution 1995/20, the Economic and Social Council requested Governments “to cooperate in controlled deliveries of suspicious shipments in special circumstances if the security of the shipment can be sufficiently ensured, if the quantity and nature of the chemical involved [are] such that it can be managed feasibly and safely by the competent authorities, and if all States whose cooperation is necessary, including transit States, agree to the controlled delivery”. Above all, the closeness of the relationship with article 13 relating to measures to prevent the diversion of materials and equipment should be kept in focus from the outset.

12.48 Steps should be taken to ensure that the legislative and regulatory regime that is instituted, in addition to achieving comprehensive coverage, is sufficiently flexible to accommodate a constantly evolving reality. As seen above, the diversion methods known to be used by trafficking networks are many and varied. The sophistication of a number of the criminal actors concerned and the resources at their disposal are such that new and ingenious methods or variants of existing techniques will emerge from time to time as they seek to evade established controls. Similarly, trafficking networks are adept at identifying weaknesses and loopholes in chemical control laws. As effective implementation of countermeasures in one State creates an inhospitable environment for their activities, they will seek out and exploit States that have no such measures in place or where the measures are insufficient. Consequently,

⁵⁹⁰Certain provisions of the Convention impose obligations on the Commission and the Board (see articles 21 and 22 and the comments thereon).

⁵⁹¹See below, comments on article 14, paragraph 5.

⁵⁹²See below, comments on article 18.

⁵⁹³See below, comments on article 19, paragraph 2, subparagraph (b).

⁵⁹⁴See above, comments on article 11.

all members of the international community are vulnerable, and States that may not yet have been targeted invite unwelcome attention unless they take prompt action. In this respect, the Board's annually published reports on the implementation of article 12, which identify the latest trends in illicit traffic in substances in Table I and Table II and examine Government action taken to implement the provisions of that article, also contain recommendations and proposals for practical steps that should be taken to prevent diversion. Governments may accordingly wish to consult those reports for further guidance on how they may strengthen controls.

12.49 A clear illustration of the dynamic nature of the process is provided by the changes made since 1988 to the list of substances contained in Table I and Table II. Following intensive discussions in 1991 involving a number of interested countries,⁵⁹⁵ a strong sentiment emerged that the number of controlled substances should be increased from the original 12 to 22. Acting upon a notification submitted by one party to the Secretary-General, the International Narcotics Control Board conducted its first assessment of substances for possible change in the scope of control. In 1992, following the assessment and recommendations of the Board, the Commission on Narcotic Drugs decided to include the additional substances in the Tables. The decision came into effect in November 1992.⁵⁹⁶ That development underlines the usefulness of having a facility for taking action at the level of domestic law when substances are added or deleted without the need to resort to primary legislation or other complex processes in order to achieve compliance. Such a facility would also be advantageous in controlling non-scheduled substances should such chemicals be identified as problematic in domestic illicit manufacture or should the Government elect to act on the basis of the special surveillance list established by the Board (see paragraph 13.4 below).

12.50 Those responsible for the domestic implementation of article 12 will also have to decide whether to restrict national measures to the obligations and requirements reflected therein or to expand the scope of their activities to take cognizance of relevant developments since 1988. It will be recalled that article 12 is, in essence, a broad framework, resulting from a compromise struck in the light of various national concerns and sensitivities and reflecting the state

⁵⁹⁵See *Chemical Action Task Force: Final Report* (Washington, D.C., June 1991).

⁵⁹⁶The five chemicals added to Table I were: *N*-acetylthranilic acid; isosafrole 3,4-methylenedioxyphenyl-2-propanone; piperonal; and safrole. Five chemicals were also added to Table II, namely: methyl ethyl ketone; toluene; potassium permanganate; sulphuric acid; and hydrochloric acid.

of knowledge of the diversion problem at that time. Since then, the Economic and Social Council and the Commission on Narcotic Drugs,⁵⁹⁷ among others,⁵⁹⁸ have sought to reflect the enhanced international understanding of relevant matters by, *inter alia*, formulating recommendations for action which reflect current best practice, often upon recommendations made by the Board. This authoritative guidance translates the general requirements of article 12 into specific actions which allow full implementation of controls. Article 24 also provides States parties with the requisite authority to adopt more strict or severe measures than are required by article 12 should they consider them appropriate to give effect to an evolving international consensus or developments at the national level.⁵⁹⁹

General prerequisites for control

12.51 As emphasized already (see paragraphs 12.10-12.15 above), article 12, paragraph 1, imposes an obligation on each party to take whatever measures it deems to be necessary to prevent the diversion of the substances under control. In order to meet this requirement, not only does a legislative basis for control need to be established but an appropriate administrative framework is needed, as well as action by the competent authorities. Paragraph 1 refers expressly to a requirement to provide international cooperation to prevent diversion.

12.52 The identification and entrusting of appropriate powers and responsibilities to a national competent authority or authorities are fundamental to success in the discharge of those general obligations, which are set out in further detail in paragraphs 8-10. In this context, consideration should be given to the direct involvement of those departments or organs of government with the most intimate working knowledge of the chemical industry. Other ministries, particularly health ministries, need to be involved. The advantages are that they will as a rule have considerable experience in conducting controls with respect

⁵⁹⁷See, for example, Economic and Social Council resolutions 1992/29, 1993/40, 1995/20, 1996/29 and 1997/41; see also Commission on Narcotic Drugs resolution 5 (XXXIV) and the annually published report of the International Narcotics Control Board on the implementation of article 12, which contains an updated list of all relevant resolutions by United Nations bodies.

⁵⁹⁸See, for example, the Model Regulations to Control Chemical Precursors and Chemical Substances, Machines and Materials (CICAD/PRECUR/doc.8/94), approved by the Inter-American Drug Abuse Control Commission at its seventh regular session; see also *Chemical Action Task Force: Final Report* (Washington, D.C., June 1991).

⁵⁹⁹See below, comments on article 24.

to drugs. Many States have determined that a large number of their agencies should be involved in diversion control. In such cases it is essential to put in place an effective system to facilitate coordination between them all. It is particularly important that this system should extend to the relevant law enforcement agency or agencies.⁶⁰⁰

12.53 There is also an important external dimension to this issue. Experience has demonstrated the value of direct and effective international cooperation in this area. To that end, the Economic and Social Council, in its resolution 1992/29, invited the International Narcotics Control Board to publish and maintain a directory of competent authorities under article 12. The directory, which contains the names, addresses and telephone and facsimile numbers of the relevant administrative and law enforcement authorities entrusted with control of precursors under the provisions of article 12, is published by the Secretariat and updated periodically.⁶⁰¹ The information has proved to be of considerable practical value in situations ranging from the verification of the licit nature of intended exports to the identification and prevention of suspicious transactions.⁶⁰² It is essential that those staffing designated contact points be in a position “to give, receive and act upon information relating to precursor and essential chemicals”.⁶⁰³

12.54 It is also of considerable importance for the effective functioning of international cooperation that counterpart agencies should have an adequate knowledge of the respective roles and responsibilities entrusted to each

⁶⁰⁰See, for example, “Chemical Action Task Force Expert Meeting on Heroin, February 10-14, 1992, Kuala Lumpur: report of proceedings”, para. 7.1.

⁶⁰¹In addition to the section on competent authorities under article 12 of the 1988 Convention, the directory, which is entitled *Competent National Authorities under the International Drug Control Treaties* (ST/NAR.3/1997/1), also contains sections listing national authorities with competence under article 7 (Mutual legal assistance) and article 17 (Illicit traffic by sea) of that Convention, as well as authorities competent to issue import and export certificates and authorizations for narcotic drugs (article 18 of the 1961 Convention) and psychotropic substances (article 16 of the 1971 Convention).

⁶⁰²See *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the International Narcotics Control Board for 1994 on the Implementation of Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* (United Nations publication, Sales No. E.95.XI.1), paras. 67-72.

⁶⁰³See “Chemical Action Task Force Expert Meeting on Heroin, February 10-14, 1992, Kuala Lumpur: report of proceedings”, para. 7.4.

designated authority in relation to the implementation of specific control measures. The Economic and Social Council specified accordingly that the directory called for in its resolution 1992/29 (see paragraph 12.53 above) should also contain “a summary of the regulatory controls that apply in each State”, especially with regard to the importation and exportation of substances listed in Table I and Table II of the 1988 Convention. Importing countries that require individual import certificates for the import of substances listed in Table I and Table II should provide the Board with copies of authentic documents. All parties will need to comply with the terms of Council resolution 1992/29 and update the information as appropriate, if the general goal of effective cooperation is to be achieved.

12.55 In article 12, it is envisaged that parties will also cooperate with the International Narcotics Control Board. Of particular relevance in this context is the obligation, contained in paragraph 12 of the article, for each party to the Convention to furnish the Board, on an annual basis, with certain categories of information. For this purpose, the Board has adopted a standard form, known as “form D”, entitled “Annual information on substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances”. The information to be furnished pursuant to paragraph 12 consists of: (a) the amounts of substances listed in Table I and Table II that have been seized and, when known, their origin; (b) information on substances not included in Table I or Table II which are identified as being used in the illicit manufacture of drugs and which are deemed by the party concerned to be sufficiently significant to be brought to the attention of the Board; and (c) methods of diversion and illicit manufacture. On the basis of the analysis of this data and other information made available to it, the Board reports annually to the Commission, as required under paragraph 13, on the implementation of article 12. A report published by the Board in accordance with article 23 of the Convention⁶⁰⁴ contains more general information on precursor control.

12.56 An annex to “form D” known as the “red list”⁶⁰⁵ contains an alphabetical listing of alternative names, including trade names if any, of substances listed in Table I and Table II. It may facilitate identification of those substances by

⁶⁰⁴See above, comments on article 12, paragraph 13; see also below, comments on article 23.

⁶⁰⁵See “Annex to form D (‘red list’)” of January 1997, which, like “form D” itself, is updated annually. The list is comparable to similar lists of narcotic drugs and psychotropic substances issued by the Board and known, respectively, as the “Yellow List” and the “Green List”.

Government authorities. For example, regulatory and administrative authorities may find it useful to check the names of chemical substances appearing on applications for authorizations for export or import, and law enforcement and customs authorities to check documentation accompanying consignments of chemicals.

12.57 Since the Convention was concluded, however, it has become clear that the Board in fact requires certain additional categories of information in order to discharge effectively its responsibilities in this critical area. For this reason, the Economic and Social Council, in paragraph 8 of its resolution 1995/20, urged Governments to inform the Board of the quantities of substances listed in Table I of the Convention that they have imported, exported or trans-shipped, and encouraged them “to estimate their annual licit needs”.⁶⁰⁶

12.58 In paragraph 9 of the same resolution, the Council also requested the Board to develop and strengthen its database in order to assist Governments in preventing diversion of substances listed in Table I.⁶⁰⁷ That database is being used to assist Governments in verifying the legitimacy of orders in respect of individual shipments. An electronic communication network has been established between the secretariat of the Board and other competent regional and intergovernmental bodies, such as Interpol, the World Customs Organization and the European Union, as well as interested Governments. Working group meetings have been held on the use of international databases and on guidelines for use by national authorities in preventing the diversion of precursors and essential chemicals. The guidelines have been transmitted to all Governments, as noted by the Economic and Social Council in its resolution 1993/40. This is but one example of the benefit to be derived by competent authorities from the establishment of cooperative and information exchange relationships with international institutions and regional bodies involved in the monitoring and control of the diversion of substances listed in Table I and Table II. The Board’s report on the implementation of article 12 includes updated information on trends in the illicit trafficking and use of precursors, as well as guidance and advice on preventing diversion.

⁶⁰⁶See also paragraph 10 of that resolution and, in general, the recommendations and proposals for further action contained in the annually published report of the Board on the implementation of article 12 of the 1988 Convention.

⁶⁰⁷See also Economic and Social Council resolution 1993/40.

Prevention of diversion and international monitoring

12.59 As noted at some length above, the general obligations contained in paragraph 1 of article 12 to prevent the diversion of the substances in Table I and Table II and to cooperate internationally to that end are set out in detail in paragraphs 8, 9 and 10, which list both optional and mandatory measures suitable for that purpose. In practice, those responsible for the implementation of article 12 will have to focus primarily on those paragraphs.

12.60 Paragraph 8 requires parties to take such measures as they deem appropriate to monitor the manufacture and distribution of the relevant substances carried out within their own territory. Subparagraph (b) then enumerates several measures that States may wish to take in that regard. By way of contrast, paragraph 9, which contains a number of mandatory measures, is largely directed at international trade, whereas paragraph 10 articulates certain contingent obligations in respect of exports of substances listed in Table I. While the distinction between domestic and international measures embodied in the Convention is clear in theory, in practice the two elements are very closely related. Without proper control at the domestic level (for example over manufacturers and exporters), international trade cannot be controlled adequately, and without proper control of international trade (for example of imports), it will not be possible to control domestic distribution. Given the interrelationship between the domestic and the international dimensions, and the growing acceptance in practice of the need to take some or all of the measures listed in paragraph 8, subparagraph (b), in order to construct an effective system, it is likely that many States will wish to address themselves to both dimensions in tandem.

12.61 The central precondition to effective action is to put in place an appropriate legal framework and administrative system capable of meeting both obligations under the Convention and specific domestic conditions in a manner that is sensitive to the requirements of legitimate commerce. To that end, States may wish to consider the ad hoc model legislation prepared by and available from the United Nations International Drug Control Programme; the recommendations contained in resolutions of the Economic and Social Council, based on the Board's proposals, as well as the Board's independent recommendations; and the growing body of domestic measures taken by other parties, as well as the product of relevant international and regional initiatives. The latter include, for example, the Inter-American Drug Abuse Control Commission's Model Regulations to Control Chemical Precursors and Chemical Substances,

Machines and Materials,⁶⁰⁸ the relevant European Community directives and regulations (as amended)⁶⁰⁹ and the recommendations of the Chemical Action Task Force.⁶¹⁰

12.62 Regulatory controls, appropriate for the activities in question and the role or potential role of each State in the diversion process, should be applied to the manufacture, distribution, import, export and end-use of the substances listed in Table I and Table II. Regulatory controls commonly include requirements for chemical operators (which include manufacturers, importers, exporters, wholesalers and retailers) to identify purchasers, to maintain records and make them available to authorities, to notify authorities of suspicious orders as well as of the loss or disappearance of substances, and to request authorities to issue permits for specific types of transactions. For import and export authorizations, it may prove useful to have recourse to the model application forms annexed to the International Narcotics Control Board "Guidelines for use by national authorities to prevent diversion of precursors and essential chemicals". (In Economic and Social Council resolution 1993/40 of 27 July 1993, the Council urged Governments to consider the guidelines fully and, where appropriate, to apply them.) The competent authorities will also need to be provided with relevant powers to inspect records and facilities of such chemical operators, to deny or revoke licences and permits on reasonable grounds, and to suspend or seize shipments of substances on evidence of possible diversion. They may also need authority to conduct controlled delivery operations and to employ other investigative measures. Consideration will also have to be given to a range of related issues, including the role, if any, to be played by the criminal law in this sphere, the desirability of having recourse to concepts such as corporate criminal liability, and the appropriateness of attaching sanctions to negligent conduct. The requisite power to maintain the confidentiality of trade, business, commercial or professional secrets or trade processes obtained as a consequence of the provision of cooperation pursuant to paragraphs 9 and 10 should also be

⁶⁰⁸CICAD/PRECUR/doc.8/94.

⁶⁰⁹For internal trade within the European Community, see Council Directive 92/109/EEC of 14 December 1992, as amended by Council Directive 93/46/EEC of 22 June 1993; for external trade, see Council Directive 3677/90 of 13 December 1990, as amended by Council Directive 2093/97 of 24 October 1997.

⁶¹⁰See *Chemical Action Task Force: Status Report for the 1992 Economic Summit* (Washington, D.C., June 1992) and *Chemical Action Task Force: Final Report* (Washington, D.C., June 1991); see also, for example, Economic and Social Council resolution 1993/40.

ensured.⁶¹¹ Furthermore, experience has demonstrated the need to address the activities of brokers and other intermediaries. As the Board stated in 1994: “Governments should consider any additional measures that they may need to take to ensure that the activities of brokers handling precursors are controlled in the same way as are the activities of manufacturers, importers, exporters, wholesalers and retailers generally”.⁶¹²

12.63 Given the direct impact of these measures on those engaged in legitimate commerce, close consultation with representatives of the various sectors involved is to be recommended. Such cooperation, which is mandated by paragraph 9, subparagraph (a), in respect of the identification of suspicious transactions (see paragraph 12.30 above), is now commonplace at the national level.⁶¹³ In 1994, the World Customs Organization signed a memorandum of understanding with the International Council of Chemical Industry Associations aimed at helping member States of the World Customs Organization “to facilitate the monitoring of trade in precursors, and to improve communication between industry and, in particular, customs authorities, through the more effective exchange of information between the various parties concerned”.⁶¹⁴

12.64 An effective system of diversion prevention and monitoring should also encompass and put into effect a further range of specific actions. Insofar as

⁶¹¹See article 12, paragraph 11.

⁶¹²*Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the International Narcotics Control Board for 1994 on the Implementation of Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* (United Nations publication, Sales No. E.95.XI.1), para. 183.

⁶¹³See, for example, the *Code of Conduct to Protect against the Diversion of Chemicals into the Illicit Production of Drugs* issued by the Plastics and Chemicals Industries Association and the Scientific Suppliers Association of Australia Inc. and sponsored by the New South Wales Police Service. On occasion it might be desirable to have in place a single code of conduct to regulate relationships between industry and government across a wider sphere than illicit drug manufacture. It might also include other goods subject to export licensing such as chemical and biological weapons (see, for example, the Code of Conduct on Chemicals Subject to Trade Controls or Voluntary Requirements, issued by the United Kingdom Chemical Industries Association, as revised in July 1995).

⁶¹⁴*Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the International Narcotics Control Board for 1994 on the Implementation of Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* (United Nations publication, Sales No. E.95.XI.1), para. 38.

export activities are concerned, these will include, in addition to the reporting of suspicious transactions, notice to the authorities of the exporting country by the exporter of the intended routine export of substances. In addition, and as required under paragraph 9, subparagraph (d), such exports must be properly labelled and documented (see paragraph 12.35 above).⁶¹⁵

12.65 The authorities should be empowered or required to use national and international data systems and other available sources of information in order to determine the legitimacy of the consignment (see Economic and Social Council resolution 1992/29). A system should also be in place concerning notices to importing and transit States. Following a meeting on information exchange systems for precursor control, convened by the International Narcotics Control Board in July 1997 to bring together representatives of major chemical manufacturing, importing and exporting countries, the Board prepared a model form to standardize and facilitate such information exchange.

12.66 In paragraph 10, specific notification is required in respect of substances listed in Table I when it is requested by the importing country in a communication to the Secretary-General (see paragraphs 12.36 and 12.37 above). In recent years, however, informed opinion has come to favour a broader application of some form of notification prior to export. For instance, in its resolution 1995/20, the Economic and Social Council requested the exporting country to provide such information, even when the Governments of importing countries have not yet formally requested such notification under article 12, paragraph 10, subparagraph (a), of the Convention. In the same resolution, the Council requested the Government of an importing country receiving such a notification to undertake, through its regulatory authorities and in cooperation with the law enforcement authorities, an investigation of the legitimacy of the transaction and, with the possible assistance of the International Narcotics Control Board, to convey information thereon to the exporting country. While pre-export notifications under paragraph 10, subparagraph (a), apply only to substances listed in Table I, some countries have requested similar pre-export notifications for substances in Table II as well. The Secretary-General notifies

⁶¹⁵The World Customs Organization has assigned a tariff code in the Harmonized System of Customs Nomenclature for each of the substances listed in Table I and Table II. The requirement to retain certain documents for at least two years is contained in article 12, paragraph 9, subparagraph (e). There is widespread sentiment that the period of retention should be longer (see, for example, the Model Regulations to Control Chemical Precursors and Chemical Substances, Machines and Materials (CICAD/PRECUR/doc.8/94) of the Inter-American Drug Abuse Control Commission).

Governments of all such requests, and they are also reflected in the Board's annually published report on the implementation of article 12.

12.67 Article 12 does not specifically envisage a system of pre-export notification to transit States. Indeed, it is apparent that those responsible for the negotiation of paragraphs 9 and 10 devoted their energies preponderantly to the articulation of the respective rights and obligations of importing and exporting States. In some instances, however, a country involved in the shipment route for precursors will fit into neither of those categories. That will be the case, for example, where the consignment passes directly through a country without leaving the means of transport or where it enters under a customs arrangement for later shipment from a port in that country without any change in packaging. In such cases the authorities of the transit State are recognized in practice as having an important function in preventing diversion, and the national regulatory and administrative system must be capable of discharging that responsibility, for example by monitoring shipments to prevent or detect surreptitious re-packaging, relabelling or other activities contributing to diversion. As noted by the International Narcotics Control Board, however, "due to the lack of full documentation, a transit country's authorities may not be aware that a specific transit is to take place. It is therefore essential that these authorities are informed fully and in advance by the authorities of the exporting country of the transit to take place."⁶¹⁶

12.68 Insofar as importing countries are concerned, consideration should be given to establishing a system to require notification of both intended routine imports and of transactions which are suspicious in nature. The system must require that imports be properly labelled and documented,⁶¹⁷ and steps can be taken pursuant to article 12, paragraph 10, subparagraph (a), to require pre-import notification of substances listed in Table I. On receipt of such a notification or of a request for investigation of a consignee from an exporting country, a thorough investigation should be conducted. This should include the legitimacy of the consignee and associates, the requirement or end-use for the type and quantity of the substance ordered, the circumstances concerning any intended distribution or re-export of the substance, and an overall determination

⁶¹⁶See "Guidelines for use by national authorities in preventing the diversion of precursors and essential chemicals", sect. III.11.

⁶¹⁷Article 12, paragraph 9, subparagraph (d), applies to imports as well as exports.

that there is no reason to suspect possible diversion. The authorities of the requesting State should be notified of the results of the investigation.⁶¹⁸

12.69 It is possible under the Convention for States to impose additional requirements or to formulate particular measures designed to accommodate their special national circumstances, to take account of specific trading relationships, and like matters. A growing practice of concluding informal arrangements or, where required, formal arrangements or agreements, bears witness to the attractions of this possibility for some countries. The Economic and Social Council, in its resolution 1992/29, invited “States in which precursor and essential chemicals are manufactured and States in regions in which narcotic drugs and psychotropic substances are illicitly manufactured to establish close cooperation in order to prevent the diversion of precursor and essential chemicals into illicit channels”.

⁶¹⁸See *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the International Narcotics Control Board for 1994 on the Implementation of Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* (United Nations publication, Sales No. E.95.XI.1), paras. 48-50.

ARTICLE 13

Materials and equipment

General comments

13.1 Article 12 provides that the parties must take such measures as they deem appropriate to prevent the diversion of substances listed in Table I and Table II for the illicit manufacture of narcotic drugs and psychotropic substances. Such illicit activity, however, requires materials and equipment in addition to the substances listed. Prevention of the use of such items for that illicit purpose is the objective of article 13. Neither the term “materials” nor the term “equipment” is defined in the Convention, but they may be interpreted quite broadly to cover a vast array of goods. Materials for illicit drug production or manufacture include a wide variety of items: cutting and tablet-bulking agents, non-scheduled chemical products (for example, pharmaceutical preparations available over the counter, cement, kerosene, diluents),⁶¹⁹ packaging material, and even ice used to cool reactions. The equipment used, especially in illicit manufacture of synthetic drugs, might include general laboratory glassware and equipment, such as reaction vessels, heating mantles, transformers, vacuum pumps, and filters, as well as specialized equipment such as tableting and encapsulating machines. Equipment in illicit cocaine and heroin laboratories is generally not as sophisticated as that used for the illicit manufacture of synthetic drugs, but is just as necessary; it may include such things as generators, microwave ovens and heating lamps. In addition to the equipment that is obtained from licit sources, clandestine drug manufacturers may produce specialized items of equipment for use in illicit drug manufacture.

13.2 The single paragraph in article 13 concerns trade in and the diversion of such materials and equipment. It supplements other provisions, such as those in article 3, paragraph 1, subparagraph (a), clause (iv), making it obligatory for parties to establish as criminal offences the manufacture, transport or distribution of such materials (including non-scheduled substances) and equipment when they are to be used for illicit purposes.

⁶¹⁹For a more detailed examination of the status of non-scheduled substances, see paragraph 13.4 below.

Single paragraph

The Parties shall take such measures as they deem appropriate to prevent trade in and the diversion of materials and equipment for illicit production or manufacture of narcotic drugs and psychotropic substances and shall cooperate to this end.

Commentary

13.3 Under article 13, parties are obligated to take such measures as they deem appropriate to prevent the trade in and the diversion of materials and equipment for illicit drug production and manufacture. The measures relate not only to materials and equipment used for illicit laboratories within a party's territory, but also to materials and equipment that are smuggled out of or exported from the party's territory to other countries and used in illicit laboratories in those countries. As is the case for monitoring the substances listed in Table I and Table II to prevent diversion from licit channels, all parties share the responsibility for preventing the diversion of materials and equipment. Under article 13, parties are also required to cooperate with each other in preventing the trade in and diversion of materials and equipment for illicit use.

Implementation considerations: article 13 as a whole

13.4 While, in general, substances not listed in Table I or Table II may be considered "materials" in the context of article 13, some of those substances have been singled out and made the object of a limited international special surveillance list. This list, established and issued by the International Narcotics Control Board at the request of the Economic and Social Council (resolution 1996/29), identifies non-scheduled substances that are likely to be diverted from licit trade channels in order to be substituted for, or be used as co-reagents with, substances in Table I or Table II, or that are likely to be used in the illicit manufacture of drugs that cannot be manufactured using the precursors scheduled under the 1988 Convention. The Board also recommends what action competent national authorities can take to prevent diversion of those "materials". Some Governments have extended, *mutatis mutandis*, their national monitoring systems for substances listed in Table I and Table II to include the substances in the special surveillance list, thereby taking advantage of an existing control mechanism.

13.5 Under certain conditions, stringent regulatory controls on the manufacture, distribution, import and export of certain types of materials or equipment may be appropriate. This is more likely to be the case with specialized equipment such as tableting and encapsulating machines than with more widely used equipment such as generators or with materials that have numerous licit uses (see paragraph 13.1 above). Each party should assess the nature of the diversion and use of materials and equipment and establish regulatory controls where warranted. Generally speaking, there are four recognized categories of goods: those such as cement or ice, cited as examples in paragraph 13.1 above, the monitoring of which is clearly out of the question; specialized goods such as those cited at the beginning of this paragraph, which can and should be monitored; items of a broader and more generalized utilization, the monitoring of which is far more problematic but may be both useful and feasible depending on circumstances that vary from country to country (see paragraphs 13.6-13.9 below); and specialized equipment made (sometimes by the end-user) solely for the purpose of illicit drug production or manufacture which, in view of its illicit nature *ab initio*, cannot be diverted but can be traded in (see paragraph 13.10 below). Paraphernalia associated with drug abuse (i.e. consumption), such as hookahs and syringes, do not seem to fall within the purview of this article, but may be the subject of whatever control measures a party deems appropriate.

13.6 Monitoring and control programmes can be made more effective by paying special attention to certain items, for example, multi-punch tableting machines or rotary evaporators. Any inquiry made by a new customer for large-capacity items, or complete sets of apparatus, should arouse suspicion. Regulatory authorities should also consider monitoring the trade in certain pieces of second-hand equipment, for example tableting machines, or any export of such second-hand equipment.

13.7 In the case of materials and equipment for which regulatory controls are not practical, some monitoring of the trade in a number of those items may still be warranted and possible. This is particularly true in the case of laboratory and related equipment. Liaison with distributors of such items and investigation and surveillance of purchasers may provide information that will lead authorities to illicit drug laboratories. Although the industry manufacturing and distributing such items legitimately supplies a large number of customers in schools, colleges, universities, hospitals and scientific establishments, as well as in the chemical industry itself, the established guidelines used by the chemical industry for identifying suspicious orders for precursors may usefully be applied, *mutatis mutandis*, to the laboratory equipment industry as well. As with the monitoring

of precursors, companies made aware of the problem can alert law enforcement authorities to suspicious inquiries and orders, especially in fields in which legitimate customers are usually well known. In addition to efforts to raise the awareness of companies, the establishment of proper channels of communication between such companies and law enforcement authorities will facilitate monitoring. A prerequisite for regulatory and law enforcement authorities when monitoring sales of materials and equipment is that they should be aware of the extent of the industry, for example, of the identity of the manufacturers, suppliers and wholesalers or the existence of a trade association. The companies concerned can provide useful assistance in this respect, since they can be expected to be totally familiar with their product area.

13.8 The possibility or practicality of monitoring some equipment may depend purely on local circumstances. Thus, lighting and heating systems used for licit horticultural purposes may also be used for sophisticated illicit hydroponic cultivation, either for illicit trafficking or private, small-scale illicit cultivation of narcotic plants for personal consumption. Clearly the extent of licit horticultural use of such systems at the local level will dictate whether a party can envisage any monitoring or control measures on the licit trade in those systems. The same reasoning would apply to import or export of such systems.

13.9 A situation may also arise in an operational setting where a piece of equipment which would not normally be thought of as a candidate for monitoring becomes one on an ad hoc basis because of intelligence data.⁶²⁰ A flexible approach is therefore necessary to enable the competent authorities to respond quickly to developing trends in illicit drug manufacturing methods. New types of equipment may be used in new manufacturing methods.

13.10 The fourth category of goods referred to in paragraph 13.5 above, namely those manufactured exclusively for illicit drug production or manufacture (for example, “home-made” tableting machines produced by local artisans, as well as the so-called “cocaine machine”),⁶²¹ can, if at all, be subject to only indirect monitoring of component parts, such as vacuum tubes, which

⁶²⁰Police intelligence reports of the intended use of outboard motors to mix large batches of substances in a clandestine laboratory prompted the discrete monitoring of that piece of equipment in one area in the United Kingdom.

⁶²¹A revolving heated metallic disk against which cocaine base is sprayed in an atmosphere of hydrochloric acid, precipitating out as cocaine hydrochloride without requiring the use of solvents.

need to be acquired on the licit market. Circumstances permitting such monitoring will vary considerably from one country to another.

13.11 The provisions of article 13 may be applied to operational investigations, for example if law enforcement personnel have to follow up a lead when illicit drug manufacturing activity is suspected, perhaps by making inquiries regarding recent purchases of specialized pieces or sets of equipment or other materials such as uncommon cutting or tablet-bulking agents and gelatin capsules. Law enforcement personnel will need training and awareness-raising to ensure that they can correctly identify suspicious items encountered during routine drug-related operational inquiries and inquiries related to illicit drug manufacturing or processing activities.

13.12 Cooperation by parties should include the exchange of strategic intelligence among competent authorities to determine sources and patterns of trade and diversion of materials and equipment used in illicit drug laboratories; direct notification to and investigative cooperation with the competent authorities regarding specific shipments of materials and equipment suspected to be destined for illicit drug laboratories (including controlled deliveries, where appropriate); and the exchange of information among the competent authorities concerning specific investigations related to materials and equipment, involving, for example, the tracing of sources of seized materials and equipment or the identification of common drug sources through comparative analysis of seized tablets. The strategic intelligence and other information collected may also be used proactively by law enforcement agencies to monitor the activity of clandestine laboratory operators and thereby identify the source of illicit drug manufacture.

ARTICLE 14

Measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances

General comments

14.1 While the 1988 Convention is in large measure designed to strengthen international cooperation and improve national criminal justice and administrative systems in an effort to tackle more effectively the illicit traffic in drugs, the drafters were fully aware of the complex nature of the problem and the consequent need for measures that would, on the one hand, reduce illicit demand for drugs and promote the treatment, education, aftercare, rehabilitation and social reintegration of abusers and, on the other hand, deal with an important aspect of the supply side through the eradication of illicit cultivation. Article 14 is notable in specifically recognizing this broader dimension of the requirements for national action and international cooperation.⁶²² Since the conclusion of the Conference, that approach has been even more firmly embraced by the international community, as illustrated by the Political Declaration and Global Programme of Action adopted by the General Assembly at its seventeenth special session, devoted to the question of international cooperation against the illicit production, supply, demand, trafficking and distribution of narcotic drugs and psychotropic substances (General Assembly resolution S-17/2, annex), held from 20 to 23 February 1990.

14.2 The initial draft of what was eventually to become article 14 of the 1988 Convention was entitled only “Measures to eradicate narcotic plants cultivated illicitly”. The text contained succinct provisions requiring the parties to “take effective action to eradicate any opium poppy, coca bush and cannabis plants that may be cultivated illicitly in their territories” and to cooperate to increase the effectiveness of eradication efforts.⁶²³ The draft was much criticized by the intergovernmental expert group at its meetings in June and July 1987,⁶²⁴ although the criticisms were in some cases mutually incompatible. Some representatives felt that the draft article added nothing to what was already in the text of the 1961 Convention. One representative proposed a new text, which

⁶²²See also, for example, article 3, paragraph 4.

⁶²³*Official Records*, vol. I ..., document E/CN.7/1987/2, sect. II, (“Article 10”).

⁶²⁴*Ibid.*, document E/CN.7/1988/2 (Part II), paras. 199-208.

subjected measures designed to eliminate illicit cultivation to “fundamental human rights, respect for the traditions of national and regional groups, and the protection of the environment”; he also proposed introducing references to “crop substitution” and “integrated rural development techniques” as adding to the effectiveness of eradication efforts.⁶²⁵ The reference to “traditions” was in turn criticized, as traditions could often be subject to change; and several representatives were of the view that the text should also deal with “demand reduction” as well as with the supply side of the equation, as “elimination of illicit demand was a major factor in dealing with the illicit traffic”.⁶²⁶ A redrafted text incorporating many of those ideas was produced after informal discussions and was the basis for the work of the Conference.

Paragraph 1

1. Any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

Commentary

14.3 Paragraph 1 serves as an introductory paragraph, requiring that measures taken under article 14 should “not be less stringent” than the relevant provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention. This wording reflects concern that the text of article 14 should not produce any conflict with, or involve any implied amendment to, those conventions. It follows that measures under article 14 should supplement measures already taken under the earlier conventions. The purport of the drafting is further reinforced by article 25, which reads: “The provisions of this Convention shall not derogate from any rights enjoyed or obligations undertaken by Parties to this Convention under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.”⁶²⁷

⁶²⁵*Ibid.*, para. 200.

⁶²⁶*Ibid.*, para. 202.

⁶²⁷See below, comments on article 25.

14.4 An amendment proposed by 12 delegations,⁶²⁸ which would have omitted any reference to the 1961 Convention and that Convention as amended by the 1972 Protocol (the original proposal did not contain any reference to the 1971 Convention), was the starting point of a rather lengthy discussion revolving largely around the “traditional” use of coca leaf by various ethnic groups.⁶²⁹ It was emphasized that any text adopted should “ensure that the convention did not penalize the licit cultivation of coca bushes and the licit traditional uses of coca leaf”.⁶³⁰ The amendment also introduced a reference to “basic human rights and environmental protection”.⁶³¹

14.5 In the ensuing discussion, a number of delegations, while recognizing the need to accommodate legitimate concerns of the delegations proposing the amendment, were strongly of the view that any deletion of reference to the 1961 Convention and that Convention as amended might effectively create a discrepancy between those conventions and the new convention being drafted. The compromise finally agreed to, on the suggestion of the Chairman, was to introduce the various ideas in separate paragraphs of an amended, and expanded, article. Thus, reference to the 1961 Convention was retained in paragraph 1 and reference to the 1971 Convention was introduced to cover the possibility of illicit cultivation of plants containing psychotropic substances. The inclusion of a reference to the 1971 Convention would have in any case become necessary to cover the added dimension of demand reduction which was integrated into article 14 (see paragraph 14.2 above).

14.6 Thus, the text of paragraph 1 of article 14 should be considered against the background of the provisions of the 1961 and 1971 Conventions which limit or control the cultivation of plants that are sources of widely abused substances or which encourage demand reduction activities.

14.7 Article 22 of the 1961 Convention, entitled “Special provisions applicable to cultivation”, is couched in the following terms:

⁶²⁸Bahamas, Bolivia, Colombia, Costa Rica, Cuba, Guatemala, India, Jamaica, Mexico, Panama, Paraguay and Peru (for the text of the proposed amendment, see *Official Records*, vol. I ..., document E/CONF.82/12, “Article 10” (E/CONF.82/C.2/L.13/Add.10), sect. II, paras. 2 and 3, pp. 149-150).

⁶²⁹*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 25th to 28th meetings.

⁶³⁰*Ibid.*, 25th meeting, para. 7.

⁶³¹*Ibid.*, para. 9.

“Whenever the prevailing conditions in the country or a territory of a Party render the prohibition of the cultivation of the opium poppy, the coca bush or the cannabis plant the most suitable measure, in its opinion, for protecting the public health and welfare and preventing the diversion of drugs into the illicit traffic, the Party concerned shall prohibit cultivation.”

The text gives considerable discretion to each party. The phrase “the diversion of drugs into the illicit traffic” does not itself prompt action under the article; consideration has to be given to the additional factor of “the public health and welfare”.⁶³²

14.8 Parties that permit the cultivation of the opium poppy for the production of opium are required under the 1961 Convention to operate a system of controls. That involves the establishment of a government agency;⁶³³ the designation of areas in which, and plots of land on which, opium poppies may be cultivated for the purpose of producing opium;⁶³⁴ and the licensing of cultivators,⁶³⁵ who are obliged to deliver their total crops of opium to the agency,⁶³⁶ which must have a monopoly in the import and export of, and wholesale trade in, opium, as well as in the maintenance of opium stocks.⁶³⁷ A party that permits the cultivation of the opium poppy for purposes other than the production of opium must take all the measures necessary to ensure that opium is not produced from such poppies and that the manufacture of drugs from poppy straw is adequately controlled.⁶³⁸

⁶³²See Commentary on the 1961 Convention, paragraph 3 of the comments on article 22.

⁶³³1961 Convention, art. 23, para. 1.

⁶³⁴1961 Convention, art. 23, para. 2, subpara. (a).

⁶³⁵1961 Convention, art. 23, para. 2, subparas. (b) and (c).

⁶³⁶1961 Convention, art. 23, para. 2, subpara. (d).

⁶³⁷1961 Convention, art. 23, para. 2, subpara. (e); see also article 24 on the limitation of the production of opium for international trade. A new article 21 *bis* was inserted by operation of article 11 of the 1972 Protocol, imposing further restrictions on the production of opium.

⁶³⁸1961 Convention, art. 25, para. 1.

14.9 The 1961 Convention requires a similar system of control to be applied where a party permits the cultivation of the coca bush.⁶³⁹ The parties are required, as far as possible, to enforce the uprooting of all coca bushes growing wild and must destroy coca bushes that are being illegally cultivated.⁶⁴⁰

14.10 The 1961 Convention also requires a similar system of control to be applied where a party permits the cultivation of the cannabis plant for the production of cannabis or cannabis resin,⁶⁴¹ but the provision does not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.⁶⁴² In addition, the parties must adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant.⁶⁴³

14.11 In the 1961 Convention as amended, an additional provision appears: a party prohibiting cultivation of the opium poppy or the cannabis plant is required to take all appropriate measures to seize any plants illicitly cultivated and destroy them, except for small quantities required by the party for scientific and research purposes.⁶⁴⁴

14.12 While the general system of supply-side control introduced under the 1961 Convention was considered an important part of a comprehensive programme to combat drug abuse, it was equally clear to the authors that it could at best be only a part of such a programme, and that educational and other measures were also required to reduce illicit demand for drugs. That was first recognized in article 38 of the 1961 Convention, in its unamended form, entitled “Treatment of drug addicts”, which calls for parties to “give special attention to the provision of facilities for the medical treatment, care and rehabilitation of

⁶³⁹There is one modification: the agency’s duties corresponding to those set out in article 23, paragraph 2, subparagraph (d), are in this context to consist only in taking physical possession of the crops as soon as possible after the end of the harvest (1961 Convention, art. 26, para. 1).

⁶⁴⁰1961 Convention, art. 26, para. 2.

⁶⁴¹1961 Convention, art. 28, para. 1.

⁶⁴²1961 Convention, art. 28, para. 2.

⁶⁴³1961 Convention, art. 28, para. 3.

⁶⁴⁴1961 Convention as amended, art. 22, para. 2 (inserted by operation of article 12 of the 1972 Protocol).

drug addicts”.⁶⁴⁵ For parties with serious problems of addiction, it is considered “desirable” that they “establish adequate facilities for the effective treatment of drug addicts”.⁶⁴⁶ Article 38 of the 1961 Convention as amended, entitled “Measures against the abuse of drugs”, which was introduced by operation of article 15 of the 1972 Protocol, reflects the language used the preceding year in article 20 of the 1971 Convention. Both of those more recent texts require parties to take all practicable measures for the prevention of drug abuse and for the early identification, treatment, education, aftercare, rehabilitation and social reintegration of the persons involved.⁶⁴⁷ They also call for the promotion of training of personnel in such demand reduction activities and of public awareness campaigns.⁶⁴⁸

14.13 For the historical record, article 49 of the 1961 Convention allowed parties to enter a number of transitional reservations which were in part directly relevant to the question of stemming drug abuse.⁶⁴⁹ Thus parties in whose territories such activity was traditional and permitted on 1 January 1961 could authorize opium smoking and coca leaf chewing, on a temporary basis. In addition, the quasi-medical use of opium and the non-medical use of cannabis and certain by-products could also be permitted temporarily.⁶⁵⁰ Under the terms of the 1961 Convention, only persons officially registered to that effect by the competent authorities on 1 January 1964 could be permitted to smoke opium; the quasi-medical use of opium had to be abolished within 15 years of entry into force of the 1961 Convention (that is, by 12 December 1979), and coca leaf

⁶⁴⁵1961 Convention, art. 38, para. 1.

⁶⁴⁶1961 Convention, art. 38, para. 2.

⁶⁴⁷Compare article 3, paragraph 4, subparagraph (b), of the 1988 Convention, where similar language is used in respect of the treatment of offenders.

⁶⁴⁸1961 Convention as amended, art. 38, paras. 2 and 3, and 1971 Convention, art. 20, paras. 2 and 3.

⁶⁴⁹Five States availed themselves of this possibility: Bangladesh, Nepal and Pakistan reserved the right to allow the quasi-medical use of opium, as well as the use of cannabis for non-medical purposes and the production and manufacture thereof and trade therein; India, in addition to the same reservations, also reserved the right to permit opium smoking; and Burma reserved the right to permit opium smoking in Shan State.

⁶⁵⁰1961 Convention, art. 49, para. 1.

chewing and non-medical use of cannabis within 25 years of its entry into force (that is, by 12 December 1989).⁶⁵¹

Paragraph 2

2. Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.

Commentary

14.14 The background to paragraph 2 includes the relevant provisions of the 1961 Convention, especially those in article 49 allowing transitional arrangements for a limited period in respect of opium smoking, quasi-medical use of opium, non-medical use of cannabis, and coca leaf chewing (see paragraph 14.13 above). At one stage, a proposal before the Conference would have distinguished between the coca bush on the one hand and the opium poppy and cannabis plants on the other; it would also have required respect for a range of “licit uses” of all those plants: “traditional, domestic, medical, pharmaceutical and industrial”.⁶⁵²

14.15 There was, however, strong opposition to that distinction, and a concern not to amend, or to appear to amend, the control regime created by the 1961 Convention; the inclusion of paragraph 1 in article 14 was important for that reason. The discussion of paragraph 2 was therefore primarily focused on the second sentence, and agreement was eventually reached on the carefully worded phrase “due account of traditional licit uses, where there is historic evidence of such use”.

14.16 When the provisions of article 22 of the 1961 Convention are read in conjunction with those of article 14 of the 1988 Convention, it can be seen that

⁶⁵¹1961 Convention, art. 49, para. 2.

⁶⁵²*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 26th meeting, para. 1.

the taking of measures to “prohibit cultivation”⁶⁵³ or to “prevent illicit cultivation of and to eradicate” the relevant plants⁶⁵⁴ is subject to a number of considerations:

(a) The prevailing conditions in the territory of a party must render prohibition of cultivation the most suitable measure, in its opinion, for protecting public health and welfare and preventing the diversion of drugs into the illicit traffic;

(b) Measures to be taken to prevent illicit cultivation and to eradicate the relevant plants must be judged:

(i) To respect fundamental human rights;

(ii) To take due account of traditional licit uses, where there is historic evidence of such use;

(iii) To take due account of the protection of the environment.

14.17 The last of these considerations raises technical issues, particularly in the context of eradication. The use of toxic chemicals, especially where they are sprayed from aircraft, may prove highly effective but the environmental risks associated with that and similar practices need to be weighed. The geography of a given region may also directly influence the suitability of the use of one eradication method over another (see paragraph 14.27 below).

Paragraph 3

3. (a) The Parties may co-operate to increase the effectiveness of eradication efforts. Such co-operation may, *inter alia*, include support, when appropriate, for integrated rural development leading to economically viable alternatives to illicit cultivation. Factors such as access to markets, the availability of resources and prevailing socio-economic conditions should be taken into account before such rural development programmes are implemented. The Parties may agree on any other appropriate measures of co-operation.

⁶⁵³The language of the 1961 Convention.

⁶⁵⁴The language of the 1988 Convention.

(b) The Parties shall also facilitate the exchange of scientific and technical information and the conduct of research concerning eradication.

(c) Whenever they have common frontiers, the Parties shall seek to co-operate in eradication programmes in their respective areas along those frontiers.

Commentary

14.18 Paragraph 3 is substantially unchanged from the text agreed by the intergovernmental expert group at its meetings in June and July 1987.⁶⁵⁵ Subparagraph (a) creates no obligation on parties, but draws attention to the need, in some countries and regions, for programmes of integrated rural development designed, in effect, to rebuild a local economy hitherto partly or entirely based on illicit cultivation. From the point of view of the countries concerned, the issues listed in the third sentence (access to markets, resources and prevailing socio-economic conditions) are crucial. Behind the studied neutrality of the text of this paragraph lies the feeling of producing countries that countries in which drugs are most commonly consumed (and which are therefore perceived as fuelling the illicit economies of producing countries) should take an active part in the provision of resources to the producing countries to enable them to introduce alternative crops or other licit activities and should guarantee, or at least place no obstacles in the way of, access to markets.

14.19 Subparagraphs (b) and (c) do impose obligations on parties in respect of the exchange of scientific and technical information and of cross-border eradication programmes. Those provisions can be seen as specific applications of the duty of parties to cooperate closely under the terms of article 9.⁶⁵⁶

Paragraph 4

4. The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs

⁶⁵⁵The only change was to divide the text into three subparagraphs, with small consequential drafting adjustments.

⁶⁵⁶Article 9 is keyed to the offences established in accordance with article 3, paragraph 1, which include the cultivation of opium poppy, coca bush or cannabis plant for the purposes of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended.

and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, *inter alia*, on the recommendations of the United Nations, specialized agencies of the United Nations such as the World Health Organization, and other competent international organizations, and on the Comprehensive Multidisciplinary Outline adopted by the International Conference on Drug Abuse and Illicit Trafficking, held in 1987, as it pertains to governmental and non-governmental agencies and private efforts in the fields of prevention, treatment and rehabilitation. The Parties may enter into bilateral or multilateral agreements or arrangements aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances.

Commentary

14.20 Paragraph 4 is a very much expanded version of the basic text before the Conference, in which parties were merely required to adopt appropriate measures to eliminate illicit demand for narcotic drugs and psychotropic substances, with a view to removing the financial incentives for illicit traffic. That provision, with an added reference to both the reduction and the elimination of demand, and the insertion of the reference to human suffering, now forms the first sentence of a much more substantial text. The purpose of the whole paragraph is to deal with the demand aspect, and to correct what would otherwise be a lack of balance between the measures aimed at eliminating production and those aimed at reducing demand.

14.21 As regards the second sentence of paragraph 4, some representatives expressed strong reservations about a reference to the Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control that might appear to give mandatory force to the recommendations of a separate, non-binding instrument.⁶⁵⁷ In fact the text of the second sentence of paragraph 4 enables but does not require the measures taken to be based upon the recommendations in the Comprehensive Multidisciplinary Outline (or the recommendations of the intergovernmental bodies referred to). It was judged expedient to refer to the Comprehensive Multidisciplinary Outline in that way

⁶⁵⁷Bulgaria, China, France, Ukrainian Soviet Socialist Republic and Union of Soviet Socialist Republics (see *Official Records*, vol. I ..., document E/CONF.82/12, "Article 10" (E/CONF.82/C.2/L.13/Add.10), sect. III, paras. 13-16, p. 151).

to avoid having to negotiate a text which would spell out the various recommendations, most of which are contained in chapter I of the Comprehensive Multidisciplinary Outline;⁶⁵⁸ some of them (as the text acknowledges) are concerned with the work of non-governmental or private agencies.

14.22 The final sentence is one of a number of provisions in the Convention designed to encourage parties to strengthen the Convention's effectiveness through bilateral or multilateral agreements or less formal arrangements.⁶⁵⁹

Paragraph 5

5. The Parties may also take necessary measures for early destruction or lawful disposal of the narcotic drugs, psychotropic substances and substances in Table I and Table II which have been seized or confiscated and for the admissibility as evidence of duly certified necessary quantities of such substances.

Commentary

14.23 In the Comprehensive Multidisciplinary Outline, it is suggested that national legislation should be enacted to authorize the early destruction or other lawful disposal of seizures of narcotic drugs and psychotropic substances after the legally required samples have been taken for analysis and evidentiary purposes.⁶⁶⁰ The object is to prevent the renewed diversion of seized drugs into

⁶⁵⁸Especially in targets 3 (Prevention through education), 4 (Prevention of drug abuse in the workplace), 5 (Prevention programmes by civic, community and special interest groups and law enforcement agencies), 6 (Leisure-time activities in the service of the continuing campaign against drug abuse) and 7 (Role of the media) (*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A).

⁶⁵⁹See, for example, article 5, paragraph 4, subparagraph (g), and article 6, paragraph 12.

⁶⁶⁰*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A, para. 267.

the illicit market.⁶⁶¹ Paragraph 5, which is permissive rather than mandatory, incorporates the suggestion in the text of the Convention.

Implementation considerations: article 14 as a whole

14.24 As noted above, much of article 14 is directed towards preventing the illicit cultivation of plants containing narcotic and psychotropic substances, promoting their eradication, and stimulating measures to eliminate illicit demand. As those concerns are also covered by other drug control treaties of global reach, it was necessary to ensure the consistency of the specific measures contained in that important article with those embodied in the earlier instruments.

14.25 Paragraph 1 of article 14 accordingly requires that measures taken pursuant to the 1988 Convention in relation to eradication of illicit cultivation and the elimination of illicit demand “shall not be less stringent” than those applicable under the earlier conventions. In consequence, this provision “leaves no question as to what cultivation is illegal in nature versus that which is legal for medicinal, traditional and scientific purposes”.⁶⁶² While parties to those instruments will necessarily have in place the requisite systems of control, specific implementation issues will arise for those States which become bound by the 1988 Convention but are not parties to one or more of the earlier instruments. Such States are under an obligation to take measures that are no less stringent than those contained in the specified treaties. Those involved in the implementation process could derive considerable benefit from a detailed examination of measures put in place by relevant States parties. In addition, the United Nations International Drug Control Programme has extensive experience in the provision of legislative drafting and related forms of technical assistance in this sphere.⁶⁶³

⁶⁶¹See, in this respect, the comments made by India (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 25th meeting, para. 23, and 28th meeting, paras. 28 and 31).

⁶⁶²“Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,” 101st Congress, 1st Session, Senate, Exec. Rept. 101-15, p. 87.

⁶⁶³See, for example, the model legislation contained in a reference document issued in September 1996 by the United Nations International Drug Control Programme.

14.26 Paragraphs 2 and 3 of article 14, which deal with the important and complex issue of eradicating illicit cultivation, may give rise in many countries to significant practical difficulties which will have to be overcome in elaborating and executing an effective programme. For example, the plants in question are often grown in remote locations or in areas beyond the effective control of Governments. An initial problem will thus be to identify the precise locations where cultivation is taking place. For many countries it may be necessary to mobilize both national resources and international cooperation. In paragraph 198 of the Comprehensive Multidisciplinary Outline and in paragraph 38, subparagraph (a), of the Global Programme of Action, for example, the importance is stressed of securing, by agreement, access to high-resolution satellite imagery and aerial photography from other members of the international community with such technological capabilities. Examples of areas for international cooperation for effective eradication programmes are provided in paragraph 3 of article 14.

14.27 Various methods and technologies are available for use in actual eradication operations, including manual and mechanical uprooting, and manual and aerial spraying. The importance of environmental factors in the choice of appropriate measures is stressed by the wording of paragraph 2 of article 14. This issue has been intensely discussed since 1988. As was stressed in the report of the Expert Group Meeting on Environmentally Safe Methods for the Eradication of Illicit Narcotic Plants, held at Vienna from 4 to 8 December 1989,⁶⁶⁴ the use of control agents to eradicate such plants would depend on, and must respond to, a complex of factors such as geography, climate, topography and prevailing socio-economic conditions.

14.28 In some circumstances, the effectiveness of eradication efforts will be enhanced by other related initiatives, including, *inter alia*, support for "integrated rural development leading to economically viable alternatives to illicit cultivation".⁶⁶⁵ Cooperation between parties in such initiatives is encouraged by the terms of article 14, paragraph 3, subparagraph (a). The methodology referred to is more commonly known as "alternative development" and involves an approach that deals with all aspects of the economy of an illicit cultivation zone, introducing an appropriate mix of improved infrastructure, health, education and job-creating measures, in addition to agricultural development and diversification. Alternative development is based on the

⁶⁶⁴E/CN.7/1990/CRP.7, para. 9.

⁶⁶⁵The wording of article 14, paragraph 3, subparagraph (a).

principle that the removal of the causes of the economic dependence on an illicit crop permits the enforcement of a ban on cultivation. Such bans are often introduced on a phased basis parallel to the developmental inputs. The United Nations International Drug Control Programme has a wealth of experience in these and related matters, which can be drawn upon by those charged with the development of appropriate implementation policies.⁶⁶⁶

14.29 By way of contrast, the focus of paragraph 4 is on the reduction or elimination of illicit demand for narcotic drugs and psychotropic substances and on facilitating international cooperation to those ends. In this area also, the obligations placed on parties are, of necessity, of an extremely open-textured nature. Much will depend on an assessment of what is appropriate given the economic, social, religious, cultural and related factors and traditions prevailing in the jurisdiction in question. Again, there is much experience, international and national, upon which those charged with implementation of this provision can draw, should they see fit. At the time that the present *Commentary* was being prepared, the Commission on Narcotic Drugs, acting on a request from the General Assembly, was in the process of elaborating a general statement of guiding principles to reduce illicit demand for drugs. That issue was to be examined by the General Assembly at its twentieth special session, to be held in June 1998, following which another important source of useful information on demand reduction would become available to parties and to the international community.

14.30 There is broad consensus that success in the fight against drug abuse depends on the existence of comprehensive programmes, including treatment and rehabilitation programmes, which give priority to the reduction of demand. While the nature and scope of national drug control programmes differ in significant respects, one common problem is the design of a system capable of delivering the selected strategy effectively. In tackling this problem, the experience of States that have established a special administration or administrations pursuant to article 17 of the 1961 Convention and article 6 of the 1971 Convention may prove instructive. As noted in the Commentary on the 1971 Convention: "The term 'special administration' as used in its technical sense in the field of drug control includes any special administrative arrangements to provide for liaison among the various national, central and local, governmental units entrusted with functions of control and to coordinate their work. Such arrangements may consist of the establishment of a special unit in

⁶⁶⁶For a detailed description of the methodology, see UNDCP Technical Information Paper No. 5, 4 November 1993.

the competent central Government department, of an inter-departmental committee or of other administrative means in conformity with the constitutional and administrative structure of the Government concerned".⁶⁶⁷ Those special units can also facilitate the preparation of coordinated national drug control plans, addressing the various sectoral requirements for which responsibility is often scattered among various ministries and departments. The United Nations International Drug Control Programme provides advice to Governments on the preparation of such national plans.⁶⁶⁸

14.31 Article 14, paragraph 5, treats a quite distinct issue of great practical importance, namely the possibility of the early destruction or lawful disposal of illicit drugs and of substances frequently used in the illicit manufacture of those drugs, as listed in Table I and Table II of the 1988 Convention. Given the volume and value of the relevant substances seized or confiscated in the course of efforts to combat the illicit traffic, the high costs of storage, the security risks posed and related matters, it was felt appropriate to signal the acceptability of a strategy of early disposal which made provision "for the admissibility as evidence of duly certified necessary quantities of such substances".

14.32 Parties to the Convention whose laws and regulations do not at present provide for the possibility of pretrial destruction or disposal, and the consequent admissibility in evidence, of samples taken from seized drugs or precursors may wish to consider the enactment or amendment of national legislation to that end. If so, they would be able to draw upon the experience of an ever-growing number of countries, representing many of the world's principal legal systems, which have already taken this step. Those responsible for any such review could also profit from an examination of relevant work conducted in various international forums. Particularly useful in this regard are the reports of the meetings of two expert groups on pretrial destruction of seized narcotic drugs, psychotropic substances and precursor and essential chemicals, which were convened under the auspices of the United Nations in 1989 and 1990 respectively at the behest of the fourteenth Meeting of Heads of National Drug Law Enforcement Agencies, Asia and the Pacific, held at Bangkok from 3 to 7 October 1988.

⁶⁶⁷Commentary on the 1971 Convention, paragraph 3 of the comments on article 6.

⁶⁶⁸See United Nations International Drug Control Programme, *Format and Guidelines for the Preparation of National Drug Control Master Plans* (December 1994).

14.33 The first of the expert groups was to consider the legal implications surrounding any such initiative and to propose practical measures for such destruction or lawful disposal without hindrance to evidentiary requirements. The meeting recommended that consideration be given to the implementation of a framework which identified procedures available for use from the time of seizure to that of ultimate disposal: "Such procedures included the inventory to be drawn up at the time of seizure, the urgent disposal, transportation, storage, sampling, expert analysis of those substances and decisions and actions regarding their disposal."⁶⁶⁹

14.34 For any State which currently lacks the capacity to undertake the necessary analysis of retained samples, it may be necessary to formulate the relevant legal norms in such a manner as to "empower the judiciary to admit in evidence the analytical findings of foreign laboratories recognized by the Government".⁶⁷⁰ If so, sufficient flexibility should be built in to facilitate the exportation and subsequent return of the samples in question. Attention could also be turned to satisfying the relevant international cooperation arrangements envisaged in article 9, including the provision, when appropriate, of "necessary quantities of substances for analytical or investigative purposes".⁶⁷¹

14.35 All parties, irrespective of whether they elect to provide for pretrial destruction or to continue with a tradition of retaining the entire bulk shipment until after trial, face the common problem of making provision for the effective disposal of these substances while taking into account possible adverse effects on the ecology and environment. That was the focus of discussion at the second meeting of the Expert Group on Pre-Trial Destruction of Seized Narcotic Drugs, Psychotropic Substances, Precursors and Essential Chemicals, held at Bangkok from 22 to 26 October 1990. In considering methods of destruction, the expert group divided the substances into three categories: plant materials, cannabis resin and opium; compressed, powdered and other processed drugs; and precursors, essential chemicals and solvents. It then analysed for each category the safety, environmental and cost factors associated with various possible

⁶⁶⁹"Report on the Meeting of the Expert Group on Pre-Trial Destruction of Seized Narcotic Drugs, Psychotropic Substances, Precursors and Essential Chemicals, held at Vienna from 13 to 17 November 1989" (E/CN.7/1990/7/Add.1), paras. 3 and 21).

⁶⁷⁰*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A, para. 268.

⁶⁷¹See above, comments on article 9, paragraph 1, subparagraph (d).

methods of destruction. Having identified the advantages and disadvantages of the various methods, it then formulated particular recommendations, according high priority to the process of incineration. Incineration was defined as “burning by controlled flame in an enclosed area with appropriate safeguards to prevent the release of inorganic acid or toxic gases, ... ensuring the maximum possible combustion of the material”.⁶⁷² Certain other alternatives were also considered to be acceptable. For example, in regard to solvents, precursors and essential chemicals, the expert group was of the view that recycling was the best environmental option but that transport, safety and security considerations might make that method prohibitively expensive in remote locations. Appropriate provisions governing the sale or transfer of such substances in this context may need to be specifically provided in some jurisdictions. Although international drug control conventions do not expressly prohibit States from using seized drugs to meet their domestic needs, that practice is discouraged not only for obvious security reasons but also on grounds of cost-effectiveness in view of the need to reprocess seized drugs, which usually contain adulterants and impurities, before they can be used to manufacture medicaments. Moreover, in a number of resolutions of the Economic and Social Council, Governments have been requested to refrain from the proliferation of supply sources, and, in its resolution 33/168, the General Assembly invited Governments to ensure a continuing equilibrium between licit supply and licit demand and to avoid unforeseen imbalances caused by sales of seized or confiscated drugs.

14.36 The recommendations of the expert group at its second meeting also covered a number of related matters, including the pre-seizure involvement of forensic chemists, the provision of adequate training, and the appropriate storage of retained samples. Such matters would need to be dealt with by those responsible for the formulation of a comprehensive policy for the safe and secure operation of any pretrial destruction programme.

⁶⁷²E/CN.7/1991/CRP.5, footnote to paragraph 8 (g).

ARTICLE 15

Commercial carriers

General comments

15.1 Article 15 has as its focus the need to ensure that means of transport operated by commercial carriers are, to the extent possible, not used in the commission of the serious offences of illicit traffic enumerated in article 3, paragraph 1. To that end, it acknowledges the necessity for each party to impose obligations on, and to cooperate closely with, the commercial sector in order to create an inhospitable environment for those engaged in international drug trafficking. This is another area in which the Convention breaks new ground at the international level. It is, for instance, “the first time an international treaty has recognized that commercial carriers have an obligation to prevent their means of transport from being used for illegal drug purposes”.⁶⁷³

15.2 A commercial carrier is defined in article 1 as “any person or any public, private or other entity engaged in transporting persons, goods or mails⁶⁷⁴ for remuneration, hire or any other benefit”.⁶⁷⁵ Illicit traffic will very often involve the services of a commercial carrier within this definition, and the need for carriers to be aware of the possible misuse of their services and to be willing to cooperate fully with law enforcement personnel cannot be overstated.

15.3 The initial draft of what was to become article 15 was much stronger than the eventual text. It made mention of increased security at ports, of “thorough searches” where suspicion existed (such searches being considered reasonable cause for delaying the departure of commercial aircraft), and also of the possible forfeiture of the means of transport where the carrier was shown to have knowledge of its use for illicit traffic.⁶⁷⁶ Many of those elements were seen as impractical or unduly burdensome by the open-ended intergovernmental

⁶⁷³“Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances”, 101st Congress, 1st Session, Senate, Exec. Rept. 101-15, p. 91.

⁶⁷⁴See below, comments on article 19, paragraph 1, for an examination of the significance of the reference to “mails” in this context.

⁶⁷⁵Art. 1, subpara. (d).

⁶⁷⁶*Official Records*, vol. I ..., document E/CN.7/1987/2, sect. II (“Article 11”).

expert group, and informal discussions at the first session of that group in June and July 1987 produced a revised draft⁶⁷⁷ which, after further discussion in the Commission on Narcotic Drugs, was not further amended at the Conference.

Paragraph 1

1. The Parties shall take appropriate measures to ensure that means of transport operated by commercial carriers are not used in the commission of offences established in accordance with article 3, paragraph 1; such measures may include special arrangements with commercial carriers.

Commentary

15.4 Paragraph 1 imposes an obligation on parties to take “appropriate measures”. Some such measures are referred to in the remaining paragraphs of the article, but the final words of this paragraph point to the desirability of entering into special arrangements with commercial carriers. In a number of States, “carrier agreements” or memoranda of understanding have been used to good effect; this matter is further discussed below (see paragraphs 15.10-15.16 below).

Paragraph 2

2. Each Party shall require commercial carriers to take reasonable precautions to prevent the use of their means of transport for the commission of offences established in accordance with article 3, paragraph 1. Such precautions may include:

(a) If the principal place of business of a commercial carrier is within the territory of the Party:

(i) Training of personnel to identify suspicious consignments or persons;

(ii) Promotion of integrity of personnel;

(b) If a commercial carrier is operating within the territory of the Party:

⁶⁷⁷Ibid., document E/CN.7/1988/2 (Part II), paras. 216-222.

- (i) **Submission of cargo manifests in advance, whenever possible;**
- (ii) **Use of tamper-resistant, individually verifiable seals on containers;**
- (iii) **Reporting to the appropriate authorities at the earliest opportunity all suspicious circumstances that may be related to the commission of offences established in accordance with article 3, paragraph 1.**

Commentary

15.5 Under paragraph 2, every party is obliged to impose on commercial carriers the requirement to take “reasonable precautions” to prevent the use of their means of transport for the commission of offences established in accordance with article 3, paragraph 1.⁶⁷⁸ What precautions are “reasonable” must depend on the circumstances of each individual case and will take into account such matters as the size of the carrier’s enterprise, the experience of its employees, the sophistication of the systems available to it, and the known risks attending the use of particular routes. No provision is included in the final text regarding penalties for failure to take reasonable precautions; the matter is left to the national law of each party. Nor is it provided (as was the case in an early draft) that, subject to reasonable precautions having been taken, the carrier is not responsible if the illicit nature of the consignment has been misrepresented by the consignor;⁶⁷⁹ some such provision will commonly be found in the national law of a party.⁶⁸⁰

⁶⁷⁸The focus of this provision is clearly the use of means of transport for the carriage of narcotic drugs and psychotropic substances, but article 3, paragraph 1, gives the provision a wider ambit, perhaps not fully intended by the authors of the Convention.

⁶⁷⁹*Official Records*, vol. I ..., document E/CN.7/1987/2, sect. II, (“Article 11”).

⁶⁸⁰See the English case of *Customs and Excise Commissioners v Air Canada* [1991] 1 All E.R. 570, C.A., where an Air Canada TriStar aircraft, on which large consignments of cannabis had been discovered, had been seized, the Court of Appeal holding that no element of knowledge was required under the relevant legislation. The European Court of Human Rights subsequently held that that did not constitute an unjustified interference with the peaceful enjoyment of possessions and was in conformity with the general interest in combating international drug trafficking (*Air Canada v United Kingdom* (Case 9.1994/456/537)). Although the offences established in accordance with article 3, paragraph 1, involve the element of intention, this is not reproduced in article 15, paragraph 1.

15.6 The text then offers a non-exclusive list of the precautions that may be required. The list is divided for jurisdictional purposes, so that the general requirements as to staff training and the “promotion of integrity” are to be imposed by the party within whose territory the commercial carrier has its principal place of business, whereas the more specific requirements are to be imposed on any carrier operating within the territory of a party (which will include any case in which the carriage begins or ends in, or passes through, that territory).

15.7 The individual items are self-explanatory and call for very little further comment here. “Container” in paragraph 2, subparagraph (b), clause (ii), is used in the general sense of the outer packaging of a consignment, rather than in the more technical meaning it has come to have in transport terminology. In the first draft there were additional items, relating to the limitation of access to means of transport and cargo at international ports and to the scheduling of arrivals of means of transport, where possible, to facilitate effective customs processing. The latter proposal received insufficient support and does not appear in the final text, but elements of the former are to be found in paragraph 3.

15.8 It was emphasized throughout the discussions by the representative of the United States that a party was free to apply the measures set out in both parts of paragraph 2 to any carrier; the two subparagraphs were not mutually exclusive.⁶⁸¹

Paragraph 3

3. Each Party shall seek to ensure that commercial carriers and the appropriate authorities at points of entry and exit and other customs control areas co-operate, with a view to preventing unauthorized access to means of transport and cargo and to implementing appropriate security measures.

Commentary

15.9 As has just been noted (see paragraph 15.7 above), paragraph 3 reflects ideas contained in an earlier version of paragraph 2. It draws attention to the

⁶⁸¹ *Official Records*, vol. I ..., document E/CN.7/1988/2 (Part II), p. 27; *ibid.*, *Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 66; and *ibid.*, Summary records of meetings of the Committees of the Whole, Committee II, 3rd meeting, para. 37.

vulnerability of means of transport and cargo while awaiting customs clearance. The only way of minimizing the risks is to prevent unauthorized access to means of transport and cargo and to take whatever further security measures are appropriate. These may usefully be similar to those already in place in many airports to restrict access for general safety reasons. The obligation placed on the parties under paragraph 3 is merely to seek to ensure that carriers and appropriate authorities cooperate in those matters.

Implementation considerations: article 15 as a whole

15.10 Article 15, paragraph 1, obligates each party to take “appropriate measures” to ensure that means of transport operated by commercial carriers are not used in the commission of the offences of illicit traffic enumerated in article 3, paragraph 1. It is also envisaged that such measures may include the conclusion of “special arrangements” with such commercial carriers; in this regard it is important to remember that the Convention affords a fairly broad definition of that term (see paragraph 15.2 above).⁶⁸² While those charged with the implementation of article 15 must ensure that all those within the scope of the definition are subject to the “appropriate measures”, consideration might also be given to the question of whether, in the light of national circumstances or prevailing international practice, to include other related actors. For example, in 1995, in the report of the Working Group on Maritime Cooperation, it was recommended that “commercial carriers, manning agencies, shipowners, port authorities, trade bodies and other professional groups active in maritime transport should be associated on the basis of voluntary cooperation in the fight against illicit drug traffic.”⁶⁸³

15.11 Recognition of the need to encourage those involved in the transport of passengers and goods, whether by road, rail, vessels or aircraft,⁶⁸⁴ to cooperate with the appropriate authorities to prevent illicit trafficking activities pre-dates the conclusion of the Convention. For example, the Comprehensive Multi-disciplinary Outline contemplates the conclusion of detailed arrangements with

⁶⁸²See also above, comments on article 1, subparagraph (d).

⁶⁸³“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 4 to 13 September 1994 and from 20 to 24 January 1995” (E/CN.7/1995/13), recommendation 23.

⁶⁸⁴See, for example, the Programme of Co-operation and Assistance to Deter Narcotics Smuggling via Commercial Aircraft, agreed between the United States Customs Service and the Air Transport Association of America in March 1985.

participants from the transport sector in which the respective responsibilities of those involved would be established. Such arrangements “should whenever possible be based upon the Memoranda of Understanding established between CCC [the Customs Co-operation Council, also called the World Customs Organization] and the various international organizations concerned, e.g. the International Chamber of Shipping and the International Air Transport Association ..., and any accompanying guidelines detailing the cooperative measures to be taken by both the authorities and the members of those organizations”.⁶⁸⁵

15.12 States that are contemplating the establishment of a programme of negotiations with commercial carriers for the first time are in a position to draw upon the ever-growing body of practice generated by other States since 1988. Those initiatives have generally sought to build upon existing relationships with the local customs service or other appropriate authority by articulating practical measures through which the participants can enhance cooperation in tackling the problem of the illicit traffic in narcotic drugs and psychotropic substances. Further guidance on the appropriate scope and content of such a programme may be gleaned from an examination of the content of article 15, paragraphs 2 and 3.

15.13 While not mandated by the 1988 Convention, it is common for arrangements with commercial carriers to include coverage of supporting activities to be undertaken by the appropriate authorities in such areas as the provision of training, education, advice and information.⁶⁸⁶ For example, the provision of guidance to the private sector on how to identify unusual situations which may be indicative of illicit drug trafficking has proved in practice to be particularly beneficial.⁶⁸⁷ This might usefully be complemented by the establishment of guidelines and procedures for reporting suspicious situations and related matters to the appropriate authorities.

15.14 It will be recalled that elsewhere in the 1988 Convention a similar approach has been resorted to, based on the concept of the State reaching out to engage participants in legitimate commerce in the effort to combat the illicit

⁶⁸⁵*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A, para. 297.

⁶⁸⁶*Ibid.*

⁶⁸⁷This is a key feature of the Anti-Drugs Alliance established in the United Kingdom by Her Majesty's Customs and Excise.

traffic. The clearest example is to be found in the prevention of diversion of substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances.⁶⁸⁸ Similarly, as has been seen elsewhere, since 1988 States have come to emphasize the importance of this cooperative dimension in their efforts to prevent the use of the financial system for the purpose of money-laundering.⁶⁸⁹ The elaboration of policy in relation to commercial carriers should, for reasons of consistency, uniformity and insight, take cognizance of relevant initiatives in those fields.

15.15 Paragraph 1 is, however, based on the premise that “appropriate measures” taken by parties will be broader than the mere conclusion of special arrangements with commercial carriers.⁶⁹⁰ Some parties have provided for the imposition of monetary penalties and/or for the seizure and forfeiture of the means of transportation that have been used in illicit drug trafficking activities.⁶⁹¹ The imposition of such penalties may be related to the conclusion of special arrangements of the types discussed above. For instance, in the United States, participation by a commercial carrier in such an arrangement “will be considered as a mitigating factor in any seizure or penalty decision or recommendation should illegal drugs be found aboard a conveyance belonging to that carrier”.⁶⁹²

15.16 In any review of the adequacy of existing law in this sphere, which could be carried out in tandem with that relating to the confiscation of instrumentalities pursuant to article 5 of the Convention,⁶⁹³ attention should be paid to the criterion of “reasonable precautions” established under paragraph 2. This formula was part of the compromise involved in the amendment of the earlier draft text (see paragraph 15.3 above). Some countries have, pursuant to the authority conferred under article 24, decided to impose a more exacting standard

⁶⁸⁸See above, comments on article 12.

⁶⁸⁹See above, comments on article 3, paragraph 1, subparagraph (b).

⁶⁹⁰See above, comments on article 15, paragraph 1.

⁶⁹¹For the position in the United States, see 19 U.S.C. 1584 and 19 U.S.C. 1594.

⁶⁹²*Manual for Compliance with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Washington, D.C., United States Department of Justice, 1992), p. 53.

⁶⁹³See above, comments on article 5, paragraph 1, subparagraph (b), paragraph 2 and paragraph 4, subparagraphs (a) and (b).

of care on commercial carriers,⁶⁹⁴ and those responsible for implementing measures in this area will have to consider whether or not it would be appropriate to follow such broadly drawn precedents. Similarly, while the structure of paragraph 2 differentiates between carriers on the basis of whether their principal place of business is or is not within the territory of the party concerned, some States have declined to give expression to this distinction in their national policies and have opted for a uniform approach. The implementation process will thus have to include an assessment of the most appropriate posture to adopt in this regard.

⁶⁹⁴See, for example, "Report of the United States Delegation to the United Nations Conference for the adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances", 101st Congress, 1st Session, Senate, Exec. Rept. 101-15, p. 91.

ARTICLE 16

Commercial documents and labelling of exports

General comments

16.1 Hiding the identity of a product is one of the most frequently used methods for diverting or smuggling narcotic drugs and psychotropic substances. The importance of accurate labelling had indeed been acknowledged in the earlier conventions⁶⁹⁵ and in 1986 the first Interregional Meeting of Heads of National Drug Law Enforcement Agencies had called for measures to ensure that consignments of narcotic drugs and psychotropic substances were correctly described on all accompanying papers, customs documents and manifests.⁶⁹⁶ During the meetings of the open-ended intergovernmental expert group, however, the contents of what was to become article 16 proved controversial. A draft article was prepared but some representatives expressed reservations, suggesting that accurate labelling might induce criminal diversion by facilitating identification of the contents of a consignment.⁶⁹⁷ It was finally agreed, however, that such a risk was offset by the preventive value of that practice.

16.2 In the 1961 Convention, there are detailed provisions in article 31 regarding import and export authorizations, which are required to state the name of the drug, with the generic name or the international non-proprietary name, if any, the quantity to be imported or exported, and the name and address of the importer and exporter.⁶⁹⁸ A copy of the export authorization must accompany each consignment.⁶⁹⁹ Under article 12 of the 1971 Convention, the import or export authorization required for substances in Schedule I and Schedule II must

⁶⁹⁵1961 Convention and 1961 Convention as amended, art. 31; 1971 Convention, art. 12.

⁶⁹⁶See "First Interregional Meeting of Heads of National Drug Law Enforcement Agencies (Interregional HONLEA), Vienna, Austria, 28 July-1 August 1986: report" (E/CN.7/1987/3), para. 2, recommendation 8.

⁶⁹⁷*Official Records*, vol. I ..., document E/CN.7/1988/2 (Part II), para. 226.

⁶⁹⁸1961 Convention, art. 31, para. 4, subpara. (b).

⁶⁹⁹1961 Convention, art. 31, para. 6.

contain similar information⁷⁰⁰ and much of the same information is required for the export declaration for substances listed in Schedule III.⁷⁰¹

16.3 The final text of article 16 deals in paragraph 1 with the contents of certain commercial documents and in paragraph 2 with labelling. It also deals with consignments of narcotic drugs and psychotropic substances and can be compared with the provisions of article 12, under which it is provided that each party must, with respect to substances listed in Table I and Table II of the Convention, require that imports and exports be properly labelled and documented and that commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents must include the names, as stated in Table I or Table II, of the substances being imported or exported, the quantity being imported or exported, and the name and address of the exporter, the importer and, when available, the consignee.⁷⁰²

Paragraph 1

1. Each Party shall require that lawful exports of narcotic drugs and psychotropic substances be properly documented. In addition to the requirements for documentation under article 31 of the 1961 Convention, article 31 of the 1961 Convention as amended and article 12 of the 1971 Convention, commercial documents such as invoices, cargo manifests, customs, transport and other shipping documents shall include the names of the narcotic drugs and psychotropic substances being exported as set out in the respective Schedules of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention, the quantity being exported, and the name and address of the exporter, the importer and, when available, the consignee.

Commentary

16.4 In paragraph 1, the information to be contained in relevant commercial documents is specified, in addition to the documents required under the 1961 and 1971 Conventions. The listed types of commercial documents (invoices,

⁷⁰⁰1971 Convention, art. 12, para. 1, subpara. (b).

⁷⁰¹1971 Convention, art. 12, para. 2, subpara. (a).

⁷⁰²Art. 12, para. 9, subpara. (d).

cargo manifests, customs, transport and other shipping documents) are not exclusive. For example, air waybills are not expressly mentioned, though they could be treated as a type of “transport document”, but they are clearly within the scope of the paragraph. The term “commercial documents” covers not only the documents that may accompany the consignment but also documents connected with but not accompanying the goods.⁷⁰³ An example of additional information that might usefully be included in such commercial documents is the manufacturer’s “batch number”, which could be useful for identifying and tracing substances.

Paragraph 2

2. Each Party shall require that consignments of narcotic drugs and psychotropic substances being exported be not mislabelled.

Commentary

16.5 Paragraph 2 makes no positive requirement as to the labelling of packages. It was, however, judged desirable to oblige parties to prohibit the mislabelling of consignments, not only in the interests of those in charge of the control of narcotic drugs and psychotropic substances but also to counter other problems such as the mislabelling of non-pharmaceutical products purporting to be medicaments, a matter of concern to WHO.⁷⁰⁴ The wording would thus also assist authorities responsible for public health and the control of medicaments in general. To prevent such mislabelling, unauthorized abbreviations of names or codes should not be used; modifications in the names or quantities, including corrections or deletions, should not be permitted; and containers should be clearly and indelibly labelled.

Implementation considerations: article 16 as a whole

16.6 The Expert Consultation on the Control of Brokers and Transit Operators Handling Psychotropic Substances and Precursors, organized jointly by the International Narcotics Control Board and the Pompidou Group of the Council of Europe in May 1995, concluded that the intentional mislabelling of

⁷⁰³*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 4th meeting, para. 34.

⁷⁰⁴*Ibid.*, para. 42 (referring to a resolution of the 1988 World Health Assembly (WHA 41.26)).

goods was a major factor contributing to the diversion of both drugs and precursors from licit channels into the illicit traffic. The group recommended that mislabelling and falsification of commercial documents to facilitate such diversion should be made a punishable offence, with more severe penalties than for comparable offences involving non-controlled substances.⁷⁰⁵

16.7 A number of tell-tale signs should arouse the suspicion of control authorities and may indicate an attempt to obfuscate the origin or nature of a shipment.⁷⁰⁶ Particular attention should be paid to any change in packaging or labelling from that of the original manufacturer or shipper, especially if the alteration is known or suspected to have taken place in a transit State or in a free trade zone or free port. Similarly, authorities in a transit State should be wary of any request for a change in the packaging or labelling of consignments in transit.

16.8 The advantages and disadvantages of specific labelling have already been debated at the international level (see paragraph 16.1 above), and the provisions of article 12, paragraph 9, subparagraph (d), and article 16, paragraph 1, require all documentation to reflect the names of narcotic drugs, psychotropic substances and precursors as they appear in the Schedules of the 1961 and 1971 Conventions and the Tables of the 1988 Convention. Any non-specific nomenclature (such as “organic chemicals” for “toluene”) should provoke a closer examination of the shipment to determine whether or not it is bona fide. In this connection, national control authorities will find it useful and convenient to consult and use the specific codes in the Harmonized System of Customs Nomenclature of the World Customs Organization.

⁷⁰⁵See, “Report of proceedings, conclusions and recommendations” (INCB/PS/1995/W.4), Expert Consultation on the Control of Brokers and Transit Operators Handling Psychotropic Substances and Precursors, organized by the International Narcotics Control Board and the Pompidou Group, Vienna, 3-5 May 1995.

⁷⁰⁶See, the International Narcotics Control Board “Guidelines for use by national authorities in preventing the diversion of precursors and essential chemicals”.

ARTICLE 17

Illicit traffic by sea

General comments

17.1 Article 17 contains highly innovative law enforcement provisions designed to promote international cooperation in the interdiction of vessels engaged in the illicit traffic in drugs by sea. The article is intimately connected with a number of other key provisions of the 1988 Convention. Thus, while its focus is on facilitating the acquisition of enforcement jurisdiction in relation to suspect vessels, the overall effectiveness of the scheme depends on the possession by States of appropriate prescriptive jurisdiction. This is the function of article 4.⁷⁰⁷ Furthermore, law enforcement activity in this area is but one aspect of the wider issue of police and customs cooperation to combat and suppress the commission of relevant offences. It should therefore be examined in conjunction with, among others, article 9 (Other forms of co-operation and training).⁷⁰⁸

17.2 Despite the importance of drug smuggling by sea, the earlier conventions on drug trafficking contained no express provisions on the topic.⁷⁰⁹ There was some reference to the matter in the 1958 Convention on the Territorial Sea and the Contiguous Zone.⁷¹⁰ By way of contrast, there is no reference to illicit drug trafficking in the 1958 Convention on the High Seas.⁷¹¹

⁷⁰⁷See above, comments on article 4.

⁷⁰⁸See above, comments on article 9.

⁷⁰⁹See W. C. Gilmore, "Drug trafficking by sea", *Marine Policy*, No. 183, 1991.

⁷¹⁰Article 19, paragraph 1, subparagraph (d), authorizes the coastal State to exercise criminal jurisdiction on board a foreign ship passing laterally through the territorial sea if such action "is necessary for the suppression of illicit traffic in narcotic drugs"; paragraph 2 of the article leaves unaffected the right of the coastal State to exercise such jurisdiction on board a foreign ship passing through the territorial sea after leaving internal waters.

⁷¹¹The 1958 Convention on the High Seas authorizes boarding of a foreign merchant vessel on the high seas only on suspicion of piracy or of the slave trade, or because the vessel is actually of the same nationality but misusing a foreign flag or refuses to show its flag (article 22).

17.3 The first substantial provisions applicable beyond the territorial sea are those of article 108 of the 1982 United Nations Convention on the Law of the Sea.⁷¹² That article, entitled “Illicit traffic in narcotic drugs and psychotropic substances”, reads as follows:

“1. All States shall co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.

2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.”

By virtue of article 58, paragraph 2, of the same Convention, this obligation applies in the exclusive economic zone as well as on the high seas.⁷¹³

17.4 Although opinion was initially against making specific reference to the question of boarding vessels flying foreign flags in any revision of the 1961 Convention,⁷¹⁴ it was the view of the Commission on Narcotic Drugs that a provision should be included in what became the 1988 Convention, and an article on the subject was included in the earliest drafts. The present text is a considerably developed version of the text included in those drafts.

Paragraph 1

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

⁷¹²*The Law of the Sea: United Nations Convention on the Law of the Sea* (United Nations publication, Sales No. E.83.V.5).

⁷¹³The paragraph reads: “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part”, namely part V of the convention, entitled “Exclusive economic zone”.

⁷¹⁴See the report of the Expert Group on the Functioning, Adequacy and Enhancement of the Single Convention on Narcotic Drugs, 1961 (E/CN.7/1983/2/Add.1), para. 4.

Commentary

17.5 The text of paragraph 1 builds on article 108, paragraph 1, of the 1982 Convention on the Law of the Sea (see paragraph 17.3 above). It imposes an obligation on parties to cooperate in this matter, the importance of which is emphasized by the words “to the fullest extent possible”. The reference to the international law of the sea⁷¹⁵ links the 1988 Convention to the relevant articles of the 1982 Convention on the Law of the Sea in that the relevant rules of the international law of the sea are reflected, in large measure, in the latter convention.

Paragraph 2

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

Commentary

17.6 Paragraph 2 develops the text of article 108, paragraph 2, of the 1982 Convention on the Law of the Sea (see paragraph 17.3 above) with respect to the assistance that a party may request in suppressing the use of a vessel flying its flag for illicit drug trafficking. In contrast to article 108, the provisions of the present paragraph also apply to ships without nationality.⁷¹⁶ The second sentence qualifies the obligation of requested parties to render such assistance, as the phrase “within the means available to them” recognizes that there may be practical limitations on the ability of some parties to assist as fully as requested (see paragraphs 17.43-17.46 below).

⁷¹⁵An amendment to include the reference was originally withdrawn (see *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 17th meeting, para. 34), but the words were added again at a later stage as a result of informal discussions.

⁷¹⁶The 1982 Convention deals with ships without nationality in its article 92 (Status of ships) and article 110 (Right of visit).

Paragraph 3

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

Commentary

17.7 The drafting of paragraph 3 proved highly controversial. That was not because of any difficulty with the principle but because of disagreement over the description of the maritime area to which it applied. In the draft before the Conference, the text referred to a vessel “beyond the external limits of the territorial sea of any State”.⁷¹⁷ An earlier version of the text had used the expression “the high seas as defined in Part VII of the United Nations Convention on the Law of the Sea”.⁷¹⁸

17.8 The reference to the exercise of “freedom of navigation in accordance with international law” in paragraph 3 and the statement in paragraph 11 that any action taken in accordance with article 17 must “take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea” are the result of a difficult compromise between those States which supported the exercise of enforcement powers beyond the outer limits of the territorial sea and those which claimed that other States did not have the right to take such action in the exclusive economic zone of a coastal State.⁷¹⁹ The discussions that took place during the Conference indicate that there was general agreement that the provisions of the 1982 Convention on the Law of the Sea would constitute the basis for article 17 and that the “international law” referred to in paragraph 3

⁷¹⁷See *Official Records*, vol. I ..., document E/CONF.82/12, “Article 12” (E/CONF.82/C.2/L.13/Add.11), sect. I, para. 1, p. 154.

⁷¹⁸*Ibid.*, document E/CN.7/1987/2, sect. II (“Article 12”).

⁷¹⁹See, for example, *Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 17th meeting, paras. 7-52; 20th meeting, paras. 1-4; 28th meeting, para. 1; and 29th meeting, paras. 1-128 and annex.

and the “international law of the sea” referred to in paragraph 11 were that law as reflected in the 1982 Convention.

17.9 Under article 87, paragraph 1, subparagraph (a), and article 58, paragraph 1, of the 1982 Convention on the Law of the Sea, all States, whether coastal or land-locked, enjoy freedom of navigation on the high seas and in the exclusive economic zone. That freedom is subject to the general responsibility imposed on flag States to act in conformity with the 1982 Convention and other rules of international law, to have due regard to the interests of other States on the high seas and to have due regard to the rights and duties of the coastal State in the exclusive economic zone. The rights and duties of the coastal State in the exclusive economic zone are provided for in article 56 of the 1982 Convention.⁷²⁰

17.10 The rights and obligations and the exercise of jurisdiction of the coastal State under the 1982 Convention on the Law of the Sea, which are fully protected under article 17, paragraph 11, of the 1988 Convention, include the coastal State’s right to exercise jurisdiction in its contiguous zone in order to prevent and punish infringement of its customs and fiscal laws and regulations,⁷²¹ and to exercise the right of hot pursuit.⁷²²

17.11 In connection with the former right, State practice shows, and the discussions that took place during the Conference generally support, the assumption that illicit traffic in narcotic drugs and psychotropic substances is accepted as constituting an infringement of the customs and fiscal laws and regulations within the territory or territorial sea of a coastal State. Article 33 of the 1982 Convention on the Law of the Sea permits a coastal State to establish a contiguous zone extending to a maximum limit of 24 miles from the baselines from which the breadth of the territorial sea is measured, in which it may exercise the control necessary to prevent infringement of its “customs, fiscal, immigration or sanitary laws and regulations”.

⁷²⁰They are, in essence, “sovereign rights” over the natural resources of the zone, and jurisdiction with respect to the establishment of artificial islands, installations and structures, marine scientific research, the protection and preservation of the marine environment, and other rights and duties provided for in the 1982 Convention.

⁷²¹1982 Convention, art. 33.

⁷²²*Ibid.*, art. 111.

17.12 A number of representatives made statements in the plenary meetings regarding their understanding of the position reached in the negotiations. The United States representative observed⁷²³ that, in his view, paragraph 11 referred to “the limited set of situations in which a coastal State had rights beyond the outer limit of the territorial sea: those involved hot pursuit in the exclusive economic zone and on the high seas and the exercise of contiguous zone jurisdiction”. The paragraph did not imply endorsement of any broader coastal State claims regarding illicit traffic interdiction in the exclusive economic zone. A statement to similar effect was made by the representative of the Netherlands, supported by the representative of the United Kingdom.⁷²⁴ The representative of Mauritania observed that it was his understanding that the Convention would be applied “without prejudice to the rights of coastal States in territorial waters and their prerogatives, and in the contiguous zone and the exclusive economic zone under the international law of the sea”.⁷²⁵ The representatives of India and the Ukrainian Soviet Socialist Republic submitted written observations to the same effect for inclusion in the *Official Records* under a procedure adopted by Committee II.⁷²⁶

17.13 In paragraph 3, a party that has reasonable grounds to suspect that the vessel concerned is engaged in illicit traffic is required to approach the flag State, first to confirm the registry of the vessel and secondly to obtain authorization to take appropriate measures. Very little is said regarding the manner in which a request is to be made or the contents of a request; that is in sharp contrast to the detailed provisions in article 7 in the context of mutual legal assistance. There are, however, procedural provisions in paragraph 7, which are considered below, and paragraph 4 is concerned with some “appropriate measures” to be taken.

17.14 In paragraph 3, and indeed in paragraph 4, reference is made to authorization by the flag State. That wording was deliberately chosen to stress the positive nature of the decision which the flag State, in the exercise of its sovereignty, was to take with regard to its vessel. Nothing in the article was

⁷²³*Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, para. 80.

⁷²⁴*Ibid.*, paras. 81 and 83.

⁷²⁵*Ibid.*, para. 84.

⁷²⁶*Ibid.*, Summary records of meetings of the Committees of the Whole, Committee II, 29th meeting, annex.

intended in any way to affect the rights of the flag State with regard to its vessel and there is no obligation on a flag State to provide the authorization requested; it is entirely within the discretion of that State to decide whether or not to allow another party to act against its vessel.⁷²⁷

17.15 In the discussion of paragraph 3, the representative of Canada indicated that it was not the practice of the Canadian Government, when responding to requests of the type to be covered by the paragraph, to grant permission; its practice, instead, was to express no objection to the proposed action. The Government considered that to be consistent with the provisions of the Convention.⁷²⁸

Paragraph 4

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, *inter alia*:

(a) Board the vessel;

(b) Search the vessel;

(c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

Commentary

17.16 Paragraph 4 describes action that may be taken. It is related to paragraph 3 in so far as it sets out action that may be authorized under that paragraph, but it also codifies practices that may be authorized in accordance with treaties in force between the relevant parties or in accordance with any agreement or arrangement otherwise reached between them.

⁷²⁷Ibid., 29th meeting, para. 7.

⁷²⁸Ibid., 29th meeting, annex.

17.17 The drafting of the paragraph was intended to make clear the disjunctive nature of the various processes which might be taken against the vessel concerned: boarding; search; and, only if evidence of illicit traffic were found, further appropriate action with respect to the vessel, persons and cargo on board.⁷²⁹ There is no greater specificity in respect of the further appropriate action: a reference to the seizure of the vessel in an earlier draft had deliberately been omitted,⁷³⁰ but this omission was balanced by the inclusion of the phrase “*inter alia*”, which indicates that the range of possible actions is not limited to those expressly mentioned.⁷³¹

Paragraph 5

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

Commentary

17.18 Paragraph 5 was inserted to ensure that action under paragraphs 3 and 4 did not endanger the vessel concerned, its crew or cargo, or the legal rights or legitimate commercial interests of the flag State or any other interested State. The language is carefully chosen: the parties are to “take due account of” the considerations listed in the text; there is no absolute language, a recognition, for example, that some prejudice to legitimate commercial interests may be inevitable if the onward progress of the vessel is halted or delayed.

Paragraph 6

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

⁷²⁹Ibid., 29th meeting, para. 8.

⁷³⁰Ibid.

⁷³¹See below, comments on article 17, paragraph 6.

Commentary

17.19 It has already been emphasized (see paragraph 17.14 above) that no party is obliged to grant the authorizations referred to in paragraphs 3 and 4. The additional point is made that, where authorization is granted, it may be subject to conditions; it is not an “all-or-nothing” situation. Although the conditions are to be mutually agreed, the reality is that the flag State can define the terms on which it is prepared to grant the necessary authorization (see paragraphs 17.35-17.36 below).

17.20 A particular concern lay behind the inclusion of such a provision and it is reflected in the final phrase, the reference to conditions relating to responsibility. The responsibility or liability⁷³² meant is for damage to the vessel or its cargo or to any third party, or injury to the crew, which may be caused in the course of, or as a result of, the boarding or search of the vessel or the taking of further appropriate action. Whether any responsibility exists in respect of damage suffered by the requested party will be a matter for the law governing any claim; it is not dealt with in the Convention. In this context, the reference to the mutual agreement of conditions may be more meaningful, as jurisdiction and choice of law in respect of any claim could be mutually agreed; this would, however, be appropriately considered in formulating standard practices between pairs of parties and not in the context of a request for immediate authorization.

Paragraph 7

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

⁷³²The word “responsibility” was preferred in order to accommodate the needs of different legal systems.

Commentary

17.21 In paragraph 7, parties are required to respond expeditiously to requests made in accordance with paragraphs 3 and 4 and, as one means of securing that expedition, the concept is introduced of an authority designated to respond to requests. A party may “when necessary” designate more than one authority. The Convention text does not encourage this (for in practice it can lead to delays where the request is initially sent to an inappropriate authority) but legal and geographical considerations may make it essential that different authorities be designated in respect of different areas (see paragraphs 17.28-17.31 below). The text assumes direct communication with the designated authority rather than any indirect approach such as one made via the diplomatic channel; such direct communication is highly desirable given the urgency of such requests.

Paragraph 8

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

Commentary

17.22 The provision in paragraph 8 underlines the authority of the flag State over actions taking place with respect to its vessels. At a more practical level, it makes for good relations between the relevant authorities that information should be promptly exchanged.

Paragraph 9

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

Commentary

17.23 Paragraph 9 is one of the exhortatory paragraphs of the Convention, imposing no obligation upon parties save that of giving consideration to certain possibilities. Paragraph 4 makes express reference to the possibility of agreements or arrangements between parties in the context of the authorizations that may be granted under that paragraph. The present provision signals the usefulness of such agreements and arrangements across the whole range of

issues covered by this article. They may be bilateral or regional, and may deal with the detailed implementation of the terms of the article (for example, means of communication to ensure expeditious handling of requests) or the enhancement of its effectiveness (for example, by the exchange of relevant information within the spirit of article 9, paragraph 1, of the Convention).

Paragraph 10

10. Action pursuant to paragraph 4 of this article shall 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.

Commentary

17.24 The wording of paragraph 10 is based on that of article 107 and article 111, paragraph 5, of the 1982 Convention on the Law of the Sea. It is designed to restrict the types of ships and aircraft that may properly be used in interdiction operations.

Paragraph 11

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.

Commentary

17.25 Paragraph 11, a particularly important one, was included as part of the resolution of the long discussions on the drafting of paragraph 3 of the article and has been examined in the commentary on that paragraph (see paragraphs 17.8-17.10 above).

Implementation considerations: article 17 as a whole

General comments

17.26 As emphasized above, article 17 of the Convention is a highly innovative law enforcement provision designed to promote international cooperation in the interdiction of vessels engaged in the illicit traffic of drugs by

sea. To that end, it formulates various procedures, practices and standards that need to be implemented effectively by parties. Article 17 is, however, essentially a framework provision and, unlike article 7, on mutual legal assistance, is not a self-contained “mini-treaty”.⁷³³ Consequently, those responsible for implementing it will have to address themselves to a broad range of both policy and practical concerns. It must be acknowledged that international practice in this sphere is less fully developed than in many other areas of cooperation dealt with in the 1988 Convention. Guidance in some areas was given in the report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995,⁷³⁴ which was endorsed by the Commission on Narcotic Drugs in its resolution 8 (XXXVIII).⁷³⁵ Similarly, there is a small but growing treaty practice in this area of concern which may be worth examining. While much of it is bilateral in nature,⁷³⁶ it has recently been supplemented by a detailed multilateral instrument, the 1995 Council of Europe Agreement on Illicit Traffic by Sea, Implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.⁷³⁷

17.27 In article 17, law enforcement activity is envisaged as taking place beyond the outer limit of the territorial sea and as being conducted in a manner that is “in accordance with the international law of the sea” (see paragraphs 17.7-17.9 above). The centrality of this concern with pre-existing norms of the international law of the sea is further reflected in the decision to include the non-derogation provision of paragraph 11. The “international law of the sea” is reflected in the provisions of the 1982 Convention on the Law of the Sea. It is therefore important to ensure that article 17 is implemented in

⁷³³See above, comments on article 7.

⁷³⁴E/CN.7/1995/13.

⁷³⁵See *Official Records of the Economic and Social Council, 1995, Supplement No. 9* (E/1995/29), chap. XII, sect. A.

⁷³⁶See, for example, the exchange of notes of 13 November 1981 between the Government of the United Kingdom and the Government of the United States concerning cooperation in the suppression of the unlawful importation of narcotic drugs into the United States; and the Treaty between Spain and Italy to combat illicit drug trafficking at sea of 23 March 1990.

⁷³⁷For the text of this important Agreement and the associated official Explanatory Report, see Council of Europe document CDPC (94) 22, Addendum of 27 June 1994 (European Treaty Series No. 156).

conformity with that Convention. Given the specialized nature of this complex branch of international law, the preparation of a manual of practical guidance may prove useful for those involved in the decision-making process.

The interdiction of foreign flag vessels

17.28 As a practical matter, the most common situation in which article 17 applies is when the law enforcement authorities of one State wish to take action against a vessel flying the flag of another party to the 1988 Convention. While not all countries have the technical capability to project their national police power into ocean areas, all are potential recipients of requests for information or authorization from others made in accordance with paragraphs 3 and 4. Consequently, in paragraph 7 each party is required to designate an authority or authorities to receive and respond to such requests.⁷³⁸ This designation must, in turn, be transmitted to the Secretary-General, who will notify all other participating States. This essential contact information, including addresses, telephone and facsimile numbers, and hours of operation, is published by the United Nations and updated on a periodic basis.⁷³⁹

17.29 While it is for each country to determine the appropriate location for its designated national authority and the powers and functions to be entrusted to it, the need for it to be in a position to respond effectively and efficiently to incoming requests is, if anything, even more important than in other areas of international cooperation. This flows from the fact that such requests will emerge in an enforcement context and will relate directly to the often difficult operational environment presented by open ocean areas. Given the fact that law enforcement action against the flag vessels of other parties can, under paragraphs 3 and 4, only be undertaken with the prior authorization of the flag State, the opportunity to take effective measures often may be lost if there are delays in responding to such requests.

17.30 In recognition of this fact, parties to the 1995 Council of Europe Agreement are required "so far as is practicable" to ensure that their designated authorities are in a position to respond to requests for authorization on a

⁷³⁸This would also include land-locked States that have authorized vessels to fly their flags.

⁷³⁹*Competent National Authorities Under the International Drug Control Treaties*, published by the United Nations in the ST/NAR.3 symbol series.

24-hour-a-day, seven-days-a-week basis.⁷⁴⁰ Furthermore, they are obligated to “communicate a decision ... as soon as possible and, wherever practicable, within four hours of receipt of the request”.⁷⁴¹ In its report, the Working Group on Maritime Cooperation also emphasized the importance of speedy decision-making and efficient communication in this regard.⁷⁴²

17.31 In order to ensure that the designated authority is in a position to respond expeditiously to a request from another party, as required in paragraph 7, it is highly desirable to provide for direct contact between the relevant national authorities (as apparently assumed by the drafters) rather than to use the much more cumbersome diplomatic channel. Thus, the provision of appropriate telephone and facsimile links should be a high priority. In situations where such direct contact is not practicable, parties may wish to consider the use of channels of communication available through Interpol or the World Customs Organization.⁷⁴³

17.32 Pursuant to article 17, paragraphs 3 and 4, the designated authority will be subject to at least two different, but clearly interrelated, types of request. The first will be to confirm the registry (and hence the nationality) of a suspect vessel. To that end, it is essential that each State should maintain a register containing information on vessels authorized to fly its flag and that the same should be readily accessible to the designated authority.⁷⁴⁴ It is widely acknowledged, however, that certain countries may require technical assistance in their efforts to upgrade their domestic systems in this regard, in order to ensure that the information is available in a form that will make it possible to respond promptly to requests.

⁷⁴⁰1995 Council of Europe Agreement, art. 17, para. 1.

⁷⁴¹*Ibid.*, art. 7.

⁷⁴²“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 16.

⁷⁴³See, for example, the 1995 Council of Europe Agreement, article 18, paragraph 2.

⁷⁴⁴“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 1.

17.33 The second type of request envisaged in these paragraphs is for authorization “to take appropriate measures in regard to that vessel”.⁷⁴⁵ Such measures may include, *inter alia*, boarding and search of the vessel and, where “evidence of involvement in illicit traffic is found,” the taking of “appropriate action with respect to the vessel, persons and cargo on board”.⁷⁴⁶ Any such decision, which is in the sole discretion of the requested State, may be made subject to certain conditions.⁷⁴⁷ In order to be in a position to respond promptly and consistently to such requests, the requested State will need to be provided with sufficient relevant information on the facts of each case. It will also need to have in place a settled policy framework within which to determine whether or not to respond positively to the request and, if so, subject to what conditions, if any.

17.34 As far as the sufficiency of information is concerned, article 17 is silent as to the procedural and other general rules that are to govern such requests. Consequently, decisions will have to be taken on a range of matters, including the required form of requests, the language or languages in which requests must be formulated and, an issue of particular importance, the types of information each request should contain.⁷⁴⁸ In the latter context, the Working Group on Maritime Cooperation⁷⁴⁹ has suggested the use of the following standard format for “action requests”:

1. Identification of the requesting party, including the authority issuing the request and the agency charged with taking measures
2. Vessel description, including name, flag and port of registration and any other information regarding the vessel
3. Known details concerning voyage and crew
4. Sighting information and weather report

⁷⁴⁵Art. 17, para. 3.

⁷⁴⁶*Ibid.*, para. 4, subpara. (c).

⁷⁴⁷See above, comments on article 17, paragraph 6.

⁷⁴⁸See, for example, 1995 Council of Europe Agreement, articles 19, 20 and 21.

⁷⁴⁹“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 3.

5. Reason for request (articulation of the circumstances supporting the intervention)
6. Intended action
7. Any other relevant information
8. Action requested by the intervening State (including confirmation of vessel registry and permission to board and search, if applicable), together with any time-limits.

It is, of course, open to any party to vary its requirements in this regard, as well as to request additional information in any case.

17.35 As noted above, pursuant to paragraph 6 of article 17, the flag State may subject its authorization to conditions which are to be “mutually agreed” with the requesting State. While specific reference is made to conditions relating to responsibility, it is clear that there are no limits to the rights of the flag State in this regard. As a practical matter, however, it is equally apparent that this facility for the protection of the interests of the requested party must be used with caution and moderation if the full potential of article 17 is to be realized. As stated in the official explanatory report on the 1995 Council of Europe Agreement: “If the flag State imposed conditions which were not acceptable to the intervening State, it would refrain from the intervention. The Committee agreed therefore that States should be cautious in using conditions and only make use of them when strictly necessary.”⁷⁵⁰ When conditions are imposed by the flag State and an intervention based on article 17 subsequently takes place, they are binding on the intervening State. Consequently, failure to comply with these conditions may trigger international responsibility and legal liability.

17.36 State practice in this area reveals a wide variety of issues that have proved to be of importance to individual flag States. In addition to liability for loss, damage or injury resulting from law enforcement operations,⁷⁵¹ these include, *inter alia*, costs normally borne by the intervening State,⁷⁵² restrictions

⁷⁵⁰Explanatory Report on the 1995 Council of Europe Agreement, para. 44.

⁷⁵¹See above, comments on article 17, paragraph 6.

⁷⁵²See, for example, the report of the Working Group on Maritime Cooperation (E/CN.7/1995/13), recommendation 19; see also the 1995 Council of Europe Agreement, article 25, paragraph 1.

on the use of information or evidence obtained,⁷⁵³ the treatment of nationals of the flag State,⁷⁵⁴ the reservation of rights to object, within a specific time-frame, to the continued exercise of jurisdiction over the vessel or persons on board,⁷⁵⁵ and restrictions on the taking of the vessel into the jurisdiction of a third State.⁷⁵⁶ It is important, however, that any temptation to impose conditions in order to rearrange the scheme of article 17 should be resisted. If a party concludes that for constitutional, legal or other reasons such a radical revision is required, consideration should be given to the negotiation of bilateral or regional agreements or arrangements under the mandate provided by paragraph 9.⁷⁵⁷ This approach is also warranted where it is desired to simplify the 1988 Convention scheme in a significant manner by, for example, providing for a general advance authorization for boarding and related measures.⁷⁵⁸

17.37 Since the grant of authorization to a requesting State is always discretionary, arrangements should be made for the effective and prompt exercise of that discretion. The identification of the appropriate framework for the exercise of this power will have a bearing on the issue of where, within the governmental system, the designated national authority should be located. While article 17 does not require that reasons be given to the requesting State in instances in which a request for authorization is denied,⁷⁵⁹ it would be within the spirit of the Convention to indicate, in appropriate cases, the basis for the

⁷⁵³See, for example, the 1995 Council of Europe Agreement, articles 23 and 24.

⁷⁵⁴1995 Council of Europe Agreement, art. 8, para. 2.

⁷⁵⁵See, for example, the 1981 exchange of notes between the United Kingdom and the United States, paragraphs 4 and 5.

⁷⁵⁶See, for example, the Explanatory Report on the 1995 Council of Europe Agreement, paragraph 44.

⁷⁵⁷It is arguable, for example, that the complex provisions required to give full effect to the concept of "preferential jurisdiction" for the flag State are best met by resort to bilateral or multilateral instruments giving expression to this concept in relation to illicit traffic by sea (see the 1990 Treaty between Italy and Spain and the 1995 Council of Europe Agreement).

⁷⁵⁸The advance "waiver of objection" system used in the 1981 exchange of notes between the United Kingdom and the United States is relevant in this context. The 1991 Treaty between Italy and Spain uses the concept of "agency" in article 5 to achieve a similar result. It should be noted, however, that it does so within a context of preferential jurisdiction for the flag State.

⁷⁵⁹In contrast to the position taken under article 7, paragraph 16, in relation to mutual legal assistance.

decision taken. Indeed, some might regard it as appropriate to institute a policy whereby no request would be refused without prior consultation between the relevant designated national authorities.

17.38 Given the fact that authorized operations of the type contemplated here depart from the norm of exclusive flag-State jurisdiction on the high seas, it would be prudent for all States to take steps to reduce the possibility of misunderstanding on the part of operators of their flag vessels, and others with a practical interest, as to the nature of the arrangements set out in article 17. This point is clearly emphasized in article 22 of the 1995 Council of Europe Agreement, which reads:

“Each Party shall take such measures as may be necessary to inform the owners and masters of vessels flying their flag that States Parties to this Agreement may be granted the authority to board vessels beyond the territorial sea of any Party for the purposes specified in this Agreement and to inform them in particular of the obligation to comply with instructions given by a boarding party from an intervening State exercising that authority.”

An initiative of this kind may be but one part of a wider scheme to associate those involved in maritime transport in the overall effort to combat illicit drug traffic by sea.⁷⁶⁰

17.39 Article 17 also imposes certain obligations and restrictions on the requesting State. Thus, law enforcement action may, under paragraph 10 and following normal international practice, only be carried out by certain categories of public ships and aircraft. Furthermore, paragraph 8 imposes a requirement of prompt reporting to the flag State of the results of any action taken. Finally, it must take “due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State”.⁷⁶¹

17.40 In the discharge of their obligations, intervening States will need to ensure that law enforcement personnel receive appropriate training and guidance and that procedures are put in place to secure compliance with accepted

⁷⁶⁰See the report of the Working Group on Maritime Cooperation (E/CN.7/1995/13), recommendation 23 for further thoughts on the nature and scope of such a programme.

⁷⁶¹Art. 17, para. 5.

international norms. For example, it is essential that arrangements should be introduced to guarantee that in stopping and boarding a vessel, resort to the use of armed force is undertaken only as a last resort and in a manner consistent with relevant rules of customary international law.⁷⁶² Similarly, practical arrangements must exist whereby the designated national authority can promptly inform the responsible law enforcement authorities of any conditions and limitations that may have been imposed by the flag State and with which they must comply.

17.41 As stressed in the comments on article 4 (see paragraphs 4.27-4.29 above), the enactment of adequate implementing legislation is essential to the proper functioning of the regime of cooperation provided by article 17. Of particular relevance is the provision thereby of comprehensive enforcement powers in respect of foreign flag vessels. For example, the First Schedule of the 1994 Irish Criminal Justice Act⁷⁶³ contains detailed treatment of, among other matters, the power to search and obtain information, powers of arrest and seizure, the use of reasonable force, the production of evidence of authority, the definition of relevant offences, and the provision of appropriate legal protection for the officers involved. Each party should give consideration to its needs in this area and ensure appropriate implementation.

17.42 It is also important for potential intervening States to give advance consideration to the circumstances in which they will normally make use of the facility to request authorization. For example, in the view of the Committee of Experts which drew up the 1995 Council of Europe Agreement, account should be taken of “the reasons militating against action against vessels in scheduled passenger service or larger vessels in commercial trade. Such vessels could often usefully be searched at the next port of call, in particular if the next port of call is located in the territory of a Party to the agreement or to the Vienna Convention”.⁷⁶⁴ Furthermore, in some instances the use of alternative co-operative law enforcement strategies may be indicated. It was the view of the Working Group on Maritime Cooperation that, where operational circumstances permit, “preference should be given to the surveillance of vessels and the increased use of controlled delivery in order to target the crime syndicates involved, rather than to boarding operations. In this case measures should be considered to ensure the integrity of the illicit shipment and to prevent its

⁷⁶²See, for example, the 1995 Council of Europe Agreement, article 2, paragraph 1, subparagraph (d), and paragraphs 2 and 3.

⁷⁶³Act No.15 of 1994.

⁷⁶⁴Explanatory Report on the 1995 Council of Europe Agreement, para. 53.

possible diversion or transshipment before the vessel arrives at its planned point of destination.”⁷⁶⁵

Other forms of cooperation

17.43 While the primary focus of article 17 is to facilitate law enforcement action in relation to illicit drug traffic by sea involving the vessels of other parties, it is not solely concerned with that matter. This fact is underlined by the terms of paragraph 2, which specifically contemplate the provision of assistance to a flag State suppressing the use of one of its own vessels or repressing the use of a stateless vessel for the purpose of such illicit traffic. In neither case, however, is further guidance provided by the text as to the manner in which, or the limits within which, such cooperative activity is to take place. The provision merely indicates that such assistance is to be rendered by parties to the Convention “within the means available to them”. It is for the requested party alone to assess whether or not it possesses the relevant means in each case.

17.44 In so far as assistance to a flag State is concerned, it can be expected that requests will normally envisage the taking of some or all of the actions contemplated in paragraph 4. Assistance can, however, also be sought for a wide range of other purposes. These might include searching for the suspect vessel, preventing it from unloading or trans-shipping its cargo, facilitating the presence of the law enforcement officials of the flag State on board the pursuing vessel and like matters. It is implicit in the nature of the process and explicit in article 4, paragraph 2, of the Council of Europe Agreement that the flag State may subject its request for assistance to such conditions and limitations as it sees fit. The requested party may similarly wish to articulate the conditions upon which it would be prepared to respond positively.

17.45 Two issues in particular are worth considering. The first relates to meeting the costs, which may be substantial, of giving effect to the request. As noted above, in normal circumstances, where action is taken at the initiative of the intervening State against a vessel of another party, the costs are generally met by the intervening State. In the special circumstances being considered here, however, international practice is less well established. It was the view of the Working Group on Maritime Cooperation that, in instances of assistance to and at the request of a flag State, it (and not the intervening State) should, save

⁷⁶⁵“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 22; see also above, comments on article 11.

where otherwise agreed, meet the costs involved.⁷⁶⁶ A somewhat different solution was formulated within the Council of Europe. Under article 25, paragraph 1, of the 1995 Agreement, the requested State would normally be expected to meet the costs involved. As the explanatory report points out, however, “where substantial or extraordinary costs are involved, it can be assumed that ... the State requesting assistance would be asked to share the burden of the intervention In such cases, it would be necessary for the concerned Parties to seek an agreement on the apportionment of the costs. Failing such agreement, the intervention would probably not take place.”⁷⁶⁷ Similar considerations apply to action against vessels without nationality undertaken at the request of another party (see paragraph 17.47 below).

17.46 A second area that may command special attention from some countries in the light of international practice relates to liability for damage. Here the question arises whether the preponderant practice of allocating liability to the intervening State should be resorted to in such circumstances. The Committee of Experts that drew up the Council of Europe Agreement was of the view that a special rule was needed. It is contained in article 26, paragraph 3, of the Agreement and reads as follows: “Liability for any damage resulting from action under Article 4 [assistance to flag States] shall rest with the requesting State, which may seek compensation from the requested State where the damage was a result of negligence or some other fault attributable to that State.”

17.47 In article 17, paragraph 2, requests for assistance are also contemplated to suppress the use of vessels “not displaying a flag or marks of registry” in illicit drug trafficking activity. The decision to refer to such vessels constitutes an explicit acknowledgement of the extent to which vessels without nationality and those assimilated to vessels without nationality under international law are in fact used by those engaged in the illicit drug traffic. In this case, however, there are significant differences compared with the other cooperative situations considered thus far. In particular, each State has, independently of the 1988 Convention, certain rights under article 110 of the 1982 Convention on the Law of the Sea, namely, the right to visit a vessel without nationality, which in accordance with article 92, paragraph 2, also includes a vessel flying the flags of two States, using them according to convenience. Article 110 indicates that the exercise of the right of visit involves boarding (paragraph 1) and inspection

⁷⁶⁶“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 19.

⁷⁶⁷Explanatory Report on the 1995 Council of Europe Agreement, para. 89.

(paragraph 2) of a ship. It would accordingly not be warranted to recognize any right on the part of a requesting State to attach conditions or limitations. It is for the requested party alone to determine what actions are appropriate.⁷⁶⁸ The obligation of the requested State, however, is to provide assistance within the means available to it and, as noted above, it may properly have regard to economic factors, including the expected costs of undertaking any relevant law enforcement action, in making that determination. In certain cases, it may be considered appropriate to make any positive response to a request contingent upon agreement as to the apportionment of such costs.⁷⁶⁹

17.48 While article 17 deals specifically only with the three categories of assistance examined above, the obligation of cooperation “to the fullest extent possible” is capable of encompassing other forms of valuable international activity relevant to the suppression of illicit traffic by sea. One area that is particularly emphasized in the report of the meeting of the Working Group on Maritime Cooperation relates to facilitating and enhancing the exchange, through appropriate channels, of general information on vessels suspected of involvement in the international drug trade and related matters.⁷⁷⁰ In particular, the Working Group recommended that States should identify, to the extent possible, and disseminate in a timely fashion to other States directly or through Interpol, the World Customs Organization, Mar-Info⁷⁷¹ or other organizations or communication networks operating or involved in that field, those indicators that, in their judgement, might assist in the identification of vessels that were involved, or that might soon become involved, in illicit drug trafficking.⁷⁷² The

⁷⁶⁸See, for example, the 1995 Council of Europe Agreement, article 5, paragraph 2.

⁷⁶⁹See, for example, the Explanatory Report on the Council of Europe Agreement, paragraph 89.

⁷⁷⁰“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), annex to recommendations.

⁷⁷¹Mar-Info is an international customs intelligence exchange system for monitoring maritime traffic in the Atlantic Ocean, the Baltic Sea, the North Sea and the Mediterranean Sea, administered by national customs authorities in France (Mar-Info South) and Germany (Mar-Info North). Mar-Info covers only commercial vessels; a similar surveillance system operated by the same authorities with respect to private pleasure craft or other non-commercial vessels is known as Yacht-Info.

⁷⁷²“Report of the meeting of the Working Group on Maritime Cooperation, held at Vienna from 19 to 23 September 1994 and from 20 to 24 February 1995” (E/CN.7/1995/13), recommendation 6; see also the 1995 Council of Europe Agreement, article 2, paragraph 5.

importance of a spontaneous exchange of information has been recognized elsewhere. Consequently those charged with the implementation of article 17 should consider what might be the most appropriate method or methods for making a positive contribution in this context.

ARTICLE 18

Free trade zones and free ports

General comments

18.1 For many years, a number of States have sought to promote the development of international commerce, external trade and domestic employment through the establishment of free trade zones and free ports.⁷⁷³ Such areas are frequently located at sea and river ports, airports or other sites possessing significant geographical advantages. As has been pointed out elsewhere: “Countries attempt to attract investors to free zones by providing tariff and tax incentives and by reducing, to an absolute minimum, control procedures and documentation.”⁷⁷⁴ A particular feature of such zones is that they are regarded for certain purposes as being outside the national customs territory and not subject to normal customs control.⁷⁷⁵

18.2 While the propriety and acceptability of such a strategy to promote economic development has not been brought into question, there has been a determination among States to make sure that the legitimate concessions granted in these geographic areas are not abused by those involved in the illicit traffic in narcotic drugs and psychotropic substances. As one party to the 1988 Convention has stated: “This article is designed to ensure that free trade zones and ports do not become safe havens for drug traffickers.”⁷⁷⁶

18.3 In the Commentary on the 1961 Convention, the comments made on article 31, paragraph 2, the text of which corresponds broadly to that of paragraph 1 of the present article, indicate that only very limited supervision, if any, is normally exercised by customs authorities over goods being shipped from abroad into free ports and free zones, or from such ports or zones to foreign

⁷⁷³Sometimes known by other names, such as “foreign trade zones”; none of these terms is defined in the 1988 Convention.

⁷⁷⁴Customs Co-operation Council, *Manual on the Use of Customs Procedures to Facilitate Exportation* (Doc.37.980E, April 1993), p. B/7/2.

⁷⁷⁵1973 International Convention on the Simplification and Harmonization of Customs Procedures, annex F.1.

⁷⁷⁶*Criminal Justice (International Co-operation) Bill: Explanatory Memorandum on the Proposals to Implement the Vienna Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (London, Home Office, 1990), p. 31.

countries. Such limited control or lack of control would make it possible for illicit traffickers to use free zones or free ports as convenient places for storing their contraband goods and to smuggle drugs over uncontrolled or insufficiently controlled border lines. In fact the conditions normally existing in free zones and free ports not only require the application of those measures which Governments generally adopt for the control of narcotic drugs but might even call for more drastic arrangements.⁷⁷⁷

18.4 It was for these reasons that what was to become paragraph 1 of article 18 was included in the earliest draft of the 1988 Convention, following a pattern established in the 1925 International Opium Convention,⁷⁷⁸ and continued in the 1961⁷⁷⁹ and 1971⁷⁸⁰ Conventions.

Paragraph 1

1. The Parties shall apply measures to suppress illicit traffic in narcotic drugs, psychotropic substances and substances in Table I and Table II in free trade zones and in free ports that are no less stringent than those applied in other parts of their territories.

Commentary

18.5 In paragraph 1, parties are required to apply, within their free trade zones and free ports, measures that are as stringent as, or more stringent than, those applied in other parts of their territory. This language is more precise than that used in the earliest draft, which spoke of measures “substantially equivalent to or more stringent than...”.⁷⁸¹ Article 24 contains a general provision that a party may adopt stricter or more severe measures than those provided by the Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic. The special opportunities for illicit traffickers that may be presented by conditions in free trade zones and free ports

⁷⁷⁷Commentary on the 1961 Convention, paragraph 1 of the comments on article 31, paragraph 2.

⁷⁷⁸League of Nations, *Treaty Series*, vol. LXXXI, art. 14, p. 317 .

⁷⁷⁹1961 Convention, art. 31, para. 2.

⁷⁸⁰1971 Convention, art. 12, para. 3, subpara. (a).

⁷⁸¹*Official Records*, vol. I ..., document E/CN.7/1987/2, sect. II, (“Article 13”).

persuaded the authors of the 1988 Convention, like their predecessors, to refer expressly in this context to more stringent measures.

Paragraph 2

2. The Parties shall endeavour:

(a) To monitor the movement of goods and persons in free trade zones and free ports, and, to that end, shall empower the competent authorities to search cargoes and incoming and outgoing vessels, including pleasure craft and fishing vessels, as well as aircraft and vehicles and, when appropriate, to search crew members, passengers and their baggage;

(b) To establish and maintain a system to detect consignments suspected of containing narcotic drugs, psychotropic substances and substances in Table I and Table II passing into or out of free trade zones and free ports;

(c) To establish and maintain surveillance systems in harbour and dock areas and at airports and border control points in free trade zones and free ports.

Commentary

18.6 The text of paragraph 2 incorporates a number of improvements to the text that was before the Conference. In the proposed text,⁷⁸² there was no reference in paragraph 2, subparagraph (a), to any monitoring of the movement of persons. Similarly, the reference to the search of crew members, passengers and their baggage was contained in subparagraph (b) and so applied only in the context of passage in or out of the relevant areas; its transfer to subparagraph (a) makes it applicable within those areas. Finally, the reference to “surveillance systems” in subparagraph (c) replaced a rather old-fashioned reference to “patrols”.

18.7 The provisions of article 18, paragraph 2, aimed at suppressing illicit traffic in controlled substances, in no way replace the strict control measures on the licit movement of such substances that parties have to apply in free ports and

⁷⁸²Ibid., document E/CONF.82/12, “Article 13” (E/CONF.82/C.2/L.13/Add.4), sect. I, p. 158.

zones, in conformity with article 31, paragraph 2, of the 1961 Convention and that Convention as amended, and article 12, paragraph 3, subparagraph (a), of the 1971 Convention.

Implementation considerations: article 18 as a whole

18.8 As has been seen, the structure of article 18 consists of two interrelated parts: first, the imposition of a general obligation in paragraph 1 to apply measures in free trade zones and free ports that are “no less stringent” than those applied elsewhere; and secondly, an enumeration in paragraph 2 of specific measures that each party must endeavour to establish. The challenge for those charged with the implementation of these obligations is to create a legislative, administrative, regulatory and enforcement structure that is effective and yet sensitive to the basic needs and commercial realities of such zones. This might, for example, result in a decision to make more extensive use of targeting, profiling and surveillance techniques in such areas than might be the case elsewhere.

18.9 Experience since the adoption of the Convention has revealed the need for particularly close attention to be devoted to the prevention of the diversion of precursors within such zones. Reflecting the depth of that concern,⁷⁸³ the Economic and Social Council, in its resolution 1992/29, underlined “the importance of applying suitable regulatory measures, in accordance with the provisions of article 18 of the [1988] Convention, to every stage of the receipt, handling, processing and delivery of precursor and essential chemicals in free ports and free trade zones and in other sensitive areas such as bonded warehouses”. More recently, the Council, in its resolution 1995/20, urged Governments to ensure, as far as possible, that shipments entering or leaving such zones are subject to “the controls necessary to safeguard against diversion”.

18.10 In creating an appropriate framework in this context, States may derive particular benefit from an examination of the International Narcotics Control Board *Guidelines for Use by National Authorities in Preventing the Diversion of Precursors and Essential Chemicals*. An important aspect of the *Guidelines* is that consignments passing through such zones and ports are treated as exports

⁷⁸³See, for example, *Chemical Action Task Force: Final Report* (Washington, D.C., June 1991), p. 22.

or imports⁷⁸⁴ and that therefore the somewhat less exacting recommendations in respect of transit States do not apply. Experience has also shown that the activities of brokers and trading companies located in free trade zones should be subject to the same obligations as those of other commercial agents if the possibilities for diversion are to be appropriately limited.⁷⁸⁵

⁷⁸⁴See “Guidelines for use by national authorities in preventing the diversion of precursors and essential chemicals”, 1993, “Guidance notes”, sects. III.10 and III.12, pp. 20 and 21.

⁷⁸⁵See *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances: Report of the International Narcotics Control Board for 1994 on the Implementation of Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988* (United Nations publication, Sales No. E.95.XI.I), para. 31.

ARTICLE 19

The use of the mails

General comments

19.1 The use of the mails for the purpose of illicit traffic in narcotic drugs and psychotropic substances has long been resorted to for both domestic distribution and international smuggling. The reliability and cost-effectiveness of the mails and the difficulties of detecting illicit items in the huge volume of legitimate mail have combined to ensure its abiding popularity, especially for relatively low-volume and high-value shipments such as cocaine, heroin and certain types of psychotropic substances. Moreover, limitations imposed by considerations of weight can be overcome in many instances by multiple use of the parcel post, so that, in practice, consignments of bulkier items, including cannabis, cannabis resin, and certain substances listed in Table I and Table II of the 1988 Convention, are also quite frequently transported in this way. The prevention and suppression of such illicit use of the mails is the object of article 19.

19.2 Despite the already well-established use of the mails for illicit trafficking, the 1961 Convention made barely any reference to postal services, either by way of exempting postal items from the general provisions of that Convention or by way of special prohibitions. The only provision dealing expressly with postal items was article 31, paragraph 8, which (in the context of international trade) reads: "Exports of consignments to a post office box, or to a bank to the account of a party other than the party named in the export authorization, shall be prohibited." Virtually identical provision is made in article 12, paragraph 3, subparagraph (b), of the 1971 Convention. The provision was judged necessary because it was hardly feasible to apply to post offices and banks the licensing procedures of the Convention.⁷⁸⁶

19.3 At the global level, the primary role of promoting international collaboration in relation to postal matters is played by the Universal Postal Union (UPU), which has been in existence since 1875 and has been a specialized agency of the United Nations since 1947. One of its concerns has been the unauthorized insertion of drugs in the mails and provisions on this matter have

⁷⁸⁶Commentary on the 1961 Convention, paragraph 3 of the comments on article 31, paragraph 8; and Commentary on the 1971 Convention, paragraph 4 of the comments on article 12, paragraph 3.

been included, or are otherwise covered, in the instruments of UPU. Apart from the Constitution of the Universal Postal Union,⁷⁸⁷ these include the Universal Postal Convention⁷⁸⁸ and various specialized agreements, including one on postal parcels.

19.4 The Universal Postal Convention provides that the insertion in letter-post items of narcotic drugs and psychotropic substances shall be prohibited.⁷⁸⁹ According to article 26.7 of that Convention, items containing such substances that have been wrongly admitted to the post shall in no circumstances be forwarded to their destination, delivered to the addressee or returned to origin.

19.5 These provisions must be read in the light of the principle of freedom of transit set out in article 1 of the Constitution and article 1 of the Universal Postal Convention: postal items in transit through a State party to those instruments may not be opened, and the relevant provisions are, therefore, applicable principally in the State of destination. As far as postal items in transit are concerned, the real difficulty appears, therefore, to lie in finding some means of reconciling law enforcement needs with the well-established principle of freedom of transit, which precludes the opening of mail in a transit State.

19.6 Consequently, in dealing with the issue of the illicit use of the mails for drug trafficking, the Conference had to be sensitive to the existing international regulation of this important and complex area of communication and to ensure an outcome that would be consistent with such regulation. Against this background, those who prepared the 1988 Convention had little scope for innovative provisions.

Paragraph 1

1. In conformity with their obligations under the Conventions of the Universal Postal Union, and in accordance with the basic principles of their domestic legal systems, the

⁷⁸⁷United Nations, *Treaty Series*, vol. 611, p. 64.

⁷⁸⁸The Convention was adopted in Tokyo on 14 November 1969 under article 22(3) of the Constitution of UPU. The Convention and the agreements are revised from time to time. The latest revised version of the Universal Postal Convention was adopted in 1994 at the Seoul Congress.

⁷⁸⁹Art. 26.5.1.

Parties shall adopt measures to suppress the use of the mails for illicit traffic and shall co-operate with one another to that end.

Commentary

19.7 The purpose of paragraph 1 is plainly to suppress the use of “the mails” for illicit drug traffic. To further that purpose parties are required to adopt the requisite measures in their national legal systems and to cooperate at the international level.

19.8 The interpretation of the term “the mails”, however, is not without its difficulties. The system of postal delivery through postal administrations governed by the instruments of UPU is not the only one to provide a delivery service to which the term “the mails” might be applied. In recent years, improvements in the field of international transport, the dramatic growth of the world economy and other factors have led to a major expansion of international commercial express, courier and similar services, whose products are also open to abuse by illicit drug traffickers. Developments such as the privatization of a number of national mail services and the abandonment or limitation of the monopoly enjoyed by many such services so far as letter post is concerned further contribute to blur the traditional concept of “the mails”.

19.9 A reasonable interpretation of “the mails” in the 1988 Convention, in the light of the object and purpose of article 19,⁷⁹⁰ would be to consider that it covers the public postal services as well as private operations which offer a comparable service. The public or private status of a national mail system would seem immaterial for present purposes, and the distinction may well depend upon the approach taken in the law of each State party. Other express delivery services would appear to be outside the scope of this article, but such services will fall within article 15, on commercial carriers. As indicated by the definition of “commercial carrier” in article 1, subparagraph (d), namely “any person or any public, private or other entity engaged in transporting persons, goods or mails for remuneration, hire or any other benefit”, there is indeed some overlap between the subject matter of article 19 and that of article 15. Whereas article 19 focuses on the use of the mails without considering the manner in which the mails are operated, the focus of article 15 is rather on an operational aspect, transportation and “means of transport”, the mails being only one item among

⁷⁹⁰See article 31 of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, p. 331).

others that might be transported. In practice, many postal services will consign bags of mail for carriage by road, sea or air to a means of transport provided by a commercial carrier, especially where the destination is in another State. In normal usage, the post offices operate “the mails” but make use of carriers in carrying out their operations, so that measures adopted pursuant to both article 15 and article 19 may be applied to “the mails”.

19.10 The parties’ obligations under paragraph 1 are stated to be “in conformity with their obligations under the Conventions of the Universal Postal Union, and in accordance with the basic principles of their domestic legal systems”. The brief discussion of the two phrases during the work of Committee II indicates that they were intended to impose cumulative limitations on the obligations being undertaken by the parties.⁷⁹¹ In earlier discussions, the relevant words were regarded as constituting a safeguard clause.⁷⁹²

Paragraph 2

2. The measures referred to in paragraph 1 of this article shall include, in particular:

(a) Co-ordinated action for the prevention and repression of the use of the mails for illicit traffic;

(b) Introduction and maintenance by authorized law enforcement personnel of investigative and control techniques designed to detect illicit consignments of narcotic drugs, psychotropic substances and substances in Table I and Table II in the mails;

(c) Legislative measures to enable the use of appropriate means to secure evidence required for judicial proceedings.

Commentary

19.11 Paragraph 2 sets out a list, not intended to be exhaustive, of measures to be adopted in accordance with paragraph 1.

⁷⁹¹*Official Records*, vol. II ..., Summary records of meetings of the Committee of the Whole, Committee II, 2nd meeting, paras. 30-48.

⁷⁹²*Official Records*, vol. I ..., document E/CN.7/1988/2 (Part II), paras. 243-247, p. 29.

19.12 Subparagraph (a) adds little to the language of paragraph 1: “to suppress”, the language of paragraph 1, is elaborated into a reference to both “prevention” and “repression”. The parties are obliged to take coordinated action, which will necessarily involve their postal administrations, customs and police services. At one stage the Commission on Narcotic Drugs had inserted a reference to “control” into subparagraph (a), but this was omitted by the intergovernmental expert group, which met in June and July 1987, to avoid any suggestion of infringement of the right of privacy and secrecy of communications.⁷⁹³

19.13 The reference in subparagraph (b) to “investigative and control techniques” was the end result of a discussion in which both the need for investigation to detect illicit consignments and also the enormity of the task, given the huge number of postal items, were recognized. The scale of the operation meant, according to some representatives, that control measures were more realistic than investigative ones; in the resulting text, both terms were used.⁷⁹⁴ The reference to “authorized law enforcement personnel” must be interpreted in accordance with national law and practice, but does forestall any argument that “the mails” can only be dealt with by agents of a postal administration to the exclusion of other appropriate law enforcement agencies.

19.14 Subparagraph (c) is a rather obscure provision, and the text was settled before the Conference turned its attention to the details of the mutual legal assistance provisions contained in article 7. It seems to have been designed to remove difficulties that had been, or might subsequently be, experienced in obtaining evidence where the mails had been used. These difficulties include such matters as the availability of search warrants and the admissibility of samples of a larger consignment. In the Comprehensive Multidisciplinary Outline, attention was drawn to the desirability, in some cases, of permitting the use of the mails to ship, in a controlled manner, samples of seized narcotic drugs and psychotropic substances to regional or other laboratories for analysis.⁷⁹⁵

⁷⁹³Ibid., para. 248.

⁷⁹⁴*Official Records*, vol. II ..., Summary records of the Committees of the Whole, Committee II, 2nd meeting, paras. 11-47.

⁷⁹⁵*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A, para. 268.

Implementation considerations: article 19 as a whole

19.15 As noted above, article 19, paragraph 1, creates a general obligation for parties to take measures to suppress the use of the mails for illicit trafficking purposes and to cooperate with other parties to that end. These obligations are, however, limited by specific reference to two factors.

19.16 The first of these is the need for the measures taken to be compatible with the obligations arising pursuant to the various instruments of UPU, in particular its Constitution and the Universal Postal Convention. Practice has revealed some tension between certain aspects of the traditional approach taken in the UPU instruments and the perceived operational needs of those sectors of the law enforcement community charged with the suppression and investigation of illicit trafficking activities. Reference has already been made to the fundamental principle of freedom of transit (see paragraph 19.7 above), which requires that postal items in transit may not be opened. This principle interacts uneasily with certain types of controlled delivery operations, especially “clean” controlled delivery as envisaged in article 11, paragraph 3,⁷⁹⁶ which implies a partial or complete substitution of contents and, therefore, the opening of postal items in transit. It is evident from this example that those charged with the implementation of article 19 should take appropriate specialized advice to ensure that all facets of the proposed strategy are similarly consistent with the requirements of UPU instruments.⁷⁹⁷

19.17 UPU and intergovernmental organizations active in the law enforcement field are striving to promote a harmonization of their sometimes divergent approaches to illicit trafficking by mail. Following its discussions with the Customs Co-operation Council (also called the World Customs Organization), UPU adopted resolution C54/1989, concerning bags of mail in transit suspected of containing narcotic drugs or psychotropic substances. In its resolution, UPU invited postal administrations to make all appropriate arrangements with the relevant authorities in their countries to ensure that bags of mail in transit suspected of containing narcotic drugs were not opened and to advise by the quickest means, at the request of their customs authorities, the administration of the country of destination so that the suspected bags could easily be identified on arrival and to request verification from the administration of the country of

⁷⁹⁶See above, comments on article 11, paragraph 3.

⁷⁹⁷The technique of controlled delivery, it should be stressed, is also very useful in instances of domestic trafficking where greater freedom of action in this context may be available.

origin.⁷⁹⁸ In the same resolution, UPU also invited postal administrations, in consultation with customs services, to intervene with legislative authorities, so that laws and regulations would not impede the use of the technique of controlled delivery. The resolution also provided that the customs of the transit State, if required with the agreement of its competent authorities, should take appropriate measures to inform the customs authorities in the country of destination and, possibly, in the country of origin of the suspected postal items. Cooperation between the World Customs Organization and UPU was further promoted through a protocol of agreement between both organizations, signed on 15 September 1994, and the adoption of directives, to be regularly upgraded, with a view to improving cooperation between customs and postal authorities in the fight against illicit drug trafficking by mail.

19.18 The general obligations set out in paragraph 1 of article 19 are further qualified by reference to the concept that the implementation measures taken by parties need not go beyond those that are “in accordance with the basic principles of their domestic legal systems”. In many countries legal protection is afforded to items placed in the mails, and interference with them may give rise to sensitive constitutional issues regarding civil liberties.

19.19 According to paragraph 2, parties should give concrete expression to their obligations under paragraph 1 in three specific areas. It is clear, however, that the list of action was not intended to be exhaustive; instead, it represents a minimum common core of action required of all parties.

19.20 Paragraph 2, subparagraph (a), calls for coordinated action to prevent and repress the use of the mails for illicit traffic. That has both a domestic and an international dimension. In so far as the former is concerned, it is of paramount importance that adequate arrangements should be established to permit efficient and effective coordination between the postal authorities, customs and other relevant agencies with a law enforcement mandate. That might include the formulation of guidelines designed to increase security, to facilitate the detection of illicit items and to provide ready access to relevant information.

⁷⁹⁸The authentic text reads: “*prendre toutes dispositions avec les autorités compétentes de leur pays afin qu’il ne soit pas procédé à l’ouverture des sacs de dépêches en transit dont elles soupçonnent qu’ils renferment des envois contenant des stupéfiants, mais à en aviser:*

a) *par les voies les plus rapides, à la demande de leurs autorités douanières, l’Administration de destination afin que les sacs litigieux soient facilement repérés à l’arrivée;*

b) *par bulletin de vérification, l’Administration d’origine de la dépêche.”*

19.21 At the international level, the coordination and exchange of information between the law enforcement agencies of parties to the 1988 Convention are necessary if the overall goals of article 19 are to be achieved. For example, information of operational value acquired through the monitoring of outgoing international mail items may need to be communicated, as envisaged in article 9, paragraph 1, subparagraph (b), clause (iii),⁷⁹⁹ to the law enforcement authorities in the country of intended delivery in order to permit appropriate action to be taken. Similarly, information acquired as a result of investigations in the country of intended delivery may often prove to be of value in the initiation or furthering of inquiries in the State of origin. The detection of even small amounts of prohibited substances may yield intelligence that is crucial to the identification of major offenders or the penetration of trafficking networks.

19.22 International coordination is also vital to the success of supervised postal delivery operations. Special difficulties arise when the potential for such an operation comes to the attention of a transit State (within the meaning of UPU instruments). In the Comprehensive Multidisciplinary Outline, it is recommended that “the customs service should urgently notify the customs authorities of the State of destination, by the quickest possible means, fully identifying the item and indicating its origin.”⁸⁰⁰ While there are obvious parallels with the technique of controlled delivery in this context the potential for constant surveillance, and hence for true control, is lacking.

19.23 In paragraph 2, subparagraph (b), the introduction of law enforcement investigative and control techniques is called for to combat the use of the mails for illicit drug trafficking. Here the major challenge is to create systems which, in combination, can yield the desired results in a manner consistent with the effective functioning of the postal service. Given the huge volume of mail items in question, many law enforcement bodies have come to place considerable emphasis on “profiling” techniques. They use risk indicators, identified on the basis of prior practical experience, in an effort to identify suspect consignments. Frequently such profiles take into account such factors as the size and shape, the method of sealing, the manner of addressing (including whether the label is typed or handwritten), unusual or false names or addresses, unusual smells from

⁷⁹⁹See above, comments on article 9, paragraph 1.

⁸⁰⁰*Report of the International Conference on Drug Abuse and Illicit Trafficking, Vienna, 17-26 June 1987* (United Nations publication, Sales No. E.87.I.18), chap. I, sect. A, para. 322.

the parcel, destination and any intelligence information about the package.⁸⁰¹ Items thus identified by virtue of their characteristics as potentially suspicious may then be subject to further, and initially non-intrusive, forms of testing. Many countries make use of trained drug-scenting dogs (“sniffer dogs”) in such circumstances. In addition, an increasing number of technological aids, such as X-ray equipment and ion-scanners, can be used to good effect in this context.

19.24 Finally, in paragraph 2, subparagraph (c), legislative measures are required to enable appropriate means to be used to secure evidence required for judicial proceedings. In order to ensure compliance with this obligation, those responsible for its implementation must examine the nature and adequacy of existing domestic law. In many States, specific legislative authority is required in order to permit the interception, opening and detention of postal items.⁸⁰² Given the frequency with which the international mails are subject to abuse for trafficking purposes, a growing number of States⁸⁰³ have sought to ensure that such powers can be used in furtherance of foreign as well as domestic investigations. Consideration may also be given to buttressing the overall thrust of activities related to article 19 by creating a specific criminal offence of sending prohibited drugs through the mails.⁸⁰⁴ Any such review of existing domestic law could, with profit, be extended to the acceptability of the use of special investigative techniques, such as the interception of telecommunications, which may be useful in the context of postal investigations, and the admissibility of evidence thus acquired in subsequent judicial proceedings. The possibility of making such powers available to other parties as a form of mutual legal assistance might also be considered at the same time.⁸⁰⁵

⁸⁰¹*Manual for Compliance with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (Washington, D.C., United States Department of Justice, 1992), p. 59.

⁸⁰²Such provisions differ significantly in terms of their nature and complexity: see, for example, Cape Verde Law 78/IV/93, art. 30; Finland, Coercive Measures Act, 30 April 1987/450, chap. IV; and South Africa, Drug and Drug Trafficking Act No. 140 of 1992, sect. 11 (c).

⁸⁰³See, for example, Ghana, Narcotic Drugs (Control, Enforcement and Sanctions) Law 1990, sect. 27(1), and Zambia, Narcotic Drugs and Psychotropic Substances Act 1992, sect. 27(1).

⁸⁰⁴See, for example, Trinidad and Tobago, Dangerous Drugs Act No. 38 of 1991.

⁸⁰⁵See above, comments on article 7, paragraph 3.

PART THREE

IMPLEMENTATION PROVISIONS

ARTICLES 20-23

ARTICLE 20

Information to be furnished by the Parties

General comments

20.1. Article 20 is the principal provision in the 1988 Convention regarding the information that has to be furnished to the Commission by the parties, although some other articles also require certain data to be provided through the Secretary-General to the Commission, to the International Narcotics Control Board or to the parties.⁸⁰⁶ Several earlier international drug control treaties⁸⁰⁷ required the submission of annual reports on the general working of those treaties for use by policy-making bodies;⁸⁰⁸ and still other drug control treaties contained provisions calling for specific reports, notifications or submissions.⁸⁰⁹ Thus, there is a long-established tradition of reporting certain data, and the 1988 Convention continues with that tradition while establishing some new specific requirements corresponding to its innovative provisions.

⁸⁰⁶Art. 5, para. 4, subpara. (e); art. 7, para. 8; art. 7, para. 9; art. 12, paras. 2 and 3; art. 12, para. 7, subparas. (a) and (b); art. 12, para. 10, subpara. (a); art. 12, para. 12; art. 17, para. 7; and art. 22, para. 1, subpara. (a).

⁸⁰⁷1931 Convention, art. 21; 1936 Convention, art. 16; and 1953 Protocol, art. 10.

⁸⁰⁸The Commission on Narcotic Drugs of the Economic and Social Council, pursuant to Council resolution 9(I) of 16 February 1946 and the 1946 Protocol, succeeded to the functions of its predecessor, the League of Nations Advisory Committee on Traffic in Opium and other Dangerous Drugs.

⁸⁰⁹See 1912 Convention, art. 21; 1925 Agreement, art. X; 1948 Protocol, art. 1; and 1953 Protocol, art. 4, subpara. (b).

20.2. Both the 1961 and 1971 Conventions specify that Governments should furnish certain information to the Secretary-General, whereas the 1988 Convention requires that such information should be furnished to the Commission on Narcotic Drugs, albeit through the Secretary-General. The distinction, however, is one of form rather than substance, since both of the earlier conventions add that the parties shall furnish to the Secretary-General such information as the Commission may request. In all cases, the Commission is the end-user of the information in the accomplishment of its policy-making and other mandated functions.⁸¹⁰

20.3 The basic proposal before the 1988 Conference had contained an article on reports to be furnished by the parties⁸¹¹ providing such information as the Commission might request. In Committee II, a number of amendments to the article were submitted for consideration.⁸¹² The Committee finally agreed on the amendment submitted by the Netherlands, paragraphs 1 and 2 of which were identical, except for one drafting change, to those same paragraphs in article 20 as adopted by the Conference. Paragraph 3 of the amendment submitted by the Netherlands was deleted, its provisions being substantially those now found in article 12, paragraph 12, of the Convention dealing with information furnished annually to the Board by each party on the amounts of substances in Table I and Table II seized by them, on substances not included in the Tables that are used in illicit manufacture and on methods of diversion and illicit manufacture.⁸¹³ There was virtually no discussion either in Committee II or in the plenary on the reasons for the formulation of article 20 as adopted.⁸¹⁴

⁸¹⁰For a general discussion of the Commission's authority to request information and a party's (and also non-party's) obligation to submit such information, see Commentary on the 1961 Convention, paragraphs 1-6 of the comments on the introductory part of paragraph 1, and paragraphs 1-4 of the comments on paragraph 1, subparagraph (a).

⁸¹¹*Official Records*, vol. I ..., document E/CONF.82/3, Annex II ("Article 16"), p. 85.

⁸¹²For example, by Canada, Denmark, France, Germany, Federal Republic of Norway and Sweden; by Japan; and by the Netherlands (for the text of the amendments, see *Official Records*, vol. I ...) document E/CONF.82/12, "Draft implementation clauses" (E/CONF.82/C.2/L.13/Add.13), sect. II, paras. 3-5, pp. 161-162.

⁸¹³See above, comments on article 12, paragraph 12.41, and below, comments on article 23, paragraph 23.5.

⁸¹⁴*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 34th meeting, paras. 31 and 32, and Summary records of plenary meetings, 7th plenary meeting, para. 86.

20.4 The 1961 and 1971 Conventions require very detailed statistical and other information for both the Commission and the Board to enable them to carry out the control functions established by those conventions. The considerations that underlie the provision of information under the earlier conventions are not necessarily applicable to the same extent to the 1988 Convention. Apart from certain important basic data on laws and regulations to give effect to the Convention, other data required under article 12, paragraph 12, and specific information to be supplied under particular articles of the Convention (see paragraph 20.1 above), the information that would be of most use to the Commission is that regarding the working of the Convention in the territories of the parties. This is the principal means by which the Commission can assess the extent to which the Convention appears to be achieving its aims and can generate recommendations on areas where improvements could be made.

Paragraph 1, introductory part

1. The Parties shall furnish, through the Secretary-General, information to the Commission on the working of this Convention in their territories and, in particular:

Commentary

20.5 The first paragraph of the article is a considerably simplified version of corresponding provisions in the 1961 and 1971 Conventions. The 1961 Convention, in article 18, specifies the information to be furnished by the parties at the request of the Commission, and, in articles 19 and 20, defines respectively, the estimates of drug requirements and statistical returns to be furnished to the Board. The 1971 Convention consolidates the information requirements into a single article (article 16, on reports to be furnished by the Parties), which covers information requested by the Commission, notification to the Secretary-General of the names and addresses of the governmental authorities referred to in various articles,⁸¹⁵ reports to the Secretary-General on important cases of illicit traffic in psychotropic substances or seizure from such illicit traffic, and statistical reports to be furnished to the Board.

20.6 As pointed out above in paragraphs 20.2 and 20.3, the corresponding provisions in the 1961 and 1971 Conventions and the text in the basic proposal before the 1988 Conference all referred, in paragraph 1 of the article, to “such

⁸¹⁵1971 Convention, art. 7, subpara. (f), art. 12 and art. 13, para. 3.

information as the Commission may request". The reference to the Commission's request is not retained in the final text of article 20. The proceedings of the 1988 Conference do not appear to shed any light on why the reference was deleted. In the Commentary on the 1961 Convention, the view was expressed that, even in the absence of such a general formula, it would not be entirely up to the party concerned to determine what information to provide. It was argued that the obligation of "Members of the United Nations to co-operate in the international campaign against drug abuse also includes their legal duty to furnish, at the request of the Council, the Commission or the Secretary-General, such data as these organs require for the performance of their functions under the United Nations Charter in regard to international co-operation concerning the social problem of abuse of drugs".⁸¹⁶ In this connection, it is interesting to note that, as early as 1920, the Advisory Committee on Traffic in Opium and other Dangerous Drugs had made a practice of asking Governments to furnish an annual report on the operation of the 1912 Convention in their territories and on illicit drug traffic and other matters bearing on the function of the League of Nations to exercise supervision in pursuance of Article 23 (c) of the Covenant "over the execution of agreements with regard to the traffic in ... opium and other dangerous drugs". A similar argument could also be made in respect of the 1988 Convention regarding information to be provided by the parties to enable the Commission to discharge its obligations under article 21, subparagraph (a), to review the operation of the Convention.

20.7 In any event, even though the reference to the request of the Commission is no longer there, the annual reports questionnaire sent to Governments by the Commission in pursuance of paragraph 2 of article 20 achieves much the same effect (see paragraph 20.13 below). It is thus possible that the deletion of the reference to the request of the Commission from the first paragraph of article 20 may have been based on a belief that it was superfluous in view of the long-established practice of obtaining information through an annual reports questionnaire that had been sent out under the 1961 and 1971 Conventions, and indeed even under earlier drug control conventions. Since the information is to be furnished to the Commission and since the specific examples given in subparagraphs (a) and (b) are qualified by the adverbial phrase "in particular", logic would dictate that the Commission must first establish what that information should be. Paragraph 2 of article 20 would seem to corroborate this interpretation.

⁸¹⁶Commentary on the 1961 Convention, paragraph 1 of the comments on article 18, paragraph 1, introductory part.

20.8 The introductory part in paragraph 1 refers to the working of the Convention in the “territories” of parties. The word “territories” is not defined in the 1988 Convention, but in the context of the Convention it should be understood to relate to areas treated as separate entities in respect of the promulgation of legislation, or from which statistics or other data may be collected. It may also apply to regions that are considered “territories” under article 1 of the 1961 Convention as far as this is relevant in the context of the provisions of the 1988 Convention.⁸¹⁷

Paragraph 1, subparagraph (a)

(a) The text of laws and regulations promulgated in order to give effect to the Convention;

Commentary

20.9 A recurring requirement under the international drug control treaties is the exchange between parties of the domestic legislation enacted to give effect to their obligations under a convention. That exchange was first effected through the Ministry of Foreign Affairs of the Netherlands for the 1912 Convention and then, in succession, by the Secretaries-General of the League of Nations and of the United Nations for the later treaties. Such an exchange of national legislative texts serves a twofold purpose: on the one hand, it is proof that a party has established the legislative basis to carry out its treaty obligations; on the other hand, it may be of potential exemplary use to parliamentary drafters in other States, particularly if they share a similar legal system.

20.10 The provision of article 20, paragraph 1, subparagraph (a), requiring parties to furnish the text of laws and regulations promulgated in order to give effect to the Convention, can place an initially heavy burden on a party, as there are numerous articles in the Convention which probably require the promulgation of new or amended laws and regulations to give full effect to articles 3-19. As in the case of the 1961 and 1971 Conventions, the data provided should include not only the texts of national legislation but also “those of political subdivisions such as states or provinces of a federal union whenever legislation falls

⁸¹⁷See also Commentary on the 1961 Convention, paragraph 7 of the comments on article 18, paragraph 1, subparagraph (a); and Commentary on the 1971 Convention, paragraph 13 of the comments on article 16, paragraph 1.

within the competence of such subdivisions”.⁸¹⁸ Legislation and regulations, which are often furnished as annexes to the annual reports questionnaire (see paragraph 20.13 below), are published by the Secretariat in the E/NL series and circulated to Governments. Cumulative indexes are published periodically in the same series.

Paragraph 1, subparagraph (b)

(b) Particulars of cases of illicit traffic within their jurisdiction which they consider important because of new trends disclosed, the quantities involved, the sources from which the substances are obtained, or the methods employed by persons so engaged.

Commentary

20.11 The wording of paragraph 1, subparagraph (b) follows very closely the wording used in a similar context in both the 1961 and 1971 Conventions,⁸¹⁹ and the comments in the commentaries on those two conventions apply, *mutatis mutandis*, to subparagraph (b).⁸²⁰ The “particulars” specified with respect to “quantities”, “sources” and “methods” were initially spelt out in article 23 of the 1931 Convention, the reference to “new trends” appearing first in article 16 of the 1971 Convention. The inclusions of such a reporting requirement in the 1931 Convention merely codified the existing practice under the League of Nations, which, at the second session of the Assembly, on 30 September 1921, adopted a resolution in which it was recommended that Governments furnish information regarding cases of illicit traffic in drugs.⁸²¹ The reasoning behind the inclusion of such a requirement in succeeding conventions is as valid for the 1988 Convention as it was for the 1931 Convention: “Cases of illicit traffic furnish an important indication as to weak points in the world system of regulation for the

⁸¹⁸Commentary on the 1961 Convention, paragraph 1 of the comments on article 18, paragraph 1, subparagraph (b).

⁸¹⁹1961 Convention, art. 18, para. 1, subpara. (c); and 1971 Convention, art. 16, para. 3.

⁸²⁰Commentary on the 1961 Convention, comments on paragraph 1, subparagraph (c) of article 18; and Commentary on the 1971 Convention, comments on paragraph 3 of article 16.

⁸²¹See the “Historical and technical study” of the 1931 Convention by the Opium Traffic Section of the Secretariat of the League of Nations (C.191.M.136.1937.XI), paragraph 195.

legitimate trade, and notification of them is therefore necessary to the efficient operation of the Convention.”⁸²²

Paragraph 2

2. The Parties shall furnish such information in such a manner and by such dates as the Commission may request.

Commentary

20.12 The second paragraph of article 20 is, *mutatis mutandis*, virtually the same as the concluding paragraphs of article 18 of the 1961 Convention and article 16 of the 1971 Convention.

20.13 Each year the Secretariat sends out an annual reports questionnaire to Governments of parties to the 1961 Convention, the 1961 Convention as amended, the 1971 Convention and the 1988 Convention to assist Governments in identifying and providing relevant information. The questionnaire is also sent to Governments of States that are not parties to the international drug control treaties, but compliance is of course voluntary in such cases. While the 1961 and 1971 Conventions specifically refer, in articles 18 and 16 respectively, to an “annual report” on the working of those conventions, no such expression appears in article 20 of the 1988 Convention. The Commission, however, pursuant to article 20, paragraph 2, authorized inclusion of requests for data on implementation of the 1988 Convention in the annual reports questionnaire. In this instance, the distinction between the text of the 1988 Convention and the two earlier conventions is, from a practical point of view, more one of form than of substance.

20.14 While the annual reports questionnaire, which cuts across all three recent international drug control treaties, contains requests for information specifically relating to the implementation of the 1988 Convention, data concerning the 1961 Convention or the 1971 Convention may also have a direct bearing on its implementation. The questionnaire, for example, includes a request for information on measures to counter drug abuse, including data on (a) the extent of, and patterns and trends in, drug abuse; (b) educational campaigns and workplace, community and media activities to combat drug abuse; and (c) treatment and rehabilitation of drug abusers. Data provided thereunder is relevant to the working of certain provisions of the 1988 Convention (for

⁸²²C.191.M.136.1937.X1.

example article 3, paragraph 4, on treatment, education, aftercare, rehabilitation or social reintegration). The questionnaire also seeks information on illicit drug traffic, including seizures of narcotic drugs and psychotropic substances, as well as other substances under national, but not international control, which have been detected in the illicit traffic; illicit manufacture of narcotic drugs or psychotropic substances; and diversion of all narcotic drugs and psychotropic substances from licit channels. Also requested in the questionnaire are data on the number of cases of forfeiture of the proceeds of drug crimes, as well as a general description of smuggling into or out of the country and illicit traffic within the country.

20.15 Many government authorities may find it difficult to complete the questionnaire fully because of lack of resources or data. Nevertheless, the data collected constitute an important basis for many United Nations activities in drug control and, without the information, major mandates cannot be carried out.

ARTICLE 21

Functions of the Commission

General comments

21.1 Article 21 confers on the Commission functions, which to a very large extent repeat the functions given to it under article 8 of the 1961 Convention and article 17 of the 1971 Convention. The views expressed in the commentaries on the 1961 and 1971 Conventions⁸²³ are therefore relevant for the interpretation of the similar provisions in the 1988 Convention. Consistent practice followed over the years in the application of these parallel provisions can provide authoritative guidance on how they are likely to be interpreted and applied under the 1988 Convention.

21.2 In the basic proposal before the 1988 Conference,⁸²⁴ the draft article on the functions of the Commission was clearly based on article 8 of the 1961 Convention, which, *mutatis mutandis*, is repeated. Article 21 of the 1988 Convention, together with the other implementation articles, was referred by the plenary to Committee II, where a number of amendments⁸²⁵ were introduced, particularly in regard to the allocation of functions between the Commission and the Board.

21.3 The discussions in Committee II on the implementation articles reflected a variety of views on how functions should be distributed between the Commission and the Board under the Convention. Article 21, as eventually adopted, derives from the amendments submitted by the Netherlands. Introducing his amendments, the representative of the Netherlands explained that they were based on the assumption that the Convention's implementation machinery ought to be adapted to the subjects it covered and that, in view of its subject matter, the relevant precedents were not the 1961 and 1971 Conventions

⁸²³Commentary on the 1961 Convention, paragraphs 1, 2, and 5-11 of the comments on article 8; and Commentary on the 1971 Convention, paragraphs 1-11 of the comments on article 17, paragraph 1.

⁸²⁴*Official Records*, vol. I ..., document E/CONF.82/3, annex II ("Article 15").

⁸²⁵In particular by Canada, Denmark, France, Federal Republic of Germany, Norway and Sweden; and by the Netherlands (for the text of the amendments, see *Official Records*, vol. I ..., document E/CONF.82/12, "Draft implementation clauses" (E/CONF.82/C.2/L.13/Add.13), sect. II, paras. 3 and 5, pp. 161 and 162).

but rather more recent conventions on the combating of terrorism and hijacking and the protection of diplomats, as well as other instruments that dealt with cooperation among parties in international criminal law. The amendments were also based on the assumption that, notwithstanding differences between the draft Convention before Committee II and the 1961 and 1971 Conventions, it would be wise to ensure as much continuity as possible in respect of implementation machinery. He would therefore prefer that the functions of both the Commission and the Board be maintained with respect to the various provisions of the new convention unless such functions were incompatible with its provisions. In addition, the Commission should, on the basis of reports submitted by the parties, exercise overall supervisory functions in relation to the Convention as a whole.⁸²⁶

21.4 In contrast, the sponsors of the other amendment proposal held the view that the Board should have full responsibility for supervising the implementation of the Convention, as sharing such responsibility between the Board and the Commission would, because of the close interlinking of most of the articles of the Convention, result in confusion and administrative conflict between the supervising bodies and poor or no supervision of the new Convention.⁸²⁷

21.5 In support of the view of the Netherlands, it was stated by the representative of Austria that the most important point was to associate the Commission more closely with implementation of the Convention and, in his view, the political will of Member States required to make the Convention a success could best be mobilized within that body.⁸²⁸ After considerable discussion in Committee II,⁸²⁹ it was decided that the Committee should base its consideration of the implementation articles on the proposals submitted by the Netherlands.

⁸²⁶*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 31st meeting, paras. 56 and 57.

⁸²⁷*Ibid.*, 32nd meeting, paras. 5 and 12.

⁸²⁸*Ibid.*, 31st meeting, para. 54.

⁸²⁹*Ibid.*, 32nd meeting.

Introductory part

The Commission is authorized to consider all matters pertaining to the aims of this Convention and, in particular:

Commentary

21.6 The Commission's right "to consider all matters pertaining to the aims of this Convention", embodied in the introductory paragraph, is, as pointed out in the commentaries on the two earlier conventions, a very comprehensive one. The 1988 Convention spells out, in subparagraph (a) of article 21, the requirement that the Commission "shall, on the basis of the information submitted by the Parties in accordance with article 20, review the operation of this Convention". The use of the word "shall" makes such a review mandatory. The other functions specified in article 21 are identified as facultative through the use of the word "may", the exception being in subparagraph (d), where it is laid down that the Commission "shall ... take such action as it deems appropriate" on any matter referred to it by the Board under article 22, paragraph 1, subparagraph (b), of the Convention. The provision in subparagraph (a) on review of the operation of the Convention is new, no parallel requirement being expressly contained in the earlier conventions, although the relevant introductory paragraph in those conventions would seem to cover some of the same ground.

21.7 The Netherlands text (see paragraph 21.2-21.5 above) did not contain the introductory paragraph that now appears in article 21, each of the functions treated therein having been the subject of independent paragraphs. The representative of the Union of Soviet Socialist Republics proposed that an introductory paragraph, taken from article 8 of the 1961 Convention, be added. That proposal was accepted by the Netherlands⁸³⁰ and supported by other representatives.⁸³¹ While the addition of the introductory paragraph did not give rise to any comment, it would seem to widen the scope of an article which would otherwise have merely listed a number of specific functions without reference to "all matters pertaining to the aims of the Convention". As already pointed out (see paragraph 21.6 above), those words are very comprehensive, and have been so understood in connection with the 1961 and the 1971 Conventions.⁸³² Subparagraphs (a)-(f), instead of providing a comprehensive list of the functions

⁸³⁰Ibid., 34th meeting, para. 18.

⁸³¹Ibid., para. 22.

⁸³²Ibid., paras. 21 and 24-26.

of the Commission, now enumerate some specific cases of the general rule laid down in the introductory wording.

Subparagraph (a)

(a) The Commission shall, on the basis of the information submitted by the Parties in accordance with article 20, review the operation of this Convention;

Commentary

21.8 The legislative history (see paragraphs 21.3-21.7 above) indicates that article 21, subparagraph (a), was introduced to provide the Commission with a supervisory role in connection with the Convention which goes beyond its responsibilities under the earlier conventions, particularly as it is of a mandatory character. That appears to have stemmed from the view that, unlike the 1961 and the 1971 Conventions,⁸³³ which dealt largely with technical aspects of the international control of trade in narcotic drugs and psychotropic substances, the 1988 Convention had a more extensive political dimension in the areas of State sovereignty, extraterritorial jurisdiction, international criminal law and the law of the sea, where a supervisory organ composed of State representatives, such as the Commission, would in the final analysis be more appropriate than a technical body such as the Board.

21.9 The Commission is a body established by the Economic and Social Council under Article 68 of the Charter of the United Nations, with terms of reference⁸³⁴ conferring on it wide responsibilities in assisting the Council in its powers of supervision over the application of international conventions and agreements in the field of narcotic drugs and psychotropic substances; in advising the Council of all matters pertaining to the control of narcotics; and in considering what changes may be required in existing machinery for international control in the area of narcotic drugs and psychotropic substances. Those wide responsibilities are supplemented by the responsibilities conferred on it in the various conventions on narcotic drugs and psychotropic substances.

⁸³³Commentary on the 1961 Convention, paragraph 6 of the comments on article 8; and Commentary on the 1971 Convention, paragraph 2 of the comments on article 17.

⁸³⁴The Commission was created and its terms of reference laid down in 1946 in Economic and Social Council resolution 9(I), supplemented at a later date by Council resolution 1991/38 and General Assembly resolution 46/185 C, section XVI (see Commentary on the 1961 Convention, paragraph 2 of the comments on article 8).

The obligation to review the operation of the 1988 Convention clearly comes within the purview of those general responsibilities.

Subparagraph (b)

(b) The Commission may make suggestions and general recommendations based on the examination of the information received from the Parties;

Commentary

21.10 Article 21, subparagraph (b), is a variation on the corresponding provision in article 8, subparagraph (c), of the 1961 Convention, concerning the right of the Commission to make recommendations for the implementation of the aims and provisions of the 1961 Convention, including programmes of scientific research and the exchange of information of a scientific or technical character. The reference to research and exchange of scientific information has been deleted in the 1988 Convention, probably in view of its different character (see paragraph 21.8 above). When article 21, subparagraph (b), is read in conjunction with the opening paragraph, it would appear that the recommendations and suggestions the Commission may make on the basis of information received from the parties need not relate only to the implementation of the 1988 Convention but may also relate to the realization of its aims.

Subparagraphs (c) and (d)

(c) The Commission may call the attention of the Board to any matters which may be relevant to the functions of the Board;

(d) The Commission shall, on any matter referred to it by the Board under article 22, paragraph 1(b), take such action as it deems appropriate;

Commentary

21.11 Subparagraphs (c) and (d) of article 21 concern the close relationship between certain functions of the Commission and of the Board. They also illustrate the somewhat different roles both bodies may play under the Convention. Subparagraph (c), while of a general character, would appear to be especially relevant to the responsibilities of the Board in instances where there

is reason to believe that violations of the Convention may have occurred, particularly in respect of articles 12, 13 and 16. When the Commission encounters a case where it might appear that an infraction has occurred, it should in the first instance refer it to the Board for an investigation of an expert and technical nature. In the event that the Board concludes, after investigation, that remedial measures have not been taken by the party concerned that are consistent with the provisions of articles 12, 13 or 16, it may refer the matter back to the Commission and the Economic and Social Council, where the political responsibility for appropriate action rests.

Subparagraph (e)

(e) The Commission may, in conformity with the procedures laid down in article 12, amend Table I and Table II;

Commentary

21.12 Subparagraph (e) does not call for particular comment, as it is merely a cross-reference to a function of the Commission that is spelt out in detail in article 12 of the 1988 Convention (see paragraph 12.22 above).

Subparagraph (f)

(f) The Commission may draw the attention of non-Parties to decisions and recommendations which it adopts under this Convention, with a view to their considering taking action in accordance therewith.

Commentary

21.13 Subparagraph (f) of article 21 closely parallels the corresponding provision in article 8, subparagraph (d), of the 1961 Convention. In both cases the provisions of the subparagraph would appear to be intended to obtain universal implementation or as wide an implementation as possible.⁸³⁵ For a number of years the Secretary-General has, as a matter of principle, transmitted decisions and recommendations of the Commission to the Governments of all States, regardless of whether or not they are Members of the United Nations or parties to any of the international drug control conventions.

⁸³⁵See also Preamble, tenth paragraph, the comments thereon in paragraphs 0.20-0.21 above.

ARTICLE 22

Functions of the Board

General comments

22.1 Substantially the same subject matter as that covered in article 22 of the 1988 Convention is dealt with in articles 9 and 14 of the 1961 Convention and the 1961 Convention as amended, entitled “Composition and functions of the Board”⁸³⁶ and “Measures by the Board to ensure the execution of provisions of the Convention” respectively, and in article 19 of the 1971 Convention, entitled “Measures by the Board to ensure the execution of the provisions of the Convention”. The comments on articles 9 and 14 in the Commentary on the 1961 Convention and on article 19 in the Commentary on the 1971 Convention therefore apply in certain measure to article 22 of the 1988 Convention, at least where those provisions, *mutatis mutandis*, are virtually identical.

22.2. Article 22 of the 1988 Convention appears to be based on the text of article 14 of the 1961 Convention, in its unamended form. The detailed amendments introduced in article 14 by the 1972 Protocol are for the most part not reflected in article 22 of the 1988 Convention, no doubt because of the very different character of the latter Convention, dealing as it does with matters of criminal law and its enforcement that go beyond the scope of the earlier conventions into areas touching more closely on the sovereignty and jurisdiction of States. The comments in the Commentary on the 1972 Protocol on article 6 (amending article 14 of the 1961 Convention) may, however, also be relevant in determining the extent to which the Board’s functions and powers under article 22 differ from its functions and powers under the 1961 Convention, that Convention as amended and the 1971 Convention. In summary, and as indicated in more detail below, the rights conferred on the Board in article 22 of the 1988 Convention differ from those found in the 1961 and 1971 Conventions. In particular:

(a) They relate not to the aims of the Convention as a whole, which is the case under the previous conventions (see paragraphs 22.10 and 22.11 below), but only to matters within the competence of the Board when it has reason to believe that the aims of the Convention are not being met;

⁸³⁶The words “and functions” were added by operation of article 2 of the 1972 Protocol.

(b) Only in respect of articles 12, 13 and 16 of the 1988 Convention may the Board resort to the procedure provided for in article 22, paragraph 1, subparagraph (b), the Board having the right to do so in respect of all provisions of the 1961 and 1971 Conventions when certain conditions are met;

(c) The Board is given no authority under article 22 of the 1988 Convention to recommend measures of the nature provided for in article 14, paragraph 2, of the 1961 Convention and article 19, paragraph 2, of the 1971 Convention, namely to impose suspension of export and import of narcotic drugs and psychotropic substances in respect of a country that has failed to provide satisfactory explanations or to take remedial measures in a case where the aims of the conventions are seriously endangered.

22.3 The basic proposal before the 1988 Conference⁸³⁷ contained an article entitled “Measures by the [Board] [Commission] to ensure the execution of the provisions of the Convention”. The option, retained throughout the text of the article in the basic proposal, to entrust the functions concerned to the Board or to the Commission reflects the lack of consensus on that point in the earlier proceedings, leaving it up to the Conference to select one of the two; the report of the Commission on Narcotic Drugs on its tenth special session, which forwarded this article to the Conference, reflects the general agreement that it would not be advisable to establish a new body for that purpose.⁸³⁸ The tasks contemplated could, however, be carried out by the Commission or the Board and there was “no preference as to whether the Board or the Commission or both should be entrusted with the task of ensuring the execution of the provisions of the Convention”.⁸³⁹

22.4 At the Conference, the differences over whether to entrust various supervisory functions under the new Convention to the Commission or to the Board continued (see paragraphs 21.3-21.9 above), as did differences over the scope and extent of those functions. Eventually, however, a compromise was reached on texts for articles 21 and 22 that could be adopted by consensus.

22.5 As with the other implementation articles, the article in the basic proposal dealing with the subject matter now contained in article 22 was referred

⁸³⁷ *Official Records*, vol. I ..., document A/CONF.82/3, annex II (“Article 18”) p. 85.

⁸³⁸ *Official Records of the Economic and Social Council, 1988, Supplement No. 3*, (E/1988/13), para. 120.

⁸³⁹ *Ibid.*

by the plenary to Committee II for consideration. Amendments were submitted to the Committee by the Netherlands (“Functions of the Board”),⁸⁴⁰ and by Canada, Denmark, France, Germany, Federal Republic of, Norway and Sweden (“General supervision of the execution of the provisions of the Convention”).⁸⁴¹

22.6 In its amendment, the Netherlands identified eight articles⁸⁴² in respect of which the Board would have exercised supervisory functions under the Convention similar to those eventually incorporated in article 22, paragraph 1, subparagraphs (a) and (b). The amendment by Canada and a number of other sponsors did not identify specific articles over which the Board would exercise supervisory functions, instead extending those functions to all the substantive articles of the Convention, as is the case in the 1961 and 1971 Conventions.

22.7 The discussion in Committee II revealed that no consensus could be reached on either of the proposed amendments, a number of representatives believing that both went too far in authorizing the Board to demand explanations, to impose sanctions and publish reports.⁸⁴³ After considerable discussion,⁸⁴⁴ however, it was decided to take the amendments by the Netherlands as the basis for the discussion of the implementation articles. As further discussion on the amendment by the Netherlands relating to the functions of the Board continued to reflect differing views, the Chairman proposed that informal consultations should be held to resolve the issue.

22.8 The representative of the Netherlands subsequently reported that the informal consultations had enabled the participants to reach agreement on a text. He explained⁸⁴⁵ that his delegation had held consultations with the delegation of Canada and the other sponsors referred to in paragraph 22.5 above, as well as

⁸⁴⁰*Official Records*, vol. I ..., document E/CONF.82/3, “Draft implementation clauses” (E/CONF.82/C.2/L.13/Add.13), paras. 17 and 18, pp. 164-165.

⁸⁴¹*Ibid.*, para. 9, p. 163.

⁸⁴²Articles 8, 9, 10, 11, 11 *bis*, 12, 13 and 14 of the basic proposal; these became articles 12, 13, 14, 15, 16, 17, 18 and 19 in the 1988 Convention.

⁸⁴³*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 31st meeting, paras. 59 and 63; and 32nd meeting, paras. 22, 30-32, 41, 43, 44 and 49.

⁸⁴⁴*Ibid.*, 32nd meeting, para. 13.

⁸⁴⁵*Ibid.*, 34th meeting, paras. 1 and 2.

with other delegations, which had urged that the article be deleted; a compromise solution had finally been achieved that was acceptable to all three groups represented in the negotiations. The text of that compromise, subject to drafting changes, is that of article 22 of the 1988 Convention.

Paragraph 1, introductory part

1. Without prejudice to the functions of the Commission under article 21, and without prejudice to the functions of the Board and the Commission under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention:

Commentary

22.9 The introductory paragraph of article 22 has no counterpart in the 1961 and 1971 Conventions, but it would appear to have its rationale in protecting to the full the functions and powers of the Board under those conventions, irrespective of such differences in this regard as may exist under the 1988 Convention. It also provides that the functions of the Commission under article 21 of the 1988 Convention are unaffected by the provisions of article 22. That may result in some overlap, particularly in the light of the Commission's obligation under article 21, subparagraph (a), to review the operation of the Convention as a whole.

Paragraph 1, subparagraph (a)

(a) If, on the basis of its examination of information available to it, to the Secretary-General or to the Commission, or of information communicated by United Nations organs, the Board has reason to believe that the aims of this Convention in matters related to its competence are not being met, the Board may invite a Party or Parties to furnish any relevant information;

Commentary

22.10 Speaking in Committee II, the representative of the Netherlands described paragraph 1, subparagraph (a), of the compromise text as being of "special importance".⁸⁴⁶ The subparagraph contained a limitation not found in

⁸⁴⁶Ibid.

the corresponding articles in the earlier conventions, in that the Board's authority would be specifically limited to aims of the Convention "in matters related to its competence". In response to a question, the representative of the Netherlands said that the reference concerned the Board's competence under the new Convention and other existing conventions, as well as the new powers conferred upon it by what was to become article 12 of the Convention.⁸⁴⁷ The representative of the United Kingdom stated that, while he was prepared to join a consensus on the text, he wished to enter a reservation in respect of paragraph 1, subparagraph (a) which gave the Board scope for action in relation to the wider aims of the Convention only in matters relating to its competence. The Board's competence was not defined in the new article, but it must certainly extend to the articles specified in paragraph 1, subparagraph (b). There was an implication that the Board might have wider competence. It already enjoyed wide-ranging competence in matters relating to illicit trafficking under the 1961 and 1971 Conventions and that competence was specifically preserved by the introductory wording of the new article 22. The situation was not clear and the representative of the United Kingdom feared that the lack of clarity would provide substantial scope for parties to argue that a particular matter on which the Board had asked for relevant information was not within its competence and, therefore, that the information need not be provided. Such a situation might militate against a strong and effective Convention.⁸⁴⁸

22.11 From the above it may be inferred that paragraph 1, subparagraph (a), could give rise to problems of interpretation that were not necessarily resolved by the comments of the sponsor of the text that was adopted. Difficulties could arise in reconciling the Board's competence in matters relating to illicit trafficking under the 1961 and 1971 Conventions and its competence under the 1988 Convention. It may be that in practice difficulties will not arise, as the Board now has long experience in the discretion required for it to act under article 14 of the 1961 Convention and of the 1961 Convention as amended and under article 19 of the 1971 Convention or to seek other ways of resolving issues where the aims of a convention are not being met. It is clear such discretion will certainly be called for under the 1988 Convention, where certain articles deal with matters that can be of a highly political character. The reference made under paragraph 1, subparagraph (a), to the aims of the Convention coming within the Board's competence should thus probably be seen as a direction to the

⁸⁴⁷Ibid., para.9.

⁸⁴⁸Ibid., paragraph 16; the reservation was repeated by the representative of the United Kingdom, in plenary (ibid., Summary records of plenary meetings, 7th plenary meeting, para. 87).

Board to act in those areas under article 22 where its traditional expertise and experience is of particular relevance, rather than in areas covered by articles that represent some of the main innovations introduced in the 1988 Convention. That view would seem to be supported by the reference in article 22, paragraph 1, subparagraph (b), to articles 12 (Substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances), 13 (Materials and equipment) and 16 (Commercial documents and labelling of exports), those all being articles on subjects that clearly fall within the traditional regulatory responsibilities and expertise of the Board.

22.12 Under article 21, the Commission is required to review the operation of the 1988 Convention on the basis of information provided by the parties. Under article 22, paragraph 1, subparagraph (a), however, the Board is permitted to proceed on the wider basis of “information available to it, to the Secretary-General or to the Commission, or of information communicated by United Nations organs”. Article 14, paragraph 1, subparagraph (a), of the 1961 Convention refers only to information submitted by “Governments to the Board ... or information communicated by United Nations organs”. The latter wording is repeated in article 19, paragraph 1, subparagraph (a), of the 1971 Convention.

22.13 The amendments introduced in article 14 of the 1961 Convention by article 6 of the 1972 Protocol added several further sources of information on the basis of which the Board might act, namely information “by specialized agencies or, provided that they are approved by the Commission on the Board’s recommendation, by either other intergovernmental organizations or international non-governmental organizations which have direct competence in the subject matter and which are in consultative status with the Economic and Social Council under Article 71 of the Charter of the United Nations or which enjoy a similar status by special agreement with the Council ...”. None of this wording is reflected in article 22, paragraph 1, subparagraph (a), of the 1988 Convention.

22.14 In practice, however, the omission of similar wording in the 1988 Convention may make little difference in view of the generality of the reference in article 22, paragraph 1, subparagraph (a), to “information available to” the Board and “to the Secretary-General”. Those formulations would seem broad enough to cover information coming from any of the sources listed in article 14, paragraph 1, subparagraph (a), of the 1961 Convention as amended by the 1972 Protocol. The omission of a reference to specialized agencies in article 22, paragraph 1, subparagraph (a), of the 1988 Convention is, likewise, not significant. Under the 1961 and 1971 Conventions the term “United Nations organs” has

been understood to cover the specialized agencies,⁸⁴⁹ despite the fact that they are intergovernmental organizations established by separate treaties. They are, however, considered to be part of the United Nations family, having been brought into relationship with the United Nations pursuant to agreements concluded with the Economic and Social Council under Article 63 of the Charter of the United Nations. Such agreements normally provide for a full exchange of information on matters of common interest.

22.15 The powers conferred by article 22, paragraph 1, subparagraph (a), of the 1988 Convention are more restricted than those of the parallel articles in the 1961 and 1971 Conventions. Not only are the Board's powers thereunder limited to matters within its competence as defined by the Convention (rather than extending to the provisions of the 1988 Convention as a whole), but also, when acting under paragraph 1, subparagraph (a), by inviting a party to furnish relevant information, the Board does not retain the right under article 22 itself that it has under the other conventions to call the attention of the parties, the Council and the Commission to the matter, unless it relates to articles 12, 13 and 16 as specified in article 22, paragraph 1, subparagraph (b). The Board would, however, retain the right to report on such matters under article 23 of the Convention ("Reports of the Board"), provided always that in so doing it does not expressly or by implication refer to the procedure laid down in article 22, paragraph 1, subparagraph (a), in view of the condition of confidentiality imposed under article 22, paragraph 5.⁸⁵⁰

Paragraph 1, subparagraph (b)

(b) With respect to articles 12, 13 and 16:

- (i) After taking action under subparagraph (a) of this article, the Board, if satisfied that it is necessary to do so, may call upon the Party concerned to adopt such remedial measures as shall seem under the circumstances to be necessary for the execution of the provisions of articles 12, 13 and 16;**

⁸⁴⁹See Commentary on the 1961 Convention, paragraph 10 of the comments on article 14, and Commentary on the 1971 Convention, paragraph 7 of the comments on article 19.

⁸⁵⁰See Commentary on the 1961 Convention, paragraph 17 of the comments on article 14, paragraph 1, subparagraph (a); and Commentary on the 1971 Convention, paragraph 13 of the comments on article 19, paragraph 1, subparagraph (a), and paragraph 7.

- (ii) Prior to taking action under (iii) below, the Board shall treat as confidential its communications with the Party concerned under the preceding subparagraphs;**
- (iii) If the Board finds that the Party concerned has not taken remedial measures which it has been called upon to take under this subparagraph, it may call the attention of the Parties, the Council and the Commission to the matter. Any report published by the Board under this subparagraph shall also contain the views of the Party concerned if the latter so requests.**

Commentary

22.16 The representative of the Netherlands, introducing the compromise text in Committee II (see paragraphs 22.5-22.7 above), explained that paragraph 1, subparagraph (b), clause (i), was in conformity with the relevant provisions of existing conventions and, in particular, the 1961 Convention.⁸⁵¹ The subparagraph does, in fact, repeat the corresponding wording in article 14 of the 1961 Convention and article 19 of the 1971 Convention, except for the addition of the limitation of the Board's authority under this provision to articles 12, 13 and 16 of the Convention. There is no similar restriction in either the 1961 or 1971 Convention. Nevertheless, the remarks in the commentaries on the 1961 and 1971 Conventions under the corresponding provisions are, *mutatis mutandis*, relevant to the interpretation of article 22, paragraph 1, subparagraph (b), clause (i), of the 1988 Convention.⁸⁵²

22.17 The provisions of article 22, paragraph 1, subparagraph (b), clause (ii), are not reflected in the corresponding provisions of the 1961 Convention and the 1971 Convention, although the commentaries on both those conventions express the view that the Board should treat communications between itself and a

⁸⁵¹*Official Records*, vol. II ..., Summary records of the Committees of the Whole, Committee II, 34th meeting, para. 10.

⁸⁵²See Commentary on the 1961 Convention, paragraphs 1-10 of the comments on article 14, paragraph 1, subparagraph (b); and Commentary on the 1971 Convention, paragraphs 1-7 of the comments on article 19, paragraph 1, subparagraph (b).

Government as confidential at this stage of the proceedings.⁸⁵³ Paragraph 1, subparagraph (a), of article 14 of the 1961 Convention and the corresponding provision in article 19 of the 1971 Convention require the Board, when acting under those subparagraphs, to treat any request it may make to a Government for information, and the Government's explanation, as confidential. The inclusion of an express confidentiality provision in article 22, paragraph 1, subparagraph (b), clause (ii), of the 1988 Convention is probably based upon the precedent provided in paragraph 1, subparagraph (a), of both article 14 and article 19 of the 1961 and 1971 Conventions respectively. In the 1988 Convention, however, this requirement of confidentiality is broadened and included as article 22, paragraph 5.⁸⁵⁴

22.18 Article 22, paragraph 1, subparagraph (b), clause (iii), of the 1988 Convention reflects similar provisions in the 1961 and 1971 Conventions. The remarks in the commentaries on the 1961 and 1971 Conventions are therefore relevant to the interpretation of subparagraph (b).⁸⁵⁵

Paragraphs 2, 3 and 4

2. Any Party shall be invited to be represented at a meeting of the Board at which a question of direct interest to it is to be considered under this article.

3. If in any case a decision of the Board which is adopted under this article is not unanimous, the views of the minority shall be stated.

4. Decisions of the Board under this article shall be taken by a two-thirds majority of the whole number of the Board.

⁸⁵³See Commentary on the 1961 Convention, paragraph 11 of the comments on article 14, paragraph 1, subparagraph (b); and Commentary on the 1971 Convention, paragraph 5 of the comments on article 19, paragraph 1, subparagraph (b).

⁸⁵⁴See below, comments on paragraphs 5, 6 and 7.

⁸⁵⁵See Commentary on the 1961 Convention, paragraphs 1-6 of the comments on article 14, paragraph 1, subparagraph (c), and paragraphs 1-8 of the comments on article 14, paragraph 3; and Commentary on the 1971 Convention, paragraphs 1-6 of the comments on article 19, paragraph 1, subparagraph (c), and paragraphs 1-8 of the comments on paragraph 3.

Commentary

22.19 Paragraphs 2, 3 and 4 of article 22 were based on the language of an amendment introduced by the Netherlands (see paragraph 22.5 above). Paragraph 2 mirrors article 14, paragraph 5, of the 1961 Convention. In the 1961 Convention, the word “State” rather than “Party” is used, the change to “Party” in the 1988 Convention reflecting the fact that that Convention is open to entities other than States. The comments on article 14, paragraph 5, in the Commentary on the 1961 Convention are thus relevant, *mutatis mutandis*, to paragraph 2 of the 1988 Convention. The 1961 Convention, in article 14, paragraph 1, empowers the Board to take measures to ensure the execution of that Convention’s provisions not only by parties but also by other countries or territories.

22.20 Article 22, paragraphs 3 and 4, of the 1988 Convention are likewise identical, except for drafting changes, to article 14, paragraphs 4 and 6, of the 1961 Convention. The representative of the Netherlands explained that “two-thirds majority of the whole number of the Board” meant a two-thirds majority of the full membership of the Board.⁸⁵⁶ Because of their identical character, the comments in the Commentary on the 1961 Convention on article 14, paragraphs 4 and 6, are thus relevant to article 22, paragraphs 3 and 4, of the 1988 Convention.

Paragraphs 5, 6 and 7

5. In carrying out its functions pursuant to subparagraph 1 (a) of this article, the Board shall ensure the confidentiality of all information which may come into its possession.

6. The Board’s responsibility under this article shall not apply to the implementation of treaties or agreements entered into between Parties in accordance with the provisions of this Convention.

7. The provisions of this article shall not be applicable to disputes between Parties falling under the provisions of article 32.

⁸⁵⁶*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 34th meeting, para. 10.

Commentary

22.21 The text of article 22, paragraphs 5, 6 and 7, of the 1988 Convention had been suggested by the representatives of Canada and Sweden.⁸⁵⁷ The requirement of confidentiality of information used by the Board pursuant to the discharge of its functions under article 22, paragraph 1, subparagraph (a) of the 1988 Convention, appears to derive from article 14, paragraph 1, subparagraph (a), of the 1961 Convention, which requires the Board, when acting under that paragraph, to “treat as confidential a request for information or an explanation by a Government under this subparagraph”. This requirement was included in paragraph 1, subparagraph (a), of the amendment submitted to the Conference by Canada, Denmark, France, Germany, Federal Republic of, Norway and Sweden (see paragraph 22.5 above).⁸⁵⁸ The requirement also appears in article 22, paragraph 1, subparagraph (b), clause (ii), in respect of the Board’s communication with a party before having possible recourse to the Council and the Commission. The wording in paragraph 5 is wider in scope than that found in paragraph 1, subparagraph (a), of the corresponding articles in the 1961 and 1971 Conventions, in that it imposes the requirement of confidentiality on all information coming into its possession when acting under paragraph 1, subparagraph (a). The requirement will cease to be operative if the Board, in connection with paragraph 1, subparagraph (b), has recourse to the provisions of subparagraph (b), clause (iii), pursuant to which the Board may publish a report. Furthermore, some of the information (for example, information provided by the parties) may become public in other contexts, such as a review of the operation of the Convention undertaken by the Commission under article 21, subparagraph (a), of the Convention or a report by the Board under article 23 (see paragraph 22.15 above). The exact parameters of the application of article 22, paragraph 5, of the Convention will thus have to be worked out in practice.

22.22 Under paragraph 6, it is not the Board’s responsibility to supervise any agreements entered into by the parties with a view to furthering the purposes of the Convention. References are made in a number of articles of the 1988 Convention to the conclusion between parties of bilateral or multilateral treaties, agreements or arrangements to enhance the effectiveness of those

⁸⁵⁷Ibid., para. 2.

⁸⁵⁸*Official Records*, vol. I ..., document E/CONF.82/3, “Draft implementation clauses” (E/CONF.82/C.2/L.13/Add.3), paras. 17 and 18, pp. 164-165.

articles, including article 5 (Confiscation),⁸⁵⁹ article 6 (Extradition),⁸⁶⁰ article 7 (Mutual legal assistance),⁸⁶¹ article 9 (Other forms of co-operation and training),⁸⁶² article 11 (Controlled delivery),⁸⁶³ article 14 (Measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances)⁸⁶⁴ and article 17 (Illicit traffic by sea).⁸⁶⁵ In addition to references of the nature just outlined, the 1988 Convention makes reference to other conventions, treaties and agreements already in force (for example extradition agreements), and it follows from the provisions of article 22, paragraphs 6 and 7, that the Board's competence would not extend to the implementation and interpretation of these other conventions, treaties and agreements, whether bilateral or multilateral in nature, except for the conventions enumerated in paragraph 1 (see paragraphs 22.10 and 22.11 above).

22.23 Paragraph 7 is not reflected in the corresponding articles of the 1961 and 1971 Conventions. It is a paragraph that puts the Board on notice that disputes between two or more parties are to be dealt with under article 32 of the Convention and not under article 22. Speaking in Committee II, for example, the representative of France pointed out that there could be no question of entrusting the Commission or the Board with the task of settling disputes arising between two parties concerning extradition, confiscation or any matter relating to reservations made under the Convention.⁸⁶⁶

⁸⁵⁹Para. 4, subparas. (c) and (g), and para. 5, subpara. (b).

⁸⁶⁰Paras. 11 and 12.

⁸⁶¹Paras. 6 and 20.

⁸⁶²Para. 1.

⁸⁶³*Ibid.*

⁸⁶⁴Para. 4.

⁸⁶⁵Paras. 4 and 9.

⁸⁶⁶*Official Records*, vol. II ..., Summary records of meetings of Committees of the Whole, Committee II, 32nd meeting, para. 29.

ARTICLE 23

Reports of the Board

General comments

23.1 Article 23 closely follows, *mutatis mutandis*, the corresponding provisions on reports of the Board to be found in article 15 of the 1961 Convention and article 18 of the 1971 Convention. The differences in paragraph 1 of the parallel article in the 1961 Convention are due solely to the more specific nature of the information to be provided under that Convention. The second paragraph in each article is identical except for a slight drafting difference in the 1961 Convention. The commentaries on the 1961 and 1971 Conventions with respect to the corresponding articles in those conventions are thus in large measure applicable and should be consulted.⁸⁶⁷

23.2 The basic proposal⁸⁶⁸ before the Conference had not contained a provision requiring annual reports by the Board, and article 23 had its origin in a proposal introduced in Committee II by Canada, Denmark, France, Germany, Federal Republic of, Norway and Sweden.⁸⁶⁹ Speaking on the proposal, the representative of the United States pointed out that it reproduced the wording used in the 1961 and 1971 Conventions; and he suggested that the Board's reports under the article would be even more eagerly awaited in the light of its new responsibilities in respect of chemicals and precursors, materials and equipment.⁸⁷⁰ The discussion that followed was largely confined to stressing the need for the article to conform as far as possible to the wording of the earlier conventions and to avoid placing on Governments reporting obligations that were too heavy, the final drafting of the article being entrusted to the Drafting Committee on that understanding.⁸⁷¹

⁸⁶⁷Commentary on the 1961 Convention, comments on article 15, paragraphs 1 and 2; and Commentary on the 1971 Convention, comments on article 18, paragraphs 1 and 2.

⁸⁶⁸*Official Records*, vol. I ..., document E/CONF.82/3, annex II.

⁸⁶⁹*Ibid.*, document E/CONF.82/12, "Draft implementation clauses" (E/CONF.82/C.2/L.13/Add.13), sect. II ("Article 18 *bis*"), paras. 10 and 11, pp. 163-164.

⁸⁷⁰*Official Records*, vol. II ..., Summary records of meetings of Committees of the Whole, Committee II, 34th meeting, para. 57.

⁸⁷¹*Ibid.*, paras. 58-67.

Paragraph 1

1. The Board shall prepare an annual report on its work containing an analysis of the information at its disposal and, in appropriate cases, an account of the explanations, if any, given by or required of Parties, together with any observations and recommendations which the Board desires to make. The Board may make such additional reports as it considers necessary. The reports shall be submitted to the Council through the Commission which may make such comments as it sees fit.

Commentary

23.3 As is the case in the 1961 and 1971 Conventions, the annual report of the Board on the 1988 Convention is mandatory, while it is left to the Board to determine when additional reports may be necessary. In the implementation of article 15 of the 1961 Convention and article 18 of the 1971 Convention, the Board has developed the practice of submitting a consolidated annual report, which provides an entire overview of the effectiveness of the international drug control treaty system and an analysis of the world situation with respect to drug abuse and illicit traffic. The consolidated report now also covers the 1988 Convention and has dealt, *inter alia*, with the implementation of that Convention and cooperation with Governments.⁸⁷² The very broad view that the Board has taken on what should be included in its annual report has thus been maintained.⁸⁷³

23.4 Under article 22, concerning remedies available to the Board when it believes the aims of the Convention are not being met, the Board may publish a report drawing attention to a party's non-compliance with the Convention. Paragraph 5 of that article, however, provides for restrictions on the publication of information obtained in such cases. The Board could decide not to proceed under article 22, paragraph 1, since the provisions of that article are of a facultative (through the use of the word "may"), rather than mandatory, nature. Instead it could rely on the provisions of article 23 and on its right to seek or to

⁸⁷²The report is published each year. The most recent report was *Report of the International Narcotics Control Board for 1997* (United Nations publication, Sales No. E.98.XI.1).

⁸⁷³ Commentary on the 1961 Convention, paragraph 6 of the comments on article 15; and Commentary on the 1971 Convention, paragraph 8 of the comments on article 18, paragraph 1.

receive information provided by parties to the Commission, under article 20, or to the Board itself, under article 12. Under article 23, the Board's annual report shall contain "in appropriate cases, an account of the explanations, if any, given by or required of Parties, together with any observations and recommendations which the Board desires to make". The provisions just quoted would appear to enable the Board to achieve, under article 23, much the same result as may be achieved under article 22. Experience shows that publicity is perhaps the most potent force in obtaining compliance with treaty provisions, where the mere possibility of resorting to such publicity can bring about the result desired by the Board. Reports prepared by the Board under article 23 of the 1988 Convention, as in the earlier conventions, have to be submitted to the Economic and Social Council through the Commission. That permits the Commission to append its own comments, usually adding further political weight to the Board's observations and recommendations. While the requirement of submission through the Commission may cause some extra delay⁸⁷⁴ (reports published by the Board under article 22, paragraph 1, subparagraph (b), clause (iii), are to be given directly to the parties, the Council and the Commission), it is unlikely to influence the eventual outcome in cases where the record clearly establishes that the aims of the Convention are not being met.

23.5 In addition to the annual report called for under article 23, the Board is required under article 12, paragraph 13, of the 1988 Convention to report annually to the Commission on the implementation of that article. That requirement is discussed under the comments on article 12 (see paragraphs 12.41-12.42 above).

Paragraph 2

2. The reports of the Board shall be communicated to the Parties and subsequently published by the Secretary-General. The Parties shall permit their unrestricted distribution.

⁸⁷⁴See, however, Commentary on the 1961 Convention, paragraph 4 of the comments on article 15, paragraph 1, for two instances in which the Council considered the Board's report before it was examined by the Commission.

Commentary

23.6 As mentioned in paragraph 23.1 above, the text of paragraph 2 is virtually identical in the 1961, 1971 and 1988 Conventions. The comments on that paragraph in the commentaries on the 1961 and 1971 Conventions are thus fully applicable.⁸⁷⁵ In particular, any report of the Board should be sent to parties as soon as it is reproduced, and in any case not later than its transmittal to the Commission. In addition, the report should be published by the Secretary-General, thereby ensuring its release to the public, and should be allowed to circulate freely by all parties, thereby also ensuring its availability to news media.

⁸⁷⁵See Commentary on the 1961 Convention, comments on article 15, paragraph 2; and Commentary on the 1971 Convention, comments on article 18, paragraph 2.

PART FOUR

FINAL CLAUSES

ARTICLES 24-34

ARTICLE 24

Application of stricter measures than those required by this Convention

Single paragraph

A Party may adopt more strict or severe measures than those provided by this Convention if, in its opinion, such measures are desirable or necessary for the prevention or suppression of illicit traffic.

Commentary

24.1. Article 24, the first of the final clauses of the 1988 Convention,⁸⁷⁶ corresponds to article 39 of the 1961 Convention and article 23 of the 1971 Convention. The remarks on those articles in the commentaries on the 1961 and 1971 Conventions thus apply, *mutatis mutandis*, to this article.⁸⁷⁷ The article follows most closely article 23 of the 1971 Convention, the changes in the text reflecting only the different nature of the two conventions, the one relating to the control of psychotropic substances and the other to measures, largely of a criminal law nature, to suppress illicit traffic; thus article 24 of the

⁸⁷⁶For the legislative history of the final clauses of the 1988 Convention (articles 24-34 in the text as adopted), see annex I to the present *Commentary*.

⁸⁷⁷Commentary on the 1961 Convention, paragraphs 1-4 of the comments on article 39; and Commentary on the 1971 Convention, paragraphs 1-4 of the comments on article 23.

1988 Convention refers just to “measures” and not to “measures of control” and ties such measures to the “prevention or suppression of illicit traffic” and not to “the protection of public health and welfare”, as is the case in the 1971 Convention.

24.2. The article was contained in the basic proposal⁸⁷⁸ before the Conference set out in the report of the review group on the draft Convention. In Committee II the article as such gave rise to no comment, beyond the suggestion that the wording of the 1961 and 1971 Conventions should be used for the article.⁸⁷⁹ Attention was instead directed to the inclusion in the same article of a non-derogation clause,⁸⁸⁰ which eventually became article 25 of the Convention. In the plenary of the Conference, no comments of substance were made on article 24, which was adopted without change.

24.3. Article 24 establishes that the 1988 Convention, like the earlier ones, provides the minimum level of measures to be taken by all parties, leaving it to them to take “more strict or severe measures”. Attention is drawn in particular to the comments on the interpretation of those words in the commentaries on the 1961 and 1971 Conventions, under articles 39 and 23 respectively.⁸⁸¹ The repetition of the same words in the 1988 Convention would seem to indicate that the participants in the Conference took the view that, in the past, application of such a provision had not given rise to serious difficulties. In the previous commentaries, it was pointed out that the article permitted a party to adopt measures additional to those prescribed by the Convention or to replace them by stricter or more severe measures than those provided for in the Convention. As an illustration of the second of these two approaches under the 1988 Convention, in connection, for example, with article 3, paragraph 8, calling for a long statute of limitations period for offences established under that article, a party might provide instead that the prosecution of those offences would not be subject to any time-limit.

⁸⁷⁸*Official Records*, vol. I ..., document E/CONF.82/3, annex II (“Article 19”).

⁸⁷⁹*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 34th meeting, para. 69.

⁸⁸⁰*Ibid.*, paras. 70-72.

⁸⁸¹Commentary on the 1961 Convention, paragraphs 2-5 of the comments on article 39; and Commentary on the 1971 Convention, paragraphs 2-4 of the comments on article 23.

24.4 In addition to the general provision of article 24, article 12 includes, in paragraph 10, subparagraph (b), a clause to the effect that a party “may adopt more strict or severe measures of control than those provided by this paragraph if, in its opinion, such measures are desirable or necessary”.

ARTICLE 25

Non-derogation from earlier treaty rights and obligations

Single paragraph

The provisions of this Convention shall not derogate from any rights enjoyed or obligations undertaken by Parties to this Convention under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.

Commentary

25.1 The basic proposal before the Conference set out in the report of the review group on the draft Convention⁸⁸² did not contain an article corresponding to article 25. That article originated in discussions at the Conference on the draft article of the basic proposal concerning offences and sanctions (which became article 3 in the 1988 Convention). The draft article had been referred by the plenary to Committee I, which in turn decided to refer the basic proposal and the amendments thereto to a working group for consideration.⁸⁸³

25.2 The Chairman of the Working Group, in introducing the report of the Working Group to the Committee,⁸⁸⁴ explained the rationale behind a recommendation by the Working Group that the Convention should contain a non-derogation clause.⁸⁸⁵ At one point, there had been a proposal to include in the list of offences in what was to become article 3 almost the same types of conduct as those listed in article 36 of the 1961 Convention, except for cultivation, possession and purchase, which would be excluded on the understanding that they were adequately provided for in the 1961 Convention. Some representatives having expressed the view that their omission might imply the possibility of derogation from the existing conventions, the Working Group had decided that the draft should contain an appropriate non-derogation clause, preferably in the

⁸⁸²*Official Records*, vol. I ..., document E/CONF.82/3, annex II.

⁸⁸³*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee I, 3rd meeting, paras. 57-59.

⁸⁸⁴*Ibid.*, 24th meeting, para. 4.

⁸⁸⁵*Official Records*, vol. I ..., document E/CONF.82/11, "Article 2" (E/CONF.82/C.1/L.18/Add.1), sect. II, para. 3 ("Paragraph 8"), p. 103 .

draft article on the application of stricter measures than those required by the new convention⁸⁸⁶ so that it could not be interpreted as implying any modification of the obligations which the existing conventions imposed on the parties to those conventions.

25.3 The provisions of the basic proposal before the Conference on the application of stricter measures than those required by the Convention had been referred by the plenary to Committee II for consideration. In view of the Working Group's decision (paragraph 25.2 above), the representative of Canada proposed the following addition to what was later to become article 24 on application of stricter measures:

“The provisions of the present Convention shall not derogate from any rights enjoyed or obligations undertaken by Parties to this Convention under the Single Convention on Narcotic Drugs, 1961, that Convention as amended by the Protocol of 1972 or the Convention on Psychotropic Substances, 1971.”⁸⁸⁷

After some discussion in the Committee,⁸⁸⁸ where the text gained considerable support, it was proposed and accepted by the Committee that the text be adopted and included in the draft Convention as a separate article.⁸⁸⁹ With some drafting changes introduced for purposes of conformity with other articles, article 25 was adopted by the plenary without comment.

25.4 The legislative history outlined above makes it clear that the 1988 Convention is intended not to weaken the earlier conventions but to supplement and reinforce them by introducing measures to deal with areas not necessarily covered by those conventions. Where certain provisions overlap or are parallel to each other, the 1988 Convention, in certain articles, makes the consequences clear. For example:

(a) Article 3, paragraph 1, subparagraph (a), clauses (i) and (ii), and paragraph 2, provides that the measures called for to establish criminal offences

⁸⁸⁶*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 34th meeting, paras. 71 and 74.

⁸⁸⁷*Ibid.*, para. 74.

⁸⁸⁸*Ibid.*, paras. 75-83.

⁸⁸⁹*Ibid.*, paras. 81 and 84.

under those paragraphs are to be established in conformity with the relevant provisions of the 1961 Convention, the 1961 Convention as amended and, where applicable, the 1971 Convention;

(b) Article 12, paragraph 8, subparagraph (a), contains a specific non-derogation clause, to the effect that measures to be taken by a party to monitor the manufacture and distribution of substances listed in Table I and Table II shall be “without prejudice ... to the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention”;

(c) Article 14 provides that measures taken under the 1988 Convention to eradicate illicit cultivation of plants containing narcotic and psychotropic substances and to eliminate illicit demand for narcotic drugs and psychotropic substances shall not be less stringent than those provided for in the earlier conventions.

Likewise, in article 22 on the functions of the Board, it is provided that such functions shall be without prejudice to the functions of the Board and of the Commission under the earlier conventions. Still another provision providing for measures supplementary to the earlier conventions is article 16, on commercial documents and labelling of exports, which requires that additional information be provided under the 1988 Convention.

25.5 The general rules of international law on the interpretation and application of treaties are clear in providing that a subsequent treaty dealing with the same subject matter as a previous treaty overrides the previous treaty to the extent of any incompatibility. When, however, a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier treaty, the provisions of that other treaty prevail.⁸⁹⁰

25.6 While the general rules may be clear, their application in a specific case is not necessarily a simple matter, particularly in relation to a convention which, while containing some provisions that overlap or are parallel to provisions in earlier conventions, is intended to regulate areas outside those previous conventions as well as to strengthen and reinforce certain of the provisions in

⁸⁹⁰See article 30 of the 1969 Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, p. 331) and article 30 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations (A/CONF.129/15). See “Reservations” (annex II, section A, below) on the applicability of those two conventions to the 1988 Convention.

those same conventions. Thus, in interpreting the provisions of the 1988 Convention, considerations to be borne in mind include the following:

(a) A basic aim of the Convention is to provide for areas not covered by the existing drug control treaties;

(b) Another aim, as evidenced by the preamble, is to reinforce and supplement the measures provided for in the earlier conventions in order to counter the magnitude and extent of illicit traffic;

(c) In certain articles, the 1988 Convention indicates expressly that those articles are to be interpreted in conformity with the previous conventions (see paragraph 25.4, subparagraphs (a) and (b), above);

(d) In one article it is specifically laid down that the measures to be taken cannot be less strict than those contained in the previous conventions (see paragraph 25.4, subparagraph (c), above);

(e) In another article there is a requirement that more information be provided than is called for in the earlier conventions (see paragraph 25.4 above);

(f) The 1988 Convention contains a general non-derogation clause in article 25, in respect of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention. The specific provisions mentioned above would prevail over the general provision in the event of conflict.

25.7 It is not useful to speculate in advance on the interpretation of a particular treaty provision in a particular case. Taking into account the considerations listed above, however, it can be argued that article 25 is intended to ensure that no provision of the 1988 Convention will weaken in any way a corresponding provision in the earlier conventions. It is not intended, on the other hand, that the 1988 Convention should be weakened in any particular provision by the argument that a similar provision in the earlier conventions is less stringent. The subsequent practice of the parties in implementing the 1988 Convention may in due course assist in interpreting the application of article 25 to parallel or overlapping provisions in the various conventions. It can, however, be said with some cogency that the articles in the 1988 Convention, for example those identified in paragraph 25.4 above, already indicate the consequences in the most significant areas where the various conventions overlap and that article 25 is thus of a residual nature, expressing in general terms the wish of the parties not to weaken in any way the various rights and obligations that flow from all the conventions.

ARTICLE 26

Signature

Single paragraph

This Convention shall be open for signature at the United Nations Office at Vienna, from 20 December 1988 to 28 February 1989, and thereafter at the Headquarters of the United Nations at New York, until 20 December 1989, by:

(a) All States;

(b) Namibia, represented by the United Nations Council for Namibia;

(c) Regional economic integration organizations which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by this Convention, references under the Convention to Parties, States or national services being applicable to these organizations within the limits of their competence.

Commentary

26.1. Article 26 reflects the evolution that has taken place in United Nations practice with regard to the entities that may become parties to multilateral conventions, intended to be of a universal character, concluded under the auspices of the Organization. The corresponding provisions of the 1961 and 1971 Conventions (article 40, paragraph 1, and article 25, paragraph 1, respectively) both contain what was known as the “Vienna formula”,⁸⁹¹ which opened conventions of this nature to States that were recognized as such, at the relevant times, by the majority of the international community. The test of such recognition was membership in the United Nations, or one or more of its specialized agencies, or the International Atomic Energy Agency, or being a party to the Statute of the International Court of Justice, or receiving an invitation from a principal United Nations organ to become a party to the convention concerned. By the time the 1988 Convention was adopted, the issues of statehood that had

⁸⁹¹The clause became widely used after its inclusion in the Vienna Convention on Diplomatic Relations of 18 April 1961 (United Nations, *Treaty Series*, vol. 500, p. 95).

given rise to the “Vienna formula” had been almost entirely resolved, and thus the 1988 Convention was opened for signature by “all States”.

26.2. The draft final clauses set out in the basic proposal before the Conference⁸⁹² contained two variants of this provision: one variant retained the “Vienna formula”, while the other contained the “all States” provision. The draft final clauses prepared by the Secretariat,⁸⁹³ at the request of the General Committee of the Conference, incorporated the “all States” provision, which was adopted by the Conference.

26.3. Article 26 of the Convention also opens the Convention for signature by “Namibia, represented by the United Nations Council for Namibia”. This represents the evolution in United Nations practice at the time the Convention was adopted, following on the assumption by the United Nations of full authority for Namibia. The provision was not incorporated in the draft final clauses contained in the basic proposal, but was included in the Secretariat’s draft of those clauses as then representing current United Nations practice.

26.4. The third evolutionary aspect reflected in article 26 is found in the opening of the Convention to regional economic integration organizations which have competence in respect of the negotiation, conclusion and application of international agreements in matters covered by the Convention.

26.5. The provision originates with the review group on the draft Convention, which met at Vienna from 27 June to 8 July 1988. The review group took note of a proposal by the Commission of the European Communities to amend the then existing text of the final clauses to add a provision to the effect that regional economic integration organizations which had competence in respect of the negotiation, conclusion and application of international agreements in matters covered by the Convention might become parties to the Convention and that references under the Convention to parties, States or national services should be applicable to those organizations within the limits of their competence. The review group agreed to amend the draft final clauses to include that provision.⁸⁹⁴

⁸⁹²*Official Records*, vol. I ..., document E/CONF.82/3, annex II.

⁸⁹³*Ibid.*, document E/CONF.82/12, “Draft final clauses” (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2, pp. 169-171.

⁸⁹⁴*Ibid.*, document E/CONF.82/3, para. 196.

26.6. As mentioned in the note on the legislative history of the final clauses (see annex I), the draft final clauses in both the basic proposal and the Secretariat's draft were referred to the Working Group on Final Clauses established by Committee II. Introducing in Committee II the set of final clauses proposed by the Working Group,⁸⁹⁵ the Chairman of the Working Group stated that the Convention would be open to all States, to Namibia, as represented by the United Nations Council for Namibia, and to regional economic integration organizations. While some reservations had been expressed in the Working Group regarding the need to refer expressly to Namibia, in view of recent developments and the fact that the United Nations Council for Namibia was in no position to exercise the rights and duties of the Convention, the majority had considered that the reference should be retained, as it reflected not only the most recent United Nations treaty practice but also the current legal situation. The Working Group, while noting the observations and reservations made, had decided to retain the provision.

26.7. The other issue that had arisen in the Working Group was the reference to regional economic integration organizations. The competence of such organizations in penal matters had been questioned and the Philippines had submitted an amendment⁸⁹⁶ that would have limited participation in the Convention to States. That view had not enjoyed majority support in the Working Group and the reference to such organizations had been retained. It had, moreover, been the understanding of the Working Group that the word "regional" should be interpreted in the widest sense to cover groupings of States, including subregional groups.

26.8. Committee II⁸⁹⁷ approved the draft article as submitted by the Working Group. In the discussion on the article in plenary, statements were made for the record on Namibia and on regional economic integration organizations.⁸⁹⁸

⁸⁹⁵*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, paras. 2-18.

⁸⁹⁶*Official Records*, vol. I ..., document E/CONF.82/12, "Draft final clauses" (E/CONF.82/C.2/L.13/Add.12), sect. II, paras. 3 and 4 ("Article 20"), p. 171.

⁸⁹⁷*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, paras. 20-39.

⁸⁹⁸*Ibid.*, Summary records of plenary meetings, 7th plenary meeting, paras. 94-97.

26.9 With the accession of Namibia to full independence, and its admission to the United Nations on 23 April 1990, the specific reference to Namibia in article 26 ceased to be operative, the Convention being open to Namibia under the “all States” provision.

26.10. As regards regional economic integration organizations, the European Community signed the 1988 Convention on 8 June 1989 and deposited an act of formal confirmation on 31 December 1990. That instrument was accompanied by the declaration on the extent of competence of the European Community called for in article 27, paragraph 2.⁸⁹⁹

26.11 The 1961 Convention, in its article 40, requires States that have signed the Convention to ratify it. It does not appear to contemplate the possibility of a State, which so indicates, being bound by signature alone. The 1971 Convention, however, expressly provides in its article 25 that States may become parties by signature alone. The draft final clauses contained in the basic proposal before the Conference provided, in one variant,⁹⁰⁰ for a potential party to be bound by signature alone, but that approach was not adopted in the Working Group, which based itself on the draft final clauses prepared by the Secretariat.⁹⁰¹ The 1988 Convention thus makes no express reference to a State becoming a party by signature alone, and the provisions of article 27 that require ratification, acceptance, approval or acts of formal confirmation appear to establish that the possibility of States becoming parties solely by signature was not contemplated. This is hardly surprising in a convention that has repercussions on the domestic legislation of each party to it, probably requiring that internal measures be taken before a State becomes a party. In any event, the question is a hypothetical one, as the closing date for signature of the Convention was 20 December 1989, and none of the signatories by that date⁹⁰² appears to have taken the position that it had become a party by signature alone.⁹⁰³

⁸⁹⁹For the text of the declaration, see the note verbale by the Secretary-General acting as depositary (C.N.250.1990.TREATIES-12 (Depositary Notification)), dated 15 March 1991.

⁹⁰⁰*Official Records*, vol. I ..., document E/CONF.82/12, “Draft final clauses” (E/CONF.82/C.2/L.13/Add.12), sect. I, para. 1, p. 166.

⁹⁰¹*Ibid.*, sect. II, para. 2, p. 169.

⁹⁰²See *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1996* (United Nations publication, Sales No. E.97.V.5), chap. VI, sect. 19.

⁹⁰³See below, comments on article 28.

ARTICLE 27

Ratification, acceptance, approval or act of formal confirmation

Article as a whole

1. This Convention is subject to ratification, acceptance or approval by States and by Namibia, represented by the United Nations Council for Namibia, and to acts of formal confirmation by regional economic integration organizations referred to in article 26, subparagraph (c). The instruments of ratification, acceptance or approval and those relating to acts of formal confirmation shall be deposited with the Secretary-General.

2. In their instruments of formal confirmation, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention.

Commentary

27.1 The corresponding provisions in the 1961 and 1971 Conventions relating to the subject matter of paragraph 1 of article 27 of the 1988 Convention (article 40, paragraph 2, and article 25, paragraph 1, subparagraph (b), and paragraph 3, respectively) refer only to “ratification”, this being the term most commonly used in United Nations practice (when those conventions were adopted) for the act by which a State, after signing a treaty, expressed its consent to be bound by that treaty. The corresponding provision in the draft final clauses in the basic proposal that was before the Conference⁹⁰⁴ also referred only, in two variants of the article, to “ratification”, as was the case of the draft final clauses prepared by the Secretariat⁹⁰⁵ at the request of the General Committee. Japan

⁹⁰⁴*Official Records*, vol. I ..., document E/CONF.82/3, annex II, pp. 85-86.

⁹⁰⁵*Ibid.*, document E/CONF.82/12, “Draft final clauses” (E/CONF.82/C.2/L.13/Add.12), sect. I, para. 1, pp. 166-167.

proposed an amendment⁹⁰⁶ referring to acceptance as a form of consent to be bound by the Convention.

27.2 When the draft article was being considered in the Working Group on Final Clauses established by Committee II, the words “acceptance or approval” were added after the word “ratification”. That brought the article into line with the provisions of the 1969 Vienna Convention on the Law of Treaties,⁹⁰⁷ which employs all three terms.

27.3 Article 2, paragraph 1, subparagraph (b), of the Vienna Convention on the Law of Treaties provides that “‘ratification’, ‘acceptance’, ‘approval’ ... mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty.” The three terms are synonymous in their effect⁹⁰⁸ and there is no legal distinction between them. They thus represent the three terms most commonly used in international practice for the act whereby a State becomes a party to a treaty after signing that treaty, unless it has expressly agreed to be bound by signature alone (see paragraph 26.11 above). It is left to national practice to decide which term to employ when depositing the necessary instrument with the Secretary-General.

27.4 The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations⁹⁰⁹ provides, in its article 1 (b *bis*) that an “‘act of formal confirmation’ means an international act corresponding to that of ratification by a State, whereby an international organization establishes on the international plane its consent to be bound by a treaty”. The term was therefore included in the draft final clauses of the 1988 Convention prepared by the Secretariat and was agreed in the Working Group on Final Clauses. Article 1 (b) of the 1986 Vienna Convention also provides that “acceptance” and “approval” mean acts whereby an international organization establishes on the international plane its consent to be bound by a treaty. That, however, is not reflected in article 27 of the 1988 Convention.

⁹⁰⁶Ibid., sect. II, para. 4, p. 171.

⁹⁰⁷United Nations, *Treaty Series*, vol. 1155, p. 331.

⁹⁰⁸The term “ratification” is limited to acts by States. “Acceptance” and “approval” may also be employed by organizations when indicating their willingness to be bound by a treaty.

⁹⁰⁹A/CONF.129/15.

27.5 Paragraph 2 of article 27 was added in the Working Group on Final Clauses, not having been included in either the basic proposal or the Secretariat's draft final clauses. Introducing in Committee II the Working Group's set of final clauses, the Chairman of the Working Group indicated that it had also been decided that the article, as well as the subsequent article on accession, should contain a paragraph describing the extent of the competence of the regional economic integration organization concerned regarding matters governed by the Convention. That was in order to provide other parties with a clear understanding of the role that the organization concerned would play in the implementation of the Convention.⁹¹⁰

27.6 There was little or no express reference to the draft article in the discussions in Committee II, except for the comments on regional economic integration organizations, referred to under the preceding article (see paragraphs 26.7 and 26.8 above). When the final clauses were before the plenary for comments, no comment was made on article 27.

⁹¹⁰*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, para. 6.

ARTICLE 28

Accession

Article as a whole

1. This Convention shall remain open for accession by any State, by Namibia, represented by the United Nations Council for Namibia, and by regional economic integration organizations referred to in article 26, subparagraph (c). Accession shall be effected by the deposit of an instrument of accession with the Secretary-General.

2. In their instruments of accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Secretary-General of any modification in the extent of their competence with respect to the matters governed by the Convention.

Commentary

28.1 Article 28 follows on naturally from the provisions of articles 26 and 27, the three articles forming an integral whole in respect of the States and entities to which the Convention is open and of the methods by which those States and entities may become parties. Except for drafting changes, the text of the article is essentially that proposed in the draft final clauses prepared by the Secretariat pursuant to the request of the General Committee of the Conference.⁹¹¹ The article was not discussed when the final clauses were before the Working Group on Final Clauses, Committee II or the plenary, since the issue of the potential parties to the Convention had already been disposed of in connection with article 26.

28.2. Accession is the means by which any State or other entity entitled to become a party to a convention, which has not signed the convention, establishes its consent to be bound by the convention. As the final date for signature of the 1988 Convention, under article 26, was 20 December 1989, any

⁹¹¹*Official Records*, vol. I ..., document E/CONF.82/12, "Draft final clauses" (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2, p. 169.

State or organization not having signed by that date will have to proceed by way of accession if it wishes to become a party to the Convention. Limitations are placed on the periods during which most United Nations conventions are open for signature in the hope that doing so will encourage States to act as quickly as possible to become parties. As the conventions normally remain open for accession without time-limits, States or other entities may, however, always avail themselves of the option of accession.

28.3. Article 28, paragraph 2, repeats the requirement contained in article 27, paragraph 2, regarding the need for a regional economic integration organization to include in an instrument of accession a declaration of the extent of its competence with respect to matters governed by the Convention. Any modification in the extent of such competence is also to be notified to the Secretary-General.

ARTICLE 29

Entry into force

Article as a whole

1. This Convention shall enter into force on the ninetieth day after the date of the deposit with the Secretary-General of the twentieth instrument of ratification, acceptance, approval or accession by States or by Namibia, represented by the Council for Namibia.

2. For each State or for Namibia, represented by the Council for Namibia, ratifying, accepting, approving or acceding to this Convention after the deposit of the twentieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

3. For each regional economic integration organization referred to in article 26, subparagraph (c), depositing an instrument relating to an act of formal confirmation or an instrument of accession, this Convention shall enter into force on the ninetieth day after such deposit, or at the date the Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

Commentary

29.1 The principal issues that arose when article 29 was being drafted during the preparatory process, and later at the Conference, were related to:

(a) The number of instruments of ratification, acceptance, approval or accession required for entry into force;

(b) The time that should elapse after the deposit of the necessary instruments for the Convention to enter into force;

(c) The time that should elapse between deposit in each case of an instrument by a State or other entity to which the Convention was open and the entry into force of the Convention in respect of that State or entity.

29.2. The 1961 Convention had provided for entry into force on the thirtieth day after the deposit of the fortieth instrument of ratification or accession and for instruments deposited after that date to become operative 30 days after such deposit. The 1971 Convention, however, provided for entry into force on the ninetieth day after 40 States had signed the Convention without reservation as to ratification or had deposited their instruments of ratification or accession. After that date, the Convention would enter into force in respect of a State depositing an instrument 90 days after such deposit.

29.3 The provisions of what eventually became article 29 in the basic proposal before the Conference⁹¹² contained two variants. Both, however, proposed options on entry into force on the thirtieth, sixtieth or ninetieth day after 20, 30 or 40 States had acted to become parties to the Convention. Thereafter, action taken by States to become parties would become effective on the thirtieth, sixtieth or ninetieth day following such action. The draft final clauses proposed by the Secretariat⁹¹³ pursuant to the request of the General Committee of the Conference provided that the Convention should enter into force on the thirtieth day after the deposit of the twentieth, thirtieth or fortieth instrument of ratification or accession. After the Convention's entry into force, any instrument deposited would become operative on the thirtieth day after its deposit.

29.4 Japan proposed an amendment⁹¹⁴ to the basic proposal to the effect that the Convention should enter into force 90 days after the deposit of the requisite number of instruments.

29.5 All the foregoing texts were considered by the Working Group on Final Clauses, which recommended the text of the article as it now stands. Except for drafting changes, it was so adopted by the Conference. Introducing the draft

⁹¹²Ibid., document E/CONF.82/3, annex II ("Article 21"), p. 86.

⁹¹³Ibid., document E/CONF.82/12, "Draft final clauses" (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2, p. 169.

⁹¹⁴Ibid., paras. 3 and 4, p. 171.

article in the Committee, the Chairman of the Working Group explained⁹¹⁵ that discussions in the Group had revealed a consensus that it was desirable to bring the Convention into force as soon as possible and that the number of instruments that had to be deposited for that purpose should not be unduly large. The Working Group had opted for 20 instruments and agreed that, to permit States to complete all necessary domestic formalities, 90 days should elapse between deposit of an instrument and entry into force in respect of the depositing entity. The text recommended by the Working Group was not the subject of any comment either in Committee II or in the plenary when the final clauses were discussed and adopted.

29.6 Article 29 does not seem to call for any further comment. It should be noted, however, that to bring the Convention into force only instruments deposited by States, or by Namibia, represented by the United Nations Council for Namibia, were to be counted.⁹¹⁶ An act of formal confirmation by a regional economic integration organization would not count for this purpose. The exclusion probably stems from the fact that such an organization has only limited competence in matters governed by the Convention, States alone having full competence in that respect.⁹¹⁷

⁹¹⁵*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, para. 8.

⁹¹⁶The Convention entered into force on 11 November 1990, 90 days after the deposit on 13 August 1990 of the instrument of ratification of Spain. For dates of signature and deposit of acts of adherence, see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997* (United Nations publication, Sales No. E.98.V.2), chap. VI, sect. 19.

⁹¹⁷For information on the entry into force of the Convention, see above, "Introduction", paragraph 25.

ARTICLE 30

Denunciation

Article as a whole

- 1. A Party may denounce this Convention at any time by a written notification addressed to the Secretary-General.**
- 2. Such denunciation shall take effect for the Party concerned one year after the date of receipt of the notification by the Secretary-General.**

Commentary

30.1 Article 30 is a simplified version of the articles on denunciation contained in articles 46 and 29 respectively of the 1961 and the 1971 Conventions. Those conventions, unlike the present one, did not permit any denunciation until two years had expired from the date on which they came into force. One variant of the draft article in the basic proposal before the Conference⁹¹⁸ and the draft article included in the final clauses prepared by the Secretariat at the request of the General Committee⁹¹⁹ also provided that denunciation could only be effected two years after the entry into force of the Convention. A second variant of the draft article in the basic proposal omitted that requirement. As stated below, the latter variant was adopted.

30.2 Articles 46 and 29 respectively of the 1961 and 1971 Conventions provide that denunciation, if received by the Secretary-General on or before 1 July of any year, shall take effect on 1 January of the succeeding year and, if received after 1 July, shall take effect as if the denunciation had been received on or before 1 July in the succeeding year. Those elaborate provisions were motivated by considerations relating to the provision of estimates or annual reporting requirements under those conventions. Such considerations are not applicable to the 1988 Convention.

⁹¹⁸*Official Records*, vol. I ..., document E/CONF.82/3, annex II, p. 86.

⁹¹⁹*Ibid.*, document E/CONF.82/12, "Draft final clauses" (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2 ("Article 25"), p. 170.

30.3 The 1988 Convention thus simply provides, in article 30, paragraph 2, that denunciation by a party shall take effect one year after the date of receipt of a notification by the Secretary-General. The text had been proposed both in the second variant of the draft article in the basic proposal and in the draft article prepared by the Secretariat.⁹²⁰ Introducing in Committee II the report of the Working Group on Final Clauses, the Chairman of the Working Group explained that discussions on the article had centred on whether a party, in the interests of stability in treaty obligations, should be obliged to remain a party for a number of years before it could denounce the Convention. As the text proposed that denunciation would take effect only one year after notification, it was, however, agreed by consensus in the Working Group not to include any other time requirements.⁹²¹ The Working Group's text was adopted by Committee II without discussion and gave rise to no comment when the final clauses were discussed in plenary.

30.4 The 1961 and 1971 Conventions make provision for denunciation by a party on behalf of a territory for which it has international responsibility, both conventions having articles on territorial application (articles 42 and 27 respectively). As no article on territorial application was included in the 1988 Convention as eventually adopted, however, there is no corresponding provision in that Convention. The matter remains to be dealt with under the provisions of general international law and the depositary practice of the Secretary-General (see under "Territorial application" in annex II, section B, below).

⁹²⁰Ibid.

⁹²¹*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, para. 10.

ARTICLE 31

Amendments

Article as a whole

1. Any Party may propose an amendment to this Convention. The text of any such amendment and the reasons therefor shall be communicated by that Party to the Secretary-General, who shall communicate it to the other Parties and shall ask them whether they accept the proposed amendment. If a proposed amendment so circulated has not been rejected by any Party within twenty-four months after it has been circulated, it shall be deemed to have been accepted and shall enter into force in respect of a Party ninety days after that Party has deposited with the Secretary-General an instrument expressing its consent to be bound by that amendment.

2. If a proposed amendment has been rejected by any Party, the Secretary-General shall consult with the Parties and, if a majority so requests, he shall bring the matter, together with any comments made by the Parties, before the Council which may decide to call a conference in accordance with Article 62, paragraph 4, of the Charter of the United Nations. Any amendment resulting from such a Conference shall be embodied in a Protocol of Amendment. Consent to be bound by such a Protocol shall be required to be expressed specifically to the Secretary-General.

Commentary

31.1 The 1961 and 1971 Conventions contain virtually identical articles on amendments, whereby amendments can be proposed by a party, through the Secretary-General, to the Economic and Social Council. The Council can then either decide to convene a conference to consider the amendment or to ask the parties whether they accept the amendment. In the latter case, if no party rejects the amendment within 18 months after circulation by the Council, it enters into force. In the event of a rejection, the Council can decide whether or not to convene a conference to consider the amendment. Article 31, paragraph 1, of the 1988 Convention provides for a similar procedure for circulating a proposed amendment, except that the Council is bypassed and the Secretary-General proceeds on his own authority to circulate the amendment. Article 31,

paragraph 1, also introduces a proviso not found in its counterparts, namely that an amendment accepted under paragraph 1 only enters into force for a party to the Convention after it has submitted an instrument expressing its consent to be bound by that amendment. It should be noted that, in article 12 of the Convention, on substances frequently used in the illicit manufacture of narcotic drugs or psychotropic substances, the procedure for amending Table I and Table II is entirely different. Under article 12 there is no requirement for, nor is there any possibility of, deposit of an instrument of acceptance of an amendment made to Table I or Table II by the Commission. A party may, however, request a review by the Council of an amendment so made, the Council having the final authority to confirm or reverse the decision of the Commission.⁹²²

31.2 The corresponding draft article on amendments in the basic proposal before the Conference⁹²³ and the draft article in the draft final clauses proposed by the Secretariat⁹²⁴ at the request of the General Committee essentially repeat the provisions of the 1961 and the 1971 Conventions. An addition made in the Secretariat text would have permitted the Economic and Social Council, in the light of comments received, to adopt a revised text of an amendment proposed by a party before determining which of the two procedures outlined above it should follow.

31.3 Japan submitted to the Conference an amendment⁹²⁵ to the effect that acceptance of an amendment “shall be dependent upon each Party’s decision”.

31.4 Introducing the draft article in Committee II, the Chairman of the Working Group on Final Clauses noted that it had been the subject of considerable discussion and that a preference had emerged for a clause that would place the amendment procedure largely in the hands of the parties rather than of a body such as the Economic and Social Council, in which non-parties might predominate. A suggestion by the Netherlands had been endorsed by the Working Group, which laid down a procedure for circulating a proposed amendment, allowing for its entry into force after a lengthy period if no party objected to it. Some representatives in the Working Group had emphasized that,

⁹²²See above, comments on article 12.

⁹²³*Official Records*, vol. I ..., document E/CONF.82/3, annex II (“Article 24”), p. 87.

⁹²⁴*Ibid.*, document E/CONF.82/12, “Draft final clauses” (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2, p. 170.

⁹²⁵*Ibid.*, paras. 3 and 4.

because of constitutional requirements, they were not generally in favour of the “tacit approval” of amendments provided for in the draft article. Any State could, however, object to a proposed amendment and thus would not in any way be bound without its consent, and the two-year period provided for in paragraph 1 would give a State sufficient time to complete the necessary legislative procedures before an amendment entered into force. Those representatives who had expressed their concern in the Working Group had agreed that, provided their views were placed on record, they would not oppose a consensus on the draft article.⁹²⁶

31.5 The Chairman of the Working Group went on to say that the Legal Consultant, in reply to specific questions from the representative of Japan, had explained that a State would in no case be bound by an amendment without its consent. He had added that, under the “tacit approval procedure”, States had the unrestricted right to object during a two-year period; moreover, if an amendment were submitted to a conference, the results of that conference would have to be embodied in a protocol of amendment, to which any State could refuse to become party if it did not approve of the amendment. The representative of Japan then withdrew his amendment to the draft article.⁹²⁷

31.6 The article on amendments proposed by the Working Group read as follows:

“Amendments

“1. Any Party may propose an amendment to this Convention. The text of any such amendment and the reasons therefor shall be communicated by that Party to the Secretary-General who shall communicate it to the other Parties and shall ask them whether they accept the proposed amendment. If a proposed amendment so circulated has not been rejected by any Party within twenty-four months after it has been circulated, it shall be deemed to be accepted and shall enter into force after a further period of one year.

“2. If a proposed amendment has been rejected by any Party, the Secretary-General shall consult with the Parties and, if a majority so requests, he shall bring the matter, together with any comments made by the Parties, before

⁹²⁶*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, para. 11.

⁹²⁷*Ibid.*, para. 12.

the Council, which may decide to call a conference in accordance with paragraph 4 of Article 62 of the Charter of the United Nations.”⁹²⁸

31.7 The above draft article was considered by Committee II, where a number of oral amendments were proposed by the representative of Brazil,⁹²⁹ the first of which was to delete, at the end of paragraph 1, the words “after a further period of one year” and to replace it by the wording now included at the end of that paragraph to the effect that the amendment would enter into force in respect of a party 90 days after that party had deposited with the Secretary-General an instrument expressing its consent to be bound by that amendment. He also proposed adding to paragraph 2 the last two sentences as they appear in the final text of the article. While some representatives preferred the text of the article as proposed by the Working Group, they agreed, in the interest of consensus, to accept the Brazilian amendments, which had received wide support. No comments were made on the article, as revised, when the final clauses were discussed in plenary.

31.8 The draft of the article on amendments as it emerged from the Working Group was clearly intended, in paragraph 1, to lay down a procedure which, by tacit consent, would expedite amendments that were generally acceptable. The introduction in Committee II, however, of the requirement for each party expressly to accept the amendment through deposit of an instrument with the Secretary-General may in practice negate the original intent of the paragraph and result in a situation in which some, but not all, States may be parties to the Convention as amended, even in cases where the amendment gives rise to no objections. It remains to be seen whether, in these circumstances, parties would not prefer the procedure foreseen in paragraph 2 of the article for convening a conference. Furthermore, the inclusion of this article does not, per se, prevent the Economic and Social Council or the General Assembly from deciding on other procedures for amendment. In the commentaries on both the

⁹²⁸*Official Records*, vol. I ..., document E/CONF.82/12, “Final draft clauses” (E/CONF.82/C.2/L.13/Add.12), sect. III, para. 8 (“Article 25”), p. 173.

⁹²⁹*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 31st meeting, paras. 3-18.

1961 Convention and the 1971 Convention, this possibility is dealt with at length under articles 47 and 30, respectively.⁹³⁰

31.9 For the procedure to amend Table I and Table II annexed to the Convention, see comments on article 12, in particular on paragraphs 2-5 (see paragraphs 12.15-12.22 above).

⁹³⁰See Commentary on the 1961 Convention, paragraphs 1-3 of the comments on article 47; and Commentary on the 1971 Convention, paragraphs 2-4 of the comments on article 30.

ARTICLE 32

Settlement of disputes

Article as a whole

1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the Parties shall consult together with a view to the settlement of the dispute by negotiation, enquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.

2. Any such dispute which cannot be settled in the manner prescribed in paragraph 1 of this article shall be referred, at the request of any one of the States Parties to the dispute, to the International Court of Justice for decision.

3. If a regional economic integration organization referred to in article 26, subparagraph (c), is a Party to a dispute which cannot be settled in the manner prescribed in paragraph 1 of this article, it may, through a State Member of the United Nations, request the Council to request an advisory opinion of the International Court of Justice in accordance with Article 65 of the Statute of the Court, which opinion shall be regarded as decisive.

4. Each State, at the time of signature or ratification, acceptance or approval of this Convention or accession thereto, or each regional economic integration organization, at the time of signature or deposit of an act of formal confirmation or accession, may declare that it does not consider itself bound by paragraphs 2 and 3 of this article. The other Parties shall not be bound by paragraphs 2 and 3 with respect to any Party having made such a declaration.

5. Any Party having made a declaration in accordance with paragraph 4 of this article may at any time withdraw the declaration by notification to the Secretary-General.

Commentary

32.1 Article 32, paragraph 1, of the 1988 Convention is essentially the same, except for drafting changes, as the corresponding provisions of the 1961 and 1971 Conventions (article 48, paragraph 1, and article 31, paragraph 1, respectively). The comments on these paragraphs in the commentaries on the earlier conventions are therefore relevant sources of information. Article 32, paragraph 1, of the 1988 Convention follows article 33, paragraph 1, of the Charter of the United Nations in its enumeration of the various methods of settlement of disputes. The comments on article 31 of the 1971 Convention contain an explanation of some of those methods.⁹³¹

32.2 Article 32, paragraph 2, of the 1988 Convention essentially repeats article 31, paragraph 2, of the 1971 Convention, which was an elaboration of the corresponding text in article 48, paragraph 2, of the 1961 Convention. In the 1971 Convention, the words “at the request of any one of the parties to the dispute” were added after the words “shall be referred”. The additional words, missing from the 1961 Convention, clarified the doubts that had existed under that Convention as to whether the compulsory jurisdiction of the International Court of Justice was provided for in cases where one or more, but not all, of the parties to a dispute made the necessary application to the Court.⁹³² In the 1988 Convention the word “States” was added before the word “Parties”, as the Convention is open to entities other than States (see article 26). Article 34, paragraph 1, of the Statute of the International Court of Justice provides that “only States may be parties in cases before the Court”. Consequently, other procedures for settlement are required where a party to a dispute is an entity other than a State.

32.3 Paragraph 3 of article 32 therefore provides for the situation in which a regional economic integration organization is a party to a dispute that cannot be settled in the manner prescribed in paragraph 1. The paragraph lays down the procedure for obtaining, through the Economic and Social Council, an advisory opinion of the International Court of Justice and also provides that such an opinion shall be “decisive”, thus giving the opinion the same binding character as a judgement of the Court under paragraph 2 of the article.

⁹³¹Commentary on the 1971 Convention, paragraphs 2-4 of the comments on article 31.

⁹³²Commentary on the 1961 Convention, paragraph 3 of the comments on article 48.

32.4 Under article 32, paragraph 4, States or regional economic integration organizations are permitted to opt out of the provisions of paragraphs 2 and 3 of the article at the time of signature or of becoming parties to the 1988 Convention. The provision thus has the effect of permitting any State or regional economic integration organization to enter a reservation by making a declaration under paragraph 4. The effect of such a declaration is to make paragraphs 2 and 3 inoperative between the State or organization making the declaration and other States and organizations that have not made such declarations.

32.5 Paragraph 5 provides that a party may at any time withdraw a declaration made under paragraph 4 by notifying the Secretary-General of such withdrawal, thus bringing paragraphs 2 and 3 into operation between the State or organization withdrawing the declaration and all other States and organizations that have not made such declarations. Once withdrawn, such a declaration may not be made again. Paragraph 5 refers only to withdrawal of a declaration by a "Party". Under paragraph 4, however, declarations may be made upon signature as well as at the time when a signatory becomes a party. The fact that there is no reference in paragraph 5 to withdrawal of a declaration by a signatory prior to its becoming a party is probably devoid of practical significance, as the article as a whole only becomes operative after a State or organization becomes a party.

32.6 Article 32 represents a compromise arrived at during the Conference between participants who favoured the compulsory settlement of disputes, in the final analysis, by the International Court of Justice and those who did not favour such an approach. As the Conference proceeded by consensus (see "Introduction", paragraph 25, above), an article reflecting both points of view was the only available compromise.

32.7 The draft article on disputes in the basic proposal before the Conference contained two variants.⁹³³ The first repeated essentially the provisions of article 31 of the 1971 Convention. The second provided for negotiation as the first means of settlement and, failing that, arbitration. If the parties could not, within six months of a request for arbitration, agree on the organization of the arbitration, any one of the parties could refer the dispute to the International Court of Justice. The second variant also provided that a State could, upon signature or ratification, declare that it was not bound by the latter provision relating to referral to the International Court of Justice.

⁹³³*Official Records*, vol. I ..., document E/CONF.82/3, annex II ("Article 26").

32.8 The draft article on disputes prepared by the Secretariat⁹³⁴ at the request of the General Committee of the Conference also contained two variants, the first of which was substantially similar to paragraphs 1, 2 and 3 as eventually adopted by the Conference. Paragraphs 4 and 5 of the article, as eventually adopted, were not included in that variant. The second variant proceeded along the lines of the second variant in the basic proposal (see paragraph 32.7 above), with the addition of a provision for an advisory opinion of the International Court of Justice when a party to the dispute was a regional economic integration organization and the addition of a paragraph on the withdrawal of a declaration of non-acceptance of the settlement procedures identical to that eventually adopted as paragraph 5 of article 32.

32.9 The Working Group on Final Clauses considered the various formulations referred to in paragraphs 32.7 and 32.8 above and an amendment by Turkey to the draft article⁹³⁵ that was to the same effect as paragraphs 4 and 5 of the article as eventually approved by Committee II and adopted at the Conference.

32.10 Introducing in Committee II the text proposed by the Working Group on Final Clauses,⁹³⁶ the Chairman of the Working Group explained that the article on disputes proposed by the Working Group combined various features of the two variants in the Secretariat's draft of the final clauses, together with the amendments by Turkey. The second of those amendments, to the effect that the unilateral instrument referred to in paragraphs 4 and 5 should be described as "a declaration" rather than a "reservation", had given rise to considerable discussion. It had been generally agreed that such a declaration had the full effect of a reservation and that, in view of the provisions of the Vienna Convention on the Law of Treaties,⁹³⁷ in which a reservation, however named, was defined, use of the word "declaration" was not inappropriate.

32.11 In the discussion in Committee II on the Working Group's text, a number of representatives indicated their preference for a text that would have

⁹³⁴Ibid., document E/CONF.82/12, "Draft final clauses" (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2 ("Article 28"), pp. 170-171.

⁹³⁵Ibid., paras. 3 and 4 ("Article 28") p. 172.

⁹³⁶*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, paras. 14 and 15.

⁹³⁷United Nations, *Treaty Series*, vol. 1155, p. 331.

omitted paragraphs 4 and 5, thus obviating the situation that might arise when a dispute could not be definitively settled for all parties to the dispute because one or more of those parties did not accept paragraphs 2 and 3 of the article. It was, however, recognized that the text represented a compromise and the Committee approved the text proposed by the Working Group,⁹³⁸ no comments were made on the article when it came up in plenary.

32.12 Article 32 could be understood to leave open the issue of what would happen if one party filed an application before the International Court of Justice and another party (for example one that had made a declaration under paragraph 4) indicated that it objected to a reference of the dispute to the Court. In such circumstances, the Court would have to determine whether or not it had jurisdiction. Given the wording of the article and the jurisprudence of the Court, the answer would probably be in the affirmative.

⁹³⁸*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 31st meeting, paras. 19-30.

ARTICLE 33

Authentic texts

Single paragraph

The Arabic, Chinese, English, French, Russian and Spanish texts of this Convention are equally authentic.

Commentary

33.1 Article 111 of the Charter of the United Nations provides that the authentic texts of the Charter are those in the Chinese, English, French, Russian and Spanish languages. It was thus the standard practice in major multilateral conventions concluded under United Nations auspices to provide for authentic texts in those languages, examples being the 1961 and 1971 Conventions and the 1972 Protocol. By its resolution 3190 (XXVIII), the General Assembly decided to include Arabic among its official and working languages. In its resolution 35/219 A, the Assembly decided to include Arabic among the official and working languages of its subsidiary organs, no later than 1 January 1982 and requested the Economic and Social Council to include Arabic among its official languages, no later than 1 January 1983. By its decision 1982/147, the Council, in pursuance of Assembly resolution 35/219 A, decided to include Arabic among its official languages, with effect from 1 January 1983. Arabic was thus added as one of the languages of the authentic texts of the 1988 Convention.

33.2 The basic proposal before the Conference⁹³⁹ contained no article on the authentic texts. One was, however, included in the draft final clauses prepared by the Secretariat⁹⁴⁰ at the request of the General Committee. It was introduced in Committee II by the Chairman of the Working Group as “self-explanatory”⁹⁴¹ and approved, as so proposed, in the Committee. It was adopted in the plenary without comment.

⁹³⁹*Official Records*, vol. I ..., document E/CONF.82/3, annex II, p. 74.

⁹⁴⁰*Ibid.*, document E/CONF.82/12, “Draft final clauses” (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2 (“Article 29”), p. 171.

⁹⁴¹*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, para. 16.

ARTICLE 34

Depositary

Single paragraph

The Secretary-General shall be the depositary of this Convention.

Commentary

34.1 Article 34 reflects, in simplified form, the most recent practice of the United Nations. Unlike the 1961 and 1971 Conventions and the 1972 Protocol, it does not attempt to spell out certain functions of the depositary.⁹⁴²

34.2 The basic proposal before the 1988 Conference⁹⁴³ had contained a draft article enumerating various notifications to be provided by the Secretary-General as the depositary. The article as eventually adopted, however, was set out in the draft final clauses prepared by the Secretariat⁹⁴⁴ at the request of the General Committee. Introducing the report of the Working Group in Committee II, the Chairman of the Working Group on Final Clauses referred to the explanation by the Legal Consultant⁹⁴⁵ that, since the adoption of the 1969 Vienna Convention on the Law of Treaties,⁹⁴⁶ the Secretary-General had advised against detailed articles on such matters as notification or transmission of certified copies and had brought United Nations practice into line with the requirements of that Convention. The article was approved by Committee II and adopted in plenary without change.

⁹⁴²1961 Convention, art. 51; 1971 Convention, art. 33; and 1972 Protocol, art. 22.

⁹⁴³*Official Records*, vol. I ..., document E/CONF.82/3, annex II ("Article 27"), p. 88.

⁹⁴⁴*Ibid.*, document E/CONF.82/12, "Draft final clauses" (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2 ("Article 30"), p. 171.

⁹⁴⁵*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, para. 17.

⁹⁴⁶United Nations, *Treaty Series*, vol. 1155, p. 331.

34.3 The functions of a depositary are laid down in article 77 of the 1969 Vienna Convention, which provides as follows:

“Functions of depositaries

“1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

“(a) Keeping custody of the original text of the treaty and of any full powers delivered to the depositary;

“(b) Preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;

“(c) Receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;

“(d) Examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;

“(e) Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;

“(f) Informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;

“(g) Registering the treaty with the Secretariat of the United Nations;

“(h) Performing the functions specified in other provisions of the present Convention.

“2. In the event of any difference appearing between a State and the depositary as to the performance of the latter’s functions, the depositary shall bring the question to the attention of the signatory States and the contracting States or, where appropriate, of the competent organ of the international organization concerned.”

34.4 In addition to the standard depositary functions laid down in the 1969 Vienna Convention on the Law of Treaties, the 1988 Convention contains provisions conferring certain express responsibilities on the Secretary-General, examples of which can be found in the following: article 5, paragraph 1, subparagraph (e); article 7, paragraphs 8 and 9; article 12, paragraphs 2, 3 and 6 and paragraph 7, subparagraphs (a) and (b), and paragraph 10, subparagraph (a); article 17, paragraph 7; and article 22, paragraph 1, subparagraph (a).

ATTESTATION CLAUSE AND CONCLUDING PARAGRAPH

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed this Convention.

DONE AT VIENNA, in one original, this twentieth day of December one thousand nine hundred and eighty-eight.

35.1 The attestation clause follows the most recent practice of the United Nations in that, unlike the 1961 and 1971 Conventions and the 1972 Protocol, it does not state that the Convention has been signed by representatives “on behalf of their respective Governments”. The reason for the omission is that the 1988 Convention is open for signature, in accordance with the provisions of article 26, not only on behalf of States, but also on behalf of Namibia, represented by the United Nations Council for Namibia, and by regional economic integration organizations meeting the qualifications laid down in subparagraph (c) of that article.

35.2 Furthermore, the attestation clause, unlike the case in the 1961 and 1971 Conventions and the 1972 Protocol, contains no reference either to the deposit of the original text in the archives of the United Nations or to the transmission of certified copies thereof. These are now regarded as standard depositary functions that come under article 34 of the 1988 Convention and the standard provisions laid down in article 77 of the 1969 Vienna Convention on the Law of Treaties (see paragraph 34.3 above).

35.3 Unlike the 1961 and 1971 Conventions and 1972 Protocol, the concluding paragraph lays down that the 1988 Convention shall be signed “in one original”, instead of “in one copy”. The word “original” is used in order to avoid the confusion that could arise in certain of the languages of the Convention from the use of the word “copy”, which could denote a text other than the original.

PART FIVE

TABLES ANNEXED TO THE CONVENTION

ANNEX TO THE CONVENTION

ANNEX

Table I

Ephedrine
Ergometrine
Ergotamine
Lysergic acid
1-phenyl-2-propanone
Pseudoephedrine

The salts of the substances listed in this Table whenever the existence of such salts is possible.

Table II

Acetic anhydride
Acetone
Anthranilic acid
Ethyl ether
Phenylacetic acid
Piperidine

The salts of the substances listed in this Table whenever the existence of such salts is possible.

Commentary

36.1 The text of the draft Convention annexed to General Assembly resolution 39/141 and forwarded to the Commission as a working document (see "Introduction", paragraphs 7-9, above) did not contain any proposal to monitor or control substances which, while not themselves either narcotic drugs or psychotropic substances, could be used in the illicit manufacture of drugs.⁹⁴⁷ Such a proposal is first reflected in the written record of preparatory work

⁹⁴⁷See above, comments on article 12 (especially paragraphs 12.1-12.8) and, for control measures applicable to substances in Table I or Table II, comments on paragraphs 8-10 of article 12.

leading to the adoption of the Convention in the note by the Secretary-General on the initiation of a draft convention against the illicit traffic in narcotic drugs,⁹⁴⁸ which was before the Commission at its thirty-first session, in February 1985. As pointed out in that document, a number of Governments as well as the Commission itself had “long been concerned with establishing closer control measures over some chemicals which are essential for the manufacture of illicit drugs and which are readily available on the licit market”.⁹⁴⁹ No specific substances, however, were identified for such treatment, and the drafting of what was to become article 12 in the final text of the Convention evolved on the understanding that the substances in question would be identified at a later stage.

36.2 In the comments received from Governments during the next step of the preparatory work (see “Introduction”, paragraph 12, above), it was evident that support for such control measures was developing,⁹⁵⁰ and this was reflected further during discussions of the Commission at its ninth special session in February 1986.⁹⁵¹ The comments at that session were again on the general advisability of introducing an article on the control of certain substances, and it was suggested “that a list of chemicals and precursors could be established by the Commission, following assessment of the substances by the International Narcotics Control Board”.⁹⁵² That procedure, further refined during the drafting process, ultimately become the basis for amending Table I and Table II, annexed to the Convention.⁹⁵³

36.3 At its thirty-second session, in February 1987, the Commission considered a preliminary draft of the Convention prepared at its request by the Secretary-General (see “Introduction”, paragraphs 16-17, above) where reference is made for the first time to substances as being in “List A” or

⁹⁴⁸E/CN.7/1985/19.

⁹⁴⁹E/CN.7/1985/19, para. 16.

⁹⁵⁰See the report of the Secretary-General on comments and proposals received from Governments concerning a draft convention on illicit traffic in narcotic drugs and psychotropic substances (E/CN.7/1986/2), paras. 62-70.

⁹⁵¹*Official Records of the Economic and Social Council, 1986, Supplement No. 3* (E/1986/23), paras. 14 and 17.

⁹⁵²*Ibid.*, para. 17.

⁹⁵³See above, comments on paragraphs 2-5 of article 12.

“List B”.⁹⁵⁴ The substances in question were not further defined or identified, but they were referred to in both the title of the draft article and in the body of the text of the article as “specific chemicals”. The introduction of two lists was a development due to the distinction made during early discussions between “precursors”⁹⁵⁵ and “essential chemicals” (including reagents and solvents).⁹⁵⁶ The comments and proposals received from Governments in response to the preliminary draft were also before the Commission at its thirty-second session,⁹⁵⁷ and, for the first time, a specific listing of substances was put forward by the United States.⁹⁵⁸ The proposal of the United States⁹⁵⁹ was to include the following “specific chemicals” in “List A” and “List B”:

List A	List B
Anthranilic acid	Acetic anhydride
Ergotamine	Acetone
Ergonovine	Ethyl ether
Phenylacetic acid	
Phenyl-2-propanone	
Ephedrine	
Pseudoephedrine	
Piperidine	

That proposal was the basis for further discussions at the open-ended intergovernmental expert group established by the Council at the request of the Commission (see “Introduction”, paragraphs 18-21, above) and was the starting

⁹⁵⁴*Official Records*, vol. I ..., document E/CN.7/1987/2, sect. II (“Article 8”), pp. 7-8.

⁹⁵⁵See footnote 540 above.

⁹⁵⁶See footnotes 541 and 542 above.

⁹⁵⁷“Preparation of a draft convention against illicit traffic in narcotic drugs and psychotropic substances: report of the Secretary-General” (E/CN.7/1987/2/Add.1).

⁹⁵⁸States had possibly submitted other proposals for inclusion of specific substances in an article on monitoring or control measures in response to the various requests for contributions to the draft Convention addressed to them by the Secretary-General, but, if so, they were not reproduced as part of the written record.

⁹⁵⁹“Preparation of a draft convention against illicit traffic in narcotic drugs and psychotropic substances: report of the Secretary-General” (E/CN.7/1987/2/Add.1), para. 480.

point for consideration of the matter in the working document that was before the expert group.⁹⁶⁰

36.4 Following informal consultations in the expert group, a redraft of article 8 (later article 12) and related lists was put forward⁹⁶¹ in which it was spelled out that “List A” would contain “immediate precursors” and “List B” would cover “essential chemicals”. In the section at the end of the draft article entitled “Tentative lists”, the distribution of substances between the two lists was as follows:

List A	List B
Ephedrine	Acetic anhydride
Ergometrine	Acetone
Ergotamine	Anthranilic acid
Lysergic acid	Ethyl ether
Phenyl-2-propanone	Phenylacetic acid
Pseudoephedrine	Piperidine

The substances in “List A” and “List B”, which were not further modified during the remainder of the meetings of the open-ended intergovernmental expert group, are identical to those in Table I and Table II, respectively, as finally adopted at the Conference.

36.5 The question of the inclusion of salts of the substances was left open for the time being by the addition of the phrase “further definition of substances concerning salts, etc. to be made”. That phrase was maintained in the various drafts before the three meetings of the open-ended intergovernmental expert group and the review group and was finally resolved only at the Conference (see paragraph 36.9, below).

36.6 In the interim report of the open-ended intergovernmental expert group, issued following its first meeting in July 1987, the title of the article read “Measures to monitor or control immediate precursors and essential chemicals used in the illicit processing or manufacture of narcotic drugs and psychotropic substances”.⁹⁶² Although tentative definitions for the terms “immediate

⁹⁶⁰DND/DCIT/WP.1, para. 676.

⁹⁶¹DND/DCIT/WP.8.

⁹⁶²DND/DCIT/WP.12, p. 26.

precursors” and “essential chemicals” had been proposed by the expert group,⁹⁶³ it became clear, following further discussions, that specific definitions could not be agreed on and that such a distinction was inappropriate. The draft article (now retitled “Measures to control substances frequently used in the illicit processing or manufacture of narcotic drugs and psychotropic substances”), as it appears in the report issued after the second meeting of the expert group in October 1987, refers only to “substances in List A and List B”,⁹⁶⁴ and does not suggest that “List A” should include only “immediate precursors” and “List B” only “essential chemicals”. This result arose from an agreement on the deletion of any definitions and the consequent simplification of reference to only substances in “List A” or “List B”, as had been recommended during informal consultations and endorsed by the expert group,⁹⁶⁵ which also agreed to include, tentatively, the substances proposed.⁹⁶⁶ The position thus adopted by the expert group not to consider the substances in either “List A” or “List B” as representing two distinct categories of substances (i.e. “immediate precursors” and “essential chemicals”) was thereafter followed by the review group and the Conference.⁹⁶⁷

36.7 At the tenth special session of the Commission, in February 1988, comments on draft article 8 concerned only the text of the draft itself, no comments being made on the contents of “List A” and “List B” as such.⁹⁶⁸ The Commission decided to forward the article as drafted, including “List A” and “List B”, to the Conference for final action on its content and formulation.⁹⁶⁹

⁹⁶³DND/DCIT/WP.8.

⁹⁶⁴“Report of the open-ended intergovernmental expert group meeting on the preparation of a draft convention against illicit traffic in narcotic drugs and psychotropic substances” (E/CN.7/1988/2 (Part II)), annexes, p. 51.

⁹⁶⁵*Official Records*, vol. I ..., document E/CN.7/1988/2 (Part II), para. 179.

⁹⁶⁶*Ibid.*, para. 160.

⁹⁶⁷In practice, the results of the scheduling procedure since the entry into force of the Convention have also reflected the clear intention of the drafters that substances in Table I not be necessarily considered “immediate precursors”, nor that Table II be limited to “essential chemicals”. The distinction between Table I and Table II concerns only the control measures applicable to the substances therein.

⁹⁶⁸See *Official Records of the Economic and Social Council, 1988, Supplement No. 3* (E/1998/13), paras. 39-50.

⁹⁶⁹*Ibid.*, para. 50

36.8 Committee II of the Conference devoted all or part of seven meetings⁹⁷⁰ to consideration of draft article 8, later to become article 12 in the final text, but most of its deliberations were directed to the technical contents of the article with respect to measures to be taken by parties. No re-examination of the composition of “List A” and “List B” (later Table I and Table II) was carried out.⁹⁷¹ Early in the discussions, the question of re-designating the lists was raised.⁹⁷² Later, the German Democratic Republic, supported by France, proposed to re-designate “List A” and “List B” as “Schedule I” and “Schedule II”.⁹⁷³ Following informal consultations, the Chairman announced that a majority of delegations favoured using the term “schedule” as in the existing international drug control treaties and the Committee agreed to that change.⁹⁷⁴

36.9 At the same time, the Chairman proposed, and the Committee agreed, to clarify the issue of the status of salts of scheduled substances (an issue that had been left in abeyance since the open-ended intergovernmental expert group) by adding after each list of substances the words “The salts of the substances listed in this Schedule whenever the existence of such salts is possible”.⁹⁷⁵

36.10 In the Drafting Committee, following some doubts as to the most suitable word in all languages for the notion of “schedule”, the term eventually adopted for the English text was “table”, and the final text of article 12 and the

⁹⁷⁰*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 10th to 16th meetings, pp. 245-267.

⁹⁷¹But see the comment of the representative of Turkey that acetic anhydride should appear in “List A” rather than “List B” (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 11th meeting, para. 30, p. 252) and comments by the representative of Sri Lanka (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 15th meeting, paras. 16-19, p. 263).

⁹⁷²See the intervention by the representative of the Union of Soviet Socialist Republics (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 10th meeting, para. 19, p. 247).

⁹⁷³*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 15th meeting, para. 20, p. 263.

⁹⁷⁴*Ibid.*, 16th meeting, paras. 1-2, p. 264.

⁹⁷⁵*Ibid.*, paras. 3-4, p. 264.

annex to the Convention were adjusted accordingly.⁹⁷⁶ The texts of article 12 and the annex containing Table I and Table II were adopted in plenary without further comment as to their formulation.

36.11 From the entry into force of the Convention on 11 November 1990 to the publication of the present *Commentary* in 1998, the amendment procedure foreseen in article 12, paragraphs 2-5, has been invoked once,⁹⁷⁷ with the result that a number of substances have been added to both Table I and Table II. The amendment proposal was to include in Table I *N*-acetylanthranilic acid and 3,4-methylenedioxyphenyl-2-propanone, and in Table II hydrochloric acid, isosafrole, methyl ethyl ketone, piperonal, potassium permanganate, safrole, sulphuric acid and toluene.

36.12 In accordance with the amendment procedure called for in paragraph 3 of article 12, the Secretary-General transmitted the proposal to parties to the Convention, as well as to the Commission and the Board. Following an assessment of the ten substances in accordance with the provisions of article 12, paragraph 4, the President of the Board conveyed to the Commission through the Secretary-General the Board's opinion that *N*-acetylanthranilic acid, isosafrole, 3,4-methylenedioxyphenyl-2-propanone, piperonal and safrole should be added to Table I and that hydrochloric acid (excluding its salts), methyl ethyl ketone, potassium permanganate, sulphuric acid (excluding its salts) and toluene should be added to Table II of the Convention. Comments on the amendment proposal received from parties as well as the assessment of the Board were taken into account by the Commission at its thirty-fifth session⁹⁷⁸ when deciding to amend Table I and Table II as recommended by the Board.⁹⁷⁹ The official notification of those amendments by the Secretary-General⁹⁸⁰ not having given rise to any request for review of the Commission decisions by the Council,⁹⁸¹ the

⁹⁷⁶See the explanations given by the representative of the Union of Soviet Socialist Republics and the Chairman of the Committee (*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 34th meeting, paras. 86-87, p. 332).

⁹⁷⁷Pursuant to a notification from the United States dated 5 July 1991.

⁹⁷⁸See *Official Records of the Economic and Social Council, 1992, Supplement No. 5 (E/1992/25)*, paras. 124-141.

⁹⁷⁹*Ibid.*, para. 232, decisions 4 (XXXV) and 5 (XXXV).

⁹⁸⁰Note verbale NAR/CL.3/1992 dated 27 May 1992.

⁹⁸¹Pursuant to the provisions of article 12, paragraph 7.

amendments became fully effective for parties on 23 November 1992, through the operation of paragraph 6 of article 12. Amended versions of the Convention issued since that date by the Secretary-General reflect the inclusion of the 10 substances in Table I and Table II, as well as the specific exclusion of the salts of both hydrochloric acid and sulphuric acid from Table II.

36.13 At the time of the publication of this *Commentary* in 1998, the revised versions of Table I and Table II, annexed to the Convention, were as follows:

Table I

N-acetylanthranilic acid
 Ephedrine
 Ergometrine
 Ergotamine
 Isosafrole
 Lysergic acid
 3,4-methylenedioxyphenyl-2-propanone
 1-phenyl-2-propanone
 Piperonal
 Pseudoephedrine
 Safrole

The salts of the substances listed in this Table whenever the existence of such salts is possible.

Table II

Acetic anhydride
 Acetone
 Anthranilic acid
 Ethyl ether
 Hydrochloric acid
 Methyl ethyl ketone
 Phenylacetic acid
 Piperidine
 Potassium permanganate
 Sulphuric acid
 Toluene

The salts of the substances listed in this Table whenever the existence of such salts is possible (the salts of hydrochloric acid and sulphuric acid are specifically excluded).

ANNEXES

ANNEX I

Legislative history of the final clauses

I.1 Very little consideration was given to the draft final clauses in the discussions that led up to the Conference. They had originally been prepared by the Secretary-General, pursuant to Economic and Social Council resolution 1987/27 (see “Introduction”, paragraph 18, above), and had been circulated to Governments and to the open-ended intergovernmental expert group (see “Introduction”, paragraphs 19-21, above) established pursuant to Council resolution 1987/27, which had held two sessions in 1987 and one in 1988. The three reports of the expert group^a were considered by the Commission on Narcotic Drugs at its tenth special session, held from 8 to 19 February 1988.

I.2 Attention both in the expert group and in the Commission was directed almost exclusively to the articles of the draft Convention other than the final clauses, which received only cursory consideration.^b The review group on the draft Convention established by the Council in its resolution 1988/8 (see “Introduction”, paragraphs 22 and 23, above) after the tenth special session of the Commission had taken place, did not address itself to the final clauses, except as noted in the comments on article 26 (see paragraph 26.6 above).

I.3 Together with the draft substantive articles, the draft final clauses were forwarded to the Conference as the basic proposal^c before the Conference. At the Conference, the draft final clauses were referred to Committee II for consideration.

^a*Official Records*, vol. I ..., document E/CN.7/1988/2 (Part II) and (Part IV).

^b*Ibid.*, document E/CN.7/1988/2 (Part II), paras. 7-14; see also the report on the tenth special session of the Commission on Narcotic Drugs (*Official Records of the Economic and Social Council, 1988, Supplement No. 3 (E/1988/13)*, paras. 124-136).

^c*Official Records*, vol. I ..., document E/CONF.82/3, annex II.

I.4 The General Committee of the Conference requested the Secretariat, taking into account the draft final clauses contained in the report of the review group on the draft Convention, to propose a reformulated text of those clauses, reflecting the most recent practice of the Secretary-General as the depositary of multilateral conventions.

I.5 Committee II decided to establish a Working Group on Final Clauses to consider the draft final clauses contained in the basic proposal^d and in the text proposed by the Secretariat^e at the request of the General Committee. The Working Group prepared a set of final clauses, which was introduced by the Chairman of the Working Group^f in Committee II for consideration. The text resulting from the Committee's consideration was transmitted to the Drafting Committee.^g The Drafting Committee's report to the Conference contained the text of the draft Convention resulting from the work of Committees I and II,^h the final clauses in that text being considered by the Conference at its 7th plenary meeting.ⁱ

^d*Ibid.*

^e*Ibid.*, document E/CONF.82/12, "Draft final clauses" (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2, pp. 169-171.

^f*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, paras. 2-18.

^g*Official Records*, vol. I ..., document E/CONF.82/12, "Final draft clauses" (E/CONF.82/C.2/L.13/Add.12), sect. IV.

^h*Ibid.*, document E/CONF.82/15.

ⁱ*Official Records*, vol. II ..., Summary records of plenary meetings, 7th plenary meeting, paras. 87-100.

ANNEX II

Subjects not included in the Convention

A. Reservations

II.A.1 The 1988 Convention contains no article on reservations, contrary to both the 1961 Convention^a and the 1971 Convention.^b

II.A.2 In the 1961 Convention, article 49 deals with transitional reservations (those intended to be of limited duration) and article 50 with other reservations. The latter article lists the articles in the Convention to which reservations are permitted, no other reservations being allowed. The same approach is to be found in article 32 of the 1971 Convention.

II.A.3 In the draft final clauses, set out in the basic proposal^c before the Conference, a draft article was included^d that would have permitted reservations to several articles, to be expressly identified by the Conference. It further provided that a reservation incompatible with the object and purpose of the Convention would not be permitted, incompatibility being established if at least two thirds of the parties to the Convention objected to it. The proposal also laid down a procedure whereby, through notification to the Secretary-General and to other States, a State might make a reservation other than one expressly permitted if not objected to within one year by one third of the States parties. The draft final clauses prepared by the Secretariat at the request of the General Committee included a draft article^e on reservations that was substantially similar. Japan submitted an amendment,^f that would have substituted a modified form of the other two proposals regarding reservations not expressly permitted by the Convention.

^a1961 Convention, arts. 49 and 50.

^b1971 Convention, art. 32.

^c*Official Records*, vol. I ..., document E/CONF.82/3, annex II.

^d*Ibid.* ("Article 25"), p. 87.

^e*Ibid.*, document E/CONF.82/12, "Draft final clauses" (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2 ("Article 27"), p. 170.

^f*Ibid.*, paras. 3 and 4 ("Article 25"), p. 172.

II.A.4 The above texts were all referred to the Working Group on Final Clauses established by Committee II. Introducing the draft clauses recommended by the Working Group in Committee II, the Chairman of the Working Group explained^g that, during the Working Group's discussions, some delegations had felt that the Convention should contain a provision indicating that no reservations whatsoever were permitted; others had taken the view that the right to enter reservations that were not contrary to the object and purpose of the Convention should be maintained. The Working Group had decided that, as it would be exceedingly difficult and time-consuming to enumerate in the final clauses those articles to which reservations were or were not permitted, the reservations clause should be omitted and the matter left to be dealt with in accordance with the rules of international law relating to reservations, which were clear since the adoption on 23 May 1969 and the entry into force on 27 January 1980 of the 1969 Vienna Convention on the Law of Treaties.^h

II.A.5 In Committee II,ⁱ several representatives commented on the absence of an article on reservations. While recognizing that the 1969 Vienna Convention on the Law of Treaties could provide guidance, they would have preferred an article either indicating that no reservations were permitted, or listing those articles to which reservations would be permitted. A few representatives indicated clauses in respect of which their Governments would have to consider entering reservations, for example in respect of the extradition of nationals and the reference of disputes to the International Court of Justice. Similar comments were made in the plenary,^j where again reference was made to the guidance that could be provided by the 1969 Vienna Convention on the Law of Treaties.

II.A.6 In the absence of an article on reservations, it is necessary to have recourse to the general international law on the subject, the most authoritative statement of which is, in fact, in the 1969 Vienna Convention, which is restricted to treaties concluded between States. The subsequent 1986 Vienna Convention on the Law of Treaties between States and International

^g*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, para. 13.

^hUnited Nations, *Treaty Series*, vol. 1155, No. 18232.

ⁱ*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 31st meeting, paras. 32-51.

^j*Ibid.*, Summary records of plenary meetings, 7th plenary meeting, paras. 101-105.

Organizations^k was not yet in force when the present *Commentary* was prepared. The provisions of both conventions, however, are identical as regards reservations and are considered to be indicative of general international law applicable to reservations to multilateral conventions to which both States and organizations may become parties.

II.A.7 Article 2, subparagraph (d), of the 1969 Vienna Convention provides that “‘reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”^l

II.A.8 If an instrument has the effects indicated in the above definition, it is irrelevant whether the depositary State denominates the instrument as a declaration or employs any term other than “reservation”. It is for each contracting State to determine whether, in its view, an instrument deposited by another contracting State contains a reservation and whether or not it objects to that reservation.

II.A.9 Under article 19 of both the 1969 Vienna Convention and the 1986 Vienna Convention, reservations may be made upon signature, ratification, acceptance, approval or accession to a treaty unless they are prohibited by the treaty; unless the treaty provides only for specified reservations, not including the reservation in question; or unless the reservation is incompatible with the object and purpose of the treaty. Again, it is for each contracting State to determine whether, in its view, a reservation by another contracting State is acceptable or not.

II.A.10 As regards acceptance of and objection to reservations, the 1969 Vienna Convention contains the following provisions in its article 20, which appear relevant in the context of the 1988 Convention:

“1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

“2.

^kA/CONF.129/15.

^lUnited Nations, *Treaty Series*, vol. 1155, No.18232.

“3.

“4. Unless the treaty otherwise provides:

“(a) Acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

“(b) An objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

“(c) An act expressing a State’s consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

“5. For the purposes of paragraph 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty whichever is later.”^m

II.A.11 While it is not expressly so identified in the 1988 Convention, a reservation of the character referred to in paragraph 1 of the article just quoted is to be found in paragraph 4 of article 32, on settlement of disputes, in the 1988 Convention (see paragraph 32.4 above).

II.A.12 On the legal effects of reservations and of objections to reservations, the 1969 Vienna Convention provides, in its article 21, that:

“1. A reservation:

“(a) Modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

^mTbid.

“(b) Modifies those provisions to the same extent for that other party in its relations with the reserving State.

“2. The reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*.

“3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.”ⁿ

II.A.13 Both the 1969 Vienna Convention and the 1986 Vienna Convention lay down in article 22 that, unless the treaty provides otherwise, a reservation and an objection to a reservation may be withdrawn at any time. They also require that, if a reservation is formulated on signature of a treaty requiring ratification or another formal act of confirmation, that reservation must be formally confirmed by the reserving State or organization when it expresses its consent to be bound by the treaty.

II.A.14 Since the conclusion of the 1988 Convention, a number of States have formulated reservations, as well as declarations and understandings, either upon signature or at the time of ratification or other formal act of confirmation, in relation to the Convention in general or to provisions of specific articles. In addition, other parties have entered objections to some of those reservations, declarations and understandings. At the time of publication of this *Commentary*, two reservations had been withdrawn and several had not been confirmed, either in part or in their entirety, upon ratification. The status of all reservations, declarations and understandings, as well as objections thereto and any withdrawals which may have occurred, is published annually by the Secretary-General acting in his capacity as depositary of the Convention.^o

ⁿIbid.

^oFor a list of all reservations, declarations, understandings, objections and withdrawals, see *Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997* (United Nations publication, Sales No. E.98.V.2).

B. Territorial application

II.B.1 The 1988 Convention does not include an article on territorial application.

II.B.2 Provisions on territorial application are to be found in articles 42 and 27, respectively, of the 1961 Convention and the 1971 Convention, which provide that those conventions shall apply, under conditions specified in those articles, to all non-metropolitan territories for the international relations of which a party is responsible.

II.B.3 Draft articles on territorial application were contained in the basic proposal before the Conference^p and in the final clauses prepared by the Secretariat^q at the request of the General Committee. The decision to omit such an article was taken in the Working Group on Final Clauses. Introducing the report of the Working Group in Committee II, the Chairman of the Working Group explained that a few representatives had wished to retain a clause on territorial application, but the majority had been of the opinion that it was no longer appropriate in the current world situation. Those who had favoured retaining the clause had subsequently joined the consensus and the Working Group had decided to omit the clause.^r No suggestion to insert such a clause was made subsequently either in Committee II, when the final clauses were discussed, or in plenary, when they were before the Conference for comment.

II.B.4 The matter is thus regulated by general international law and applicable depositary practice. In a notification received on 2 December 1993, the Government of the United Kingdom notified the Secretary-General that the Convention should apply to the Isle of Man, with a stated reservation in respect of a provision in article 7. On 8 February 1995, the Government of the United Kingdom further notified the Secretary-General that the Convention should also apply, as from that same date, to the following territories: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos

^p*Official Records*, vol. I ..., document E/CONF.82/3, annex II ("Article 22"), p. 86.

^q*Ibid.*, document E/CONF.82/12, "Draft final clauses" (E/CONF.82/C.2/L.13/Add.12), sect. II, para. 2 ("Article 24"), p. 170.

^r*Official Records*, vol. II ..., Summary records of meetings of the Committees of the Whole, Committee II, 30th meeting, para. 9.

Islands.⁵ None of those declarations gave rise to any observations by other parties to the Convention. It would thus seem that previous practice regarding the application of the 1961 Convention and the 1971 Convention continues to apply in respect of dependent territories, even in the absence of a territorial application clause. That presumably would also be the case with regard to any denunciation of the Convention in respect of a dependent territory to which the Convention had been applied.'

⁵*Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1997* (United Nations publication, Sales No. E.98.V.2), chap. VI, sect. 19, note 5.

'See above, comments on article 30.

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