



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

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## Working Group of Government Experts on Technical Assistance

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**Application of the Organized Crime Convention for  
preventing and combating transnational organized  
crimes that affect the environment**

## Working Group on International Cooperation

Vienna, 23–27 May 2022

Item 3 of the provisional agenda\*\*

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for preventing and combating transnational  
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## Application of the Organized Crime Convention for preventing and combating transnational organized crimes that affect the environment

Background paper prepared by the Secretariat

### I. Introduction

1. Crimes that affect the environment are widely recognized as among the most profitable crimes and have manifold negative consequences, some of which are irreversible. They contribute to the acceleration of climate change and undermine sustainable development by depriving Governments of vast revenues that could otherwise be used to support development and by undercutting legitimate businesses and markets. Such crimes can also undermine the rule of law and good governance and fuel geopolitical conflicts, thus posing challenges to the efforts of the international community to achieve the 2030 Agenda for Sustainable Development.<sup>1</sup> Moreover, illegal activities that affect the environment, biodiversity or natural resources are often lucrative and involve comparatively low risks of detection and conviction rates for criminals and organized criminal groups.<sup>2</sup>

2. The scale and nature of crimes that affect the environment have been well recognized in different international forums. While there is no commonly accepted definition of environmental crime, numerous discussions and resolutions within the United Nations system have recognized crimes that affect the environment as a growing threat to peace and sustainable development. In that connection, such crimes have been discussed at United Nations congresses on crime prevention and criminal justice since 1990 and have also been the focus of resolutions adopted by the General Assembly, the Economic and Social Council and the Commission on Crime Prevention and Criminal Justice, as well as other treaty-based intergovernmental

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\*\* CTOC/COP/WG.2/2022/1–CTOC/COP/WG.3/2022/1.

<sup>1</sup> United Nations Environment Programme (UNEP), *The State of Knowledge of Crimes that Have Serious Impacts on the Environment* (Nairobi, 2018), p. XVII.

<sup>2</sup> International Criminal Police Organization (INTERPOL) and UNEP, *Strategic Report: Environment, Peace and Security – A Convergence of Threats* (2016), p. 53.



bodies, such as the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and the Conference of the States Parties to the United Nations Convention against Corruption.

3. Two important intergovernmental processes have recently been launched and run almost in parallel, with the aim of gaining a better understanding of the efforts needed at the national, regional and global levels to combat the scale and sophistication of criminal activities that harm the environment. The first one is linked to the Commission on Crime Prevention and Criminal Justice and was mandated by the General Assembly in its resolution 76/185, on preventing and combating crimes that affect the environment. In the resolution, the Assembly called upon the Commission to hold during the intersessional period expert discussions on preventing and combating crimes that affect the environment in order to discuss concrete ways to improve strategies and responses to effectively prevent and combat those crimes and to strengthen international cooperation at the operational level on that matter. Pursuant to the resolution, expert discussions were held from 14 to 16 February 2022 and focused on three thematic pillars: (a) preventing crimes that affect the environment; (b) combating crimes that affect the environment; and (c) strengthening international cooperation to address crimes that affect the environment.<sup>3</sup>

4. With regard to the second process, in its resolution 10/6, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime requested the Working Group of Government Experts on Technical Assistance and the Working Group on International Cooperation to hold a joint thematic discussion on the application of the United Nations Convention against Transnational Organized Crime for preventing and combating transnational organized crimes that affect the environment and to make recommendations for consideration by the Conference at its eleventh session, within their mandates, in order to promote the practical application of the Convention. Building on the aforementioned expert discussions held by the Commission, the joint thematic discussion will, for its part, on the basis of its mandate, serve two objectives: to examine and assess criminalization approaches to addressing transnational organized crimes that affect the environment, as well as issues relating to international cooperation to combat those crimes, including the practical application of the relevant provisions of the Organized Crime Convention; and to assist the two working groups in their endeavour to make pertinent recommendations for consideration by the Conference.

5. The present background paper has been prepared to substantively support the joint thematic discussion to be held by the two working groups, in accordance with Conference resolution 10/6. To that end, the paper focuses in particular on criminalization approaches and international cooperation in order to shed light on a basic affirmation contained in the resolution: that the Organized Crime Convention constitutes an effective tool and an essential part of the legal framework for preventing and combating transnational organized crimes that affect the environment and for strengthening international cooperation in this regard.

## **II. Legal responses and the protection of the environment through criminal law**

6. The scope and implementation of legal responses to crimes that affect the environment vary significantly at the local, national, regional and global levels. Since the second half of the twentieth century, environmental law has seen a significant proliferation of international texts. The legal framework governing environmental matters in international law is defined by over 500 multilateral environmental agreements and related instruments. The multilateral environmental agreements may be regional, global, sectoral or cross-sectoral in nature.

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<sup>3</sup> See <https://indd.adobe.com/view/e041a20d-2eb1-4ff1-8167-c1c0853ee58c>.

7. The lack of a universal definition of environmental crime is arguably a result of the lack of overall coherence among this tangle of supranational texts. It can also be attributed to the diversity of crimes that affect the environment and their interlinkages with other criminal activities, as well as the dearth of knowledge of such crimes and the low priority often accorded to them. Moreover, it has been acknowledged that the criminal enforcement dimension of the international regulatory framework for the protection of the environment has not been fully utilized.<sup>4</sup> An indicative example is the Convention on the Protection of the Environment through Criminal Law,<sup>5</sup> which was the first international convention to criminalize acts causing or likely to cause environmental damage, but which, after almost 24 years, has not yet entered into force, owing to the insufficient number of ratifications. States therefore have wide discretion in regulating and enforcing these environmental offences.

8. Deploying criminal law as a tool for environmental protection within national discretion is not as straightforward as might initially be assumed. One must overcome obstacles that are less problematic in relation to other traditional categories of offences in criminal law, for example, offences against persons, property, the public order and the State. The first challenge is that, given the huge range and diversity of environmental harms, it is very difficult to achieve, for purposes of legal certainty, the clarity and precision traditionally demanded for “mainstream” criminal offences.

9. The main stumbling block in developing a general criminal law text lies in defining in clear and precise terms, to avoid arbitrariness (principle of the legality of criminal offences and penalties), what constitutes damage to the environment, the point at which such damage becomes grave and serious (principle of necessity of punishment) and the “price” of nature (principle of proportionality of punishment).<sup>6</sup> Resorting to loosely defined environmental offences with a very broad scope is equally problematic, as they give executive and judicial authorities too much discretion to determine which environmentally harmful acts should or should not be subject to punishment. Not only does that conflict with the basic principles of the rule of law, but it also fails to depict clearly the particular forms of environmental harm that need to be singled out as worthy of criminal condemnation and punishment.

10. The limitations of the traditional criminal law method might be overcome, at least partially, by resorting to what are frequently referred to as regulatory criminal offences. This entails that criminal enforcement is only linked to infringements of administrative licences and licence conditions. While this licensing approach undoubtedly has immense value and makes a major contribution to environmental protection, it can be criticized as diminishing or masking the criminal nature of the most serious incidents of environmental harm. Under this approach, the criminal offence is seen and treated as a mere breach of an administrative licensing condition, rather than an inherently criminal act. As such, it avoids much of the public condemnation and moral opprobrium generally associated with the latter.<sup>7</sup>

11. By contrast, many countries have introduced a “toolbox approach”, providing for remedies such as administrative fines as an alternative to the criminal law, thus allowing criminal law to play its role as *ultimum remedium*. The rationale for this approach is grounded in particular on the empirical finding that criminal sanctions have rarely been imposed in practice.<sup>8</sup>

<sup>4</sup> John A.E. Vervaele and Daan P. van Uhm, “Criminal justice and environmental crime: how to tackle organized crime and ecocide?”, International Association of Penal Law, (n.d).

<sup>5</sup> Council of Europe, *European Treaty Series*, No. 172.

<sup>6</sup> European Committee on Crime Problems, Working paper on protecting the environment through criminal law, document CDPC(2020)9, p. 2.

<sup>7</sup> Andrea Schieber, “Environmental criminal law”, Criminal Justice Notes, 20 December 2019. Available at <https://blogs.kent.ac.uk/criminaljusticenotes/>.

<sup>8</sup> Michael Faure, “The development of environmental criminal law in the EU and its member States”, *Review of European Community and International Environmental Law*, vol. 26, No. 2 (2017), p. 145. See also Michael Faure and others, “Conclusions and recommendations”, Study in the framework of the European Union Action to Fight Environmental Crime (EFFACE) research project (2016).

12. The enforcement of criminal (or administrative) offences against the environment presents challenges that are not normally associated with other traditional offences, such as offences against persons or property. Despite the wide range of risks and harms pertaining to offences that affect the environment, such offences often fail to prompt the required response from Governments and law enforcement authorities, which may be explained in part by the fact that they are often wrongly perceived as victimless crimes.

13. To address the above-mentioned challenges in using criminal law to protect the environment and to tackle the multifaceted challenges posed by crimes that affect the environment, both national and transnational, it may be necessary for criminal law mechanisms to follow an approach that is both sectoral and systemic, to cover the full range of conduct and activities that cause or may cause the most serious damage to the environment. Furthermore, a key consideration is the establishment of a clear relationship between penal provisions and the legislation that governs the management of environmental resources. This is necessary to ensure that the different pieces of legislation are interlinked, complementary and consistent. Moreover, consistency and harmonization of legislation within countries and across regions are critical to closing loopholes and preventing the displacement of crime to areas with lesser penalties. This could also improve cross-border investigations and judicial cooperation.<sup>9</sup>

14. The need to also protect the environment through criminal law has been particularly evident in the legal context of the European Union, where such protection has matured over the last 20 years, owing in particular to the jurisprudence of the Court of Justice of the European Union<sup>10</sup> and also to a legislative process that culminated in the adoption of Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.<sup>11</sup> Directive 2008/99/EC expressly recognized the worthiness of the protection of the environment as a legal good through criminal law (recital 3).<sup>12</sup> Upon completion of the evaluation of Directive 2008/99/EC, which concluded that its practical impact was limited, the European Commission adopted in December 2021 a proposal for a new draft European Union directive aimed at strengthening compliance with European Union environmental laws through the introduction of new criminal offences, increased sanctions and better enforcement.<sup>13</sup>

### III. Criminalization aspects

#### A. In search of convergence and common denominators

15. At the expert discussions held by the Commission on Crime Prevention and Criminal Justice in February 2022, a number of speakers highlighted the need to address the lack of global consensus on a scale for classifying the seriousness of crimes that affect the environment. A number of speakers underscored that it was crucial to jointly discuss how to codify and sanction such crimes in accordance with the principle of proportionality, as there was such a wide variety of crimes that could not be treated in a universal manner.

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<sup>9</sup> See also *World Wildlife Crime Report: Trafficking in Protected Species* (United Nations publication, 2020), p. 20.

<sup>10</sup> Court of Justice of the European Union, *Commission of the European Communities v. Council of the European Union*, Case C-176/03, Judgment, 13 September 2005 and Case C-440/05, Judgment, 23 October 2007.

<sup>11</sup> *Official Journal of the European Union*, L 328, 6 December 2008, pp. 28–37.

<sup>12</sup> See also Chiara Perini, “The protection of the environment through criminal law” in *Environmental Loss and Damage in Comparative Law Perspective*, Barbara Pozzo and Valentina Jacometti, eds., European Environmental Law Forum Series (n.p., Intersentia, 2021), pp. 182 ff.

<sup>13</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, document COM(2021) 851 final.

16. The fact that there is a diversity of domestic criminal law systems employing differing legal notions, combined with the sectoral nature of legislation intended to cover the multiple environmental aspects at the national and international levels, makes it difficult to ensure alignment in legislative approaches. Given such normative diversity, common denominators need to be identified for achieving, to the fullest extent possible, the convergence and consistency of criminalization-based responses to today's environmental challenges and to the growth of crimes that affect the environment.

17. Such common denominators could include the following: (a) offences regarding non-compliance of a criminal and/or administrative nature, established in accordance with specific rules and complemented by legislative schedules; (b) specific offences according to environmental sector, with a focus on illegal acts such as trafficking and illegal possession; (c) alignment with, or adjustment of, other existing criminal offences, as appropriate, in the light of the interlinkages between crimes that affect the environment and other offences, including transnational organized crime, money-laundering and corruption; and (d) treatment of serious offences that affect the environment as "serious crimes" as defined in the Organized Crime Convention.

## **B. Offences at the national level focusing on wildlife crime, crimes in the fisheries sector, waste trafficking and illegal mining**

18. While there are other typologies recognized at the national level, the present background paper focuses mainly on the following selected crimes that affect the environment: wildlife crime, crimes in the fisheries sector, waste trafficking and illegal mining. The complexity and often transnational nature of these crimes necessitate a multidisciplinary and incremental legislative approach designed to build upon and complement existing initiatives of the international community, including international instruments such as the Organized Crime Convention.

19. In 2018, UNODC published the *Guide on Drafting Legislation to Combat Wildlife Crime*. The objective of the guide is to assist States in their efforts to protect wildlife by criminalizing serious wildlife-related offences and strengthening criminal justice and law enforcement capacities. To complement the guide, UNODC has also commissioned the drafting of a series of similar guides for Member States on drafting legislation to combat crimes in the fisheries sector, waste trafficking and illegal mining. The development of each of these guides progressed significantly in 2021 and they are due to be published in 2022. This initiative is part of a larger effort launched by UNODC focused on the operational implementation of the Organized Crime Convention to prevent and combat crimes that affect the environment. States will be able to use these legislative guides as practical tools when drafting, amending or reviewing national legislation within their constitutional and legislative frameworks.

### **Legislative schedules**

20. All of the crimes under discussion in the present section are complex and often involve different perpetrators. In order to be used effectively by courts, prosecutors and other relevant stakeholders, provisions establishing relevant criminal offences should be sufficiently clear and provide legal certainty, and should not neglect the complexity of the underlying issues. A recommended approach that can be followed in a cross-cutting and horizontal manner to achieve this balance and facilitate the coherence and consistency of legislative responses is the use of legislative schedules. Such schedules are components of and supplements to legislative instruments. They are used to provide for details that, for reasons of usability, cannot be adequately addressed in the main body of the legislation. Depending on the legal system in question, the schedules could be included in primary legislative instruments such as statutes, or subordinate or delegated legislative instruments such as regulations.

21. In the field of wildlife crime, legislative schedules may include schedules of wildlife (which form the basis of the offences related to specimens of listed species);

schedules of prohibited and regulated weapons, devices and methods; and schedules of areas designated for protection.<sup>14</sup>

22. In relation to crimes in the fisheries sector, legislative schedules may refer to protected fish, prohibited destructive fishing practices and prohibited and regulated gear, and marine areas designated for protection. Moreover, the use of waste schedules, namely, lists of waste streams belonging to a particular category, is recommended for inclusion in primary legislative instruments on waste trafficking. In addition, to facilitate the drafting of legislation to counter illegal mining and trafficking in metals and minerals, it is useful to classify the different types of metals and minerals into broad categories through the use of schedules.

### **Basic offences of trafficking and illegal possession**

23. The criminalization of domestic and cross-border trafficking is an essential component of criminal laws aimed at combating crimes that affect the environment. In the field of wildlife crime, the aforementioned UNODC *Guide on Drafting Legislation to Combat Wildlife Crime* contains a model provision containing two offences of trafficking in wildlife: a basic offence and an optional addendum establishing a stronger standard for criminalization.<sup>15</sup> Similarly, the forthcoming UNODC guides on drafting legislation to combat crimes in the fisheries sector, waste trafficking and illegal mining will also include model provisions and, where appropriate, relevant optional guiding addenda on the offences of trafficking in fish and fish products, waste trafficking and trafficking in metals and minerals, respectively.

24. Another form of criminal conduct that is found as common ground in the categories of offences under discussion (with the exception of waste trafficking) and is subject to further tailor-made adjustments to fit the specificities of each category is that of illegal possession. The *Guide on Drafting Legislation to Combat Wildlife Crime* recommends two relevant model provisions, one relating to illegal possession of a specimen listed in a particular wildlife schedule and one relating to possession of a specimen obtained in contravention of the State's wildlife legislation. The rationale of the latter model provision is to avoid the proliferation of illicit markets by addressing the demand for illicit wildlife specimens, imposing liability on recipients who acquire such illicit property. In that regard, it mirrors the content of article 6, paragraph 1 (b) (i), of the Organized Crime Convention.<sup>16</sup>

25. Similar model provisions, subject to their specific context, will be recommended in the forthcoming UNODC guides on drafting legislation to combat crimes in the fisheries sector and illegal mining.

## **C. The linkages between crimes that affect the environment and other offences**

26. At the expert discussions held by the Commission on Crime Prevention and Criminal Justice in February 2022, a number of speakers underscored that the industrial scale of crimes that affect the environment was driven by transnational organized criminal groups, and that those serious crimes did not occur in isolation, but were often associated with other serious crimes, such as money-laundering and tax evasion, fraud, violence and threats of violence, bribery and corruption.

27. In its resolution 10/6, the Conference of the Parties to the Organized Crime Convention expressed its alarm at research indicating that crimes that affect the environment had become some of the most lucrative transnational criminal activities and were often closely interlinked with different forms of crime and corruption, and

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<sup>14</sup> United Nations Office on Drugs and Crime (UNODC), *Guide on Drafting Legislation to Combat Wildlife Crime* (Vienna, 2018), p. 6.

<sup>15</sup> *Ibid.*, p. 27.

<sup>16</sup> *Ibid.*, pp. 24–25.

that money-laundering and the illicit financial flows derived from them might contribute to the financing of other transnational organized crimes and terrorism.

28. Earlier, in 2019, the Conference of the States Parties to the United Nations Convention against Corruption, in its resolution 8/12, called upon States parties to strengthen anti-corruption frameworks, to promote ethical practices, integrity and transparency, and to endeavour to prevent conflicts of interest, with the aim of preventing corruption as it relates to crimes that have an impact on the environment.

29. Research has found clear indications of the convergence between crimes that affect the environment and other crimes. Some crimes, such as corruption, facilitate crimes that affect the environment, while others, such as financial crime, are by-products. Money-laundering practices can be used to facilitate crimes that affect the environment because they disguise and/or conceal the sources of illegal proceeds derived from such crimes.<sup>17</sup> Moreover, the analysis of trends and patterns relating to crimes that affect the environment shows that such crimes are also intrinsically linked to organized crime. The connection between crimes that affect the environment and organized criminal groups also indicates links with other forms of trafficking, such as trafficking in drugs and arms. Furthermore, organized criminal groups feed on the illegal workforce, using forced labour to commit crimes that affect the environment.<sup>18</sup> In relation to wildlife crimes, UNODC found that the means of transportation and the routes used, as well as the concealment methods and the logistics involved, were often interlinked with other forms of organized crime.<sup>19</sup>

30. Against this background, it is critical that States adopt appropriate legislative and other measures to address ancillary offences that are interlinked with crimes that affect the environment. In doing so, they can rely on existing penal provisions at the domestic level establishing criminal liability for such offences. With the aim of achieving convergence to the fullest extent possible and/or closing possible legal loopholes, they can further rely on the requirements set forth in the corresponding criminalization provisions of multilateral instruments such as the Organized Crime Convention (arts. 5, 6, 8 and 23) and the Convention against Corruption (the criminalization provisions in chapter III).

31. In conclusion, a key opportunity for stepping up efforts against crimes that affect the environment is offered by enabling the application of existing laws and enforcement and prosecution systems to other forms of serious crime involved and raising the awareness of this opportunity among enforcement entities of Member States.<sup>20</sup>

#### **D. Crimes that affect the environment and the notion of “serious crime”**

32. In its resolution 10/6, the Conference of the Parties to the Organized Crime Convention called upon States parties to the Convention to make crimes that affect the environment, in appropriate cases, serious crimes, in accordance with their national legislation, as defined in article 2, subparagraph (b), of the Convention, in order to ensure that, where the offence is transnational in nature and involves an organized criminal group, effective international cooperation can be afforded under the Convention (para. 4).

33. However, at the expert discussions held by the Commission on Crime Prevention and Criminal Justice in February 2022, speakers identified a number of challenges faced in effectively combating crimes that affect the environment, including the lack of prioritization of measures to address such crimes, and the fact that, in many jurisdictions, offences relating to crimes that affect the environment

<sup>17</sup> UNEP, *The State of Knowledge of Crimes*, p. 17.

<sup>18</sup> INTERPOL and UNEP, *Strategic Report: Environment, Peace and Security*, pp. 56–57.

<sup>19</sup> *World Wildlife Crime Report*, pp. 11 ff.

<sup>20</sup> UNEP, *The State of Knowledge of Crimes*, p. XIII.

were not deemed to be “serious crimes” within the meaning of the Organized Crime Convention, namely, “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty” (art. 2, subpara. (b), of the Convention).

34. The outstanding question is why many States parties to the Organized Crime Convention are not using such tools or concepts to address crimes that affect the environment. The answer likely lies in a combination of a lack of understanding of the nature of these crimes and their broader impact, insufficient prioritization and/or a lack of capacity or resources. Moreover, countries are at different stages of tackling the challenges posed by these crimes and have differing capacities to do so. It is therefore important to continue raising awareness of the added value of, and the benefits offered by, the qualification of an offence as “serious crime”, as defined in the Organized Crime Convention, in tackling crimes that affect the environment.

35. Already at the time of adoption of the Organized Crime Convention, the General Assembly referred specifically to, inter alia, illicit trafficking in endangered species of wild flora and fauna, when it expressed its strong conviction, in the preamble to its resolution 55/25 of 15 November 2000, that the Convention would constitute an effective tool and the necessary legal framework for international cooperation.

36. The great adaptability and flexibility of the Convention stems from the expansion of its scope of application beyond a predetermined and rigid list of offences.<sup>21</sup> In addition to the offences established in accordance with its provisions and the relevant provisions of its supplementary Protocols, the Convention can also be used to cover existing and emerging crimes, such as those affecting the environment, through the appropriate use of the concept of “serious crime”, bearing in mind the level of criminal penalty specified in the definition of serious crime in the Convention (a threshold of maximum deprivation of liberty of at least four years), on the understanding that the offence in question is transnational in nature and involves an organized criminal group (art. 3).

37. Moreover, many crimes that affect the environment meet the requirements of transnationality, as specified in article 3, paragraph 2, of the Convention.

38. Nevertheless, the Convention also requires each State party to criminalize certain conduct even if there is no transnationality or organized criminal group involved. Pursuant to article 34, paragraph 2, of the Convention, offences are to be established in the domestic law of each State party independently of whether they are transnational in nature or involve an organized criminal group, except with regard to the offence of participation in an organized criminal group set out in article 5.<sup>22</sup> This is of importance because not all crimes that affect the environment are transnational in nature. Relevant legislative responses are not based on a conception of crimes that affect the environment as “wrongs against another State”, but instead pursue the protection of the environment as an end in itself.

39. Apart from being instrumental in determining the scope of application of the Organized Crime Convention, pursuant to its article 3, paragraph 1, the notion of “serious crime” is also a central element of the definition of an organized criminal group contained in article 2, subparagraph (a), of the Convention. Furthermore, it is relevant in the establishment of the offence of participation in an organized criminal group (art. 5, para. 1 (a) (i) and (b), and para. 3).

40. Determining whether specific offences meet 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 of the Convention, which provides that States parties shall include as predicate offences all serious crime as defined in article 2,

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<sup>21</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (Vienna, 2016), para. 41 (b).

<sup>22</sup> *Ibid.*, paras. 44, 64 and 213. See also conference room paper CTOC/COP/2012/CRP.4, para. 12.



subparagraph (b), of the Convention, in addition to the specific offences established in accordance with the Convention (art. 6, para. 2 (b)).

41. Against this background, for the Organized Crime Convention to apply to serious forms of crime that affect the environment, it is necessary that national legislators provide for penalties of maximum deprivation of liberty of at least four years. In addition, in some States, the designation of predicate offences for the purpose of money-laundering legislation is determined by reference to the maximum penalty for the offence in question. In such States, legislative drafters should ensure that the maximum penalties for crimes that affect the environment intended for designation as predicate offences are sufficiently high to meet this threshold.<sup>23</sup>

## E. Liability of legal persons

42. Legal persons may also be involved in crimes that affect the environment and therefore should be held responsible for their culpable actions and omissions. In its resolution 10/6, the Conference of the Parties to the Organized Crime Convention urged States parties to take measures, consistent with their legal principles, to ensure that legal and natural persons involved in transnational organized crimes that affect the environment and related offences covered by the Convention are held accountable (para. 5).

43. The Organized Crime Convention requires States parties to establish a legal framework addressing the liability of legal persons. Article 10, paragraph 1, requires that States parties adopt such measures as necessary to establish the liability of legal persons “for participation in serious crimes involving an organized criminal group”. The legal nature of their liability is left to each State to decide. Article 10, paragraph 2, specifies that the liability of legal persons may be criminal, civil or administrative. Article 10, paragraph 3, clarifies that the liability of legal persons must be without prejudice to the criminal liability of the natural persons involved in the offences.

44. The principle that corporations cannot commit crimes (*societas delinquere non potest*) used to be universally accepted. This initially changed in some common law systems. Today, the age-old debate on whether legal entities can bear responsibility for crimes has shifted to the question of how to define and regulate such responsibility. However, national legal regimes remain quite diverse in the ways in which they address the liability of legal persons and how they attribute responsibility or guilt and determine sanctions, with some States resorting to criminal penalties against the organization itself, such as fines, forfeiture of property or deprivation of legal rights, and others employing non-criminal or quasi-criminal measures.

45. The second edition of the *Model Legislative Provisions against Organized Crime* sets out three different ways in which a legal person can be liable for the conduct of its senior officers, including two forms of liability requiring the taking of some active steps on the part of the senior officer (commission of the offence; authorization or permission for the commission of the offence) and one form of liability in situations where there has been a failure of supervision (the concept of “organizational fault”), to reflect the culpability of the organization itself and whether or not the legal person exercised due diligence, without the need to focus on the acts of individual perpetrators (art. 9, para. 4).

## F. Jurisdiction

46. Establishing flexible jurisdiction is particularly important in the context of crimes that affect the environment, as many of them are typically committed across borders or might have an impact across borders. Offenders may also move between States and exploit jurisdictional gaps in States’ laws to avoid apprehension and

<sup>23</sup> See also Conference of the Parties resolution 10/6, para. 6.

prosecution (so-called “forum shopping”). It is therefore important to clearly articulate the jurisdictional bases upon which national courts can determine proceedings for offences involving illegal mining or trafficking in metals and minerals.

47. A State may exercise jurisdiction over acts committed within its territories, including its territorial waters, as well as on board a vessel that is flying its flag or an aircraft that is registered under its laws at the time that the offences are committed (the territoriality principle). This includes the jurisdiction of a State over acts committed outside the State but intended to have a substantial effect within the territory of the State (the objective territoriality principle). The right of States to exercise extraterritorial jurisdiction in a number of circumstances is recognized in international law and includes the jurisdiction of a State over its nationals, even when they are outside its territory (the active personality principle) and the jurisdiction of a State over acts injurious to its nationals (the passive personality principle). Article 15 of the Organized Crime Convention establishes both territorial and extraterritorial jurisdictional bases for offences covered by the Convention, including serious crimes.

48. With particular regard to crimes in the fisheries sector, the varying jurisdictional rights and associated powers and responsibilities of States, in particular coastal, archipelagic and flag States in distinct maritime zones, are regulated by the United Nations Convention on the Law of the Sea and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

## **G. Sanctions**

49. Legislation establishing crimes that affect the environment should include appropriate penalties and sentences for the commission of those offences, taking into account the gravity of the offences in question (art. 11, para. 1, of the Organized Crime Convention). Approaches to setting penalties and sentencing offenders vary greatly between States depending on their legal traditions and principles. An issue for further consideration, however, is the need to assess the benefits and advantages of a possible convergence of sanctions in this area. Arguments in favour of such convergence include the following:

(a) Disparities between Member States in terms of sanctioning levels could lead to a “race to the bottom” and to so-called “pollution havens”, that is, jurisdictions that attract criminals because of their much lower penalties for acts that cause harm to the environment;

(b) The convergence of sanctions could be needed to signal that many offences affecting the environment are serious crimes and should be treated as such by all competent authorities in the enforcement chain, thereby enjoying all the advantages stemming from this treatment and associated with the application of the provisions of the Organized Crime Convention.

50. As with other penalties for crimes that affect the environment, maximum fines should adequately reflect the seriousness of the offences and be large enough to act as effective deterrents. Compensation and restitution to victims should be given priority over the imposition of such fines. In determining the appropriate value for maximum fines for crimes that affect the environment, legislators should bear in mind that, if such fines are not sufficiently substantial, there is a risk that they will simply be absorbed into the operational costs of engaging in a criminal activity, thus failing to disincentivize criminal conduct. The financial status and capacities of the offender should be taken into account in determining the appropriate sum of any fine. In some cases, a fine alone will not serve as an effective deterrent if not combined with the confiscation of proceeds of crimes and property, equipment and other

instrumentalities used, or destined for use, in criminal offences. Article 12 of the Organized Crime Convention is of relevance in this regard.

51. The overriding consideration in determining appropriate penalties for legal persons involved in crimes that affect the environment is that such penalties (whether criminal or non-criminal, including monetary sanctions) should be effective, proportionate and dissuasive (art. 10, para. 4, of the Organized Crime Convention).<sup>24</sup> Sanctions that may be imposed against legal persons may range from monetary penalties, confiscation of proceeds of crime, adverse publicity and disqualifications, to the disestablishment of the legal person.

## **IV. International cooperation**

### **A. Added value of the Organized Crime Convention as a legal basis for international cooperation**

52. Considering the transnational nature of most crimes that affect the environment, establishing strong and robust international cooperation mechanisms is a key element in the response to those crimes. At the expert discussions held by the Commission on Crime Prevention and Criminal Justice in February 2022, a number of speakers underlined that the Organized Crime Convention, as well as the Convention against Corruption, provided a common framework for international cooperation, and argued that the political will to prioritize efforts to address crimes that affect the environment was crucial for empowering enforcement agencies to cooperate at the international level.

53. At the same expert discussions, there was extensive debate on a series of operational aspects of international cooperation to combat crimes that affect the environment, including the use and impact of networks and the strengthening of international inter-agency cooperation and capacity-building. In an effort to constructively supplement that debate, the present background paper highlights a number of selected legal aspects pertaining to the practical application of the Organized Crime Convention in the field of international cooperation in criminal matters that have an impact on the fight against crimes that affect the environment.

54. The provisions on international cooperation of the Organized Crime Convention are aimed at playing a key role in promoting international cooperation in criminal matters, both as a means for increased convergence and a way of filling possible legal gaps, where no bilateral or multilateral agreement exists between countries seeking to cooperate (CTOC/COP/WG.3/2015/3, para. 20).

55. In relation to international cooperation to combat existing and emerging forms of transnational organized crime, including crimes that affect the environment, the concept of “serious crime”, as defined in the Convention, in particular enables the use of the international cooperation provisions of the Convention for forms and dimensions of transnational organized crime that meet the requirements of the definition contained in article 2, subparagraph (b), of the Convention.<sup>25</sup>

### **B. Extended scope of application of articles 16 and 18 of the Organized Crime Convention**

56. Another advantage of the Convention is the extended scope of application of its international cooperation provisions. Article 16, on extradition, also applies to serious crime involving an organized criminal group, where “the person who is the subject of

<sup>24</sup> See also Conference of the Parties resolution 10/6, para. 5.

<sup>25</sup> See UNODC, *Digest of Cases of International Cooperation in Criminal Matters Involving the United Nations Convention against Transnational Organized Crime as a Legal Basis* (Vienna, 2021), p. 5. See also Conference of the Parties resolution 10/6, para. 4.

the request for extradition is located in the territory of the requested State party”. Therefore, the condition of transnationality of the offence, as described in article 3, paragraph 2, is not strictly necessary for the application of article 16. This would allow competent authorities to seek extradition of offenders also in cases involving crimes that affect the environment that have been committed within national borders, provided that the persons sought are in the territory of the requested State.

57. Furthermore, under article 18, on mutual legal assistance, 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 crimes, 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. This allows for assistance to be provided at early phases of investigations, when the evidentiary basis of the commission of offences, particularly crimes that affect the environment, may still be weak (CTOC/COP/WG.3/2015/3, para. 31).

### **C. Crimes that affect the environment as extraditable offences**

58. A key legal issue with regard to extradition is the designation of crimes that affect the environment as extraditable offences. Some of these crimes may not be deemed by a State to be sufficiently serious to warrant extradition. This is a matter for each State to determine in accordance with its legal system and requirements. For those offences potentially warranting extradition, States need to ensure that they are considered as such under the domestic law of the State and under its bilateral and multilateral extradition treaties. How this can be implemented will depend on the method for designation of extraditable offences used by the State in question.

59. Two approaches have historically been used for designating offences as extraditable offences: the “list approach” and the “minimum penalty approach”. States using the list approach would need to ensure that crimes affecting the environment that warrant extradition are included in lists of extraditable offences in relevant bilateral and multilateral extradition treaties and in any relevant implementing legislation. In contrast, States using the minimum penalty approach need to ensure that crimes affecting the environment meet the minimum penalty threshold for extradition under their bilateral and multilateral extradition treaties and their extradition legislation.<sup>26</sup>

60. If the request for extradition includes separate serious crimes, some of which do not meet the requirement under article 16, paragraph 1, that an organized criminal group be involved, article 16, paragraph 2, allows States parties to apply the article on extradition to those serious offences as well. Thus, article 16, paragraph 2, enables, but does not oblige, the requested State to deal with all of the alleged offences involving the same alleged offender or offenders, in addition to the offences set forth in article 16, paragraph 1, in the same procedure.<sup>27</sup> Although States parties are under no obligation to extradite for these separate serious offences, they are encouraged to do so.

### **D. Dual criminality in extradition proceedings**

61. The dual criminality requirement is a deeply ingrained principle of extradition law and is expressly provided for in article 16, paragraph 1, of the Organized Crime Convention. With regard to extradition requests relating to serious crimes, where

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<sup>26</sup> See, in relation to wildlife crimes and extradition, UNODC, *Guide on Drafting Legislation to Combat Wildlife Crime*, p. 50.

<sup>27</sup> UNODC, *Legislative Guide*, para. 513.

States parties are not required to criminalize the same conduct, no obligation to extradite arises unless the dual criminality requirement is fulfilled.<sup>28</sup>

62. An important point, including with regard to the complexity of crimes that affect the environment, is that the legal denomination of the offence in question need not be identical for the purposes of determining the fulfilment of dual criminality in the cooperating States, since the laws of those States cannot be expected to coincide on that point. Instead, the conduct underlying the offence is the crucial factor; it should be defined as criminal under the laws of both States. There has been growing recognition of this interpretation in recent years and it has been reflected in an international normative instrument (art. 43, para. 2, of the Convention against Corruption).

## E. Mutual legal assistance involving legal persons

63. In accordance with article 18, paragraph 2, of the Organized Crime Convention, mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State party with respect to investigations, prosecutions and judicial proceedings in relation to offences for which a legal person may be held liable in accordance with article 10 of the Convention.

64. The establishment of criminal liability for legal persons in different jurisdictions through specific legislation or modifications to criminal codes seems to have a positive impact on the scope of cooperation that could be provided in the context of mutual legal assistance, including in relation to combating crimes that affect the environment. By contrast, a failure to enact legislation establishing the criminal liability of legal persons may pose a challenge to mutual legal assistance in cases involving crimes that affect the environment, as States parties may also decline to render mutual legal assistance on the ground of absence of dual criminality (art. 18, para. 9, of the Convention). This may result in obstacles to cooperation, to the extent that assistance is not provided on the basis of reciprocity,<sup>29</sup> and may also be linked to the existence of certain grounds for refusal of requests for mutual legal assistance, for example, a prohibition by the domestic law of the requested State on carrying out the action requested had it been subject to domestic proceedings (see art. 18, para. 21 (c)).<sup>30</sup>

65. The country reviews carried out within the framework of the Mechanism for the Review of Implementation of the Convention against Corruption offered useful feedback on national approaches when focusing on the implementation of the corresponding provision of article 46, paragraph 2, of the Convention against Corruption. The majority of countries under review confirmed that they could grant assistance in relation to offences for which legal persons could be held liable. The status of the implementation of article 46, paragraph 2, appeared more uncertain in countries under review that had not established the criminal liability of legal persons domestically or had established it only in respect of specific offences, such as

<sup>28</sup> Ibid., para. 473.

<sup>29</sup> In one survey of European Union member States, 32 per cent of requesting and 21 per cent of requested States reported having experienced difficulties in relation to mutual legal assistance, owing to non-recognition of the criminal liability of legal persons. See Gert Vermeulen, Wendy De Bondt and Charlotte Ryckman, *Liability of Legal Persons for Offences in the EU*, Institute for International Research on Crime Policy Series, vol. 44 (Antwerp, Belgium, Maklu, 2012).

<sup>30</sup> For the sake of comparison, the Convention against Corruption includes a general principle in its article 43, paragraph 1, enabling States parties to consider assisting each other in investigations and proceedings in civil and administrative matters relating to corruption. This principle may facilitate cooperation even in cases where the liability of legal persons is only of a civil and/or administrative nature. See Dimosthenis Chrysikos, "Mutual legal assistance", in *The United Nations Convention against Corruption: A Commentary*, Cecily Rose, Michael Kubiciel and Oliver Landwehr, eds., Oxford Commentaries on International Law Series (Oxford, Oxford University Press, 2019), pp. 445–446.

money-laundering. However, a number of countries that could not hold legal persons criminally responsible confirmed that they could grant mutual legal assistance for offences involving legal persons, normally on the basis of the direct application of the Convention or another treaty.<sup>31</sup>

## F. Conflicts of jurisdiction and transfer of criminal proceedings

66. In accordance with article 21 of the Organized Crime Convention, States parties are to consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by the Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

67. The transfer of proceedings offers responses to problems posed by concurrent jurisdictions and the resulting plurality of criminal proceedings, which are particularly inherent in cases involving criminal activities of a transnational nature, such as those affecting the environment. At the international level, the potential for multiple legal proceedings is greatly increased. The effective coordination and handling of multiple legal proceedings is important for a number of reasons, including the consideration of the principle of *ne bis in idem* (double jeopardy) (CTOC/COP/WG.3/2017/2, para. 9).

68. As the transfer of criminal proceedings is associated with ways to overcome challenges posed by conflicts of jurisdiction and the existence of multiple proceedings, the combined consideration of article 21 and article 15 (on jurisdiction) of the Convention may prove to be useful in cases involving transnational crimes that affect the environment.

## G. Joint investigations

69. As crimes that affect the environment are often transnational in nature, joint investigations between the competent authorities of two or more States can prove to be more effective in dismantling organized criminal groups, especially in complex cases. Article 19 of the Organized Crime Convention requires States parties to consider concluding agreements or arrangements with other States to establish frameworks for conducting joint investigations. In the absence of such frameworks, joint investigations may be undertaken by agreement on a case-by-case basis.

70. At the expert discussions held by the Commission on Crime Prevention and Criminal Justice in February 2022, one of the challenges identified was the lack of international cooperation to combat crimes that affect the environment, including with regard to joint financial investigations and the confiscation of assets. In addition, many speakers underscored the importance of strengthening international cooperation, and of the exchange of information and intelligence, as well as the setting up of joint investigations with incisive investigation tools and clear and fast procedures for confiscation. The necessity for specific arrangements to tackle challenges encountered in joint financial investigations was brought to the attention of the Working Group on International Cooperation in the recent past (see CTOC/COP/WG.3/2020/2, para. 57) and was also emphasized at the policy level.<sup>32</sup>

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<sup>31</sup> UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation* (Vienna, 2015), p. 225.

<sup>32</sup> Conference of the Parties resolution 10/6, para. 9.

## H. Law enforcement cooperation

71. International cooperation between law enforcement authorities is instrumental in the fight against crimes that affect the environment. Article 27, paragraph 1, of the Organized Crime Convention requires States parties to closely cooperate with each other, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement against offences covered by the Convention.

72. Law enforcement cooperation in the area of crimes that affect the environment may involve the use of special investigative techniques,<sup>33</sup> including techniques associated with financial investigations (wiretapping, search warrants, witness interviews, search and seizure orders, production orders and account monitoring orders) or other techniques, such as forensic technology or satellite imagery.

73. Controlled deliveries can also be used in cross-border investigations of crimes that affect the environment. Allowing, for example, shipments to proceed to their final destinations offers to law enforcement authorities the opportunity to identify and address the role that different criminal actors play across the entire chain of illicit trafficking of environmentally sensitive commodities, while also facilitating a better understanding of the *modi operandi* of organized criminal groups involved in crimes that affect the environment. In this regard, the Organized Crime Convention offers both a definition of “controlled delivery” (art. 2 (i)) and relevant authorization provisions (art. 20, paras. 1 and 4) (see also [CTOC/COP/WG.3/2020/3](#), paras. 52 ff).

## V. Conclusion

74. The Working Group of Government Experts on Technical Assistance and the Working Group on International Cooperation may wish to consider the various issues examined above as a basis for their deliberations. The working groups may also wish to use the present background paper as a reference to facilitate their joint thematic discussion and bring to the attention of the Conference of the Parties the main conclusions and recommendations of the discussion, in accordance with Conference resolution 10/6.

75. The working groups may further wish to recommend that the Conference:

(a) Urge States parties to use the tools offered by the Organized Crime Convention to develop or amend national legislation, as necessary and appropriate, and to achieve, to the fullest extent possible, convergence in legislative approaches and sentencing policies in relation to crimes that affect the environment;

(b) Continue to encourage States parties to make use, where appropriate, of the Organized Crime Convention as a legal basis for international cooperation to combat crimes that affect the environment;

(c) Encourage States parties to exchange best practices and lessons learned on the application of the Organized Crime Convention for preventing and combating transnational organized crimes that affect the environment, focusing in particular on approaches to criminalization and international cooperation in criminal matters.

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<sup>33</sup> *Ibid.*, para. 3.