

Anti-Trafficking Assessment Tool

A tool for non-legal researchers to rapidly assess jurisdictional concordance with the requirements of UN Trafficking Protocol and the UN Convention against Transnational Organized Crime¹.

Provided by:

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¹ This is a diagnostic tool only, and is not in any way meant as an exhaustive measure of concordance or otherwise with the relevant international instruments. The UNODC takes no responsibility for the accuracy of assessments made using this tool for guidance.

Background

The UN Convention against Transnational Organised Crime (the Palermo Convention) was adopted by the UN General Assembly at its Millennium Meeting in November 2000; opened for signature in December 2000. It requires signing and ratifying by 40 countries to come into force. It has not yet come into force, having 147 signatures and 28 parties as at 1 January 2003.

States party to the Palermo Convention would be required to establish in their domestic laws four criminal offences:

- participation in an organized criminal group;
- money laundering;
- corruption; and
- obstruction of justice.

The Convention spells out how countries can improve cooperation on such matters as extradition, mutual legal assistance, transfer of proceedings and joint investigations. It contains provisions for victim and witness protection and shielding legal markets from infiltration by organized criminal groups. Parties to the treaty would also provide technical assistance to developing countries to help them take the necessary measures and upgrade their capacities for dealing with organized crime.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children (the Trafficking Protocol), one of three optional protocols to the Palermo Convention, deals with trafficking in persons, especially women and children. It was also adopted at the Millennium Meeting of the General Assembly in 2000. It requires signing and ratifying by 40 countries to come into force. It has not yet come into force, having 117 signatures and 21 parties as at 1 January 2003.

States party to the Trafficking Protocol would be required to establish in their domestic law measures "prevent and combat" trafficking in persons and facilitate international co-operation against such trafficking. It provides for criminal offences, control and co-operation measures against traffickers. It also provides some measures to protect and assist the victims.

The Convention and its protocols are instruments in international law, not the domestic laws of individual countries. They are negotiated between states, and when in force, they bind only states, not individuals. The negotiation process develops policies and language which most or all of the states involved in the negotiations can support. When a final text is established, countries which accept the finished product signify their acceptance by signing it. This is followed by ratification and implementation, in which each country brings the terms of the international instruments into force in its jurisdiction. Implementation usually consists of the adoption of whatever new domestic laws or amendments may be needed, accompanied by whatever new administrative frameworks or procedures are needed to make the new laws actually work.

The instruments oblige countries which sign and ratify them to take a series of measures against transnational organised crime. The fundamental purpose is to reinforce international co-operation. To accomplish this, it is necessary to ensure that as many states as possible have adopted basic minimum measures against organised crime so that there are "no safe havens" where organizational activities or the concealment of evidence or profits can take place. Beyond this, many provisions are intended to ensure that the approaches taken by different states under their domestic legislative and law-enforcement regimes are as coordinated as possible to make collective international measures both efficient and effective. The instruments set basic minimum standards for countries, but it is expected that many will go further in adopting domestic measures, based on domestic needs or agreements with other countries on a bilateral or regional basis.

Explanation

This diagnostic tool is prepared and provided by the UN Office on Drugs and Crime (UNODC) Regional Centre for East Asia and the Pacific, Bangkok. It was developed to provide the means rapidly to assess, 'at a glance', how a jurisdiction is in concordance with the provisions of two of the leading international instruments on human trafficking; the Palermo Convention, and its optional Trafficking Protocol.

By way of explanation, each checklist is divided into two sections; the first dealing with the mandatory requirements for parties, and the other dealing with non-mandatory or recommended provisions.

Part One- Mandatory Requirements

This section contains those parts of the Treaties with which States must be in compliance if they are to ratify the Palermo Convention and the Trafficking Protocol

The wording in both the Palermo Convention and the Trafficking Protocol that denote a mandatory requirement is:

- shall

Additionally, the requirements of both instruments are often qualified by terms such as "where appropriate, where available, in accordance with domestic law etc". These qualifications have not been referred to in the checklists on the basis that where a requirement is mandatory it should be implemented to the fullest extent possible in any applicable situation.

Further, much of the Palermo Convention and Trafficking Protocol set out procedures for fulfilling the obligations thus established. Where this is the case, we refer you to the article with the procedure in order to provide a reference, but we have not provided the detail.

Part Two- Measures to be considered by States

This second part of the checklist contains those obligations which are not mandatory. Instead they are recommended, and considered 'optional', and for the consideration of each party. They should be regarded as strengthening the mandatory requirements and as providing a framework for effective implementation of those requirements.

The wording that denotes an optional (but preferred) obligation in the Palermo Convention is:

- may

The wording that denotes an optional (but preferred) obligation in the Trafficking Protocol is:

- shall consider

Where a definition is given in the relevant treaty, it is understood that these definitions are not for the purpose of domestic law but instead should be used as a framework in order for states to develop their own definitions which are compatible and coherent in domestic law. Therefore, elements which states may wish to consider have been outlined on the understanding that it is the drafting of a definition which is mandatory and that some elements would be important within any definition.

Checklist I: The UN Convention against Transnational Organised Crime

Mandatory Requirements for Ratification

1. "Organized criminal group" is defined in a manner compatible with the Convention.

Elements of a compatible definition:

- i. Structured group
- ii. 3 or more people
- iii. In existence for a period of time
- iv. People act in concert with one another
- v. Aim to commit serious crimes
- vi. Obtain financial or other material benefit

Note: All important terms in any definition should be defined according to domestic legal definitions but direction is given in the convention as to possible definitions.

(Use of Terms - Article 2 (a-j) refers)

2. Where states seek to criminalise "transnational crime" then transnational must also be defined in accordance with the Convention. Thus the following elements may be applicable:

- i. Committed in more than one state
- ii. Committed in one state but the planning etc takes place in another state
- iii. Committed in one state but involves a criminal group engaging in activities that take place in more than one state.
- iv. Committed in one state but has a substantial effect on/in another state.

(Scope of Application- Article 3(2)(a-d) refers)

3. Participation in an organized criminal group is a criminal offence.

-Participation to be defined in a manner compatible with the Convention

(Criminalization of participation in an organized criminal group- Article 5(1) refers)

4. Organizing, directing, aiding, abetting, facilitating counseling a serious crime involving an organized criminal group is a criminal offence. (Article 5(1)(b) refers)

5. Where State laws are not compatible with the Convention in terms of definitions of the degree of knowledge/ intent required for the commission of offences, provision should be made for them to inform the UN at the point of ratification.

6. The following are established as criminal offences:

- i. Conversion or transfer of property knowing that the property is the proceeds of crime, where the transfer is made for the purpose of disguising the origin of the property or in order to help an offender avoid punishment.
- ii. Concealing the source, true nature of, location, ownership of property rights, knowing that such property is the proceeds of crime.
- iii. Acquisition, use of, possession of, property knowing that the property is the proceeds of crime.
- iv. Participation, association, conspiracy to commit any of the above is also criminalized.

(Criminalisation of Laundering of Proceeds of Crime - Article 6 (1)(a -b) refers)

7. States are to apply the above offences to the widest range of predicate offences.

8. States shall put in place a comprehensive regulatory regime for banks and other financial institutions.

The regime must highlight the need for:

- i. customer identification
- ii. record keeping
- iii. reporting of suspicious transactions.

Authorities that are bound to combat money laundering are obliged to share information at all levels.

9. The following are to be established as criminal offences:

Promise, offering, giving to a public official an undue advantage in order that the official act, or refrain from acting in the exercise of official duties.

- i. Acceptance and solicitation of an undue advantage by a public official in order that the official act, refrain from acting in the exercise of official duties.
- ii. The same offences are to apply where a foreign public official or an international civil servant is involved.
- iii. Participating as an accomplice in any of the above is also criminalized.
- iv. A public official is to be defined according to domestic law.

(Criminalisation of Corruption- Article 8 (1-4) refers)

10. In order to prevent corruption, each state is to put in place measures to:

- i. Promote integrity
- ii. Prevent corruption
- iii. Detect corruption
- iv. Punish corrupt acts

Measures to ensure authorities are active in preventing detecting and punishing corruption and to ensure there is no undue influence in the activities of such authorities.

(Measures Against Corruption- Article 9 (1-2))

11. Legal persons are to be criminally, administratively or civilly liable for offences.

a) All such persons are to be liable to effective and proportionate sanctions. (Liability of Legal Persons- Article 10 (1-4) refers)

12. The sanctions applied must reflect the gravity of the offence committed.

- i. It is acknowledged that discretionary powers are to be used to ensure maximum effectiveness of law enforcement measures.
- ii. Decisions regarding pre-trial release of a defendant are to take into account the need for the defendant to be present at the trial.
- iii. Courts are made aware of the gravity of offences involving transnational organized crime.
- iv. Statutes of limitation are extended to take into account the nature of the offences committed.

(Prosecution, Adjudication, Sanctions- Article 11(1-6))

13. a) Measures are in place to permit the confiscation of:

- i. Proceeds of crime
- ii. Property, equipment used in the commission of offences.
- iii. Proceeds of crime which have been converted into other types of property
- iv. Proceeds of crime that have been intermingled with other property
- v. Income derived from proceeds of crime.

(Confiscation and Seizure - Article 12(1-5))

b) Courts have the power to order the removal of bank and financial records.

(Article 12(6) refers)

c) Where a State is requested to do so it is obliged to cooperate with requests regarding confiscation of property within its territory.

(International Cooperation for Purposes of confiscation Article 13(1)(a,b) refers)

d) In the event of a request being made then a State is obliged to freeze, confiscate assets and proceeds of crime as reasonably requested. (Article 13(2)refers)

For details about how to make such a request see Article 13(3)(a,b,c))

e) Where a State considers that confiscation etc is only able to take place on condition of a treaty, the Convention is made to act as the necessary and sufficient treaty. (Article 13(6) refers)

f) Where proceeds of crime are confiscated states are obliged to return that property without undue delay in order for it to be returned to legitimate owners or to be given as compensation to victims of crime. (Disposal of Confiscated Proceeds of Crime or property- Article 14(14)(2) refers)

14. When any of the offences outlined above are committed, measures are in place to ensure that a State has established jurisdiction over:

- i. Offences committed within its territory
- ii. Offences committed on board a vessel flying the flag of a State
- iii. Offences committed on an aircraft registered under a State

(Jurisdiction- Article 15(1)(a,b))

15. Measures are in place which establish jurisdiction where offences are committed by a State national and the State will not extradite the offender because the offender is a State national.
(Article 15(3) refers)

16. Where it is discovered that two States or more are conducting investigations about conduct covered by the Convention they are obliged to coordinate their activities. (Article 15(5) refers)

17. Extradition. (For detail on how the extradition procedure in relation to functioning of the convention and domestic law, see Extradition- Article 16 (1-7)).

- i. States ensure that extradition procedures are simplified, particularly evidential requirements.
- ii. Where extradition is requested but refused on the grounds that the offender is a national, the refusing country is obliged to refer the matter to authorities for prosecution
- iii. In such a case, cooperation between States is assured.
- iv. In such a case the refusing country shall consider the imposition of the penalty imposed by the requesting state.
- v. Rights of the defendant are safeguarded
- vi. It is not possible to refuse extradition on the grounds that a financial crime has been committed.

(Article 16 (8-17) refers)

18. Measures are in place assuring the greatest possible mutual legal assistance in investigations, prosecutions, and judicial proceedings of transnational organized crime

In particular states are obliged to comply with requests for:

- i. Taking evidence/statements
- ii. Effecting service of legal documents
- iii. Searches, seizures and freezing
- iv. Examinations of sites and objects
- v. Providing information and other forms of evidence and expert evaluations
- vi. Providing original documents and certified copies
- vii. Identifying and tracing proceeds of crime, and property
- viii. Facilitating the voluntary appearance of persons in the requesting state

ix. Any other type of assistance necessary.

It is recognized that requests for mutual assistance cannot be denied on the basis of bank security.

(Mutual Legal Assistance- Article 18 (2-4) refers)

For procedures where an offender is needed for an investigation in another State but is serving a prison term, see article 18(10) and for the detail on how such a transfer is to be made see article 18(11).

A central authority is in place to deal with requests for mutual legal assistance issues
(Article 18(13) refers)

For details on the information needed in a request for mutual legal assistance see Article 18(15).

For details on when mutual legal assistance may be refused see Article 18(21).

19. Measures are in place allowing for the use of controlled delivery and special investigative techniques in order to combat organized crime. (Special Investigation Techniques- Article 20(1) refers)

20. The following are established as criminal offences:

- i. The use of physical force
- ii. Threats
- iii. Intimidation
- iv. Offering an undue advantage
- v. in order to induce false testimony, to interfere with the giving of a testimony, the production of evidence in proceedings related to offences covered by the convention.
- vi. Or to interfere with the official duties of justice or law enforcement personnel in relation to offences covered by the Convention.

(Criminalization of Obstruction of Justice- Article 23 (a,b))

21. Measures are in place to ensure the safety of witnesses who give evidence in proceedings.

- a) Members of their families are also protected.
- b) Those in a close relationship with the witness are also protected

Such measures may include:

- i. Relocation of witnesses
- ii. Disclosure limitations on identities and whereabouts
- iii. Testimony using technology

(Protection of Witnesses- Article 24(1-4))

22. a) Measures are in place to provide assistance and protection to victims of offences covered by the Convention.

b) Measures are in place which establish a victim's right to compensation and restitution

c) Measures are in place to ensure that victim's views and concerns are presented in proceedings of offences covered by the Convention.

(Assistance and Protection of Victims - Article 25(1-3))

23. Measures to encourage those who have participated in crimes covered by the Convention, to provide authorities with information, are in place.

(Measures to enhance cooperation with law enforcement authorities- Article 26(1))

24. States are obliged to put in place measures which;

- i. Enhance cooperation between agencies in order to facilitate the rapid exchange of information.

- ii. To cooperate with other States in all aspects of investigations into crimes covered by the Convention.
 - iii. Ensure all items needed for an thorough investigation can be exchanged effectively.
 - iv. To exchange information about investigations into means and methods of investigation of organized crime groups.
 - v. Combat cyber crime
- (Law Enforcement Cooperation- Article 27)

25. a) Law enforcement personnel training is being developed

and includes the following:

- i. Methods used in prevention, detection and control of offences covered by the Convention.
- ii. Techniques used by suspects
- iii. Monitoring the movement of contraband
- iv. Detection and monitoring of proceeds of crime etc
- v. Collection of evidence
- vi. Control techniques in free trade zones and free ports
- vii. Electronic surveillance
- viii. Controlled delivery
- ix. Undercover operations
- x. Protection of victims and witnesses
- xi. Extradition and mutual legal assistance (Article 29(3))
- xii. Bilateral etc agreements (Article 29(4))

(Training and Technical Assistance- Article 29(1))

b) Assistance to other States is given and acknowledged.
(Article 29(2))

26. Measures are conducive to the optimal implementation of the Convention

- i. Concrete efforts are being made to ensure international cooperation at all levels. (Article 30)

State is using all means possible to reduce the opportunities for committing organized crime with a focus on:

- i. Strengthening cooperation between law enforcement agencies at all levels
- ii. Developing standards and procedures to safeguard the integrity of public and private bodies.
- iii. Developing codes of conduct for professionals such as accountants etc
- iv. Establishment of public records
- v. Where a person is convicted for an offence under the Convention, that person may be disqualified from being a director.

(Prevention -Article 31)

Measures To Be Considered by States

1. Establishment of a financial intelligence unit to detect and combat money laundering
(Article 7(1)(b))

2. Establishment of measures to detect and monitor movement of cash and other negotiable instruments

- i. May include the requirement that substantial cross border transactions need to be reported. (Article 7(2) refers)

- ii The criminalization of the corruption offences as outlined in article 8(1) where a foreign public official or international civil servant is involved. (Article 8(2))
3. The requirement for a defendant to demonstrate that alleged proceeds of crime are in fact legitimate. (Article 12(7) refers)
4. Implementation of bilateral or multilateral treaties to enhance to effectiveness of measures relating to confiscation of property which is considered to be the proceeds of crime.
(Article 13(9))
5. a) Arrangements are in place for the equivalent value of confiscated proceeds of crime and property to be given by the confiscating State to a special UN fund and to inter-governmental bodies who specialize in the fight against organized crime.
b) Arrangements are in place for States to share the funds from the sale of proceeds of crime.
(Article 14(3)(a,b) refers)
6. When any of the offences outlined above are committed, measures are in place to ensure that a State has established jurisdiction over:
- i. Offences committed against a State national
 - ii. Offences committed by a State national or a stateless person who resides in the territory
 - iii. Offences committed outside of the territory but with the aim of committing further offences within the territory.
- (Article 15 (2) refers)
- A state establishes jurisdiction where the alleged offender is present in its territory but the State does not extradite him. (Article 15 (4) refers)
7. Bilateral or multilateral agreements on the transfer of sentenced offenders to complete sentences.
(Article 17 refers)
8. Authorities are permitted to transfer information to other States so that the information can be used more effectively in investigations. (Article 18 (4))
9. Provision for the transfer of proceedings from one State to another where considered to be in the best interests of justice. (Transfer of Criminal Proceedings Article 21 refers)
10. Provision for the consideration of other criminal offences committed by the offender to be used in prosecutions for crimes under the convention is made.
11. Where an individual helps in an investigation, state may reduce his sentence or be granted immunity from prosecution, for participation in the offence
(Measures to Enhance Cooperation with law enforcement authorities Article 26(2) and (3) refer)
12. Implementation of bilateral treaties between law enforcement agencies to facilitate and ensure cooperation. (Law Enforcement Cooperation Article 27(2) refers)
13. Promotion of analysis of how organized crime operates, professional groups and technologies are involved.
- i. Analytical expertise is shared
 - ii. State authorities to monitor effectiveness of investigations carried out and implement improvements.
- (Article 28 refers)

Checklist II: The UN Trafficking Protocol

Mandatory Requirements for Ratification

Trafficking Protocol - Part One

1. Domestic criminal legislation to comply with the definition of trafficking in persons (Article 3 (a))

The definition must include the following elements

a) Acquisition or movement of persons

- i. Recruitment
- ii. Transportation
- iii. Transfer
- iv. Harboring
- v. Receipt of persons

b) Means employed to achieve acquisition or movement of persons

- i. Use of force
- ii. Threat of the use of force
- iii. Other forms of coercion
- iv. Abduction
- v. Fraud
- vi. Deception
- vii. Abuse of power or of a position of vulnerability
- viii. Giving or receiving payments or benefits to achieve the consent of a person having control over another

c) Exploitation (non-exhaustive list)

- i. Prostitution
- ii. Other forms of sexual exploitation
- iii. Forced labour or services
- iv. Slavery
- v. Practices similar to slavery
- vi. Servitude
- vii. Removal of organs

2. Issue of consent (Article 3 (b))

It is not possible to consent to exploitation (1 (c)) where any of the means referred to in 1 (b) have been employed.

3. Children (Article 3 (c) and (d))

- i. The acquisition or movement of children for the purpose of exploitation (1(a) and (c)) shall constitute trafficking in persons.
- ii. The means employed to achieve the acquisition or movement of children do not need to be established.
- iii. Children are defined as a person under eighteen years of age

4. Criminal Offences
- i. In domestic legislation, “trafficking in persons” as defined by the Protocol, when committed intentionally, shall constitute a criminal offence. (Article 5(1))
 - ii. A criminal offence shall be established in domestic legislation for attempting to commit an offence referred to Article 5(1). (Article 5(2)(a))
 - iii. A criminal offence shall be established in domestic legislation for participating as an accomplice in an offence referred to in Article 5(1). (Article 5(2)(b))
 - iv. A criminal offence shall be established in domestic legislation for organising or directing other persons to commit an offence referred to in Article 5(1). (Article 5(2)(c))

5. Application of the Protocol (Article 4)

The Protocol applies to criminal offences referred to in Article 5, where those offences are:

- i. Transnational in nature, and
- ii. Involve an organised criminal group

Cross-reference: See Articles 2(a) and 3(2) of the UN Convention against Transnational Organised Crime

Trafficking Protocol - Part Two

- 1. To the extent possible victims privacy and identity are protected in domestic law
 - Legal Proceedings relating to trafficking are confidential
(Article 6 (1))
- 2. Victims of trafficking are legally entitled to be provided with:
 - Information on court and administrative proceedings
 - Assistance to enable views and concerns to be presented and considered in criminal proceedings against offenders.
(Article 6 (2) refers)
- 3. Victims of trafficking are legally entitled to obtain compensation for harm suffered
(Article 6(6) refers)
- 4. State is legally obliged to accept the return of victims of trafficking who are state nationals/have permanent residency **without undue/unreasonable delay**(Article 8(1) refers)
- 5. Receiving states are legally obliged to only return victims of trafficking where due regard for safety has been taken.
 - i. It is recognized that returns should be made voluntarily
(Article 8(2) refers)
- 6. States are obliged to state, when requested, whether a victim of trafficking is a national/has a right of permanent residency, **without undue delay**. (Article 8(3) refers)
- 7. The victim’s state is obliged to provide travel documents for the return of the victim on confirmation that the victim is a national. (Article 8(4) refers)

Trafficking Protocol - Part Three

1. Policies to prevent and combat trafficking and to protect victims from re-victimisation have been established. (Article 9(1)(a,b) refers)

2. States are taking measures to alleviate factors that make persons vulnerable to trafficking
i. Including bilateral and multilateral cooperation
(Article 9(4) refers)

3. States are taking measures to reduce the demand which leads to trafficking
i. Including bilateral and multilateral cooperation
(Article 9(5) refers)

4. Authorities within state parties are obliged to cooperate with each other through information exchange. (Article 10(1)(a-c) refers)

5. Training for all law enforcement officials (including immigration) is being provided or strengthened.

Training should focus on:

- i. Preventing trafficking
 - ii. Prosecution of traffickers
 - iii. Protecting victim rights
 - iv. Human rights
 - v. Child and gender issues
 - vi. Encouraging cooperation with NGOs.
- (Article 10(2) refers)

6. Where a state requests that information provided remain confidential then the receiving State is obliged to ensure the confidentiality of such information
(Article 10(3) refers)

7. Border controls are to be strengthened in order to promote the prevention and detection of trafficking. (Article 11(1) refers)

8. Legislation is in place to prevent commercial carriers being used in trafficking offences (Article 11(2) refers)

i. Commercial carriers are obligated to ensure passengers have the correct travel documents and are subject to sanction when not fulfilling their obligation (Article 11(3,4) refers)

9. States are obliged to ensure, with consideration given to available means, that travel documents are of a high quality so as to prevent forgery etc.

i. Measures to prevent unlawful creation of such documents are in place.
(Article 12 (b) refers)

ii. A state is obligated to verify the legitimacy of any travel documents within a reasonable time. (Article 13 refers)

Measures To Be Considered by States

1. Measures to provide for safety and recovery of victims.
(Note: Should be achieved through cooperation with non-governmental organizations)

Such measures should include the following provision of:

- i. Appropriate housing
- ii. Counseling and information (particularly about legal rights and in a language that victims can understand)
- iii. Medical, psychological and material assistance
- iv. Employment, education and training opportunities

(Article 6(3)(a-d) refers)

2. Measures which permit victims to remain in a country, temporarily or permanently.
(Article 7(1-2) refers)

3. The following should be undertaken as measures to prevent and combat trafficking:

- i. Research
- ii. Information
- iii. Mass media campaigns
- iv. Social and economic initiatives

(Article 9(2) refers)

4. Coordination with non-governmental organizations
(Article 9(3) refers)

5. States should consider denying entry visas and revoking those already issued to those who are implicated in trafficking offences.
(Article 11(5) refers)

Other Useful Legislative References

General Introduction to the Convention and Protocol:

www.undcp.org/odccp/crime_cicp_convention.html

Text- Convention and Protocol:

http://www.undcp.org/pdf/crime/a_res_55/res5525e.pdf