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Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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Identification of technical assistance needs and good practices relating to the criminalization of the laundering of proceeds of crime (article 6)

Criminalization of the laundering of proceeds of crime

Background paper by the Secretariat

I. Introduction

1. Criminal groups generate vast amounts of illegal proceeds yearly. Money-laundering methods are used to disguise the illicit origins of those proceeds, derived from organized crime or other predicate crimes. The 2011 United Nations Office on Drugs and Crime (UNODC) publication entitled *Estimating Illicit Financial Flows Resulting from Drug Trafficking and Other Transnational Organized Crimes*[1] estimated that, in 2009, $1.6 trillion were laundered globally, which represented 2.7 per cent of global gross domestic product in the same year. The report also estimated that criminal proceeds amounted to $2.1 trillion, equal to 3.6 per cent of global gross domestic product in 2009.

2. In addition to the criminalization provisions in the United Nations Convention against Transnational Organized Crime, the international community has developed international standards[2] to combat money-laundering, and Member States are called upon to criminalize it by establishing robust and comprehensive money-laundering legal regimes.

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* CTOC/COP/WG.2/2016/1.

[1] Available at www.unodc.org/documents/data-and-analysis/Studies/Illicit_financial_flows_2011_web.pdf.

[2] Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: the FATF Recommendations* (Paris, February 2012). Available at www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf.

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3. The present background paper outlines the criminalization of the laundering of proceeds of crime under article 6 of the Organized Crime Convention. It identifies the rationale of the article, explains the offences set out in it and discusses the responses of UNODC in assisting Member States in implementing effective regimes against money-laundering.

II. Rationale

A. Purpose of article 6

4. Article 6 of the Organized Crime Convention mandates that States parties establish money-laundering as a criminal offence in order to prosecute offenders, and to protect both national and international financial markets from the negative effects of money-laundering. If left to proliferate unchecked, money-laundering can undermine the integrity of political and judicial systems and the stability of national and international financial sectors. The operations of legitimate companies and markets can be corrupted by money-laundering, which, in turn, interferes with economic and other policies, distorts market conditions and ultimately produces severe systemic risks. Article 6 reflects the resolve of the international community to combat money-laundering not only through incarceration, but also through confiscation and forfeiture of the proceeds of crime, sending the message that "crime does not pay".

5. The main motive of organized criminal groups is to obtain financial or other material benefits. Consequently, removing that gain and combating money-laundering is crucial. Targeting the gains and finances of criminal groups undermines the profitability of their criminal operations and reduces the incentive to participate in such activities, thereby inhibiting further growth and expansion. Pursuing criminal investigations of money-laundering activities also entails the investigation of financial affairs related to criminal conduct so as to establish the links between the origins of criminal proceeds, the beneficiaries thereof and intermediaries involved in the laundering process. Financial investigation techniques provide additional tools to identify criminal networks and the scale of their criminal activities. This makes the pursuit of money-laundering investigations and prosecutions (including associated confiscation of illegal proceeds) an important means of identifying and dismantling organized criminal groups. Furthermore, combating money-laundering helps to preserve the integrity of financial institutions, both formal and informal, and to protect the smooth operation of the international financial system as a whole.

6. Article 6 of the Organized Crime Convention, which criminalizes the laundering of proceeds of crime, must be read in conjunction with article 7, which addresses measures to combat money-laundering. The money-laundering offence contains mandatory provisions and consists of four main elements that States parties should cover. The article must also be read in the context of articles 2, 12, 13, 14, 16, 18, 19 and 20, which focus on the definitions, confiscation, seizure, international cooperation for confiscation, disposal of confiscated proceeds, extradition, mutual legal assistance, joint investigations and special investigative techniques.

B. Definitions

7. The following definitions in article 2 of the Organized Crime Convention are applicable to laundering of proceeds of crime:

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

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

(f) "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

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

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

(i) "Controlled delivery" shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

C. Scope and application

8. According to article 3, paragraph 1, the Organized Crime Convention applies "to the prevention, investigation and prosecution" of the offences under articles 5 (criminalization of participation in an organized criminal group), 6 (criminalization of the laundering of proceeds of crime), 8 (criminalization of corruption) and 23 (criminalization of obstruction of justice), and to "serious crime" as defined in article 2 of the Convention, "where the offence is transnational in nature and involves an organized criminal group."

9. Under article 3, paragraph 2, an offence is transnational in nature if:

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

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

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

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

10. Article 34, paragraph 2, of the Organized Crime Convention underlines that in domestic laws the criminalization of laundering of proceeds of crime, along with the

other offences covered by the Convention, do not require the conduct to be transnational in nature. In other words, while the focus of the offences under article 6 is on the criminalization of the laundering of proceeds of crime in connection with transnational criminal activities, domestic law must not be limited in that manner. It must equally criminalize the laundering of proceeds of crime, even when there is no cross-border component or organized criminal group involvement.

III. Content and structure of article 6

Offences

1. Article 6, paragraph 1 (a)

11. Article 6 of the Organized Crime Convention requires that each State party establish the four offences described below relating to money-laundering, in accordance with fundamental principles of its domestic law, when they are committed intentionally.

Conversion or transfer of proceeds of crime (art. 6, para. 1(a)(i))

12. Article 6, paragraph 1(a)(i), establishes as an offence the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action. States parties must take legislative and other measures to establish that as a criminal offence.

13. The term “conversion or transfer” includes instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.

14. With respect to the mental elements required, the conversion or transfer must be intentional. The accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds, and the act or acts must be done for the purpose of either concealing or disguising their criminal origin — for example, by helping to prevent their discovery or helping a person evade criminal liability for the crime that generated the proceeds.

15. As with all measures called for by the Convention, those are the minimum requirements, but States are free to adopt more strict or severe measures (art. 34, para. 3).

16. The *travaux préparatoires* indicate that the terms “concealing or disguising” and “concealment or disguise” used in article 6, paragraph 1(a)(ii), should be understood to include preventing the discovery of the illicit origin of property.[3] This applies to the four acts to be criminalized under article 6, paragraph 1(a) and (b).

[3] United Nations publication, Sales No. E.06.V.5, p. 62.

Concealment or disguise of proceeds of crime (art. 6, para. 1(a)(ii))

17. Article 6, paragraph 1(a)(ii), criminalizes the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.

18. The elements of this offence are quite broad, including the concealment or disguise of almost any aspect of or information about property.

19. With respect to the mental elements required, the concealment or disguise must be intentional and the accused must have knowledge that the property constitutes the proceeds of crime at the time of the act. This mental state is less stringent than for the offence set forth in article 6, paragraph 1(a)(i). Accordingly, States parties should not require proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin. The *travaux préparatoires* specify that concealment of illicit origin should be understood to be covered by article 6, paragraph 1(a) and (b).[4] However, States parties should also consider criminalizing concealment for other purposes, or in cases where no purpose has been established.

2. Article 6, paragraph 1 (b)

Acquisition, possession or use of proceeds of crime (art. 6, para. 1 (b) (i))

20. Article 6, paragraph 1(b)(i), criminalizes the "acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime." This mirrors the offences under article 6, paragraph 1(a)(i) and (ii), in that while those provisions impose liability on the providers of illicit proceeds, article 6, paragraph 1(b)(i), imposes liability on recipients who acquire, possess or use property.

21. The mental elements are the same as for the offence under article 6, paragraph 1(a)(ii). There must be an intent to acquire, possess or use, and the accused must have knowledge, at the time of commission, that the property is the proceeds of crime. No particular purpose for the acts is required.

22. The offence set forth under article 6, paragraph 1(b)(i), is to be established subject to the basic concepts of the legal system of the State. This safeguard clause recognizes that States parties may use different systems of classifying the various forms of involvement and set different boundaries for criminal liability, especially in relation to attempt and preparation.

Participation in, association with or conspiracy to commit, attempt to commit, aiding, abetting, facilitating and counselling the commission of any of the foregoing (art. 6, para. 1(b)(ii))

23. The offence in article 6, paragraph 1(b)(ii), involves the "participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article".

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[4] Ibid., p. 62.

24. These terms are not defined in the Convention, allowing for certain flexibility in domestic legislation. States parties should refer to the way these additional forms of criminal liability are established in their domestic systems and ensure that they apply to the other offences established pursuant to this article.

25. The knowledge, intent or purpose, as required for these offences, may be inferred from objective factual circumstances (art. 6, para. 2(f)). States parties could see to it that their evidentiary provisions enable such inference with respect to the mental state, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven.

3. Sanctions

26. As an international treaty that needs to be adaptable to the laws, administrative and legal systems, traditions and needs of individual States parties, the Convention does not determine set penalties for the offences under article 6. To offer guidance and ensure that States parties adequately recognize the seriousness of organized crime, article 6 has to be read together with article 11, paragraph 1, as well as article 10, paragraph 4, which provide that offences established must be subject to "effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions", which "take into account the gravity of that offence." Article 11, paragraph 4, further requires that States parties "ensure that its courts or other competent authorities bear in mind the grave nature of the offences […] when considering the eventuality of early release or parole of persons convicted of such offences."

27. Article 26, paragraphs 2 and 3, encourage States parties to consider mitigating sentences and granting immunity and/or leniency to those individuals who decide to cooperate with the authorities. These provisions are not mandatory and are dependent on domestic legal principles and traditions. In jurisdictions where the prosecution of such crimes is in principle mandatory, affording immunity from prosecution will require specific legislation.

4. Attempts

28. Attempts to commit any of the offences established in accordance with article 6 should be criminalized. Article 6, paragraph 1(b)(ii), contains explicit reference to varying degrees of complicity or participation that should be criminalized other than the physical commission of the money-laundering offence, namely, assistance (aiding and abetting, facilitating) and encouragement (counselling).

5. Predicate offences: article 6, paragraph 2

29. Article 2, paragraph (h), of the Convention defines a "predicate offence" as "any offence as a result of which proceeds have been generated that may become the subject of" any of the money-laundering offences established under article 6.[5]

[5] For purposes of defining money-laundering offences, the assets involved are the "proceeds of crime". By contrast, the seizure and confiscation provisions apply to "instrumentalities" as well as to proceeds of crime, that is, property used in or destined for use in crime (art. 12, para. 1(b)).

30. Many countries already have laws on money-laundering, but there are many variations in the definition of predicate offences. Some States have an exhaustive list of predicate offences set forth in their legislation. Other States define predicate offences generically as including all crimes, or all serious crimes, or all crimes subject to a defined penalty threshold.

31. Article 6, paragraph 2(a), requires that the money-laundering offences be applicable to the "widest range of predicate offences." Paragraph 2(b) requires that the predicate offences include the offences established in accordance with articles 5, 8 and 23 of the Convention, and with article 1, paragraph 3, of each of the Protocols to which States are or are considering becoming parties, as well as all "serious crimes" (art. 6, para. 2(b); see also art. 2, para. (b), for the definition of "serious crimes").[6]

32. States parties that limit the application of money-laundering measures to an exhaustive list of predicate offences must amend that list accordingly and, "at a minimum", include "a comprehensive range of offences associated with organized criminal groups" (art. 6, para. 2(b)). The *travaux préparatoires* add that the words "associated with organized criminal groups" are intended to indicate "criminal activity of the type in which organized criminal groups engage."[6]

33. The money-laundering offence should extend to any type of property, regardless of its value, that directly or indirectly represents the proceeds of crime.

34. Regardless of the manner in which States parties choose to identify predicate offences, it is important to bear in mind that it should not be necessary that a person be convicted of a predicate offence when proving that property is the proceeds of crime.

35. Predicate offences must not be limited to offences committed in the territory of the State applying the Convention. States must provide for the inclusion of offences committed in other jurisdictions, provided that the conduct is a crime where it was committed as well as in the State applying the Convention (art. 6, para. 2(c)). In other words, it requires dual criminality.

36. The constitutions or fundamental legal principles of some States do not permit the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds from that offence. This reflects a particular understanding of the principle of double jeopardy, which forbids the same act being the subject of two different offences. Thus, in such a State, for example, a public official, who has accepted a bribe and then intentionally conceals the proceeds of that offence, might be found guilty of passive bribery, but would not be found guilty of the separate offence of laundering the proceeds of crime (so-called "self-laundering"). The Convention acknowledges this issue and allows for the non-application of the money-laundering offences to those who committed the predicate offence, but only by countries whose fundamental principles so provide (art. 6, para. 2(e)).

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[6] See also Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: the FATF Recommendations* (Paris, February 2012).

37. In some States, on the other hand, money-laundering is set out as an independent offence, such that a person who commits the predicate offence and the offence of money-laundering may be convicted for both offences. Thus, in such a State, a public official who has accepted a bribe and then intentionally conceals the proceeds of the offence can be found guilty of both passive bribery and of money-laundering.

38. The *travaux préparatoires* indicate that article 6, paragraph 2(e), takes into account legal principles of several States where prosecution or punishment of the same person for both the predicate offence and the money-laundering offence is not permitted. Those States confirmed that they did not refuse extradition, mutual legal assistance or cooperation for purposes of confiscation solely because the request was based on a money-laundering offence, the predicate offence of which was committed by the same person.

IV. Issues and challenges

39. The Organized Crime Convention recognizes the close link between organized criminal activities and money-laundering and builds on earlier international initiatives in that regard. Those initiatives addressed the issue through a combination of repressive and preventive measures, and the Convention follows the same pattern. Article 6 of the Convention adopts the offences set out in article 3, paragraph 1(b) and (c)(i) and (ii), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988,[7] which requires the criminalization of money-laundering in the context of trafficking in drugs.

40. Criminalization not only allows national authorities to organize the detection, prosecution and repression of the offence, but also provides the legal basis for international cooperation among police, judicial and administrative authorities, including mutual legal assistance and extradition. As a consequence of domestic or international initiatives, many countries already have laws on money-laundering.

41. As part of the preparation process for the special session of the General Assembly on the world drug problem, Member States completed and submitted part I of the annual reports questionnaire to UNODC, which analysed the data. The conclusion drawn from the analysis was that, on average, more than 90 per cent of responding Member States had criminalized money-laundering. A significant portion of the legislation was reported as taking into consideration international requirements, such as the international conventions applicable to money-laundering, including the Organized Crime Convention, and international standards.[2]

42. It is not enough, however, to criminalize money-laundering. Member States are also required by international standards to show the effectiveness of their criminalization regimes. In this regard, UNODC technical assistance and training delivery is geared towards assisting States to reach that goal. Many States parties find it difficult to demonstrate the effectiveness of their regimes against money-laundering and, as the international community is moving away from technical compliance as the only way of assessing compliance with the international standards, this remains an issue and major challenge.

[7] United Nations, *Treaty Series*, vol. 1582, No. 27627.

43. Most States are very effective in investigating and prosecuting the predicate crimes of money-laundering and often neglect to investigate and prosecute the money-laundering offences. Money-laundering cases can be very complex, for example, owing to the layering of transactions, and it might be difficult to unravel transactions and have a clear picture of the actual financial flows. Many States lack the capacity to properly conduct those financial investigations. Such investigations require expertise, inter-agency cooperation, political will, and structured and documented statistics, which may present difficulties for some States.

V. Technical assistance provided by UNODC

A. Model legislation

44. In order to assist States parties in criminalizing money-laundering, UNODC, in collaboration with the International Monetary Fund, has developed model legislation for civil law jurisdictions and, together with the Commonwealth Secretariat and the International Monetary Fund, it has developed model legislation for common law legal systems. The common law model was updated in January 2016 and covers money-laundering, terrorism financing, preventive measures and proceeds of crime. It also contains extensive sections on conviction and non-conviction-based confiscation.

B. Advisory services and mentor programme

45. The mentor programme of the UNODC Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism is a long-term capacity-building and training programme designed to assist specified Member States in establishing, improving and implementing their regimes countering money-laundering and terrorist financing, including assisting them in criminalizing money-laundering. Mentors are a key part of the strategy of the Global Programme to provide sustainable technical assistance to facilitate enhanced national capacity and coordination in combating money-laundering and countering the financing of terrorism, as well as to further the overall implementation of effective national regimes countering money-laundering and terrorist financing in Member States.

46. The mentor programme is particularly effective in the highly specialized and technically complex field of combating money-laundering and terrorist financing, in which many Member States lack technical expertise and appropriate legislative and regulatory frameworks. The programme's strength lies in the extensive knowledge and years of operational experience in the fight against money-laundering and terrorist financing of each of the mentors deployed by the Global Programme. This means that they are ideally positioned to give expert advice, as well as provide the hands-on guidance that national practitioners need to both grow their craft and effectively implement their country's regimes to counter money-laundering and terrorist financing to meet international standards.

47. Mentors are based in the field and provide on-site technical assistance by delivering tailored outreach programmes and training to help participating Member

States to make the best use of their capabilities in the fight against money-laundering and terrorist financing and to comply with international standards set out in relevant United Nations conventions, General Assembly and Security Council resolutions and recommendations of the Financial Action Task Force.

48. The Global Programme currently employs expert advisers in the regions of the Pacific, South-East Asia, Southern Africa and West Africa. Posts in Afghanistan, the Caribbean and Central America, Central Africa, Central Asia and East Africa are to be filled in the near future.

VI. Conclusions

49. The purpose of article 6 of the Organized Crime Convention is to criminalize money-laundering in all its forms and manifestations. Article 6 is an important provision to ensure that States parties have the legal basis to initiate criminal proceedings when any person engages in money-laundering. For technical assistance providers, article 6 is the foundation on which training and capacity-building measures are built. It is clear that the money-laundering offences should be applicable to the "widest range of predicate offences", including tax crimes.

50. The present background paper has outlined the purpose and scope of, and explained the offences set out in, article 6 of the Organized Crime Convention, so as to shed light on the requirements, design and scope of these offences and assist States parties in tailoring relevant offences to their domestic needs. A range of challenges that States parties may experience in their implementation and enforcement efforts relating to offences based on article 6 of the Convention have also been identified, as have UNODC responses in the form of technical assistance. The aim is to assist States parties in understanding the offences that should be covered and possibly identify needs for technical assistance for the implementation of the provisions.

51. The technical assistance activities of UNODC, including training, are geared towards assisting States parties in putting in place the necessary normative systems as well as effective systems to ensure both the conviction of criminals for money-laundering offences and the confiscation of the criminal proceeds. Despite most States parties having criminalized money-laundering, much work still needs to be done to comply with the provisions of article 6.