United Nations CTOC/COP/WG.3/2017/2

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

Distr.: General
7 August 2017

Original: English

Working Group on International Cooperation
Vienna, 9-13 October 2017
Item 2 of the provisional agenda*
Practical considerations, good practices and challenges encountered in the area of transfer of criminal proceedings as a separate form of international cooperation in criminal matters

Practical considerations, good practices and challenges encountered in the area of transfer of criminal proceedings as a separate form of international cooperation in criminal matters

Background paper prepared by the Secretariat

I. Introduction

1. In accordance with article 21 of the United Nations Convention against Transnational Organized Crime, States parties are to consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by the Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

2. At its seventh meeting, held in Vienna from 19 to 21 October 2016, the Working Group on International Cooperation recommended that the Conference of the Parties to the Organized Crime Convention include in thematic discussions at its future meetings, among other topics, the issue of practical considerations, good practices and challenges encountered in the area of transfer of criminal proceedings as a separate form of international cooperation in criminal matters. That recommendation (see CTOC/COP/2016/15, annex II, para. 2 (a)) was endorsed by the Conference in its resolution 8/1.

3. The present background paper was prepared by the Secretariat in order to facilitate discussions under item 2 of the provisional agenda of the eighth meeting of the Working Group on International Cooperation. It presents an overview of the international framework related to the transfer of criminal proceedings in relation to organized crime, including but not limited to the Organized Crime Convention, and of legal and practical aspects pertaining to it, with a view to enabling further dialogue on good practices and challenges encountered specifically in the field of international cooperation in criminal matters.

* CTOC/COP/WG.3/2017/1-CTOC/COP/WG.2/2017/1.

II. Conceptual and practical considerations: conflicts of jurisdiction and plurality of criminal proceedings

4. The transfer of proceedings in criminal matters is based on an agreement to transfer responsibility for conducting criminal proceedings from one country to another country that is considered a more appropriate forum for exercising criminal jurisdiction. Though less well entrenched than other modalities of international cooperation in criminal matters, such as extradition and mutual legal assistance, the transfer of criminal proceedings has been used as an option for cooperation, particularly among countries with a civil law tradition. In other countries, however, there have been fewer cases of such transfer. The reason for this may be that criminal justice authorities in the latter countries adhere to more traditional perspectives on sovereignty that treat criminal proceedings as an emanation of national sovereign prerogatives, and they reject the idea of transferring them to another State.[1] However, such views are gradually changing, albeit with certain difficulties and challenges, because of globalization and the concomitant increase in overall rates of transnational criminality, which results in the need for more concerted international cooperation.

5. The transfer of proceedings in criminal matters implies that the requesting State has instituted criminal proceedings, that the first stage of the proceedings has commenced and is perhaps completed, and that the presumed perpetrator is known. It is possible that the investigations of the accused have been carried out in the requesting State and that the trial stage has already been reached, or that a judgment has been rendered but not yet enforced.[2] It may also be the case that the prosecuting authority in the requesting State has concluded that the criminal proceedings cannot be properly conducted there.

6. The transfer of criminal proceedings may be an option when the suspect is a habitual resident or national of the requested State, or when the State in question is the suspect's country of origin. It is also possible for the proceedings to be transferred for various other practical reasons, for example, because the suspect is undergoing or is about to undergo custodial measures in the requested State or because proceedings have been initiated against him or her in that State for the same or another offence.[3]

7. Under international law, each State may establish criminal jurisdiction and claim the right to prosecute and try offences on different grounds, including, among others, territoriality, active and passive personality principles, universality or considerations of national security. Whenever an offence involves a foreign element, there may be an overlap of two or more jurisdictional powers, giving rise to positive conflicts of jurisdiction. Such conflicts may, in particular, have the consequence that a single person is tried successively by courts in several States for the same offence.

8. The solution to positive conflicts of jurisdiction entails some form of agreement between the States involved as to which of them should take action against the perpetrator of a given offence. In many cases, an adequate solution to such conflicts must include the possibility of transferring to one State proceedings already commenced in another State.[4]

9. The transfer of proceedings offers responses to problems posed by concurrent jurisdictions and the resulting plurality of criminal proceedings, which are

[1] See M. Cherif Bassiouni, "Introduction to transfer of criminal proceedings" in *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms*, 3rd ed., vol. II, M. Cherif Bassiouni, ed. (Leiden, Netherlands, Martinus Nijhoff Publishers, 2008), p. 518.

[2] See *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (United Nations publication, Sales No. E.98.XI.t5), art. 8, para. 8.5.

[3] An additional practical reason is the transfer of criminal proceedings under the piracy prosecution model of the United Nations Office on Drugs and Crime (see para. 15 of the present paper for further information).

[4] See "Explanatory report to the European Convention on the Transfer of Proceedings in Criminal Matters", para. 17.

particularly inherent in cases involving criminal activities of a transnational nature. Multiple legal proceedings involving the same individual or individuals pose a series of challenges in the prosecution of organized crime. At the international level, the potential for multiple legal proceedings is greatly increased. The effective coordination and handling of multiple legal proceedings is important for a number of reasons. Multiple criminal proceedings regarding the same individual may involve, for example, considerations such as the principle that no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted (*ne bis in idem*, or double jeopardy). The possibility that a suspect could be prosecuted in any one of a number of jurisdictions also brings up the consideration of ensuring that justice is administered in the closest possible proximity to identified victims of the crime.

10. At the international level, the Organized Crime Convention offers, among others, practical tools for coordinating multiple legal proceedings. Where initial investigations in one State reveal that the interests of justice are best served by prosecuting in another State, States parties should consider the possibility of transferring proceedings with a view to concentrating the prosecution in one jurisdiction. In practice, that may involve the transfer of evidence or case files from one investigating jurisdiction to another, on the understanding that the receiving jurisdiction will take action on such information.

11. While the challenge of having multiple legal proceedings is often associated primarily with extradition, States may also become increasingly aware of the existence of multiple proceedings through requests for mutual legal assistance regarding the same individual or set of facts or events. In cases where multiple criminal investigations are conducted without the full knowledge of all States involved, there is a risk that investigations may become compromised or that, owing to the double jeopardy principle, commencement of prosecution in one State will prevent prosecution in another State where stronger evidence may have been gathered.[5] In that respect, the obligation for States parties to consult one another in the case of multiple proceedings is specifically addressed in a number of international instruments.

III. Rationale and objectives of the transfer of criminal proceedings

12. The assumption that it is normally more appropriate to prosecute an offence where it has been committed is not always justified. The rehabilitation of the offender, which has been increasingly given weight and attention in modern criminal law, both at the national and international levels, requires that the sanction be imposed and enforced where the reformative aim can be most successfully pursued. That is normally understood to be the State in which the offender has family or social ties, is a citizen or resident or will take up residence after the enforcement of the sanction.

13. Alternatively, a State that is competent to deal with an offence may resort to the transfer of criminal proceedings when it considers that the prosecution of the offender would be more effectively carried out by another State. Such a transfer may be carried out, for example, in instances where the offender has fled to the territory of another State and extradition cannot be granted. Other reasons for transferring proceedings may relate to the trial proceedings themselves, revolving around difficulties in proving a criminal charge or in reaching a decision after the parties have been heard, or to the connection with other offences tried in another State. Furthermore, they may also be associated with the enforcement of the sentence, which may be impossible or inadequate in the State requesting the transfer.

[5] See the discussion guide for the thematic discussion on international cooperation in criminal matters (E/CN.15/2014/12, para. 34).

14. A cross-cutting approach that takes on board the above considerations and underlies the concept and mechanism of transfer of criminal proceedings is to employ the existing resources in criminal justice and penitentiary matters in a manner that ensures their maximum efficacy with a view not only to serving the interests of the proper administration of justice, but also to protecting the rights of the individuals involved (offender and victim) and furthering the offender's subsequent rehabilitation.

IV. International normative framework

A. Organized Crime Convention

15. As regards the work of the United Nations Office on Drugs and Crime (UNODC), in a sui generis example of technical assistance, the Office has been assisting States in the transfer of criminal proceedings in relation to piracy in the Indian Ocean, through the piracy prosecution model developed under the Office's Global Maritime Crime Programme (formerly the "Counter Piracy Programme"). Under that model, UNODC has assisted willing prosecuting States in adopting legislation that allows them to prosecute piracy domestically. The prosecuting States have then formalized transfer agreements with naval forces carrying out counter-piracy patrols. Under those agreements, when suspected pirates are apprehended at sea, the naval force secures the evidence of piracy and submits a transfer request to the prosecuting State. The State may then accept or refuse the case for prosecution on the basis of its own evaluation of the evidence and other considerations. Upon receiving the suspected pirates in its own jurisdiction, the prosecuting State investigates the case further and proceeds to prosecute it domestically.[6] UNODC has developed handover guidance material to improve the quality of evidence collected and transferred by the patrolling naval States, which has assisted in securing successful prosecutions.[7]

16. Based on the framework established under article 8 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, article 21 of the Organized Crime Convention provides that:

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

17. As in the case of article 8 of the 1988 Convention, article 21 of the Organized Crime Convention imposes no obligation on States parties to transfer proceedings in any particular case. It does, however, require the parties to consider the possibility of using the cooperative mechanism of transfer of proceedings for the prosecution of offences falling within the scope of the Convention. It identifies as the relevant criterion that such transfer would be in the interests of the proper administration of justice. Furthermore, it makes specific mention of cases where several jurisdictions are involved and there would be an advantage in concentrating the prosecution in one jurisdiction. (The latter element was not included in the wording of article 8 of the 1988 Convention.)[8]

18. With regard to the history of negotiations on the draft text of article 21, at the informal preparatory meeting of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, held in Buenos Aires in 1998,

[6] See www.unodc.org/unodc/en/piracy/Indian-Ocean.html.

[7] Kristen E. Boon, Aziz Hug and Douglas C. Lovelace, Jr., eds. *Piracy and International Maritime Security: Developments through 2011,* Terrorism: Commentary on Security Documents Series, vol. 125 (New York, Oxford University Press, 2012), p. 161.

[8] See David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (New York, Oxford University Press, 2007), p. 251.

some delegations felt that the subject matter of the article would be best placed in paragraph 5 of (draft) article 9, on jurisdiction, or in paragraph 9 of (draft) article 10, as amended by the Ad Hoc Committee at its first session, on domestic prosecution in lieu of extradition of nationals. Irrespective of the placement of the provision, there was general consensus on its content, which was therefore left unmodified throughout the sessions of the Ad Hoc Committee. At its tenth session, the Ad Hoc Committee considered and finalized the article on transfer of criminal proceedings, amending its title with the addition of the word "criminal".[9]

19. A provision identical to article 21 was also included in the United Nations Convention against Corruption as article 47.

B. Interrelationship of article 21 with other provisions of the Organized Crime Convention

20. The Organized Crime Convention seeks to develop a comprehensive and efficient international cooperation framework and assist States parties in bolstering effective and flexible cooperation mechanisms through which various forms of cooperation could be used jointly to reinforce one another and further ensure and promote the proper administration of justice. With particular regard to article 21, on the transfer of criminal proceedings, such objectives are facilitated by the interrelationship between article 21 and other relevant provisions of the Convention, as detailed below.

Article 15

21. As the transfer of criminal proceedings is associated with ways to overcome challenges posed by conflicts of jurisdiction and the existence of multiple proceedings, article 21 may need to be considered in conjunction with article 15, which addresses jurisdictional issues. In article 15, paragraph 5, for example, it is stated that if a State party learns that one or more other States parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States parties are to consult one another with a view to coordinating their actions. The Convention does not, however, provide specific guidance regarding the relationship between multiple legal proceedings in general. Neither does it clearly resolve the issue of concurrent exercise of jurisdiction by different States.

22. Moreover, article 21 must be considered in conjunction with two other provisions of article 15 that establish jurisdictional bases over offences covered by the Convention. The first one, article 15, paragraph 3, introduces a mandatory requirement for the establishment of criminal jurisdiction in cases where a State party cannot extradite a person sought on grounds of nationality. The second one, article 15, paragraph 4, provides States parties the option of establishing criminal jurisdiction where they cannot grant an extradition request on any grounds other than that of nationality.

Article 16

23. A transfer of criminal proceedings can be an option when extradition for an offence is not possible, in particular in view of the prohibition that exists in many States against extradition of their own nationals. In such cases, if the country of domicile is unable to take over the proceedings, there is a risk of the suspect escaping liability for his or her act. In response to such risk of impunity, a transfer of proceedings may be used, where appropriate, as a procedural tool when applying the principle *aut dedere aut judicare*, thus increasing the efficiency and effectiveness of

[9] See *Travaux Prèparatoires 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. 207.

domestic prosecutions initiated and conducted in lieu of extradition, especially in cases where extradition is denied because the person sought is a national of the requested State (art. 16, para. 10).[10]

Article 18

24. In all cases in which a request for the transfer of proceedings is presented, an inquiry has already been carried out in the requesting State and some or all of the evidence has been gathered. Such information will usually be necessary in order for a decision to be rendered by the requested State to take over the proceedings; that State may even require additional information in order to make such a decision. A good system of mutual legal assistance is therefore indispensable for the transfer of proceedings, and in that connection, the interrelationship between articles 21 and 18 on the subject of mutual legal assistance is explicit.

C. Regional instruments

25. One multilateral convention that deals ad hoc with the transfer of criminal proceedings has been adopted; within the framework of the Council of Europe, the European Convention on the Transfer of Proceedings in Criminal Matters[11] was opened for signature on 15 May 1972 and entered into force on 30 March 1978. It has been ratified by 25 member States of the Council of Europe.[12] The European Convention is detailed and its underlying concept is simple: when a person is suspected of having committed an offence under the law of one State party, that State party may request another State party to take action on its behalf in accordance with the Convention, and the latter may take prosecutorial action under its own law.

26. Article 8, paragraph 1, of the European Convention indicates the cases in which one contracting State may request the taking of proceedings in another contracting State, as follows:

(a) If the suspected person is ordinarily resident in the requested State;

(b) If the suspected person is a national of the requested State or if that State is his or her State of origin;

(c) If the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;

(d) If proceedings for the same or other offences are being taken against the suspected person in the requested State;

(e) If it considers that transfer of the proceedings is warranted in the interests of arriving at the truth and in particular that the most important items of evidence are located in the requested State;

(f) If it considers that the enforcement in the requested State of a sentence, if one were passed, is likely to improve the prospects for the social rehabilitation of the person sentenced;

(g) If it considers that the presence of the suspected person cannot be ensured at the hearing of proceedings in the requesting State and that his or her presence in person at the hearing of proceedings in the requested State can be ensured;

(h) If it considers that it could not itself enforce a sentence if one were passed, even by having recourse to extradition, and that the requested State could do so.

---

[10] See Lech Gardocki, “Transfer of proceedings and transfer of prisoners as new forms of international co-operation”, in *Principles and Procedures for a New Transnational Criminal Law*, Albin Eser and Otto Lagodny, eds. (Freiburg, Eigenverlag MPI, 1992), p. 318; A/CONF.203/9, para. 68.

[11] United Nations, *Treaty Series*, vol. 1137, No. 17825.

[12] Specific provisions on transfer of criminal proceedings are also included in the European Convention on Mutual Assistance in Criminal Matters (art. 21).

27. Where the suspected person has been finally sentenced in a contracting State, that State may request the transfer of proceedings only if it cannot itself enforce the sentence, even by having recourse to extradition, and if the other contracting State does not accept enforcement of a foreign judgment as a matter of principle or refuses to enforce such sentence (art. 8, para. 2, of the Convention).

28. Other regional instruments that include provisions on the transfer of criminal proceedings are the Commonwealth of Independent States Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk Convention, 1993), of which part IV, section II, on criminal persecution (arts. 72-77) is of relevance; and the Commonwealth of Independent States Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau Convention, 2002), of which article 100 is of relevance.

29. A European Union instrument of indirect relevance is Council of the European Union framework decision 2009/948/JHA, on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, which aims to prevent unnecessary parallel criminal proceedings in the European Union concerning the same facts and the same person. The framework decision followed an initiative to map related problems and issues for further consideration, namely, the European Commission green paper on conflicts of jurisdiction and the principle *ne bis in idem* in criminal proceedings, and was perceived as a first step in European Union law towards the prevention of conflicts of jurisdiction.

30. The framework decision sets out the procedure whereby competent national authorities of European Union member States are to contact one another when they have reasonable grounds to believe that parallel proceedings are being conducted in one or more European Union member States. The consultation should lead, preferably, to the concentration of the proceedings in one European Union member State, for example, through the transfer of criminal proceedings. In order to reach consensus, the competent authorities should consider all relevant criteria and take into account the place where the major part of the criminality occurred, the place where the majority of the loss was sustained, the location of the suspected or accused person and possibilities for securing his or her surrender or extradition to other jurisdictions, the nationality or residence of the suspected or accused person, significant interests of the suspected or accused person, significant interests of victims and witnesses, and the admissibility of evidence or any delays that may occur. If no agreement is reached, the case is to be referred to Eurojust, where appropriate, and provided that it falls under the latter's competence. As Eurojust is particularly well suited to provide assistance in resolving conflicts, referral of a case to Eurojust should be a usual step when it is not possible to reach consensus.[13]

D. A soft-law model instrument as guidance: the Model Treaty on the Transfer of Proceedings in Criminal Matters

31. The United Nations has sought to promote the development of bilateral and multilateral treaties on the subject of transfer of proceedings by preparing a Model Treaty on the Transfer of Proceedings in Criminal Matters.[14] As the Model Treaty is only a framework treaty, it has to be adapted to the specific requirements of the two or more States that are negotiating its terms. The Model Treaty was the result of preparatory work undertaken within the framework of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana in 1990, which recommended it for adoption by the General Assembly.

[13] See European Commission, "Report from the Commission to the European Parliament and the Council on the implementation by the member States of framework decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings", document COM(2014) 313 final, p. 4.

[14] General Assembly resolution 45/118, annex.

32. Although not as detailed as the European Convention, the Model Treaty provides guidance on a range of issues, such as the 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 and the rights of the victims, the principle of *ne bis in idem*, the effects of the transfer on the requested State, provisional measures, the plurality of criminal proceedings, and costs associated with the transfer.

V. Regulatory framework for the transfer of proceedings

A. Legal bases

33. An issue to be resolved when implementing article 21 of the Organized Crime Convention is whether or not to require the existence of a bilateral or multilateral treaty on the transfer of proceedings as a condition for cooperation. Proceedings may be transferred even if no international convention has been concluded to regulate the matter. What is necessary is that the criminal law of the requested State be applicable to the perpetrator of the offence; it is of little consequence whether provisions to this effect were made with a view to affording mutual assistance or not. Although the existence of an international convention is not an indispensable condition for the transfer of criminal proceedings, it is nevertheless highly desirable.

34. Parties wishing to take advantage of this form of international cooperation may wish to ensure that their domestic legislation provides for both the transfer of proceedings to foreign States and the acceptance of transfers from those States. Of central importance in the latter context is the ability to discharge the obligation to prosecute once the transfer of proceedings has been accepted. It is equally important 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.[15]

35. In practice, however, countries demonstrate flexibility with regard to the legal basis for the transfer of proceedings. This conclusion can be drawn, in a comparative context, from the findings of the first reporting cycle of the Mechanism for the Review of Implementation of the Convention against Corruption on the implementation of article 47 of the Convention, on transfer of criminal proceedings (the wording of which, as stated earlier, is identical to that of article 21 of the Organized Crime Convention). In that connection, the majority of States parties reported that they had no domestic legislation and were not bound by any international instruments regulating such transfer. Some countries stated that transfers could be made through informal arrangements. As noted in certain reviews, no particular law was needed to implement article 47 of the Convention as long as there was a practice, policy or arrangement that provided for the possibility of transferring criminal proceedings.[16]

B. Conditions for the transfer

36. The transfer of proceedings may take place in respect of any offence that may be prosecuted in the requesting State, if such transfer is, first of all, in the interests of the proper administration of justice. This fundamental principle is enshrined in all relevant international provisions of normative or soft law. It is further specified in article 21 of the Organized Crime Convention (and in article 47 of the Convention

[15] See Model Treaty on the Transfer of Proceedings in Criminal Matters (General Assembly resolution 45/118, annex), art. 1, para. 2.

[16] See United Nations Office and Drugs and Crime, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation* (Vienna, 2015), p. 208.

against Corruption) through the example of concentration of prosecution when several jurisdictions are involved.

37. A second basic condition is that of dual criminality. The requirement of dual criminality is not only part and parcel of traditional forms of international cooperation in criminal matters, such as extradition, and applicable in other contexts, such as the enforcement of foreign criminal judgments, but also applies to the transfer of proceedings. It is perceived as *in concreto* dual criminality (see below). The requirement is fulfilled if an offence punishable in a given State would have been punishable if committed in the State requested to prosecute the accused and if the perpetrator would have been liable to a sanction under the legislation of the requested State.

38. The legal denomination of the offence in question need not be identical for the purposes of determining the fulfilment of dual criminality in the cooperating States, since the laws of those States cannot be expected to coincide on that point. Instead, the conduct underlying the offence is the crucial factor; it should be defined as criminal under the laws of both States. There has been growing recognition of this interpretation in recent years and it has been reflected in an international normative instrument (art. 43, para. 2, of the Convention against Corruption).

39. Certain factors, such as the grounds of justification or absolute extenuation (such as legitimate defence or force majeure), and the subjective and objective conditions that make an offence punishable will also have to be taken into account in defining the scope of the dual criminality requirement. Consequently, if the law of the requested State provides for such grounds and conditions while the law of the requesting State does not, there is no dual criminality in the concrete sense, since the accused would not have been liable to punishment in the requested State if he or she had committed the same offence there.[17]

40. Furthermore, and as an additional condition for the transfer, the requested State may accept a request for the transfer of proceedings only if its criminal courts have competence to try the offence and if it can apply either its own criminal law or that of the requesting State. To enable the transfer of proceedings wherever the interests of a proper administration of justice so require, it is essential to confer competence on the requested State and make its criminal law applicable.

C. Time limits for prosecution (statute of limitations period)

41. Three scenarios emerge with regard to time limits for prosecution within the context of transfer of criminal proceedings, as described below.

Time limit for prosecution in the requesting State

42. A request for a transfer of proceedings limits the right of the requesting State to prosecute. However, it does not guarantee that proceedings can take place in the requested State, since that State should first examine whether or not it can take action on it. It may find that it cannot comply with the request, in which case the full right of prosecution reverts to the requesting State. The same applies when acceptance of the request is revoked (see art. 21 of the European Convention on the Transfer of Proceedings in Criminal Matters). Except where expressly provided otherwise, the time allowed for prosecution in the requesting State under the statute of limitations continues to elapse between the presentation of the request and the negative reply by the requested State, if any. As a consequence, to prevent the continuation of the proceedings in the requesting State from being adversely affected, article 22 of the European Convention requires any request to take proceedings to have the effect, in that State, of extending the time limit for prosecution by six months.

[17] See “Explanatory report to the European Convention on the Transfer of Proceedings in Criminal Matters”, para. 32, notes on art. 7 of the Convention.

43. Article 10 of the European Convention provides that the requested State cannot take action on the request if, on the date of the request, the time limit for criminal proceedings had already expired in the requesting State in accordance with that State's legislation. It is self-evident that a transfer of proceedings is impossible if the time limit for prosecution has expired in the requesting State.

Time limit for prosecution in the requested State

44. In the requested State, time limits for prosecution may apply in two ways. Either the requested State is already competent under its own law, or its competence is exclusively grounded on a treaty, such as the European Convention ("subsidiary" jurisdiction). In the former situation, its ordinary time limits are applicable. Article 11, subparagraph (f), of the European Convention entitles the requested State to refuse a request if proceedings were already time-barred when the request was received.

45. In the latter scenario of subsidiary jurisdiction, article 23 of the European Convention provides that the time limits are prolonged by six months. Article 11, subparagraph (g), of the European Convention gives the requested State the right to refuse the transfer of proceedings if, in spite of the prolongation of six months, proceedings would be precluded — at the time of receipt of the pertinent request — by lapse of time according to its law.

Acts interrupting time limitation

46. Article 26, paragraph 2, of the European Convention on the Transfer of Proceedings in Criminal Matters provides that any step that interrupts time limitation and that has been validly performed in the requesting State shall have the same effects in the requested State and vice versa (see also art. 11, para. 2, of the Model Treaty).

D. Grounds for refusal

47. Grounds on which a request for transfer of proceedings may be refused are set out in article 7 of the Model Treaty and article 11 of the European Convention. They range from the status of the suspected person (national or resident of the requested State) to procedural requirements (lapse of time or commission of the offence outside the territory of the requesting State) and the nature of the offence (political, fiscal or military). Assistance may also be refused where proceedings would be contrary to the fundamental principles of the legal system or the international undertakings of the requested State, or where the request for transfer is based on discriminatory grounds against the offender. A request may not be granted when relevant action is prevented by the application of the double jeopardy principle (*ne bis in idem*) (see art. 35 of the European Convention).[18] A separate note to article 7 of the Model Treaty specifies that, when negotiating on the basis of the Model Treaty, States may wish to add other grounds for refusal, or conditions relating, for example, to the nature or gravity of the offence, the protection of fundamental human rights or considerations of public order.

E. Transfer procedure: required documentation

48. Comprehensive information in support of a request for transfer of proceedings is important for ensuring that the dual criminality requirement is fulfilled. It is also important for verifying whether any act that interrupts time limitation has been validly performed and for assessing the nature and extent of applicable sanctions. Article 3 of the Model Treaty requires a request to transfer proceedings to contain or be accompanied by: a description of the act for which transfer of proceedings is being requested, including the specific time and place of the offence; a statement on the

[18] See McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, p. 251.

results of investigations that substantiate the suspicion of an offence; the legal provisions of the requesting State on the basis of which the act is considered to be an offence; and a reasonably exact statement on the identity, nationality and residence of the suspected person. In contrast, article 15 of the European Convention was drafted in more vague terms by referring to "and all other necessary documents".

49. The transfer of criminal proceedings was one of the additional types of assistance listed in the Mutual Legal Assistance Request Writer Tool, as revised by the Secretariat to provide more streamlined and up-to-date assistance to criminal justice practitioners in expeditiously drafting requests for mutual legal assistance, thereby enhancing international cooperation in criminal matters. For this type of assistance, if selected, the Tool offers guidance on providing the information needed for the timely submission of a complete request.

F. Position of suspected persons and rights of victims

50. The Model Treaty provides for the rights of both the suspect and the victim of a crime. First of all, it provides that the suspected person may express an "interest" in the transfer, as may his or her close relatives or his or her legal representatives. Before the request is made, the requesting State is required, if practicable, to allow the suspect to express his or her views on the alleged offence and the transfer, unless the suspect has absconded or otherwise obstructed the course of justice (art. 8 of the Model Treaty). The text is silent as to what is to be done with such views, there being no obligation to communicate them to the requested State.

51. Article 17 of the European Convention stipulates that if the competence of the requested State is not original but exclusively grounded on article 2 of the European Convention ("subsidiary" jurisdiction), that State is to inform the suspected person of the request for transfer of the proceedings with a view to allowing him or her to present his or her views on the matter before that State has taken a decision on the request. The rationale behind this provision is that the suspected person should be entitled to be heard or, in any event, to present such views as he or she deems relevant, before a decision is taken. On the one hand, article 17 responds to the need to respect the individual's right to defend himself or herself, since the decision is liable to affect the outcome of the criminal proceedings to a considerable degree. On the other hand, it also responds to the necessity to enable the person directly concerned to supplement and, where appropriate, dispute the information provided by the requesting State in order to preclude as much as possible the danger of making decisions based on erroneous evidence, which may possibly give rise at a later stage to a withdrawal of acceptance of the request.[19]

52. The rights of the victim of the crime, in particular those relating to restitution or compensation, are not to be affected by the transfer of proceedings. If there has been no settlement prior to the transfer, the requested State is to permit the representation of the claim in the transferred proceedings if this is permitted under its law. If the victim of the crime has died, the right is to be extended to his or her dependants
(art. 9 of the Model Treaty).

G. Effects of the transfer of proceedings on the requesting State

53. Under article 10 of the Model Treaty, upon acceptance by the requested State of the request to take proceedings against the suspected person, the requesting State is to provisionally discontinue prosecution, except necessary investigation, including judicial assistance to the requested State, until the requested State informs the requesting State that the case has been finally disposed of. From that date on, the

[19] See "Explanatory report to the European Convention on the Transfer of Proceedings in Criminal Matters", para. 32, notes on art. 17 of the Convention.

requesting State shall definitely refrain from further prosecution of the same offence. A similar approach is followed under the European Convention, which, given that the examination of the request by the requested State takes a certain amount of time, provides that the requesting State may take any steps in respect of prosecution, short of bringing the matter before the trial court (art. 21, para. 1). This means that the requesting State cannot render a decision in the case, nor arrange for the hearing in court of witnesses or experts. However, it is not prohibited from having the accused questioned by the investigating authorities, from seizing stolen objects and from taking the necessary steps to preserve evidence.

54. Article 21, paragraph 2, of the European Convention restores to the requesting State all rights of which it was deprived by the request for transfer to the requested State, if the latter does not prosecute the accused or if the requesting State withdraws its request before the requested State has informed it of a decision to take action on the request.

H. Effects of the transfer of proceedings on the requested State

55. Article 11, paragraph 1, of the Model Treaty requires the proceedings transferred upon agreement to be governed by the law of the requested State. When charging the suspected person under its law, the requested State shall make the necessary adjustment with respect to particular elements in the legal description of the offence.

56. Article 25 of the European Convention requires the sanction to be determined by the law of the requested State if the competence of that State is already grounded on its national law, without any restriction imposed by the European Convention. The law of another State is to be taken into account only if the law of the requested State expressly so provides. If, however, the competence of the requested State is exclusively grounded on article 2 of the European Convention ("subsidiary" jurisdiction), the sanction pronounced in that State is not to be more severe than that provided for under the law of the requesting State (see also art. 11, para. 1, of the Model Treaty).

57. As far as compatible with the law of the requested State, any act with a view to proceedings or procedural requirements performed in the requesting State in accordance with its law is to have the same validity in the requested State as if the act had been performed in or by the authorities of that State (art. 11, para. 2, of the Model Treaty). Together with article 26, paragraph 1, of the European Convention, that provision lays down the "rule of equivalence or assimilation" by specifying that procedural steps lawfully taken in the requesting State are to have the same validity in the requested State as if they had been taken in the requested State. However, when there is a question of probative effect, i.e., of the evidential weight of procedural acts, the European Convention provides that this weight cannot be greater than that stipulated in the foreign law.

58. When the requesting State announces its intention to transmit a request for transfer of proceedings, the requested State may, upon a specific request made for this purpose by the requesting State, apply all such provisional measures, including provisional detention and seizure, as could be applied under its own law if the offence in respect of which transfer of proceedings is requested had been committed in its territory (art. 12 of the Model Treaty). If the request for proceedings has already been received, the requested State may arrest the accused provisionally on its own initiative. The situation is somewhat different in cases where all the formalities necessary for the request have not yet been completed: the requested State is entitled under an applicable treaty (e.g., the European Convention) to take the necessary steps to ensure the presence of the accused, but it cannot make the arrest except upon an express application by the requesting State, and unless both of the following conditions are met: if the law of the requested State authorizes remand in custody for the offence in question; and if there are reasons to fear that the suspected person will

abscond or will cause evidence to be suppressed (art. 27, para. 1, of the European Convention).

VI. Practical considerations

59. Bearing in mind the above legal aspects, it is important for competent authorities in Member States, in particular in States parties to the Organized Crime Convention, to take into account difficulties encountered in applying relevant legal norms, as well as to have access to practical guidelines to accelerate and facilitate procedures and avoid unnecessary efforts or costs.

60. Priority should be given to considering the legal basis allowing for the transfer of proceedings. It is true that the only comprehensive ad hoc multilateral instrument in place, namely the European Convention, has so far been ratified by only 25 parties, which is considerably fewer than the number that have ratified other Council of Europe instruments dedicated to international cooperation in criminal matters. Moreover, in 2009, in the context of the European Union, 15 member States proposed a framework decision on the transfer of criminal proceedings which was intended to replace the European Convention for States members of the European Union, but that proposal was not followed up on for further adoption and implementation.

61. Framework decision 2009/948/JHA of the Council of the European Union of 30 November 2009, on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings, was intended to resolve issues arising from parallel proceedings by, inter alia, obliging European Union member States to enter into direct consultations that may, where appropriate, lead to the concentration of criminal proceedings in one member State (art. 10, para. 1, of the framework decision). The framework decision was not implemented very effectively; as of June 2014, only 15 European Union member States had transposed it into their domestic legal systems, while 13 others had not done so, according to a report by the European Commission to the European Parliament and the Council, based on data available at the time of its preparation.[20] In a more recent development, a draft regulation of the Council of the European Union on the establishment of a European public prosecutor's office was put forward that included provisions on decisions to reallocate or merge cases. It remains to be seen whether it will be implemented any more effectively once it is adopted in its final form.[21]

62. The lack of an enabling treaty framework, or the limited use made of the one available, can be attributed to several causes, such as difficulties with the application of substantive or procedural conditions (as in the case of divergent statutes of limitations or lack of dual criminality), the perception that transferring proceedings would remove the transferred person from his or her "natural judge" or infringe the sovereign right of the country in question to bring criminal proceedings. However, enhancing the treaty framework, including through the conclusion of more formal agreements, would help to consolidate existing practices, which may have been developed piecemeal and tailored to the circumstances of individual cases, and would

[20] See European Commission, "Report from the Commission to the European Parliament and the Council on the implementation by the member States of framework decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings", document COM(2014) 313 final, p. 11.

[21] The Council of the European Union reached agreement on a first compromise text for a regulation on a European public prosecutor's office in January 2017. In March 2017, the European Council acknowledged that there was no unanimity in the Council, thus opening the way to the establishment of the European public prosecutor's office via enhanced cooperation. On 8 June 2017, the Council adopted its general approach to the regulation. A total of 20 member States are to participate in its establishment. Final adoption of the text by the European Parliament is expected in October 2017.

determine the effects of a possible transfer on the States involved. In that context, States could benefit from taking into account the Model Treaty.[22]

63. What should be borne in mind is that it is in the interests of effective criminal justice to ensure, including through appropriate legal tools, that criminal proceedings are conducted in the best-placed Member State, for example, in the State where the major part of the criminality occurred, where the majority of the loss was sustained or where the suspected or accused person or victims have significant interests. This jurisdiction must be chosen in a transparent and objective way in order to safeguard legal certainty for citizens, avoid risks of infringement of the *ne bis in idem* principle and improve judicial cooperation in criminal matters between authorities that may exercise parallel competence.

64. Another issue that requires particular attention is the consideration of the proportionality of the case to be transferred, as well as its appropriateness, taking into account the need to avoid impunity, the efficiency of proceedings and the applicable legal requirements. In that context, the following considerations may be taken into account:

(a) The nationality and place of residence of the suspected person;

(b) The possibility that the suspected person is undergoing or is to undergo a sentence involving deprivation of liberty in the requested State;

(c) The place where the offence occurred and/or where the most important items of evidence can be found;

(d) The possibility that proceedings are being taken against the suspected person for the same or different offences in the requested State;

(e) The practicability of dealing with all the prosecutions in the jurisdiction of the requested State in cases where the offence(s) occurred in several jurisdictions;

(f) The possibility of the presence of the suspected person in the proceedings in the requesting or the requested State;

(g) The willingness and ability of witnesses to travel and give evidence in the jurisdiction of the requested State;

(h) The interests of victims and whether they would be prejudiced, for example, in their possibilities to claim compensation if any prosecution were to take place in one jurisdiction rather than another;

(i) The likelihood that the enforcement in the requested State of a sentence, if one were passed, would improve the prospects for the social rehabilitation of the person sentenced;

(j) The likelihood that the requesting State could not itself enforce a sentence, if one were passed, even by having recourse to extradition, and that the requested State could do so.[23]

65. Consideration should also be given, where necessary, to informal preliminary consultations (for example, by phone, email, videoconference or meetings) with the State or the States to which a request might be addressed so as to discuss the appropriateness and potential success of the request envisaged, ways to deal with differences in national legislation (e.g., extraterritorial jurisdiction, admissibility of evidence, mandatory or discretionary prosecution), and the time frame and practicalities of the cooperation (contact persons, elements to be included in the request, translation requirements and costs, etc.).[24]

[22] See *State of Implementation of the United Nations Convention against Corruption*, p. 208.

[23] See Council of Europe, European Committee on Crime Problems “Guidelines on practical measures to improve cooperation in respect of transfer of proceedings, including a model request form”, document PC-OC INF 78, p. 3.

[24] Ibid.

VII. Conclusions and recommendations

66. The Working Group may wish to encourage States parties to exchange best practices and lessons learned in the field of transfer of criminal proceedings, especially those on practical aspects associated with this form of international cooperation in criminal matters and the implementation of article 21 of the Organized Crime Convention.

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

(a) Encourage States parties to make use, where appropriate, of the Organized Crime Convention as a legal basis for transferring criminal proceedings to another State party in relation to offences covered by the Convention and its Protocols and to further engage in consultations before the submission of a request for transfer of proceedings to ensure the clarity and effectiveness of the process;

(b) Encourage States parties to facilitate training activities for competent authorities involved in the field of transfer of criminal proceedings;

(c) Invite the Secretariat to develop legal, practical and operational guidelines on the implementation of article 21 of the Organized Crime Convention, which would supplement the guidance on how to draft a request for the transfer of criminal proceedings, as contained in the redeveloped version of the Mutual Legal Assistance Request Writer Tool.