

# THE GLOBAL SITUATION OF TRANSNATIONAL ORGANIZED CRIME, THE DECISION OF THE INTERNATIONAL COMMUNITY TO DEVELOP AN INTERNATIONAL CONVENTION AND THE NEGOTIATION PROCESS

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## I. TRANSNATIONAL ORGANIZED CRIME IN PERSPECTIVE

The threat posed to national and international security by transnational crime, in all its forms and manifestations, is not the inadvertent by-product of long-term trends. On the contrary, this threat is an inevitable consequence of the activities of individuals and organizations as they corrupt state institutions, undermine the rule of law, threaten the integrity of financial and commercial sectors of society, contravene legal and social norms and conventions, transgress national sovereignty and violate national borders. New opportunities offered by the globalization of trade and communications have been exploited eagerly and effectively by criminals, leaving law enforcement trailing behind and working to match the inventiveness, adaptability and resilience of criminal organizations that have become transnational in both thought and deed.

The toll of crime has become frightening. Not to mention the misery it leaves in its wake, the financial damage to societies is staggering. The economic price exacted on nations is enormous, while its social and hidden human costs

are even higher. In addition to traditional and “street” crime, the consequences of organized crime present real and present dangers to progress and a brake to development. Violence associated with this form of crime is extending its reach far beyond national frontiers. Organized criminal groups are spreading their operations around the globe and are engaging in a variety of activities that range from the traditional to the modern with an increased level of sophistication. They also display a remarkable ability to shift across borders and from activity to activity with speed and adaptability that would be the envy of any legitimate business. Overall, the annual profits of organized crime are estimated, according to some sources, at one trillion dollars world-wide; almost as much as the United States annual federal budget. Moreover, the export of precious raw materials, including chemical, biological and nuclear material, is increasingly attracting the attention, and often falling into the hands of organized crime. Through its interfaces with other licit and illicit activities, organized crime is infiltrating national economies, taking advantage of the difficulties of following the trail of criminal proceeds. It has become clear that only by tackling organized crime in a concerted manner inroads can be made into a problem that exceeds the capacity of national mechanisms operating alone.

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Developing countries and emerging democracies are becoming a target for organized criminal groups operating across borders, because of their vulnerabilities, while their institutions are either young or in the process of being built. Often, the sophisticated *modus operandi* of these groups is no match to the criminal justice systems of developing countries and countries with economies in transition. The need for foreign capital to give new life to the economy and assist these countries in entering today's competitive and demanding global market, frequently obscures the long-term threat posed by the investment of criminal proceeds. Criminal groups are keen to enter developing countries and economies in transition, not only because of their potential, but also because of the decreased risks involved. The advantages that such groups enjoy, due to the sizeable amounts of money at their disposal and their ability to eliminate competition through intimidation and violence, make risks that would daunt any legitimate business perfectly acceptable. The consolidation of their power places in grave danger the growing economies of those countries, particularly in terms of their future development, their competitiveness in the international arena, and their stability.

Money laundering is a vital component of all forms of organized crime. The infiltration of legal financial markets and the attempts of organized crime to control sectors of national economies through the laundering of its illicit proceeds continue to represent grave threats for the international community and for national and international financial systems. Free trade and high-speed telecommunications make it easier to engage in multiple activities and launder money across national borders, with an estimated one billion dollars in crime profits wire-

transferred through the world financial markets every day. In addition to concealing wealth and laundering proceeds, organized criminal groups are turning to "borderline" economic endeavours, while diversifying their operations in response to a principle that has been driving international business for ever: reduce risks and maximize profitability. Since these types of crime often involve no violence, they offer the additional advantage of not drawing public attention, which puts increased pressure on national authorities for action. Such activities come with the potential for power, which organized crime has never shunned. Another feature in these types of crime is that the successful engagement of criminals in economic crimes is often viewed by the public as an act of cunning and even bravery. This attitude amply demonstrates the corrosive effects that such crimes have on the social fabric. It is fundamental that this attitude be reversed, because it can prove equally or more dangerous than the offences themselves.

Novel threats demand novel combinations of expertise and novel operational capabilities. If the international community is to respond effectively to the threats posed by transnational criminal organizations, then policy solutions need to be not only comprehensive and well-coordinated, but also highly imaginative. Strategies should take full account of the nature of the challenge. On the grounds that it takes a network to defeat a network, emphasis should be given not simply to extending the formalities of law enforcement and judicial cooperation, but also to building a transnational network of coordinated measures that would eventually be global. An effective concerted approach should also take into

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account the risk management strategies of criminal organizations and should initiate appropriate action to reduce or overcome them. The responses should be the converse of the criminal organizations. Among the objectives to be achieved is to eliminate safe havens for criminal organizations, recognizing that a safe haven is more likely to be the result of limited state capacity than to be the result of lack of will. A multilateral approach offers distinct advantages and a higher probability of success. Equally important is the targeting of the assets of criminal organizations, focusing less on the money laundering process as such and more on the uncovering and forfeiture of the assets accrued by these organizations. States must reflect very seriously on the impact of organized transnational crime on the lives and economic activity of their citizens. It is imperative to promote worldwide a culture of legality and tolerance, instead of accepting a culture of lawlessness and violence, which dangerously threatens national institutions and their principal foundation: global values. Policy- and decision-makers, and leaders must begin, as a matter of urgency, to think in terms of new partnerships to safeguard global values and prevent organized crime and money laundering from impeding the quest of countries for growth, stability and steady progress towards democracy.

Throughout the world, there is recognition of the need to develop more effective, ideally global, strategies for the prevention and control of organized crime in all its forms and manifestations. The task before the international community is, however, even greater, because the development of better and more effective solutions is not the only need; the international community must reassess the very nature and dimensions of the problem, and the policies that can serve

the common purpose of dealing with it. States must also reflect very seriously on the impact of crime in general, and organized transnational crime in particular, on the lives and economic activity of their citizens. Policy- and decision-makers, leaders and the public in general must gear their minds to think beyond and challenge perceptions more or less well ingrained. It is necessary to reassess interests and look beyond traditional roles and stereotypes. If this is done, it is almost certain that the international community will discover that the public and private sectors share much more than was thought. They share not only common interests but also common values. The international community must begin, as a matter of urgency, to think in terms of new partnerships to safeguard these values and protect mutual interests.

**II. UNITED NATIONS EFFORTS TO  
STRENGTHEN INTERNATIONAL  
COOPERATION AGAINST  
ORGANIZED CRIME: THE EARLY  
YEARS**

The work of the United Nations to strengthen international cooperation against organized crime dates back twenty-five years. The issue in its various aspects has been debated and analysed by successive congresses on the prevention of crime and the treatment of offenders, the quinquennial event organized by the United Nations Crime Prevention and Criminal Justice Programme since its establishment.<sup>1</sup> This debate and its results reflect the changing perceptions and comprehension of the problem over several decades. It must also be viewed as

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<sup>1</sup> The Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders was held in Vienna from 10 to 17 April 2000.

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a series of steps, as a sustained course in the direction of raising awareness among policy- and decision-makers and challenging the conventional thinking about crime prevention and criminal justice matters. The process must be viewed in perspective and in context. The United Nations is a global organization, with a steadily increasing membership, especially after the end of the Cold War. In this environment, there are various and multiple political concerns and differences in political and substantive approaches to problems. Dominant among the concerns remains safeguarding sovereignty, which is for many smaller developing countries and countries with economies in transition (or emerging democracies) the last bastion of national integrity and identity. Criminal justice matters are at the core of sovereignty concerns, being perceived as essentially domestic in nature, touching as they are on institutions ranging from national constitutions to legal regimes and systems.

The Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in 1975, examined the “Changes in Forms and Dimensions of Criminality—Transnational and National” under agenda item 5. In what could today, with the benefit of hindsight, be termed prophetic, the Congress focussed on crime as business at the national and transnational levels: organized crime, white-collar crime and corruption. Crime as business was recognized to pose a more serious threat to society and national economies than traditional forms of crime. While it was a serious problem in many developed countries, the national welfare and economic development of the entire society in developing countries was found to be drastically affected by such

criminal conduct as bribery, price-fixing, smuggling and currency offences.

In 1980, the Sixth United Nations Congress, under agenda item 5 entitled “Crime and the Abuse of Power: Offences and Offenders beyond the Reach of the Law,” added new elements to the international perception of organized crime. Among these offences were those crimes with respect to which the law enforcement agencies were relatively powerless because the circumstances under which they had been committed were such as to decrease the likelihood of their being reported or prosecuted. Organized crime, bribery and corruption were among the first examples listed.

The Seventh Congress considered the issue further in 1985 under its Topic 1, entitled “New dimensions of criminality and crime prevention in the context of development: challenges for the future.” The Congress emphasised that multiple illicit operations carried out by international criminal networks represented a major challenge to national law enforcement and to international cooperation.

In 1990, within the framework of its Topic III, entitled “Effective national and international action against: (a) Organized crime; (b) Terrorist criminal activities,” the Eighth Congress examined the problem of organized transnational crime in the light of new historic developments. The rapid increase in the number of independent countries, together with the growing expansion of criminal activities beyond national borders, had created the need for new international institutions, which could introduce a measure of order and enhance the effectiveness of crime prevention efforts. On the recommendation of the Congress, the General Assembly focused

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on strengthening international cooperation by adopting the Model Treaties on Extradition,<sup>2</sup> on Mutual Assistance in Criminal Matters,<sup>3</sup> on Transfer of proceedings in Criminal Matters<sup>4</sup> and on Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released.<sup>5</sup> The Congress also adopted a set of guidelines against organized crime in resolution 24, which was welcomed by the General Assembly in resolution 45/121. In resolution 45/123, the General Assembly urged Member States to implement these guidelines and invited them to make available to the Secretary-General their national legislation against organized crime and money laundering.

The Eighth Congress also marked the beginning of a new era for the United Nations Crime Prevention and Criminal Justice Programme. At first glance, the changes that were precipitated by the recommendations of the Congress, and the action that followed at the legislative level, were of a mostly institutional nature. Quite to the contrary, the significance of these changes lies in the fact that States confronted, albeit imperfectly, one of the core concerns of the international community. The question was to what extent the United Nations, faced with radically changed political and historical realities, would credibly perform its primary function of being a policy-making forum and medium, while simultaneously providing developing countries with the means to

effectively cooperate with their peers. On the recommendation of the Eighth Congress, the Secretary-General convened the Ministerial Meeting on the Creation of an Effective United Nations Crime Prevention and Criminal Justice Programme, which was held in Versailles from 21 to 23 November 1991.<sup>6</sup> The Meeting developed a Statement of Principles and Programme of Action, which the General Assembly adopted in December 1991.<sup>7</sup> In this document the Assembly determined that the revamped Programme would focus its activities on specific areas of priority, and direct its energies toward providing timely and practical assistance to States at their request. Action against organized crime figured prominently among the areas of priority attention for the new Programme. On the institutional level, the Assembly decided that the Committee on Crime Prevention and Control, the governing body of the Programme composed of experts nominated by Governments but serving in their individual capacity, would cease to exist. In its place, the Assembly established the Commission on Crime Prevention and Criminal Justice, a functional Commission of the Economic and Social Council, composed of the representatives of 40 Governments, thus ensuring direct governmental involvement in both decision-making and oversight of the Programme's activities.

The Commission was established and held its first session in 1992. One of its first endeavours was to flesh out further the general guidelines established by the General Assembly regarding the priorities of the Programme. On its

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<sup>2</sup> See General Assembly resolution 45/116, of 14 December 1990.

<sup>3</sup> See General Assembly resolution 45/117, of 14 December 1990.

<sup>4</sup> See General Assembly resolution 45/118, of 14 December 1990.

<sup>5</sup> See General Assembly resolution 45/119, of 14 December 1990.

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<sup>6</sup> See General Assembly resolution 45/108, of 14 December 1990.

<sup>7</sup> See General Assembly resolution 46/152, of 18 December 1991.

recommendation, the Economic and Social Council determined that one of the priority themes that should guide the work of the Commission and the United Nations Crime Prevention and Criminal Justice Programme would be: "national and transnational crime, organized crime, economic crime, including money laundering, and the role of criminal law in the protection of the environment".<sup>8</sup> The Council also took note of the recommendations of two Ad Hoc expert group meetings, which had been held in 1991, in Smolenice, Slovak Republic, and in Suzdal, Russian Federation, and requested the Secretary-General to continue the analysis of the impact of organized criminal activities upon society at large.<sup>9</sup> The Commission, also at its first session, requested the Secretary-General to examine the possibility of coordinating efforts made at the multilateral level against the laundering of proceeds of crime, and to propose means for technical assistance to requesting Member States in drafting legislation and in training of law enforcement personnel, as well as in developing regional, subregional and bilateral cooperation.<sup>10</sup>

### III. THE ROAD TO THE CONVENTION

The direct governmental involvement in setting the agenda for the United Nations Crime Prevention and Criminal Justice Programme, assured through the establishment of the Commission, helped give new impetus to the importance of international action against organized

crime. In its first couple of sessions, the Commission engaged in intense work, reviewing and assessing the activities of the Programme until that time and paving the road for the future. International concerted action had been identified as a key component of success against organized crime, which was sorely missing at the time. This was one of the conclusions which one of the prominent figures of the fight against organized crime, Judge Giovanni Falcone, had derived from all his efforts against the Mafia. Judge Giovanni Falcone is known for sweeping successes against organized crime in Italy through meticulous work, expansion of his investigations into fields previously beyond the scope of traditional prosecutorial work, and through cooperation with the authorities of other countries. What is perhaps less well known is that about two months before his tragic death, Judge Falcone led his country's delegation to the inaugural session of the Commission. In what probably was his last public address at an international forum, he called for more meaningful action at the international level against organized crime, in order to address the problem of national authorities trying to cope with a phenomenon that was no longer national. In explaining why he thought more international cooperation was a must, Judge Falcone launched the idea of a world conference at a sufficiently high political level to lay the foundations for such cooperation.

The Commission took up the idea of a major world conference on organized crime the year after Judge Falcone's death. In doing so, it built on the efforts of the United Nations and the awareness and interest displayed by the international community through the significant work at the policy-making

<sup>8</sup> See Economic and Social Council resolution 1992/22.

<sup>9</sup> See Economic and Social Council resolution 1992/23.

<sup>10</sup> See Commission on Crime Prevention and Criminal Justice resolution 1/2.

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level that it had accomplished in its short existence. The result was the organization of one of the most significant events in the history of the United Nations Crime Prevention and Criminal Justice Programme. The World Ministerial Conference on Organized Transnational Crime, held in Naples, from 21–23 November 1994 was also one of the best attended events ever, with over 2000 participants and delegations from 142 States (86 of them at the Ministerial level, while others were represented by their Heads of State or Government). The Conference unanimously adopted the Naples Political Declaration and Global Action Plan against Organized Transnational Crime,<sup>11</sup> which was approved by the General Assembly one month later.<sup>12</sup>

The Naples Political Declaration and Global Action Plan emphasised the need for urgent global action against organized transnational crime, focussing on the structural characteristics of criminal organizations. Countries were called upon to begin the process of harmonising their legislation, while special attention was paid to the need for countries to ensure that their criminal justice systems had the capacity to prevent and control organized transnational crime in all its manifestations. Equal attention was given to the need for the international community, particularly donor countries and financing institutions, to assist developing countries and countries with economies in transition to bridge the gap between the capacity of their criminal justice systems in general, and law enforcement authorities in particular, and the ability of organized criminal groups to shift their operations from

activity to activity and to elude efforts against them by using sophisticated methods of operation.

The Naples Political Declaration and Global Action Plan stressed the need for the international community to arrive at a generally agreed concept of organized crime as a basis for more compatible national responses and more effective international cooperation. Particular attention was given to more effective bilateral and multilateral cooperation against organized transnational crime, asking the Commission on Crime Prevention and Criminal Justice to examine the possibility for a convention or conventions against organized transnational crime. Furthermore, the prevention and control of the laundering and use of the proceeds of crime were considered essential elements of any international effort.

The negotiations for the Naples Political Declaration and Global Action Plan were long and difficult. One issue of contention was whether the document would issue a clear mandate for the elaboration of a new convention against transnational organized crime. Most of the members of what is known in the United Nations as the Western European and Others Group (a regional group which includes all Western European countries as well as Australia, Canada, New Zealand and the United States) were sceptical, if not openly negative to the idea of a convention. The reason was that they regarded the subject as too thorny to approach, especially since it involved a number of conceptual and legal difficulties, with definitions figuring prominently among them. These conceptual and legal problems, coupled with the inherent difficulty of negotiations with the full membership of the United Nations around the table, led

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<sup>11</sup> See United Nations document A/49/748.

<sup>12</sup> General Assembly resolution 49/159 of 23 December 1994.

these countries to conclude that the final product was likely to be the lowest common denominator. An instrument without “teeth” was something that was not desirable and perhaps not worth the time and effort for most developed countries. A further concern stemmed from the perception that the more or less quite well developed networks of regional and bilateral arrangements that developed countries had developed, especially in the field of international cooperation in criminal matters, was sufficiently operational and functional to deal with organized crime. These countries thought that a new convention might place those arrangements in jeopardy, especially regarding the presumably stronger provisions they contained.

At the other end of the spectrum stood the vast majority of developing countries that thought the idea of a new convention was a good one for several reasons. First, the prospect of a universal instrument held appeal for developing countries because of the nature of the problem they were beginning to witness crossing into their territories and affecting their efforts towards development. In this regard, many developing countries and countries with economies in transition were experiencing sentiments bordering on genuine shock because they had no way of accurately estimating the malicious potential of organized criminal groups. For many years, they were under the impression that organized crime was the problem of industrialised countries. Most of them were also under the impression that organized crime was synonymous to drug trafficking and that issue had been the object of numerous international and regional initiatives and instruments, which provided a certain degree of guidance and coordinated response. Second, the possibility of dealing with a

problem in the context of a global forum, such as the United Nations, has always been favoured by developing countries because of the relative parity, which that forum affords them. Strengthening this conviction is the tendency of United Nations in most of its entities to favour decisions by consensus and to avoid, if at all possible, voting. Consensus decision-making allows more room for the concerns of smaller countries to be taken into consideration and reflected in the final outcome of the endeavour. Third, as any instrument against transnational organized crime would dwell at length on methods of international cooperation, developing countries saw a new convention as the way of addressing pressing needs in that area. Lacking the resources, both human and financial, as well as the negotiating power, developing countries and emerging democracies had quickly recognized their inability to embark upon the development of extensive networks of bilateral agreements or arrangements in the field of international cooperation in criminal matters. An international convention offered the potential of making up for this inability and of filling the gaps these countries had identified in the cooperation they needed.

In view of all this, developing countries and countries with economies in transition, as a block, threw their support behind the idea of a convention in Naples and tried to use the Declaration as the vehicle for promoting its elaboration. The final language of the Declaration was a compromise solution, which was the result of the tireless efforts of the then Vice-President of Colombia (who was chairing the negotiating committee at the Conference) and the delegate of Italy in charge of these negotiations, Ambassador Luigi Lauriola (who is now serving as the Chairman of the Ad Hoc Committee on

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the Elaboration of the Convention). It is important to keep this background in mind, when the elaboration of the Convention itself will be discussed, because over time and with changing circumstances and political agendas, there has been considerable evolution of that position.

The Commission on Crime Prevention and Criminal Justice followed up on the implementation of the Naples Political Declaration and Global Action Plan at its fourth<sup>13</sup> and fifth<sup>14</sup> sessions. On its recommendation at its fourth session, the Economic and Social Council requested the Secretariat to perform the following functions: (a) to initiate the process of requesting the views of Governments on a convention or conventions; (b) to collect and analyze information on the structure and dynamics of organized transnational crime and on the responses of States to this problem, for the purpose of assisting the international community to increase its knowledge on the matter; (c) to submit to Member States at the following session of the Commission a proposal on the creation of a central repository of existing legislative and regulatory measures and information on organizational structures designed to combat organized transnational crime; (d) to submit proposals to the Commission for the development of practical models and practical guidelines for substantive and procedural legislation in order to assist developing countries and countries in transition; (e) to provide advisory services and technical assistance to requesting Member States in needs assessment, capacity-building and training, as well as in the implementation of the Naples Political Declaration and Global Action Plan; and (f) to join efforts with other

relevant international organizations in order to reinforce common regulatory and enforcement strategies in the area of prevention and control of money laundering, and to assist requesting States in assessing their needs in treaty development and the development of criminal justice infrastructure and human resources.<sup>15</sup> An in-session intergovernmental working group was established at the fifth session of the Commission to review the views of Governments on a convention or conventions, as well as the proposals of the Secretariat described under (c) and (d) above. The (then) Crime Prevention and Criminal Justice Division, on the basis of information provided by Member States, prepared a report for the Commission's consideration at its fifth session, in which the actual situation of organized crime was reviewed. Most responding Member States expressed their favourable disposition towards a convention against organized transnational crime.

In November 1995, the Division organized a regional Ministerial Workshop on the Follow-up to the Naples Political Declaration and Global Action Plan, hosted by the Government of Argentina in Buenos Aires. The Workshop adopted the Buenos Aires Declaration on Prevention and Control of Organized Transnational Crime. The countries of Latin America and the Caribbean expressed their support for expeditious follow-up to the Naples Political Declaration and Global Action Plan and endorsed the idea of developing a convention against organized transnational crime, offering a list of elements that such a convention should include.

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<sup>13</sup> Vienna, 30 May to 9 June 1995.

<sup>14</sup> Vienna, 21 to 31 May 1996.

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<sup>15</sup> Economic and Social Council resolution 1995/11.

At its fifth session, the Commission devoted particular attention to the issue of organized crime in general and to the follow-up to Naples in particular. On its recommendation, the General Assembly adopted the United Nations Declaration on Crime and Public Security.<sup>16</sup> By this Declaration, Member States undertook to protect the security and well-being of all their citizens, by taking effective national measures to combat serious transnational crime, including organized crime, illicit drug and arms trafficking, smuggling of other illicit articles, organized trafficking in persons, terrorist crimes and the laundering of proceeds from serious crimes. Member States also pledged to promote bilateral, regional, multilateral and global law enforcement cooperation and assistance, while taking measures to prevent support for and the conduct of operations of criminal organizations in their national territories. In addition, Member States agreed to provide, to the fullest extent possible, for effective extradition or prosecution of those who engage in serious transnational crimes in order to ensure that these criminals find no safe haven.

According to the Declaration, mutual cooperation and assistance in these matters would also include the strengthening of systems for the sharing of information among Member States, and the provision of bilateral and multilateral technical assistance. This cooperation was also considered important in connection with the agreement of States to take steps to strengthen the overall professionalism of their criminal justice, law enforcement and victims assistance systems, as well as relevant regulatory authorities. Member States were urged to become parties as soon as possible to the principal existing

international treaties relating to the various aspects of the problem of international terrorism, as well as to the international drug control conventions. The Declaration called upon States to take measures to improve their ability to detect and interdict the movement across borders of those engaged in serious transnational crime, as well as the instrumentalities of such crime, and to protect their territorial boundaries. Such measures would include adopting effective controls on explosives and against illicit trafficking in certain materials and their components that are specifically designed for use and manufacturing of nuclear, biological or chemical weapons; strengthening supervision of passport issuance and enhancement of protection against tampering and counterfeiting; strengthening enforcement of regulations on illicit trafficking in firearms; and coordinating measures and enhancing information exchange to combat the organized criminal smuggling of persons across national borders.

In connection with the control of the proceeds of crime, Member States agreed to adopt measures to combat the concealment or disguise of the true origin of the proceeds of serious transnational crime and the intentional conversion or transfer of such proceeds for that purpose. Member States also agreed to require adequate record keeping by financial and related institutions and the reporting of suspicious transactions and to ensure effective laws and procedures to permit the seizure and forfeiture of the proceeds of serious transnational crime. Member States recognized the need to limit the application of bank secrecy laws with respect to criminal operations and to obtain the cooperation of financial institutions in detecting these and other

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<sup>16</sup> General Assembly resolution 51/60.

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operations, which may be used for the purpose of money laundering.

Further, Member States agreed to combat and prohibit corruption and bribery and to consider developing concerted measures for international cooperation to curb corrupt practices, as well as developing technical expertise to prevent and control corruption.

On the recommendation of the Commission at its fifth session, the Economic and Social Council adopted a resolution,<sup>17</sup> in which it took note of the Buenos Aires Declaration and requested the Secretary-General to continue his consultations with Member States on the possibility of elaborating a convention or conventions against organized transnational crime. The Council also requested the Secretary-General to assist in the implementation of the Naples Political Declaration and Global Action Plan and to meet the needs of Member States for increased knowledge on the structure and dynamics of organized transnational crime in all its forms, as well as trends in its development, areas of activity and diversification. In addition, the Secretary-General was called upon to assist Member States in reviewing existing international instruments and exploring the possibility of elaborating new ones to strengthen and improve international cooperation against organized transnational crime and to intensify technical assistance in the form of advisory services and training. The Secretary-General was also requested to establish a central repository for national legislation, including regulatory measures, on organized transnational crime; information on organizational structures designed to combat organized transnational crime; and instruments for

international cooperation, including bilateral and multilateral treaties and legislation to ensure their implementation. For the purpose of providing increased technical assistance to requesting Member States, the Secretary-General was requested to develop training manuals for specialised law enforcement and investigative personnel on action against organized transnational crime, taking into account differences in legal systems.

In 1995 and 1996, the issue of the convention was a topic of discussion and debate during the annual Commission sessions but also in other fora, both within and outside the United Nations. The doubts and hesitation that had resulted in the compromise language of the Naples Declaration persisted, even though the surveys carried out by the Secretariat showed that the majority of countries were favourably disposed to the convention. In numerous discussions, the issue that appeared to be the most difficult was how would the international community define organized crime in a way that would be acceptable to everyone, despite differences in concepts, perceptions and legal systems. But even within the group of countries which had been the most sceptical, there were signs of at least a change in thinking. The Group of Senior Experts, which was established by the Group of Seven Major Industrialised Countries and the Russian Federation (what was then known as G7/P8 and since 1998 is referred to as the G8) at Lyon, deserves much of the credit for this reversal of opinion. The Group's mandate was to explore ways and means to strengthen cooperation against transnational organized crime. Chaired by Ambassador Lauriola of Italy, the Group produced a set of forty recommendations, which set the stage for

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<sup>17</sup> Economic and Social Council resolution 1996/27.

much of what has been done since in the field.

In September 1996, the President of Poland submitted to the General Assembly the draft of a framework convention against organized crime.<sup>18</sup> Poland had been one of the most vocal proponents of the new convention since the Naples Conference. Its initiative was a component of its consistent policy of support for the new instrument, but also resulted from the Government's conviction that the issue was urgent and required commensurate action. The Government of Poland was of the view that the best way to allay the fears and dispel the doubts expressed by several countries about the difficulty of approaching the matter was to get them to focus on something in writing. Poland's methodological approach was sound. The question of the new convention until that time had been a largely abstract one. Every discussion revolved around whether the approach to international cooperation was more effective at the bilateral and regional level, or whether there was tangible benefit to be gained by elevating normative efforts to the global level. In the absence of a draft, which people could study and discuss at capitals with their criminal law and other experts, there was hardly any debate about what the contents of a new convention could be. Consequently, hardly anyone was visualising the possible benefits of a new international binding legal instrument. Poland tried to shift the focus of the discussion and stimulate national thinking along the lines of assessing potential benefits and coming to terms with the individual problems that would be associated with the process of obtaining those benefits. Poland also wanted to show that isolated

manifestations of the type of criminality, which the new instrument would target, had already been the object of previous international negotiations. In order to achieve these goals, Poland included in its draft a list of offences, based on the terminology used in other previous international conventions.

Poland's objective about focusing the thinking and discussions on the possibility of the convention was achieved. The General Assembly adopted a resolution in December 1996,<sup>19</sup> by which it took note of Poland's proposal and asked the Commission to devote priority attention to the question of the convention at its sixth session. Even if on the face of it that resolution did not give the green light for the beginning of the process towards the new convention, the discussions that preceded its final drafting were indicative of a change in attitude. This change ranged from acceptance of the merit of having a new convention to resignation to what appeared to be inevitable. This latter approach stemmed from the building and expanding momentum in favour of the convention, which began increasing the political cost of its rejection.

On the other hand, the inclusion of the list of offences in Poland's draft, and especially the inclusion of terrorism in that list, created two problems. First it was immediately picked up by a number of countries, which had serious problems with terrorism. For these countries, including terrorism into a list of offences usually committed by organized criminal groups, thus treating terrorism as just another form of organized crime, was the answer to their frustrations of many years about the lack of progress in

<sup>18</sup> See United Nations document A/C.3/51/7.

<sup>19</sup> General Assembly resolution 51/120 of 12 December 1996.

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concerted action against terrorism at the international level. This is an important feature of the development and evolution of the convention because it was resolved only at the very last moment in the negotiations. Second, including offences established or defined in other conventions created problems for those countries that were not Parties to these conventions.

In preparation for the sixth session of the Convention and in order to boost the chances of the convention, the Giovanni and Francesca Falcone Foundation (a foundation established in Palermo in the memory of Judge Giovanni Falcone and his wife, who was killed with him) organized from 6 to 8 April 1997 in Palermo an informal meeting. All members of the Commission were invited to discuss what issues a new convention should cover. The meeting in Palermo confirmed the attitude described earlier but also showed that whatever reservations remained were still to be reckoned with.

The key turning point for the fate of the new convention was the sixth session of the Commission.<sup>20</sup> During that session, the Commission established a working group to deal with the matter of the implementation of the Naples Declaration. The core mandate of the group, however, was to discuss the question of the convention. Even if, as mentioned earlier, attitudes had begun to change and even those still holding reservations about whether the new convention was truly feasible or desirable had begun to accept the inevitable, the group had to tread a fine line. The careful formulation of the group's report to the Commission is perhaps the best indication of how precarious the whole

question remained. The group reported that "... it was [its] sense that its contribution would be most useful to the Commission if it would canvass the scope and content of a convention, rather than engage in a drafting exercise, which would be outside the mandate given by the Council and the Assembly, and would require significantly more time than that available. ... In determining the scope and content of a convention, the international community could draw on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, but should be able to come up with new and more innovative and creative responses. The Group recognized that it was desirable to develop a convention that would be as comprehensive as possible. In this connection, several States indicated that their remaining reservations on the effectiveness and usefulness of a convention were contingent upon a convention's scope of application and the measures for concerted action that such an instrument would include. Several States stressed the importance they attached to the nature of a convention as a framework instrument. One difficult issue was arriving at an acceptable definition of organized crime. It was indicated, however, that this issue was not insurmountable, especially in the presence of a strong and sustained political will. Several States were of the view that a definition was not necessarily the most crucial element of a convention, and that the instrument could come into being without a definition of organized crime. In this connection, it was also suggested that the phenomenon of organized crime was evolving with such rapidity that a definition would limit the scope of application of a convention, by omitting activities which criminal groups may engage in. Other States felt that the absence of a definition would send the

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<sup>20</sup> Vienna, 28 April to 9 May 1997.

wrong signal regarding the political will and commitment of the international community. In addition, avoiding the issue would eventually create problems in the implementation of a convention. In view of all this, concerted efforts to arrive at a solution should be made. ... The problem of definition could be solved by looking at each of its elements separately. It was suggested that a first step towards a definition might be to use the definitions of offences contained in other international instruments. .... There was also discussion about whether in approaching the definition, the focus should be on the transnational aspects of organized crime or on organized crime in general. It was pointed out that the mandate of the Commission was related to transnational organized crime but that the issue required further serious consideration in the context of determining the overall scope of a convention. In the context of the discussion on whether a convention should include a list of offences, some States expressed their support for the inclusion of terrorist acts in such a list. Most States were of a contrary view, recalling the initiatives currently under way in the United Nations and other forums on terrorism and the conclusions of the Commission at its fifth session. The Group agreed that it would be useful to focus on widely accepted constituent elements of organized crime. In the discussion that ensued, the elements identified included some form of organization; continuity; the use of intimidation and violence; a hierarchical structure of groups, with division of labour; the pursuit of profit; and the purpose of exercising influence on the public, the media and political structures. The Group decided that the best way to proceed for the purpose of advancing the issue was to seek common ground, utilising as many previous contributions

as possible, and building on the positive experience and valuable work done at other forums, such as the European Union and the Senior Experts Group on Transnational Organized Crime. The draft United Nations framework convention against organized transnational crime (A/C.3/51/7) was a useful point of departure and a good basis for further work. In this connection, the Group decided to discuss matters related to international cooperation in criminal matters that would form an essential part of an international legally binding instrument. The overriding concern would be to equip the international community with an effective instrument to strengthen action against organized crime.

In spite of this careful language, it was evident that the tide had changed. In fact, several delegations began putting proposals on the table that went beyond a mere discussion of the desirability or feasibility of the convention. The issue became not whether there would be a new convention but what should the new convention contain and how soon it should be developed. It is interesting to note that some of these proposals were submitted in the form of "non-papers", in order to afford their authors the possibility to keep the option of backing out open. The Group agreed that considerable work was required on the issue of the convention. For this purpose, it proposed that an open-ended intergovernmental group of experts should be established to consider all pending proposals related to the issue of conventions, as well as all elements thereof and appropriate cooperation modalities and mechanisms.

Continuing its efforts for the implementation of the Naples Political Declaration and Global Action Plan, the

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Crime Prevention and Criminal Justice Division organized a regional Ministerial Workshop in Dakar, Senegal, for the countries of the African region in July 1997. That was the second follow-up ministerial meeting after the one organized in 1995 in Buenos Aires. The purpose of the meetings was to sustain the commitment and political will, which developing countries had clearly displayed in Naples, and to further build on it in order to promote the idea of the convention. In unanimously adopting the Dakar Declaration, the Ministers reaffirmed their commitment to fight against organized transnational crime and reiterated their collective political will to support the efforts of the Commission towards the elaboration of an international convention against organized transnational crime. In addition, the Ministers reviewed and approved two regional projects for technical cooperation, aimed at providing assistance to the Governments of the region in strengthening their capacities to prevent and control organized transnational crime.

On the recommendation of the Commission at its sixth session, the General Assembly established<sup>21</sup> an intergovernmental group of experts, which met from 2 to 6 February 1998 in Warsaw. The group's mandate was to elaborate a preliminary draft of a possible international convention against organized transnational crime, on the basis of the contributions and proposals that Governments had made at the sixth session of the Commission, or such documents as the forty recommendations of the G7/P8 Lyon Group.

The Warsaw meeting was the first occasion on which the question of the desirability or possibility of the new convention was laid to rest. The intergovernmental working group reported that "there was broad consensus on the desirability of a convention against organized transnational crime. There was much to be gained from this international legal instrument, which would not only build on, but also go beyond, other successful efforts to deal with pressing issues of national and international concern in a multilateral context."

The Group then went on to develop a "list of options" for the convention, which amounted to a first draft containing several options for various provisions. The term "list of options" was deliberately used as a way of satisfying those few who were still reluctant to speak of a "preliminary draft", considering this term as determining in an unequivocal manner the resolution of the issue of whether the negotiations for the new convention should be authorised. It is interesting to note that before embarking on the very loose drafting exercise, the Group put down a number of general principles, which it understood would guide "the efforts to elaborate a new international convention." The main principles emanating from the general discussion, were as follows:

"(a) While the contours of organized crime were generally understood, there continued to be divergences of a legal nature that made it difficult to reach a comprehensive definition. Engaging in such an endeavour might require considerable time, whereas there was a general feeling of the urgency of action in the direction of elaborating the new convention. Organized crime continued to evolve and manifest itself in different ways. As there was a general

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<sup>21</sup> See General Assembly resolution 52/85 of 12 December 1997.

understanding of criminal organizations, efforts to determine the scope of the convention should build on that understanding, focusing action under the new convention against those groups.

(b) Certain States were of the view that attempting to list all possible criminal activities in which criminal organizations were likely to engage would be difficult and might lead to a convention that was too narrow. Such an approach entailed two major risks. First, it would *ab initio* prejudice the applicability and effectiveness of the convention, as a list could not be all-inclusive and would most probably exclude emerging forms of criminal activity. Secondly, it would present considerable difficulties with regard to other provisions of the convention, as specific crimes often demanded specific responses. The need to deal with specific offences might be accommodated by additional protocols, which could be negotiated separately, not affecting the comprehensiveness of the convention or its operability and effectiveness. Furthermore, it was observed that such an approach might prove more conducive to a more expeditious negotiating process that would make the new convention a reality in a shorter period of time.

(c) An alternative approach that was proposed might be based on the seriousness of the offence, which might be determined on the basis of the penalty foreseen in national legislation and a requirement that the offence be committed in connection with a criminal organization, association or conspiracy. That approach was not free of difficulties, as the concept of seriousness was not as meaningful in all national systems. However, there was merit in further considering such an approach as a potential solution, especially combining it

with a focus on the organized nature of the offence in question, as well as looking at elements that would necessitate international cooperation, including its transnational reach.

(d) There was agreement that the convention should include practical measures of international cooperation, such as judicial cooperation, mutual assistance in criminal matters, extradition, law enforcement cooperation, witness protection and technical assistance. The convention should be a capacity-building instrument for States and the United Nations alike in connection with the collection, analysis and exchange of information, as well as the provision of assistance. Furthermore, the convention should expand the predicate offences for the purpose of action against money-laundering, while it should include provisions creating the obligation of States to confiscate illicitly acquired assets and regulate bank secrecy. The convention should also include provisions to prevent organized crime, such as measures to reduce opportunities for criminal organizations or limit their ability to engage in certain activities. The convention should have provisions that require legislative action on the part of Governments, in order to facilitate meaningful and effective cooperation. Certain delegations expressed strong opposition to a "serious crimes convention" as opposed to an instrument focused on organized crime.

(e) Other international instruments, especially the International Convention for the Suppression of Terrorist Bombings (General Assembly resolution 52/164, annex) and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, were useful sources of inspiration. They contained provisions

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of direct relevance to the new convention. Some of those provisions could provide solutions to similar problems, or serve as a point of departure in order to go beyond their scope, taking into account new needs and developments. In addition, the convention should empower the law enforcement authorities of States parties to employ extraordinary investigative techniques (e.g. wire-tapping and undercover operations), consistent with constitutional safeguards.

(f) Finally, the convention should incorporate appropriate safeguards for the protection of human rights and to ensure compatibility with fundamental national legal principles.”

In March 1998, the Centre for International Crime Prevention<sup>22</sup> organized the third regional ministerial event in follow-up to the Naples Political Declaration and Global Action Plan. This time, the meeting was convened in Manila, was attended by countries of the Asian and Pacific region and adopted the Manila Declaration on the Prevention and Control of Transnational Crime, in which renewed support for the convention was expressed.

The proposals of the Warsaw Intergovernmental Group were submitted to the Commission at its seventh session.<sup>23</sup> During that session, the traditional in-session working group on the implementation of the Naples Declaration began what in essence was a first reading of the draft prepared in Warsaw. That same working group also made recommendations to the

Commission, which formed the basis for a draft resolution, for eventual consideration and adoption by the General Assembly, by which an Ad Hoc Committee would be established to elaborate the new instrument.<sup>24</sup> One key element of the debate on that draft resolution was whether it would include a deadline for the work of the Ad Hoc Committee. Many delegations thought this would be premature and a deadline was not included in the text. However, everyone began speaking in terms of making every effort possible to complete the work by the end of 2000. The symbolism was certainly one motive for the choice of the unofficial deadline. Other motives included the desire of many countries to ensure that embarking on negotiations was not an open-ended endeavour, not wishing to see the issue embroiled in endless debate, as had been the case with other international conventions. Another, perhaps more powerful, reason was the prominent place on the international agenda that action against transnational organized crime had acquired. Linked with this was the realization that attempting to negotiate such a major international legal instrument was fraught with all kinds of conceptual and political difficulties, which had the potential to erode the political will that made the commencement of the negotiations possible.

The negotiations of the draft resolution that would give the green light for the elaboration of the new convention to begin were conditioned by an interesting development. Faced with pressing political priorities, or frustrated by other processes, some countries had begun identifying individual issues, which they

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<sup>22</sup> As part of the reform of the United Nations, the Crime Prevention and Criminal Justice Division was reconstituted into the Centre for International Crime Prevention in October 1997.

<sup>23</sup> Vienna, 21 to 30 April 1998.

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<sup>24</sup> General Assembly resolution 53/111.

thought merited attention at the international normative level.

Argentina had for quite some time favoured action, in the form of a new convention, against trafficking in minors. It had tried to push forward the initiative in the context of the work done in Geneva on additional protocols to the Convention on the Rights of the Child. However, progress there was frustratingly slow, mainly because of the fact that the proposed new protocol approached the issue from a purely human rights perspective. Therefore, Argentina decided to give the whole matter a new spin and see whether the international community was ready to deal with it in the context of criminal justice. At the seventh session of the Commission, Argentina proposed the drafting of a new convention against trafficking in minors, citing the growing evidence of this becoming an activity in which organized criminal groups were engaged.

Austria was experiencing an increase in incidents of smuggling of migrants. Its efforts to cope with the problem led it to discover that it was not alone in having to deal with more and more cases of illegal entry of migrants, organized by criminal gangs from various regions of the world. As part of its consolidated effort to see the issue rising in the international agenda, and building on previous work on smuggling of migrants done by the Commission and the Secretariat, Austria presented to the Commission the draft of a convention against the illegal trafficking and transport of migrants. At about the same time, Italy was developing new policies in response to the influx of Albanian migrants who were being transported across the Adriatic by organized crime groups. Italy was also shocked by the sinking of a ship carrying illegal

immigrants off its coast. Consequently, Italy undertook an initiative at the International Maritime Organization (IMO) aimed at the issuance of directives regarding trafficking of migrants by sea. When it found out about Austria's initiative at the Commission, Italy joined forces and presented a proposed protocol to deal with trafficking by sea, to be attached to the proposed Austrian convention.

The Crime Prevention and Criminal Justice Division had been mandated to carry out a study on firearms regulation. The study had been assigned to the Division on the initiative of Japan and had been carried out with voluntary funding provided by that country. The study (which was eventually published in 1998) was before the Commission at its seventh session. The Governments of Canada and Japan thought that, as a result of the conclusions of the study, the issue of action against the illicit manufacturing of and trafficking in firearms had sufficiently matured to merit attention at the normative level. They thus proposed a new instrument on that subject, which could draw upon and be inspired by the Organization of American States Convention on Firearms, which had recently been concluded.

The Commission was thus found in front of a major decision. Whereas it had been engaged in discussing whether the time was ripe to ask that the international community embark on the negotiations of a new convention, it was now faced with the prospect of authorizing negotiations for four such instruments. All of the proposed subjects deserved attention, having risen, in one way or another, to the top of the political agenda. However, there was also the question of limited resources, especially

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of the United Nations, in supporting, both substantively and organizationally, the negotiations. In addition, there was the political issue of whether authorization to commence negotiations on four separate conventions would not result in dispersing efforts and diluting the political commitment required for success. Then, there was the issue of which of these instruments would command priority. The question facing delegations was whether prioritising was feasible and, if so, what would be the criteria for determining which of these proposed instruments would be elaborated first. The political decision reached at the end was to link the more recent initiatives to the proposed convention against transnational organized crime. The talk among delegations was along the lines of negotiating protocols to the convention on each of these subjects. Not everyone was happy with that solution, mainly because of the lower status of a protocol compared with a full-fledged convention. As a result, the draft resolution proposed by the Commission for adoption by the General Assembly did not speak of protocols but of additional instruments, leaving their status open for further consideration at a more opportune moment.

On the recommendation of the Commission, the General Assembly decided "to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration, as appropriate, of international instruments addressing trafficking in women and children, combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, and illegal trafficking in

and transporting of migrants, including by sea."<sup>25</sup> The Assembly also decided to accept the recommendation of the Commission to elect Luigi Lauriola of Italy as the Chairman of the Ad Hoc Committee.

As mentioned earlier, the discussions that led to the final version of this resolution revolved around establishing a deadline for the completion of the negotiations. Even if the draft did not include such a deadline, planning for the work of the Ad Hoc Committee had to be carried out taking into account the commonly shared understanding about the total time available to it to complete its tasks. At the seventh session of the Commission, the delegation of Argentina came forward with an invitation to host a meeting of the Ad Hoc Committee. However, the resolution remained a draft, as it was intended for adoption by the General Assembly. The annual sessions of the General Assembly begin in September and the Third Committee, which is the committee responsible for crime prevention and criminal justice matters, does not take up relevant recommendations before October. Legally speaking, the Ad Hoc Committee would not come into existence before the General Assembly had adopted the resolution establishing it. A paragraph was included in the resolution to deal with this institutional problem, while assuring that the time between May and October would be productively used. The General Assembly "welcomed with appreciation the offer of the Government of Argentina to host an informal preparatory meeting of the intergovernmental ad hoc committee at Buenos Aires, so as to ensure the continuation without interruption of

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<sup>25</sup> General Assembly resolution 53/111 of 9 December 1998.

work on the elaboration of the convention.” In order to further advance the work, the Chairman invited interested countries to form an informal group of “Friends of the Chair”, which would explore mainly procedural matters to pave the way for the Ad Hoc Committee.

The “Friends of the Chair” held a meeting in July 1998 in Rome, where they began discussing a host of issues surrounding the new convention. One of these was the timetable for the negotiations, in order to ensure that the work could finish by the end of 2000. Even if the terms of reference of the group were oriented primarily towards procedure, several substantive matters began to be ventilated by delegations. It is important to note that the size of the group kept increasing. Wishing not to let anyone out, the Chairman of the Ad Hoc Committee had specifically indicated that the group was open-ended. As countries started coming to terms with the implications of the negotiations, they joined the group in order to participate in decisions that could have a bearing on the process.

The meeting in Buenos Aires was held from 28 August to 3 September 1998. It picked up where the Commission had left off in going through the Warsaw text by way of a first reading. Already at this early stage, delegations started beefing up the text with new proposals on most major issues that it was supposed to cover. Also at this early stage, one of the questions that was intensely debated was the list of offences and whether such a list would make reference to terrorism. Perhaps most importantly for the negotiation process, the Buenos Aires meeting marked the formation of a core group of delegates, who were experts in their fields and shared considerable

experience from previous negotiations. One important feature of this core group was that it was highly participatory, in the sense that it included representatives from virtually all regions and all legal systems of the world. The formation of this core group brought with it a gradually increasing sense of ownership regarding the text, which is a key element of the success of the endeavour.

The group of “Friends of the Chair” held two more meetings, one in the margins of the Buenos Aires meeting and another in November 1998 in Vienna. Its contribution was considerable especially in mapping the road towards the completion of the process and discussing in a very informal way other procedural matters, including the question of the Ad Hoc Committee’s Bureau.

The Ad Hoc Committee was officially established in December 1998 and held its first session in Vienna in January 1999. It finalized the text of the Convention at its tenth session in July 2000 and the text of the Protocols against Trafficking in Persons, Especially Women and Children and against Smuggling of Migrants at its eleventh session in October 2000. The Ad Hoc Committee tried very hard but did not manage to overcome differences impeding the finalization of the text of the third Protocol, against Illicit Manufacturing of and Trafficking in Firearms. Therefore, it scheduled another session (its twelfth) for February/March 2001, in order to complete this task. After a very intense week, the Committee’s efforts were crowned with the successful conclusion of the negotiations for the third Protocol, which completed the package that the international community had set out to conclude only two years before.