20 September 2012

English only

Conference of the Parties to the United Nations Convention against Transnational Organized Crime
Sixth session
Vienna, 15-19 October 2012
Item 3 of the provisional agenda*
Other serious crimes, as defined in the Convention, including new forms and dimensions of transnational organized crime

The notion of serious crime in the United Nations Convention against Transnational Organized Crime

Note by the Secretariat

I. Introduction

1. In its resolution 64/179, the General Assembly recommended that the Conference of the Parties to the United Nations Convention against Transnational Organized Crime organize a high-level segment during its fifth session to discuss new and emerging forms of crime and ways and means of enhancing the implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto. At the high-level segment, held on 18 October 2010, many States underlined the great adaptability of the Organized Crime Convention, which provided a broad definition of serious crime and it was noted that the Convention therefore constituted an invaluable and effective instrument in tackling new and emerging forms of crime. Furthermore, in its resolution 5/1, the Conference noted with concern the emergence, in the past decade, of new forms and dimensions of transnational organized crime, noted previously by the Conference in its decision 4/2, in which it was emphasized that the Convention, as a global instrument with wide adherence, offered the broadest scope of cooperation to address existing and emerging forms of transnational organized crime.

* CTOC/COP/2012/1.

V.12-56101 (E)

2. The present document has been prepared with the view to contributing to deliberations by the Conference on item 3 of the provisional agenda entitled "Other serious crimes, as defined in the Convention, including new forms and dimensions of transnational organized crime". The document summarizes relevant issues that the Conference may wish to consider in relation to the application of the notion of serious crime, and it analyses the definition of serious crime, and its relevance, for the purposes of determining the scope of application of the Convention, as well as of articles 5, 6, 10, 16, 18 and 23 of the Convention. The document also refers to resolutions, adopted by United Nations bodies, which provide for specific offences that may also be considered by States as serious crimes in the context of the Organized Crime Convention.

II. The notion of serious crime and its use in the Convention

A. The definition of serious crime

3. Serious crime is defined in article 2, subparagraph (b), of the Organized Crime Convention as meaning "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty." The definition of serious crime thus does not contain any other requirements in relation to the gravity, motivation or content of the offence, other than the amount of criminal penalty associated to it. In other words, according to and for purposes of the Organized Crime Convention, any conduct for which the maximum deprivation of liberty provided by the applicable domestic criminal legislation is of at least four years, is considered a serious crime. This more flexible approach means that there is no exhaustive or indicative list of offences that would provide for a uniform approach among States parties. Depending on the penalty, an offence may be considered a serious crime in one State and not in others.

4. It is important to stress that the definition of "serious crime" is valid only for purposes of the application of the Organized Crime Convention, and it does not require a State party to introduce a definition of serious crime in its national laws.

5. The notion of serious crime is instrumental in determining the scope of application of the Organized Crime Convention, pursuant to article 3, paragraph 1. Serious crime is also a central element of the definition of an organized criminal group, contained in article 2, subparagraph (a): "Organized criminal group" shall mean 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 offences to which these model legislative provisions apply, in order to obtain, directly or indirectly, a financial or other material benefit."

Serious crime as an element of the offences covered by the Convention

6. The determination as to whether certain offences fall under the definition of serious crime is of direct relevance in establishing the offences of criminalization of participation in an organized criminal group, laundering of proceeds of crime and obstruction of justice (articles 5, 6 and 23), the liability of legal persons (article 10), and the scope of international cooperation in criminal matters, including extradition and mutual legal assistance (articles 16 and 18).

7. Therefore, the notion of serious crime is relevant in the establishment of the offence of participation in an organized criminal group, set forth in article 5 of the Organized Crime Convention, including organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

8. Whether specific offences fit the definition of serious crime is also essential in the context of the criminalization of the laundering of proceeds of crime, as set forth in article 6. States parties, whose legal system requires the inclusion of predicate offences, have the obligation to anticipate that all serious crime be considered as predicate offences of the laundering of proceeds of crime.

9. In addition, the criminalization of obstruction of justice, provided for in article 23, is mandatory "in relation to the commission of offences covered by this Convention", including serious crime.

10. More generally, it should be emphasized that, in order for the Organized Crime Convention to apply to specific categories of offences, in addition to the offences established by the Convention and its Protocols, these offences should also carry a maximum penalty of deprivation of liberty of four years or more.

11. The notion of serious crime is, therefore, instrumental in enabling the application of the Organized Crime Convention to a wide variety of offences in different countries, in addition to the offences specifically regulated by the Convention and its Protocols. The additional conditions that the offence be transnational and involve an organized criminal group, ensure that the scope of the Convention remains in the sphere of transnational organized crime.

12. Although the focus of the Convention is on transnational organized crime, according to article 34, paragraph 2, national laws criminalizing the laundering of criminal proceeds (article 6), corruption (article 8) or obstruction of justice (article 23) and the various Protocol offences shall be established independently of the transnational nature or the involvement of an organized criminal group. National laws criminalizing participation in an organized criminal group (article 5) should not require the conduct to be transnational in nature.

The notion of serious crime in the scope of application of extradition and mutual legal assistance

13. Articles 16 on extradition and 18 on mutual legal assistance extend the scope of the provisions on international cooperation in criminal matters.

14. With regard to extradition, article 16 also applies to serious crime involving an organized criminal group, where "the person who is the subject of the request for extradition is located in the territory of the requested State Party". This implies that the condition of transnationality of the offence, as described in article 3, paragraph 2, is not strictly necessary for the application of article 16. Furthermore, article 16 requires the application of the dual criminality principle.

15. Furthermore, under article 18, States parties are required to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention, including serious crime, where the requesting State Party has reasonable grounds to suspect that the offence is transnational in nature and that it involves an organized

criminal group. The transnationality requirement in this provision includes situations where victims, witnesses, proceeds, instrumentalities or evidence of such offences are located on the territory of the requested State party. This allows for assistance to be provided in the early phases of investigations, when the evidentiary basis of the commission of an offence covered by the Convention and its Protocols, may still be weak, and it also provides for an enlarged notion of transnationality of the offence. It should be noted that the Convention enables States to provide assistance, at their discretion, in the absence of dual criminality.

The notion of serious crime in establishing the liability of legal persons

16. Article 10 creates an obligation for each State party "to adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group". Such a liability may be criminal, civil or administrative.

17. Other provisions that refer to measures in relation to offences covered by the Convention are also subject to the scope given to serious crime committed by organized criminal groups in national law. This is the case for inter alia confiscation measures, as defined in articles 12 to 14 of the Organized Crime Convention, and the establishment of jurisdiction, as outlined in article 15.

B. Summary of the negotiating history of the notion of serious crime

18. Given the function of the notion of serious crime in the finally agreed upon text of the Convention, it is understandable that the negotiations were complex on this point. In particular, the importance of discussing the limits of the scope of application of the Convention clearly emerged from the early phases of its negotiation. The different proposals could be divided in two different approaches: one that contained a list of offences, and one that considered the seriousness of the offences, based on the hypothetical level of punishment.

19. During the second session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, held in March 1999, reference was made to "a list of offences, which could be either indicative or exhaustive, […], [to] be included either in an annex to the Convention or in the *Travaux Préparatoires*. That list, however, would need to be supplemented with proposals from States".[1]

20. At the request of the Committee, the Secretariat prepared "an analytical study on provisions of national laws concerning serious offences punishable by deprivation of liberty"[2] in relation to specific provisions of the draft Convention. The results of that study were based on responses to a questionnaire, which included reference to offences, defined in national laws, commonly committed by organized criminal groups, such as murder, rape, abduction, theft, robbery, burglary, handling

---

[1] A/AC.254/4/Rev.2, p. 2, footnote 3. See also United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York, NY: United Nations, 2006), pp. 33-35.

[2] A/AC.254/22, para. 1.

stolen property, extortion, trafficking in drugs, embezzlement, bribery, fraud, counterfeiting of money, money-laundering, trafficking in human beings, smuggling of firearms, participation in a criminal organization, and forming or leading a criminal organization. According to the findings of the study, while most States still recognized such a concept in their legal systems, about one third of the forty-five responding States had specific provisions concerning serious offences in their penal legislation. Furthermore, it could be noted that the typical minimum term of imprisonment for such serious offences ranged from one to five years, with the average being three years. The study concluded that the concept of "serious offence" seemed to be well established in the legislation and practice of States.

21. An examination of the *Travaux Préparatoires* makes it possible to identify the lack of agreement on the approach based on a list of offences during the negotiations. While some delegations supported an illustrative list of offences, others were of the view that a more restrictive list was needed.[3] The various proposals on lists of offences included, inter alia, the illicit traffic in narcotic drugs and psychotropic substances, money-laundering, trafficking in persons, in particular women and children, illicit trafficking in and transport of migrants, counterfeiting of currency, illicit trafficking in or theft of cultural objects, illicit trafficking in or theft of nuclear material, acts of terrorism, illicit manufacturing of and trafficking in firearms.[4]

22. Consensus could not be reached on which offences would have needed to be included in such a list. Thereafter, the main elements of the draft provisions on the definition of serious crime and on the scope of the Convention were introduced and remained basically unchanged until the final text of the Convention was adopted by the United Nations General Assembly. At the seventh session of the Ad Hoc Committee, in January 2000, the selection of the number of years for the definition of the scope of serious crime, for the purpose of the Convention, was finally agreed upon.

C. The application of the Organized Crime Convention to specific offences

23. It appears that there is no uniform approach at the global level to dealing with all the offences commonly associated with activities of organized criminal groups. The Conference of the Parties to the Organized Crime Convention, the Commission on Crime Prevention and Criminal Justice and other United Nations bodies have explicitly indicated that certain offences are related to organized crime and that States should consider establishing them as serious offences, as defined in the Organized Crime Convention.

24. The General Assembly referred to specific categories of offences when it strongly expressed the view, in the preamble to its resolution 55/25 of 15 November 2000, containing the adopted text of the Organized Crime Convention and of two of its Protocols, that the Convention would "constitute an effective tool and the necessary legal framework for international cooperation in combating,

---

[3] See *Travaux Préparatoires*, p. 12, footnote 18; p. 20, footnote 1; p. 23, footnote 12; and p. 24, footnote 16.

[4] See *Travaux Préparatoires*, pp. 19-24 and 33-35.

inter alia, such criminal activities as money-laundering, corruption, illicit trafficking in endangered species of wild flora and fauna, offences against cultural heritage and the growing links between transnational organized crime and terrorist crimes".

25. In deliberations during the fourth and fifth sessions of the Conference, delegates referred to a broad range of offences as new forms and dimensions of organized crime. This included the illicit trafficking in cultural property, environmental crimes (such as illegal logging, illegal fishing, illegal mining and illicit trafficking in wildlife), cybercrime, identity theft, piracy, trafficking in fraudulent medicines and trafficking in human organs. It should be noted that those references during deliberations are not an indication of consensus on the status of those offences.

26. The resolution 5/7 adopted by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, entitled "Combating transnational organized crime against cultural property", reaffirmed that the Organized Crime Convention "constitutes an effective tool for international cooperation in combating criminal offences against cultural property".

27. In its resolution 66/180 of 19 December 2011, the General Assembly established a direct relationship between the implementation of the Organized Crime Convention and the "strengthening of crime prevention and criminal justice responses to protect cultural property, especially with regard to its trafficking, for the purpose of providing the widest possible international cooperation to address such crimes, including for extradition, mutual legal assistance and the confiscation and return of stolen cultural property to its rightful owner". More specifically, in paragraph 6 of that resolution, the General Assembly urged "Member States to consider, among other effective measures within the framework of their national legislation, criminalizing activities related to all forms and aspects of trafficking in cultural property and related offences by using a broad definition that can be applied to all stolen, looted, unlawfully excavated and illicitly exported or imported cultural property." The Assembly also invited States "to make trafficking in cultural property, including stealing and looting at archaeological and other cultural sites, a serious crime, as defined in article 2 of the United Nations Convention against Transnational Organized Crime, with a view to fully utilizing that Convention for the purpose of extensive international cooperation in fighting all forms and aspects of trafficking in cultural property and related offences". In that resolution, the General Assembly also welcomed resolution 5/7 adopted by the Conference, as well as resolution 2010/19 of 22 July 2010 of the Economic and Social Council, which contained similar language and reaffirmed previous resolutions of the Council.

28. Furthermore, on 26 July 2012, the Economic and Social Council adopted resolution 2012/19 entitled "Strengthening international cooperation in combating transnational organized crime in all its forms and manifestations". In that resolution, Member States were invited "within the framework of their domestic legal systems and international obligations, to consider reviewing their legal and regulatory arrangements in order to provide for the criminalization of the production and distribution of falsified and fraudulent products linked to organized crime". In paragraph 8, Member States were urged "to consider, among other effective measures, within the framework of their national legal systems, criminalizing activities related to all forms and aspects of trafficking in cultural property and related offences by using a broad definition […] and to apply the relevant provisions

of the United Nations Convention against Transnational Organized Crime". In paragraph 10 of that resolution, Member States were urged "to consider, among other effective measures, in accordance with their national legal systems, addressing different forms and manifestations of transnational organized crime that have a significant impact on the environment, including illicit trafficking in endangered species of wild fauna and flora".

29. The Economic and Social Council, in its resolution 2011/36 of 28 July 2011, invited "Member States to consider making illicit trafficking in endangered species of wild fauna and flora a serious crime, in accordance with their national legislation and article 2, paragraph (b), of the United Nations Convention against Transnational Organized Crime, especially when organized criminal groups are involved".

30. In its resolution 2009/22 of 30 July 2009, the Council mentioned the importance of the Organized Crime Convention and its Protocols, as well as of the United Nations Convention against Corruption, in preventing and combating economic fraud and identity-related crime. In resolution 2007/20 of 26 July 2007, the Council extended the scope of the language used in its resolution 2004/26 of 21 July 2004, and encouraged "Member States to take into account the use of terms and scope of application set out in articles 2 and 3 of the United Nations Convention against Transnational Organized Crime in establishing or updating, as appropriate, offences relating to the criminal misuse and falsification of identity".

31. In resolution 2009/24 of 30 July 2009, the Council further referred to the utility of certain conventions, including the Organized Crime Convention, as a vital tool for assisting States in the administration of justice, particularly in the prosecution of kidnapping cases. The General Assembly, in resolution 61/179 of 20 December 2006, declared itself convinced "that the United Nations Convention against Transnational Organized Crime provides a legal framework when necessary for international cooperation with a view to preventing, combating and eradicating kidnapping". In its resolution 2003/28 of 22 July 2003, the Council invited "Member States that [had] not yet done so to adopt the legislative or other measures necessary to establish kidnapping as a serious crime in their domestic legislation, in accordance with the definition of 'serious crime' in the United Nations Convention against Transnational Organized Crime". This provision reinforced similar language contained in paragraph 2 of resolution 2002/16 of 24 July 2002 of the Council.

32. In its resolution 21/2, the Commission on Crime Prevention and Criminal Justice called upon Member States to criminalize maritime piracy and armed robbery at sea under their domestic law, and it "[e]ncouraged Member States to continue cooperating with each other, using relevant and applicable bilateral or multilateral instruments for law enforcement cooperation, mutual legal assistance and extradition, inter alia, the United Nations Convention against Transnational Organized Crime and its Protocols".

33. In its resolution 20/6, the Commission further underscored "the potential utility of the United Nations Convention against Transnational Organized Crime in reinforcing international cooperation in the fight against trafficking in fraudulent medicines, including their illicit production and distribution".

D. Conclusions

34. The inclusion of the notion of serious crime in the Organized Crime Convention enables the application of the Convention to a broad range of offences in a flexible manner. Moreover, new forms and dimensions of transnational organized crime fall under the scope of the Convention, considerably enhancing the use of the Convention, in particular for purposes of international cooperation.

35. States may wish to consider the following issues:

(a) Whether the approach based on the seriousness of the offences, as an element of the concept of organized criminal group, has influenced policymakers, including in promoting legislative changes at national level;

(b) Whether the scope of the Organized Crime Convention has facilitated international cooperation in specific areas of transnational organized crime, which had previously been identified by the Conference of the Parties to the Organized Crime Convention or the Commission on Crime Prevention and Criminal Justice;

(c) Whether a study should be undertaken to collect relevant legislation from a large number of States parties from different geographical regions and legal traditions in order to identify the main approaches and trends with regard to serious crime and the types of offences, which are broadly covered by the definition of serious crime in the Convention.