

Third Study Commission Questionnaire 2024
South Africa
**Responses on behalf of the Judges' Council of
England and Wales**

In 2024, the Third Study Commission of the International Association of Judges (IAJ) intends to study *the rapid evolution of illicit drug manufacturing and the challenges this unstoppable process poses to successful prosecution.*

Background

In general, a precursor is a starting material used to manufacture a narcotic drug, psychotropic substance or another precursor. A subset of starting materials is under national or international control, but there are a number of starting materials used in illicit drug manufacture that are as yet not controlled, often referred to as “non-scheduled chemicals”.

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 provides the legal framework for addressing the problem of international drug trafficking, including manufacturing. With 191 States parties, this Convention enjoys nearly universal adherence.

Article 12 of the 1988 Convention introduces a set of control measures to ensure control of internationally scheduled substances frequently used in the illicit manufacture of narcotic drugs and psychotropic substances, also known as “precursors”. The premise underlying the control of precursors is that the denial of these substances to illicit producers and manufacturers of drugs will result in a reduction in illicit drug manufacture.

The decision whether a chemical precursor should be placed under international control lies with the United Nations [Commission on Narcotic Drugs](#)¹ (CND), a policy making body of the United Nations system with prime responsibility for drug-related matters. The scheduling decision by CND is prompted by the technical assessment by the International narcotic Control Board.

The very article 12 of the 1988 Convention establishes a system under which designated national competent authorities with the support of INCB monitor imports and exports of the internationally scheduled precursors listed in Table 1 and table 2 of the 1988 Convention. Finally, national legislations regulate to different extents the domestic manufacture, trade and distribution of these substances, as well as of any other substance which can be used for illicit drug manufacturing.

The evolution of illicit drug markets toward synthetic drugs including the so called New Psychoactive Substances reflects the increased use by criminal drug manufacturers of non-scheduled precursors, including designer precursors³. To cope with this development some legislations put under national control entire families of chemical substances and incite operators of the chemical industries to exercise due diligence in selling their products. Similarly, and keeping in mind article 13 of the 1988 Convention, some jurisdictions also extend control and due diligence to the market of essential equipment possibly used in illicit drug manufacturing.

¹ The CND has 53 member states that are elected by ECOSOC.

Sample questions

1. Does your country have legislation, or regulations, and/or court rules of procedure that are relevant to the topic of our focus this year – chemical substances and essential equipment possibly used in illicit drug manufacturing and trafficking, including importing, exporting, for domestic distribution and use and private sector due diligence.

Yes

Please explain.

A. The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (“The 1988 Vienna Convention”) is implemented through two European Regulations (EC) No 273/2004 and (EC) No 111/2005 (as respectively amended by The Law Enforcement and Security (Amendment) EU Exit Regulations 2019) – which replaced earlier EU Regulations and Directives. These regulations established measures governing the control and monitoring of substances frequently used for the illicit manufacture of narcotic drugs or psychotropic substances so as to prevent their diversion. The Regulations set out rules for labelling, documenting (and auditing) of scheduled substances; the licensing of those engaged in the exporting and importing of such substances and for authorising the export or import of such substances.

Any person applying for a licence is required to hold a Disclosure and Barring Service Check (undertaken by a specific security undertaking); a company is required to have an officer to be responsible for the trade in scheduled substances (who is certified as being of good conduct) as well as a person to guarantee that person’s performance of those obligations.

A variety of legislative measures govern the licensing, manufacture, export and import of Drug Precursors – see below.

B. Licensing:

Domestic licenses are required for any companies that possess, manufacture, produce or supply drugs precursor chemicals. A wall chart relating to the licenses required for export import to or from different countries according to the category of chemical is attached below at Annex 1. Authority to import / export may be refused if there are grounds for believing that diversion might occur.

C. Monitoring/Auditing

A wholesaler, manufacturer producer or supplier of controlled drugs or drug precursor chemicals is required to complete annual return forms; inform the competent authorities of any circumstances which may suggest that scheduled substances may be diverted for the illicit manufacture of narcotic drugs or psychotropic substances as well as providing bi-annual summaries of transactions involving scheduled substances used and supplied.

D. Criminal offences

*i. Breaches of obligations on operators imposed by Regulation (EC) No 273/2004 [in relation to domestic trade – including placing scheduled substances on the market; documentation, labelling and notification to the competent authority] are made **criminal offences** by virtue of*

Regulations set out in Controlled Drugs (Drug Precursors) (Intra-Community Trade) Regulations 2008 No 295 and Section 13 of the Criminal Justice (International Co-Operation) Act 1990.

*ii. Breaches of obligations on operators imposed by Regulation (EC) No 111/2005 [in relation to international trade covering eg: documentation (customs declarations, commercial documents including invoices and cargo manifests), labelling of packages containing scheduled substances, demonstration of the licit purposes for which the substances are required, provision of any information that suggests scheduled substances are intended to be diverted for the illicit manufacture of narcotic drugs or psychotropic substances; improper exportation or importation] are made **criminal offences** by virtue of Regulations set out in Controlled Drugs (Drug Precursors) (Community External Trade) Regulations 2008 No and Section 13 of the Criminal Justice (International Co-Operation) Act 1990.*

iii. It is a criminal offence to manufacture or supply a scheduled substance (those within Tables 1 and 2 of the Vienna Convention) knowing or suspecting that the substance is to be used in or for the unlawful production of a controlled drug (Section 12 of the Criminal Justice (International Co-operation) Act 1990.

iv. It is a criminal offence to import or export scheduled substances in prohibition of the restrictions imposed by the above regulations (Sections 50 and 68 of the Customs and Excise Management Act 1979.

2. Does your country have specific legislation on precursors control?

Yes

Title of current legislation date of adoption and latest amendment

*Misuse of Drugs Act 1971 – (s.23) for powers of search in relation to controlled drugs are extended to enforcing the regulations applicable scheduled substances) [**In force July 1 1991 and modified 24th Feb 2003**]*

*Customs and Excise Management Act 1979 – Sections 50 and 68 makes it an offence to import or export scheduled substances in breach of the Regulatory controls (clarified in respect of importation by Reg 7(3) of the Controlled Drugs (Drugs Precursors) (Community External Trade) Regulations 2008 and in respect of exportation by Regulation 6(3) of the Controlled Drugs (Drug Precursors) (Community External Trade) Regulations 2008 as well as s.13 of the Criminal Justice (International Co-operation) Act 1990. [**Customs and Excise Management Act in force 22nd Feb 1979 however offences and penalties for importation or exportation of scheduled substances not in force until the implementation of the Criminal Justice (International Co-operation) Act 1990 on 1st July 1991.**]*

*Criminal Justice (International Co-Operation) Act 1990 – Part II in particular dealing with the Vienna Convention [**In force 1st July 1991**]*

*Controlled Drugs (Drug Precursors) (Intra-Community Trade) Regulations 2008 No 295 [**In force 7th March 2008 and last amended by Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019/742 –with amendments taking effect from 31st Dec 2020**]*

*Controlled Drugs (Drug Precursors) (Community External Trade) Regulations 2008 No 296 [**In force 7th March 2008 and last amended by Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019/742 –with amendments taking effect from 31st Dec 2020**]*

3. In your country, is an approval by a judge a pre-condition to launch investigations into a case of diversion and trafficking of precursors? Similarly, is a court order or approval by a judge required for effecting controlled or monitored deliveries?

No

4. When a drug/precursor-related crime is being investigated in your country, does the judiciary have any role (a) in the request for information from a foreign state and/or (b) in the provision of information to a foreign state?

Yes

No....

If your answer to either (a) or (b) is yes, what legislation, regulations or rules of procedure apply to the decision of a judge involved at the investigation stage?

The role of Judges in England and Wales is limited. They do not undertake any investigative, or prosecutorial role; these are the sole province of the police and the Crown Prosecution service respectively – which act independently of the Judiciary.

Judges nevertheless may have a limited procedural role in considering and making requests of other States for evidence or in dealing with requests made by foreign states.

The principle legislation governing the procedural steps is The Crime (International Co-operation) Act 2003 – supplemented by Rules of Criminal procedure – and in particular Criminal Procedure Rules 49 (International Co-operation)

Please refer to the details provided in answer to the 2023 3rd Study Commission's questionnaire in relation to mutual assistance in the obtaining protection and preserving of evidence.

*For present purposes reference is made to the answer given in that questionnaire at paragraph 1.5. ii (b) relating to the provisions of sections 13-25 of the **Crime (International Co-Operation) Act 2003** which provide for the giving of assistance to overseas authorities and for the protection or securing of evidence that is sought.*

- *These provisions are generally triggered by the making of a Mutual Legal Assistance (MLA) Request (by means of a Letter of Request) to the Secretary of State*
- *Upon receipt of such a LOR the Secretary of State may arrange for evidence to be obtained as requested provided the SoS is satisfied EITHER that an offence under the law of the requesting state has been committed and proceedings instituted OR that there are reasonable grounds for suspecting that an offence has been committed and that an investigation is being carried on there. A certificate issued by the requesting authority confirming these matters will be regarded as conclusive. [Different provisions apply for fiscal offences]*
- *The SoS will **nominate a court to** receive the evidence to which the request relates. Such a nominated court has powers to secure a witness to give evidence. CPR 49.4 – 49.5 sets out rules relating to persons entitled to appear at any such hearing; the exclusion of the public during such a hearing and for the recording of evidence given and creation of an “overseas” record. The evidence received by the court is then forwarded to the requesting court/authority.*
- *The SoS may also direct that a search warrant be applied for – in which case the police are entitled to exercise the powers of entry search and seizure under PACE*

provided the overseas offence is one which would amount to an indictable offence if committed in England and Wales.

5. Does your country have legislation or court rules that relate to monitoring manufacture and distribution of precursors which are applicable over the entire national territory?

Yes; Legislation as set out above.

There are no court rules that specifically relate to the monitoring, manufacture or distribution of precursors

6. Does your country have legislation or court rules that establish as a criminal offence the manufacture, transport and distribution of essential equipment intended to be used for illicit drug manufacturing.

No not directly. However, if a person knowingly manufactured, transported or distributed equipment that was intended to be used and was in fact used in the production of controlled drugs then an offence would be committed under Section 4(2) of the Misuse of Drugs Act 1971 (Being concerned in the production of a controlled drug by another).

7. In respect of non-scheduled chemicals/ equipment, is the fact that they have been mis-declared before the Customs, sufficient to impute 'knowledge' on the part of the supplier of their being used for illicit drug manufacture?

Such evidence would be one piece of evidence on which knowledge may be imputed. However, it would not be determinative in itself. This would be a matter for the Jury to assess and determine having regard to the nature of the evidence overall – of which such mis-declaration may well be a crucial element.

8. In your country, does domestic legislation include measures and/or civil, criminal and/or administrative sanctions to address non-scheduled chemicals and emerging precursors, namely those that are used as starting materials and/or intermediaries in the legitimate manufacture of substances in Table I and Table II of the 1988 Convention? If yes, which type of sanctions?

No – not to my knowledge

9. Please elaborate on specific pieces of information and level of details that would allow you as a judge to act on information/intelligence/evidence received from counterparts in investigations related to new emerging drug precursor chemicals not under control in your country.

Please explain:

A Judge in England and Wales has no investigative or inquisitorial role to play. Any such information would not be of any assistance since it could not be acted on. Such information would of course be of general relevance both to the police, Crown Prosecution Service, Regulators and the Home Office.

10. Are there any specific provisions that allow you as judge to act on non-scheduled chemicals with no known legitimate uses? Would information from an international body, or a collection of information from other countries, that a chemical has no known legitimate use facilitate your work in any way?

Please explain:

I do not know of any. The Judge takes no investigative role in any criminal investigation and accordingly would not be expected to act in any particular way.

11. As a judge, if you receive a request for assistance in a drug/precursor-related crime from a foreign country, whether at the investigation stage or in the context of a court proceeding (a hearing or a trial), how is it relevant to your determination to ensure that basic human rights, principles of natural justice, and/or rules of procedural fairness that exist in your country are respected?

Such matters will be relevant.

A. *Again, see the answers given in response to Question 5 in the the 2023 3rd Study Commission Questionnaire namely:*

5.1 in general a judge in the UK will not receive a direct request for assistance whether in relation to investigation of a crime or in the context of court proceedings.

5.2 The process in relation to requests for assistance is for such requests to be made to the Secretary of State who may refuse requests where:

- **The investigation or prosecution is politically motivated**
- **There is a risk that the execution of the request may result in the imposition of the death penalty;**
- **The request relates to a person who, if proceeded against in the UK for the offence for which assistance is requested, would be entitled to be discharged on the grounds of previous acquittal or conviction (Double Jeopardy)**
- **There are reasonable grounds for believing that the request has been made for the purpose of investigating, prosecuting or punishing a person on account of their race, gender, sexual orientation, religion, nationality, ethnic origin or political opinions**

In addition the UK will conduct a human rights assessment when considering the provision of assistance overseas- Guidance on how this is applied is at:

<https://www.gov.uk/government/publications/overseas-security-and-justice-assistance-osja-guidance>

B. In the event that the Secretary of State accedes to the request and nominates a court to receive evidence under s.15 of the Crime (International Co-operation) Act the requesting state will be asked to provide a list of questions to be asked and provide details of the procedure to be followed in taking evidence including any rules on privilege which a witness or suspect may be entitled to claim. However, the rules of the requesting state will be complied with only in so far as to do so is also consistent with UK law (See Home office guidance “Request for Mutual Legal Assistance in Criminal Matters – Guidelines for Authorities outside of the United Kingdom March 2022). In the event that a person is summonsed to attend court to give evidence following the making of a Mutual Legal Assistance the rules of evidence and procedure applicable to England and Wales will prevail and these include that an individual may choose to remain silent by exercising their right against self-incrimination. Similarly, the Court will be obliged to take into account whether if at all the request or evidence sought breaches the witnesses’ Convention rights (Regina (Hafner and another) v City of Westminster Magistrates Court 2009 1 WLR 1005 (which dealt with rights to privacy).

12. Describe your own personal experience(s) as a judge that are relevant to the topic of our focus this year, whether it be presiding over an extradition hearing (a request to extradite an accused person to another country in order to be prosecuted in that other country), or receiving evidence in a court proceeding in your country from a witness who is testifying from another country

and with the help of court officials in that other country, or helping to arrange for a witness in a court proceeding in another country to testify from a place in your own country, or responding to a request for assistance from an international court such as The Hague, or something else. These are just examples of things that you may have experienced; they are not meant to be exhaustive.

No significant personal experience. The reply given to this same question in the 2023 3rd Study Commission applies namely

“My own experience is limited to a witness giving evidence via link from Australia. Necessary consents were obtained. The evidence did not require the witness to refer to documents nor video playback (which could cause issues where evidence is to be given via a remote link). Timetabling the evidence was the principal issue. Otherwise, the remote link worked well.

Extradition requests are generally handled by Senior District Judges in Westminster Magistrates Court. I have sought the views of Paul Goldspring Senior District Judge (Chief Magistrate) for England Wales to share his own experiences of handling extradition cases. He has also very helpfully provided assistance in formulating some of the above answers – in particular those relating to extradition. He comments as follows:

My personal experience of the above law and procedures is largely in the extradition sphere. In the first instance courts MLA tends to be requests for the provision of evidence within the requesting states trial process, it is not rare but is not something I personally do a lot of. By contrast I have heard many 100’s of extradition hearings, many with live link applications and the taking of evidence from abroad.

In the 30 months I have been Chief Magistrate this has included the taking of evidence over the link from Japan, Montenegro, Serbia, Mexico, Sint Maarten and the USA amongst many others.

The extradition requests from Japan, Montenegro, Sint Maarten and Mexico were the first ever extradition proceedings for those countries. The actual logistics of arranging the link, testing it works and the technical know-how needed are handled by HMCTS admin staff but from the judges’ perspective issues surrounding objections to exercising our jurisdiction in another State, case management and timing are all for the judges consideration.

The current law on receiving witness evidence from abroad in these proceedings, despite case law, is uncertain and presents a challenge to the judge but when permission is granted and / or not deemed necessary the process is an extremely useful case management and evidential tool.

In the Japanese proceedings for example I was able to receive evidence from the Director of Prisons in the MOJ without him coming to the UK, given his remit and availability; without it the case would likely still be ongoing. I received expert evidence in relation to prison conditions in Japan and on their law and procedures, the challenge was seeking to show they do not comply with international norms on Human rights and in particular Articles 3 and 6 of the ECHR.”

Tim Smith

Chairman of the Criminal Sub-Committee of HM Council of Circuit Judges

Judges' Council of England and Wales

8th August 2024



Precursor chemical export and import authorisation

Licences issued pursuant to EC Regulation 111/2005 (as amended by The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 [GB only])

With effect from 1 January 2021 GB- Northern Ireland and GB- EU Member State trade (and vice versa in both cases) is subject to the requirements in this table. All applications for GB- NI and NI-GB trade must be made to the Home Office. Both importer and exporter must separately apply for a licence, where needed, according to this table

Exporting

Importing

Table 1 UN (Vienna) 1988 Convention

Category 1 Drug Precursor Chemicals- All substances
Category 2A-Drug Precursor Chemicals All substances
Category 2B Drug Precursor Chemicals Phenylacetic Acid Potassium Permanganate

Individual consignment authorisation required for exports to:

Pre-Export Notifications (PEN) required (allow at least 17 working days processing time) for export to:

All Counties

Individual consignment authorisation required for imports from:

All countries

Table 2 UN (Vienna) 1988 Convention

Category 2B Drug Precursor Chemicals Anthranilic Acid Piperidine
Category 3 Drug Precursor Chemicals Acetone Ethyl Ether Methyl Ethyl Ketone (MEK) Toluene
Category 3 Drug Precursor Chemicals Hydrochloric Acid Sulphuric Acid
Category 4 Drug Precursor Chemical Preparations Ephedrine (Medicinal preparations) Pseudoephedrine (Medicinal preparations)

All Countries

All countries, with the following exceptions;
Northern Ireland, EU Member States, China (Anthranilic Acid only),Indonesia (Anthranilic Acid only), South Africa (Anthranilic Acid only), Thailand (Anthranilic Acid only), USA (Piperidine only),

Afghanistan, Antigua & Barbuda, Argentina, Australia, Benin, Bolivia, Brazil, Canada, Cayman Islands, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Ghana, Guatemala, Haiti, Honduras, India, Jordan, Kazakhstan, Lebanon, Madagascar, Malaysia, Maldives, Mexico, Nigeria, Oman, Pakistan, Paraguay, Peru, Philippines, Republic of Korea, Republic of Moldova, Russian Federation, Saudi Arabia, Tajikistan, Turkey, United Arab Emirates, United Republic of Tanzania, Uruguay and Venezuela

Bolivia, Chile, Colombia, Ecuador, Peru, Russian Federation, Turkey and Venezuela

All Countries

Authorisation not required

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