



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

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Sharing of best practices and challenges in implementing:

(a) international cooperation for purposes of confiscation

(article 13 of the United Nations Convention against

Transnational Organized Crime); (b) disposal of

confiscated proceeds of crime or property (article 14 of

the United Nations Convention against Transnational

Organized Crime)

Implementation of articles 13 and 14 of the United Nations Convention against Transnational Organized Crime: international cooperation for purposes of confiscation and disposal of confiscated proceeds of crime or property

Background paper prepared by the Secretariat

I. Introduction

1. In the early years of international cooperation, the focus was placed on apprehending fugitives and bringing them to justice. Less attention was paid to requests for other States to take measures and provide assistance in relation to confiscation and disposal of the proceeds of crime. Only recently have international conventions, among them the United Nations Convention against Transnational Organized Crime, begun to contain provisions on assistance in identifying, tracing and freezing or seizing proceeds of crime for the purpose of eventual confiscation and disposal. The reason for the inclusion of such provisions was the need to target the proceeds of crime and the profit motive, which are behind the rapid growth of cross-border crime.

2. The Working Group on International Cooperation was established by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime in its decision 2/2, with the purpose of holding substantive

* CTOC/COP/WG.3/2016/1.



discussions on, inter alia, international cooperation for the purpose of confiscation. In its 10-year history, the Working Group has dealt three times with issues related to confiscation: at its second meeting, held in Vienna from 8 to 10 October 2008; at its third meeting, held in Vienna on 20 and 21 October 2010; and at its fourth meeting, held in Vienna on 15, 16 and 18 October 2012, where the focus was mostly on the disposal, sharing and use of confiscated proceeds of crime.

3. The present background paper is aimed at building on discussions held by the Working Group in the past, providing an overview of challenges encountered by Member States in practice and ways to address them, and bringing to the attention of the Conference recommendations aimed at improving the implementation of relevant provisions of the Convention.

II. International cooperation for purposes of confiscation: informal assistance and mutual legal assistance requests

4. The process of international cooperation for purposes of confiscation may involve a combination of both informal requests for assistance and mutual legal assistance requests. Typically, mutual legal assistance is required in cases where the requested measures involve the use of coercive powers by the requested State, such as the power to compel the production of bank account transaction details or search and seizure orders.

5. At the first stages of an investigation and during the collection of information and intelligence, however, the coercive powers of the requested State may not necessarily be engaged, and a mutual legal assistance request may not be required. In that context, the requested assistance may be of an informal nature. One such example comprises direct communication channels among financial intelligence units, the police, and prosecutors or investigating magistrates of the two jurisdictions who exchange information at a preliminary level, prior to the submission of an anticipated mutual legal assistance request.

6. The importance of these informal channels of assistance has been emphasized in the Organized Crime Convention (art. 18, paras. 4 and 5).¹ The main goal of spontaneous exchange of information is to assist foreign counterparts in obtaining information that could be helpful in conducting the preliminary stage of criminal proceedings. Informal assistance can also help jurisdictions better understand each other's requirements for a formal mutual legal assistance request, thereby minimizing the risk of such a request being refused or returned and delayed. In some cases, informal assistance may result in the requested State assisting in drafting the letter of request.

7. Despite the advantages of informal information exchange, its use may not be appropriate in cases where the information provided to another State may be used as evidence in criminal and confiscation proceedings. To overcome that concern, the

¹ See also the corresponding provisions in the United Nations Convention against Corruption (art. 46, paras. 4 and 5), as well as relevant provisions in regional instruments (for example, art. 11 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters; and art. 10 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism).

jurisdiction providing the information informally can require that more formal procedures be followed before the requesting jurisdiction can use the information as evidence.

8. In contrast, information obtained through the use of formal mutual legal assistance requests is admissible in judicial proceedings and enables enforcement of orders. In practice, prior to executing a request, sufficient admissible evidence usually has to be provided to officials in the requested State that meets the evidentiary threshold mandated by their courts. That may be challenging, as admissibility requirements vary among jurisdictions. Requested jurisdictions may require standards for some measures that are more demanding than those in the requesting jurisdiction; what may be an appropriate request in one jurisdiction may be considered overly broad in another.

9. The difficulty in meeting that threshold may increase when the exchange takes place between a civil law jurisdiction and a common law jurisdiction or between States with different confiscation systems (e.g., a value-based system versus a property-based system, or criminal confiscation versus non-conviction-based confiscation) because standards of proof, evidentiary tests and requirements for admissibility may differ widely. For example, if facts about the case are to be admissible as evidence, common law jurisdictions generally require statements in affidavit or certificate format. Civil law jurisdictions, however, generally do not impose that requirement.

10. In general, the more intrusive the measure, the higher the evidentiary standard of proof required, *inter alia*, (a) to demonstrate that an offence has been committed; (b) to demonstrate that the assets sought are linked to the offence or offender, or are otherwise subject to confiscation in the practitioner's jurisdiction; and (c) to show where exactly the assets sought to be restrained or recovered are located. Common law jurisdictions typically permit investigative and provisional measures on a "reasonable grounds to believe" or "probable cause" standard; a higher standard is required for confiscation, namely, the "balance of probabilities" or "preponderance of the evidence" standard. With some exceptions, most civil law jurisdictions provide investigative and provisional measures on the "reasonable grounds to believe" standard, but they require a higher level of proof ("intimate conviction") for confiscation.

11. The Working Group may wish to further discuss the interaction between informal channels for assistance and the process of mutual legal assistance. They may also wish to highlight good practices in using those channels to overcome widely recognized barriers to cooperation, such as the precipitated and premature submission of mutual legal assistance requests.

III. The Organized Crime Convention as a normative framework for international cooperation in targeting the proceeds of crime

A. Article 13: International cooperation for purposes of confiscation

12. Article 13 of the Organized Crime Convention contains the obligation to support a confiscation request from another State party “to the greatest extent possible.” To that end, the requested State may either submit the request to its competent authorities and apply, on the basis of the information provided in the request, for a domestic order of confiscation (art. 13, para. 1 (a)), or it may directly recognize and enforce a foreign confiscation order issued by a court in the requesting State (para. 1 (b)).

13. In either case, and even before confiscation, the requested State must, upon request, take provisional measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities for the purpose of eventual confiscation (para. 2). These are preliminary and preventive measures taken in order to enable and secure confiscation at a later stage.

14. In addition to the information specified in article 18, paragraph 15, as the minimum content for a request for mutual legal assistance, requests made for purposes of confiscation pursuant to article 13 should contain the following:

(a) A request for a domestic confiscation order (art. 13, para. 1 (a)) should contain a description of the property to be confiscated. Moreover, a statement of the facts relied upon by the requesting State party should be provided and should be sufficiently precise to enable the requested State party to seek the order under its domestic law;

(b) A request for direct enforcement of a foreign court order (art. 13, para. 1 (b)) should contain:

(i) A legally admissible copy of that confiscation order; and

(ii) A statement of the facts and information as to the extent to which execution of the order is requested;

(c) For the purposes of identifying, tracing and freezing or seizing proceeds of crime, property, equipment or other instrumentalities, the requesting State should provide:

(i) A statement of the facts it relies upon; and

(ii) A description of the actions requested.

15. Article 13, paragraph 4, clarifies that, in any case, the applicable law is the domestic law of the requested State or any international treaty by which it may be bound in relation to the requesting State. However, if the requested State party can take measures for the purpose of confiscation only on the basis of a relevant treaty, the lack of such a treaty may not necessarily be a ground for refusal of cooperation. In fact, paragraph 6 provides that such a State party shall consider the Organized Crime Convention the necessary and sufficient treaty basis. The option of considering the conclusion of bilateral or multilateral treaties, agreements or

arrangements to enhance the effectiveness of international cooperation under article 13 of the Organized Crime Convention is also foreseen in paragraph 9.

16. Cooperation may, however, be refused if the offence to which the request relates is not an offence covered by the Convention (art. 13, para. 7). The provisions of article 13 shall not be construed to prejudice the rights of bona fide third parties who may have an interest in the property in question (art. 13, para. 8).

B. Article 14: Disposal of confiscated proceeds of crime

17. Confiscation of assets based on foreign evidence or a foreign court order or conviction requires decisions to be made concerning the disposal of those assets. In article 14, paragraph 2, the Organized Crime Convention stipulates that “States Parties shall, to the extent permitted by domestic law and if so requested, give priority consideration to returning the confiscated proceeds of crime or property to the requesting State party so that it can give compensation to the victims of the crime or return such proceeds of crime or property to their legitimate owners.”

18. Furthermore, following the precedent of article 5, paragraph 5 (b), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the Organized Crime Convention — with its broad application to any type of serious crime committed by an organized criminal group for profit — proposed that State parties confiscating proceeds consider sharing the proceeds with intergovernmental bodies specializing in the fight against organized crime or with other States parties. The Convention also added the option of contributing the value of proceeds of crime to the account designated in its article 30, paragraph 2 (c), for the purpose of facilitating the provision of technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention.

C. Interrelationship with other provisions of the Convention

19. The Organized Crime Convention seeks to develop a comprehensive and efficient international cooperation framework for purposes of confiscation and disposal of proceeds of crime derived from offences falling within its scope of application. That is facilitated by the interrelationship between article 13 and other relevant provisions of the Convention.

Article 12

20. A first basic interrelationship is that with article 12 of the Convention, which requires States parties to adopt measures, to the greatest extent possible within their legal systems, to enable confiscation of proceeds — equivalent to the value of the proceeds derived from the offences covered by the Convention — as well as property, equipment or other instrumentalities used in or destined for use in such offences. Article 12 also obliges States parties to adopt measures to enable the identification, tracing, freezing and seizing of items for the purpose of eventual confiscation. In addition, it obligates each State party to empower courts or other competent authorities to order the production of bank records and other evidence for purposes of facilitating such identification, freezing and confiscation.

21. Paragraphs 3 to 5 of article 12, which apply when proceeds of crime have been converted into other property or intermingled with funds derived from lawful activity, are also applicable to article 13.²

Article 18

22. In its paragraph 3, article 13 of the Convention provides explicitly for another interrelationship: it must be read in conjunction with article 18 on mutual legal assistance. Accordingly, article 18 is applicable, *mutatis mutandis*, to article 13. Hence, the provisions of article 18 can be used in an analogous manner to produce the evidence and information necessary to justify identification, tracing, freezing or seizing and confiscation pursuant to article 13.

Article 7, paragraph 1 (b)

23. Article 7, paragraph 1 (b), of the Convention provides that each State party shall ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering — including, where appropriate under domestic law, judicial authorities — have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering. The establishment of financial intelligence units to facilitate information-sharing at the international level regarding suspicious transactions has proved to be of significant value in efforts to foster international cooperation to target and confiscate illicit proceeds.

Article 27, paragraph 1 (b) (ii)

24. Another relevant provision of the Organized Crime Convention is that of article 27, paragraph 1 (b) (ii), which obliges each State party to cooperate with other States parties in conducting inquiries with respect to offences covered by the Convention concerning “the movement of proceeds of crime or property derived from the commission of such offences.”

IV. Soft law and model instruments as guidance for practitioners: the Model Bilateral Agreement on the Sharing of Confiscated Proceeds of Crime or Property

25. International cooperation could be expanded further to include agreements or arrangements on the sharing of confiscated proceeds of crime or property, taking into particular consideration article 14 of the Organized Crime Convention, but also article 5, paragraph 5, of the 1988 Convention. In that context, an intergovernmental expert group, convened pursuant to Economic and Social Council resolution 2004/24, met in Vienna from 26 to 28 January 2005 and prepared a draft bilateral agreement

² *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (United Nations publication, Sales No. E.06.V.5), p. 123.

model on disposal of confiscated proceeds of crime covered by the above-mentioned conventions, for use by Member States as a framework for the conclusion of pertinent bilateral agreements.³ The Model Bilateral Agreement on the Sharing of Confiscated Proceeds of Crime or Property was adopted by the Economic and Social Council in 2005.⁴

V. Barriers to effective cooperation for purposes of confiscation

26. International cooperation in the field of confiscation poses particular difficulties. Practitioners may find that obtaining a domestic confiscation order in the requested State or achieving the direct recognition and enforcement of a foreign confiscation order pursuant to a mutual legal assistance request can be challenging for several reasons. One reason is that, despite the influence of the Organized Crime Convention, for example, considerable diversity remains in the domestic regimes of cooperating States. A second factor is the need to ensure the cooperation of the banking and financial sector. A third element to be considered is that the concepts involved in such international cooperation are relatively new and tend to be unfamiliar to the authorities involved, thus causing problems and difficulties in practice. A series of specific obstacles and barriers of a legal, institutional and operational nature that impede effective cooperation for purposes of confiscation, as well as suggested ways of addressing them, are presented below.

Lack of trust

27. A relationship of trust between cooperating States parties is important to ensure successful international cooperation for purposes of confiscation, whether it is for collecting and sharing intelligence data; gathering evidence for use in an investigation or prosecution; freezing, seizing or confiscating proceeds of crime; or the disposal of confiscated assets. Lack of trust can cause delays or even refusal to provide assistance to requesting States and may be particularly problematic in cases of urgency. Lack of trust can also be a barrier to mutual legal assistance when the

³ See E/CN.15/2005/7, annex.

⁴ Economic and Social Council resolution 2005/14, annex. Article 5 of the Model Agreement includes two options for the sharing of confiscated proceeds of crime or property. According to the first option, where a Party proposes to share confiscated proceeds of crime or property with the other Party, it shall determine at its discretion and in accordance with its domestic law and policies, the proportion of the confiscated proceeds of crime or property to be shared, which, in its view, corresponds to the extent of the cooperation afforded by the other Party. In determining the amount to transfer, the Party holding the confiscated proceeds of crime or property may include any interest or appreciation that has accrued on them and may deduct reasonable expenses incurred in investigations, prosecution or judicial proceedings leading to their confiscation. According to the second option, in sharing confiscated proceeds of crime or property, their proportion to be shared shall be determined by the Parties on a quantum meruit basis or on any other reasonable basis agreed upon by the Parties. In determining the amount to transfer, the Parties shall agree on any issues related to interest and appreciation that has accrued on the confiscated proceeds of crime or property and the deduction of reasonable expenses incurred in investigations, prosecution or judicial proceedings leading to their confiscation.

process involves jurisdictions with significantly different political, judicial or legal systems.

28. Early and proactive communication between the cooperating States may significantly ease the challenges posed by differences in their systems. Reviews of draft mutual legal assistance requests by practitioners in the requested jurisdiction prior to submission by requesting States can also help to avoid potential problems.

29. The Working Group may wish to discuss effective ways of developing trust among practitioners, including through enhanced networking and practices such as the spontaneous sharing of information among them.

Failure to comply with requirements set forth in multilateral or bilateral instruments

30. The failure to implement and use the provisions of conventions, such as the Organized Crime Convention, is another barrier to effective cooperation for purposes of confiscation. In countries requiring the transposition of the provisions of international treaties into domestic law, a problem frequently encountered is the incomplete and inaccurate transposition of the convention provisions into the domestic legal order. In such jurisdictions, domestic laws on mutual legal assistance may fail to allow for all types of assistance as set out in conventions such as the Organized Crime Convention, provide for overly broad grounds for refusal, or apply stringent evidentiary requirements.

31. By contrast, in jurisdictions where the mere ratification of a self-executing international convention such as the Organized Crime Convention makes the treaty provisions part of domestic law and thus directly applicable by national judges and authorities, those provisions may not be used consistently as vehicles for cooperation. That inconsistency can be attributed to the fact that practitioners are often not fully familiar with the treaty framework in question.

32. The Working Group may wish to foster dialogue on how to ensure that the potential of international conventions such as the Organized Crime Convention is fully explored and used for promoting international cooperation in the fields of confiscation and disposal of confiscated proceeds of crime. The Working Group may also wish to consider the need for States parties to review their existing bilateral mutual legal assistance treaties and, if required, update them periodically to ensure their continued relevance. The impact and added value of sufficient training for practitioners may also be discussed.

Weaknesses in preventing money-laundering

33. Confiscation — both within a single jurisdiction and internationally — is made more difficult by technological advances and the complexity of the banking and financial sectors. The conflicting demands for ease in carrying out financial transactions and for the protection of the identity of account holders, as well as an efficient (and often self-regulating) banking system with minimum controls, pose challenges for investigators of money-laundering.

34. Reported cases demonstrating the ease with which proceeds of crime derived from offences covered by the Convention were moved into and through financial centres provide an indication of weak implementation at the national level of article 7 of the Convention on measures to combat money-laundering. This could

imply that financial institutions might not adequately implement preventive measures and that financial institution supervisory agencies might also be deficient in ensuring that banks and other institutions follow regulations to counter money-laundering.

35. The Working Group may wish to discuss measures to overcome the issue of weak implementation in that area. In doing so, consideration may be given to the usefulness of preservation requests that can be made through an informal request prior to the submission of a mutual legal assistance request. The Working Group may also wish to discuss ways to seize and restrain assets for a sufficient amount of time so as to preserve them while foreign proceedings are pending.

36. In addition, the need for specialized investigative techniques, the development of essential skills to “follow the money” beyond national borders, and the ability to act quickly to avoid dissipation of the targeted assets, are also issues that could be discussed and examined.

Lack of clarity regarding focal points and lack of effective coordination

37. The lack of information available to a requesting State on the appropriate focal point, or designated point of contact, in a requested State for the provision of assistance may impede the ability of the requesting State to initiate an effective request for such assistance. The lack of clarity about relevant focal points at the beginning of the process can affect cooperation between jurisdictions and result in delays in informal assistance. Personal contacts can be a valuable means of identifying appropriate focal points in other countries. However, if those personal contacts leave their organizations or move to different positions, difficulties may arise in the identification of new focal points.

38. Moreover, and in the context of mutual legal assistance proceedings, channels for transmission of requests for mutual legal assistance and follow-up communication are crucial factors in the timeliness of processing requests. The rapid transmission of requests and direct communication with competent officials to provide clarification are highly desirable in an effective mutual legal assistance process, especially for high-priority cases.

39. A significant impediment to timely responses to requests for mutual legal assistance is the channelling of such requests through numerous government agencies or departments, which slows the process unnecessarily. In the case of requests using letters rogatory, the communication should go through diplomatic channels, which can delay action on the request. In some jurisdictions, even if letters rogatory are not the means of request, all communication regarding requests for mutual legal assistance is to be channelled through the ministry of foreign affairs. In other jurisdictions, the central authority acts as only a “postbox”, forwarding the request to the operational practitioners.

40. The Working Group may wish to recall and further discuss the significance of networks of contact points acting as advisory groups to other appropriate authorities. Such networks function as vehicles to promote the exchange of information and good practices and, with time, as centres of expertise on tackling challenges pertaining to international cooperation for purposes of confiscation.

Lack of resources

41. Efforts to foster international cooperation for purposes of confiscation are often expensive and may fail to yield results. In many jurisdictions, dedicated resources are scarce. Among the problems identified are the lack of qualified personnel to conduct financial investigations, stemming from a lack of financial resources; the failure of law enforcement leadership to prioritize financial investigations; general personnel issues, such as difficulties recruiting qualified and experienced investigators; and inadequate training of prosecutors and judges.

42. The Working Group may wish to discuss practical aspects of tackling the challenges posed by deficient resources, such as cost-sharing arrangements and the implementation of provisions of mutual legal assistance treaties that require prior consultations between parties when it becomes apparent that expenses of an extraordinary nature are required.

VI. Topics and practical aspects discussed at previous meetings of the Working Group

A. The handling of foreign confiscation orders

43. In the concluding remarks of the Chair at the second meeting of the Working Group in 2008, it was noted that the application of the different components of article 13 of the Organized Crime Convention, such as the handling of a foreign confiscation order, would merit further discussion on the basis of practical experiences.⁵

44. In seeking enforcement of confiscation orders against property located in another jurisdiction, the requesting State can use mutual legal assistance channels to forward its request to that jurisdiction. The requested State will determine whether the forfeiture judgment is valid for execution under its domestic law. Typically, the judgment should be certified by a court, and the requesting jurisdiction will need to verify that the judgment is final and no longer on appeal or, where no appeal has been filed, that the time for filing an appeal has expired. The mutual legal assistance request should also demonstrate that the interested parties had an opportunity to challenge the forfeiture action. The request should therefore confirm that the interested parties were provided notice of the proceedings in accordance with domestic law; they were afforded an opportunity to participate in the proceedings; and they either did participate and their efforts were unsuccessful, or they declined to participate.

45. Some jurisdictions enforce a foreign confiscation order by giving effect to it through “direct execution”. Several jurisdictions allow for direct enforcement of such orders only if dual criminality is met, or only if the order has been issued by a jurisdiction that has been designated by the requested jurisdiction as one whose orders will be enforced. Another option is for the requested State to “domesticate” the foreign order and enforce it through an order of its competent authorities.

⁵ CTOC/COP/2008/18, para. 62.

46. A confiscation regime that complies with the Organized Crime Convention better ensures the enforceability of a confiscation order beyond the borders of the requesting State. It is necessary for a jurisdiction to have both the capacity to obtain a confiscation order against property located beyond its borders, when it is the requesting State, and the capacity to enforce a confiscation order of another State, when it is the requested State.

47. The Working Group may wish to consider: the relative advantages and disadvantages of the direct enforcement (recognition) approach and the indirect (domestic order) approach; whether direct enforcement has cost-benefits and is speedier and more effective and efficient; and whether there should be a recommendation that States parties should, whenever possible, opt for direct enforcement.

48. In some States, domestic law does not impose criminal liability on legal persons, such as corporations, thus preventing enforcement of confiscation proceedings and orders. The Working Group may therefore wish to examine how to enforce confiscation orders against legal persons in jurisdictions where criminal liability of legal persons is not recognized.

B. Non-conviction-based confiscation

49. In the concluding remarks of the Chair at the second meeting of the Working Group in 2008, it was noted that there was an interest in future detailed discussions on the practice of non-conviction-based confiscation.⁶

50. An increasing number of jurisdictions, including civil law jurisdictions, have adopted legislation permitting confiscation without a conviction, and the practice has also been encouraged by multilateral treaties⁷ and by international standards.⁸

51. In cases where non-conviction-based confiscation is accepted, international cooperation can be challenging. The cooperating legal systems can vary significantly, both in the identification of the court (civil or criminal) and the procedural and substantive elements, such as the standard of proof (balance of probabilities, beyond reasonable doubt or intimate conviction). The non-conviction-based order is in rem in some jurisdictions (an action asserting a proprietary claim over the assets) but in personam in others (a claim against a person for a crime or breach of a legal duty). For in rem proceedings, the presence of property in the State is sufficient to establish jurisdiction to proceed with non-conviction-based confiscation. Some jurisdictions will pursue non-conviction-based confiscation only after criminal

⁶ Ibid.

⁷ Article 54, paragraph 1 (c), of the Convention against Corruption requires States parties to consider taking such measures as may be necessary to allow confiscation without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.

⁸ Recommendation 3 of the Financial Action Task Force 40+9 recommendations requires countries to consider allowing confiscation without a conviction. FATF has also introduced best practices on NCB confiscation, including recognition of foreign NCB confiscation orders: FATF, Best Practices Paper on Confiscation (R. 3 and 38), adopted by the FATF plenary in February 2010.

proceedings are abandoned or unsuccessful, while others pursue it in parallel with the related criminal proceedings.

52. The Working Group may wish to further discuss practical aspects of non-conviction-based confiscation (e.g., procedural and evidentiary concepts, definition of assets or property subject to non-conviction-based confiscation, and parties to relevant proceedings and remedies). The introduction of relevant domestic legislation in countries without non-conviction-based confiscation and its scope of application, as well as relevant national approaches in this direction, may also be examined. The Working Group may also wish to discuss experiences and existing practices in States that have put in place a regime allowing for non-conviction-based confiscation.

C. Mechanisms for restoring confiscated proceeds of crime or property to victims

53. At its third meeting in 2010, the Working Group discussed the restitution of confiscated proceeds of crime. States had been encouraged to adopt legislation on the return of assets to victims, as required in article 14, paragraph 2, of the Convention. The idea of selling assets to raise funds for the compensation of victims had also been discussed.⁹

54. It is becoming increasingly common for jurisdictions to use confiscation mechanisms as a means to provide restitution to the victims of crime. Legislation and regulations have been designed to give priority to victims over the general treasury or confiscation fund of the State or Government. Using confiscated proceeds to obtain restitution for victims may save them the significant fees or percentages of recovery that are usually required in a private law (civil) case.

55. The Working Group may wish to further discuss this issue and also consider good practices and legislative approaches relating to the preferred model of distribution of confiscated assets in addressing recoveries for victims (pro rata distribution of recovered assets or any other distribution scheme). In addition, it is important to determine an exact definition of victims of crimes to whom confiscated assets should be returned. That may require a further exchange of views, since it is possible that members of the public could be victims of both organized crime — individuals killed or extorted, families torn apart, communities damaged — and corruption.

56. In that context, the Working Group may wish to take into account that several States provide for a type of disposal aimed at the “social re-use” of confiscated assets. This happens, in particular, in States confronting mafia-type organized crime, where approaches have been developed that seek to compensate the communities and social groups that have disproportionately suffered from the presence of such organized crime. In those cases, the general policy objectives applying to the management and disposal of all seized and confiscated assets (e.g., efficiency, cost-effectiveness, transparency) are complemented by considerations such as ensuring that the assets stolen from the public or accrued through various forms of organized crime activity at the cost of the public are being rededicated to benefitting

⁹ CTOC/COP/WG.3/2010/1, para. 32.

the public, and that the “culture of legality” and the State and its institutions are seen to prevail.

D. Management and sharing of confiscated assets

57. At its fourth meeting in 2012, the Working Group discussed loopholes in national legislation which did not allow for the appropriate management of confiscated proceeds, as well as proposals to establish systems to manage confiscated assets while ensuring that they did not lose their value and were properly disposed.¹⁰ At that meeting, speakers also exchanged views and experiences on the sharing of assets with other States, following successful collaborations in investigations, prosecutions and confiscation of criminal assets.

58. The Working Group may wish to continue the discussion on asset-sharing arrangements in cases where the return of assets linked to certain offences is not mandated by treaty requirements. In doing so, consideration may be given to further examples of ad hoc sharing arrangements and/or the usefulness of domestic legislation that can be used to ensure compliance with treaty provisions on asset return either to victims or to legitimate owners (see art. 14, para. 2, of the Organized Crime Convention).

59. The Working Group may also wish to discuss the effective management of seized and confiscated assets as a prerequisite for preserving their value pending their disposal. The issue of administration of seized assets has been addressed through, inter alia, the “Group of Eight best practices for the administration of seized assets”, published in 2005,¹¹ which are intended to help States preserve the value of seized assets while confiscation proceedings (primarily domestic) are pending. Moreover, the issue of confiscated assets is addressed by, inter alia, the Financial Action Task Force “Best practices on confiscation (recommendations 4 and 38) and a framework for ongoing work on asset recovery”, published in 2012,¹² which sets out international good practices to assist countries in their implementation of recommendations 4 and 38, and to address impediments to effective confiscation and asset recovery in the international context.

60. The Organized Crime Convention lacks an explicit provision on the administration of frozen, seized and confiscated property.¹³ However, the policy and operational aspects of such administration are commonly addressed as significant issues in both organized crime and corruption cases in view of the need to maximize the benefit that can be gained from the confiscated proceeds or property.

61. The management of assets creates a multitude of practical challenges requiring specialized professional skills to maintain their value, manage them cost-effectively and ensure their sale at market value. Countries have been tackling those challenges

¹⁰ CTOC/COP/WG.3/2012/5, para. 11.

¹¹ Available at www.coe.int.

¹² Available at www.fatf-gafi.org.

¹³ In contrast with the United Nations Convention against Corruption, which states in art. 31, para. 3, that: “Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.”

using diverse approaches. Several countries have created specialized asset management offices, either within existing public sector structures or as independent entities. Those offices seem to have varied mandates, functions, sizes and institutional structures. Other countries have opted for court-appointed asset managers and subcontractors.

62. Some countries use special asset recovery funds financed from the revenue of past disposal of seized or confiscated assets to cover the costs of the management, particularly of commercial assets. In other countries, the costs of the management of the receiver/administrator are covered by the eventual disposal of the respective asset. Alternatively, in cases where the asset has to be returned, the costs are imposed on the original suspect.

63. Another pertinent issue relates to the establishment of databases that allow for the traceability of all seized and confiscated assets. Such databases should be accessible by all relevant stakeholders, with varying levels of access. Databases are instrumental in enabling national systems to achieve their aims, including facilitating the return of seized property or its disposal, where appropriate, and compensation for victims.

64. Owing to the technical complexities and challenges, as well as the diversity of approaches adopted by States to tackle them, the Working Group may wish to discuss good practices and lessons learned, which would provide fertile ground for the development of global knowledge and guidance on effective ways to manage and dispose of assets seized and confiscated domestically, and on the administration, return and disposition of assets where more than one jurisdiction is involved. The Working Group may also wish to discuss the need for proper training of asset managers.¹⁴

VII. Conclusions and recommendations

65. The Working Group may wish to recommend that the Conference of the Parties to the Organized Crime Convention:

(a) Decide that international cooperation for purposes of confiscation and disposal of confiscated proceeds of crime or property become a standing item on the agenda of the Working Group;

¹⁴ It should be noted that, in accordance with resolution 5/3 and, subsequently, resolution 6/3 of the Conference of the States Parties to the United Nations Convention against Corruption, in early 2014 the United Nations Office on Drugs and Crime (UNODC) started to work with the Region of Calabria, Italy, in the field of management, use and disposal of seized and confiscated assets. The objective of the initiative was to identify good practices with a view to developing relevant tools and guidelines on the issue of administration of seized and confiscated assets, both at the national level and within the context of international asset recovery cases. In connection with that initiative, UNODC conducted an international expert group meeting in September 2015 specifically focusing on the domestic management, use and disposal of seized and confiscated assets. On the basis of the outcome of that meeting, UNODC is currently in the process of preparing a compilation of national experiences and good practices in this field to help those directly tasked with developing policy frameworks or who manage such assets to learn from these experiences and avoiding and/or managing some of the risks and liabilities involved.

(b) Continue to encourage States parties to make use of the United Nations Convention against Transnational Organized Crime as a legal basis for international cooperation for purposes of confiscation and disposal of confiscated proceeds of crime or property, taking into account the full scope of cooperation available under its relevant provisions; to promote awareness of the Convention in dealing with related matters; and to facilitate training activities for central authorities, judges, prosecutors, as well as law enforcement officers and personnel of financial intelligence units, who are engaged in international cooperation to target proceeds of crime;

(c) Propose and support the consistent use of the Working Group as a forum for in-depth discussion in setting priorities for technical assistance in the field of international cooperation for the purposes of confiscation and disposal of confiscated proceeds of crime or property, and for addressing the needs of countries in implementing the pertinent provisions of the Organized Crime Convention;

(d) Note with appreciation the work of the Secretariat in the field of developing tools for international cooperation in criminal matters and for purposes of confiscation and disposal of confiscated proceeds of crime or property, including the United Nations Office on Drugs and Crime *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* and the redeveloped Mutual Legal Assistance Request Writer Tool, and invite the Secretariat to continue such work, in particular with a view to compiling data, information and cases in that regard and developing operational guidelines on the implementation of articles 13 and 14 of the Organized Crime Convention.
