

January 1990

Internationalizing the War on Drugs: The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

David P. Stewart

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

David P. Stewart, Internationalizing the War on Drugs: The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 18 Denv. J. Int'l L. & Pol'y 387 (1990).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

Internationalizing the War on Drugs: The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Keywords

Drugs, War, Drug Trafficking, Treaties, European Union, Regulation, Water Law

Internationalizing The War on Drugs: The UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

DAVID P. STEWART*

The recent adoption of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances¹ marks a significant step by the world community towards bringing effective law enforcement measures to bear against international narcotics traffickers. Illicit trafficking in natural and man-made substances has grown exponentially over the past two decades to the point where no nation or culture is immune to the ravages of rampant drug abuse. Existing domestic laws in many countries, and the international enforcement regime established under prior multilateral treaty arrangements, have proven unequal to the task of controlling, much less suppressing, this vicious trade. Awakened to the need for concerted and more effective action to harness the traffickers, the international community began work in 1984, under UN auspices, on a new multilateral treaty that would establish a comprehensive set of laws and guidelines to be adopted and applied by all party states in combatting illicit trafficking.

Adopted by consensus at an international conference of 106 states in Vienna in December 1988, the Illicit Trafficking Convention is intended to establish a new international legal regime for combatting international drug trafficking. Explicitly recognizing in the preamble that illicit trafficking is "an international criminal activity,"² it requires that each signatory state establish as criminal offenses under its domestic law a comprehen-

* Assistant Legal Adviser, U.S. Department of State. Mr. Stewart was a member of the U.S. Delegation to the International Conference at which the Convention was adopted. The views expressed, however, are solely those of the author and do not necessarily represent the position of the Department of State or the U.S. Government.

1. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc. E/CONF.82/15 and rev. 1, *adopted by consensus* Dec. 19, 1988; *reprinted in* 28 I.L.M. 493 (1989) [hereinafter *Convention*]. For background, see A REPORT ON THE STATUS OF THE DRAFT, THE U.S. NEGOTIATING POSITION, AND ISSUES FOR THE SENATE, S. REP. No. 64, 100th Cong., 1st Sess. (1987). See also SENATE EXEC. RPT. 101-15, REPORT OF THE FOREIGN RELATIONS COMMITTEE (1989) (reporting favorably with the understandings). The Senate gave its advice and consent to ratification on Nov. 22, 1989; the U.S. instrument of ratification was deposited with the U.N. on Feb. 20, 1990.

2. Convention, *supra* note 1, preamble, ¶ 4. The term "illicit traffic" is defined in art. 1(m) to mean "the offences set forth in article 3, paragraphs 1 and 2," that is, the specific offenses required by the Convention to be made illegal under the domestic law of party states.

sive list of activities involved in or related to international drug trafficking. It obligates party states to cooperate in taking broad measures to suppress illicit trafficking across national boundaries and, within their own jurisdictions, to enact and enforce specific domestic laws aimed at suppressing the drug trade. These laws include those related to money laundering, confiscation of assets, extradition, mutual legal assistance and trade in chemicals, materials and equipment used in the manufacture of controlled substances. The Convention is one of the most detailed and far-reaching instruments ever adopted in the field of international criminal law, and if widely adopted and effectively implemented, will be a major force in harmonizing national laws and enforcement actions around the world.

This article briefly reviews the most important provisions of the Illicit Trafficking Convention, from the perspective of U.S. as well as international law. As the largest importer and consumer of narcotic drugs and psychotropic substances in the world, the United States has had substantial experience in developing effective law enforcement tools against international traffickers.³ The U.S. participated actively in the negotiation of the Convention, and many of its provisions reflect legal approaches and devices already found in U.S. law. At the same time, for many other countries lacking the modern legal tools for effective counter-narcotics enforcement, the Convention broke new ground; achieving consensus among states with widely varied domestic systems of criminal law was a substantial achievement requiring innovation and a certain degree of compromise.

BACKGROUND

International efforts to control the trafficking of drugs began in 1909, when thirteen states met in Shanghai in an attempt to regulate what was then the major narcotics problem, opium. Their efforts led to the signing of the International Opium Convention at The Hague in 1912.⁴ Subsequently, under the auspices first of the League of Nations and then of the United Nations, a series of multilateral conventions was developed in order to supervise and regulate the production, control and shipment of narcotic drugs for licit (i.e., medical and scientific) purposes.⁵ These con-

3. Ninety-five percent of the illicit narcotics consumed in the U.S. originates overseas. Foreign sources account for all of the cocaine and heroin and most of the U.S.-consumed marijuana. It is estimated that U.S. consumers use 65% of the world's supply of illegal narcotics.

4. Convention of Jan. 23, 1912 relating to the Suppression of the Abuse of Opium and Other Drugs, 38 Stat. 1912, T.S. No. 612, 1 Bevans 855, 8 L.N.T.S. 187.

5. See Second International Opium Convention, *done at Geneva* Feb. 19, 1925, 81 L.N.T.S. 317; Convention of July 13, 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, 48 Stat. 1543, T.S. No. 863, 3 Bevans 1, 139 L.N.T.S. 301; Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, *done at Geneva* June 26, 1936, 198 L.N.T.S. 299; Protocol of Dec. 11, 1946, *done at New York*, 61 Stat. 2230, T.I.A.S. No. 1671, 4 Bevans 267, 12 U.N.T.S. 179; Amendments to 1931 Convention, Mar.

ventions created a complex and to some degree overlapping system of regulation as well as international oversight bodies to monitor and enforce their provisions. As a result, efforts were undertaken in the United Nations to simplify and unify international narcotics regulation.

The 1961 Single Convention on Narcotic Drugs⁶ consolidated the earlier international instruments into a simpler, more streamlined regime. Not only were the most important substantive provisions of the earlier treaties integrated into a single treaty, but the various oversight mechanisms were merged into a unified body, the International Narcotics Control Board. The Single Convention extended international control to include the cultivation of plants grown as the raw material of natural narcotic drugs, putting cannabis plant and coca bush under the same international control system as applied to opium. Subject to certain grace periods, it prohibited the practices of opium smoking, opium eating, coca leaf chewing, hashish smoking and the use of the cannabis plant for any non-medical purposes.

In 1972, the Single Convention was amended by a protocol,⁷ which strengthened its provisions related to preventing the illicit production of, traffic in, and use of narcotics. It also highlighted the need to provide treatment and rehabilitation services to drug abusers by stressing that treatment, education, after-care, rehabilitation and social reintegration should be considered as alternatives to, or in addition to, imprisonment for abusers who commit drug offenses.

International control was extended beyond narcotic drugs to man-made hallucinogens, stimulants and sedatives by the 1971 Psychotropic Substances Convention.⁸ Based largely on the control system of the 1961 Single Convention, the Psychotropic Substances Convention differentiates between those substances which are completely prohibited except for limited scientific and medical purposes, and those whose manufacture, distribution, trade and use is merely curtailed.⁹ The World Health Organization is designated to recommend to the Commission on Narcotic

30, 1948, 62 Stat. 1796, T.I.A.S. No. 1895; Protocol Bringing Under International Control Drugs Outside the Scope of the Convention of July 13, 1931, *done at Paris*, Nov. 19, 1948, 44 U.N.T.S. 277; Protocol Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, *done at New York*, June 23, 1953, 456 U.N.T.S. 3.

6. Single Convention on Narcotic Drugs, *done at New York*, Mar. 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 204 [hereinafter Single Convention].

7. Protocol Amending the Single Convention, *done at Geneva*, Mar. 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3.

8. Psychotropic Substances Convention, *done at Vienna*, Feb. 21, 1971, 32 U.S.T. 543, T.I.A.S. No. 9725, 1019 U.N.T.S. 175. For U.S. implementation, see Psychotropic Substances Act of 1978, Pub. L. No. 95-633, § 101, 92 Stat. 3768 (1978) (codified at scattered sections of Titles 21 and 42); Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. 810-966 (Supp. 1989)).

9. See Schedules I-IV of Psychotropic Substances Convention, *supra* note 8.

Drugs, based on scientific and epidemiological data, whether new substances should be controlled and to what degree.

Together, these two conventions regulate the legal production and distribution of controlled substances for medical and scientific purposes and make illegal all other production. They also provide the international basis for domestic legislation such as the Comprehensive Drug Abuse Prevention Act of 1970.¹⁰ Although they contain limited provisions relating to the prosecution and punishment of drug users and traffickers, the two Conventions are primarily regulatory in nature and do not provide a basis for comprehensive national action aimed at curtailing and punishing distribution and use. In the following decade, as the power of the drug cartels became more pervasive and their methods increasingly sophisticated, the need for new and more stringent international measures became clear. Within the United Nations, the Commission on Narcotic Drugs¹¹ became the focus of efforts to formulate and adopt a more comprehensive, long-range approach to the drug problem at the international level.

Such a "master plan" emerged in 1981 with the adoption of the International Drug Abuse Control Strategy. This plan contained proposals for increased international cooperation to combat both drug abuse and trafficking through (1) improvement of drug control systems, (2) balancing legitimate drug supply and demand, (3) eradicating illicit drug supply, (4) reducing illicit traffic, (5) reducing illicit demand, and (6) provisions for treatment, rehabilitation and social reintegration of drug abusers.¹² In the context of this comprehensive approach, it was recognized that, while the Single and Psychotropic Substances Conventions continued to provide an adequate basis for regulating the licit production and distribution of controlled substances, they lacked the effective mechanisms for containing and suppressing the massive volume of illicit trafficking across national boundaries. There was general agreement on the need to supplement and reinforce those Conventions through the adoption of up-to-date law enforcement techniques through national legislation.

Accordingly, in 1984 the United Nations General Assembly unanimously adopted a resolution¹³ asking the UN Economic and Social Council to request the UN Commission on Narcotic Drugs to initiate preparation of a draft convention to complement the 1961 Single and 1971 Psychotropic Substances Conventions. Work on the draft began at the Commission's thirty-first session in February, 1985, with the adoption of

10. Comprehensive Drug Abuse Prevention and Control Act of 1970, *supra* note 8.

11. The Commission on Narcotic Drugs, one of the six functional commissions of the Economic and Social Council, serves as the central policy-making body within the UN system on questions of drug abuse control. Consisting of expert representatives of the 40 Member States, the Commission has various oversight functions including those under the 1961 and 1971 Conventions and decides, under the recommendation of the World Health Organization, which substances should be placed under international control.

12. 1981 International Drug Abuse Control Strategy.

13. U.N. GAOR No. 39/41 (1984).

a resolution containing fourteen fundamental points for inclusion in the new convention. A first draft was circulated for governmental comment in June 1986, and a revision was considered in detail by intergovernmental experts, meeting within the Commission's framework, during the summer and fall of 1987.¹⁴ As further progress was made during 1988, the Economic and Social Council decided to convene a plenipotentiary conference to complete the negotiations and adopt a final version of the Convention.

SUMMARY OF PROVISIONS

As adopted, the Convention calls upon party states to take specific law enforcement measures to improve their ability to identify, arrest, prosecute and convict those who traffic in drugs across national boundaries. Such measures include the establishment of drug-related criminal offenses and sanctions under domestic law, making such offenses the basis for international extradition between party states, and providing for mutual legal assistance in the investigation and prosecution of covered offenses, as well as the seizure and confiscation of proceeds from and instrumentalities used in illicit trafficking activities.

In addition, the Convention imposes new and more stringent controls on the international trade of previously unmonitored chemicals, equipment and other materials used in the clandestine manufacture of drugs, and obliges party states to cooperate among themselves in suppressing illicit traffic by sea or through the mails. Party states must take appropriate measures to ensure that private means of transport operated by commercial carriers are not used for illicit trafficking and must apply measures to suppress illicit trafficking in free trade zones and free ports that are no less stringent than those applied in other parts of their territories. Party states are also required to take effective action to prevent illicit cultivation of plants containing narcotic or psychotropic substances, to cooperate in eradicating illicitly cultivated crops, and to adopt measures aimed at eliminating or reducing illicit demand.

Finally, the UN Commission on Narcotic Drugs and the UN International Narcotics Control Board are empowered with administrative and oversight responsibilities concerning the operation of the Convention and

14. A further call for the urgent completion of the draft Convention was among the central conclusions of the International Conference on Drug Abuse and Illicit Trafficking which convened in Vienna in June, 1987. Convened under a mandate from the General Assembly (Res. 40/122 of December 13, 1985), the Conference was charged "to generate universal action to combat the drug problem in all its forms at the national, regional and international levels." Many of the specific "targets" adopted by the Conference as objectives for the international community are in fact reflected in the Illicit Trafficking Convention. See Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, U.N. Doc. ST/NAR/14, (1988).

the responsibilities of the party states.¹⁵

OFFENSES AND SANCTIONS

Article 3 of the Illicit Trafficking Convention requires that each party state establish as criminal offenses under its domestic law a comprehensive list of activities involved in or related to international drug trafficking. These offenses largely track existing provisions of U.S. law, but are currently not covered in the criminal law of many other nations; in the latter, their adoption will extend and substantially strengthen criminal regulation of international drug trafficking.

Specifically, the mandatory offenses covered by Article 3(1) of the Convention include:

- the production, manufacture, distribution or sale of any narcotic drug or psychotropic substance contrary to the provisions of the 1961 Single Convention or the 1971 Psychotropic Substances Convention;
- the cultivation of opium poppy, coca bush or cannabis plant contrary to those earlier Conventions;
- the possession or purchase of any narcotic drug or psychotropic substance for the purpose of illicit trafficking;
- the manufacture, transport or distribution of materials, equipment and substances for the purpose of illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- the organization, management or financing of any of the foregoing offenses.¹⁶

The last provision, which criminalizes the financing, organizing or managing of any of the acts listed above, should be a significant tool in reaching the highest levels of the trafficking organizations, or cartels.¹⁷ In addition, the Convention specifically criminalizes drug-related money laundering, including the conversion or transfer of property derived from the offense, as well as the concealment or disguise of its true nature and source.¹⁸

Also under Article 3(1), party states are required, subject to their constitutional principles and basic concepts of their legal systems, to es-

15. The Commission on Narcotic Drugs is one of the functional commissions set up pursuant to art. 68 of the UN Charter. The International Narcotics Control Board was established pursuant to U.N. ESCOR 1106 (XL) of Mar. 2, 1968, pursuant to Single Convention, *supra* note 6, art. 45(2).

16. Convention, *supra* note 1, art. 3(1)(a). All of the offenses listed in this paragraph are criminal offenses under Title 21 of the United States Code.

17. This paragraph would include such offenses under U.S. law as money laundering, 18 U.S.C. §§ 1956-1957 (Supp. 1989); racketeer influenced corrupt organizations, 18 U.S.C. §§ 1961-1968 (Supp. 1989); and continuing criminal enterprises, 21 U.S.C. § 848 (Supp. 1989).

18. See Convention, *supra* note 1, art. 3(1)(b). Much of the language was derived from the United States statutes on money laundering, in particular 18 U.S.C. § 1956-1957 (Supp. 1989).

establish as criminal offenses:

- the acquisition, possession or use of property knowingly derived from the above offenses;
- possession of equipment, materials and substances knowingly used or to be used in the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- publicly inciting or inducing others to commit the above-listed offenses;
- related offenses of conspiracy, participation, aiding and abetting, etc.¹⁹

The obligation of a party state to establish this group of offenses is made "subject to its constitutional principles and the basic concepts of its legal system," because of the difficulties encountered by the negotiators in formulating precise definitions acceptable to differing legal systems. For example, in systems where prosecutorial discretion is limited or non-existent, there was concern that innocent conduct not be covered inadvertently; concepts of "conspiracy" and "criminal association" differ significantly from country to country; and for some, including the United States, a literal reading of the provisions concerning incitement and inducement could have created constitutional difficulties.

These "core" or "covered" offenses under Article 3(1) constitute the cornerstone of the Convention, and are specifically focused on those drug trafficking and money laundering activities which have the greatest international impact. Many of the other provisions in the Convention, for example those relating to confiscation, extradition and mutual legal assistance, are keyed to these particular offenses.

The Convention treats "personal use" offenses separately, requiring party states to adopt such measures, subject to constitutional principles and basic concepts of their legal systems, as may be necessary to criminalize the intentional possession, purchase and cultivation of illicit narcotic drugs and psychotropic substances for personal consumption contrary to the 1961 Single Convention, as amended, or the 1971 Psychotropic Substances Convention.²⁰ This distinction was intended to differentiate those offenses from the relatively more serious offenses defined in paragraph 1 of Article 3, which are directly related to international trafficking. This distinction thereby limits the obligations imposed upon party states with respect to extradition and mutual legal assistance and permits party states to fashion alternative remedies such as treatment and rehabilitation, rather than incarceration, in appropriate cases.

Each party state is obliged to make these covered acts punishable by sanctions which take into account the grave nature of the offenses, such

19. Convention, *supra* note 1, art. 3(1)(c).

20. *Id.* art. 3(2).

as imprisonment, fines and confiscation.²¹ The Convention requires competent authorities to take into account factual circumstances making the commission of the offenses particularly serious, such as the involvement of organized criminal groups, use of violence, victimization of minors, and the fact that the offender holds public office.²²

Importantly, the Convention provides that the covered offenses shall not be considered "fiscal offenses," "political offenses" or "regarded as politically motivated" for purposes of its confiscation, extradition and mutual legal assistance provisions.²³

JURISDICTION

For the most part, the offenses covered by the Convention are international offenses, involving acts which occur in, or have an effect on, more than one state. To give effect to these offenses, each party state is required under Article 4 of the Convention to establish jurisdiction when the offenses are committed in its territory or on board its vessels or aircraft.²⁴ A state may, but is not required to, establish jurisdiction over offenses: (a) committed anywhere by its nationals or habitual residents; (b) on board vessels outside its territorial sea which it is properly boarding and searching; and (c) with respect to conspiratorial actions committed outside its territory with a view to commission of a covered offense within its territory.²⁵ The Convention thus recognizes a number of conceptual bases for the exercise of prosecutorial jurisdiction but does not assign a priority in the case of overlapping or competing jurisdiction.

The Convention also requires the establishment of jurisdiction to prosecute when the party state refuses to extradite an alleged offender on the ground that the offense was committed in its territory or on board its aircraft or vessel, or that the offender is its national.²⁶ Concomitantly, when a party state does not extradite an alleged offender for those reasons, it is obliged to submit the case to its competent authorities for the purpose of prosecution, unless otherwise agreed with the party requesting extradition.²⁷ This is a somewhat more limited form of "general jurisdiction" than found in other international criminal law treaties,²⁸ in that ju-

21. *Id.* art. 3(4).

22. *Id.* art. 3(5).

23. *Id.* art. 3(10). This important provision will operate to remove potential barriers to extradition and prosecution of drug traffickers. The U.S. delegation had also sought to include a provision to the effect that member states could not decline to extradite their own nationals for offenses under the Convention. That proposal was not, however, endorsed by the conference.

24. *Id.* art. 4(1)(a).

25. *Id.* art. 4(1)(b). Exercise of jurisdiction on board foreign flag vessels is necessary to implement the provisions of art. 17 but requires an agreement or arrangement between the enforcing party and the flag state. *See id.* art. 4(1)(b)(ii).

26. *Id.* art. 4(2).

27. *Id.* art. 6(9).

28. *See, e.g.,* Convention for the Suppression of Unlawful Seizure of Aircraft ("Hi-

isdiction to prosecute is permitted but not required when extradition is refused for any reason other than those given above.²⁹

CONFISCATION

Article 5 of the Convention requires party states to enact far-reaching domestic laws providing for the "confiscation" (i.e., freezing, seizing and forfeiting) of all forms of property, proceeds or instrumentalities used in or derived from covered offenses. This property includes the proceeds of the offense, as well as the narcotic drugs and psychotropic substances, materials and equipment, and other instrumentalities.³⁰ Parties are required to take necessary steps (i.e., adopt legislation or administrative rules) to enable their authorities to identify, trace, freeze or seize property, proceeds, instrumentalities or any other objects as preliminary steps toward the eventual confiscation of that property.³¹

Importantly, the Convention requires party states to enable their courts or other competent authorities to order the production or seizure of bank, financial or commercial records necessary to trace, identify, seize and forfeit proceeds and instrumentalities of drug trafficking. In this connection, it specifies³² that parties shall not decline to act on the ground of bank secrecy; thus, states have an affirmative obligation not to shield from discovery materials which are needed in forfeiture proceedings. This provision, and a related undertaking in Article 7 not to invoke bank secrecy in the context of a request for mutual legal assistance, are among the most important in terms of the prosecution of trafficking offenses.

Article 5 also emphasizes the importance of international cooperation in forfeiture proceedings by requiring party states, upon request of another, to assist in taking measures to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other objects for the purposes of eventual confiscation either by the requesting party or its own authorities.³³ In this connection, the Convention establishes procedures by which one party may ask another to assist it by forfeiting proceeds or instrumentalities located in the requested party's territory. Two alternative mechanisms are contemplated, depending on the law of the requested member state:

jackings"), *done at* The Hague, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Sabotage"), *done at* Montreal, September 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7470; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("Maritime Terrorism"), *done at* Rome, March 10, 1988, (not yet published). See generally § 404, Restatement (Third), Foreign Relations Law of the United States (1987).

29. Convention, *supra* note 1, art. 4(2)(b).

30. *Id.* art. 5(1). U.S. law currently provides authority for the forfeiture of the categories of property within the scope of this paragraph. See, e.g., 21 U.S.C. §§ 853, 881; 18 U.S.C. § 981, 1956-1957 (Supp. 1989).

31. Convention, *supra* note 1, art. 5(2).

32. *Id.* art. 5(3).

33. *Id.* art. 5(4).

- initiation of proceedings in the requested state on the basis of evidence provided by the requesting state, or
- an action in the requested state to enforce the judgment of forfeiture rendered in the requesting state.³⁴

The alternatives recognize that, while a few countries are able to enforce foreign criminal judgments of forfeiture, most are not. However, these other countries may proceed *in rem* against an offender's assets on the basis of sufficient factual information provided by another party state.

United States law currently permits the forfeiture of property located in the U.S. "which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale or distribution of a controlled substance" if such offense would have been punishable by imprisonment for one year or more if it had occurred in the United States.³⁵ United States law also provides ample authority for U.S. courts to order assistance to foreign tribunals.³⁶

The disposition of confiscated property and proceeds must necessarily be a matter of domestic law and administrative procedures, at least in the first instance.³⁷ The Convention acknowledges this fact, but also contemplates the possibility that the parties may enter into agreements providing either to share between them (or with other states) the confiscated property or proceeds on a regular or case-by-case basis, or to contribute the value of confiscated proceeds and property to inter-governmental bodies specializing in the fight against illicit drug trafficking.³⁸ Such asset-sharing agreements may be among the most potent inducements to international cooperation and may result in significant enhancements of law enforcement capabilities in producing and transit states. U.S. law already provides authority for such agreements.³⁹

Where proceeds from illegal activity have become intermingled with property from legitimate sources, the Convention provides for confiscation up to the assessed value of the intermingled proceeds.⁴⁰ It also seeks to preserve the rights which innocent *bona fide* third parties may have in such situations.⁴¹

34. *Id.* arts. 5(4)(a)(i) and (ii), respectively.

35. *See* 18 U.S.C. § 981(a)(1)(B). This statute does not, however, grant authority for forfeiting instrumentalities used in (as opposed to the proceeds of) foreign drug trafficking crimes.

36. *See* 28 U.S.C. § 1782.

37. Convention, *supra* note 1, art. 5(5). *See also id.*, art. 5(9).

38. *Id.* art. 5(5)(b).

39. *See* 18 U.S.C. § 981(i) and 19 U.S.C. 1616a(c)(2).

40. Convention, *supra* note 1, art. 5(6).

41. *Id.* art. 5(8).

EXTRADITION

The Convention should make it easier for prosecuting states to obtain the extradition of narcotics traffickers and cartel chiefs from overseas. Article 6 operates to amend existing extradition treaties between party states to include the offenses covered by Article 3(1) as extraditable offenses, and provides that they shall be extraditable offenses between states that do not make extradition conditional on an extradition treaty.⁴² The scope of this provision is important: it automatically updates older extradition treaties to include the modern formulation of offenses contained in the Convention. In particular, it explicitly recognizes that narcotics-related money laundering, a new category of offense for many states, is an extraditable offense. At the same time, reflecting a focus on activities constituting international trafficking, it excludes offenses involving possession, cultivation and purchase for personal use.

Under U.S. law and practice, extradition from the United States may only occur pursuant to a bilateral extradition treaty between the U.S. and the requesting country. Extradition to the United States may, however, take place absent such a treaty relationship if permissible under the law of the other party. Thus the Convention will serve, like the 1961 Single Convention, to supplement older bilateral treaties which did not cover drug offenses.⁴³

While acknowledging that extradition is subject to conditions provided by the law of the requested party or applicable extradition treaties, the Convention calls upon party states to expedite extradition procedures and to simplify evidentiary requirements relating to those procedures in respect of covered offenses.⁴⁴ States must also undertake to conclude bilateral and multilateral agreements to enhance the effectiveness of extradition.⁴⁵

In considering extradition requests under the Convention, the requested state may refuse to comply where there are substantial grounds to believe that compliance would facilitate prosecution or punishment of a person on account of his race, religion, nationality or political opinions.⁴⁶ However, extradition requests may not be refused under the Con-

42. *Id.* arts. 6(1), (2), (3) and (4).

43. The concern expressed by Senator Helms during floor consideration in the U.S. Senate that the Convention could require the U.S. to extradite U.S. citizens to countries whose legal systems lack "even rudimentary due process protections or fair evidentiary proceedings" is misplaced. See 135 CONG. REC. S16617 (1989). However, that concern is reflected in an understanding included in the Senate resolution of advice and consent to ratification of the Convention, dated Nov. 22, 1989, to the effect that "[t]he United States shall not consider this convention as the legal basis for extradition of citizens to any country with which the United States has no bilateral extradition treaty in force."

44. Convention, *supra* note 1, arts. 6(5) and (7).

45. *Id.* art. 6(11).

46. *Id.* art. 6(6). In the United States, the relevant procedural law reserves the decision on such matters to the Executive Branch; nothing in the Convention alters that allocation of

vention on the grounds that they involve "fiscal," "political" or "politically motivated" offenses.⁴⁷

If a member state in which an offender is found does not extradite that person because the offense was committed by one of its nationals, in its territory, or on its vessel or aircraft, that state is obliged to submit the case to its competent authorities for the purpose of extradition, unless otherwise agreed with the requesting party.⁴⁸ This provision reflects the *aut dedere aut judicare* principle common to international criminal law conventions but limited to the specified grounds of refusal. The obligation would also apply, however, if the requested state had established permissive jurisdiction under Article 4(2)(b) covering those situations.⁴⁹ In both instances, the Convention contemplates that the requesting party may seek the agreement of the requested party not to exercise its right to submit the case for prosecution, and if so agreed, the requested state is relieved from its obligation.⁵⁰ The reason is straightforward; the negotiators were concerned about allowing the authorities requesting an offender's extradition to have some basis for asking the requested state, if it determined to deny the extradition request, not to proceed with the prosecution in order to preserve the option of later seeking extradition from a third state.

MUTUAL LEGAL ASSISTANCE

Modern law enforcement requires a means for the acquisition of evidence abroad in a form admissible in the courts of the requesting state. Treaty provision for such assistance has long been done on a regional basis in Europe. In recent years, the United States has embarked on a program to negotiate bilateral mutual legal assistance treaties ("MLATs"), six of which have been recently ratified.⁵¹ Until this Convention, however, the U.S. had not been a party to any such multilateral arrangement.⁵²

responsibility.

47. *Id.* art. 3(10).

48. *Id.* art. 6(9)(a). As noted above, art. 4(2) requires party states to establish jurisdiction to submit cases for prosecution when extradition is refused on two specified grounds.

49. *Id.* art. 6(9)(b).

50. *Id.* art. 6(9)(a). Article 6(9)(a) limits the obligation by the phrase "unless otherwise agreed to by the Parties"; art. 6(9)(b) does so by providing "unless otherwise requested by the requesting party for the purposes of preserving its legitimate jurisdiction."

51. Recently ratified MLATs include those with the Bahamas, Belgium, Canada, Jamaica, Mexico, Thailand, and the United Kingdom in respect of the Cayman Islands. Other MLATs were earlier concluded with Switzerland (*done at Berne*, May 25, 1971, 27 U.S.T. § 2019, T.I.A.S. No. 8302); Turkey (*done at Ankara*, June 7, 1979, 32 U.S.T. § 311, T.I.A.S. No. 9891); the Netherlands (*done at The Hague*, June 12, 1981, T.I.A.S. No. 10734); Columbia (*done at Washington*, Aug. 20, 1980) (not yet ratified by Columbia); Italy (*done at Rome*, Nov. 9, 1982); Morocco (*done at Rabat*, Oct. 10, 1983) (not yet ratified). Absent such a treaty basis, the provision of mutual legal assistance is a matter of comity and is normally carried out through the device of letters rogatory. Authority for U.S. courts to execute foreign requests for mutual legal assistance is found in 28 U.S.C. § 1782 (1948).

52. Although the Congress has encouraged the negotiation and conclusion of bilateral

Article 7 of the Convention provides a general treaty obligation to provide "the widest measure of mutual legal assistance" to other party states in investigations, prosecutions or other judicial proceedings in relation to Article 3(1) offenses.⁵³ Such assistance includes the taking of evidence, service of documents, executing searches and seizures, examining objects and sites, providing bank, financial and business records, and identifying and tracing proceeds and instrumentalities of crime.⁵⁴ Other forms of mutual legal assistance may be provided as allowed by the domestic law of the requested party.⁵⁵ Provision of mutual legal assistance in forfeiture proceedings is addressed separately, in Article 5.⁵⁶

One of the most significant provisions of the Convention from the law enforcement perspective is found in Article 7(5), which provides that "[a] Party shall not decline to render mutual legal assistance under this article on the ground of bank secrecy." Thus, bank secrecy laws cannot be used to justify refusal of a request for mutual legal assistance under this Convention or under any of the bilateral treaties affected by its provisions.

As it does with extradition treaties, the Convention operates to amend bilateral mutual legal assistance treaties between party states to include covered offenses under Article 3(1).⁵⁷ Thus, money laundering within the definition of the Convention will fall within the reach of existing MLATs. However, the obligations of party states under any existing bilateral or multilateral mutual legal assistance treaty are not diminished by this Convention.⁵⁸ As between states which are not party to any existing bilateral or multilateral treaties on mutual legal assistance, the Convention provides a basis for according such assistance; indeed, it specifies the procedures to be followed in making and executing such re-

MLATs, *see, e.g.*, § 4605, Omnibus Anti-Drug Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988), codified at § 3181 (1948), Senatorial criticism of MLAT relations with non-democratic countries, and of the prospect that such treaties may require the U.S. to share law enforcement information with corrupt officials in foreign governments was the source of one of the Senate's imposed reservations to the Trafficking Convention:

Pursuant to the rights of the United States under Article 7 of this treaty to deny requests which prejudice its essential interests, the United States shall deny a request for assistance when the designated authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this treaty is engaged in or facilitates the production or distribution of illegal drugs.

See 135 CONG. REC. S16617 (1989) (statement of Senator Helms).

53. Convention, *supra* note 1, art. 7(1). The broad reference to "investigations, prosecutions and other judicial proceedings" is intended to include all criminal proceedings (other than those relating to forfeiture).

54. *Id.* art. 7(2).

55. *Id.* art. 7(3).

56. *See id.* art. 5(4).

57. *See id.* arts. 7(1), 7(6) and 7(7).

58. *Id.* art. 7(6).

quests.⁵⁹ Requests may be refused only for a limited number of reasons.⁶⁰

The Convention also provides for the possibility of transfer of criminal proceedings for covered offenses, where such transfer would be in the interests of the proper administration of justice.⁶¹

LAW ENFORCEMENT MEASURES

In addition to mutual legal assistance pursuant to Article 7, party states are required by Article 9 to provide other, less formal types of law enforcement assistance, cooperation and training. This assistance includes, (a) establishing direct channels of communication between law enforcement authorities; (b) assisting in particular inquiries concerning the identity and location of suspects, the import or export of drugs, or the movement of proceeds of drug transactions from one jurisdiction to another; and (c) where appropriate and not contrary to domestic law, establishing joint law enforcement teams.⁶² Such forms of "cop-to-cop" assistance and cooperation, already provided to some extent through INTERPOL, can be among the most effective in preparing cases for prosecution. Recognizing that fact, the Convention also provides for the establishment of specific training programs in modern law enforcement techniques (covering such matters as detection and suppression of offenses, trafficking routes and techniques, the import and export of drugs, concealment and movement of proceeds, and property derived from and instrumentalities used in covered offenses, etc.) as well as international cooperation in such training in order to "share the expertise."⁶³

Specific law enforcement measures tailored to illicit trafficking across national boundaries are endorsed by the Convention. For example, under Article 11, states are required to take the necessary measures to allow for the use of "controlled deliveries" at the international level to the extent permitted by the basic principles of their respective domestic legal systems and on the basis of mutual agreements or arrangements.⁶⁴ The technique of "controlled delivery" contemplates the known passage of an illicit consignment through a territory in which the authorities elect not to effect an arrest or seizure immediately, in order to trace the further movement of the consignment and to identify higher levels of the trafficking organization. Widely used by U.S. law enforcement authorities, the technique has not been universally adopted, and in some states it may actually contravene the obligation of authorities not to condone or tolerate known illegal behavior. Its inclusion in the Convention not only reflects the endorsement of the technique by the international community, but also provides a specific basis in international law for its adoption and

59. *Id.* art. 7(7). *See also id.* arts. 7(8)-(19).

60. *Id.* art. 7(15).

61. *See id.* art. 8.

62. *Id.* art. 9(1).

63. *Id.* art. 9(2).

64. *Id.* art. 11(1).

use at the domestic level. Reflecting the fact that the technique can be expensive in terms of manpower and resources, the Convention provides that the decision to employ it shall be made on a case-by-case basis, when necessary, taking into consideration financial arrangements and understandings.⁶⁵

Drug traffickers have increasingly turned to legitimate transnational commerce for surreptitious shipment of illegal drugs. Article 15 of the Convention requires party states to ensure that means of transport operated by commercial carriers are not used in the commission of offenses covered under Article 3(1) and to require that the commercial carriers themselves take reasonable precautions to prevent such use. These precautions should include such measures as training of personnel, advance submission of cargo manifests and the use of tamper-resistant, individually verifiable seals on containers.⁶⁶ Moreover, states are required by Article 19 to adopt measures to suppress the use of the mails for illicit trafficking purposes, including the introduction of investigative and control techniques to detect illicit consignments.⁶⁷ Recognizing the special risks that free trade zones and free ports pose, Article 18 of the Convention requires party states to take suppressive measures in those areas no less stringent than those applied in other parts of their territories, including monitoring the movement of goods and services, establishing systems to detect illicit consignments, and maintaining surveillance systems in dock and harbor areas.⁶⁸

Illicit traffic by sea represents for many states, including the United States, one of the most significant threats. Article 17 of the Convention requires parties to cooperate to the fullest extent possible, in conformity with the international law of the sea, in suppressing this traffic.⁶⁹ It provides in particular that a party with reasonable grounds to suspect that a vessel displaying its own flag, or not displaying any flag or marks of registry, may seek the assistance of other parties in suppressing its use for that purpose, and the other party states are obliged to render such assistance.⁷⁰ More importantly, if a party state has reasonable grounds to suspect that a vessel flying the flag of another party is engaged in illicit traffic, it may request the flag state's authorization to take appropriate measures, including boarding and searching the vessel.⁷¹ The flag state

65. *Id.* art. 11(2).

66. *Id.* arts. 15(1) and (2).

67. *Id.* arts. 19(1) and (2).

68. *Id.* arts. 18(1) and (2).

69. *Id.* art. 17(1). The "international law of the sea" referred to in this article is the customary law reflected in the navigational articles of the 1982 United Nations Law of the Sea Convention.

70. Convention, *supra* note 1, at art. 17(2). *Cf.* art. 108(2) of the U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF.62/122, *reprinted in* 21 I.L.M. 1261 (1982).

71. Convention, *supra* note 1, at art. 17(3). This provision applies to a "vessel exercising freedom of navigation in accordance with international law," which means a vessel in an

may subject its authorization to mutually agreed-upon conditions, including conditions relating to responsibility.⁷²

MANUFACTURE AND DIVERSION OF CHEMICALS

Reflecting international concern over the diversion of legally produced chemicals used in the basic manufacture of illicit controlled substances or to facilitate their processing, the Convention includes provisions for prevention of diversion at the national level and for cooperation among member states at the international level.⁷³ Specific obligations are imposed under Article 12 on party states with respect to monitoring suspicious shipments, providing for the proper labelling and documentation of lawful export shipments, maintenance of records, and advance notification of international shipments of certain chemicals.⁷⁴ The chemicals covered by the Convention are listed in two tables annexed to the Convention, and the specific procedures for adding or deleting chemicals parallel those under the 1961 Single Convention and the 1971 Psychotropic Substances Convention.⁷⁵

Separately, party states are required by Article 13 to take appropriate action to prevent trade in and diversion of common materials and equipment used in the illicit manufacture of narcotic drugs and psychotropic substances. This provision is addressed to materials and equipment typically designed for legitimate drug manufacture, such as glassware, mixing tanks, tableting and encapsulating machines, but which are diverted into illicit activities. Party states are obliged to cooperate in preventing trade in such materials and equipment.⁷⁶

ERADICATION AND DEMAND REDUCTION

Although the main thrust of the Convention is aimed at the suppression of illicit trafficking, the negotiators realized that both eradication and demand reduction were necessary components of an effective international strategy to reduce drug abuse. Thus, Article 14 of the Convention obliges each party to take appropriate measures to prevent the illicit cultivation of, as well as the eradication of, plants containing narcotic or

area (including the coastal state's contiguous zone) seaward of the territorial sea of a coastal state, as opposed to vessels "on the high seas." Paragraph 11 of art. 17 requires parties taking action in accordance with this article to take due account of the rights and obligations and the exercise of jurisdiction of coastal states in accordance with the international law of the sea; this provision refers only to the limited circumstances in which a coastal state has rights beyond the outer limit of the territorial sea (e.g., hot pursuit in the exclusive economic zone) and does not create or endorse any broader claims by the coastal states regarding illicit traffic interdiction in the exclusive economic zone.

72. *Id.* art. 17(6).

73. *Id.* arts. 12(1) and (8).

74. *Id.* arts. 12(9) and (10). With respect to proper labelling and documentation, see also *id.* art. 16.

75. *Id.* arts. 12(2)-(7), and 12(11)-(14).

76. *Id.* art. 13.

psychotropic substances (such as opium poppy, coca bush and cannabis plants) cultivated illicitly in its territory.⁷⁷ In this regard, parties may not take measures pursuant to this Convention which are less stringent than those stipulated by the 1961 Single Convention, as amended, or the 1972 Psychotropic Substances Convention.⁷⁸

Parties must also take appropriate measures to eliminate or reduce illicit demand for narcotic drugs and psychotropic substances, based *inter alia* on the recommendations of competent UN bodies such as the World Health Organization.⁷⁹

Separately, Article 10 of the Convention calls upon party states to assist and support "transit states" (i.e., countries through which illicit shipments pass on the way to their intended destinations) and, in particular, developing countries in need of such assistance and support, through programs of technical co-operation in interdiction and other related activities. Conclusion of bilateral and multilateral agreements in the areas of interdiction and other law enforcement activities is specifically encouraged.⁸⁰

SUPERVISING MECHANISMS

Within the UN system, the International Narcotics Control Board has for years exercised broad supervisory responsibility with respect to the 1961 Single Convention and the 1972 Psychotropic Substances Convention. Consistent with that longstanding role, the Illicit Trafficking Convention assigns broad oversight functions to the Board, including in such traditional areas as national coordination, mutual assistance and international coordination. The Board is given additional responsibilities in such areas as illicit manufacture of narcotic drugs and psychotropic substances, diversion of chemicals and equipment, and commercial documentation and labelling of exports.⁸¹ The Board is required to prepare an annual report concerning the information at its disposal.⁸²

In addition, the UN Commission on Narcotic Drugs is given certain supervisory responsibilities likewise consistent with the oversight role accorded to it under the two prior Conventions. In particular, the Commission is empowered to review the operation of the Convention, to make suggestions and general recommendations based on the information received from party states, and to take action on matters referred to it by the International Narcotics Control Board.⁸³

Finally, the Convention assigns an important "clearing house" role to

77. *Id.* art. 14(2).

78. *Id.* art. 14(1).

79. *Id.* art. 14(4).

80. *Id.* art. 10(3).

81. *Id.* art. 22(1), referring to the Board's functions with respect to arts. 12, 13, and 16.

82. *Id.* art. 23.

83. *Id.* art. 21.

the Secretary-General of the United Nations by requiring party states to furnish his office with specific information concerning their obligations under the Convention. Generally, under Article 20, party states must provide the text of laws and regulations promulgated to give effect to the Convention as well as the "particulars" of cases of illicit traffic within their jurisdictions which may indicate new trends or otherwise important information concerning quantity, sources or methods.⁸⁴ Party states are also obliged to notify the Secretary-General of the laws and regulations giving effect to their obligations with respect to forfeiture,⁸⁵ the languages in which requests for mutual legal assistance may be made,⁸⁶ information requiring the inclusion of a substance in the tables annexed to the Convention,⁸⁷ and the designation of an authority to receive and respond to requests under Article 17 for authorization to board foreign flag vessels.⁸⁸

CONCLUSION

The Illicit Trafficking Convention includes many important and innovative features for international law enforcement cooperation in suppressing the drug trade. It should serve to lift the veil of bank secrecy as an impediment to the gathering of evidence against traffickers and as a method of hiding illicit profits. It provides the tools to seize illicit drug profits and to use those profits to enhance law enforcement efforts across national boundaries. Signatories have agreed to exchange evidence of criminal conduct and to extradite accused traffickers so there are no longer safe havens. Supervision of the manufacturing and sale of essential and precursor chemicals for the production of illegal drugs is subjected to increased scrutiny. Party states have undertaken an obligation to ensure that commercial consignments are free from drugs. The legitimacy of high seas interdiction is recognized in that law enforcement officials are given the authority to board, search and, if necessary, seize vessels used in the drug business. Aggressive efforts are endorsed in the areas of crop eradication and demand reduction to complement law enforcement initiatives.

Ultimately, of course, the effectiveness of the international counter-narcotics offensive will depend on the political will and good faith efforts of all nations to confront the drug trade. The rapid conclusion of negotiations on the Convention, and its adoption in Vienna by consensus, provide some basis for the expectation that the international community will in fact carry out its provisions in an effective manner.

84. *Id.* art. 20(1).

85. *Id.* art. 5(4)(e).

86. *Id.* art. 7(a).

87. *Id.* art. 12(2).

88. *Id.* art. 17(7).