



# Conference of the Parties to the United Nations Convention against Transnational Organized Crime

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**Review of the implementation of the United Nations  
Convention against Transnational Organized Crime  
and the Protocols thereto: expert consultation on  
criminalization**

## **Criminalization within the scope of the United Nations Convention against Transnational Organized Crime and the Protocols thereto**

**Note by the Secretariat**

### **I. Criminal offences under the Convention and the Protocols thereto**

1. The United Nations Convention against Transnational Organized Crime<sup>1</sup> requires the criminalization of four basic offences (participation in an organized criminal group (article 5); the laundering of proceeds of crime (article 6); corruption (article 8); and obstruction of justice (article 23)) that are vital to the ability of offenders to operate efficiently, generate substantial profits and protect themselves from law enforcement authorities.

2. In the provisions on the scope of application of the Convention (article 3) it is stated that the Convention should apply to those offences where they are transnational in nature and involve an organized criminal group. However, the offences need to be criminalized in domestic law independently of the transnational nature or the involvement of an organized criminal group (article 34). The issues of whether an offence is transnational in nature or is committed with the involvement of an organized criminal group are relevant in the context of international cooperation, but making them elements of a domestic offence would unnecessarily hamper law enforcement.

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\* CTOC/COP/2008/1.

<sup>1</sup> United Nations, *Treaty Series*, vol. 2225, No. 39574.



3. In addition, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention,<sup>2</sup> requires parties to criminalize trafficking in persons (articles 3 and 5); the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the Convention,<sup>3</sup> requires parties to criminalize the smuggling of migrants (articles 3 and 6); and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the Convention,<sup>4</sup> requires parties to criminalize the illicit manufacturing of firearms, the illicit trafficking in firearms and the falsification or illicit removal of markings on firearms (articles 3 and 5).

4. Criminalizing offences as required by the Convention and its Protocols constitutes the cornerstone of coordinated efforts to counter transnational organized crime. It is not only the basis on which investigations and prosecutions are carried out, but is also crucial to successful international cooperation in criminal matters. Parties that have criminalized offences in compliance with the Convention and its Protocols will be in a position to meet the dual criminality requirement, thereby significantly facilitating the provision of extradition, mutual legal assistance and cooperation for the purposes of confiscation.

5. In its decisions 1/2, 1/5, 1/6 and 2/5, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime decided to include in its programme of work an examination of criminalization legislation adopted by parties in accordance with the Convention and its Protocols. Pursuant to such decisions, the Secretariat developed questionnaires on the implementation by parties and States signatories of the criminalization provisions contained in the Convention and its Protocols. The responses to that questionnaire received from States are reflected in the reports prepared by the Secretariat on that matter (see CTOC/COP/2005/2/Rev.2, CTOC/COP/2005/3/Rev.2, CTOC/COP/2005/4/Rev.2 and CTOC/COP/2006/8/Rev.1). Notes by the Secretariat were also prepared on the implementation of the Trafficking in Persons Protocol (CTOC/COP/2008/6), travel and identity documents (CTOC/COP/2008/13), matters related to the implementation of the Firearms Protocol (CTOC/COP/2008/14) and money-laundering (CTOC/COP/2008/15), to be addressed by the Conference in the framework of its expert consultations; the notes also include observations and possible questions on various criminalization issues for discussion by the Conference.

## **II. Application of the Convention to serious transnational crime involving an organized criminal group**

6. In addition to criminalizing the offences mentioned in paragraphs 1 and 3 above, the Convention covers all serious crime, defined as conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty (article 2), if it is transnational in nature and involves an organized criminal group.

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<sup>2</sup> Ibid., vol. 2237, No. 39574.

<sup>3</sup> Ibid., vol. 2241, No. 39574.

<sup>4</sup> Ibid., vol. 2326, No. 39574.

7. Pursuant to article 3 of the Convention, an offence is transnational in nature if:
  - (a) It is committed in more than one State;
  - (b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
  - (c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State;
  - (d) It is committed in one State but has substantial effects in another State.
8. That definition, which is already broad and flexible, has been broadened further by the articles of the Convention on international cooperation. In fact, an offence is considered to be transnational in nature if, pursuant to article 16 (extradition), the person who is the subject of the request for extradition is located in the territory of the requested State party and if, pursuant to article 18 (mutual legal assistance), victims, witnesses, proceeds, instrumentalities or evidence of offences are located in the requested State party.
9. In article 2 of the Convention, an organized criminal group is defined as a structured group of at least three 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, in order to obtain a financial or other material benefit. According to the interpretative notes for the official records (*travaux préparatoires*) of the negotiation of the Convention and the Protocols thereto, the term “structured group” in article 2 of the Convention is to be used in a broad sense so as to include non-hierarchical groups where the roles of the members of the group need not be formally defined.<sup>5</sup>
10. Flexibility in the interpretation of what makes an offence transnational in nature and of what constitutes an organized criminal group, in conjunction with a broad definition of what constitutes serious crime, ensure that the widest range of traditional, emerging and future forms of criminality can be encompassed by the Convention and that international law enforcement and judicial cooperation efforts may be triggered in relevant investigations and prosecutions. In that context, it may be useful to recall some of the work carried out by the United Nations Office on Drugs and Crime (UNODC) with respect to a number of emerging issues related to crime.

#### **A. Identity-related crime**

11. The transnational elements of identity-related crime were highlighted in the report of the Secretary-General on the results of the second meeting of the Intergovernmental Expert Group to Prepare a Study on Fraud and the Criminal Misuse and Falsification of Identity (E/CN.15/2007/8 and Add.1-3), which was submitted to the Commission on Crime Prevention and Criminal Justice at its sixteenth session pursuant to Economic and Social Council resolution 2004/26. In that report it was noted that identity-related crimes were often transnational in

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<sup>5</sup> United Nations publication, Sales No. E.06.V.5, p. 17.

nature, especially where computer and Internet technologies were used (E/CN.15/2007/8, para. 19, and Add.3, paras. 25 and 26).

12. That report also provided information on the links between identity-related crime and organized criminal groups. Organized criminal groups might use identity-related crime to protect their members and operations from surveillance of illicit activities and to carry out routine, non-criminal activities such as international travel. In addition, there was also evidence of the treatment of identity documents and information as an illicit commodity to be bought, sold or exchanged and of criminal groups becoming specialized, developing the expertise to fabricate increasingly sophisticated identity documents or exploit weaknesses in issuance schemes. Identity crimes that are transnational in particular tend to involve falsification or tampering with identification systems and documents, activities that require resources that are typically beyond the means of individual offenders but that are at the disposal of organized criminal groups. In addition, a substantial percentage of identity-related crime is associated with offences that involve travel and identity documents and that are committed with a view to facilitating organized criminal activities such as trafficking in persons and smuggling of migrants.

13. In the report, which focused on the development of appropriate legal responses, it was recognized that basing offences on abuses of identity represented a fresh approach for most States. It was stated that lawmakers needed to carry out extensive work to develop appropriate concepts, definitions and approaches to the criminalization of a range of conduct, including identity theft, identity fraud and other identity-related crimes. It was recommended that States consider the establishment of new identity-based criminal offences. In doing so, they should also take into consideration the definition of serious crime contained in article 2 of the Convention (E/CN.15/2007/8, para. 22).

14. In the report it was noted that the Organized Crime Convention, the United Nations Convention against Corruption<sup>6</sup> and, where applicable, the Convention on Cybercrime,<sup>7</sup> as well as the universal legal instruments against terrorism, appeared to provide an adequate framework and legal basis for the types of mutual legal assistance, extradition and other forms of international cooperation needed to deal with transnational cases of identity-related crime. As a result, it was recommended that Member States that had not yet done so should ratify or accede to and fully implement the Organized Crime Convention and that national law enforcement and other agencies responsible for organized crime should be encouraged to consider major cases of identity-related crime as a form of organized crime and be trained in the effective use of the Convention and its implementing legislation.

15. In its resolution 2007/20, entitled “International cooperation in the prevention, investigation, prosecution and punishment of economic fraud and identity-related crime”, the Economic and Social Council requested UNODC to provide legal expertise or other forms of technical assistance to Member States reviewing or updating their laws dealing with identity-related crime, in order to ensure that appropriate legislative responses were in place. It also encouraged Member States to ensure that their judicial and law enforcement authorities could cooperate more effectively in fighting identity-related crime, if necessary by enhancing mutual legal

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<sup>6</sup> United Nations, *Treaty Series*, vol. 2349, No. 42146.

<sup>7</sup> Council of Europe, *European Treaty Series*, No. 185.

assistance and extradition mechanisms, taking into account the transnational nature of such crime and making full use of the relevant international legal instruments, including the Convention (CTOC/COP/2008/13, para. 12).

16. In considering ways to implement Economic and Social Council resolution 2007/20, the Secretariat drew on the advice of a group of experts on identity-related crime.<sup>8</sup> At its first meeting, held in Courmayeur, Italy, on 29 and 30 November 2007, the group noted that, while several States were in the process of considering or establishing new criminal offences against identity abuses, others remained to be convinced that a new perspective on criminalization would constitute an improvement over existing offences such as fraud, forgery and impersonation. At the group's second meeting, held in Vienna on 2 and 3 June 2008, it was noted that criminalizing specific abuses of identity-related information might be more effective in relation to crimes committed with the use of technologies and the involvement of organized criminal groups since different stages of those kinds of offences were often carried out by offenders located in different jurisdictions; if specific identity-related offences were in place in every location where an offender was operating, each offender could be prosecuted in the jurisdiction where he or she had committed a crime. Criminalizing an activity for being preparation for another crime requires proof of that other crime, which may not exist or may only be available in another State. Thus, the existence of specific offences increases the likelihood that investigations and prosecutions will be successful and may alleviate some of the demands placed on overstretched international cooperation frameworks.

17. Also at its second meeting, the group concluded that it was likely that organized criminal groups were involved in the majority of serious transnational identity crime and identity-related crimes such as fraud. It therefore recommended that further deliberations focus on the development of materials to support the most effective use of the existing international legal instruments. It is also recommended that materials be developed, in consultation with the Conference, in order to assist legislators, investigators and prosecutors in ensuring that the Convention and its Protocols are available in appropriate cases and that investigators and prosecutors are equipped to use it.

## **B. Cybercrime**

18. In the Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice (General Assembly resolution 60/177, annex), Member States welcomed efforts to enhance existing cooperation to prevent, investigate and prosecute high-technology and computer-related crime and invited the Commission on Crime Prevention and Criminal Justice to examine the feasibility of providing further assistance in that area under the aegis of the United Nations, in partnership with other similarly focused organizations. They reaffirmed the importance of implementing existing instruments and of further developing national measures and international cooperation in relation to criminal matters, in particular against cybercrime.

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<sup>8</sup> The reports of the first and second meetings of the expert group are available on the UNODC website ([http://www.unodc.org/documents/organized-crime/Courmayeur\\_report.pdf](http://www.unodc.org/documents/organized-crime/Courmayeur_report.pdf) and [http://www.unodc.org/documents/organized-crime/Final\\_Report\\_ID\\_C.pdf](http://www.unodc.org/documents/organized-crime/Final_Report_ID_C.pdf)).

19. In its resolution 48/5, entitled “Strengthening international cooperation in order to prevent the use of the Internet to commit drug-related crime”, the Commission on Narcotic Drugs noted with concern the growing tendency of criminal groups to use modern technologies in their activities and to operate transnationally. In its resolution 16/2, entitled “Effective crime prevention and criminal justice responses to combat sexual exploitation of children”, the Commission on Crime Prevention and Criminal Justice recalled the Convention, recognized that sexual exploitation of children through sexually explicit images of children is a growing international problem and encouraged Member States to handle effectively and expeditiously requests for mutual legal assistance and extradition relating to crimes involving sexual exploitation of children.

20. The most common forms of cybercrime (such as computer-related fraud and forgery, as mentioned above with regard to identity-related crime, and content-related cybercrime) usually take place in more than a single jurisdiction, involve at least three actors and are committed with the aim of achieving some material or financial benefit. Concerning the use of the Internet for child sexual abuse and exploitation (criminal behaviour that is also covered by the Trafficking in Persons Protocol), there is evidence that an increasingly large proportion of related websites are of a commercial nature, generating significant proceeds for organized criminal groups. The interpretative notes to article 2 of the Convention<sup>9</sup> indicate that the words “in order to obtain, directly or indirectly, a financial or other material benefit” (which constitute an element of the definition of the term “organized criminal group”) should be understood broadly to include, for example, crimes in which the predominant motivation may be sexual gratification, such as the receipt or trade of materials by members of child pornography rings, the trading of children by members of paedophile rings or cost-sharing among ring members. In order to ensure that computer-related transnational organized crime is covered under the Convention, it is important that domestic legislation adequately criminalize such offences by qualifying them as forms of serious crime and that the sanctions provided for reflect the gravity of such acts.

21. Article 29 (Training and technical assistance) of the Convention requires parties to develop specific training programmes for law enforcement personnel, including prosecutors and investigating magistrates. Such programmes should deal, inter alia, with methods used in combating transnational organized crime committed through the use of computers, telecommunications networks or other forms of modern technology. UNODC is exploring the possibility of assisting criminal justice systems in addressing computer-related crime and, in partnership with relevant international organizations, has started developing training materials on the investigation and prosecution of computer-related crime, including child sexual exploitation through the Internet.

### **C. Environmental crime**

22. In carrying out its mandates, UNODC has done considerable work in recent years to examine the involvement of organized criminal groups in different forms of environmental crime. With regard to the trafficking in protected species of flora and

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<sup>9</sup> United Nations publication, Sales No. E.06.V.5, p. 17.

fauna, a report of the Secretary-General on the subject was submitted to the Commission on Crime Prevention and Criminal Justice at its twelfth session, held from 13 to 22 May 2003. Among the findings contained in the report were several useful and reliable indicators for assessing the probability that organized criminal groups were involved in that form of crime (E/CN.15/2003/8, para. 29).

23. The increased involvement of organized criminal groups in trafficking in protected species of wild flora and fauna was also noted in the Bangkok Declaration, in which Member States were called upon to take effective measures to strengthen international cooperation to combat such crime, bearing in mind the relevant international legal instruments.

24. Furthermore, in its resolution 16/1, entitled “International cooperation in preventing and combating illicit international trafficking in forest products, including timber, wildlife and other forest biological resources”, the Commission on Crime Prevention and Criminal Justice noted that international trafficking in forest products, including timber, wildlife and other forest biological resources, harvested in contravention of national laws, was often perpetrated by individuals and groups, including organized criminal groups that might operate transnationally and might also be engaged in other illicit activities. The Commission expressed concern that such trafficking had an adverse environmental, social and economic impact in many countries and encouraged Member States to cooperate at the bilateral, regional and international levels to prevent and combat such trafficking through the use of international legal instruments such as the Convention.

25. Pursuant to resolution 16/1, UNODC, in cooperation with the Government of Indonesia, organized a meeting of the Open-ended Expert Group on International Cooperation in Preventing and Combating Illicit International Trafficking in Forest Products, including Timber, Wildlife and Other Forest Biological Resources, in Jakarta from 26 to 28 March 2008. The report of that meeting (E/CN.15/2008/20) was submitted to the Commission on Crime Prevention and Criminal Justice at its seventeenth session.

26. At its meeting, the Expert Group recognized the inextricable links between the criminal activities under consideration and organized crime, and assessed the problems arising from the involvement of organized crime in the commission of forest-related illegal practices. The Expert Group stressed the need for national authorities to develop appropriate law enforcement and criminal justice responses, as well as to adopt policies aimed at tackling related challenges. Where reference was made to relevant criminal legislation at the domestic level, it was underscored that the sanctions foreseen did not reflect the gravity of the crimes under discussion. Therefore, the experts stressed that any action aimed at developing new or streamlining existing legal frameworks needed to be founded on the notion that the offences targeted were of a serious nature. That approach could produce substantial deterrent effects domestically and further promote international cooperation in criminal matters, including through the application of the Convention (E/CN.15/2008/20, paras. 15 and 18).

27. The Expert Group was of the view that mechanisms of cooperation such as extradition and mutual legal assistance, as well as law enforcement and cross-border cooperation, including the conducting of joint investigations, could be used efficiently in that context and that the Convention, *inter alia*, could be considered as

an appropriate legal basis. The Expert Group also noted that the use of other international legal instruments such as the Convention on Biological Diversity,<sup>10</sup> the Convention on International Trade in Endangered Species of Wild Fauna and Flora<sup>11</sup> and the non-legally binding instrument on all types of forests should be promoted, as appropriate (E/CN.15/2008/20, paras. 23 and 28 (g)).

#### **D. Illicit trafficking in cultural property**

28. In its resolution 2008/23 of 24 July 2008, the Economic and Social Council recalled the Bangkok Declaration, in which the increased involvement of organized criminal groups in the theft of and trafficking in cultural property had been noted. The Council reaffirmed the fundamental importance of implementation of existing instruments and the further development of national measures and international cooperation in criminal matters, calling upon Member States to take effective action to that end.

29. In the same resolution, the Economic and Social Council, alarmed at the growing involvement of organized criminal groups in all aspects of trafficking in cultural property, stressed the importance of fostering international law enforcement cooperation and, in particular, the need to increase the exchange of information and experiences in order for competent authorities to operate in a more effective manner. The Council also stressed that the entry into force of the Organized Crime Convention had created a new impetus in international cooperation to counter transnational organized crime, which would lead to innovative and broader approaches to dealing with the various manifestations of such crime, including trafficking in cultural property.

30. Also in that resolution, the Economic and Social Council urged Member States and relevant institutions to strengthen and fully implement mechanisms to strengthen international cooperation, including mutual legal assistance, in order to combat trafficking in cultural property, including trafficking committed through the use of the Internet, and to facilitate the recovery, return or restitution of cultural property. The Council requested UNODC to convene, in close cooperation with the United Nations Educational, Scientific and Cultural Organization, an open-ended intergovernmental expert group meeting in order to submit to the Commission on Crime Prevention and Criminal Justice at its eighteenth session relevant recommendations on protection against trafficking in cultural property. Pursuant to that resolution, such a meeting will be organized by UNODC, in cooperation with the International Scientific and Professional Advisory Council, in Courmayeur, Italy, in December 2008.

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<sup>10</sup> United Nations, *Treaty Series*, vol. 1760, No. 30619.

<sup>11</sup> *Ibid.*, vol. 993, No. 14537.



### III. Questions for possible discussion by the Conference

31. At its fourth session, the Conference may wish to discuss the following questions:

(a) With regard to criminalization of the four basic offences mentioned in paragraph 1 above (articles 5, 6, 8 and 23 of the Convention):

(i) What challenges have been encountered in criminalizing participation in an organized criminal group in accordance with the Convention?

(ii) What practical impact do the offences of conspiracy and criminal association have on the fight against transnational organized crime?

(iii) What experience has been gained in criminalizing and prosecuting the acquisition, possession and use of proceeds of crime?

(iv) Are emerging forms of serious organized crime adequately established as predicate offences to the offence of laundering of proceeds of crime?

(v) What practical impact do enhanced criminalization and prosecution of corruption offences have on the fight against transnational organized crime?

(vi) What experience has been gained in criminalizing and prosecuting obstruction of justice in the context of organized crime?

(vii) With regard to which offences covered by the Convention and which forms of serious crime is a lack of dual criminality most often identified as an obstacle to international cooperation?

(b) With regard to ancillary offences:

(i) What challenges have been encountered in establishing liability for aiding, abetting and participating in the commission of offences covered by the Convention and its Protocols?

(ii) What challenges have been encountered in criminalizing attempted and preparatory acts to commit offences covered by the Convention and its Protocols?

(iii) What experience has been gained in establishing liability of legal persons for participating in offences covered by the Convention and its Protocols? What good practices exist for defining the conditions establishing the liability of a legal person?

(c) With regard to prosecution and sanctions:

(i) What experience has been gained in using aggravating circumstances to ensure adequate sentencing in relation to offences covered by the Convention and its Protocols?

(ii) What considerations should be taken into account in order to ensure that sanctions for the commission of offences covered by the Convention and its Protocols are effective, proportionate and dissuasive?

(iii) How can one identify the most appropriate venue for prosecuting offences covered by the Convention and its Protocols?

- (d) With regard to emerging forms of transnational organized crime:
    - (i) What experience has been gained in developing effective legislative responses against identity-related crime?
    - (ii) What experience has been gained in developing effective legislative responses against cybercrime?
    - (iii) What experience has been gained in developing effective legislative responses against trafficking in natural resources?
    - (iv) What experience has been gained in developing effective legislative responses against trafficking in cultural property?
    - (v) Have the international cooperation provisions contained in the Convention been useful for addressing emerging forms of transnational organized crime? Have there been situations where lack of adequate criminalization has hampered the provision of required international cooperation in criminal matters?
    - (vi) Are there new trends in the activities of organized criminal groups that require enhanced attention by the international community and strengthened criminalization at the domestic level?
  - (e) In general: what legislative assistance, including for the development of model legislation, is needed with respect to offences covered by the Convention and its Protocols and to emerging forms of transnational organized crime?
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