Statement of Bruce Swartz
Deputy Assistant Attorney General
Criminal Divison
Senate Foreign Relations Committee
Multilateral Law Enforcement Treaties
July 13, 2004

A. Introduction

Mr. Chairman and members of the Committee, I am pleased to appear before you today to present the views of the Department of Justice on the Inter-American Convention against Terrorism, the Council of Europe Cybercrime Convention, the UN Convention against Transnational Organized Crime, and the Protocols to the Transnational Organized Crime Convention on Trafficking in Persons and Smuggling of Migrants. Each of these treaties will directly advance the law enforcement interests of the United States. Moreover, with the respective reservations, declarations or understandings recommended by the Administration, each convention can be implemented on the basis of existing U.S. law.

These conventions were negotiated by the Departments of Justice and State, as well as the Commerce Department in the case of the Council of Europe Convention on Cybercrime, and the Department of the Treasury in case of the Convention against Transnational Organized Crime. We join the Departments of State, Treasury and Commerce today in urging the Committee to report favorably to the Senate and recommend its advice and consent to the ratification of these treaties.

The Secretary of State has submitted letters that describe in detail each of these multilateral instruments. In my testimony today, I will concentrate on why they provide important benefits for United States law enforcement.

I am not testifying today with regard to the Protocol of Amendment to the International Convention on Simplification and Harmonization of Customs Procedures, and I defer to my colleagues in the Departments of State and Homeland Security as to that instrument. In this connection, I would note that, as a general matter, enhancement of customs procedures is of benefit to the broad law enforcement community.

B. OAS Terrorism Convention

With respect to the Inter-American Convention against Terrorism, as indicated in Mr. Witten's testimony, the elaboration of that treaty was a part of the hemispheric actions taken subsequent to the events of September 11.

In light of existing terrorism conventions on a wide array of subjects, the OAS Convention does not seek to elaborate a comprehensive and new definition of terrorism or punish such conduct as a criminal offense. The Convention is structured to provide for a range of modern law enforcement mechanisms that facilitate cooperation in combating the forms of terrorism already prohibited by 10 key UN counter-terrorism conventions. Some of these mechanisms are already found in the two most recent UN counter-terrorism conventions -- the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism -- but not in older UN counter-terrorism conventions. Others are enhanced versions of law enforcement tools called for by UN Security Council Resolution 1373.

The tools in this treaty increase the ability of U.S. law enforcement to obtain cooperation from other States in the hemisphere in combating terrorist groups. They are therefore important to our efforts against globally active groups such as Al Qaida, and those in the hemisphere, such as the Revolutionary Armed

Forces of Colombia (FARC) and the Autodefensas Unidas de Colombia (AUC), whose members have been charged with a range of offenses against the United States. I will review its most significant benefits.

First, the Convention provides mechanisms that facilitate extradition and mutual legal assistance for terrorism offenses. For example, Article 11 prohibits refusal of extradition or mutual legal assistance for the conduct set forth in the UN Conventions on the grounds that the offense is considered political in nature. Modern U.S. extradition treaties, and some mutual legal assistance treaties, limit the invocation of the so-called political offense exception as a ground for refusal of cooperation in terrorism cases, as do the two most recent UN counter-terrorism conventions. However, older extradition treaties, and many mutual legal assistance treaties, do not contain this limitation.

Similarly, Article 10 provides a legal framework for Parties to temporarily transfer persons who are in custody to another Party so that they may give testimony or otherwise assist with respect to terrorism offenses, irrespective of whether or not there is a mutual legal assistance treaty in place between the States concerned containing such a provision. The ability to arrange such temporary transfers may facilitate the taking of testimony in a U.S. terrorism prosecution, as well as the gathering of other evidence of terrorism, and is typically contained in mutual legal assistance treaties to which the United States is party. Here, too, only the two most recent UN counter-terrorism conventions provide for this mechanism; the OAS Convention will allow Parties to apply it among themselves with respect to the range of conduct addressed in the earlier UN counter-terrorism conventions as well.

Second, the Convention provides important tools that can be used by law enforcement to halt the flow of funds to terrorist groups. Article 4 requires that Parties establish effective regulatory oversight of financial institutions for purposes of detecting efforts to finance terrorism, and provide for Financial Intelligence Units to facilitate the international exchange of information that has been gathered. Building on the similar but less specific provisions of the 1999 UN Terrorism Financing Convention, UN Security Council Resolution 1373, and the UN Convention on Transnational Organized Crime, the Convention provides stronger regulatory measures to address financing of terrorism than any convention to date.

The provisions of Article 5 (on asset confiscation) and Article 6 (on designation of money laundering predicate offenses) also helpfully go further than prior conventions by requiring that the offenses set forth in the 10 UN counter-terrorism conventions be designated as predicate offenses for purposes of prosecuting the laundering of proceeds of crime, and freezing and confiscating crime-related assets. Given that in many cases the terrorist acts will not have been committed in the jurisdiction in which assets are hidden or money laundering transactions take place, it is particularly important that these acts be considered predicate offenses wherever committed.

Finally, Articles 12 and 13, based on more general language in UNSCR 1373, prohibit Parties from granting refugee or asylum status to persons who there are reasonable or serious grounds to believe committed one of the offenses covered by the 10 UN conventions. These articles, which are fully consistent with U.S. law, constitute the farthest reaching regime to date in an international convention with respect to immigration measures that must be taken against terrorists, and they are important mechanisms for preventing members of terrorist groups from abusing the asylum system to establish footholds in States in this hemisphere.

C. Council of Europe Cybercrime Convention

Turning next to the Council of Europe Cybercrime Convention, this is the first and thus far only multilateral treaty to address specifically the problem of computer-related crime and electronic evidence gathering. With the growth of the Internet, attacks on computer networks have caused large economic losses and created great risks for critical infrastructure systems. In addition, criminals around the world are using computers to commit or assist a great variety of traditional crimes, including kidnapping, child pornography, child sexual exploitation, identity theft, fraud, extortion, and copyright piracy. Computer networks also provide terrorist organizations and organized crime groups the means with which to plan,

coordinate, and commit their crimes. This Convention contains significant law enforcement tools to be applied against all of these activities.

The Convention focuses on three types of measures that must be taken to effectively address these types of criminal behavior: First, establishment of domestic criminal offenses; second, adoption of procedural tools for investigating crimes effectively in the Internet age; and third, establishment of strong mechanisms for international cooperation, since computer-related crimes are often committed via transmissions routed through numerous countries. With respect to each of these areas, the Convention provides important safeguards to protect civil liberties and legitimate commercial interests. I will now briefly review the key features of the Convention.

The Convention first requires Parties to criminalize “classic” computer crime offenses – such as unauthorized intrusions into computer systems; unauthorized interception and monitoring of computerized communications; attacks on computers and computer systems, such as denial of service attacks, or attacks using computer viruses or worms; and the misuse of devices, such as passwords or access codes, to commit offenses involving computer systems. Parties must further prohibit the carrying out of a number of more traditional crimes committed by means of a computer system, such as forgery, fraud, the production, advertisement, and distribution of child pornography, and copyright piracy. For criminal liability to attach for each of these offenses, the conduct in question must be committed intentionally or wilfully, and “without right,” thereby protecting legitimate computer users and researchers as well as Internet Service Providers engaged in the provision of legitimate services. The Explanatory Report to the Convention, which has been submitted to the Senate for its information, describes in great detail the manner in which these provisions should be applied, so that these legitimate activities are protected.

These types of criminal offenses already exist under U.S. law; however, countries that do not have adequate criminal laws governing these types of conduct have become havens for cyber-criminals. The Convention’s requirement that Parties establish these criminal offenses will therefore serve as a deterrent to the commission of crimes that threaten U.S. national security and financial interests.

The procedural section of the Convention arose from a recognition that - with respect to both computer-related and traditional crime - the speed and efficiency of electronic communications make electronic evidence of crime difficult to locate and secure. Such evidence may be in transit, and can be quickly altered, moved or deleted. To ensure that Parties are able to investigate effectively the offenses established under the Convention and to collect electronic evidence regarding other criminal offenses, such as terrorism, organized crime and violent crimes, the Convention requires each Party to have the power - on an expedited basis - to preserve and disclose stored computer data, including traffic data, to compel the production of electronic evidence by ISPs, to search and seize computers and data, and to collect traffic data and content in real time. These powers and procedures are already provided for under U.S. law, and have proved invaluable to many investigations.

As with the substantive offenses, the Convention contains safeguards on the use of these procedural tools. For example, the powers and procedures may be used only in connection with “specific” criminal investigations or proceedings; there is no general obligation on service providers to collect and retain data on a routine basis, and ISPs are required only to preserve data in specific cases that they already have gathered for commercial purposes. The Convention also requires that the procedural powers I have described be subject to conditions and safeguards under domestic law that protect civil liberties.

Finally, the Convention contains important provisions on international cooperation. Modern telecommunications facilitate the commission of crimes without regard to national borders, making cooperation between law enforcement in different countries more important than ever. Recognizing this need, the Convention provides enhancements to extradition regimes in force among the Parties, and obliges Parties to afford mutual assistance “to the widest extent possible” as to both the computer-related criminal offenses established under the Convention, and where electronic evidence needed for the investigation and prosecution of other serious criminal conduct.

With respect to extradition, the Convention obliges the Parties to consider the criminal offenses they establish as extraditable offenses under their applicable extradition treaties and laws. The Convention does not, however, require the U.S. to extradite persons in the absence of a bilateral treaty, and we will continue to apply the relevant terms and conditions of our bilateral extradition treaties to the offenses established by the Convention.

Similarly, the Convention augments existing mutual legal assistance relationships to account for computer-related crime and creates new relationships where necessary. Mutual legal assistance is generally to be provided through existing MLATs between the Parties. If the requesting and requested States do not have an MLAT in place between them, the Convention - in an analogous manner to the Transnational Organized Crime Convention - provides certain mechanisms to be applied between them, including grounds for refusal so that cooperation can be denied in appropriate cases, such as where execution of a request would prejudice the sovereignty, security, or other essential interests of the requested State.

Whether operating through existing MLATs or under the Convention, Parties are required to have key procedural mechanisms available for use in international cases. Thus, the Convention provides a basis for U.S. law enforcement to obtain, on an expedited basis, preservation of electronic evidence stored in another country relevant to a U.S. criminal investigation, and to trace in real time electronic communications by criminals to their source in another State. Another key innovation by which the Convention helps ensure the rapidly expedited international cooperation required to combat cybercrime effectively is the establishment of a 24/7 network of emergency contacts. Such contacts are to be available at any time, day or night, and comprised of professionals having both the technical means and the legal mechanisms to respond to urgent requests for information from their foreign counterparts.

The adoption of these tools by other countries will give U.S. investigators a much better chance of obtaining evidence needed to successfully prosecute criminals who endanger our national security and economic interests. In the past, if an electronic transmission's trail led to another country, the chances were slim of successfully tracing the communication to its source or securing the evidence before deletion. With the tools provided for under the Convention, however, the ability of U.S. law enforcement to obtain international cooperation in identifying major offenders and securing evidence of their crimes so that they can be brought to justice will be significantly enhanced.

The Administration has recommended that the United States deposit a number of reservations and declarations designed to ensure that we can discharge our obligations under the Convention through existing federal law. These reservations and declarations will enable the U.S. to apply additional threshold requirements to the offenses of illegal access to data, misuse of access devices, computer-related forgery, and data interference; limit application of the offenses of misuse of devices, child pornography and copyright piracy; and - like the reservations proposed for the UN Convention on Transnational Organized Crime - limit application of the jurisdiction article in cases involving crimes committed on ships or aircraft registered under U.S. law, and clarify that the U.S. will implement its obligations in a manner consistent with our federal system of government and existing federal law.

D. UN Transnational Organized Crime Convention

With respect to the UN Convention on Transnational Organized Crime ("TOC"), Mr. Witten's testimony describes its role as a modern framework for combating organized crime. Prior to the TOC Convention, there was no meaningful multilateral framework for addressing the phenomenon of organized crime. The TOC Convention and its protocols create a broad regime modeled on the most recent and effective of the multilateral drug trafficking treaties – the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, also known as the 1988 Vienna Narcotics Convention.

From the Transnational Organized Crime Convention, we anticipate law enforcement benefits flowing from the obligations on States Parties to establish criminal offenses and related domestic measures, and to provide international cooperation as to a broad range of organized criminal activity.

The Convention first requires Parties to establish a number criminal offenses and related measures that already exist under U.S. laws, but that do not yet exist in some countries - a gap that is exploited by organized crime groups. For example, it is important to an overall strategy for fighting organized crime that all States have laws which enable prosecution of leaders, advisors or other persons whose role in criminal enterprises is indirect and insulated from the actual commission of the financial and violent crimes that enable the enterprise to maintain its wealth and power. Accordingly, Article 5 requires countries to criminalize conspiracy or criminal association with respect to a broad range of serious crimes.

Also significant are the Convention's provisions on money laundering, bribery and obstruction of justice. Article 6 of the TOC Convention requires the criminalization of money laundering with respect to a comprehensive range of predicate offenses associated with organized crime activities and therefore builds upon and expands earlier commitments with respect to drug trafficking predicate offenses in the 1988 Vienna Narcotics Convention. Moreover, Article 7, based on the groundbreaking prior work of the Financial Action Task Force, is the first provision in an international convention to require the establishment of a comprehensive regulatory regime for combating money laundering.

Since organized crime groups often seek to maintain their influence through corruption, as well as disruption of investigative and prosecutive efforts against them, Articles 8 and 23 also require Parties to criminalize both bribery of domestic public officials and a wide range of activities that obstruct justice.

Finally, from our century-long experience in combating organized crime in the United States, we know that there are other domestic measures law enforcement must employ in order to effectively address organized crime, including a system for protecting witnesses from the criminal groups that may seek to intimidate or harm them, and means of penetrating secretive organized crime groups through lawful inducements for group members to cooperate with law enforcement. Articles 24 and 26 of the Convention provide for States Parties to adopt such measures.

The second area from which important benefits will flow from the TOC Convention is in the area of international cooperation. Foreign countries already obtain excellent cooperation from the U.S. in extradition, mutual legal assistance and police cooperation; however, the legal framework for obtaining reciprocal benefits is not always present. The Convention's provisions on international extradition, mutual legal assistance and police cooperation provide a legal basis for other Parties to provide similarly broad cooperation, both to the United States and among one another.

Of particular note are the provisions in Articles 16 and 18. Article 16 requires that the Parties deem as extraditable offenses under their applicable treaties the offenses established by the Convention, as well as any crime that has been committed by an organized criminal group, and that is punishable by a maximum term of at least four year's imprisonment under the law of both the requesting and extraditing States. The practical import of the broad scope of this Article will be to significantly expand the reach of older U.S. extradition treaties that contain a "list" of extraditable offenses.

Article 18 on mutual legal assistance establishes a similarly broad obligation to provide mutual legal assistance under the following terms: Where the State requesting assistance already has a mutual legal assistance treaty in force with the State from which assistance is sought, that treaty will continue to govern requirements for obtaining assistance. However, where there is no such treaty, the Article contains a "mini-MLAT," meaning that paragraphs 9-29 of the Article serve, in effect, as a mutual legal assistance treaty governing in great detail cooperation between the States Parties for offenses covered by the Convention. Paragraph 21 provides for grounds for refusal that would enable the U.S. to decline assistance in politically motivated cases and other appropriate circumstances. Also significant is that Article 18 requires on a global scale measures that have long been a standard aspect of U.S. mutual

legal assistance practice, but that are not always applicable in other countries - such as a prohibition on invoking bank secrecy to bar cooperation. An analogous article in the 1988 Vienna Narcotics Convention has increased cooperation obtained by the United States from other countries in narcotics cases, and we would anticipate a similar increase in cooperation in organized crime cases pursuant to this provision.

The Administration has submitted to the Senate three proposed reservations and one understanding and one declaration. With these reservations, understanding and declaration, existing federal law is sufficient to enable the United States to discharge the obligations undertaken in the Convention.

E. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the "Trafficking Protocol")

The Trafficking Protocol also advances important policy interests of the United States, which are reflected, for example, in the Trafficking Victims Protection Act of 2000 and the reauthorization legislation of 2003. Those laws make clear the importance the United States places on all countries adopting effective criminal laws against trafficking in persons, and on international cooperation to combat this phenomena.

Article 1 of the Trafficking Protocol (as with the Migrant Smuggling Protocol also pending before the Committee) requires Parties to apply all of the benefits and obligations of the Main Convention to the offenses established in the protocols. Thus, the extradition, mutual legal assistance, confiscation of assets, witness protection obligations and other key parts of the main Convention also apply, for Parties to the Protocols, to the offenses of trafficking in persons and smuggling of migrants.

Among the most important elements of the Trafficking Protocol is that it provides for the first time in an international treaty a definition of trafficking in persons, and requires all Parties to criminalize conduct included within the definition of trafficking in persons. Having a common definition will allow countries to cooperate more effectively in providing mutual legal assistance, granting extradition, and providing police-level information and intelligence sharing.

Article 3, which sets forth the definition, may be divided into three components: conduct, means and purpose. First, the conduct covered by "trafficking in persons" is the recruitment, transportation, transfer, harboring or receipt of persons. Second, the means element can be satisfied by any of the following: the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (in essence, the buying and selling of persons). Third, the purpose of exploitation includes, at a minimum, exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs. Article 3 further provides that, once any of the means set forth above has been used, the consent of the victim to the intended exploitation is irrelevant.

With respect to children, the Article makes it clear that any of the conduct set forth above, when committed for the purpose of exploitation, constitutes "trafficking" even if none of the means set forth above are used. Thus, any recruitment or harboring of a child for prostitution or other sexual exploitation would constitute trafficking.

I would like to point out that the negotiating record sets forth several statements intended to assist in the interpretation of the definition of "trafficking in persons." One of those statements makes clear that the Protocol is without prejudice to how States Parties address prostitution in their respective domestic laws. Thus the practices and policy choices related to prostitution of individual States in the United States are unaffected by this protocol.

Further, both the Trafficking Protocol and the Migrant Smuggling Protocol establish for the first time in a multilateral instrument the obligation of States Parties to take back their own citizens and to facilitate such

returns when necessary, for example, by issuing necessary travel documents. In the Trafficking Protocol, this obligation is set forth in paragraph 1 of Article 8 ("Repatriation of victims of trafficking in persons").

The United States has recommended two Reservations and three Understandings with respect to the Trafficking Protocol.

F. Protocol against the Smuggling of Migrants by Land, Sea and Air

The Migrant Smuggling Protocol provides all of the benefits I have already mentioned that flow from the interplay of the Protocols with the main Convention (such as in facilitating extradition, mutual legal assistance, and asset confiscation with respect to smuggling offenses), and from specific provisions common to both Protocols (such as the obligation to accept the return of citizens).

Of course, most importantly, it also benefits the United States by requiring other countries to criminalize the smuggling of migrants, and the production of fraudulent documents that furthers smuggling. With migrant smuggling an ever-present problem for United States law enforcement, these obligations will help fill gaps in the current abilities of many countries to effectively address smuggling crimes domestically, and open the door to increased international cooperation in such cases.

Article 6 ("Criminalization") is the critical article that contains these obligations. The article requires States Parties to criminalize three distinct types of conduct: (1) "smuggling of migrants" as that term is defined in Article 3; (2) document fraud when committed for the purpose of enabling the smuggling of migrants; and (3) enabling a person to reside illegally in a State by means of document fraud or any other illegal means.

The Protocol also contains important provisions regarding boarding and searching vessels suspected of smuggling migrants. We anticipate that these provisions will help promote interdiction efforts by States Parties, and they should enhance cooperation in a number of practical ways, including through the obligation on the vessel's "flag State" to expeditiously respond to requests for boarding and search, as well as through the providing of an express basis in international law for the search of vessels suspected of engaging in migrant smuggling.

We do suggest one Reservation and two Understanding with respect to the Migrant Smuggling Protocol to enable us to implement our obligations through application of our current laws.

We have not sought the same Reservations and Understanding with respect to jurisdiction and federalism issues as in the Main Convention and Trafficking Protocol. Since U.S. federal law comprehensively covers migrant smuggling into U.S. territory, including any such crime occurring on a ship or aircraft, as well as related document offenses, in our view such limitations are not required with respect to this instrument.

G. Conclusion

In conclusion, the Department of Justice appreciates the opportunity to explain the terms of these instruments. Each convention and protocol will aid our law enforcement efforts, both by enhancing the ability of many countries to address these very serious forms of criminality, and by facilitating enhanced international cooperation with the United States in specific cases. We urge the Senate to give rapid advice and consent to ratification of these conventions.

I would be pleased to respond to any questions the Committee may have.