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Information-gathering under article 32, paragraph 5, of the United Nations Convention against Transnational Organized Crime

Draft needs assessment tool on liability of legal persons and jurisdiction

Note by the Secretariat

I. Implementation of the Convention

1. The purpose of this draft tool is to provide guidance in assessing what should be done by a State Party in order to ensure that the full potential of the Organized Crime Convention can be realized. The Working Group on Technical Assistance may wish to discuss how the draft tool could be further developed to make it useful in the delivery of technical assistance, in particular in assessing the needs of States for technical assistance. Experts are requested to provide concrete comments on the proposed indicators and questions in the thematic areas contained in the Conference Room Paper. The comments received will be taken into consideration in the further development of the tool in a consultative process.

2. The Organized Crime Convention requires action by the States Parties to harmonize their legislation with the Convention requirements. Art. 34(1) of the Convention calls upon each State Party to take "the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention."

3. In its resolution 6/4, entitled "Implementation of the provisions on technical assistance of the United Nations Convention against Transnational Organized Crime", the Conference noted that technical assistance is a fundamental part of the

* CTOC/COP/WG.2/2014/1.

V.14-06281 (E)

work carried out by the United Nations Office on Drugs and Crime to assist Member States in the effective implementation of the Organized Crime Convention and the Protocols thereto, and welcomed the work of the Working Group of Government Experts on Technical Assistance.

4. The seventh session of the Working Group on Technical Assistance recommended, inter alia, that UNODC should continue to provide coordinated technical assistance to States to ensure the effective implementation of the Convention and the Protocols thereto. The Working Group further recommended that UNODC should continue the development of technical assistance tools, for the Convention and the Protocols thereto and on specialized issues, including mutual legal assistance and extradition1

5. The tool consists of sets of indicators and questions designed to enable experts from international organizations, non-governmental organizations, national governments as well as relevant institutions, in particular policy makers and legislators, to conduct a comprehensive assessment of the implementation of the Organized Crime Convention. This includes:

(a) Identifying gaps in the existing legislation and its implementation;

(b) Facilitating the formulation and development of technical assistance projects that adequately respond to the gaps and needs identified; and

(c) Facilitating the development of performance indicators for evaluating progress in implementation.

II. Criminalization (establishment of specific conduct as criminal offences)

6. The Convention calls for the establishment of four forms of conduct as criminal offences, when committed intentionally:

(a) Participation in an organized criminal group (art. 5);

(b) The laundering of the proceeds of crime (art. 6);

(c) Corruption (art. 8); and

(d) Obstruction of justice (art. 23).

7. The way in which conduct is established as a criminal offence varies between jurisdictions. Art. 11(6) of the Convention specifically stresses the principle that “the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party”. However, the criminal offences must be established by legislative measures and not simply by other

[1] Report on the meeting of the Working Group of Government Experts on Technical Assistance held in Vienna from 28 to 30 October 2013 (CTOC/COP/WG.2/2013/5).

measures, although these "other measures" may supplement the proscribing legislation (A/55/383/Add.1, para. 9).[2]

8. All of these four offences are relatively new, in the sense that they had not been universally criminalized before the Organized Crime Convention entered into force. Furthermore, the States that had already established, for instance, corruption or obstruction of justice as criminal offences before the Convention entered into force, had used definitions that varied extensively among jurisdictions. For this reason, any apparent similarities in the concepts used between such pre-existing law and the text of the Convention, may prove to be misleading. National law should be carefully compared with the text of the Convention. The scope of the conduct criminalized need not be exactly the same as that required by the Convention, as long as the full range of conduct required by the Convention is criminalized.

9. ***The scope of criminalization.*** Although the Convention and the Protocols explicitly deal with transnational organized crime, the Convention requires each State Party to criminalize these four different forms of conduct even if there is no transnational element or organized criminal group involved. According to art. 34(2),

> "The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group."

10. It follows from this, for example, that the criminalization of corruption in each State Party should extend equally to purely domestic cases, as well as to transnational cases, and to the payment of a bribe by an individual person acting alone as well as by a member of an organized criminal group.

11. ***Statutes of limitation.*** The law of many countries establishes maximum time periods during which certain actions may be brought, for example the maximum period (generally from the date on which the offence is alleged to have been committed) during which a suspect may be charged with the offence. Should a State Party use such statutes of limitation, the Organized Crime Convention requires that a long statute of limitation be established for the offences covered by the Convention, in particular, when alleged offenders are evading the administration of justice (art. 11(5)).

12. In this context, the Convention itself does not define what is meant by a "long" statute of limitations. The appropriate length of the statute of limitations is determined in relation to the general length of such statutes of limitations in the State Party in question, bearing in mind, at the same time, the seriousness of these offences, as well as the fact that their investigation often requires considerable time.

13. ***Level of sanctions.*** The Convention does not require that the criminalization incorporate a specific level of sanctions: for example, that the offence be punishable

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[2] Draft Convention against Transnational Organized Crime, General Assembly Document A/55/383/Add.1 titled *Addendum, Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols, 21 March 2001*.

by a certain number of years of imprisonment. The determination of the proper level of sanctions is left to each State Party, in view of its general penal policy. However, according to art. 11(1), each State Party is required to make the commission of any of the four offences specified by the Convention "liable to sanctions that take into account the gravity of that offence."

14. The level of sanctions will also generally be a factor in international cooperation. Many States will agree to a request for international cooperation (such as extradition and mutual legal assistance) only if the maximum sentence that is applicable to the offence in question is above a certain level, such as two years of imprisonment.

Participation in an organized criminal group (art. 5)

15. Criminalization of participation in an organized criminal group is a relatively new concept in responding to organized crime. The establishment of such offences target the enhanced public safety threats posed by organized criminal groups who engage in or facilitate the commission of crime. The Convention provides for two different approaches for criminalizing participation in an organized criminal group, or a combination of the two. One is based on the concept of conspiracy (a concept widely used in common law countries), and the other on the concept of criminal association (a concept that emerged in civil law countries).

16. ***Conspiracy.*** The offence based on the concept of conspiracy is defined in art. 5(1)(a)(i) as follows:

> "Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group."

17. ***Criminal association.*** The offence based on the concept of criminal association is defined in art. 5(1)(a)(ii) as follows:

> "Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
>
> (a) Criminal activities of the organized criminal group;
>
> (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".

18. If the State in question decides on the "conspiracy" approach, the key normative indicators of implementation are the following:

- The law recognizes the concept of conspiracy, and, accordingly, agreeing with one or more other persons to commit a serious crime is defined as a criminal offence;
- The concept of conspiracy extends to agreement on the commission of any serious crime "for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit";

- Serious crime is defined by the Convention as an offence that is punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;
- The concept may be conditional on the person actually taking action to carry out the agreement, or the action involves an organized criminal group;
- The legal framework is in place to allow the knowledge, intent, aim, purpose or agreement referred to in article 5(1) to be inferred from objective factual circumstances.

19. If the State in question decides on the "criminal association" approach, the key normative indicators of implementation are the following:

- Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in the criminal activities of the organized criminal group, and in 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, is defined as a criminal offence;
- The law recognizes the concept of "organized criminal group";
- Such concept of "organized criminal group" encompasses at least the elements specified in art. 2(a) of the Convention (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 serious crimes or offences established in accordance with the Convention or any of the protocols to which the State is a party, in order to obtain, directly or indirectly, a financial or other material benefit);
- The mental element (mens rea) is general knowledge of the criminal nature of the group or at least one of its criminal activities or objectives;
- In respect 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;
- The legal framework is in place to allow the knowledge, intent, aim, purpose or agreement referred to in article 5(1) to be inferred from objective factual circumstances.

Most jurisdictions require proof of fault for criminal offences.

Some legal systems admit the concept of "strict liability", where certain forms of conduct would be criminalized regardless of whether or not an accused intended the outcome. Strict liability offences are negligence based and require evidence that the accused's conduct was a departure from the standard of a reasonable person. If it has been established beyond a reasonable doubt that the accused has engaged in the prohibited conduct, the onus then shifts to the accused to show that they acted with due diligence.

However, in other countries, the concept of strict liability is not acceptable under criminal law. A system of administrative offences may then be considered to

complement criminal offences in order to address harmful conduct which does not require proof of mens rea.

20. Regardless of which of the above two approaches are selected, art. 5(1)(b)) requires criminalization of the following forms of participation:

> "Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group."

21. In respect of participating in criminal activities, as covered by art. 5(1)(b), the question of the mental element arises also indirectly, in respect of the activity that is organized, directed, aided, abetted, facilitated or counselled.

22. The key performance indicators of implementation of this approach are the following:

- How many cases of participation in an organized criminal group have been reported?
- How many of these cases have been cleared[3]?
- How many cases have been forwarded to the prosecutorial service for the presentation of charges?
- How many prosecutions have resulted in a conviction/acquittal?

23. Additional questions:

- What factors lead to successful investigations/prosecutions? Please elaborate on promising practices.
- What problems or challenges were encountered?

The laundering of proceeds of crime (art. 6)

24. The concept of laundering the proceeds of crime (in the context of drug trafficking) was first incorporated into a United Nations treaty in connection with the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances,[4] and it is a relatively new concept. The United Nations Convention against Transnational Organized Crime expands the scope of laundering the proceeds of crime to include a broad category of predicate offences.

25. Art. 6 of the Convention requires the criminalization of two types of conduct, when committed intentionally:

(a) conversion or transfer of the proceeds of crime (art. 6(1)(a)(i)); and

(b) concealment or disguise of the proceeds of crime (art. 6(1)(a)(ii)).

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[3] For purposes of this paper, "cleared" means that an arrest has been made or the police have "solved" the crime.

[4] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, Vienna.

26. Art. 6 also requires, subject to the basic concepts of the legal system, the criminalization of two further types of conduct, when committed intentionally:

(a) acquisition, possession or use of the proceeds of crime (art. 6(1)(b)(i)); and

(b) participation in, association with or conspiracy to commit, attempt to commit, aiding, abetting, facilitating and counselling the commission of the laundering of the proceeds of crime (art. 6(1)(b)(ii)).

27. In respect to all four offences related to laundering the proceeds of crime, knowledge, intent or purpose, required as an element, may be inferred from objective factual circumstances.

28. If required by fundamental principles of the domestic law of a State Party, it may be provided, that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence. Thus, in such a State Party, for example, a public official, who had accepted a bribe and then intentionally concealed the proceeds of this offence, might be found guilty of passive bribery, but would not be found guilty of the separate offence of laundering the proceeds of crime, (i.e. "self-laundering").

29. The key normative indicators of implementation of the criminalization of money-laundering are the following:

- The conversion, transfer, concealment or disguise of the proceeds of crime is defined as a criminal offence;
- The scope of "proceeds of crime" includes any property derived from or obtained, directly or indirectly, through the commission of a predicate offence;
- The scope of "predicate offences" includes at least all offences that are punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. If the legislation of the State Party sets out a list of specific predicate offences, this list shall include, at a minimum, a comprehensive range of offences associated with organized criminal groups;
- The scope of "predicate offences" includes the offences of participation in an organized criminal group, corruption and obstruction of justice, as established in accordance with articles 5, 8 and 23 of the Convention;
- In addition, the scope of "predicate offences" has been expanded to "the widest range of predicate offences";
- The scope of "predicate offences" includes also offences committed outside of the jurisdiction of the State Party, to the extent that relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article, had it been committed there;
- The scope of "property" includes all assets, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets;
- Knowledge, intent and purpose can be established through inference from objective factual circumstances.

30. The key implementation questions relevant to the criminalization of money-laundering are the following:

- Does domestic law criminalize the conversion, transfer or concealment of property, or the disguise of its true nature, source, location, disposition, movement or ownership, where the person in question knew that such property represents the proceeds of crime?
- Does domestic law criminalize the acquisition, possession or use of property, where the person in question knew that such property represents the proceeds of crime?
- Do these offences apply to the proceeds derived from all serious crimes? If so, do predicate offences include offences committed both within and outside the national territory? If committed outside the national territory, does the double criminality requirement apply?
- Does liability for the offences cover intentionally, knowingly or negligently engaging in the prohibited conduct? Can strict liability be applied to the offence?
- Does liability for the offences extend to participating in, attempting to commit, conspiring to commit, aiding, abetting, facilitating, and counselling the commission of these offences?
- What are the penalties for these offences?
- Are the money-laundering provisions applicable to the persons who committed the predicate offence (self-laundering) or are predicate offences and money-laundering punished separately?

31. The key performance indicators of implementation of the criminalization of money-laundering are the following:

- How many money-laundering cases have been reported?
- How many of these cases have been cleared?
- How many cases have been forwarded to the prosecutorial service for the presentation of charges?
- How many prosecutions have resulted in a conviction/acquittal?

32. Additional questions:

- What factors lead to successful investigations/prosecutions? Please elaborate on promising practices.
- What problems or challenges were encountered?

Corruption (art. 8)

33. Art. 8(1) of the Convention requires the criminalization of two types of conduct, when committed intentionally:

> “(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or

entity, in order that the official act or refrain from acting in the exercise of his or her official duties;" (active bribery)

"(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties." (passive bribery)

34. In addition, each State Party shall also take such measures as may be necessary to establish as a criminal offence, and subject to the basic concepts of its legal system, participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of an offence of corruption.

35. Similar criminalizations, as well as many other measures, are called for by the United Nations Convention against Corruption.[5]

36. In order to prevent corruption, art. 9 of the Organized Crime Convention requires that State Parties adopt legislative or other measures, as appropriate and consistent with the legal system of the State Party, in order to:

(a) promote integrity;

(b) prevent, detect and punish corruption of public officials; and

(c) ensure effective action by officials.

37. Art. 9(2) requires that States Parties provide anti-corruption authorities with sufficient independence to deter undue influence.

38. The key normative indicators of implementation of the criminalization of corruption are the following:

- The promise, offering or giving to a public official of an undue advantage in order that the official act or refrain from acting in the exercise of his or her official duties (active bribery), is defined as a criminal offence;
- The solicitation or acceptance by a public official of an undue advantage, in order that the official act or refrain from acting in the exercise of his or her official duties (passive bribery), is defined as a criminal offence;
- The promising, offering or giving of an undue advantage, and respectively the solicitation or acceptance of an undue advantage, may be direct or indirect, and may be for the official in question or another person or entity;
- The desired purpose of corruption includes both action and refraining from action by the official in the exercise of his or her official duties;
- The concept of "undue advantage" is defined to include both tangible or intangible advantage;
- The concept of "public official" is defined in domestic law;

[5] United Nations Convention against Corruption adopted by General Assembly Resolution 58/4 of 31 October 2003, New York.

- The conduct is criminalized also when committed by a person who provides a public service, as defined in domestic law and as applied in the criminal law of the State Party in which this person performs the function;
- Consideration is given to extending the concept of "public official" to include a foreign public official or international civil servant;
- Complicity in corruption is criminalized;
- Consideration is given to establishing other forms of corruption as criminal offences.

39. The key implementation questions relevant to the criminalization of corruption are the following:

- Are the following activities criminalized pursuant to domestic law?[6] If so, under which laws are these activities criminalized (criminal code, specific laws or other)? How are the offences defined, in respect of both the objective (conduct of the accused) and the subjective (mental element, mens rea) elements?[7]
  - Active and passive bribery, complicity in bribery offences and other forms of corruption;
  - Embezzlement, misappropriation or other diversion of property by a public official;
  - Bribery of foreign public officials and officials in public international organizations;
  - Trading in influence;
  - Abuse of functions;
  - Illicit enrichment; and
  - Bribery in the private sector.
- Are there special offences to criminalize the following?
  - Payment of bribes to government officials and politicians for preferential treatment (for example, to receive a concession, permit or licence; or to avoid reporting restrictions, overlook petty infringements, ignore illegal activities);
  - Payment of bribes in order to avoid prosecution or administrative intervention for non-compliance with laws and regulations;
  - Financial extortion by officials;
  - Favouritism (that is, favourable decisions by officials with the tacit understanding that the recipient will extend a favour in return, financially or otherwise);
  - Cronyism (that is, decisions by officials that inappropriately benefit friends and relatives); and

[6] These offences are defined in the United Nations Convention against Corruption.

[7] See the box on p. 15.

- Manipulating bidding processes or divulging bidding information to preferred contractors.

- Does liability for the offences cover intentionally, knowingly or negligently engaging in the prohibited conduct? Can strict liability be applied? Does liability for the offences extend to participation in, attempting to, conspiring to, aiding, abetting, facilitating and counselling the commission of these offences?
- What are the penalties for these offences?
- Is the liability of legal persons for the relevant offences established domestically? What is the nature of such liability?
- Has the State become a party to the United Nations Convention against Corruption?

40. The key performance indicators of implementation of the criminalization of corruption are the following:

- How many cases of active bribery/passive bribery have been reported?
- How many cases of embezzlement, misappropriation or other diversion of property by a public official have been reported?
- How many cases of bribery of foreign public officials and officials in public international organizations have been reported?
- How many cases of trading in influence have been reported?
- How many cases of abuse of functions by a public official have been reported?
- How many cases of illicit enrichment by a public official have been reported?
- How many cases of bribery in the private sector have been reported?
- How many cases of each of these respective offences have been cleared?
- How many cases have been forwarded to the prosecutorial service for the presentation of charges?
- How many prosecutions have resulted in a conviction/acquittal?
- Are financial disclosure forms required of public officials?
- What is the sanction for failure to file a required financial disclosure form?
- If such laws exist, have they been enforced? How frequently?
- Is filing a false financial disclosure form criminalized?

41. Additional questions:

- What factors lead to successful investigations/prosecutions? Please elaborate on promising practices.
- What problems or challenges were encountered?

Obstruction of justice (art. 23)

42. Art. 23 of the Convention defines obstruction of justice as follows:

> "(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by the Organized Crime Convention;
>
> (b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by the Organized Crime Convention."

43. The key normative indicators of implementation of the criminalization of obstruction of justice are the following:

- The use of physical force, threats or intimidation (coercive means) to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by the Organized Crime Convention is defined as a criminal offence;
- Said conduct extends not only to force, threats and intimidation, but also to the promise, offer or giving of an undue advantage (corrupt means) to induce false testimony or to interfere in the giving of testimony or the production of evidence;
- The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by the Organized Crime Convention, is defined as a criminal offence;
- Said conduct extends to force, threats and intimidation that interferes both directly and indirectly with the exercise of official duties by a justice or law enforcement official;
- The conduct extends to proceedings related to participation in an organized criminal group, money-laundering and corruption; "serious crime" as defined in art. 2(b) of the Convention; and to offences criminalized on the basis of any of the three Protocols to which the State is a party.

44. The key implementation questions relevant to the criminalization of the obstruction of justice are the following:

- Does the criminalization cover both coercive and corrupt means to obstruct justice?
- Does the criminalization cover inducing false testimony; interference in the giving of testimony or production of evidence; or interference with duties of law enforcement, prosecution or juridical authorities in the course of justice? This may include situations involving intimidation of jurors, court reporters, translators and others who may be associated with the administration of justice.
- Does the criminalization cover situations involving intimidation of other categories of public officials or others, such as reporters who uncover a crime story or human rights activists?

- Are the penalties applicable when threats are made to persons close to those administering justice?
- Does the criminalization cover the pretrial, trial and post-trial phase?

45. The key performance indicators of implementation of the criminalization of obstruction of justice are the following:

- How many cases of obstruction of offences have been reported?
- How many of these cases have been cleared?
- How many cases have been forwarded to the prosecutorial service for the bringing of charges?
- How many prosecutions have resulted in a conviction/acquittal?
- Have the sentences for obstruction of justice resulted in consecutive prison time (as opposed to concurrent) in addition to any underlying criminal conduct that resulted in conviction?

46. Additional questions:

- What factors lead to successful investigations/prosecutions? Please elaborate on promising practices.
- What problems or challenges were encountered?

III. Jurisdiction over offences

47. Art. 15(1) of the Convention requires that each State Party is able to assert jurisdiction over the offences established on the basis of the Convention, when these are committed

(a) in its territory,

(b) on board a ship flying its flag, and

(c) on board an aircraft registered under its laws.

48. In addition, under article 15(3), in cases where an alleged offender is in the territory of a State and the State does not extradite him or her solely on the ground that he or she is their national (see art. 16(10)), that State must be able to assert jurisdiction over the following conduct committed even outside its territory:

(a) Offences established in accordance with articles 5, 6, 8 and 23 of the Organized Crime Convention, when they involve an organized criminal group;

(b) Serious crime that involves an organized criminal group, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party; and

(c) Offences included in the Protocols to which States are parties.

49. Art. 15(2) and (4) of the Convention identify further grounds on the basis of which States Parties may consider assuming jurisdiction. According to art. 15(2), and subject to art. 4 of the Convention, a State Party may also establish its jurisdiction over any such offence when:

> "(a) The offence is committed against a national of that State Party;
>
> (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
>
> (c) The offence is:
>
> (i) One of those established in accordance with article 5, paragraph 1, of the Convention and is committed outside its territory with a view to the commission of a serious crime within its territory;
>
> (ii) One of those established in accordance with article 6, paragraph 1 (b) (ii), of the Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 6, paragraph 1 (a) (i) or (ii) or (b) (i), of the Convention within its territory."

50. According to art. 15(4) of the Convention, "each State Party may also adopt such measures as may be necessary to establish its jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her."

51. The key normative indicators of implementation of the provisions on jurisdiction over offences are the following:

- Jurisdiction has been established in accordance with the so-called territoriality principle (cases where the offence is committed in the territory of the State);
- Jurisdiction has been established in accordance with the so-called flag principle (cases where the offence is committed on board a vessel that is flying the flag of the State or an aircraft that is registered under the laws of the State at the time that the offence was committed);
- Jurisdiction has also been established over the offences of participation in an organized criminal group, money-laundering, corruption, and obstruction of justice; "serious crime" as defined in art. 2(b) of the Convention; and offences criminalized on the basis of any of the three Protocols to which the State is a party, when these are committed by its nationals outside of its territory.

52. The key implementation questions relevant to the provisions on jurisdiction over offences are the following:

- Subject to article 4 on the protection of sovereignty, jurisdiction has been established also in accordance with the following principles:
  - The passive nationality principle (art. 15(2)(a) of the Convention);
  - The active nationality principle (art. 15(2)(b) of the Convention);
  - The protection principle (art. 15(2)(c) of the Convention);
- Jurisdiction has been established in accordance with the principle "extradite or prosecute", or "*aut dedere aut judicare*" (art. 15(4) of the Convention).

- Some agreements, such as Security Council resolutions, may create a requirement on countries to establish jurisdiction over certain conduct. In some cases this may include universal jurisdiction.[8]
- Jurisdiction may have to extend over territorial waters or even high seas (see e.g. Convention on the Law of the Sea)

53. The key performance indicators of implementation of the provisions on jurisdiction over offences are the following:

- How many cases have been reported in which an offence, related to organized crime, was committed outside the territory of the State in question?
- In what proportion of these cases has the prosecutor brought charges after it was determined that the foreign territory was not prosecuting the case?
- What proportion of these cases have resulted in conviction/acquittal of the defendant?
- Have domestic courts examined the application of the Convention or its protocols in any judicial proceeding?

IV. Liability of legal persons

54. Art. 10 of the Organized Crime Convention requires the establishment of liability for legal entities, consistent with the State's legal principles, for the following:

(a) participation in serious crimes (as defined in art. 2(b) of the Convention) and in an offence criminalized on the basis of any of the three Protocols to which the State is a party, involving an organized criminal group;

(b) offences established in accordance with articles 5, 6, 8 and 23 of the Convention;

(c) Protocol offences, to which States are parties (art. 1(3) of each Protocol).

55. Art. 10(2) of the Convention provides that the liability required under art. 10 may be criminal, civil or administrative, and that sanctions must be effective, proportionate and dissuasive. The rationale of liability of legal persons is, that entities, on whose behalf or for whose benefit any offence was committed by one of their employees or agents, should be deemed criminally responsible on the basis of criminal law. Legal structures should not be used to shield individuals from liability. There are different models of liability of legal persons such as the attribution model and organizational fault model[9].

56. The key normative indicators of implementation of the provisions on the liability of legal persons are the following:

- Liability has been established for legal entities in accordance with art. 10;
- This liability may be criminal, civil or administrative;

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[8] See, for instance, Security Council Resolution S/RES/1267 (1999).

[9] See CTOC/COP/WG.2/2014/3.

- This liability is without prejudice to the criminal liability of the natural persons who have committed the offence; and
- The legal entity is subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, which take into account the gravity of the offence;

57. The key implementation questions relevant to the provisions on the liability of legal persons are the following:

- Can legal persons be held criminally responsible for participation in serious crimes and in an offence criminalized on the basis of any of the three Protocols to which the State is a party, involving an organized criminal group? If not, does administrative or civil liability exist?
- Which model of liability of legal persons (attribution/organization fault) is applied?
- Does the prosecution of the legal person prejudice the prosecution of individuals?
- What types of sanctions can be imposed on legal persons?
- If corporate criminal liability does not exist, is it possible to impose civil or administrative sanctions on corporations? What do the civil or administrative sanctions entail?
- Is it possible to seek confiscation of the corporation's assets?

58. The key performance indicators of implementation of the provisions on the liability of legal persons are the following:

- In how many cases of offences related to organized crime has a legal person been investigated?
- In what proportion of these cases has the prosecutor brought criminal charges?
- What proportion of these cases has resulted in conviction/acquittal of the legal person?
- Alternatively, in how many organized crime related cases have civil or administrative measures been directed against the legal person?
- In how many organized crime related cases has confiscation been directed against the legal person?
- Please elaborate on effective practices.