

# Section 8: Organized Crime Offenses

## General Commentary

The offenses contained in Section 8 derive from the United Nations Convention against Transnational Organized Crime and its additional protocol, the Protocol against the Smuggling of Migrants by Land, Sea, and Air. There are two more protocols to the convention, one relating to firearms (Protocol against Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition) and the other on trafficking in persons (Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children). The former is contained in Section 13 of the MCC Special Part, “Offenses Involving Firearms, Ammunition, Explosives, and Weapons.” The latter is contained in Section 4, “Offenses against the Rights of Persons.”

## Article 136: Participation in an Organized Criminal Group

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### *Article 136.1: Definition of Offense*

1. A person commits the criminal offense of participation in an organized criminal group when he or she, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the criminal offenses in question, takes an active part in:
  - (a) criminal activities of the organized criminal group; or
  - (b) other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.

2. The knowledge, intent, aim, purpose, or agreement referred to in Paragraph 1 may be inferred from objective factual circumstances.
3. For the purposes of Article 136:
  - (a) *organized criminal group* means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more criminal offense under the MCC or the applicable law, in order to obtain, directly or indirectly, a financial or other material benefit;
  - (b) *structured group* means a group that is not randomly formed for the immediate commission of a criminal offense and that does not need to have formally defined roles for its members, continuity of its membership, or a developed structure; and
  - (c) *property* has the same meaning as in Article 1(8).

## Commentary

**Paragraph 1:** Organized crime, perpetrated through organized criminal groups, is often deeply entrenched in post-conflict societies. This is not surprising since much of the “war economy” during a conflict is based on organized crime activities, such as weapons and gasoline trafficking and trafficking in goods, diamonds, or other resources. Additionally, in the absence of a functioning government during the conflict, organized criminal groups or parties to the conflict often fill the vacuum of authority and perform traditional government services, such as “authorizing” the opening of businesses and providing funding mechanisms for public utilities and amenities. After a conflict, it is common for organized criminal groups and the former parties to the conflict to continue their organized criminal activities, sometimes changing the focus of their activities, for example, from weapons trafficking to trafficking in persons. Most post-conflict states have had to grapple with the problem of organized crime. In Kosovo organized crime was a huge problem right from the outset of the peace operation, exacerbated by the fact that the applicable law did not provide for organized crime offenses. In 2001 UNMIK promulgated UNMIK Regulation 2001/22 on Measures against Organized Crime. Many other peace operations around the world have faced or are facing similar problems. A good primer on organized crime in the context of peace operations, the reasons behind its existence, difficulties experienced in post-conflict environments, and potential solutions and strategies may be found in *Organized Crime as an Obstacle to Successful Peacebuilding*, a publication of Zentrum für Internationale Friedenseinsätze (ZIF). Reference could also be made to *Combating Serious Crimes in Postconflict Environments: A Handbook for Policymakers and Practitioners*, edited by Colette Rausch and published by the United States Institute of Peace Press.

Organized crime does not exclusively affect post-conflict states. On the contrary, it is widespread in non-post-conflict states also. International efforts have been under

way for several years to tackle organized crime in both a domestic context and a transnational context. In 2002 the United Nations Convention against Transnational Organized Crime was promulgated. It sought to “promote cooperation to prevent and combat transnational organized crime more effectively” (Article 1). The convention contains some provisions on the prevention of organized crime (Article 31); however, for the most part the focus is on the criminalization, prosecution, and adjudication of organized crime offenses. The convention deals with a wide range of issues, including which offenses should be implemented into domestic law (Article 5); which offenses related to corruption and closely tied to organized crime—namely, corruption, obstruction of justice, and money laundering (Articles 6, 7, 8, and 23)—should also be criminalized; confiscation and disposal of proceeds of crime (Articles 12–14); investigative techniques that should be employed in relation to organized crime (Article 20); witness-protection measures (Article 24); mutual legal assistance (Article 18); and extradition of alleged perpetrators of organized crime (Article 16). The latter three issues are dealt with in greater detail in the substance and commentaries to the MCCP, which deals with the procedural aspects of prosecuting organized crime as opposed to the substantive criminal aspects, which are dealt with in the MCC. Reference should be made to Chapter 14, Parts 1 and 2, and Chapter 8, Part 4, Section 1, of the MCCP. General reference should be made to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. Reference should also be made to the Council of Europe Octopus Programme report, *Combating Organized Crime: Best Practice Surveys of the Council of Europe*.

It is worth noting that many post-conflict states have established specialized anti-organized crime units of the domestic police force to deal exclusively with organized crime.

The first step in tackling organized crime from a substantive criminal law perspective is to ensure that the sorts of offenses perpetrated by organized criminal groups are contained in domestic legislation. In post-conflict states in particular, many of these offenses, particularly newer offenses, are absent from legislation. In surveying the penal codes of post-conflict states in the course of drafting the MCC, it was apparent that offenses such as money laundering, trafficking in persons, trafficking in drugs, smuggling in persons, and corruption were not adequately provided for. Definitions of these offenses are contained in the MCC and can be drawn upon for inspiration when the authorities in a post-conflict state seek to criminalize these offenses.

As stated in the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 19), in relation to the perpetration of the offenses committed by organized criminals,

frequently, people assist organized criminal groups in the planning and execution of serious offenses without direct participation in the commission of the criminal act. In response to this problem, many countries have adopted criminal laws proscribing lesser participation in criminal groups. The approaches countries have adopted so far vary depending on historical, political, and legal backgrounds. ... Common law countries have used the offense of conspiracy, while civil law jurisdictions have used offenses that proscribe an involvement in criminal organizations. ... The Convention does not deal with prohibition of membership in specific organizations.

Instead, it criminalizes participation in the activities of criminal groups, another criminal offense that must be added to domestic criminal law to effectively combat organized crime. Article 136 incorporates this offense into the MCC.

The wording of Article 136 is taken from Article 5(1)(a)(ii) of the United Nations Convention against Transnational Organized Crime. Article 5 of the convention sets out two offenses, either or both of which should be implemented into domestic law. The first offense is akin to a conspiracy offense and has not been included in the MCC, as conspiracy is not contained herein as a ground of criminal liability. The second offense has been included, however. It involves the offense of criminal association, where a person takes part in the criminal activities of an organized criminal group, or takes part in other activities of the group, in the knowledge that his or her participation will contribute to the achievement of the criminal aim. The *Legislative Guide to the United Nations Convention against Transnational Organized Crime* states, with regard to “other activities” as provided for in this article, that “[t]hese other activities may not constitute crimes, but they perform a supportive function for the group’s criminal activities and goals” (page 24). Elaborating on the elements of the crime of participation in an organized criminal group, the guide further states that “the mental element of the activity in question would also apply. For instance, active participation in kidnapping or obstruction of justice would require the mental element for those offenses. In the case of taking part in non-criminal but supportive activities, an additional requirement is that of knowledge that such involvement will contribute to the achievement of a criminal aim of the group. . . . [In relation to the offense], the knowledge, intent, aim, purpose or agreement referred to above may be inferred from objective factual criteria” (paragraphs 62–65).

Article 5(1)(b) of the convention requires that a person who organizes, directs, aids, abets, facilitates, or counsels the commission of a serious crime involving an organized criminal group also be penalized. These grounds of criminal responsibility are covered in Section 11 of the General Part of the MCC. Reference should be made to Articles 29–32 and their accompanying commentaries. The convention requires that legal persons be liable for the offense set out in Article 136. This requirement is addressed in Article 19 of the General Part of the MCC. Reference should be made to this article and its accompanying commentary.

In Article 15, the convention sets out mandatory grounds of jurisdiction for the offense of participation in an organized criminal group. Jurisdiction must be asserted when the offense is committed in the territory of the state, on board an aircraft registered in that state, on board a vessel flying the flag of that state, or by a national of that state. These grounds are covered by Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extraterritorial Jurisdiction”) of the General Part of the MCC. The discretionary grounds of jurisdiction in the convention require states to consider asserting jurisdiction where the offense is committed by or against a national of the state or by a stateless person who has his or her habitual residence in its territory; where the offense is committed outside the territory with a view to the commission of a serious crime within the territory (serious crime is defined in Article 1[b] of the convention as an offense that is punishable with at least four years of deprivation of liberty); or where a money laundering offense is committed outside the territory with a view to the commission of an organized crime offense. The first discretionary ground of jurisdiction

is contained in the MCC under Article 5. Reference should be made to Article 5 (“Extraterritorial Jurisdiction”) and its accompanying commentary.

**Paragraph 2:** The wording of this paragraph is taken from Article 5(2) of the United Nations Convention against Transnational Organized Crime.

**Paragraph 3(a):** The wording of this paragraph is taken from Article 1(a) of the United Nations Convention against Transnational Organized Crime.

**Paragraph 3(b):** The wording of this paragraph is taken from Article 1(c) of the United Nations Convention against Transnational Organized Crime.

**Paragraph 3(c):** Reference should be made to Article 1(8) of the MCC, which defines property, and its accompanying commentary.

## *Article 136.2: Penalty*

The applicable penalty range for the criminal offense of participation in an organized criminal group is three to fifteen years’ imprisonment.

# **Article 137: Offenses Related to the Smuggling of Migrants**

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## *Article 137.1: Definition of Offense*

1. A person commits the criminal offense of smuggling of migrants when he or she:
  - (a) procures the illegal entry of a person into the state when the person is not a national or permanent resident of the state;
  - (b) in order to obtain, directly or indirectly, a financial or other material benefit.
2. A person commits the criminal offense of producing a fraudulent travel or identity document for a smuggled person when he or she:
  - (a) in order to obtain, directly or indirectly, a financial or other material benefit;
  - (b) for the purpose of enabling the smuggling of migrants;

- (c) produces a fraudulent travel or identity document for a smuggled person.
3. A person commits the criminal offense of procuring, providing, or possessing a fraudulent travel or identity document for a smuggled person when he or she:
    - (a) in order to obtain, directly or indirectly, a financial or other material benefit;
    - (b) for the purpose of enabling the smuggling of migrants;
    - (c) procures, provides, or possesses a fraudulent travel or identity document for a smuggled person.
  4. A person commits the criminal offense of enabling illegal residence when he or she:
    - (a) in order to obtain, directly or indirectly, a financial or other material benefit;
    - (b) enables a person who is not a national or a permanent resident to remain in the state without complying with the necessary requirements for legally remaining in the state by:
      - (i) producing a fraudulent travel or identity document for a smuggled person;
      - (ii) procuring, providing, or possessing a fraudulent travel or identity document for a smuggled person; or
      - (iii) any other illegal means.
  5. For the purposes of Article 137:
    - (a) *illegal entry* means crossing borders without complying with the necessary requirements for legal entry into the receiving state;
    - (b) *fraudulent travel or identity document* means any travel or identity document:
      - (i) that has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a state;
      - (ii) that has been improperly issued or obtained through misrepresentation, corruption, or duress or in any other unlawful manner; or
      - (iii) that is being used by a person other than the rightful holder.
  6. A person is not criminally responsible under Article 137 if he or she is a migrant who is the object of the criminal offense provided for in this article.

## Commentary

Migrant smuggling has become a global business, generating huge profits (estimated at between \$3.5 billion and \$10 billion annually) for the organized criminal gangs that typically perpetrate it (see the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, *Effective Measures to Combat Transnational Organized Crime: Working Paper Prepared by the Secretariat*, UN document A/CONF.2003/4, paragraph 14). Post-conflict states are a prime market for organized criminals involved in migrant smuggling. In many of these states, smugglers have seized upon the fact that people are willing to pay to escape the violence and poor living conditions that characterize post-conflict societies.

The criminal offense of migrant smuggling targets those persons who run smuggling operations. It does not target the persons who are smuggled, although those persons may be liable to sanctions (e.g., for unlawful border crossing) under other provisions of the criminal law or under migration law. The definitions of the criminal offenses contained in Article 137 come from the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (Article 6). The protocol requires states parties to introduce legislation criminalizing smuggling and other related offenses, all of which are contained in Article 137, above. Migrant smuggling is a relatively recent phenomenon. Consequently, a survey of the criminal legislation of post-conflict states, and indeed of non-post-conflict states, found that this offense was rarely if ever included in domestic law. A post-conflict state should consider including the offenses contained in the MCC and the protocol in order to combat organized criminal activity of this sort.

The protocol contains other provisions on cooperation between states (Article 7); measures against the smuggling of migrants by sea (Articles 8 and 9); and prevention, cooperation, and other measures against smuggling (Articles 10–18), including border measures (Article 11), security and control of documents (Article 12), and migrant protection and assistance (Article 16). For a detailed discussion on how to implement these noncriminal aspects of the protocol into domestic law, reference should be made to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. Under Article 1 of the protocol, the provisions of the Convention against Transnational Organized Crime apply, unless otherwise provided for in the protocol. Reference should therefore be made to the commentary to Article 136, which discusses the obligations under the convention.

Prevention is the cornerstone of any antismuggling policy. The protocol includes many prevention measures, but at the core of the problem of smuggling are economic disparities between states, the reduction of which should be looked at as a core prevention method (see the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, *Effective Measures to Combat Transnational Organized Crime: Working Paper Prepared by the Secretariat*, UN document A/CONF.2003/4, paragraph 18). In addition, public information or awareness campaigns are needed in a post-conflict state or any state wishing to combat smuggling in persons. Persons should be made aware both of the dangers of smuggling and of available legal mechanisms for migration (paragraph 18).

Before discussing the particular offenses contained in Article 137, it is worth discussing in brief the distinction between migrant smuggling and trafficking in persons (Article 102 of the MCC). Both acts are covered by protocols additional to the United Nations Convention against Transnational Organized Crime. Both acts also involve the transport of persons between states. However, this is where the similarities end. People who are smuggled are smuggled through their own free will. In fact, they usually pay the smuggler to smuggle them. Trafficking involves coercive, deceptive, or abusive means. Trafficked persons are treated as victims and consequently are afforded certain rights under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (reference should be made to the commentary accompanying Article 102). In addition, trafficked persons are transported “for the purpose of exploitation.” This is not a constituent element of the criminal offense of migrant smuggling, although smuggled persons often end up being exploited once they reach their final destinations.

**Paragraph 1:** The wording of Paragraph 1 is taken from Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The *Interpretative Notes for the Official Records of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (paragraph 92) states that the offense “targets those who smuggle others for gain and is not directed at those who procure their own illegal entry or the entry of another where there is no gain made.” In the latter case, the notes state in paragraph 92 that “the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties” are excluded from the scope of the criminal offense of migrant smuggling.

Entry is usually procured by bringing migrants over the border in hiding and without a declaration to the border police or agents or through the use of forged or falsified travel or identity documents (an act that is itself an offense under Article 128 of the MCC). In cases where a migrant’s documents are valid but are used improperly (e.g., where a tourist visa is obtained but the migrant stays in the state beyond its expiration), as the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* points out (page 342), this is a separate offense—an offense laid out in Paragraph 4 of Article 137. The *Interpretative Notes for the Official Records of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* also states, at paragraph 112, that a “permanent resident” is one who has “longer term but not necessarily indefinite residence.” It states at paragraph 94 that “any other illegal means” refers to illegal means as defined under domestic law. Finally, the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, at page 342, states that to be found criminally responsible for migrant smuggling, “there must have been some primary intention to procure illegal entry and there must have been a second intention, that of obtaining a financial or other material benefit.”

For this, and for the other smuggling-related offenses, Article 6(2) of the protocol provides that attempts to commit any of the offenses; participation as an accomplice, in relation only to the offenses contained in Articles 137.1(1), 137.1(2), and 137.1(4); and organizing or directing migrant smuggling or related offenses be criminalized in



domestic legislation. In the MCC, these obligations are covered under Articles 27, 29, and 31. Reference should be made to the relevant articles and their accompanying commentaries.

**Paragraph 2:** The wording of Paragraph 2 is taken from Article 6(1)(b)(i) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The intention element in this criminal offense is to produce a fraudulent travel or identity document, with the added intention of obtaining a financial or other material benefit. Coupled with this situation, the perpetrator of the offense must produce the fraudulent travel or identity document for the purpose of enabling the smuggling of migrants (see the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, page 344). If this intention element cannot be proven, the person is not criminally liable under this paragraph. Instead, he or she may be liable for forgery under Article 128.

**Paragraph 3:** The wording of Paragraph 3 is taken from Article 6(1)(b)(ii) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The intention element is the same as in Paragraph 2. The *Interpretative Notes for the Official Records of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (paragraph 93) states that this offense “was adopted on the understanding that ... [it] would only apply when the possession was for the purpose of smuggling migrants. ... Thus, a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included” (paragraph 93).

**Paragraph 4:** The wording of Paragraph 4 is taken from Article 6(1)(c) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* provides that “the intention in establishing this offense was to include cases where the smuggling scheme itself consisted of procuring the entry of migrants using legal means, such as the issuance of visitors’ permits or visas, but then resorting to illegal means to enable them to remain for reasons other than those used for entry or beyond the length of time covered by their permits or authorizations to enter” (page 343). The *Interpretative Notes for the Official Records of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* states, at paragraph 94, that any other illegal means refers to illegal means as defined under domestic law. Finally, the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, at page 343, states that to be found criminally responsible for the kinds of offenses set out here under Article 137.1(4), “there must have been the intention to commit whatever act is alleged as having enabled illegal residence and the further intent or purpose of obtaining some financial or other material benefit.”

**Paragraph 5(a):** The wording of Paragraph 5(a) is taken from Article 3(b) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The state will need other pieces of legislation (e.g., migration laws) to determine whether the entry was legal or illegal.

**Paragraph 5(b):** The wording of Paragraph 5(b) is taken from Article 3(c) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. The *Interpretative Notes for the Official Records of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* states, at paragraph 89, that travel documents include any type of document required for entering or leaving a state under its domestic law and that identity documents include any document commonly used to establish the identity of a person in a state under the laws or procedures of that state. It further states, at paragraph 90, that *falsely made or altered* should be interpreted as including not only the creation of false documents but also the alteration of legitimate documents and the filling in of stolen blank documents and should include both documents that have been forged and genuine documents that had been validly issued but were used by a person other than the lawful holder. Further reference should be made to paragraph 42 of the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, which discusses the definition of fraudulent travel or identity documents in greater detail.

**Paragraph 6:** The wording of Paragraph 6 is taken from Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. This paragraph underscores a point made in the commentaries above: the offense of migrant smuggling targets smugglers and does not target smuggled persons. A smuggled person may be liable for other sanctions under domestic migration law or criminal law. For example, a smuggled person may be liable for possession of a false instrument under Article 130 of the MCC or for unauthorized border crossing under Article 162.

## *Article 137.2: Penalty*

1. The applicable penalty range for offenses related to the smuggling of migrants is two to ten years' imprisonment.
2. The applicable penalty range for offenses related to the smuggling of migrants is three to fifteen years' imprisonment where the offense related to the smuggling of migrants:
  - (a) endangered or was likely to endanger the lives or safety of the migrants concerned; or
  - (b) entailed inhuman or degrading treatment, including exploitation of such migrants.

## Commentary

**Paragraph 2:** Article 6(3) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, requires that states include the circumstances set out in Paragraph 2 as aggravating circumstances in domestic legislation. The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 346) states that “the fundamental obligation [of states parties] is to ensure that, where the aggravating circumstances are present, offenders are subject to at least the risk of harsher punishments.” Hence, in the MCC, the presence of these aggravating factors means the applicable penalty range is increased from two to ten years’ to three to fifteen years’ imprisonment. Reference should be made to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (pages 346–347).