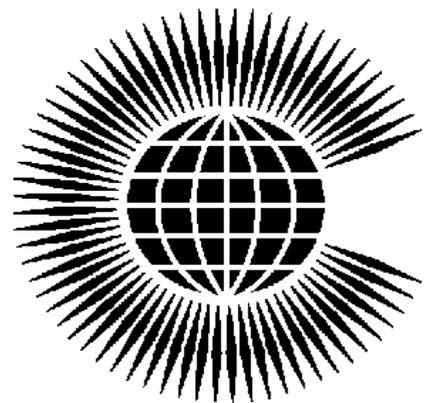


COMMONWEALTH STRATEGIES TO COMBAT CORRUPTION



THE COMMONWEALTH UPDATED LEGISLATIVE AND TECHNICAL GUIDE

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FOREWORD

Corruption is always a two-way transaction, with a supply and a demand side. It does not discriminate in regards to economic or social development, nor is it specific to one type of government. With globalisation, the menace of corruption emerged as a global policy problem, one that could no longer be addressed purely through domestic means. A truly international response came with the adoption of the United Nations Convention Against Corruption (UNCAC) by the United Nations General Assembly on 31 October 2003. The Convention was opened for signature on the 9 December of the same year, while it entered into force on 14 December 2005.

UNCAC is the first truly global anti-corruption instrument. It addresses a wide range of prevention, detection and enforcement provisions and, for the first time internationally, sets out comprehensive provisions on asset recovery.

Consistent with the principles and strategies set out in UNCAC, the Commonwealth Heads of Government endorsed a framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption at their meeting in Durban, South Africa, in 1999. Their subsequent meetings in Abuja, Nigeria, in 2003 and Malta in 2005 reiterated the need to sign, ratify and implement UNCAC, and implement measures to root out, both at the national and international levels, systemic corruption, including extortion and bribery, which undermines good governance, respect for human rights and economic development. The working group established by the Secretary-General pursuant to the Abuja meeting met in London in April 2004 and produced a report which, inter alia, made recommendations on the content of model legislative provisions that could be used to implement measures set out in UNCAC in the domestic setting. The group carried out a far-reaching study and made a number of recommendations. The report then went through a series of refinements and a Commonwealth Legislative and Technical Guide ('the Guide') was adopted by Law Ministers at their meeting in Edinburgh, the UK, in 2008.

Since the adoption of the Guide, there have been several developments and best practice models at both the domestic and international levels. Subsequently, the Secretariat undertook wide-ranging consultations with other international organisations and practitioners to review and update the Guide with a view to bringing it to conformity with current practice and international standards. This consultation resulted in the 2010 Updated Commonwealth Legislative and Technical Guide (also called 'the Guide'), which was endorsed and approved for dissemination by the Commonwealth Law Ministers and Attorneys-General at their meeting in July 2011 in Sydney.

The Guide reflects those requirements of UNCAC which are susceptible to model drafting, aimed at meeting the particular needs of Commonwealth states and complementing the guide produced by UNODC. It contains the most up-to-date guidance, not only on legislation but also on best practice throughout the world, as provided in UNCAC and as practiced by other international organisations and states. It provides a comprehensive point of reference not only for states grappling with the implementation of UNCAC, but also for states that have proceeded with implementation and seek to review and update their legislation and/or practices.

The overall aim of the Guide is to provide documentary guidance, best practice, legislative options and technical assistance, while at the same time recognising that each member state will legislate in accordance with the fundamental principles of its legal system and constitution.

Accordingly, it addresses legislative requirements discretionary provisions and technical approaches and, where appropriate, best practices.

The Guide is not intended to be exhaustive or prescriptive; it nonetheless lays out the basic requirements of the Convention taking into consideration the common law tradition of member states, as well as practical challenges in the implementation of the provisions of UNCAC and suggested solutions to implementing them.

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Commonwealth Secretariat
London, November, 2011

EXECUTIVE SUMMARY

2010 UPDATED DRAFT LEGISLATIVE AND TECHNICAL GUIDE FOR COMMONWEALTH STATES

Chapter II - Preventive Measures

Article 5 – Preventive Anti-Corruption Policies and Practices

This Article mandates States Parties to develop policies and practices that prevent corruption. Avoiding the opportunity for corruption, training in deterring corruption, and involving public support for anti-corruption measures are key components to reducing the incidence and cost of corruption. States are encouraged to plan for four phases: development; design; delivery; and follow-up.

Article 6 – Preventive Anti-Corruption Body or Bodies

This Article is designed to help States to establish anti-corruption bodies that are in keeping with those envisaged by UNCAC. These bodies are not intended to be simply law enforcement bodies, but should approach the prevention of corruption broadly. Under the heading of Practical Challenges and Solutions, the Guide includes an evaluation of the benefits and drawbacks of using an existing body or bodies or establishing a new body or bodies to fulfil the requirement under Article 6. It also invites States Parties to assess the commitment of resources and powers to the anti-corruption body or bodies.

Article 7 – Public Office Requirements

This Article relates to the recruitment, hiring, retention and promotion of civil servants and non-elected officials. The Guide proposes procedures to identify those public positions or activities that are more susceptible to corruption and then to take measures to ensure that these posts are filled more carefully.

The Guide also proposes that persons hired into public office should be trained in the sort of real life situations they might face, and provided with appropriate means for reporting concerns and the areas of risk of corruption and misconduct.

Article 8 – Codes of Conduct for Party Officials

How States Parties propagate their Code of Conduct will depend on their legislative system, but the UNCAC directs States Parties to a number of initiatives relating to establishing a Code of Conduct. The Guide leaves open whether the Code of Conduct should be put into specific legislation or disseminated by the use of delegated authority; another body will be responsible for creating technical rules or setting specific standards.

Article 9 – Public Procurement and the Management of Public Finances

This Article addresses the critical issue of procurement, where the operation of public services meets the resources of the private sector. The Guide provides details of measures to enhance transparency in public procurement as well as suggesting ways in which the effectiveness of these measures can be reviewed. In relation to public finance, characteristics of a sound public finance system are listed so that States Parties can compare them to their own systems. Guidance is also given on accounting, auditing and risk management.

Article 10 – Public Reporting

Article 10 focuses on the value of transparency in public administration. The Guide discusses making available to the public details: (a) on policies that should be published; (b) on those responsible for public decision-making; (c) on access to reports and decisions of public bodies; and (d) on the threats of corruption and the operation of anti-corruption measures.

Article 11 – Measures Relating to the Judiciary and Prosecution Service

Corruption in the judiciary and in law enforcement is a core threat to the rule of law, and thus to all anti-corruption initiatives. Where there is no access to justice, there is no mechanism to rectify corruption. Article 11 suggests that States Parties should assess the nature and extent of corruption in the judicial system to identify weaknesses. The Guide recommends that the review be minute in its detail, in order to minimise opportunities for corruption to occur. The additions to the guidance on Article 11 lay out what judicial integrity is and suggests specific and direct methods of prevention, including screening of the past conduct of judicial candidates and ensuring that, wherever possible, judicial proceedings should be open to the public. The Guide recommends States Parties to produce codes of judicial conduct and conduct for court personnel and for prosecutors. .

Article 12 – Private Sector

Article 12 concentrates on measures that States Parties can use to prevent corruption in the private sector. Additional guidance is provided on how the private sector can: introduce measures to enhance accounting and auditing standards; introduce measures to promote co-operation between law enforcement and the private sector; safeguard the integrity of the private sector; encourage transparency and prevent the misuse of procedures regulating private entities.

Article 13 – Participation of Society

Article 13 addresses the value of including civil society, NGO's and community-based organisations, among others, in fighting corruption. Principal among those values is the enhanced transparency that comes from multiple avenues for public distribution of information concerning corruption. Guidance is given on how to undertake publicity campaigns and how to ensure appropriate contact points for allegations from citizens. States Parties are directed to provide a legislative or constitutional framework that positively supports the freedom to collect, publish and distribute information.

Article 14 – Measures to Prevent Money Laundering

This Article focuses on the preventive steps that States Parties should take to reduce or prevent money laundering. It does not focus on criminal statutes, which are covered in Article 23. Guidance on this Article sets out that financial and non-financial institutions within the State

Party must be required to take steps to prevent the use of their services by potential launderers, including: (a) undertaking the appropriate level of due diligence; (b) monitoring the activity of the potential launderer; and (c) reporting any suspicious or unusual actions. Allegations of laundering should be disseminated, analysed, investigated and, where appropriate, result in enforcement actions, including asset freezing, seizure and prosecutions.

The Guide describes the establishment of regulatory and supervisory bodies with responsibility for imposing standards on the conduct of financial institutions (and possibly non-financial institutions). The guidance encourages States Parties to create positive incentives and to avoid negative incentives to help "gatekeeper" financial institutions perform their reporting duties.

Details of what States Parties need to consider when setting up a declaration system for the cross-border movement of cash and negotiable instruments are provided in the additional guidance. A list of anti-money laundering initiatives undertaken by regional, interregional and multilateral organisations is included.

Chapter III – Criminalisation and Law Enforcement

Article 15 – Bribery of National Public Officials

This Article describes the need to establish a domestic criminal offence of bribery of public officials. The Guide includes a reiteration of the definition of a 'public official', information on what can constitute an undue advantage, and guidance on the required mental element of both the active and passive bribery offences set out by the article.

Article 16 – Bribery of Foreign Public Officials and Officials of Public International Organisations

This Article addresses the need to legislate forbidding the bribery of foreign officials. The Guide provides material on the definitions of 'foreign public official' and 'foreign country'. The Guide points out the distinction between this active bribery offence and the active offence under Article 15, which is that the undue advantage or bribe must be linked to the conduct of the international business, which includes the provision of international aid. The Guide also provides interpretive notes on the passive offence of bribery under Article 16 as well as information on immunity of foreign public officials under international law.

Article 17 – Embezzlement, Misappropriation Etc of Property by a Public Official

This Article relates to the fundamental misuse of public office – embezzlement and misappropriation of public resources by public officials. The guidance provides details of the required elements of the offence including what 'items of value' includes and what is meant by 'property'.

Article 18 – Trading in Influence

More subtle than outright bribery, which is addressed in Article 15, the misuse of the influence of office is the focus of Article 18. Under Article 18, the offence involves using one's real or supposed influence to obtain an undue advantage for a third person from an administration or public authority, whereas the offence under Article 15 involves an act or refraining to act by public officials in the course of their duties. The guidance gives an example of national legislation which includes a trading in influence offence.

Article 19 – Abuse of Public Functions

Article 19 encourages States Parties to consider adopting legislation that would make abusing one's public power a criminal offense. The Guide points readers to where they can obtain further information.

Article 20 – Illicit Enrichment

Article 20 encourages States Parties to consider adopting legislation to establish illicit enrichment – unexplained increases in wealth – by public officials as a criminal offence. The Guide contains commentary on the value of this offence, giving examples of States that have found it helpful in establishing a prima facie case of corruption when enrichment is grossly disproportionate to a person's lawful income.

Article 21 – Bribery in the Private Sector

Article 21 encourages States Parties to consider adopting legislation that prohibits bribery in private business transactions. The Guide provides detailed information on the required elements of the active and passive offence under Article 21.

Article 22 – Embezzlement of Property in the Private Sector

Article 22 parallels the mandatory provisions in Article 17, but suggests legislation applying the strictures in the private sector.

Article 23 – Laundering of Proceeds on Crime

Article 23 requires States Parties to criminalise money laundering involving the “proceeds” of crime. Neither the Article nor the Guide addresses “promotional” money-laundering, which involves the movement of non-proceeds to commit a crime in another jurisdiction.

The Guide provides useful summaries of the way in which UNCAC addresses money laundering, what should be criminalised and other measures that should be implemented. In terms of implementation, the guidance addresses each offence contained in Article 23, gives guidance on the definition of certain terms, including conspiracies, aiding and abetting money laundering offences.

Article 24 – Concealment

Article 24 encourages States to consider making a separate offence of the concealment or continued retention of property that is the result of a corruption offence. The Guide explains the relationship of this Article to Article 23 and provides references to such legislation.

Article 25 – Obstruction of Justice

Article 25 protects the administration of justice by requiring States Parties to prohibit several forms of obstruction of justice relating to corruption offences. Guidance on this Article sets out the two offences established under the Article and assists States Parties by indicating what is meant by certain terms, including 'proceedings', which is to be interpreted broadly to cover all official governmental proceedings.

Article 26 – Liability of Legal Persons

This Article addresses the criminal, administrative or civil liability of “legal persons” (i.e. corporations and other entities created by law) for offences under the UNCAC. This is a topic on which there is broad disagreement and diffuse practice. The nature of the liability, the inclusion of appropriate sanctions and details such as the provision of limitation periods for the offences that match the likely length of relevant investigations are all covered by the guidance. It also includes commentary from the UNODC Legislative Guide which discusses, inter alia, the background to the debate on whether or not legal entities can bear criminal responsibility and points to other relevant publications dealing with the liability of legal persons.

Article 27 – Participation and Attempt

Article 27 addresses accomplice liability and attempts in corruption cases. The Guide briefly notes that paragraph 1 of the Article was intended to capture different degrees of participation but explains that it was not intended to create an obligation for States Parties to include all of those degrees in domestic legislation.

Article 28 – Knowledge, Intent and Purpose as Elements of an Offence

Article 28 provides that knowledge, intent and purpose may be inferred from objective factual circumstances. Guidance on this Article provides that national drafters should seek to ensure that their evidentiary provisions enable such inference to be made with respect to the mental state of the offender, rather than requiring direct evidence, such as confession, before the mental state is deemed proven.

Article 29 – Statute of Limitations

Article 29 encourages States Parties to establish a long statute of limitations for corruption cases, and a suspension of the statute of limitations where the alleged offender has evaded the administration of justice. The difficulty raised by this provision, the Guide suggests, is to strike a balance between the interests of swift justice, closure and fairness to victims and defendants and the recognition that corruption offences often take a long time to be discovered and established. Various methods of reviewing the time-length of existing statutes of limitations are provided in the guidance.

Article 30 – Prosecution, Adjudication and Sanctions

Article 30 addresses such issues as sanctions and sentences, immunities, and civil consequences for criminal conduct. A useful summary of what is required of States Parties under Article 30 is provided at the beginning of the guidance. Relating to sanctions, guidance is given on how to determine the gravity of the offence, for example taking into account the seniority of those involved and the level of trust attached to the public official. Relating to immunities, the guidance reiterates that the Article follows a 'functional' notion of immunities – authorised official acts by public officers and parliamentarians may be immune, but the official or parliamentarian himself or herself is not above the law. Relating to discretionary legal powers, States Parties, it is suggested, could maximise the deterrent effects if they would advise their law enforcement authorities that the investigation and prosecution of corruption offences are the norm, while the dismissal of proceedings are an exception to be justified.

Guidance is also given on considerations for early release or parole, stating that many States Parties have moved away from the parole system, preferring a 'true sentence' or a precisely determined sentencing system, and that disqualification from public office may be a consequence of a violation.

Article 31 – Freezing, Seizure and Confiscation

Freezing, seizing and confiscating assets addressed in this Article are the enforcement mechanisms for money laundering offences described in Article 23. The Guide explains how confiscation can be divided into two types – the confiscation of the proceeds of crime and the confiscation of the instrumentalities of crime. Information is also given on the methods of confiscation, namely object confiscation and value (substituted assets) confiscation. Guidance is given on what to consider as the proceeds of crime and how States Parties might adopt measures to efficiently identify, trace, restrain, seize or freeze property that might be the object of an eventual confiscation order.

With reference to the Article's recommendation that States Parties reverse/shift the burden of proof in these cases, the guidance provides commentary on which countries have already implemented such shifts/reversals and the different methods of implementation that are available. Guidance is also given on how to protect the interest of bona fide third parties.

Article 32 – Protection of Witnesses, Experts and Victims

Successful enforcement of any anti-corruption regime depends upon the willingness of witnesses, including victims, to provide leads, evidence, and testimony. Article 32 addresses the need to protect them from potential retaliation or intimidation. The Guide provides help on the important point of making agreements or arrangements with other States. It is suggested that States may deal with the need to relocate witnesses within other countries on an ad hoc basis, or they may wish to develop and construct transnational agreements or arrangements which do not only apply for a single case but serve as a framework for a number of cases that may occur. The development of a co-operation agreement or arrangement between a 'family of countries' is another option discussed in the guidance. Such agreements could be of particular interest to Commonwealth countries.

Article 33 – Protection of Reporting Persons

Article 33 builds upon Article 32, and encourages States Parties to consider legislation to protect good faith "reporting persons" – persons who may or may not be actual witnesses. The Guide provides a useful summary of the policy framework needed to implement the Article. Other practical challenges are also considered: engaging public officials, engaging the public, who to report to, and the criteria for reporting and protecting reporting persons. In terms of who to report to, the guidance shows that it has generally been found useful to have two levels at which reporting persons can express their concerns. The first level should include entities within the organisation for which the reporting person works. The second level should be another institution and could be, for example, an ombudsman, an anti-corruption agency, or an auditor general.

Article 34 – Consequences of Acts of Corruption

This Article emphasises how States Parties implementing criminal sanctions for corrupt acts is not enough. States Parties must ensure consistency within their overall legal systems and

translate the condemnation of corrupt practices into all relevant fields of law: private law; tax law; competition law; administrative law; law of contracts; law of torts; and law of dispute resolution.

The Convention leaves the choice of specific kinds of consequences to the discretion of States Parties. However, the guidance provides details of what practitioners might take into account when making decisions about the implementation of this article. It also recommends that States Parties ensure that documentation of the administrative process that leads to the conclusion of a contract, and all tender documentation, holds guidance on the consequences of acts of corruption in any procedures or acts that fall under the contract.

Article 35 – Compensation for Damage

Article 35 recognises that the harm from corruption offences is not measured by the size of a bribe or the inducement to corruption, but can be much greater and may have many victims. Guidance on this Article indicates that 'entities or persons' to whom damages may be due are deemed to include States as well as legal and natural persons. It also reiterates that the Article does not require that victims should be guaranteed compensation or restitution, but that legislative or other measures must provide procedures whereby it can be sought or claimed.

Article 36 – Specialised Authorities

Article 36 encourages the creation of specialised law enforcement authorities focused on corruption offenses. The Guide reminds States Parties that they may establish a special body exclusively in charge of corruption or provide for specialised expertise within the existing structures of the police, prosecution officers and/or the courts. The guidance suggests tools with which States Parties can evaluate their domestic situation in order to decide which type of specialised authority is correct for them. The guidance weighs the positive and negative features of establishing an anti-corruption unit. The guidance also provides details of resources that the specialised authority should be provided with and details of safeguards that States Parties can put in place to ensure the specialised authorities are and remain independent.

Article 37 – Co-operation with Law Enforcement Authorities

Article 37 directs States Parties to encourage offenders to co-operate with law enforcement. Guidance on this Article provides that in order to have their punishment mitigated or being granted immunity, persons must provide information that is relevant to the investigation, prosecution or adjudication of a case. Two models are given for implementing the mitigation of punishment term: the imposition by the court or judge of a sentence that is mitigated compared to a sentence that usually would have been imposed; and the mitigation of punishment subsequent to the judgment and during its enforcement.

In relation to immunity, two models of implementation are also suggested: that States Parties introduce new legislation that allows the granting of immunities; and that States Parties, whose prosecutors have the discretion not to prosecute, may advise their law enforcement authorities that substantial co-operation could be a reason for allowing the granting of an immunity, within the range of the prosecutor's discretion. The guidance also provides commentary on how, through agreements or arrangements, States Parties might allow the law enforcement agencies of one State Party to propose a mitigated sanction or even immunity in exchange for substantial co-operation with regard to a corruption offence committed in another State Party.

Article 38 – Co-operation Between National Authorities

Article 38 requires States Parties to encourage co-operation between national authorities to share information relating to corruption offences. Guidance on this Article indicates how the co-operation between National Authorities can be fostered - specifically through training programmes and by ensuring there are regular and structured opportunities to promote co-operation.

Article 39 – Co-operation Between National Authorities and the Private Sector

This Article is similar to Article 38 except that it requires States Parties to take measures to encourage the private sector and private individuals to do the same as the public sector. Methods to achieve this are given in the guidance and include ensuring that private sector entities understand the purpose of the Article, indicating which agencies should receive reports from the private sector and promoting a degree of reciprocity between the investigation and prosecution authorities and the entities of the private sector.

Article 40 – Bank Secrecy

Article 40 covers the need for bank secrecy and the competing need to overcome bank secrecy to investigate corruption and money laundering. The Guide concentrates on the following key practical points: who has authority to overcome bank secrecy, under what circumstances and for what purposes; what is procedurally required to lift bank secrecy; when should information be automatically disclosed, or disclosed upon request; use of centralised databases; the content of a request for financial information; implementation of the preventive principles of 'know your customer and know your beneficial owner'; and bank secrecy and professionals.

The Guide also notes that bank secrecy may apply not only to customers under investigation but also to the activities of the professional advisers who may claim the benefits of bank secrecy in relation to their activities that may be linked to those of their clients under investigation.

Article 41 – Criminal Record

This Article encourages information sharing concerning possible “repeat offenders.” The Guide provides practical solutions, including suggestions that States Parties may wish to enable foreign States access to their criminal registers both legally and technically.

Article 42 – Jurisdiction

Corruption, particularly in the case of the bribery of foreign officials, is often a multi-jurisdictional offence. Some offenders are in one State, while other offenders as well as witnesses and victims may be in another. The proceeds of the offence may be in a third jurisdiction. Article 42 directs and encourages States Parties to adopt legislation or other measures that assert jurisdiction to investigate and to prosecute such offences in a single state. The Guide follows the jurisdictional distinctions drawn by Article 42: when an offence is committed in the territory of the State Party; when the offence is committed against a national of that State Party; when the offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; jurisdiction over preparatory money-laundering offences; when the offence is committed against the State Party. Finally, the Guide discusses the imposition of “universal jurisdiction” for certain offences.

Chapter IV – International Co-operation

Article 43 – International Co-operation

Article 43 directs that States Parties shall co-operate with one another in corruption cases. Co-operation includes evidence gathering through treaties and conventions, which are described in the Guide. Following an overview of the requirements of the Article, the Guide addresses certain specific issues: determining dual criminality; the involvement of a central, or other competent, authority; co-operation frameworks; ways and means to ensure resources; and address practical problems (such as resources) in the field.

The Guide then addresses other methods of co-operation, such as training programmes and capacity building. Finally the Guide provides a checklist which States Parties can use to ensure that they are implementing this article to the extent envisaged by UNCAC.

Article 44 – Extradition

One aspect of international co-operation in corruption cases is the extradition of accused offenders, which is the subject of Article 44. The Guide provides a thorough definition of extradition and a brief summary of the relevant history surrounding it. The Guide then addresses the challenges that might be faced in implementing the Article and possible solutions. The challenges are identified as setting up the legal framework for extradition and improving procedures. One such example is the European Arrest Warrant and its innovative features, such as the abolition of the dual criminality requirement in prescribed cases, and that Member States can now no longer refuse to surrender their own nationals.

The Guide again provides a useful checklist to ascertain that Article 44 has been appropriately implemented.

Article 45 – Transfer of Sentenced Persons

Article 45 says that States Parties may consider entering into arrangements that allow for the transfer of sentenced prisoners. After providing an overview of the requirements of the Article, the Guide provides information on some of the challenges that might be met by States Parties when implementing the article and suggests ways in which these challenges might be overcome. The challenges highlighted include the conditions for transferring offenders, sentences, and forming appropriate channels of communication. In relation to the legal framework that will be necessary to implement Article 45 it is suggested that national legislation should allow for enough flexibility on the side of the requested and the requesting States Parties to make the request/granting of the transfer dependent on the willingness of the convicted person to co-operate.

Article 46 – Mutual Legal Assistance

Article 46 builds upon the general provisions of Article 43, focusing on the provision of Mutual Legal Assistance in providing evidence between States Parties. Guidance on this Article is extensive, as Mutual Legal Assistance is at the core of the treaty obligations relating to corruption. In addition to the lengthy description of international practice, the Guide provides a checklist, references to other sources, advice on specific forms of requests, new developments in practice. At the conclusion of the Guide, a model Mutual Legal Assistance Law is attached as Appendix B. Appendix C and Appendix D are also addressed to this subject.

Article 47 – Transfer of Criminal Proceedings

Article 47 asks States Parties to consider transferring criminal proceedings to other jurisdictions where the interests of the proper administration of justice would be best met, including where the witnesses, the victims, or the evidence is centrally located. In some instances, this has been used as an alternative to extradition. Guidance on this Article provides details on how to deal with the practical challenges of implementation, such as policy criteria for decisions on transfer, where the majority of witnesses or most important evidence is located, which jurisdiction has the best/most effective laws, which jurisdiction will involve the least delay, and in which jurisdiction the crime had its most substantial effects. Useful practical suggestions are also provided, such as drawing up a list of priorities to be established when considering the transfer of criminal proceedings.

Article 48 – Law Enforcement Co-operation

Article 48 directs that States Parties will co-operate to enhance law enforcement; to the extent such co-operation is consistent with domestic legal and administrative systems. The Guide highlights some of the difficulties that might be faced in doing so. These include facing the diversity of approaches and priorities in different jurisdictions – law enforcement agencies may fail to agree on how to deal with a specific cross-border form of crime. Suggested ways to address these difficulties are also provided. They include exchanging strategic and technical information, co-operating in the field of professional training and working groups, and using contact points and networks.

Article 49 – Joint Investigations

Article 49 encourages States Parties to undertake joint investigations. In some instances, these will be through the establishment of joint investigative bodies; in others, through co-operation on a case-by-case basis. The Guide identifies areas of difficulty, including certain operational issues, such as the legal standing and powers of officials operating in another jurisdiction or the admissibility of evidence in a State Party obtained in that jurisdiction by an official from another State Party. Methods of dealing with these difficulties are suggested in the Guide, which also provides a useful checklist for States Parties to use to check they have implemented the article to the extent envisaged by UNCAC.

Article 50 – Special Investigative Techniques

Investigative techniques like “sting operations” or wire-tapping may be employed in some co-operating jurisdictions, but not in others. Article 50 encourages the appropriate use of these techniques, and the Guide provides information on, amongst other things, what safeguards to set up, ways to check that resources and technological competence are sufficient, the issue of the admissibility of evidence, integrity and financial transaction monitoring. Further commentary and additional examples are also given, concentrating on proactive investigations, co-operating defendants/protected witnesses/resident informants, and the use of intrusive techniques and impact of human rights considerations.

Chapter V – Asset Recovery

Article 51 – General Provision

Article 51 simply states that the return of assets is a fundamental principle of the UNCAC, and that States Parties shall co-operate with one another to do so. The commentary looks at specific hurdles that have been faced in efforts to recover assets worldwide. This is a topic which has been the subject of a study by a Commonwealth Working Group.

Article 52 – Prevention and Detection of Transfers of Proceeds of Crime

Building upon the mandate of Article 14 concerning the prevention of money laundering, Article 52 focuses on methods to detect and to prevent transfers of the proceeds of crime. The Guide contains a lengthy commentary on “know your customer” provisions, the identification of beneficial owners of high value accounts, scrutiny of accounts held by Politically Exposed Persons, the role of advisers, and other financial record-keeping regimes, including records concerning shell banks; financial disclosure systems for appropriate public officials; and public official and overseas accounts. The Guide provides some discussion of best practices.

Article 53 – Measures for Direct Recovery of Property

Article 53 directs States Parties to allow, consistent with domestic law, another State Party to initiate actions to establish title and to obtain recovery of assets acquired through the commission of corruption offences, and to require offenders to pay compensation to States Parties that have been harmed by their criminal acts. The guidance provides information on how States Parties should review their current provisions and what they need to include in them in order to ensure their legal standing. Further guidance highlights the need for States Parties to be alert to ensuring that other States Parties are notified at an early stage that they are a victim of corruption, as any other victim should be.

Article 54 – Mechanisms for Recovery of Property through International Co-operation in Confiscation

Article 54 directs states to take measures to allow for the confiscation, freezing and seizure of assets on behalf of a requesting state. The Guide discusses practical challenges including the enforceability of a foreign confiscation order, confiscation without criminal conviction, confiscation of the proceeds of foreign corruption based on money-laundering or related offences, and provisional measures for the eventual confiscation of assets. The guidance also points readers to the European Court of Human Rights' judgments on confiscation.

Article 55 – International Co-operation for Purposes of Confiscation

Article 55 builds upon the procedure by which the mandate of Article 54 can be achieved. The Guide addresses the requirements of the Article and suggests specific aspects of allowing for the confiscation of property that States Parties should consider when implementing the requirements.

Article 56 – Special Co-operation

Article 56 relates to the “spontaneous” and unrequested disclosure of anti-corruption information by one State Party to another. The Guide includes the suggestion that States Parties include in their domestic legislation proactive co-operation provisions allowing their competent authorities to forward information considered of interest to the authorities of other States

Parties. Such disclosures could occur through such parties as the Egmont Group or other international organisations.

Article 57 – Return and Disposal of Assets

Article 57 describes the considerations involved in the return of assets that have been confiscated by a State Party. The Guide highlights that this innovative Article of UNCAC leaves little discretion to States Parties – they are required to implement the provisions and introduce legislation or amend existing law as necessary.

Article 58 – Financial Intelligence Unit

This Article encourages the establishment of Financial Intelligence Units (FIUs) in order to increase the effectiveness of co-operation for asset recovery. The Guide addresses the roles of FIUs and the different models for FIUs: the administrative model, which is either attached to a regulatory/supervisory authority, such as the central bank of the ministry of finance, or as an independent administrative authority; the law enforcement model; the judicial or prosecutorial model; or the hybrid model. The advantages and disadvantages of each are discussed.

Article 59 – Bilateral and Multilateral Agreements and Arrangements

Article 59 encourages States Parties to enter into bilateral and multilateral agreements to enhance the international co-operation urged by the UNCAC. The Guide provides some discussion on how to use modern technology to enhance these traditional and developing mechanisms.

UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC): THE SCOPE OF THIS GUIDE AND ANTI-CORRUPTION MEASURES WITHIN THE COMMONWEALTH

CHAPTER I: INTRODUCTION

The United Nations Convention Against Corruption (UNCAC) was adopted by the General Assembly on 31 October 2003, opened for signing on 9 December that year, and entered into force on 14 December 2005. The first truly global anti-corruption instrument, UNCAC addresses a wide range of preventive, detection and enforcement provisions and, for the first time internationally, sets out comprehensive provisions on asset recovery.

The objective of this guide is to assist Commonwealth states to ratify and implement UNCAC, whilst at the same time recognising that each member state will legislate in accordance with the fundamental principles of its legal system and constitution. Accordingly, it addresses legislative requirements, discretionary provisions and technical approaches and, where appropriate, best practice. To assist states, it also includes measures and initiatives (for instance, the Recommendations of the Commonwealth Expert Group on Asset Recovery & Repatriation) which, in some or all respects, go beyond the requirements of UNCAC.

It includes all the relevant guidance given in the UNODC Legislation and Technical Guides to UNCAC in order that Member States should have all that material within the one Guide. [Examples of best practice and model legislation will be included in a second volume of the Guide].

This guide is not intended to be exhaustive or prescriptive and should be read in conjunction with the tools, products and practices produced by a range of international and regional organisations, both governmental and non-governmental. In particular, recourse should be had to the legislative and technical guides (the latter still under production at the time of writing) compiled by the UNODC, the wealth of guidance on preventing and combating corruption produced by the OECD, and the resources available through the Norway-based U4 organisation.

However, the commitment of the Commonwealth to anti-corruption measures in general, and to UNCAC implementation, should be recorded here.

Commonwealth Heads of Government emphasised their commitment to the tackling of corruption at their Meeting in Durban in 1999 at which they endorsed the 'Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption' (set out at Appendix E below).

Meanwhile, the Aso Rock Declaration in December 2003 urged Commonwealth states to sign, ratify and implement UNCAC, and saw the convening of an Expert Working Group to look at UNCAC's provisions and, where possible, to make recommendations for model legislation. The Group met in 2004 and produced a thorough report; the findings of which have been incorporated into the present guide.

At their 2005 Meeting, Heads of Government reiterated their commitment to root out, both at national and international levels, systemic corruption, including extortion and bribery, which undermines good governance, respect for human rights and economic development. They also

welcomed the imminent entry into force of UNCAC and urged member states, which had not already done so, to become parties to the Convention and to strengthen the fight against corruption by the adoption of principles and policies, as appropriate that emphasise good governance, accountability and transparency.

It is hoped that the guidance which follows will assist in bringing that commitment to fruition.

CHAPTER II: PREVENTIVE MEASURES

Article 5: Preventive Anti-Corruption Policies and Practices

UNCAC LANGUAGE

- 1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, co-ordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.*
- 2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.*
- 3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.*
- 4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.*

Article 5 states that each State Party must provide the context and framework to implement the Convention by devising, developing and implementing an anti-corruption strategy that addresses corruption directly and indirectly. This will be achieved through the promotion of the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

Each State Party is thus required to review its existing legislative, institutional and procedural provisions to strengthen what is in place and introduce what is required in order to develop a coherent and co-ordinated anti-corruption strategy. In doing this, each State Party should include participation of its citizens in the planning and implementation of the strategy. Externally, each State Party should work with other States Parties to share good practice and to ensure co-operation and mutual support.

As the UNODC Technical Guide makes clear, an equal emphasis should be given to prevention because it not only safeguards the integrity of the application of rules, procedures, funds, and so on, but has wider benefits in promoting public trust and managing the public conduct of officials.

The UNODC Technical Guide also sets out key issues for State Parties in relation to the creation of an anti-corruption strategy. It provides that State Parties should consider the following when developing their strategy:

Who is the main developer of the strategy?

Does this require coalition building in order to ensure the participation of the government and non-governmental actors or will consultation suffice?

Who will own or oversee implementation?

How will progress be assessed?

How will the strategy be reviewed and revised?

Government has the main responsibility for developing the building blocks for the policy drafting process but should do so in a consultative and inclusive manner; promotion of civil society participation is an objective of the strategy. In so doing, each State Party should ensure: an agreed definition of corruption; the collection, collation, and analysis of where corruption occurs, and why; a process to devise a strategy that ensures public participation; a strategy that includes the co-ordination and linkage between the various Articles in Chapter II; a body or body as specified in Article 6 to ensure the implementation and review of the strategy; means to ensure regional and international collaboration.

The strategy should publicly and transparently set out clear goals, timelines and the sequences in which specific goals should be accomplished. There should be a process to mobilize public support, and to allow for review and revision, to assist in planning future actions and evaluating past or ongoing actions.

The strategy itself should reflect both an overall approach that reflects the perspectives of public bodies, regulators and investigators, and private sector and civil society that builds a practical, prioritised and measurable framework that is owned by the institutions involved and suitable for monitoring, review and revision.

While the delivery of the strategy will fall within the responsibility of the body or bodies mandated for that purpose under Article 6, the strategy is to provide overall policy guidance. Within that guidance, specific action plans should be developed by individual sectors or institutions to ensure that the strategy is cascaded down through all public bodies. These should reflect the implementation of the strategy in detail and ensure that the strategy is not simply a mere declaration of intent. In order to be credible they must be co-ordinated and must comprise definite, measurable objectives. It must be ensured that they are implemented and periodically evaluated and adapted. In particular, one of the pivotal means of fighting corruption is the existence of an effective and continuing means of monitoring, review, and revision. This will need to be institutionally organised and co-ordinated.

Once the assessment has been undertaken the strategy will go through a number of stages. The first stage is the development phase to set priorities, to make an estimate of how long the strategy will last and to determine the resources required to implement it. The assessment should cover all sectors of the public administration and, if necessary, the private sector, to ensure no detail is overlooked. The strategy developed at this stage will be the baseline against which future progress will be assessed. This will be followed by the design stage, to set clear and reasonable objectives for the strategy and each of its elements, and measurable performance indicators for those objectives.

The delivery stage of the strategy will raise the awareness of the public and other key stakeholders of the true nature, extent and impact of corruption. Awareness-raising will help foster understanding of the anti-corruption strategy, mobilise support for anti-corruption measures such as from the private sector and civil society/NGOs, and encourage and empower populations to expect and insist on high standards of public service integrity and performance. Finally, the follow-up phase will be used to help assess progress against the strategy, to provide periodic information about the implementation of strategic elements and their effects on corruption, and to help decide how strategic elements/priorities can be adapted in the face of strategic successes and failures.

Article 6: Preventive Anti-Corruption Body or Bodies

UNCAC LANGUAGE

1. *Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:*
 - a. *Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;*
 - b. *Increasing and disseminating knowledge about the prevention of corruption.*
2. *Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.*
3. *Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.*

Article 6 requires a specialist anti-corruption body to be established and/or maintained. The Article does not prescribe specifically whether there should be a single agency or more than one agency, in addition to a specialised law enforcement agency (required by Article 36). The main focus of the body or bodies is on prevention, and specifically in relation to promulgating and implementing policies and practices (Article 5). Given the need for coherence for anti-corruption policies, States Parties should consider the potential for confusion and thus non-compliance before diffusing the final responsibility for policy among multiple bodies. Conversely, anti-corruption policy invites innovation, which often comes from tasking multiple bodies. The need for specialised law enforcement, which differs from policy-making bodies, is addressed in Article 36.

To prevent corruption, in accordance with Article 5, the body or bodies need to address:

- an equitable and uniform approach across various sectors;
- the legislative context to ensure a body or bodies work across sector boundaries with equal authority;
- means to ensure the co-ordinated implementation of policies and undertake inquiries and reviews;
- measures to ensure the impartiality of appointments, security of tenure for staff; operational independence to allow the effective performance of the body or body's mandate; and
- appropriate budgetary and reporting arrangements.

Again, the UNODC Technical Guide will be of assistance, and provides that: “The body or bodies shall develop, maintain, revise and monitor the implementation of effective, coordinated anti-corruption policies within the State Party’s strategy mandated by Article 5.” This strategy would designate responsibilities across the public sector, the private sector, the voluntary or NGO sector, and civil society.

Once a strategy is established, the body or bodies should ensure that it or they establish and promote effective practices aimed at the prevention of corruption. There should be capacity to undertake periodic evaluation of relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

To fulfil this mandate, the body or bodies will require the formal legislative authority to undertake a number of functions. Thus the legislative framework should:

- provide the body or bodies with the statutory authority to develop policies and practices outlined in the Convention;
- allow the body the ability to commence an inquiry on its own initiative, and ensure that it does not require that any matter for inquiry be referred to it before it may act;
- require a public authority or public official to produce a statement of information;
- require any person to produce specified documents or information;
- require the attendance of public officials at hearings;
- determine the body or bodies' right to hold hearings in public;
- ensure the exchange of information with appropriate bodies involved in anti-corruption work;
- ensure the authority to determine whether or not to hold public hearings;
- ensure the authority to publish findings;
- ensure the appropriate independence to fulfil its functions;
- provide for appropriate levels of accountability and reporting;
- ensure the appropriate leadership;
- ensure the appropriate level of resources.

Practical challenges and solutions

1. Preventive anti-corruption body or bodies

There is no universally accepted model but States Parties may consider a number of structural features which have been deemed useful in contributing to the effectiveness of a preventive anti-corruption body or bodies.

When considering the institutional framework, States Parties may wish to consider using an existing body or bodies, giving more responsibility to an existing body or establishing a new body. Each will have its own challenges but States Parties may wish to weigh the added value of a newly created body compared to the work of existing agencies. Further, consideration would be needed to assess the impact of a new body on the mandate and performance of existing ones. In other words, a careful review of the functions of existing bodies is a necessary concomitant of the decision to establish new bodies.

Factors in favour of using an existing body include:

- They already have premises, trained staff, legal powers, internal procedures etc., all of which would have to be created from the beginning by a new body, thus risking the loss of momentum.
- Existing bodies may have a high degree of credibility already and simply need an amendment to their terms of reference and/or mandate to enhance their effectiveness.
- The creation of a new body poses a dilemma as to whether to maintain or abolish existing bodies – maintenance

Factors in favour of a new body include:

- Its establishment would represent a new beginning and a demonstration of a new commitment.
- Existing bodies may have lost credibility and the inertia of their existing unsuccessful practices may be difficult to change.
- Existing bodies may have staff that do not have the skills required for the new mandate.
- A new body can be given new powers appropriate to current circumstances

As noted above, the Convention leaves to States the breadth of the mandate given to this body, in recognition of the wide range of administrative and legal systems, and the circumstances prevailing in each country. Thus, there are anti-corruption bodies charged only with prevention while others are given powers that range from prevention to investigation and prosecution, which are further described in Article 36.

2. Functions

Within an appropriate legislative framework, the body or bodies would be able to perform functions which, depending on the particulars and breadth of their mandate, would include:

- requiring public sector institutions to produce specific plans of action and guiding/reviewing their implementation;
- undertaking evaluations or inspections of institutions;
- receiving and reviewing complaints from the public,
- receiving and reviewing audit, investigative or parliamentary reports from public bodies, including those specifically responsible for anti-corruption investigations;
- undertaking research into legislation and administrative procedures;
- undertaking public opinion surveys, and developing other sources of information; and
- taking evidence on and conducting hearings for periodic reviews of progress on the anti-corruption plans.

Finally, the body or bodies should be able to enter into agreements to facilitate collaboration with other agencies and with relevant international and regional organisations in promoting and developing the measures referred to in the article, and participate in international programmes and projects aimed at the prevention of corruption.

The body or bodies should work with public sector institutions to ensure that information on

Co-ordination:

While their primary focus is on prevention policy and practices, the body or bodies should ensure that it or they take appropriate measures to co-ordinate work with other agencies, **especially to avoid jeopardising law enforcement inquiries and possible future prosecutions** without compromising independence.

anti-corruption measures is disseminated to appropriate agencies and the public, as well as NGOs and educational institutions to promote the preventive work and the integration of anti-corruption awareness into school or university curricula. The body or bodies should have authority to publish their reports. It or they should consider the production of manuals of guidance to be distributed as widely as possible.

3. Resources

An essential issue is to ensure that the body or bodies are funded and staffed appropriately and adequately. One method for doing this is direct submission of the body's annual business plan, with full budgetary details, to the appropriate budgetary committee of the legislature for approval. Where possible, the funding for the body should be agreed on a multi-year basis. This will minimise the potential for the legislature to use its budgetary approval power to limit the body's independence or to exercise improper influence in relation to specific corruption cases. An alternate method would be that the body receives an overall grant and be free from legislative influence over individual items in its budget. How it spends its funds is the responsibility of the body or bodies, but each year the body or bodies should submit accounts and be subject to the appropriate external audit arrangements for public bodies of an equivalent nature. In general, the more transparent the funding process, the more likely the body will be free from transient political influence.

4. Independence and accountability

The legislative framework should ensure operational independence of the body or bodies so that they may determine their own work agenda and how they perform their mandated functions.

The means to secure independence and accountability should be enshrined in law rather than executive decrees (which can easily create such a body but also abolish it). Establishment by law or, as experience shows, constitutional guarantees of independence enhance the likelihood that the body or bodies will have sufficient powers to promote effective policies and ensure implementation, as well as conveying a sense of stability.

The body and its staff should be protected from civil litigation for actions performed within their mandate as long as those actions have been carried out under the authority of the agency and in good faith.

Independence should not be perceived as contradictory to accountability, however. anti-corruption bodies should operate within an established governance system that includes appropriate and functioning checks and balances and in which nobody and nothing is above the law. Independence needs to be balanced by mechanisms to ensure the transparency and

In addressing independence, consideration would need to be given to the following issues:

- rules and procedures governing the appointment, tenure and dismissal of the Director and other designated senior personnel;
- the composition of the body and/or any supervisory board; suitable financial resources and remuneration for staff;
- an appropriate budget;
- suitable recruitment, appointment/election, evaluation and promotion procedures;
- periodic reporting obligations to another public body, such as the legislature;
- formal paths to allow co-operation and exchange of information with other agencies;
- arrangements to determine the involvement of civil society and the media.
- the appointment, retention, tenure and dismissal of staff with useful expertise

accountability of the body or bodies, such as through reporting to or being the subject of review by competent institutions, such as parliamentary committees, or by being subject to reporting to parliament, annual external audit and where relevant to the courts through judicial review.

Such processes need to respect what are often confidentiality requirements because of the sensitivity of anti-corruption work. These agencies will often be in a position to hold a person's freedom, resources and reputation at risk and they should have an affirmative obligation to protect information until an appropriate finding can be made.

Part of the independence of the body or bodies, and also a means to ensure public visibility, should be the right to determine how it or they conduct their work. In particular, the body or bodies should be entitled to determine the public nature of their work, through public hearings, which can be an important tool in exposing evidence of corruption and educating the community about corruption. At the same time, private hearings can be used to maintain the integrity of the inquiry, protect the identity of a witness or informant, receive information that may be used for further criminal and disciplinary charges, avoid interference with other proceedings, and avoid unnecessary harm to individual reputations.

The body or bodies should have the authority to follow up on whether and how its recommendations have been implemented. It or they should be able to issue periodic public reports on their work. Consistent with the need to protect the safety of witnesses and victims, the body or bodies should have a general policy of publishing their findings and reports to emphasise their role in upholding public integrity.

5. Specialised staff and training

Within its annual business plan and budget estimate, the body or bodies should identify staffing requirements. The authority creating them should consider allowing anti-corruption bodies to plan their own human resources policies, determine the number and professional qualifications of staff, identify necessary specialisations, as well as training qualifications and requirements. For transparency, it would be reasonable for the body to publish its recruitment and appointment procedures. These should meet the requirements for public appointments set out in article 7 of the Convention and should be subject to audit

Article 7: Public Office Requirements

UNCAC LANGUAGE

1. *Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:*
 - a. *That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;*
 - b. *That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;*
 - c. *That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;*
 - d. *That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.*
2. *Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.*
3. *Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.*
4. *Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.*

In article 2, the Convention contains a broad and comprehensive definition of the term “public official”, which embraces the staff of all public sector services and all those holding an elected public office. Appointed public office should be based on recruitment and, throughout a career, on merit with transparent policies and procedures. Those elected to public office should also uphold standards similar to those expected from appointed public officials. Thus ethical and anti-corruption requirements are an integral part of public office and concern all types of elected or appointed public officials as defined in article 2. Article 8 addresses more detailed issues relating to conflict of interest while articles 10 and 13 cover freedom of information, accessibility of public records and transparent decision-making.

Practical challenges and solutions

1. *Efficient, transparent and objective systems for recruitment, hiring, retention, promotion and retirement of public officials*

A fundamental pillar for an efficient, transparent and effective state free of corruption is a public service staffed with individuals of the highest level of skill and integrity. States Parties should develop a system to attract and retain such individuals. This may be achieved through the establishment of an institution such as a public service commission to handle or provide guidance on recruitment, employment and promotion procedures. Whether or not such an institution is advisory (where individual departments manage their own staffing) or executive (where the institution itself is responsible for staffing issues), it is important that procedures are, as far as possible, uniform, transparent and equitable.

Thus procedures should cover the need for job profiles for new posts, with stated requirements and qualifications. Posts should be openly advertised and filled under agreed recruitment procedures which would range from transparent procedures for selection and appointment criteria, to the confirmation of qualifications and references for successful candidates. Appointments should have stated terms and conditions of service, and remuneration commensurate with the duties and responsibilities of the post. The procedures for promotion or any reward or performance-related schemes should be consistent throughout the public sector.

There should also be annual performance appraisals for individual members of staff for determination of effectiveness, training needs, career progression and promotion.

States Parties should ensure that all ministries and departments maintain accurate personnel records for all recruitment, promotion, retirement and resignation, and other staffing issues. Since the wage bill is usually one of the biggest items of government expenditure and susceptible to weak controls, payroll records should be underpinned by a centralised or institutional personnel database against which to verify the approved post establishment list and the individual personnel records (or staff files).

2. Procedures for selection and training for positions vulnerable to corruption

States Parties will recognise that certain posts or activities may be more susceptible to corruption. These will require a higher level of assurance against misuse and it is important to identify the organisational vulnerabilities and procedures that need to be addressed (sometimes termed “corruption-proofing”). The institution discussed in II.1, possibly in conjunction with the body or bodies identified in article 6, should consider conducting an audit to:

- determine which public positions or activities are particularly vulnerable to corruption;
- analyse vulnerable sectors; and
- prepare a report addressing the assessments and specific risks within vulnerable sectors, with consequential proposals to deal with them.

Recommendations or proactive measures may include: pre-appointment screening of successful candidates (ensuring that the potential appointee has already demonstrated high standards of conduct); specific terms and conditions of service for successful candidates; procedural controls, such as benchmarking performance, or the rotation of staff, as means of limiting inducements to and effects of corruption arising from protracted incumbency.

Management should also introduce specific support and oversight procedures for public officials in positions that are especially vulnerable to corruption, including regular appraisals, confidential reporting, registration and declaration of interests, assets, hospitality and gifts, as well as efficient procedures to regularly monitor the accuracy of the declarations. They should also adopt, where possible and depending on the level of risk, a system of multiple-level review and approval for

certain matters rather than having a single individual with sole authority over decision-making. This is in part also intended to protect staff from undue influence and in part to introduce an element of independence to the decision-making process.

It may also be advisable to explore ways to monitor lifestyles of certain key officials. This would admittedly be a rather delicate matter and would need to be approached with due regard to, and in compliance with, applicable laws for the protection of privacy. Such monitoring may include looking for telltale signs in living accommodations, use of vehicles or standards of vacations that may not be consistent with known salary levels. Individuals' bank accounts may also need to be monitored, provided that such monitoring is approved by employees in their contracts.

3. Adequate remuneration and payscales

One major area of concern, particularly for developing countries or countries with economies in transition, is ensuring adequate remuneration for public officials. Both the level and certainty of payment may encourage a range of unacceptable conduct, from taking time from official responsibilities to undertake secondary employment to the susceptibility to bribery. "Adequate" means that, at the least, pay scales should allow public officials to enjoy the means to meet living costs commensurate with their position and responsibilities and comparable with similar positions in other sectors. "Certainty" of payment is equally critical. The military, the police, and other public officials will be tempted to abuses if left unpaid for long periods. States Parties should also ensure that the pay scales are linked to career progression, qualifications and promotion opportunities. The method of determining public sector pay and the criteria by which it is determined should be public.

4. Training public officials in ethics

The awareness among public officials of the risks of corruption posed in the performance of their public functions, and ways to prevent or report corruption, will be enhanced through training and regular information-gathering on corruption. It would be advisable to seek ways of establishing a comprehensive and periodic training programme, as an overall framework for the public sector, from which tailor-made programmes and courses can flow. Thus all public officials should benefit from suitable courses on professional ethics, not only upon recruitment but also as part of in-service training and especially for the posts most exposed to risks of corruption. Training should incorporate discussion on the resolution of specific real-life situations and the appropriate means for raising or reporting concerns. Adequate information to staff on their rights and duties, and on the risks of corruption or misconduct attaching to the performance of their functions, will help emphasise the importance of the ethical conduct expected of every official and foster a culture of integrity.

Management of public organisations should consider preparing reports that will draw on material from:

- Staff in positions with responsibility;
- Different sources, including:
- Management risk assessments;
- Management of risk techniques;
- Internal and external audits;
- Public surveys on perceptions of the effectiveness of anti-corruption measures;
- Employee surveys on topics such as:
- Training relevance;
- "Bottom-up" risks;
- Perceptions of the effectiveness of preventive measures; and
- Reports on the willingness of staff to report suspicions.

Involving staff in annual corruption reviews would engage them in awareness. It will also enable them to identify areas of concern and possible prevention measures.

Public bodies should also consider incentives to encourage employees to propose new preventive measures. For example, an employee who proposes effective preventive measures could receive credit for organisational effectiveness on a performance appraisal.

5. Candidature for and election to public office criteria

States Parties should consider that the same themes and issues addressed above concerning appointment to public offices are also pertinent to elected officials. Most States Parties will have constitutional and legal criteria frameworks that stipulate the requirements for standing for any election, as well as laws and regulations governing the integrity of the electoral process. States Parties, however, may also wish to consider ensuring that those seeking or holding public office also adhere to high ethical standards. This may involve laws or regulations that limit the political involvement, such as party membership or standing for elected office, for certain categories of public official. They may list those existing elected and appointed posts that would be incompatible with seeking a new or additional elected public office. They may have provisions to debar those with convictions for certain criminal activity, including corruption, from seeking or holding public office. They may require candidates to make a full disclosure of their assets and include provisions to void elections if a candidate or the candidate's party or supporters are involved in electoral corruption.

6. Transparency in campaign and political party financing

Putting in place appropriate rules and procedures to govern the finance of political campaigns and the financing of political parties has proved crucial in preventing and controlling corruption. A number of States Parties have set up one or more public bodies to be responsible for registering voters and managing elections, registering parties, monitoring party finances, reviewing candidate eligibility and financial disclosures, administering campaign finance laws and investigating any associated offences.

There are a number of issues to be addressed to encourage transparent funding, including: setting the parameters for the limits, purpose and time periods of campaign expenditures; limits on contributions; identification of donors (including whether or not anonymous, overseas and third-party donations or loans are permissible, restricted or prohibited); what types of benefits-in-kind are allowable; the form and timing of submission of, and publication of, accounts and expenditure by party organisations; means to verify income and expenditure; whether tax relief is allowed on donations or loans; and means to dissuade governments from using state resources for electoral purposes. For States Parties relying on public funding for elections and parties there are also issues relating to the calculations of the level of subsidy, how to encourage the development of new parties (while avoiding the creation of parties whose prime purpose is to access funding), and access to public broadcasting. Finally there need to be robust legal provisions and institutional procedures to deal with adjudication over contested candidatures and contested elections.

States Parties are invited to take note of the relevant initiatives of regional organisations, such as the Council of Europe Recommendation No.R (2003) 4 on common rules against corruption in the funding of political parties and electoral campaigns.

7. Transparency and the prevention of conflicts of interest

States Parties should consider introducing legislation that provides for the freedom of information and access to records, and transparent public decision-making, with appropriate administrative regulations on the retention, storage, access to, and privacy of state documentation. This requirement is addressed in more detail in articles 10 and 13.

For all holders of public office, and depending on the office concerned, States Parties should ensure general provisions on conflicts of interest, incompatibilities and related issues, based on the central Convention requirement that it should be forbidden for those holding elected or appointed public office to be in a position of conflicting interests, to hold undisclosed assets, and to perform incompatible functions or illicitly engage in incompatible activities. This requirement is addressed in more detail in article 8.

Article 8: Codes of Conduct for Public Officials

UNCAC LANGUAGE

- 1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.*
- 2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.*
- 3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.*
- 4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.*
- 5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.*
- 6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.*

Overview

States Parties are required to actively promote personal standards, such as integrity, honesty and responsibility, and the correct, impartial, honourable and proper performance of public functions among all public officials. To achieve this, States Parties must provide guidance on how public officials should conduct themselves in relation to those standards and how they may be held accountable for their actions and decisions. Specifically the Article indicates that all States Parties provide: (a) public reporting legislation; (b) conflict of interest rules and procedures; (c) a Code of Conduct; and (d) disciplinary requirements for public officials.

Most States Parties use a code of conduct or equivalent public statement. This has a number of purposes. It establishes clearly what is expected of a specific public official or group of officials, thus helping to instil fundamental standards of behaviour that curb corruption. It should form the basis for employee training, thus ensuring that all public officials know the standards by which they should perform their official duties. The standards should include: fairness, impartiality, non-discrimination, independence, honesty and integrity, loyalty towards the organisation, diligence, propriety of personal conduct, transparency, accountability, responsible use of organisational resources and appropriate conduct towards the public.

Conversely the code or equivalent public statement, together with the training, warns of the consequences of failing to act ethically, thus providing the basis of disciplinary action, including

dismissal, in cases where an employee breaches or fails to meet a prescribed standard (in many cases, codes include descriptions of conduct that is expected or prohibited as well as procedural rules and penalties for dealing with breaches of the code).

Public officials are thus not only aware of the standards relevant to their official duties and functions but it becomes difficult, where all of the applicable standards, procedures and practices are assembled into a comprehensive code, to claim ignorance of what is expected of holders of public office. Conversely, public officials are entitled to know in advance what the standards are and how they should conduct themselves, making it impossible for others to fabricate disciplinary action as a way of improperly intimidating or removing them.

How States Parties promulgate a code of conduct or equivalent public statement will depend on their specific institutional and legal systems. In some countries, specific legislation is used to set standards applicable to all public officials. The second means is the use of delegated authority, by which the legislature may develop a generic code but delegates the power to another body to create specific technical rules, or set standards for specific categories of officials, such as prosecutors, members of the legislature or officials responsible for financial accounting or procurement. Finally contract law, and associated employment terms and conditions, may set requirements to abide by a code of conduct for a specific employee as part of his or her individual contract of employment. Alternatively, an agency or department may set general standards to which all employees or contractors are required to agree as a condition of employment.

In all aspects of devising a code, States Parties are invited to take note of the relevant initiatives of regional, interregional and multilateral organisations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly Resolution 51/59 of 12 December 1996, the Council of Europe Recommendation No. R (2000) 10 on Codes of Conduct for Public Officials, which contains, as an appendix, a model code of conduct for public officials, and the OECD's Recommendation of the Council on Improving Ethical Conduct in the Public Service Including Principles for Managing Ethics in the Public Service (1998-C(98)70/FINAL).

Practical challenges and solutions

1. Promotion of integrity, honesty and responsibility among public officials

States Parties should ensure that the promotion of integrity, honesty and responsibility among public officials is addressed from both positive and negative aspects. In relation to the former, States Parties should provide guidance for public officials to be supported and rewarded for ethical conduct: appropriate training in the conduct expected of public officials, both on recruitment and during their careers. All public officials should receive appropriate training in the delivery of public services. All States Parties must provide rules and means for public officials to disclose financial or family interests, gifts and hospitality. States Parties should undertake to ensure that public officials may report or discuss concerns not only about the conduct of other public officials but also pressure and undue influence that might be applied to them by colleagues or by others; reassurance must be given that reporting will be treated confidentially and will not adversely affect their careers. States Parties should carry out risk assessments of post or activities vulnerable to corruption, and hold discussions with office holders on how to protect both them and the activities from corruption. More generally, there should be regular surveys of public officials about the risks, threats and vulnerabilities of their work.

2. Standards of behaviour and codes of conduct

Standards emphasise the importance of roles undertaken by officials. They should encourage public officials' sense of professional commitment, service to the public, and responsibility to the powers and resources of their office. Standards should set out core values of behaviour expected of those in public life, including lawful conduct, honesty, integrity, non-partisanship, due process, fairness, probity and professionalism. Reforms in many countries have focused on improving management competency and making public sectors better equipped to perform their tasks. This calls for public officials to be imbued with a wider range of values than before – values mainly concerned with being efficient, purposeful and accountable.

Standards often include high-level values to use as a basis for making well-reasoned decisions and judgments. There are general statements that can be applied to help with specific decisions, especially where public officials have to use their discretion and make choices. For example, they may include:

- serving the public interest;
- serving with competence, efficiency, respect for the law, objectivity, transparency, confidentiality and impartiality, and striving for excellence;
- acting at all times in such a way as to uphold the public trust;
- demonstrating respect, fairness and courtesy in their dealings with both citizens and fellow public officials.

Codes will state the standards of behaviour of public officials and translate them into specific and clear expectations and requirements of conduct. These identify the boundaries between desirable and undesirable behaviour and would often be grouped in a variety of ways, e.g., according to the boundaries of key relationships, or according to groups to whom responsibilities are owed.

Thus codes should address issues of public service (e.g. procedures to ensure fairness and transparency in providing public services and information) and political activities (e.g. placing restrictions on political activities and ensuring that political activities do not influence or conflict with public office duties). They will state clearly the requirements relating to both financial conflicts of interest (e.g. where a public official is working on matters in his official capacity that would affect his personal financial interest or the financial interests of those close to him) and conflicts of interest based on non-financial concerns (e.g. where a public official is working on matters that affect persons or entities with whom he has close personal, ethnic, religious or political affiliations). Codes should include clear and unambiguous provisions on acceptance or rejection of gifts, hospitality, and other benefits, especially addressing restrictions on acceptance of gifts from persons or entities that have business with the organisation, any outside employment (e.g. ensuring that outside work does not conflict with official work) and the use of government resources (e.g. using government resources only for government purposes, or protecting non-public information). Finally codes should deal with post-resignation and post-employment restrictions (e.g. restrictions on former public officials representing a new employer before their former agency or taking confidential information to new employers).

3. Applicability

In addition to basic tenets, effective compliance with the requirements of article 8 of the Convention may entail a set of codes for the various categories of public officials. It may also entail codes designed for and applicable to those doing business with government, such as contractors, or those private sectors or non-governmental bodies disbursing public funds.

For implementation, the first issue is whether the code should have legal status. Many of the activities covered by the code relate to the impartial and transparent performance of an official's responsibilities. Given the number of officials who may be covered by such a code, the implications of the legal enforcement of all aspects of a code should be considered carefully.

The second issue is whether a State Party wishes to differentiate between those parts of the code that relate primarily to the performance of the functions of office and those parts that deal with conflict of interest and other areas where the purpose of the code is to distinguish between proper and improper influences on an official's actions and decisions. Here States Parties may wish to take a more formal or legal approach to those aspects of a code that cover the declaration of assets, gifts, secondary employment, post-employment, hospitality or other benefits from which a conflict of interest may arise.

The third issue concerns avoiding the development and implementation of a code that follows the "develop and file" approach. This involves codes that are developed but then filed away in an induction manual, or are prepared without staff involvement. This approach risks the possibility of staff becoming cynical about the codes' usefulness or even regarding it as irrelevant because staff may feel it was imposed on them.

For a code to be effective, States Parties should ensure that:

- Senior public officials support the code and lead by example;
- Staff are involved in all stages of code development and implementation;
- Support mechanisms are in place to encourage the use of the code;
- Compliance with the code may be taken into account in relation to career progression etc.;
- Compliance with the code is monitored regularly through appropriate verification means;
- Code of conduct (and general corruption-awareness) training is regular and comprehensive;
- The organisation continually promotes its ethical culture (a code of conduct is an important but not the only tool for this);
- The code is enforced through disciplinary action when necessary;
- The code is regularly reviewed for currency, relevance and accessibility;
- The code is devised with a style and structure that meets the particular needs of the organisation;
- The code becomes an integral aspect for influencing decisions, actions and attitudes in the workplace (see article 10).

The fourth issue is what template should be used for a code or its contents. There is no single approach. The range could include the following topics: standards of public office and values of the organisation; conflicts of interest; gifts and benefits; bribes; discrimination and harassment; fairness and equity in dealing with the public; handling confidential information; personal use of resources – facilities, equipment (including e-mail, Internet, PCs, fax etc.); secondary employment; political involvement; involvement in community organisations and volunteer

work; reporting corrupt conduct, maladministration and serious waste; post-employment; and disciplinary procedures and sanctions.

The fifth issue concerns the context or framework within which States Parties develop a code. Writing a code alone is not enough. Therefore, States Parties will need to give consideration to ways of making the code effective in terms of its status and impact.

Thus States Parties can give the code general legitimacy and authority through laws and regulations and individual relevance by making employment offers to officials conditional upon their acceptance of the code (e.g. via a collective or individual acceptance or oath of office, or an employment agreement/contract). States Parties can ensure that accountability for implementing a code rests with senior management in individual departments which should develop their own code and more detailed policies, based on the general code, tailored to the roles and functions they are expected to carry out and to suit their particular requirements and circumstances. This gives the values and standards more operational relevance and enables them to be built into management systems.

Individual departments should complement a code with policies, rules, training, and procedures that spell out in more detail what is expected and what is prohibited. They will require specific clauses for officials in positions with a high risk of corruption. Compliance should be supported by ease of access to and understanding of a code. Specific requirements, such as asset disclosure, should be assisted by readily available asset declaration forms. Senior management may wish to consider assessment of compliance with any code as part of staff appraisal and performance management systems, as well as ensuring that the consequences for breaches, including disciplinary procedures and possible referral to justice, are known.

States Parties should publish the code to clearly communicate to the media and general public the standards expected of officials so that they know what are acceptable and unacceptable practices for public officials. There should be guidance on how the public may report breaches, and to whom, as well as the ability of the media to report in good faith on any breaches, without fear of retribution or retaliation.

Finally, States Parties should ensure that there is an oversight body, such as that designated under article 6, to scrutinise and monitor the implementation of a code – including regular reviews and surveys of public officials to find out from them their knowledge of the code and its implementation as well as what are the challenges and pressures they are facing – and to publish annual reports on whether entities are fulfilling their obligations with regard to the code.

Reporting by public officials of acts of corruption

Article 8(4) addresses reporting by public officials. Commonwealth states are referred to the Model Legislative Provisions on Whistleblowing in this regard, and also to the 2009 UNODC Technical Guide, which provides that:

“An important means of breaking the collusion and silence that often surrounds breaches of a code is to introduce an effective system for reporting suspicions of breaches in general, and corruption in particular (often termed ‘whistleblowing’ but also described as public interest disclosure, public reporting or professional standards reporting). States Parties are required to establish adequate rules and procedures facilitating officials to make such reports. These are intended to: encourage an official to

report, to know who to report to, and to be shielded from possible retaliation for such reporting by superiors.”

Part of the purpose of a code is to impress on public officials including through training, the responsibilities and professional nature of their work and responsibilities and thus their duty to report lapses or breaches of those standards by other public officials and members of the public. There should be the creation of specific reporting procedures, for example instituting ‘persons of trust’ or means of reporting in private such as through specified mail-boxes, telephone hotlines or designated third party agencies. Close attention must be paid to the security and confidentiality of any reporting through the establishment of systems to ensure those who report suspicions of corruption in good faith are fully protected against open or disguised reprisals. Further protection is necessary to protect the officials concerned from any form of ‘disguised’ discrimination and damage to their careers at any time in the future as a result of having made allegations of corruption or other infringements in public administration. [States Parties are invited to take note of specific developments on this issue in GRECO’s 2006 activity report at [http://www.coe.int/Greco/documents/2007/Greco\(2007\)1act.rep06 EN pdf](http://www.coe.int/Greco/documents/2007/Greco(2007)1act.rep06_EN.pdf) and the website of the NGO Public Concern at Work at <http://www.pcaw.co.uk>].

In this connection, States Parties will therefore need to consider legislation and procedures intended to make clear to whom allegations will be made; in what format (for example, in written form, or anonymously); by which media (by telephone, by letter); with procedural safeguards to protect the source; how allegations are investigated; and means to avoid retaliation or retribution.

A ‘whistleblower’ for present purposes, is an individual who, in good faith, reports corruption or other wrongdoing (which, usually, has come to his/her notice in the course of employment or engagement) to an appropriate authority. Depending on a state’s domestic law, that appropriate authority might be the employer, a regulatory or oversight body, a law enforcement agency or even, in cases of last resort, the media.

States Parties have an obligation to consider whether to introduce measures to protect such individuals against unjustified treatment, such as discrimination, with, in addition, Article 33 providing that:

“Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”

The whistleblower should be distinguished from the protected witness. The former has reported, but may or may not become a witness before a court or other tribunal. In the event that such a person is required to become a witness, whistleblowing legislation, as generally understood, will not provide protection against risks or threats to the person arising from giving, or being about to give, evidence. Rather it will be confined to treatment received, almost inevitably from an employer or other employees, as a result of making a report.

Indeed, UNCAC specifically provides (at Articles 25 and 32 respectively) that States Parties must criminalise acts that obstruct justice and must provide effective protection for witnesses.

The Model Provisions, already referred to, aim to provide a framework of protection for the person who reports in good faith and with reasonable grounds, and to set out a series of avenues for reporting, beginning with the employer and only moving beyond that when such reporting is impracticable. Therefore, by their very nature, these provisions seek to encourage the employer to take action in response to a report and expect the employee, ordinarily, to make a report without hiding his/her identity from the employer.

Those provisions reflect work and legislative drafting undertaken in a number of Commonwealth jurisdictions; in particular, New Zealand, South Africa and the United Kingdom. Reliance has also been placed on the expertise of specialist non-governmental organisations, including the United Kingdom's 'Public Concern at Work'.

Conflict of Interest

Respecting the principle that it is forbidden for any public official to place his/herself in a position of conflicting interests and to hold incompatible functions or illicitly engage in unacceptable activities, States Parties are required to introduce general provisions on conflicts of interest. See the working definition of conflict of interest provided by Michael McDonald¹ in the Box.

Changes that have taken place in the public service across the world and in particular the greater mobility of personnel between public and private sectors, the growth of public partnerships and enhanced co-operation between the public and business sectors, have all had the effect of increasing the 'grey areas' where the private interests of public servants can, or can be perceived to, unduly influence the way in which those public servants perform their official functions. These difficulties tend to be particularly acute in small jurisdictions.

A conflict of interest, whether real or apparent may not in itself amount to corruption, but conflicts between, on the one hand, the private interests of a public official and, on the other, his or her public duties, may result in corrupt activity unless the conflict is managed. A bar on a public official having any private interests is, of course, unworkable and may well lead to unfairness. The aim of the solutions set out below is to maintain integrity by reducing the potential for abuse and ensuring that a conflict of interest, where one exists, is brought to notice and results in preventive or punitive measures being applied as appropriate.

The OECD Guidelines for Managing Conflict of interest in the Public Service (the OECD Guidelines) adopt a definition which, aiming to be simple and practical, provides that 'A conflict of interest involves a conflict between the public duty and private interests of a public official, in which the public official had private capacity interests which could improperly influence the performance of [his/her] official duties and responsibilities'. Two further categories have been added to the OECD definition: the apparent conflict of interest, where it appears that a public official's private interests could improperly influence the performance of official duties, but they have not, in fact, done so, and the potential conflict of interest where the private interests are such that a conflict would arise if

What is "conflict of interest"?

A useful working definition is that put forward by Michael McDonald which defines it as "a situation in which a person, such as a public official, employee, or a professional, has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties". On that definition, there are three elements to a conflict of interest:

- A private or personal interest (which may, or may not, be financial);
- An official duty, usually due to the office or position held;
- Interference with objective professional judgment (or a perceived risk of the same).

¹ Ethics and Conflict of Interest by Michael McDonald in *Journal of Business Ethics* 39:1-2, 67-74, August 2002 (p. 68)

the official in question was to become involved in official duties which were relevant to his/her private interests.

Political scientists such as Kernaghan and Langford have gone further and produced seven typologies of conflict of interest.²

What is “conflict of interest”?

Seven typologies of conflict of interest by Kernaghan and Langford:

- “Self dealing”: the using of an official post or position to ensure that a contract is awarded to oneself or to relatives/associates.
- Accepting benefits, i.e. gift receiving.
- Influence peddling: where typically, the public servant seizes benefit or gift in exchange for exerting his or her influence.
- Using the employer’s property for private advantage: for instance, using office supplies or technology to carry out private work.
- Using confidential information for private ends.
- Taking additional work or employment; in other words, “moonlighting”.
- Post-employment activities: the typical example of the public servant who goes into business in the same field as that of his former employer and takes a share of the business of those with whom he worked; alternatively, in his new position persuading or lobbying his former department to action or to contract closure.

Disclosure Systems

Any strategy to address and manage conflict of interest might wish to take account of the core principles set out in the OECD Guidelines, as these have found favour with both OECD and non- OECD states.³ These provide that an unresolved conflict of interest may result in abuse of public office and that counter measures should have the following core principles in mind:

- a public official should serve the public interest;
- public officials and the organisations/ministries for which they work should act in a way which supports transparency and scrutiny;
- the public service should promote individual responsibility and personal example;
- an organisational culture in the public service should be engendered which is intolerant of conflicts of interest.

Given the risk of apparent and potential conflicts, as discussed above, it is important to recognise that a conflict of interest may arise in one of two broad ways: the behaviour may, in fact, be unlawful (in which case it is likely that a

corruption or ‘misconduct in public office’ offence will have been committed), or society, in other words “the public”, may think that unlawful behaviour has taken place. Given, therefore, the importance of perception, transparency and accountability must be addressed.

As a general principle, public bodies also need to create a climate where the public service provision is transparent and impartial, where it is known that the offering and acceptance of gifts and hospitality is not encouraged and where personal or other interests should not appear to influence official actions and decisions. This can be done in a number of ways, including general publicity on the provision of public services (see article 10) and the publishing of anti-fraud and corruption policies and codes of conduct. It can also be done by targeted publicity, particularly in

² Kernaghan and Langford, 1990 (see also OECD, 2003)

³ OECD Guidelines for managing conflict of interest in Public service Report, 2007. see further www.oecd.org/gov/ethics

the areas of tendering and contract documentation and by notices in public buildings or on the Internet.

One way of achieving, or at least contributing, to this is to introduce a requirement of declaration of interests by public officials in general or, at least, by public officials in key positions (such as within procurement). Any declaration requirement should address financial interests of the official in general; for example, a declaration of assets. Thus, property and investments should be included, along with share holdings and directorships (in those jurisdictions where public officials are allowed to be directors of public companies). In addition, the declaration requirement should extend to the declaration of a “potential” conflict of interest before it arises. Thus, a procurement officer who is faced with a relative or associate tendering for a contract should be required to declare as soon as he becomes aware of the relative’s or associate’s presence in the process. A third requirement for declaration should address acceptable gift giving. In other words, a threshold value for gifts should be decided upon and any official receiving a gift below that value should be required to declare the same in a register. That register should, ideally, be open to public inspection, perhaps online. In addition, an explicit prohibition should be introduced preventing the acceptance of gifts above the threshold value, but, at the same time, providing that, in circumstances where a refusal would offend the giver, the gift itself should be sold and the sum realised put into the public coffers or towards charitable cause.

It will be important that the public official knows from the outset what is required in relation to identifying and declaring conflict of interest situations. Accordingly, the process should begin on an official taking up a post and should require initial declaration/disclosure at that stage, along with steps being taken to give detailed guidance to the official to assist him/her in complying with the obligation. The declaration requirement should then continue whilst the official is in post and at the conclusion of time in post. At all times, the responsibility for the adequacy of any declaration must rest, and be seen to rest, with the post-holder.

As to the extent to which the public should have access to the full breadth of declaration, again transparency should be the determining factor. Arguably, at the very least, a senior public official or politician should expect that such declarations are available to public inspection in all regards.

Declaration requirements will only be effective if supported by a number of other measures. Thus, as already highlighted above, a clear code of conduct for public officials must be in place which contains in its terms, the public’s expectations of public servants’ behaviour and which explicitly provides for declaration and makes it a disciplinary offence at least for an unmanaged conflict “situation” to exist.

If declarations and a concise code are to be effective, the code should address: how a conflict may be resolved (including divestment of interest, recusal from involvement in the affected decision-making process, transfer to another post and resignation), and the options available to management, as well as the individual official.

In general terms, conflict-of-interest regulations should cover major types of conflict of interest, which have been the source of concern in a given country. Appropriate procedures need to exist for action when a conflict of interest is likely to occur or is already detected. In situations where conflicts of interest cannot be avoided (e.g., in small communities), there must be procedures which safeguard the public interest without paralysing the work of the agency in question. Public officials who are subject to the regulations should be aware of, understand and accept the concept of conflict of interest and of applicable regulations. Information and consultations should be available for public officials on how to act in case of doubt about their possible

conflict of interest. It would be useful to put in place an informal consultation process or mechanism of which public officials can readily avail themselves to seek clarifications and advice in particular situations. Body/bodies should be assigned to investigate and obtain all necessary information regarding possible conflicts of interest. Legislation, delegated authority and/or contracts of employment should provide appropriate penalties for failure to comply with conflict-of-interest regulations. Information about the conflict-of-interest requirements for public officials should be available to the public.

Registers of gifts and hospitality should record both offers made and hospitality and gifts accepted. Guidance should also be given to public officials about when and how they should make entries in the record (having a formal system and following the guidance also protects public officials against malicious allegations). Good practice guidelines will set a minimum value level at which declarations are required to be made. It should also set a value level at which the official must seek prior approval from a senior official before accepting the offer. The guidance will also stress that disclosures must be made promptly and will set out procedures for and monitoring of the records by senior management and internal audit.

All States Parties should seek to have in place institutional means for revising codes, monitoring implementation and related issues such as training and reviews; States Parties may look to the body or bodies established under article 6 to undertake these functions.

Specifically, the requirements on the disclosure and registration of assets and interests should ensure that:

- Disclosure covers all substantial types of incomes and assets of officials (all or from a certain level of appointment or sector and/or their relatives);
- Disclosure forms allow for year-on-year comparisons of officials' financial position;
- Disclosure procedures preclude possibilities to conceal officials' assets through other means or, to the extent possible, held by those against whom a State Party may have no access (such as overseas or held by a non-resident);
- A reliable system for income and asset control exists for all physical and legal persons – such as within tax administration – to access in relation to persons or legal entities associated with public officials;

- Officials have a strong duty to substantiate/prove the sources of their income;
- To the extent possible, officials are precluded from declaring non-existent assets, which can later be used as justification for otherwise unexplained wealth;
- Oversight agencies have sufficient manpower, expertise, technical capacity and legal authority for meaningful controls;
- Appropriate deterrent penalties exist for the violations of these requirements.

In devising appropriate and relevant conflict-of-interest requirements, States Parties should pay particular attention to:

- What posts or activities are considered incompatible with a particular public office?

- What interests and assets should people declare (including liabilities and debts)?
- Do different posts have different types of conflict-of-interest requirements?
- What level and detail of information should be declared (thresholds)?
- What form should the declaration be in?
- Who verifies the information disclosed?
- Who should have access to the information?
- How far should records of indirect interests (such as family) go?
- Who should have the obligation to declare (for example, depending on the risk of, or exposure to, corruption; depending on the institutional capacities to verify the declarations)?
- To what extent and in which way should the declarations be published (with due consideration of privacy issues and institutional capacity)?
- How will compliance to the obligation to declare be enforced and by whom?

All States Parties should also have stated policies and procedures relating to gifts and hospitality. These should address:

- Permission to receive a gift, invitation or hospitality;
- Information required for a register;
- Access to the register;
- Ownership of any gift;
- Verification of information;

Disciplinary measures

It is important that all States Parties have clearly stated and unambiguous procedures to deal with breaches of the code. These will depend on their own institutional and legal systems but will need to consider who or which agency should be responsible for receipt, verification and investigation of allegations concerning assets, gifts or hospitality, bearing in mind the possible volume of work and ease of access to relevant information. They will also have to decide who or which agency will be responsible for adjudicating on identified breaches of the requirements.

Legislation, rules, or terms and conditions of service relating to the rights and duties of public officials should provide for appropriate and effective disciplinary measures. All public bodies' personnel and management systems should therefore address procedures and penalties for deterring, detecting and dealing with incidents of professional misconduct. The code should provide the foundation of a unified disciplinary and grievance framework to protect the integrity of the service and of each individual public official. The framework should provide a crucial mechanism in deterring and dealing with incidents of administrative corruption or misconduct by outlining clear and unambiguous responses and sanctions. The grievance framework provides a safeguard to a public official maliciously and falsely accused of corruption as well as other forms of misconduct but should also outline procedures for the actions and protection of public officials that report corrupt practices going on around them.

In addition, appropriate criminal sanctions should be considered. These might extend to non-compliance in respect of some or all aspects of the declaration requirements. Certainly the declaration of assets and of financial interests should be obligatory on pain of criminal proceedings. However, the particular environment of a state will determine whether those other aspects of declaration, such as the gift giving provisions, are addressed through disciplinary procedures or the criminal courts.

Whether disciplinary or criminal, each offence must be clear its provisions accessible to those capable of being affected by it, and it must be effectively enforced.

In determining the sanction, thought should be given to the real purpose of the declaration requirement. For most states, the need for declaration serves not just to produce a public register of public officials' interests, but to instil public confidence in the workings of government, both at the central and local levels, and to identify the corrupt or potentially corrupt by their coming to notice via non or late declaration. It is therefore important that time limits for declaration are set and that late declaration is also penalised.

There are a number of instances of states having introduced a declaration requirement, but having cast the requirement too wide with the result that no examination or monitoring of the declarations themselves takes place. It is better, particularly for a small state, for a limited number of public officials in key positions to have to make very thorough financial interest declarations and for those declarations to be properly scrutinised, than for a blanket requirement extended to all public officials in circumstances where it is common knowledge that the declarations themselves will be too numerous for any effective analysis to take place. If declarations are thrown into disrepute in this way, the whole system of conflict of interest management in the state in question becomes meaningless.

Article 9: Public Procurement and the Management of Public Finances

UNCAC LANGUAGE

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

- (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
- (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
- (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
- (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;
- (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:

- (a) Procedures for the adoption of the national budget;
- (b) Timely reporting on revenue and expenditure;
- (c) A system of accounting and auditing standards and related oversight;
- (d) Effective and efficient systems of risk management and internal control; and
- (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

3. Each State Party shall take such civil and administrative measures as maybe necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

The 2009 UNODC Technical Guide contains comprehensive guidelines for this very important area which are set out in full below:

Overview

Procurement is acknowledged to be a process vulnerable to corruption, collusion, fraud and manipulation. States Parties are required to develop procurement procedures that incorporate 1 (a) to (e) above. States Parties are invited to take note of special developments on this issue in recent OECD publications such as *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, OECD, 2007 at http://www.oecd.org/document/60/0,3343,en_2649_37447_38446908_1_1_1_37_447,00.html. Also, *Integrity in Public Procurement: Good Practice from A to Z* (OECD, 2007) and *Fighting Corruption and Promoting Integrity in Public Procurement* (OECD, 2005), policy and research papers published by Transparency International at <http://www.transparency.org>, and the World Bank at <http://go.worldbank.org/KVOEGWC8Q0>.

It is important to note that public procurement regulation is not about anti-corruption per se – the common objectives of most procurement systems include value for money, integrity, accountability, fair treatment, and social/industrial development.⁴ Balancing these objectives, some of which may conflict, is the challenge in procurement regulation. Nonetheless, there is agreement that procurement systems should reflect the requirements set out in article 9 (1) above. There is a range of agencies providing guidance on procurement, including the United Nations Commission on International Trade Law (UNCITRAL), which has published a Model Law on Procurement of Goods, Services and Construction and an accompanying explanatory Guide to Enactment and the World Bank, which has published procurement and related guidelines⁵. Other international and regional groupings that have procurement regulations, which could be taken into account when drafting national legislation in member states, include the Asia-Pacific Economic Co-operation (APEC), the European Union (EU, which adopted two procurement directives in 2004 – Directive 2004/17/EC (contracts awarded in the utilities sectors) and Directive 2004/18/EC (contracts awarded by public authorities)), the draft Free Trade Area of the Americas Agreement (FTAAA), the North American Free Trade Agreement (NAFTA), the Organization of American States (OAS) and the World Trade Organization's (WTO) Agreement on Government Procurement (GPA)⁶.

Achieving the objectives of procurement including anti-corruption comes about not only through regulation but also as part of good governance. States Parties are therefore required to ensure that all public income and expenditure is fully disclosed to public scrutiny and subject to effective internal and external audit, and should ensure that the law and procedures are enforced (institutional culture as well as regulation), and that there is appropriate oversight for procurement itself. As with procurement, there are a range of agencies to support the development of audit principles and practice, especially the International Organization of Supreme Audit Institutions (INTOSAI) and its seven regional working groups.

Practical challenges and solutions

⁴ See, e.g., Arrowsmith, Linarelli and Wallace, *Regulating Public Procurement: National and International Perspectives* (2000; Kluwer Law International), ch. 2; Schooner, "Desiderata: Objectives for a System of Government Contract Law" (2002) 11 P.P.L.R. 103-110.

⁵ See "Guidelines: Procurement under IBRD Loans and IDA Credits", and other documents regarding the Bank's procurement policies and procedures, available at <http://go.worldbank.org/9P6WS4P5E1>.

⁶ The working group of all WTO members addressing transparency in government procurement has discontinued its work. See the General Council's decision on the Doha Agenda work programme (the "July package", at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm), of 1 August 2004, stating inter alia that there will be no negotiation on the Singapore issue of transparency in government procurement. However, it is hoped that the working group will be revived in the future

1. Procurement

1.1. The principles

The main elements of national procurement systems are procedures to identify, specify, and announce goods to be procured and to determine which suppliers are eligible to participate, a requirement for open tendering or equivalent unless there is justification for restricting participation, pre-established evaluation and award procedures, and review or bid-challenge procedures. States Parties must have clear and comprehensive procedures that cover all aspects of contracting, including the role of public officials, which explicitly promote and maintain the highest standards of probity and integrity in all dealings. States Parties must also have similar requirements governing any deviation from stated procedures, with documented and publicly recorded reasons to justify this. It is essential that all decisions taken are transparent and accountable, and can withstand scrutiny by monitoring agencies, the legislature and the public.

1.2. Measures to enhance transparency

Transparency is one of the main means to achieve integrity in the procurement process. There are three main stages of the procurement procedure: procurement planning and the decision to procure, including the preparation of operational-technical requirements (specifications); organisation and allocation of public procurement through open procedures (unless there are exceptional circumstances justifying alternative procedures) and the completion of contract; and closure of the contracts through post-award performance and payment. The article lays down guidance on areas to be regulated.

As regards the requirement for public distribution of procurement-related information in paragraph 1 (a) of article 9, the UNCITRAL Model Law contains several articles that seek to ensure transparency, including the mandatory publication of relevant laws and regulation, and the mandatory use of open tendering or its services equivalent unless there are specific circumstances justifying a more restricted method. Indeed, as its accompanying Guide to Enactment notes, open tendering is the method of procurement widely recognised as generally most effective in promoting the objectives of procurement described above, including the avoidance of corruption. Open tendering is a transparent procurement technique requiring, as a general rule, unrestricted solicitation of participation by suppliers or contractors; pre-tender comprehensive description and specification of the items to be procured; full disclosure to suppliers or contractors of the criteria to be used in evaluating and comparing tenders and in selecting the successful tender (i.e. price alone, or a combination of price and some other technical or economic criteria); strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; public opening of tenders at the deadline for submission of tenders; and disclosure of any formalities required for the procurement contract. In the procurement of services, open tendering is sometimes varied to allow weight to be given in the evaluation process to the qualifications and expertise of the service providers.

For the exceptional circumstances in which the above methods are not appropriate or feasible, most systems, including the UNCITRAL Model Law, offer some alternative methods of procurement that can be used upon justification. Justification is required because these alternative methods involve some degree of restriction on the numbers of suppliers that are invited to compete for the relevant contract, or other aspects of transparency, and may include sole source procurement. The circumstances justifying the use of alternative methods include situations in which it is not feasible for the procuring entity to formulate specifications to the

degree of precision or finality required for tendering proceedings, urgent needs due to catastrophic events, technically complex or specialised goods, construction or services available from only a limited number of suppliers and procurement of such a low value that it is justified to restrict the number of tenders that would have to be considered by the procuring entity. It is vital that appropriate guidance is given regarding which alternative methods can be used, and in which circumstances. Nonetheless, under all methods provided for in the UNCITRAL Model Law and those commonly found in most procurement texts on the international stage, including in those that do not require public advertisement of the procurement, the conditions and criteria for participation and selection must be objective, predetermined and disclosed to participants, and the award of the contract published (subject in some cases to a de minimis threshold). It is particularly important in non-open proceedings that these transparency measures are respected.

A further important dimension of transparency is free, accurate and accessible information. Ideally, all procurement information should be free for transparency reasons, but the kind of information that must and should be free, and what accessible means in practice are not always uniform. Although most national systems do not charge for participation (in some cases beyond a nominal fee reflecting the cost of distribution of tender documents), some international organisations do charge fees for some elements of participation. Thus States Parties should ensure that there is public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and on types of approved lists, and relevant or pertinent information on the award of contracts, allowing potential tenders sufficient time to prepare and submit their tenders. States Parties are encouraged to provide this information without charge.

States Parties should develop and publicise in advance all information that enables effective participation in the procurement process, including: all relevant laws, rules and regulations, the conditions for participation, including selection and award criteria, and establish ceilings and conditions for the alternative methods of procurement described above. They should publish objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures.

There should be publicly stated measures to regulate matters regarding personnel responsible for procurement, such as risk management, audit trails, specific appointment processes, specific codes of conduct and training requirements. Consideration must be given to ensuring that legislative committees and State Audit have access to contract documentation and public officials. States Parties should develop and publicise an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedure established are not followed. One consequence may be the debarment of contractors for proven non-compliance with procurement processes or corrupt conduct. For examples of effective sanctions procedures see http://www.eipa.eu/files/repository/eipascope/Scop06_3_3.pdf. There should be possible measures against procurement officials, who may be the originators of the corrupt behaviour.

States Parties should explore the establishment of either an independent agency or commission for the organisation and execution of **public procurement procedures**. Such a body would have executive or monitoring responsibilities for:

- access to and monitoring of bidding and implementation procedures;
- attending any part of the procurement process;
- identifying fraud indicators, that might point to corrupt activity at an early stage,

- collating intelligence on procurement fraud and corruption, including (i) receiving all complaints; (ii) creating a confidential telephone “hotline”; (iii) reviewing publicly available debarment lists; and (iv) ensuring the effective exchange of relevant information with other parts of the government involved in contracting with the private sector, as appropriate;
- monitoring specific awards, such as single source procurement;
- developing and overseeing integrity pacts;
- co-ordinating prevention strategies through education and training initiatives, providing direction and guidance to internal audit, provision of advice on anti-corruption issues, performing due diligence reviews or developing and maintaining debarment lists;
- promoting freedom of information legislation and access to information;
- promoting specialist training, codes of conduct and asset declaration requirements for procurement staff and auditors.

1.3. Rules of the tender and review process

Such a body will require the use of procedures to be followed with specific reference to:

- how procurement procedures are selected – e.g. open, restricted, sole-source, negotiated, emergency procedure etc. and how to choose between them;
- how contracts are structured – e.g. framework or master agreements, or one-time contracts;
- tender and award procedures: bid preparation and budget planning; solicitation and selection; contract delivery, variation and performance, and approved lists;
- award criteria; price, price/quality etc.;
- tendering frameworks: threshold limits, prime, cost-plus, term etc.;
- use of standard verification, validation and audit controls, including: no-collusion and no-bribe clauses, debarment policies, data matching and mining, product benchmarking for supplies, evidence of company economic stability and capacity proportionate to contract. The standardisation of procurement systems necessitates that all elements used for oversight need to be integrated – e.g. using e-procurement systems;
- fraud indicator controls, specific procedures to address areas or activities of risk or vulnerability (ranging, for example, from the artificial splitting of contract specifications to substitution of counterfeit goods);
- asset declaration requirements of all public officials involved in procurement;
- post-resignation or post-employment requirements of all public officials involved in procurement (e.g., to avoid pre-resignation negotiations with suppliers by procurement officials to get a good job);
- contract variation;
- contract verification;
- use of Internet as one means for contract information dissemination;
- liaison with law enforcement agencies on allegations of corruption and criminal behaviour such as bribery and facilitation payments;
- debarment procedures.

Specifically, such a body would undertake or require to be undertaken risk assessments of the main areas of potential corruption and fraud, including: rigged specifications and procedures; collusive bidding; false claims and statements; failure to meet specifications, including use or supply of substandard or counterfeit materials; co-mingling of contracts; false invoices; duplicate contract payments; contract variation misuse and split purchases; phantom contractors.

1.4. Personnel responsible for procurement

As noted previously under article 7, States Parties should carry out risk assessments of certain posts or offices such as those involved in procurement. These will require a higher level of assurance against misuse and it is important to identify the organisational vulnerabilities and procedures that need to be addressed.

After these assessments are completed, public organisations should consider implementing a number of proactive measures. These may include: pre-appointment screening of successful candidates (ensuring that the potential appointee has already demonstrated high standards of conduct); specific terms and conditions of service for successful candidates; procedural controls, such as benchmarking performance, or the rotation of staff, as a means of limiting inducements to and effects of corruption arising from protracted incumbency.

Management should also introduce support and oversight procedures for employees in positions that are especially vulnerable to corruption, including regular appraisals, confidential reporting, registration and declaration of interests, assets, hospitality and gifts. They may also wish to adopt, where possible and depending on the level of risk, a system of multiple-level review and approval for certain matters rather than having a single individual with sole authority over decision-making, in part to protect staff from undue influence and in part to introduce an element of independence to the decision-making process.

As noted in II.1.3, the body responsible for procurement would also, in consultation with other bodies, such as external auditors and including those agencies designated under articles 6 and 36, develop a management Corruption and Fraud Risk Register as a potential warning or fraud indicator system, which prompts a closer inspection of a particular area of the public procurement process, or a debarment register covering companies and personnel involved in non-compliant or corrupt conduct. It would also provide or promote specialist training for managers, auditors, and investigators to ensure a good working knowledge, working practices, and procurement procedures to facilitate their work.

Common procurement vocabulary and standardised terms in defining specifications have a useful role to ensure objectivity in the procurement process. For example, see article 16 of the UNCITRAL Model Law.

It is vital for effective oversight functions, as further discussed below, that adequate documentation be retained. The UNCITRAL Model Law (article 11) requires the maintenance of a record for each procurement, setting out the information to be included, which would constitute the basic information necessary for audit. In addition, the text provides rules regarding the extent of disclosure. Essentially, basic information geared to the accountability of the procuring entity to the general public must be disclosed to any member of the general public, and information necessary to permit participants in the process to assess their performance and to detect instances in which there are legitimate grounds for challenge.

Full procurement records are also required in order for any challenge, including appeal, to be effective, particularly regarding speed, transparency, publicity, timely suspension of procurement proceedings or contract as appropriate.

Proper budget preparation at the individual procuring entity level is an essential feature of procurement planning, and vice versa. Inadequate or non-existent procurement planning is a well-documented source of abuse in procurement, for example leading to unjustifiable recourse to non-open procedures (because non-urgent procurement becomes “urgent”), or to

unnecessary procurement (if budgeted funds are viewed as lost if not spent). Additionally, essential procurement can be withheld because of lack of funds.

2. Public finance

2.1. Management of public finances

States Parties should ensure that all budget preparation and presentation reflects clarity of roles and responsibilities, the public availability of information, open budget preparation, execution, and reporting, effective audit and legislature oversight. A sound public finance system should reflect the following components:

- transparency of sources of public income;
- predictability of taxation requirements;
- credibility of the budget – the budget is realistic and is implemented as intended;
- comprehensiveness and transparency – the budget and the fiscal risk oversight are comprehensive, and fiscal and budget information is accessible to the public;
- limited extrabudgetary, off-budget or supplementary budget expenditure, which is subject to appropriate, publicly available criteria and controls;
- policy-based budgeting – the budget is prepared with due regard to government policy;
- predictability and control in budget execution – the budget is implemented in an orderly and predictable manner and there are arrangements for the exercise of control and stewardship in the use of public funds;
- accounting, recording and reporting – adequate records and information are produced, maintained and disseminated to meet decision-making control, management and reporting purposes;
- external scrutiny and audit – arrangements for scrutiny of public finances by State Audit and the Legislature, and follow-up by the Executive, are operating; limited areas of confidential expenditure; access to all bodies spending public funds; annual legislative review of audit reports.

2.2. Procedures for the adoption of the national budget

All states will have due process for approving their annual government budgets. Where there is an elected legislature, it is normal for the power of government authority to spend, to be exercised through the passing of the annual budget. If the legislature or other examining authority does not rigorously examine and debate the budget, that power is not being effectively exercised and will undermine the accountability of the government. The scrutiny and debate of the annual budget will be informed by consideration of several factors, including the scope of the scrutiny, the internal procedures for scrutiny and debate and the time allowed for that process. Even where there is no elected legislature, States Parties should seek maximum public examination of the budget.

The budget is the government's key policy document. It should be comprehensive, encompassing all government revenue and expenditure, so that the necessary trade-offs between different policy options can be assessed and legislative or other public scrutiny is meaningful. The budget process should address a number of issues.

First, States Parties should provide the context – the economic assumptions underlying the budget estimate report should be made in accordance with standard budget practice and the

budget should include a discussion of intended revenue streams. The budget should also contain a comprehensive discussion of the government's financial assets and liabilities, non-financial assets, employee pension obligations and contingent funding.

States Parties should ensure that, as far as possible, all budget proposals should be accessible, including defence budgets, and expenditure through non-public agencies. The government's draft budget should be submitted to parliament and/or the public far enough in advance to allow the legislature and/or other bodies and the public to review it properly. In no case should this be less than 3 months prior to the start of the fiscal year. The budget should be approved by legislature prior to the start of the fiscal year.

The budget, or related documents, should include a detailed commentary on each revenue and expenditure programme, as well as non-financial performance data, including performance targets, and should be presented for expenditure programmes where practicable. Comparative information on actual revenue and expenditure during the past year and an updated forecast for the current year should be provided for each programme. Similar comparative information should be shown for any non-financial performance data.

The budget should include a medium-term perspective illustrating how revenue and expenditure will develop during, at least, the two years beyond the next fiscal year. Similarly, the current budget proposal should be reconciled with forecasts contained in earlier fiscal reports for the same period; all significant deviations should be explained.

If revenue and expenditures are authorised in permanent legislation, the amounts of such revenue and expenditures should nonetheless be shown in the budget for information purposes along with other revenue and expenditure. Expenditures should be presented in gross terms. Earmarked revenue and user charges should be clearly accounted for separately. This should be done regardless of whether particular incentive and control systems provide for the retention of some or all of the receipts by the collecting agency. Expenditures should be classified by administrative unit (e.g. ministry, agency). Supplementary information classifying expenditure by economic and functional categories should also be presented.

2.3. Timely reporting on revenue and expenditure

All States Parties should ensure predictability and effectiveness in tax assessment is ascertained by an interaction between registration of liable taxpayers and correct assessment of tax liability for those taxpayers. States Parties should take steps to ensure transparency on major sources of income is declared to the tax authority. They should bear in mind that certain industries, internationally, tend to create a higher risk of corrupt payments. Such industries would include the extraction, processing and distribution of natural resources, such as those relating to mineral and other resources, as well as arms and aircraft sales, gambling and pharmaceuticals.

All States Parties should ensure the effective execution of the budget, in accordance with the workplans, to ensure that the spending ministries, departments and agencies receive reliable information on availability of funds within which they can commit expenditure for recurrent and capital inputs. All States Parties should ensure the timely delivery of consolidated year-end financial statements which are critical for transparency in the financial management system. To be complete they must be based on details for all ministries, independent departments and devolved units. In addition, the ability to prepare year-end financial statements in a timely fashion is a key indicator of how well the accounting system is operating, and the quality of records maintained. In some systems, individual ministries, departments and devolved units issue

financial statements that are subsequently consolidated by the ministry of finance. In more centralised systems, all information for the statements is held by the ministry of finance.

2.4. Accounting, auditing and oversight

Reliable reporting of financial information requires constant checking and verification of the activities and the recording practices and is an important part of internal control and a foundation for good quality information for management and for external reports. Timely and frequent reconciliation of data from different sources is fundamental for data reliability.

All States Parties should ensure an appropriate internal and external audit structure.

The core functions of internal audit should be broadly defined as: a basic audit process reviewing the accuracy with which assets are controlled, income is accounted for and expenditure is disbursed; a system-based audit, reviewing the adequacy and effectiveness of financial, operational and management control systems; a probity, economy, efficiency and effectiveness audit reviewing the legality of transactions and the safeguards against waste, extravagance, poor value for money, fraud and corruption; a full risk-management-based audit.

Ministries of Finance or Treasury should provide guidance on the annual submission of accounts on the level and size of internal audit capacity by size and turnover of the entity, as well as the level of professional accreditation to perform adequately their audit functions.

In brief, internal audit is established by the management of the public body within State Party guidelines and, although operating independently, is part of the overall management function of the organisation.

External or State Audit's overall purpose is to carry out an appraisal of management's discharge of its stewardship responsibilities, particularly where they relate to the use of public money, and to ensure that these have been discharged responsibly. This work will include an appraisal of the work of internal audit and staffing capacity. There should be a stated formal relationship between internal audit and state audit in terms of reporting, training and security of tenure issues, as well as shared accreditation levels and exchange of staff.

State audit agencies may turn for guidance on competences and work to international organisations such as the International Organization of Supreme Audit Institutions (INTOSAI). In that regard the conclusions of INTOSAI's XVIth conference in Uruguay in 1998 supported a greater involvement of supreme audit institutions in anti-corruption efforts. States Parties should legislate to ensure the separate entity of the state audit, its operational independence, the appointment of an appropriately qualified Head by the legislature, adequate capacity to undertake its work, right of access to the expenditure of any public funds, and the right to report to the legislature. States Parties should work with representative accounting professional bodies to promote wider training and qualifications, drawing on general international audit standards.

Key elements of the quality of an external audit comprise the scope/coverage of the audit, adherence to appropriate auditing standards, a focus on significant and systemic financial management issues in its reports, and performance of the full range of financial audit such as reliability of financial statements, regularity of transactions and functioning of internal control and procurement systems. Inclusion of some aspects of performance audit (e.g. value for money in major contracts) would also be expected of a high quality audit function. The scope of an audit mandate should include extra-budgetary funds, autonomous agencies and any body in

receipt of public funding, including private sector contractors involved in public procurement, as noted above.

A key element in the effectiveness of the audit process is the timing of reports and the timing of follow-up action. Experience shows that where the audit report appears some years after the end of the audited financial period, the subject of the audit is able to claim that the findings are out of date and the individuals concerned have moved on. Thus, pressure to take action is reduced. The timing of audit reports should be mandated by law or some other effective means.

While the exact process will depend to some degree on the system of government, in general the executive (the individually audited entities and/or the ministry of finance) would be expected to follow-up the audit findings through correction of errors and system weaknesses identified by the auditors. Evidence of effective follow-up of the audit findings includes the issuance by the executive or audited entity of a formal written response to the audit findings indicating how these will be or already have been addressed. The following year's external audit report may provide evidence of implementation by summing up the extent to which the audited entities have cleared audit queries and implemented audit recommendations. These should be available to and discussed by the appropriate committees of the legislature.

The legislature has a key role in exercising scrutiny over the execution of the budget that it previously approved. A common way in which this is done is through a legislative committee(s) or commission(s), which examines the external audit reports and questions responsible parties about the findings of the reports. The operation of the committee(s) will depend on adequate financial and technical resources, the right to call for public officials and relevant documentation, and on adequate time being allocated to keep up to date with reviewing audit reports. Hearings should as far as possible be in public. The committee may also recommend actions and sanctions to be implemented by the executive, in addition to adopting the recommendations made by the external auditors. The committee should have the authority to monitor corrective actions taken.

The focus should not only be on central government entities but any agency in receipt of public funding. They should either: (a) be required by law to submit audit reports to the legislature; or (b) their parent or controlling ministry/department must answer questions and take action on the agency's behalf. Thus all States Parties should ensure that there is legislative provision to allow state audit to access and report on the expenditure of public funds through any body in either the public or private sectors on an annual basis and within an agreed timetable for submission to the legislature. The legislature should have the authority to investigate late submissions or failure to co-operate with the state audit. Unless defined by statute, all such reports should be made public. State audit should also be required to review and, where appropriate, to report on issues relating to standards of financial conduct and control procedures in public bodies and aspects of the arrangements set in place by the audited body to ensure the proper conduct of its financial affairs.

The legislature should maintain oversight of the use of public funds through the state audit, which should be required to pay particular attention to issues of regularity and propriety. The state audit should also have a role in investigating and reporting on impropriety encompassing fraud, corruption and other forms of misconduct, with the right to report to the specialist committee of the legislature.

2.5. Risk management and internal control systems

Public audit plays an important role in ensuring that those responsible for handling public money are held accountable for its use. Propriety should be a stated responsibility within the range of audit work, which includes the audit of financial statements, issues of regularity and “value for money”. Public sector auditors should be required to review and, where appropriate, to report on issues relating to standards of financial conduct in public bodies and aspects of the arrangements set in place by the audited body to ensure the proper conduct of its financial affairs.

Auditors should also report on the financial statements and conduct examinations into value for money, governance issues, and where indicated as necessary, fraud and corruption. Auditors have the power to publish reports directly where they believe these to be in the public interest on issues of impropriety and poor governance. Statements concerning potentially unlawful actions will often, of practical necessity, be supported by a specific report.

Internal audit has its own part to play in the scrutiny function. Apart from its role as a component in the internal control environment as noted above, it can act as an organisation’s own watchdog on matters of propriety. Internal audit’s focus on risk and internal controls and detailed knowledge of its organisation, places it in a powerful position to detect issues of propriety. Close liaison with an organisation’s internal audit is therefore likely to greatly help external auditors, and those bodies involved with the prevention and investigation of corruption designated under articles 6 and 36, undertaking a review of propriety to achieve a thorough understanding of the business. States Parties should ensure that state audit has the right to exchange information and co-operate with the bodies.

In relation to general audit work, and while external auditors may not be required to perform specific procedures for the purpose of identifying improprieties as part of the examination of the financial statements, they take reasonable steps to assure themselves that financial statements are free of misstatements related to fraudulent or corrupt activities, and remain alert for instances of significant possible or actual non-compliance with general standards of public conduct. In particular, auditors may develop a general appreciation of the framework of governance and standards of conduct within which the entity conducts its activities, from their work to gain an understanding of the overall control environment. This can be an important potential source of information on any impropriety. Auditors should:

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- familiarise themselves with the general regulations, rules and other guidance relating to the conduct of the organisation’s business;
- enquire of management concerning the entity’s policies and procedures regarding the implementation of codes and instructions, while having regard to whether the policies and procedures are comprehensive and up to date;
- discuss with management, internal auditors and other relevant agencies the policies or procedures adopted for promulgating and monitoring compliance with relevant codes and instructions.

Other procedures that may bring such impropriety to the auditors’ attention include:

- reviewing documentation of the decision-making processes at senior level;
- assessing the entity’s control environment, particularly the absence of policies and procedures in relation to areas where there are significant risks of fraud, corruption or other impropriety;

- reviewing organisational culture, public official reporting arrangements;
- reviewing the results of internal audit examinations;
- performing substantive tests of details of transactions or balances.

Regular and adequate feedback to management should be undertaken on the performance of the internal control systems. Such a role should reflect international standards, in terms of: (a) appropriate institutional arrangements, particularly with regard to professional independence; (b) sufficient breadth of mandate, access to information and power to report; and (c) use of professional audit methods, including risk assessment techniques.

The internal control function should be focused on reporting on significant systemic issues in relation to: reliability and integrity of financial and operational information; effectiveness and efficiency of operations; safeguarding of assets; risk reviews; and compliance with laws, regulations, and contracts. Such functions are in some countries concerned only with pre-audit of transactions, which is here considered part of the internal control system and therefore should also be assessed. Specific evidence of an effective internal audit (or systems monitoring) function would also include a focus on high-risk areas, use by external audit of the internal audit reports, and action by management on internal audit findings.

2.6. Measures to preserve the integrity of relevant documentation

States Parties should legislate to ensure that all records of any entity spending public funds are retained for an agreed number of years, with timetables for the destruction of main ledgers and supporting records also agreed, and this information will include the record of each procurement described above. The legislation should require that the original documents be retained – originals of documents such as contracts, agreements, guarantees and titles to property may be required for other purposes including presentation as evidence to courts.

The legislation should make specific reference to areas of risk and vulnerability as well as offences associated with relevant documentation (such as cash payments; recording of non-existent expenditure; the entry of liabilities with incorrect identification of their objects; the use of false documents; and the intentional destruction of bookkeeping documents earlier than foreseen by the law).

Article 10: Public Reporting

The full 2009 UNODC Guidelines are set out below:

Overview

UNCAC LANGUAGE

Each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

- (a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;*
- (b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and*
- (c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.*

Article 10 is intended to ensure that citizens understand the workings of public administration, and have information on, and access to, the decisions of public officials. Additionally, institutions of the state should publish regular reports on their work, including the risks of corruption associated with their activities.

Transparency enables citizens to check what the administration is doing on their behalf and enhances their trust in institutions. Citizens have a right to information within clearly defined criteria. At the same time, there should be specific means to facilitate access, clear rules on the timing and format of provision of information and a recourse procedure for refusals.

Embedding transparency and accessibility requires review of the procedures governing decision-making, the public's right to information about such procedures, as well as about how comprehensive, understandable and available the information is. States Parties may wish to consider means to review existing regulations, and the impact of new legislation, with the inclusion of means to consult civil society and legal entities, such as professional associations.

States Parties must ensure that the resolve to guard against corruption is reflected in the administration's decision-making process. Factors that should be addressed include: procedural complexity; the degree of discretion in decision-making; transparency in relation to access and the provision of public information; whether codes of conduct exist and are enforced and how they are related to service delivery. States Parties should consider how regulating official discretion through the development of rules, practices and cultural values will reduce conditions in which corruption may flourish without imposing elaborate or unwieldy controls that impede the transaction of public affairs.

Practical challenges and solutions

1. Measures to enhance transparency in public administration

The principal aims of the article are to make decision-making more efficient, transparent and accountable so that public organisations can be more open and responsive to the needs and aspirations of the communities they serve. Central to executive arrangements will be the effective access for the public to decision-making processes and decision makers. This should be provided in booklets and other media that explain the functions and services of the administration, how they are accessed, what forms and other documentation are needed and the processes of decision-making, from the issues of licensing to procurement (see article 9). Ministries and departments should make widespread use of electronic media in disseminating general information and procedures.

Where there is a website, the information should be accessible on that website, together with relevant papers. Where connection to the Internet is limited, the government should facilitate the provision of access using more traditional means.

The key characteristics of effective access are:

- those responsible for decisions are publicly known;
- the decisions they take are publicly known;
- people have access to information about decisions with technical information available in plain language;
- people know what decisions have been taken and the reasons for them;
- there are efficient and accessible means to challenge or appeal decisions.

Any ministry or government department with decision-making authority should have a clear policy on the making, recording and publication of those decisions. This policy should apply particularly for day-to-day operational and management decisions. From a citizen's perspective, such information should be part of all ministries' and departments' service delivery or Citizens Charter documentation. This should be sufficiently clear to allow the public to know broadly where to go for action or decision, what documentation is required to process requests, who is responsible for which decisions, how they can be contacted, what information about the process is available, and to whom they might appeal in the event of a disputed decision.

Any official who has custody of a document to which the public is entitled to have access or any other material relevant to any decision-making process that is determined as accessible to the public, including all regulations and procedures relating to any decision to be made by that official, and who intentionally obstructs such access, should be considered to have committed an offence under the code of conduct (see article 8) or other applicable regulations or administrative instructions.

2. Access to information concerning public administration

The public should have a right to request public information. States Parties will need to establish and publish policies on reporting obligations, accessibility to reports, the definition of official documents and rules for denial of disclosure (e.g. on grounds of national security, personal privacy etc.), timetables for the provision of documents, and procedures of appeal.

It would be useful to approach the issue from a positive angle. In that vein, access to information on policies would depart from the principle that all documentation should be accessible and then specify on which grounds access should be restricted or denied. Such grounds may include: national security, defence and international relations; public safety; the prevention, investigation and prosecution of criminal activities; protection of privacy and other legitimate private interests; the equality of parties concerning court proceedings; state economic, monetary and exchange rate policies; the confidentiality of deliberations within or between public authorities during the internal preparation of public policy.

Public entities should also consider the creation of official websites accessible to the public, designate persons to be responsible for the dissemination of public interest information and use e-government, e-procurement, e-administration systems and tools to simplify administrative procedures.

States Parties may wish to consider whether there should be an independent agency dealing with procedures for access to information, and adjudicating on complaints, as well as ensuring that the Ombudsman or state audit has the right to consider allegations on failure to report and, in the case of the former, investigating complaints of maladministration in relation to access to information and decision-making. States Parties may wish to consider the role of the body or bodies established under article 6 to review the relationship between access to information, decision-making and the risk of corruption.

3. Access to decision-making authorities through simplified administrative procedures

In many cases procedures may become outdated, conflict or duplicate newer procedures or become disproportionately expensive. This often means bureaucratic and burdensome paperwork requirements on citizens, opacity in terms of the decision-making process, and a duplication of information required of citizens – often to the same department. As well as being a hindrance to

the development of a free and fair market and attracting foreign investment, such practices can also set the conditions for public officials to manipulate the authority of their office in which fraud and corruption can flourish. States Parties should regularly review the issuing of, for example, licences and permissions to see whether the required procedures are necessary, whether fees are proportionate to the cost of issuing them and whether multiple agencies or services should be involved in their issuance. A key aspect of addressing such issues is the quality, accuracy and accessibility of the records and record management systems used by departments, and how far ICT allows interactive use by a range of departments to avoid duplication and excessive delays in decision-making.

In any case, there should be closer liaison between ministries/departments to reduce the regulatory burden on all citizens seeking information and services from the state. States Parties can ensure a more effective approach to this by including in all legislation on licences, permissions or concessions sunset or review clauses and reducing procedural complexity. States Parties can consider de-layering and other restructuring procedures, including one-stop shops, especially in “service-delivery” areas involving extensive contact with private individuals, companies and other elements of civil society, not only to reduce the potential for corruption but also to increase the cost-effectiveness of administrative activity. These provide a means to combine types of licences and permissions or to combine the same basic processes and procedures to be carried out in the issuing of different licences and permissions to build up expertise, use complementary databases and provide economies of scale.

4. Periodic public reporting, including risks of corruption

All public organisations should report periodically on the threats of corruption and anti-corruption prevention measures undertaken. This report should be provided under the framework established under article 5. The report may answer the following questions: What functions does the ministry or department perform? Which processes does it carry out? Which of its processes, systems and procedures are susceptible to fraud and corruption? What are the internal and external risks likely to be? What are the appropriate key anti-fraud and corruption preventive measures in place? How are they assessed in practice?

Either States Parties, or the legislature or the body or bodies designated under article 6 could also undertake periodic reviews on the necessity for, or cost-effectiveness of, existing requirements and procedures for licences, permissions and concessions; and administrative impact assessments for new licences, permissions and concessions. Both reviews could also assess the potential for misuse of office or corruption. Such assessments should be published annually, collated and monitored by the body or bodies proposed in article 6.

Article 11: Measures relating to the Judiciary and Prosecution Services

UNCAC LANGUAGE

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

Article 11 requires measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary, including their conduct. States Parties should follow existing guidance, including The Bangalore Principles of Judicial Conduct 2002, Report of the Fourth Meeting of the Judicial Integrity Group, UNODC, 2005, the United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, 2005, and the 1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors.

The 2009 UNODC Guide contains the following guidelines.

Overview

There is no more important sector to reach in anti-corruption practices than the judiciary, the prosecutors and the police, for where they are corrupt or are seen to be corrupt, there is no respect for the rule of law, and thus compliance with anti-corruption measures is virtually impossible. Article 11 requires measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary, which may include measures to regulate the conduct of the members of the judiciary. Such requirements have also been made applicable to prosecution services. For the purposes of this Guide, much of the guidance is applicable to both the judiciary and the prosecution services. In relation to the judiciary, the guidance is also intended to be applicable to all court personnel. States Parties would also draw inspiration from existing guidance, including The Bangalore Principles of Judicial Conduct 2002, Report of the Fourth Meeting of the Judicial Integrity Group, UNODC, 2005, the United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, 2005, the UN Guidelines on the Role of Prosecutors, 1990, and the 1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors. The overall framework of implementation is the independence of the judiciary and that should be taken into account at all times in designing, promulgating and implementing relevant measures.

Practical challenges and solutions

States Parties must give due consideration to the types and levels of corruption, and to the weaknesses or vulnerabilities of the existing judicial system that need review and attention.

Whatever the institutional arrangements that a State Party may have for such a review, States Parties should assess the nature and extent of corruption in the judicial system to identify weaknesses in the system that provide opportunities for "gatekeepers" (whether judges, lawyers or court personnel). The reviews should address not only the important issues of the procedures for judicial appointment, tenure and other career-related issues, but also more minor details, such as the issuing of summonses, the service of summonses, securing evidence, the obtaining of bail, the provision of certified copies of a judgment, expedition of cases and the delay of cases.

This in turn would lead to measures to minimise opportunity through systemic reforms designed to limit the situations in which corruption can occur, including focus group consultations conducted by the judiciary with court users, civic leaders, lawyers, police, prison officers and other actors in the judicial system; national workshops of stakeholders; and judges' conferences. Responsibility for monitoring and reviewing progress may be the responsibility of an institution such as the Supreme Court of the Judiciary, a Judicial Services Commission, or equivalent agency, or the Ministry of Justice. Such an institution may wish to consider the desirability and feasibility of establishing an inspectorate or equivalent independent guardian in order to inspect,

and report upon, any systems or procedures that are observed which may endanger the actuality or appearance of integrity and also to report upon complaints of corruption or identify the reasons for any perceptions of corruption in the judiciary.

1. Measures to strengthen integrity of judges

For the purposes of implementing this article, the concept of judicial integrity may be defined broadly to include:

- the ability to act free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason;
- impartiality (i.e. the ability to act without favour, bias or prejudice);
- personal conduct which is above reproach in the view of a reasonable observer;
- propriety and the appearance of propriety in the manner in which the member of the judiciary conducts his or her activities, both personal and professional;
- an awareness, understanding and recognition of diversity in society and respect for such diversity;
- competence;
- diligence and discipline.

“Judicial independence” also refers to the institutional and operational arrangements defining the relationship between the judiciary and other branches of government and ensuring the integrity of the judicial process. The arrangements are intended to guarantee the judiciary the collective or institutional independence required to exercise jurisdiction fairly and impartially over all issues of a judicial nature. There are three essential conditions for judicial independence.

The first concerns security of tenure for all judicial appointments, i.e. a tenure, whether until an age of retirement, for a fixed term, or for a specific adjudicative task, that is secure against interference by the executive or other appointing authority in a discretionary or arbitrary manner. Secondly, those holding judicial appointments require financial security, including the right to salary and pension, which is established by law and which is not subject to arbitrary interference by the executive in a manner that could affect judicial independence. Thirdly and finally, States Parties must ensure institutional independence with respect to matters of administration that relate directly to the exercise of the judicial function, including the management of funds allocated to the judicial system. An external force must not be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, assignment of judges, sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary’s duty to adjudicate individual disputes and uphold the law and values of the Constitution.

Judicial independence does not require that judges should enjoy immunity from the application of laws, except to the extent that a judge may enjoy personal immunity from civil suits for alleged improper acts or omissions in the exercise of judicial functions. In many countries, judges, like other citizens, are subject to the criminal law. They have, and should have, no immunity from obedience to the general law. Where reasonable cause exists to warrant investigation by police and other public bodies of suspected criminal offences on the part of judges and court personnel, such investigations should take their ordinary course, according to law.

Other countries provide immunities from prosecution for judges. Where such immunities are provided, the preferred approach, in order to limit the potential for judges to avoid prosecution for corruption and so as not to undermine the credibility of the judiciary, is a “functional”

approach, so that judges are only immune from prosecution for offences that take place in the course of carrying out their judicial duties. In order to ensure that the “functional” approach cannot be misused to avoid criminal liability, it is also essential to provide a process for lifting the immunity in appropriate circumstances, along with safeguards for ensuring that the process is transparent, fair and consistently applied.

2. Measures to prevent opportunities for corruption in the judiciary

There are two aspects to preventing corruption in the judiciary. These concern the appointment and promotion of judges, and the work for which they are responsible.

First, there is a need to institute transparent procedures for judicial appointments and promotions. Judicial appointments should be on merit, subject to established criteria which should not derogate from those applicable to other public officials in general terms, but should of course reflect the specialised professional competence required for the performance of the respective duties. A process to ensure appropriate screening of past conduct prior to appointment would also be useful. In many countries, entry into the judiciary is subject to competitive examinations and subsequent mandatory training in a specialised institution such as a judicial academy. Further, in many countries, the system of appointment, including the administration of entry examinations and training, is administered by institutional mechanisms of the judiciary itself, such as supreme councils of the judiciary or judicial commissions. Under the direction of senior judges, the institutional mechanisms are responsible for the recruitment, appointment, promotion, training, conduct and supervision of judges during their tenure of office. Such mechanisms are designed to safeguard the independence of judicial decisions which should not be subject to political interference through attempts to move, failure to promote or dismissal of judges. Rules are also required for the removal of judges which in many countries is the responsibility of the mechanisms governing the judiciary mentioned above and is a measure applied only for proven misconduct or incapacity according to stated criteria and agreed, transparent procedures.

Second, States Parties should help strengthen the integrity of the judiciary by ensuring that the judicial process is open and accessible. Barring exceptional circumstances, which should be determined by law, judicial proceedings should be open to the public. Judges should be obliged by law to give reasons for their decisions. To ensure the integrity of the judiciary, including the availability of an effective appeals process, the reasons for judges’ decisions should also be recorded.

The daily administration of the judicial process is an important component in preventing corruption. Elements of effective administration of court proceedings include:

- the prominent display of notices (in at least court buildings) describing procedures and proceedings;
- efficient systems to maintain and manage court records, including registries of court decisions;
- the introduction of computerization of court records, including of the court hearing schedule, and computerized case management systems;
- the introduction of fixed deadlines for legal steps that must be taken in the preparation of a case for hearing; and
- the prompt and effective response by the court system to public complaints.

Judges must take responsibility for reducing delay in the conduct and conclusion of court proceedings and discourage undue delay. Judges should institute transparent mechanisms to

allow the legal profession and litigants to know the status of court proceedings. (One possible method is the monthly circulation among judges of a list of pending judgments.) Where no legal requirements already exist, standards should be adopted by the judges themselves and publicly announced in order to ensure due diligence in the administration of justice.

The judiciary must take necessary steps to prevent court records from disappearing or being withheld. Such steps may include the computerization of court records. They should also institute systems for the investigation of the loss and disappearance of court files. Where wrongdoing is suspected, they should ensure the investigation of the loss of files, which is always to be regarded as a serious breach of the judicial process. In the case of lost files, they should institute action to reconstruct the record and institute procedures to avoid future losses.

The judiciary should adopt a transparent and publicly known procedure for the assignment of cases to particular judges to combat the actuality or perception of litigant control over the decision maker. Procedures should be adopted within judicial systems, as appropriate, to ensure regular change of the assignments of judges having regard to appropriate factors including gender, race, tribe, religion, minority involvement and other features of the judge. Such rotation should be adopted to avoid the appearance of partiality.

Where they do not already exist and within any applicable law, the judiciary should introduce means of reducing unjustifiable variations in criminal sentences. Where sentences may not be prescribed in law, this could be achieved through the introduction of sentencing guidelines and like procedures. Other methods of promoting consistency in sentencing include availability of sentencing statistics and data and judicial education, including the introduction of a judicial handbook concerning sentencing standards and principles.

3. Codes and standards

A number of measures may be taken to promote the integrity of the judicial process.

One important measure is ensuring that the highest level of legal education is required for entry into the judiciary and that the level remains high through continuing professional development. States Parties should consider supporting continuing training programmes for judges on a regular basis. Those responsible for judicial and legal education should also consider providing more general legal instruction to judges in such areas as international law, including international human rights and humanitarian law, environmental law, and legal philosophy. Judicial education should include instruction concerning judicial bias (actual and apparent) and judicial obligations to disqualify oneself for actual or perceived partiality.

Another measure is the adoption of, and compliance with, a national code of judicial conduct that reflects contemporary international standards. The code should at the least impose an obligation on all judges publicly to declare the assets and liabilities and those of their family members. It should also reflect the guidance provided in article 8 relating to the disclosure of more general conflicts of interests. Such declarations should be regularly updated. They should be inspected after appointment and monitored from time to time by an independent official as part of the work of a judicial oversight body or the body or bodies established under article 6.

A code of conduct will be effective only if its application is regularly monitored, and a credible mechanism is established, to receive, investigate and determine complaints against judges and court personnel, fairly and expeditiously. Appropriate provision for due process in the case of a judge under investigation should be established, bearing in mind the vulnerability of judges to false and malicious allegations of corruption by disappointed litigants and others.

A code of judicial conduct may be supplemented with a code of conduct for court personnel.

Yet another measure concerns the responsibility of Bar Associations or Law Societies to promote professional standards. Such bodies have an obligation to report to the appropriate authorities instances of corruption that are reasonably suspected. They also have the obligation to explain to clients and the public the principles and procedures for handling complaints against judges and court personnel. Such bodies also have a duty to institute effective means to discipline their own members who are alleged to have been engaged in corruption of the judiciary or court personnel. In the event of proof of the involvement of a member of the legal profession in corruption, whether of a judge, of court personnel or of any other, appropriate means should be in place for investigation and, where proved, disbarment of the persons concerned.

Finally, recognising the fundamental importance of access to justice to ensure true equality before the law, the costs of private legal representation and the typical limits on the availability of public legal aid, consideration should be given, in accordance with any legal provisions that may apply and in co-operation with the legal profession, to various initiatives to encourage accessibility to justice and standards in the judicial process through, for example, the encouragement of pro bono representation by the legal profession of selected litigants.

Judges should take appropriate opportunities to emphasise the importance of access to justice, given that such access is essential to true respect for constitutionalism and the rule of law. States should also consider providing specialist training on corruption matters to judges in view of the complex nature of corruption cases.

4. Measures to strengthen the integrity of prosecutors

Measures may be required to ensure that prosecutors perform their duties in accordance with the law, and in a fair, consistent and expeditious manner, as well as respecting and protecting human dignity and upholding human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

In the performance of their duties, prosecutors should: (a) carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other discrimination; (b) protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; (c) keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise; and (d) consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Best Practice Series No. 5 of the International Association of Prosecutors – “Victims” – www.iap.nl.com, may be helpful in that regard.

5. Measures to prevent opportunities for corruption in the prosecution service

In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

6. Codes and standards of conduct for prosecutors

As public officials, able to carry out their professional responsibilities independently and in accordance with the standards of office discussed in article 7, prosecutors should be protected against arbitrary action by governments and from compliance with an unlawful order or an order which is contrary to professional standards or ethics. They are entitled to the same terms and conditions as all public officials. In general they should expect recruitment and promotion procedures based on objective factors, and in particular based on criteria relating to professional qualifications, ability, integrity, performance and experience. They should receive reasonable and regulated tenure, salary, pension and age of retirement conditions, as well as be allowed to join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status.

They should be allowed to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability. They should expect to be physically protected by the authorities when their personal safety or that of their families is threatened as a result of the proper discharge of their prosecutorial functions. As with other public officials, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards of their employment they should be subject to expeditious and fair hearings, based on law.

Using the 2005 United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators as a working document to be used by prosecution services in developing their own standards, States Parties may wish to explore incorporating the standards into their own contexts to cover a number of core requirements.

The first requirement is the primacy of professional conduct. Prosecutors shall at all times maintain the honour and dignity of their profession and always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession. At all times, they should exercise the highest standards of integrity and care, and strive to be, and be seen to be, consistent, independent and impartial. They should always protect an accused person's right to a fair trial, and, in particular, ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial. Prosecutors should always serve and protect the public interest, and respect, protect and uphold the universal concept of human dignity and human rights.

When prosecutorial independence and discretion is permitted in a particular jurisdiction, such independence should include freedom from political or other inappropriate interference (e.g. media, sectional interests). Prosecutorial discretion must be exercised on the basis of professional motives. An important safeguard for ensuring the proper exercise of prosecutorial discretion is the requirement that prosecutors record the reasons for terminating prosecutions or not prosecuting cases that have been referred to them by the investigative authorities. In addition, there should be an avenue for relevant stakeholders to obtain a review of the prosecutor's decision to not prosecute a particular case. If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be: transparent; consistent with lawful authority and subject to established guidelines to safeguard the actuality and perception of prosecutorial independence.

Generally, prosecutors should perform their duties without fear, favour or prejudice and in particular carry out their functions impartially. They should remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest. They should act with objectivity, and seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the

accused. They should always search for the truth and assist the court to arrive at the truth according to law and the dictates of fairness.

Prosecutors should be subject to a code of conduct reflecting the guidance given for all public officials in article 8. Specific requirements should be included to reflect the particular issues facing prosecutors.

As part of the judicial process prosecutors should contribute to the fairness and effectiveness of prosecutions through co-operation with the police, the courts, defence counsel and relevant government agencies, whether nationally or internationally, and render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

The issues raised previously regarding training of judges, including specialised anti-corruption training, apply equally to prosecutors.

Article 12: Private Sector

UNCAC LANGUAGE

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

2. Measures to achieve these ends may include, inter alia:

(a) Promoting co-operation between law enforcement agencies and relevant private entities;

(b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;

(c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;

(d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;

(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;

(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

(a) The establishment of off-the-books accounts;

(b) The making of off-the-books or inadequately identified transactions;

(c) The recording of non-existent expenditure;

(d) The entry of liabilities with incorrect identification of their objects;

(e) The use of false documents; and

(f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

The 2009 UNODC Guide gives the following guidance.

Overview

Article 12 has three specific objectives: to address private sector corruption, to improve preventive and monitoring functions in the private sector through accounting and auditing standards and, where appropriate, to introduce sanctions for non-compliance. Addressing private sector corruption has a number of benefits, e.g. enhancing investor confidence and protecting consumer interests. It should be borne in mind that this article represents one of the innovations of the Convention as it deals with corruption that takes place entirely within the private sector.

Practical challenges and solutions

1. Measures to prevent corruption involving the private sector

It may be efficient and productive to involve legal entities, or their representative associations, in the development of anti-corruption preventive strategies proposed under article 5, in the review of administrative procedures under article 10, and in the work of any agency established under article 6. In terms of promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, the main areas are codes of conduct, guidance on corruption, or corporate governance codes, conflict-of-interest regulations and internal audit controls. States Parties should require – or invite stock exchanges or other regulatory agencies to require – such standards and procedures to be part of any listing rules for publicly quoted companies. Within companies, these should be integrated as an ethics and business conduct programme to help ensure that a company’s staff, regardless of what they do and where they work, understand and apply the entity’s values and principles to their everyday conduct, relationships and decision-making, and comply with legal, organisational, professional and regulatory policies. Comments on the standards and procedures should be, as far as possible, within the legal framework of a particular State Party, an audit requirement.

2. Measures to enhance accounting and auditing standards

States Parties should ensure that auditing standards and private sector frameworks for the establishment of parameters for internal controls provide clear guidance and procedures on the core functions of internal audit in the private sector. These should be broadly stratified as: a basic audit process reviewing the effectiveness with which assets are controlled, income is accounted for and expenditure is recorded; a system-based audit, reviewing the adequacy and effectiveness of financial, operational and management control systems; audits reviewing the legality of transactions and the safeguards against fraud and corruption; a full risk-management-based audit.

Legal entities should be legally obliged to keep proper financial records and prepare regular financial statements. For larger companies, such as those legal entities that are publicly traded, as well as large non-listed or privately held companies with substantial international business, there should be a requirement to have accounts externally audited and published on an annual basis. Such accounts should be registered with a public agency responsible for the registration of companies and their accounts. More detailed external audit requirements will be required for publicly quoted companies as specified by stock exchanges and financial regulators.

States Parties should work with representative accounting professional bodies to promote wider training qualifications and continuing professional development.

3. Civil, administrative or criminal penalties for the private sector

In reviewing their legislation or regulatory regime, states may wish to turn to the work of international organisations or entities for guidance or inspiration. The International Standards of Auditing (ISA) are currently undergoing a revision process. ISA 240 has recently been revised and focuses on the behaviour expected from an auditor who is confronted with fraud during the certification of financial statements, which is likely to enhance the contribution of the profession to the prevention and detection of corruption. In principle, it is for the business world to implement those standards, but states can no doubt support this process in various ways.

States Parties are likely to have appropriate criminal sanctions against individuals involved in corruption in the private sector. Courts and other regulators should have the authority to impose a range of other sanctions, which may include financial penalties, compensation and confiscation penalties, debarment, supervision or closure of companies, disqualification of directors and suspension of professional accreditation of, for example, company accountants and lawyers.

4. Measures to promote co-operation between law enforcement and the private sector

Article 39 discusses the promotion of co-operation between law enforcement agencies and relevant private entities. While there may be no specific duty to report crime to law enforcement legal entities – although some countries may require the reporting of money-laundering – States Parties should encourage legal persons to report corruption-related crime to law enforcement authorities, even though a statutory obligation on all private individuals and legal entities to report crimes to the law enforcement authorities may be preferable. Law enforcement in its turn should consider designing and offering awareness-raising seminars, establishing single points of contact, as well as providing preventive advice.

5. Standards and procedures to safeguard the integrity of the private sector

While the extent of government regulation of the private sector may be the subject of debate, the private sector itself should be aware of the need for corporate integrity, business ethics and

corporate social responsibility to stakeholders (such as customers, clients, citizens, employees and shareholders). The ability to deal with issues of business conduct and/or shape the activities around the responsibilities and duties of an organisation are, however, complex challenges. Business organisations exist to make a profit. At the same time, businesses increasingly have obligations imposed on them by stakeholders – including regulators, suppliers, buyers and the public at large – that go beyond the profit motive. One of the methods that organisations are utilising to address these seemingly differing obligations is through the development of codes of conduct, or ethics or corporate governance programmes, and a closer alignment with the requirements and expectations placed on the public sector. Several sets of principles or models have been developed in recent years⁷ to provide useful sources of inspiration. As a result of a recent initiative, many of these principles are currently under review with the intention of bringing them in line with the principles enshrined in the UNCAC.

6. Transparency in the establishment and management of corporate entities

States Parties should ensure that there is a public agency legally responsible for the approval of the formation and the registration of companies, as well as for receiving their accounts. Company registration procedures and information for legal entities registered in each country should ensure that full details of those involved are included and verified. Public agencies should be authorised to obtain (through compulsory powers, court-issued subpoenas etc.) information about the legal and natural persons involved when illicit activity is suspected or when such information is required by the agencies and others, to fulfil their regulatory functions.

7. Preventing the misuse of procedures regulating private entities

States Parties should ensure that all procurement requirements for public contracts adhere to policies and practices derived from the provisions of article 9. In particular, entities should be made aware of the implications of failing to abide by the requirements, including debarment or rendering contracts void.

States Parties should review the continuing need for certain types of licences and permissions where the provision has no direct government or strategic relevance, where there is the potential for misuse and where private sector forces may be more effective regulators of activity. Where relevant, consideration should be given to the processes for streamlining obtaining licences and permissions, including “one stop shops”, to develop clear and widely available service standards. These standards should be made available to all applicants to define the level of service they can expect, the documents required and the remedies available if the issuing agency fails to comply with them.

8. Post-employment restrictions for public officials in the private sector

All States Parties should have formal procedures governing the move of public officials on resignation or retirement to those private sector entities with whom they have had dealings while

⁷ Example of such principles are: the OECD Principles on Corporate Governance, as reviewed in 2004 (http://www.oecd.org/document/49/0,3343,en_2649_34813_31530865_1_1_1_1,00.html); the ICC Rules of Conduct and Recommendations on Combating Extortion and Bribery (<http://www.icc.se/policy/mutor/iccrules2005.pdf>); the PACI Principles for Countering Bribery, endorsed within the context of the World Economic Forum Partnering Against Corruption Initiative (PACI) (http://www.weforum.org/pdf/paci/PACI_PrinciplesWithout_SupportStatement.pdf); and the Transparency International Business Principles for Countering Bribery (http://www.transparency.org/global_priorities/private_sector/business_principles).

in public service or for whom they may hold confidential or commercial information or where they may be employed to influence their former employers or colleagues. Such procedures should apply to both appointed and elected officials. States Parties should consider prescribing measures that would have specific consequences for public officials who attempt to:

- use their office to favour potential employers;
- seek employment during official dealings;
- misuse confidential information gained through public employment;
- represent private interests on a matter for which they were responsible as a public employee;
- represent (within a specified time period) private parties on any matter in front of the specific office or agency in which they had previously been employed.

Definitions of post-public employment activities and the procedures governing movement should be clear and understandable. States Parties may wish to consider:

- permission being included in all terms and conditions of appointment;
- the right to impose conditions on use of information and contact with previous employers;
- the right to notify private sector competitors of a move of a significant public official to a rival firm;
- the right to debar any private sector entity from dealings with a State Party if any conditions are breached.

In drafting such provisions, States Parties should consider:

- length of time for any restriction;
- the precise level or group of officials subject to restrictions;
- defining with some precision the area in which representation is not permitted by former officials.

9. Internal auditing and certification procedures

States Parties should provide requirements with appropriate sanctions for the annual submission of accounts, audited where required, with penalties for late or incomplete submission to be placed on those entities under obligation to submit accounts. They may also wish to give guidance themselves, or through stock exchanges, financial regulators or representative associations on the level and size of internal audit capacity by size and turnover of the entity, as well as the level of professional training and accreditation necessary or required to perform adequately their audit functions.

10. Maintenance of books, records, financial statement disclosure and accounting and auditing standards

States Parties should ensure that there is appropriate legislative provision to ensure that all records involved in the activity of an entity be retained for an agreed number of years with timetables for the destruction of main ledgers and supporting records. The legislation should clarify what constitutes a document or source of information and the original documents or information be retained (originals of documents such as contracts, agreements, guarantees and titles to property may be required for other purposes including presentation as evidence to courts). The legislation should make specific reference in terms of legal definitions, requirements and sanctions to: off-the-books accounts; recording of non-existent expenditure; the entry of

liabilities with incorrect identification of their objects; the use of false documents; and the intentional destruction of bookkeeping documents earlier than foreseen by the law.

11. Prohibition of tax-deductibility of bribes and related expenses

States Parties should legislate to ensure that entities cannot claim tax relief on payments that may be construed as a bribe. The prohibition of tax-deductibility of “bribes” includes bribes to foreign public officials. The prohibition against claiming a tax deduction for bribe payments should be extended to individuals. The prohibition against claiming a tax deduction for a bribe payment needs to be clearly stated, and the tax authorities must be careful to ensure that bribe payments cannot be concealed under legitimate categories of expenses, such as “social and entertainment costs” or “commissions”. The role of tax measures in the detection of corruption offences can only be served if state revenue or tax authorities are obligated or at least permitted to report their suspicions of corruption to the law enforcement authorities.

Article 13: Participation of Society

UNCAC LANGUAGE

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

- (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;*
- (b) Ensuring that the public has effective access to information;*
- (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;*
- (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
 - (i) for respect of the rights or reputations of others;*
 - (ii) for the protection of national security or of public health or morals.**

2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

The 2009 UNODC Guide provides the following guidance

Overview

Preventing and controlling corruption is a means to the promotion of good governance and wider reform to public services to make them more efficient and effective, decision-making more transparent and equitable, and budgets and laws more aligned to the needs and expectations of society in general and its poorer and more vulnerable members in particular. Those affected by corruption indirectly, from the misuse of public funds and resources, and directly, through having to pay bribes to obtain public services, should be involved in processes designed to determine what needs to be addressed, in what sequence, and by whom.

Practical challenges and solutions

1. Promoting the participation of society in the prevention of corruption

States Parties should take a broad view of what comprises society and representative associations with whom they should engage. There should be a broad view and understanding of the society, comprising NGOs, trade unions, mass media, faith-based organisations etc. and should include also those with whom the government may not have a close relationship. States Parties should also ensure that the perspectives and views of those without some form of representation, particularly social groups which may be marginalized, are reflected through, for example, household and other surveys.

2. Raising public awareness on corruption

Many anti-corruption agencies run effective campaigns against corruption, but the point of the Convention is that awareness-raising should be fully supported at all levels as a priority and public commitment of a government. All public bodies should be expected to indicate their commitment to the prevention of corruption. Here the means for the citizens to express concerns or lay allegations without fear of intimidation or reprisal is particularly important. Special efforts should be made to reach the poorer parts of society, which are often disproportionately harmed by corruption directly and indirectly. Campaigns should explicitly explain what corruption is, the harm done, the prohibited types of conduct and what needs to be done to fight it.

3. Promoting the contribution of the public to decision-making processes

States Parties may involve the public through direct representation in the development of preventive strategies required by article 5, or by involvement in the body or bodies established under article 6. The work undertaken in article 5 will include significant assessments of the public's perceptions of the provision of administrative services as well as the rights to information stipulated in the same article.

4. Public information and education

Bodies noted in articles 6 and 36 should undertake publicity campaigns and ensure appropriate contact points for allegations from citizens. The campaigns may include leaflets and posters, clearly displayed in all public bodies. All public bodies should also publish their own information on their services and functions, including information on how to report allegations of corruption.

Specifically, the body or bodies designated under article 6 should work with public sector institutions to ensure information on anti-corruption measures is disseminated to appropriate agencies and the public, as well as with NGOs, local think tanks and educational institutions to promote the preventive work and the integration of anti-corruption awareness into school or university curricula.

5. Freedom to seek, receive, publish and disseminate information concerning corruption and its restrictions

States Parties should review their licensing and other arrangements for various forms of media to ensure that these are not used for political or partisan purposes to restrain the investigation and publication of stories on corruption. At the same time, while those subject to allegations may have recourse to the courts against malicious or inaccurate stories, States Parties should ensure that their legislative or constitutional framework positively supports the freedom to collect, publish and distribute information and that the laws on defamation, state security and libel are not so onerous, costly or restrictive as to favour one party over another.

6. Raising public awareness of anti-corruption bodies

States Parties may wish to ensure that relevant public agencies, such as anti-corruption agencies (preventive and investigative), ombudsmen and electoral commissions, have a formal remit and adequate resources to undertake programmes of education and training for educational institutions, civic groups and other civil society bodies.

7. Public access to information

One of the major issues in terms of the symmetry of the relationship between the government and the citizen is the lack of awareness and understanding on the part of the latter of their rights and on how the government works. Much of the potential mutual suspicion and mistrust may be mitigated with the introduction of civic education which in turn has the additional benefit of introducing young people to the possibility of a public career or engagement in political activity. States Parties should consider whether or not a freedom of information law would help clarify what may or may not be available, and the means and procedures for access. States Parties should in any case publish their policies on freedom of and access to information, on the basis that they should guarantee the right of everyone to have access, on request, to official documents held by public authorities, without discrimination. Further guidance is provided in article 10.

8. (Anonymous) reporting of corruption

States Parties may bear in mind the importance of promoting the willingness of the public to report on corruption. Therefore, they may wish to consider the experience of those states which do not only protect public officials, or employees of legal entities, but any person who reports a suspicion of corruption, irrespective of their status.

Article 33 discusses reporting in more detail but States Parties may wish to provide for reporting guidelines that advise the public which authority they should notify of a corruption suspicion and how they should do it. In particular States Parties should ensure that, subject to legal safeguards against malicious or defamatory reporting, those who distrust the established channels of reporting or fear the possibility of identification or retaliation are able to report to those bodies noted in II.7.

Article 14: Measures to Prevent Money-Laundering

UNCAC LANGUAGE

1. Each State Party shall:

(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money laundering, within its competence, in order to deter and detect all forms of money laundering, which regime shall emphasize requirements for customers and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

(b) Without prejudice to Article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money laundering (including, where appropriate under domestic law, judicial authorities) have the ability to co-operate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:

(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;

(b) To maintain such information throughout the payment chain; and

(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

4. In establishing a domestic regulatory and supervisory regime under the terms of this Article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money laundering.

5. States Parties shall endeavour to develop and promote global, regional, sub-regional and bilateral co-operation among judicial, law enforcement and financial regulatory authorities in order to combat money laundering.

The UNODC Technical Guide addresses the Article in detail and Commonwealth states are referred to the following passages set out therein.

Overview

The implementation of a comprehensive anti-money-laundering strategy involves a broad range of policy options in which several issues need to be taken into account from different perspectives.

The preventive aspect of the strategy, which is the subject of Article 14 (in contrast to the criminalisation aspect of the strategy addressed in Article 23), assumes a greater involvement of the private sector, especially those performing functions of financial intermediaries, in co-operation with but also under the supervision of public bodies. When implementing a preventive strategy important policy options will arise depending on several features, including, among others, the role financial services play in a country's economy, the size of the informal economy, the relationships between the financial sector and its regulators, the co-ordination capacities among several public agencies and the financial and human resources the State Party is able to devote to this strategy.

The prevention of money laundering is a function performed by a combination of private and public institutions and actors. The private sector, mainly financial intermediaries, performs the so-called "gatekeeper" function. Given their direct contact with potential money-launderers trying to introduce or move illegal gains through the financial system, they are in the best position to prevent such transactions from occurring, and to report and follow the paper trail when they do occur. The public sector, on the other hand, performs both regulatory and supervisory functions. The regulatory function refers to the enactment of rules necessary to detect and deter all forms of money-laundering while the supervisory function entails the enforcing – either by sanctioning or by co-operative methods – of such regulations.

Challenges and solutions

1. Choosing the more relevant institutional anti-money-laundering framework

States Parties are required to adopt measures in light of three different subcomponents of a preventive money-laundering system: the scope of the preventive system, those required to perform related tasks and the minimum coverage for obligations.

States Parties are required to establish "a comprehensive domestic regulatory and supervisory regime in order to deter and detect all forms of money-laundering". As long as the designated system covers both regulatory and supervisory aspects, States Parties are free to establish the system that best fits their circumstances in view of the requirements and complexity of implementing such a system.

For this reason, States Parties may vary the components of domestic "regulatory and supervisory regimes". For the purposes of this Article, and bearing in mind the prescriptions of article 58 relating to Financial Intelligence Units (FIUs), States Parties may wish to assess or determine the general institutional framework of their preferred regime and build the appropriate preventive and international co-operation approaches accordingly.

An effective anti-money-laundering regime must combine:

- financial and non-financial institutions must be required to take steps to prevent the use of their services by potential launderers. The steps include sufficient customer due diligence to enable the institution to build a profile of a customer and expected activity, to

monitor the activity and to report suspicious or unusual actions that do not conform to the profile;

- reports from financial institutions and intelligence from other sources must be collated, and shared as appropriate with other domestic and international authorities and analysed so as to form the basis for enforcement action;
- allegations of laundering should be investigated and where appropriate, result in asset freezing and seizure, and prosecutions.
- Most countries have already established regulatory and supervisory bodies with the responsibility of imposing standards of conduct on financial institutions, such as banks, insurance companies, securities firms and currency exchanges. Such bodies are likely to have appropriate powers of supervision and regulation, are familiar with the business of the financial institutions, monitor the capacity and propriety of the institutions and their management and focus on achieving high standards of corporate governance, internal controls, staff ethics and appropriate behaviour. Consequently, many countries charge such bodies with the responsibility for imposing measures designed to prevent the laundering of the proceeds of corruption. On the other hand, some countries allocate this task to a separate body (usually the FIU established to carry out the second of the listed functions). This approach has the advantage of concentrating the expertise on the laundering of the proceeds of corruption, but such an organisational model must be carefully designed to avoid the danger of conflicting instructions to institutions, and duplication of the examination of capacity and propriety, corporate governance controls and records.

For non-financial institutions, such as real estate agents, jewellers and car dealers, there is usually no appropriate body available to enforce customer due diligence and other requirements. Some countries give such functions to trade associations (although in many cases, they have insufficient powers to conduct such functions) while others give responsibility for non-financial institutions also, to the FIU.

Virtually all countries have established, or are in the process of establishing an FIU with the responsibility for the second function described above – collating and analysing intelligence, including reports mandated by law from financial (and in some cases non-financial institutions). In some countries, the FIU is purely administrative in that it focuses on collation, analysis, and distribution of intelligence and information. In other cases, the FIU has the authority to carry out investigations and may even be able to prosecute, or seize and freeze assets (the third of the functions described above).

The FIU may be wholly independent, included within the Justice Department or law enforcement authorities, or attached to a supervisory body such as the Ministry of Finance or the central bank. There are clear advantages in independence. However, there are also advantages in ensuring close co-ordination with law enforcement bodies so that intelligence can be produced in a form most appropriate for them. There are also advantages in attachment to the supervisory bodies, since some financial institutions (the source of most reports of suspicious behaviour) feel more comfortable making confidential reports to an agency with which they are already familiar.

States Parties should adopt the model that best suits their legal, constitutional, and administrative arrangements. There are advantages in all models and States Parties should make sure that the

arrangements for staff training, the provision of statutory powers and the co-ordination between agencies is designed to maximise the advantages and minimise the risks identified above.

From a different perspective, one can differentiate preventive systems according to the degree of functions performed by private sector institutions as opposed to public agencies. In the models described above, the regulatory and supervisory functions rest with public agencies. Some States Parties have adopted self-regulating models, in which existing private bodies with regulatory functions (such as business associations or professional associations) take the “day-to-day” regulatory role and public agencies oversee those private bodies and conduct random supervision over the regulation they perform. Others may give such bodies more formal powers with which to enforce regulation. States Parties adopting these systems usually do not suffer from extensive domestic economic crime but rather from the misuse of their financial systems by illicit transaction activity. Given these circumstances, the sector has special incentives to implement a functional self-regulating system based on reputation considerations and States Parties may consider lighter-touch supervision.

2. Who should be subject to preventive obligations?

The second issue addressed by paragraph 1(a) of article 14 relates to those institutions or activities that need to be subject to preventive obligations. From an initially narrow focus on banks, the scope of institutions and activities has been extended in most jurisdictions to non-banking financial institutions, usually including the intermediaries in the securities and insurance markets. Many jurisdictions have now taken a more function-oriented approach in order to gradually include a broad range of natural or legal persons or corporate entities when performing financial activities such as lending, transferring funds or value, issuing and managing means of payment (e.g. credit and debit cards, checks, travellers’ cheques, money orders, bankers’ drafts and electronic money), giving financial guarantees and commitments, trading in money market instruments (cheques, bills, derivatives etc.), foreign exchange, interest rates, index instruments or transferable securities, managing individual or collective portfolios or otherwise investing, administering or managing funds on behalf of other persons. Some jurisdictions have also moved to extend obligations to any activity involving high-value goods, including precious stones, works of art and more common goods such as vehicles. Some States Parties may wish to consider whether non-governmental activities (such as charities) or public sector institutions (such as those trading commercially) should also be subject to similar obligations.

The focus here should be less on the institution and its activity than on the susceptibility of such an institution to the concealment and transfer of the proceeds of corruption. Thus, while the article clearly mandates States Parties to subject banking and non-banking financial institutions, and formal and informal money transmitters to preventive anti-money laundering obligations, States Parties are also encouraged to require “other bodies particularly susceptible to money-laundering” to comply with such obligations. As mentioned, States Parties should review all the available means of introducing proceeds of criminal or illicit activity into the legal economy which not only depends on the sources of such funds, but also the means by which this can be done. This may in turn be influenced by a range of factors, from the extent of the informal economy to the availability of legitimate financial instruments in a given jurisdiction. Some countries have deemed it appropriate to subject lawyers to anti-money-laundering regulations when they perform financial intermediary functions. Other jurisdictions have deemed it appropriate to include within the scope of anti-money laundering obligations areas that may be at risk from high-value cash-based activities, such as domestic car dealers or real estate agencies. Thus, when deciding who will perform a “gatekeeper” function, States Parties could look at the workings of their domestic illegal markets and undertake a full risk assessment - through the FIU

proposed by article 58 or possibly involving the body or bodies established under article 6 or 36 - to identify the institutions or activities that might be susceptible to misuse for laundering purposes and the most likely modalities that could be used by those wishing to launder the proceeds of corruption.

3. What are the minimum requirements for regulated institutions or activities?

The third requirement of the preventive system is the minimum coverage of the obligations to which the regulated sector or activity needs to be subjected. According to the Convention, the preventive system “shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and reporting of suspicious transactions”.

In order to prevent money-laundering, the first duty of a designated “gatekeeper” is to identify those with whom financial relationships are established. The “know-your-customer” rule, a well-established principle of prudential banking law, is the cornerstone of the preventive obligations. Starting from a simple formal identification rule, it proved to be a very dynamic concept whose ultimate developments are reflected in detail in article 52. Article 14 establishes the general framework by requiring States Parties to stress the importance of client identification, as well as of “beneficial owner” identification in such cases where there are reasons to believe that there may be other persons, in addition to the client, with an interest in the assets involved in the transaction in question. The term “beneficial owner” should be regarded as covering any person with a direct or indirect interest in or control over assets or transactions. States Parties, preferably in conjunction with the relevant institutions, should agree on an identification and verification framework which is publicised. In addition, States Parties must define what additional due diligence is necessary to ensure that an institution understands the customer’s business sufficiently to be able to create a profile of the customer, monitor the activity and report unusual or suspicious transactions or activity. The extent of the additional due diligence should be informed by a risk profile that should be created for each customer. States Parties may also want to agree with the relevant institutions whether the framework should apply to existing as well as new customers and, in the case of the former, determine the period over which the existing customers’ due diligence should be conducted.

States Parties shall also require their gatekeepers to keep original records of the financial transactions. This obligation is a key nexus between the preventive and the investigative approaches as the records constitute the most relevant evidence for money-laundering investigations and prosecutions. States Parties are encouraged to carefully evaluate the period of time for which financial records will be required to be kept, in what format and what constitutes a “record” for retention and evidential purposes. The practical and costly burden that record-keeping represents for gatekeepers should be balanced against the fact that many corruption investigations do not start until the defendant(s) have left office - a reason for article 29 to require a sufficiently long statute of limitations. In this regard, States Parties may consider extending the record-keeping obligation for transactions carried out by the persons mentioned in article 52.

Finally, States Parties shall require its gatekeepers to report suspicious transactions. In implementing a system for reporting suspicious transactions, States Parties may consider a balance between the margin of discretion given to gatekeepers to decide when a transaction is suspicious and the capacity of its FIU to process, analyse and use in a meaningful fashion all the information required to be reported. Some countries tend to establish objective reporting systems with a minimum value threshold over which every transaction must be reported. For this model to work properly, the FIU should be provided with sufficient resources for receiving,

processing and analysing all the information received from the regulated sector. Virtually all States Parties, including all those who impose minimum cash transaction reporting systems, have considered that the gatekeepers are in the best position to decide when a transaction is to be considered suspicious, and have adopted “subjective” systems in which the gatekeepers make the decision and the public bodies supervise compliance within established criteria. In this model, regulated institutions have specific incentives to preserve their reputation and to keep their environment free from money of dubious origin. The routine information provided by a threshold-based system is used as raw material for creating financial databases, this will prove to be useful for investigations carried out on the basis of transactions reported as suspicious by the gatekeepers.

4. Promoting reporting

States Parties should consider how to create positive incentives and how to avoid negative incentives for establishing a co-operative relationship with the gatekeepers and help them to perform their reporting duties in a meaningful way.

Among the positive incentives, “safe harbour” provisions are very useful from a substantive perspective. Safe harbour provisions protect the reporting institution and its employees from civil, administrative and criminal liabilities when reporting in good faith. Protection from intimidation by those on whom reports are made is also important and so it may be necessary to allow for the protection of the identity of the reporting official. Other positive incentives may be more related to practical issues, such as providing adequate time framework and the use of non-burdensome methods – such as easy to fill forms, encrypted reporting systems through the Internet – in order to facilitate the gatekeepers’ function. States Parties may also wish to consider what feedback they should provide to reporting institutions and how far, in subjective systems, that feedback helps reporting institutions to refine their approaches. States Parties may also take into account how to avoid the creation of negative incentives that will produce inadequate reports or increased pre-emptive reporting to avoid regulatory sanction. In general, in either system, States Parties should ensure regular and relevant feedback to reporting institutions on the quality, detail and usefulness of reports and work with institutions on the refining and prioritisation of the information being submitted. The ultimate goal would be creating a collaborative environment between public and private actors, which will vary depending on existing practices, institutions and the goals of the system to be implemented.

5. Exchanging financial information

Paragraph 1(b) of article 14 deals with the ability of public bodies involved in combating money-laundering to co-operate and exchange information both at domestic and international levels.

At the domestic level, the treatment of information raises two fundamental questions. The first relates to the rights of any individual who may be accused of criminal activity (in this case, corruption or the laundering of its proceeds) and the second relates to the rights of an individual to privacy in his or her private (in this case financial) affairs.

Most countries have rules governing evidence in criminal proceedings. These include restrictions on the way information can be collected and used as evidence. A requirement that private institutions and public agencies must report suspicions will mean that private information, which has been collected by the institution or agency for other commercial or public purposes, may become available to authorities with an interest in a prosecution connected to corruption. This information would not have been collected as part of a formal investigation and may not have

been collected in a way that matches the legal or constitutional safeguards surrounding the collection and use of evidence in criminal proceedings. Such information would often be unacceptable as evidence in criminal proceedings. In most countries, this difficulty is resolved by treating information gathered through public and private agencies and passed to the FIU as intelligence rather than evidence. It can be used only to prompt a formal investigation in which evidence can be collected in the appropriate manner. Countries are likely to have different legal and constitutional provisions in this area and must make arrangements for the protection and use of financial intelligence in a way that respects the rights of those against whom offences are alleged.

Most countries now have data protection arrangements that maintain the confidentiality of personal information provided to private institutions and public agencies. It will be necessary for legislation to override such provisions in order to allow for reporting of suspicions by these institutions and agencies. However, fundamental human rights should not be abandoned. They should be respected by imposing confidentiality requirements on the recipients of the information – the FIU and those to whom it distributes information. In addition to the importance of data protection, such arrangements have the additional advantage that citizens are more likely to be forthcoming in responding to official requests for information if they are convinced that their information will remain confidential. Full participation is necessary to preserve the integrity of data that is used for public policy purposes, such as the provision of public services and the collection of tax on income.

If citizens were aware that information supplied to public agencies might be shared with other authorities in a way that was detrimental to their interests, they might be less inclined to share that information. The result would be that data was less reliable and public policy could suffer. On the other hand, it may be argued that those who are engaged in corruption are hardly likely to be volunteering information about their corruption in any case.

States Parties must consider the balance of advantage in breaking down the barriers erected between public agencies in order to preserve confidentiality and thereby making greatest use of information, against the possible disadvantage that some public data may become less reliable if citizens have doubts about its confidentiality.

Whatever course States Parties choose, it will be necessary for recipients of personal information to keep that information confidential and for fundamental human rights to be protected.

The final domestic issue to take into account when building a system of exchange of financial information relates to the amount of information to be generated by the system and the human and technical resources to be devoted to its analysis, classification and maintenance. Though technological means might play a crucial role in augmenting the analytical capacities, an unmanageable volume of information might threaten the efficacy and credibility of the whole anti-money laundering system. The way many countries have tried to overcome some of these issues is by creating a central agency for collecting, analysing and disseminating the financial information collected through the preventive anti-money-laundering system. This is the reason why paragraph 1(b) recommends States Parties to seriously consider creating an FIU at the national level that concentrates all the mentioned functions and also the ability to share information with other States Parties, which is the specific concern of article 58 of the Convention.

At the international level, the crucial agency for exchanging financial information is the FIU, as recognised by article 58. FIUs exchange information among themselves on the basis of reciprocity or mutual agreement which usually encourages spontaneous co-operation.

The issues identified above in respect of the protection of the rights of anyone accused of corruption and the right to privacy of data apply with greater force to the international exchange of information, since different countries protect rights in different ways. It is important that the proper exchange of information is not inhibited by differences in the form of such protection, even where the substance of the protective regime is similar. The procedures for information sharing are usually much simpler than in mutual legal assistance, since the latter are designed to protect the rights of those accused whereas information exchange agreements between FIUs are not. In effect, information exchanged between FIUs tends to be intelligence not evidence and can rarely be used in criminal proceedings in its raw form. It can, however, be the basis for an investigation (which may ultimately include an international request for evidence through the mutual legal assistance channels).

Usually, agreements between FIUs are guided by the following principles:

- the requesting FIU should disclose to the requested FIU the reason for the request, the purpose for which the information will be used and enough information to enable the receiving FIU to determine whether the request complies with its domestic law;
- mutual agreements or memorandums of understanding between FIUs usually limit the uses of the requested information to the specific purpose for which the information was sought or provided:
- the requesting FIU should not transfer information shared by a disclosing FIU to a third party, nor make use of the information for an administrative, investigative, prosecutorial, or judicial purpose without the prior consent of the FIU that disclosed the information. The FIU giving the information should not unreasonably withhold any such consent;
- all information exchanged by FIUs must be subjected to strict controls and safeguards to ensure that the information is used only in an authorised manner, consistent with national provisions on human rights and data protection. At a minimum, exchanged information must be treated as protected by the same confidentiality provisions as apply to similar information from domestic sources obtained by the receiving FIU.

The Egmont Group of FIUs published in 2004 a document of “Best Practices for the Exchange of Information between Financial Intelligence Units” with legal and practical advice for exchanging financial information at the international level. The document provides advice on the request process, information required, processing the request, responses, and confidentiality.

6. Cross-border movement of cash and negotiable instruments

Paragraph 2 of article 14 requires States Parties to consider the adoption of measures to detect and monitor the cross-border movement of cash as well as of “appropriate negotiable instruments”. The transportation of currency, negotiable instruments and valuables that are easily liquidated – such as bank guarantees or precious stones – is of strong concern to any anti-money

laundering preventive system. The reason is quite simple, once borders have been crossed, disguising the origins of ill-gotten gains becomes easier because tracing its origin requires the use of international co-operation, which usually proceeds more slowly than investigations within a single jurisdiction.

The Convention recommends that States Parties adopt a declaration system by virtue of which all persons making a physical cross-border transport of cash or designated negotiable instruments are required to submit a truthful declaration to the designated competent authorities. In implementing such a system, a range of issues needs to be considered.

- States Parties need to establish a threshold above which the declaration is required. In adopting a threshold the “free movement of capital” criteria may be taken into account. For practical reasons, countries tend to follow a threshold established by many other countries. In this vein, thresholds of US\$10,000, or the equivalent in local currency, are widespread.
- States Parties need to decide which “negotiable instruments” will be appropriate to subject to declaration. Frequently, these systems include all negotiable instruments – such as cheques, travellers cheques, promissory notes or money orders – that are either in bearer form or in such a form that title passes upon delivery (endorsed without restriction, made out to a fictitious payee, incomplete documents). In addition to financial instruments, countries may also include other high-liquidity valuables, such as gold, precious metals, precious stones, or other high-value portable commodities.
- States Parties need to consider which modes of transportation will be subjected to the declaration system. Typically, States Parties apply a declaration system for transportation of cash or other negotiable instruments to: (1) physical transportation by a natural person, in that person’s accompanied luggage or vehicle; (2) shipment of currency or negotiable instruments through cargo; and (3) mailing of currency or negotiable instruments by a natural or legal person. The declaration should apply to both incoming and outgoing transportation.
- Upon discovery of a failure to declare currency or designated negotiable instruments above the threshold, the competent authorities should have legal authority to contact the carrier with regard to the origin of the assets in question and their intended use. States Parties should make such information available to the FIU. The FIU may issue a specific advisory to the competent authority regarding the frequency and types of reports. A balance against the criteria regarding the proper use of the information may be taken into account when designing this set of provisions.

Such discoveries are, in many cases, facilitated by combining the standard declaration system with a disclosure system, by virtue of which all persons making a cross-border transport of currency or designated negotiable instruments are required to make a truthful disclosure to the competent authorities upon request. The inquiries are on a targeted basis, based on intelligence sources, suspicion, or on a random basis.

States Parties may consider establishing procedures to conduct inspections of passengers, vehicles and cargos for the purpose of detecting cross-border movements, when it is suspected that currency and bearer negotiable instruments may be falsely declared or undisclosed or that it may be related to a criminal activity.

When suspicious currency instruments are discovered, it is good practice to keep the baggage/cargo intact with the currency to preserve evidence. When inspecting for currency which may be falsely declared or undisclosed, or which may be related to money laundering, it is good practice to give particular attention to the potential use of counterfeit currencies. Some States Parties have established mechanisms to detect counterfeit currency. For example, when encountering questionable or suspicious euro notes authorities can check these notes using the European Central Bank website (www.eur.ecb.int/en/section/recog.html). In the case of US dollars, authorities can check them against the US Secret Service Counterfeit Note Search Website (www.usdollars.usss.gov).

Customs authorities and other enforcement agencies are encouraged to work with prosecutorial or judicial authorities to establish guidelines for the stopping or restraining of currency and bearer negotiable instruments, and the arrest and prosecution of individuals in cases involving falsely declared or disclosed currency and bearer negotiable instruments, or where there are suspicions that the currency or bearer negotiable instruments are related to terrorist financing or money laundering. States Parties may also enact clear rules of how to proceed in case of failure of declaration or false declarations. Typically, a provisional measure allowing authorities to restrain the currency or negotiable instruments for a reasonable time should be adopted, in order to ascertain whether there is evidence of money laundering or any other crime.

States Parties need to consider whether failure to comply with the declaration system will be sanctioned under civil, administrative or criminal law. Typically, fines – whether administrative or criminally imposed – have been regarded as proportional and dissuasive sanctions for enforcing these systems, with ranges from a lower percentage in cases of negligence to a high percentage in cases of intentional violation.

While the enforcement of cash declaration systems is important, it is vital that States Parties determine how they intend to use the information that is included in routine currency declarations. Focusing only on the apprehension of those who fail to declare will result in the lost opportunity of using actual declarations to detect the laundering of the proceeds of corruption. If States Parties cannot see how they will use cash declarations, or have not got the capacity to analyse the information, there is little point in collecting it. States Parties should use the risk assessment recommended earlier to determine the most likely ways in which cash transportation may be connected to the laundering of the proceeds of corruption. They should build a profile of those most likely to be engaged in transporting corruption proceeds and focus investigatory attention on cash declarations from those who match the profile. The profile will need to be updated in the light of experience domestically and internationally. States Parties will also need to consider what triggers might result in suspicion and further investigation so that staff collecting declarations can be appropriately trained. Aggregate figures on cash transportation may also give indications about methods used by launderers. The risk assessment, profile and information on trends can then be used to amend cash declaration forms so as to ensure that information that creates alerts and suspicions can be readily collected.

7. Money transfers

In light of the same concerns of paragraph 2, paragraph 3 of article 14 recommends that States Parties consider implementing appropriate and feasible measures to require financial institutions, including money remitters: (a) to include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator; (b) to maintain such information throughout the payment chain; and (c) to apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

Electronic transfer systems should be addressed with the same stringency as other financial transactions. The first essential is to determine the risks associated with money transmitters as part of the overall risk assessment. As minimum requirements, States Parties are strongly urged to apply “know-your-customer” rules to the originator of the transaction and making the transaction traceable by accumulating information through the payment chain and by enhancing the scrutiny (on the receiving side of the transfer) when the information on the originator is incomplete.

The group of financial intermediaries allowed to perform electronic transfers is a matter of domestic financial law and therefore varies across States Parties. However, States Parties may wish to consider including any money service business that allows customers to send and receive money, within its jurisdiction or internationally, by electronic means. The transaction allows a customer to send money by visiting any participating outlet, filling out a money transfer form and paying for the transaction. The customer receiving the transaction does not usually have to pay any fee.

When considering adopting preventive measures regarding electronic transfers, a State Party may take into account several issues. First, States Parties may consider the appropriateness of establishing a threshold that triggers the system. Some jurisdictions have established different reporting systems that are triggered by different thresholds: some for routine monthly reporting, some (or none) for “suspicious” reporting. “Structured” transactions – transactions divided in a specific fashion to avoid the threshold – may also be taken into account.

Second, States Parties will need to decide the appropriate information for money transmitters to obtain from their clients. A non-exhaustive list of information that a State Party might consider necessary includes: the transmitter’s name and address, and a copy of his/her identification subjected to verification procedures (usually requiring 2 different photo IDs); the amount of the transmittal order; the execution date of the transmittal order; any payment instructions received from the transmitter; the identity of the recipient’s financial institution; any form relating to the transaction that is completed or signed by the person placing the order; name, address, and account number of recipient when specified in the transmittal order.

Finally, States Parties may decide what part of such information should be reported to the competent authorities and what other part of such information should be kept – and for how long – by the transmitter.

Some states do not allow money remitters to provide services on an ad hoc basis but insist on customers providing substantial personal information before being allowed any use of the services. Such information would include employment and other income sources and a profile of likely remittances and the likely beneficiaries, so that actual remittances can be compared with this profile (preferably electronically). States Parties should consider this approach if appropriate.

8. Implementation

States Parties may wish to refer to relevant initiatives of regional, interregional and multilateral organisations against money-laundering.

The FATF has been promoting the creation of several FATF-style regional bodies; some of them are also associated members of FATF. The FATF regional groups are as follows:

- The Caribbean Financial Action Task Force, created in 1993 (www.cfatf.org);
- The Asia Pacific Group against Money Laundering, created in 1997 (<http://www.apgml.org>);
- The Select Committee of Experts on the Evaluation of Anti-Money-Laundering Measures (MONEYVAL), created in 1997 (www.coe.int/moneyval);
- The Eurasian Group, created in 2004 (<http://www.eurasiangroup.org/index-1.htm>);
- The Eastern and South African Anti-Money Laundering Group, created in 1999 (<http://www.esaamlg.org/index.php>);
- The GAFISUD, created in 2000; and
- The Middle East & North Africa Financial Action Task Force (MENAFATF), created in 2004 (<http://www.menafatf.org/Home.asp>).

In relation to FIUs, a group of FIUs established an informal group in 1995 for the stimulation of international co-operation, currently known as the Egmont Group (<http://www.egmontgroup.org/index2.html>). With 101 active FIU members in 2006, the Egmont Group meets regularly to find ways to co-operate, especially in the areas of information exchange, training, and the sharing of expertise.

In addition, States Parties are more generally encouraged to develop and promote global, regional, sub-regional and bilateral co-operation among judicial, law enforcement and financial regulatory authorities in order to combat money laundering. This is addressed in a number of articles below.

CHAPTER III: CRIMINALISATION AND LAW ENFORCEMENT

UNCAC sets out a comprehensive and far-reaching framework for the criminalisation of corrupt activity.

Where not already provided for in domestic law, UNCAC requires states to criminalise a wide range of corrupt acts and transactions. In some instances, for example the promising, offering or giving to a national public official of an undue advantage, countries are obliged to establish criminal offences; whilst, in others, for example the solicitation or acceptance by a foreign public official of an undue advantage, they are required to consider such criminalisation.

UNCAC goes further than previous international counter-corruption instruments by addressing not only bribery, but also trading in influence and the concealment and laundering of the proceeds of corruption. In addition, it seeks to address those activities, such as money laundering, which facilitate corrupt acts.

The Criminalisation Requirements of UNCAC: Bribery

Article 15: Bribery of National Public Officials

UNCAC LANGUAGE

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself/herself or another person or entity, in order that the official act or refrain from acting in the exercise of his/her official duties;*
- (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself/herself or another person or entity, in order that the official act or refrain from acting in the exercise of his/her official duties.*

Overview

In accordance with article 15, States Parties must establish as criminal offences the following conduct:

- (a) active bribery, defined as the promise, offering or giving to a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties.
Legislation is required to implement this provision;

- (b) passive bribery, defined as the solicitation or acceptance by a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties.
Legislation is required to implement this provision.

Article 15 requires the establishment of two offences: active and passive bribery of national public officials. In many states, the level of proof required for corruption offences is very high. Often, evidence must be found that a preliminary, corrupt agreement has taken place. The distinction between the active and passive sides of the offence allows to more effectively prosecute corruption attempts and introduces a stronger dissuasive effect.

Implementation

1. Active bribery of national public officials

States parties must establish as a criminal offence, when committed intentionally, the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official him/herself or another person or entity, in order that the official act or refrain from acting in the exercise of his/her official duties (article 15, subparagraph (a))⁸.

It is reiterated that for the purposes of the Convention, with the exception of some measures under Chapter II, “public official” is defined in article 2, subparagraph (a) as:

- (a) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority;
- (b) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;
- (c) any other person defined as a “public official” in the domestic law of a State Party.

An interpretative note indicates that, for the purpose of defining “public official”, each State party shall determine who is a member of the categories mentioned in subparagraph (a)(i) of article 2 and how each of those categories is applied (A/58/422/Add.1, para. 4).

The required elements of this offence are those of promising, offering or actually giving something to a public official. The offence must cover instances where no gift or other tangible item is offered. So, an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary.

The undue advantage does not have to be given immediately or directly to a public official of the state. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organisation. Some national legislation might cover the promise and offer under provisions regarding the attempt to commit bribery. When this is not the case, it will be necessary to specifically cover promising (which implies an agreement between the bribe giver and the bribe taker) and offering (which

⁸ For specific examples of national implementation, see Australia, Independent Commission against Corruption Act, § 8; Hong Kong Special Administrative Region of China, Prevention of Bribery Ordinance, Chap. 201, § 4.1; Kenya, Anti-Corruption and Economic Crimes Act, § 39; Mauritius, Prevention of Corruption Act, part II § 5; and United States of America, Title 18, § 201.

does not imply the agreement of the prospective bribe taker). The undue advantage or bribe must be linked to the official's duties.

The required mental element (or subjective element) for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties. Since the conduct covers cases of merely offering a bribe, that is, including cases where it was not accepted and could therefore not have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place (see article 28, which provides that "Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances").

2. Passive bribery of national public officials

States Parties must establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his/her official duties (article 15, subparagraph (b))⁹.

This offence is the passive version of the first offence. The required elements are soliciting or accepting the bribe. The link with the influence on official conduct must also be established.

As with the previous offence, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly.

The mental or subjective element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties (see article 28, which provides that "Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances").

Attention should also be paid to some other provisions (articles 26-30 and 42) regarding closely related requirements pertaining to the offences established under the Convention¹⁰.

The language used in provisions regarding passive and active bribery of national public officials is identical to that used in article 8, paragraph 1, of the Organized Crime Convention. Noteworthy, however, is the difference in the definition of "public official" under the two conventions. As stated in article 2, subparagraph (a), some provisions of the Convention against Corruption apply to persons performing certain public functions or roles, even if they are not defined as public officials by domestic law.

⁹ For specific examples of national implementation, see Hong Kong Special Administrative Region of China, Prevention of Bribery Ordinance, Chap. 201, § 4.2; Kenya, Anti-Corruption and Economic Crimes Act, § 39; Mauritius, Prevention of Corruption Act, part II (Corruption offences), § 4; and United States of America, Title 18, § 201 (Bribery of public officials and witnesses).

¹⁰ Special attention is also drawn to article 27 of the Convention against Corruption, which addresses the question of participation in the offences established under the Convention. Participation was mandated as a separate offence under the Organized Crime Convention (art. 8, para. 3).

Article 16: Bribery of Foreign Public Officials and Officials of Public International Organisations

UNCAC LANGUAGE

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official, or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself/herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself/herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person.

Overview

In accordance with article 16, paragraph 1, States Parties must establish as a criminal offence the promise, offering or giving of an undue advantage to a foreign public official or official of an international organisation, in order:

- (a) to obtain or retain business or other undue advantage in international business;
- (b) that the official take action or refrain from acting in a manner that breaches an official duty.

Legislation is required to implement these provisions.

Implementation

1. Active bribery of foreign public officials and officials of public international organisations

Under article 16, paragraph 1, states must establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his/her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business¹¹.

As noted in Chapter I of the Convention against Corruption, “foreign public official” is defined as “any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise ” (article 2, subparagraph (b)), the

¹¹ The OECD has found that some states do not cover all the elements of the offence of bribing a foreign public official in their implementing legislation, but instead rely on direct application of the terms of the OECD Bribery Convention. To date, no party to that Convention has produced any legal cases showing that language in a treaty or convention will be directly applied to a criminal offence. This is probably the result of constitutional guarantees that a person shall not be deprived of his or her liberty except in accordance with the law.

“foreign country” can be any other country that is, it does not have to be a State Party. State Parties’ domestic legislation must cover the definition of “foreign public official” given in article 2, subparagraph (b) of the Convention, as it would not be adequate to consider that foreign public officials are public officials as defined under the legislation of the foreign country concerned. Article 16 does not require that bribery of foreign public officials constitute an offence under the domestic law of the concerned foreign country.

An official of a public international organisation is defined as “an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation” (article 2, subparagraph (c)).

What is a public office or official?

The Commentary (Commentaries 12-18) to the OECD Convention says:

- It includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.
- It is an entity constituted under public law to carry out specific tasks in the public interest.
- It is an enterprise, regardless of its legal form, over which a government or governments, may, directly or indirectly, exercise a dominant influence. subscribe capital, control the majority of votes attaching to shares issued by the enterprise, or can appoint a majority of the members of the enterprise
- An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market (i.e. on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidiaries or other privileges).
- In certain circumstances some persons (e.g. political party officials in single party states), not formally designated as public officials, may, through their de facto performance of a public function, under the legal principles of some countries, be considered to be foreign public officials.
- Includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of confidence, including, for example, a region economic integration organisation such as the European Communities.
- Is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

This offence mirrors the active bribery offence discussed above. One difference is that it applies to foreign public officials or officials of a public international organisation, instead of national public officials. The other difference is that the undue advantage or bribe must be linked to the conduct of international business, which includes the provision of international aid (see A/58/422/Add.1, para. 25). Otherwise, all required elements of the offence (promising, offering or giving), the nature of the undue advantage and the required mental or subjective element remain the same as described above¹².

¹² The OECD has noted that a number of parties implementing the OECD Bribery Convention have criminalised the bribery of foreign public officials by extending their existing domestic bribery offences. In such cases, the OECD recommends that parties verify that the domestic offence conforms to the standards of the OECD Convention. This means that the party must ensure that each element of the relevant offence under the Convention is covered by the domestic offence, that no additional elements are contained therein and that no applicable defences create a gap in the implementation of the Convention. Moreover, if the domestic bribery

Creating the offence of passive bribery by foreign public officials or officials of a public international organisation is not mandatory and is discussed below.

The provisions of article 16 do not affect any immunity that foreign public officials or officials of public international organisations may enjoy under international law. As the interpretative notes indicate: “The States Parties noted the relevance of immunities in this context and encourage public international organizations to waive such immunities in appropriate cases” (A/58/422/Add.1, para. 23; see also article 30, paragraph 2, regarding immunities of national public officials).

Attention should also be paid to some other provisions (articles. 26-30 and 42) regarding closely related requirements pertaining to offences established under the Convention.

States with only territorial jurisdiction will have to make an exception to territorial jurisdiction in order to cover this particular offence, which will usually be committed by nationals abroad.

2. Passive bribery of foreign public officials and officials of public international organisations¹³

Article 16, paragraph 2, requires that States Parties consider establishing as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his/her official duties.

This is the mirror provision of article 15, subparagraph (b), which mandates the criminalisation of passive bribery of national public officials; the discussion above of article 15, subparagraph (b) therefore applies to article 16, paragraph 2, *mutatis mutandis*. In this respect, drafters of national legislation may wish to consult the OECD Bribery Convention.

It has also been seen above that the offence of active bribery of foreign public officials and officials of public international organisations is mandatory. As the interpretative notes indicate, article 16, paragraph 1, requires that States Parties criminalise active bribery of foreign public officials and paragraph 2 requires only that States Parties “consider” criminalising solicitation or acceptance of bribes by foreign officials in such circumstances. The notes state that “This is not because any delegation condoned or was prepared to tolerate the solicitation or acceptance of such bribes. Rather, the difference in degree of obligation between the two paragraphs is due to the fact that the core conduct addressed by paragraph 2 is already covered by article 15, which requires that States Parties criminalize the solicitation and acceptance of bribes by their own officials” (A/58/422/Add.1, para. 28).

Further interpretative notes clarify additional points, which are described in the following paragraphs.

offence is to be extended to apply to foreign bribery, it must be ensured that the resulting structure of the offence is not too cumbersome (for example, because of cross references) and complicated, creating uncertainty over precisely what conduct is covered by the offence.

¹³ The General Assembly, in operative paragraph 6 of its resolution 58/4, requested the Conference of the States Parties to the United Nations Convention against Corruption to address the criminalization of bribery of officials of public international organizations.

The provisions of article 16 are not to affect “any immunities that foreign public officials or officials of public international organizations may enjoy in accordance with international law. The States Parties noted the relevance of immunities in this context and encourage public international organizations to waive such immunities in appropriate cases” (A/58/422/Add.1, para. 23).

National drafters should be aware that a statute that defines the offence in terms of payments “to induce a breach of the official’s duty” could meet the standard set forth in paragraphs 1 and 2 of article 16, provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and that this was an “autonomous” definition not requiring proof of the law or regulations of the particular official’s country or international organisation (A/58/422/Add.1, para. 24).

The negotiating delegations considered it quite important that any State Party that has not established the offence defined in paragraph 2 of article 16 should, insofar as its laws permit, provide assistance and co-operation with respect to the investigation and prosecution of the offence by a State Party that has established it in accordance with the Convention and should avoid, if at all possible, allowing technical obstacles such as lack of dual criminality to prevent the exchange of information needed to bring corrupt officials to justice (A/58/422/Add.1, para. 26).

The word “intentionally” was included in article 16, paragraph 2, primarily for consistency with paragraph 1 and other provisions of the Convention and was not intended to imply any weakening of the commitment contained in paragraph 2, as it was recognised that a foreign public official cannot “unintentionally” solicit or accept a bribe (A/58/422/Add.1, para. 27).

Finally, attention should also be paid to some other provisions (articles. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention. For further guidance on what constitutes a "Public Official", and a "Foreign Public Official" and other Articles which need to be taken into consideration when implementing Article 16, as well as examples of model legislation, see Appendix A.

Criminalisation of other Offences under the UNCAC

Article 17: Embezzlement, misappropriation etc of property by a public official

UNCAC LANGUAGE

Each State Party shall adopt such legislative and other measures as necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities, or any other thing of value entrusted to the public official by virtue of his/her position.

Article 17 of the Convention against Corruption requires the establishment of the offence of embezzlement, misappropriation or other diversion of property by a public official.

States Parties must establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or

for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position¹⁴.

The required elements of the offence are the embezzlement, misappropriation or other diversion¹⁵ by public officials of items of value entrusted to them by virtue of their position. The offence must cover instances where these acts are for the benefit of the public officials or another person or entity.

The items of value include any property, public or private funds or securities or any other thing of value. This article does not “require the prosecution of de minimis offences” (A/58/422/Add.1, para. 29).

It is recalled that, for the purposes of the Convention against Corruption, “property” means “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets” (article 2, subparagraph (d)).

Attention should also be paid to some other sections of the present guide (concerning articles 26-30, article 42 and, in particular, article 57) regarding requirements that are closely related to offences established in accordance with the Convention.

¹⁴ For specific examples of national implementation, see Australia, Crimes Act, 1900 § 157 (Embezzlement by clerks or servants); and United States, Title 18, § 641 (Public money, property or records), § 657 (Lending, credit and insurance institutions), § 659 (Interstate or foreign shipments by carrier; State prosecutions), and § 666 (Theft or bribery concerning programs receiving Federal Funds).

¹⁵ The term "diversion" is understood in some states as separate from "embezzlement" and "misappropriation", while in others "diversion" is intended to be covered by or is synonymous with those terms (A/58/422/Add.1, para. 30).

Article 18: Trading in influence

UNCAC LANGUAGE

Each State Parties shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- a. The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the States Parties an undue advantage for the original instigator of the act or for any other person;*
- b. The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for him/herself or another person in order that the public official or person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the States Parties an undue advantage.*

Overview

Article 18 requires that States Parties consider establishing as criminal offences, when committed intentionally:

- (a) the promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;
- (b) the solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

The provisions of this article mirror those of article 15, which mandates the criminalisation of active and passive bribery of national public officials. There is one main difference between article 15 and article 18. The offences under article 15 involve an act or refraining to act by public officials in the course of their duties. In contrast, under article 18, the offence involves using one's real or supposed influence to obtain an undue advantage for a third person from an administration or public authority of the state.

Otherwise, the elements of the offences under article 18 are the same as those of article 15.

Implementation

1. Active trading in influence

The elements of the first offence (active trading in influence) are those of promising, offering or actually giving something to a public official. The offence must cover instances where it is not a gift or something tangible that is offered. So, an undue advantage may be something tangible or intangible.

The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organisation. The undue advantage or bribe must be linked to the official's influence over an administration or public authority of the state.

The mental or subjective element for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to abuse his or her influence in order to obtain from an administration or public authority of the State Party an undue advantage for the instigator of the act or for any other person.

Since the conduct covers cases of merely offering a bribe, that is, even including cases where it was not accepted and could not therefore have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place.

2. Passive trading in influence

In the passive version of this offence, the elements are soliciting or accepting the bribe. The link with the influence of official conduct must also be established.

As with the previous offence, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly.

The mental or subjective element is only that of intending to solicit or accept the undue advantage for the purpose of abusing one's influence to obtain an undue advantage for a third person from an administration or public authority of the state.

Attention should also be paid to some other provisions (articles 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

Set out below is an example of the trading in influence offence from Mauritius (Prevention of Corruption Act 2002):

Example of national legislation: Mauritius, Prevention of Corruption Act, part II (Corruption offences), § 10

Influencing public official

Any person who exercises any form of violence, or pressure by means of threat, upon a public official, with a view to the performance, by that public official, of any act in the execution of his functions or duties, or the non-performance, by that public official, of any such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

'Trafic d'influence'

(1) Any person who gives or agrees to give or offers a gratification to another person, to cause a public official to use his influence, real or fictitious, to obtain any work, employment, contract or

other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Any person who gives or agrees to give or offers a gratification to another person to use his influence, real or fictitious, to obtain work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years

(3) Any person who gives or agrees to give or offers a gratification to a public official to cause that public official to use his influence, real or fictitious, to obtain work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(4) Any person who solicits, accepts or obtains a gratification from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(5) Any public official who solicits, accepts or obtains a gratification from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years

Article 19: Abuse of functions

UNCAC LANGUAGE

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally the abuse of functions, or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions for the purpose of obtaining an undue advantage for him/herself or for another person or entity

Overview

Article 19 requires that States Parties consider the establishment as a criminal offence, when committed intentionally, of the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of the law, by a public official in the discharge of his or her

functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity¹⁶.

This provision encourages the criminalisation of public officials who abuse their functions by acting or failing to act in violation of laws to obtain an undue advantage. According to the interpretative notes, this offence may encompass various types of conduct such as improper disclosure by a public official of classified or privileged information (A/58/422/Add.1, para. 31)¹⁷.

Attention should also be paid to some other provisions (articles 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

Article 20: Illicit enrichment

UNCAC LANGUAGE

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his/ her lawful income.

Overview

Subject to the constitutional and fundamental principles of their legal systems, States Parties must consider the establishment of illicit enrichment as a criminal offence. States must consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income (article 20).

Attention should also be paid to some other provisions (articles 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

The establishment of illicit enrichment as an offence has been found helpful in a number of jurisdictions¹⁸. It addresses the difficulty faced by the prosecution when it must prove that a public official solicited or accepted bribes in cases where his or her enrichment is so disproportionate to his or her lawful income that a prima facie case of corruption can be made. The creation of the offence of illicit enrichment has also been found useful as a deterrent to corruption among public officials.

The obligation for parties to consider creating such an offence is however subject to each State Party's constitution and the fundamental principles of its legal system (see also paragraph 13 of the present guide concerning safeguard clauses). This effectively recognises that the illicit enrichment offence, in which the defendant has to provide a reasonable explanation for the

¹⁶ See art. 3, para. 1(c), of the Southern African Development Community Protocol against Corruption for a similar provision. An example of national legislation is article 130 of the Macau Special Administrative Region of China Chief Executive Election Law, Law No. 3/2004

¹⁷ For other specific examples of national legislation and regulation, see France, Penal Code, arts. 432-10 and 432-1; Kenya, Prevention of Corruption Act, § 3 (revised 1998); and Zambia, Corrupt Practices Act, § 30. Some states, such as the Netherlands, may consider this offence as a variant of article 15 of the Convention against Corruption, so they would not need to implement it separately

¹⁸ See, for example, Hong Kong Special Administrative Region of China, Prevention of Bribery Ordinance, chap. 201, sect. 10, and Zambia, Corrupt Practices act, sect. 33.

significant increase in his or her assets, may in some jurisdictions be considered as contrary to the right to be presumed innocent until proven guilty under the law. However, the point has also been clearly made that there is no presumption of guilt and that the burden of proof remains on the prosecution, as it has to demonstrate that the enrichment is beyond one's lawful income. It may thus be viewed as a rebuttable presumption. Once such a case is made, the defendant can then offer a reasonable or credible explanation.

The remaining offences that are to be considered for criminalisation should also be noted.

Article 21: Bribery in the Private Sector

UNCAC LANGUAGE

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

Overview

The Convention against Corruption also introduces active and passive bribery in the private sector, an important innovation compared to the Organized Crime Convention or other international instruments. Article 21 thus brings out the importance of requiring integrity and honesty in economic, financial or commercial activities¹⁹.

Specifically, article 21 requires that States Parties consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

- (a) the promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;
- (b) the solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

¹⁹ See also Council of the European Union Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, article 2 of which makes the criminalisation of active and passive corruption in the private sector mandatory.

As the above provisions mirror those of article 15, the discussion regarding article 15 applies here, *mutatis mutandis*²⁰.

Implementation

1. Active bribery

The required elements of this offence are those of promising, offering or giving something to a person who directs or works for a private sector entity. The offence must cover instances where it is not a gift or something tangible that is offered. So, an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary.

The undue advantage does not have to be given immediately or directly to a person who directs or works for a private sector entity. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or a political organisation. Some national laws may cover the promise and offer under provisions regarding the attempt to commit bribery. When this is not the case, it will be necessary to specifically cover promising (which implies an agreement between the bribe giver and the bribe taker) and offering (which does not imply the agreement of the prospective bribe taker). The undue advantage or bribe must be linked to the person's duties.

The required mental or subjective element for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the person who directs or works for a private sector entity to act or refrain from acting in breach of his or her duties in the course of economic, financial or commercial activities. Since the conduct covers cases of merely offering a bribe, that is, even including cases where it was not accepted and could therefore not have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place (see article 28, which provides that "Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances").

2. Passive bribery

This offence is the passive version of the first offence. The required elements are soliciting or accepting the bribe. The link with the influence over the conduct of the person who directs or works in any capacity for a private sector entity must also be established.

As with the previous offence, the undue advantage may be for the person who directs or works in any capacity for a private sector entity or some other person or entity. The solicitation or acceptance must be by that person or through an intermediary, that is, directly or indirectly.

The mental or subjective element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in breach of his or her duties, in the course of economic, financial or commercial activities.

²⁰ For a specific example of national legislation and regulations, see the Corporate Code of Conduct developed by the Independent Commission against Corruption of Hong Kong Special Administrative Region of China. Relevant international and regional treaties and documents include the African Union Convention on Preventing and Combating Corruption; the Council of Europe Criminal Law Convention on Corruption; the Council of the European Union Framework Decision 2003/568/JHA on combating corruption in the private sector; the International Chamber of Commerce 2005 publication Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations; the OECD Bribery Convention; and the United Nations Declaration against Corruption and Bribery in International Commercial Transactions (General Assembly Resolution 51/191, annex).

Article 21 as well as article 22 on embezzlement of property, are intended to cover conduct confined entirely to the private sector, where there is no contact with the public sector at all²¹.

Attention should also be paid to some other provisions (articles 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

Article 22: Embezzlement of property in the private sector

UNCAC LANGUAGE

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.

Overview

Beyond the active and passive bribery offences, article 22 urges states to consider criminalising, when committed intentionally, acts of embezzlement by persons who direct or work, in any capacity, in a private sector entity of any property, private funds or securities or anything of value entrusted to them by virtue of their position.

This article parallels the mandatory provisions contained in article 17, which addresses the same types of misconduct when committed by public officials (see sect. III.B.1 above)²². Attention should also be paid to some other provisions (articles 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

²¹For example, see United States Code, Title 18, § 1341 (Frauds and swindles)

²² The Netherlands considers the embezzlement of property by public officials or in the private sector as variants of the same offence. When a public official is the perpetrator, this may constitute an aggravating circumstance. The Netherlands takes the position that clear-cut descriptions of offences enhance international co-operation by facilitating dual criminality.

The Anti-Money Laundering Provisions

Article 23: Laundering of proceeds of crime

UNCAC LANGUAGE

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

Overview

UNCAC addresses money laundering in the following ways:

- it criminalises the concealment and laundering of the proceeds of corruption;
- It addresses money laundering as an offence committed in support of corrupt acts;
- in relation to international co-operation, it requires countries to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

In considering the treatment of money laundering within UNCAC, it should be remembered that the Preamble states that asset recovery is “a fundamental principle of the convention...”.

The criminalisation of the laundering of the proceeds of corruption is dealt with in Article 23, which sets out a mandatory requirement. It provides that States Parties shall, in accordance with fundamental principles of domestic law, criminalise:

- the conversion or transfer of property known to be the proceeds of crime (where there is an ulterior purpose, e.g. concealment, disguising illicit origin etc);
- the concealment or disguise of the true nature of, source, location, disposition, movement or ownership of property, knowing that such properties are the proceeds of crime.
- the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
- participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with Article 23.

The Article goes on to provide that the above provisions should be applied to the widest range of predicate offences.

The offence of “Concealment” is dealt with specifically in Article 24 which provides that States Parties shall consider adopting such legislative and other measures as may be necessary to criminalise the intentional concealment or continued retention of property, when such property is known to be the result of any of the criminal offences established in accordance with UNCAC.

UNCAC goes further, however; in particular it addresses a wide range of measures aimed at preventing money-laundering activity. In particular, it provides that States Parties shall:

- institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank institutions (including both natural and legal persons that provide both formal and informal services for the transition of money etc) in order to deter and detect all forms of money laundering;
- ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money laundering have the ability to co-operate and exchange information at the national and international levels, and that the establishment of a financial intelligence unit to serve as a national centre is considered;
- consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across borders;
- consider implementing appropriate and feasible measures requiring financial institutions to include on forms for electronic transfer of funds accurate and meaningful information on the originator and the maintaining of such information through the payment chain;
- establish a domestic regulatory and supervisory regime, to use as a guideline the relevant initiatives of regional, interregional and multilateral organisations against money laundering;
- to endeavour to develop and promote global, regional sub-regional and bilateral co-

operation among judicial, law enforcement and financial regulatory authorities in order to combat money laundering;

- recognising the importance of restraint and confiscation to money laundering provisions, UNCAC sets out (at Article 31) a number of measures which need to be taken. It provides that States Parties shall take such measures as may be necessary to enable confiscation of:
 - proceeds of crime (and property corresponding to such proceeds) from offences established in accordance with UNCAC;
 - property, equipment etc used/to be used in such offences;

UNCAC also provides that States Parties shall:

- take measures to ensure that identification, tracing, freezing or seizure of proceeds of crime/property corresponding to such proceeds for the purpose of confiscation can take place.

(The reader is referred to ‘Asset Recovery’, below)

Implementation

1. Money-laundering

Article 23 requires the establishment of offences related to the laundering of proceeds of crime, in accordance with fundamental principles of domestic law. The related Convention articles addressing measures aimed at the prevention of money laundering were discussed in the previous Chapter.

In the context of globalisation, criminals take advantage of easier capital movement, advances in technology and increases in the mobility of people and commodities, as well as the significant diversity of legal provisions in various jurisdictions. As a result, assets can be transferred instantly from place to place through both formal and informal channels. Through exploitation of existing legal asymmetries, funds may appear finally as legitimate assets available in any part of the world.

Confronting corruption effectively requires measures aimed at eliminating the financial or other benefits that motivate public officials to act improperly. Beyond this, combating money laundering also helps to preserve the integrity of financial institutions, both formal and informal, and to protect the smooth operation of the international financial system as a whole²³.

As noted in the previous Chapter, this goal can only be achieved through international and co-operative efforts. It is essential that states and regions try to make their approaches, standards and legal systems related to this offence compatible, so that they can co-operate with one another in controlling the international laundering of criminal proceeds. Jurisdictions with weak or no control mechanisms render the work of money launderers easier. Thus, the Convention against Corruption seeks to provide a minimum standard for all states²⁴.

The Convention against Corruption specifically recognises the link between corrupt practices and money laundering and builds on earlier and parallel national, regional and international initiatives in that regard. Those initiatives addressed the issue through a combination of

²³ See also the report of the sixth meeting of the International Group of Anti-Corruption Co-ordination, available at <http://www.igac.net/publications.html>.

²⁴ See also Article 6 of the Organized Crime Convention.

repressive and preventive measures and the Convention follows the same pattern (see also Chapter II of the present guide).

One of the most important of the previous initiatives related to the Organized Crime Convention, mandated the establishment of the offence of money laundering for additional predicate offences, including corruption of public officials, and encouraged states to widen the range of predicate offences beyond the minimum requirements.

“Predicate offence” is defined as “any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention” (article 2, subparagraph (h)).

As a result of all these initiatives, many states already have money-laundering laws. Nevertheless, such laws may be limited in scope and may not cover a wide range of predicate offences. Article 23 requires that the list of predicate offences include the widest possible range and at a minimum the offences established in accordance with the Convention against Corruption.

The provisions of the Convention against Corruption addressing the seizure, freezing and confiscation of proceeds (see article 31) and the recovery of assets (see Chapter V of the Convention and, especially, article 57) include important related measures. States should review the provisions they already have in place to counter money laundering in order to ensure compliance with these articles and those dealing with international co-operation (Chapter IV). States undertaking such a review may wish to use the opportunity to implement the obligations they assume under other regional or international instruments and initiatives currently in place. Article 23 requires that States Parties establish the four offences related to money-laundering described in the following paragraphs.

2. Conversion or transfer of proceeds of crime

The first offence is the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action (article 23, para. 1 (a) (i)).

The term “conversion or transfer” includes instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase precious metals or real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.

The term “proceeds of crime” means “any property derived from or obtained, directly or indirectly, through the commission of an offence” (article 2, subparagraph (e)).

With respect to the mental or subjective elements required, the conversion or transfer must be intentional, the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds and the act or acts must be done for the purpose of either concealing or disguising their criminal origin, for example by helping to prevent their discovery, or helping a person evade criminal liability for the crime that generated the proceeds.

As noted in Article 28 of the Convention against Corruption, knowledge, intent or purpose may be inferred from objective factual circumstances.

3. Concealment or disguise of proceeds of crime

The second money-laundering offence is the concealment or disguise of the nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime (article 23, para. 1 (a) (ii)).

The elements of this offence are quite broad, including the concealment or disguise of almost any aspect of or information about the property.

Here, with respect to the mental or subjective elements required, the concealment or disguise must be intentional and the accused must have knowledge that the property constitutes the proceeds of crime at the time of the act. This mental state is less stringent than for the offence set forth in article 23, subparagraph 1 (a)(i). Accordingly, drafters should not require proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin²⁵.

The next two offences related to money laundering are mandatory, subject to the basic concepts of the legal system of each State Party.

4. Acquisition, possession or use of proceeds of crime

The third offence is the acquisition, possession or use of the proceeds of crime knowing, at the time of receipt, that such property is the proceeds of crime (article 23, para. 1 (b)(i)).

This is the mirror image of the offences under article 23, paragraph 1 (a)(i) and (ii), in that, while those provisions impose liability on the providers of illicit proceeds, this paragraph imposes liability on recipients who acquire, possess or use the property.

The mental or subjective elements are the same as for the offence under article 23, paragraph 1 (a)(ii): there must be intent to acquire, possess or use, and the accused must have knowledge, at the time this occurred, that the property was the proceeds of crime. No particular purpose for the acts is required.

5. Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the foregoing offences

The fourth set of offences involves the participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences mandated by the article (article 23, para. 1(b)(ii)).

These terms are not defined in the Convention against Corruption²⁶, allowing for certain flexibility in domestic legislation. States Parties should refer to the manner in which such ancillary offences are otherwise structured in their domestic system and ensure that they apply to the other offences established pursuant to article 23.

²⁵ In the equivalent article in the Organized Crime Convention, the language used was identical and an interpretative note indicated that concealment of illicit origin should be understood to be covered by art. 6, paras. 1(a) and (b), which for the Convention against Corruption comprises art. 23, paras 1(a) and (b). The note added that national drafters should also consider concealment for other purposes, or in cases where no purpose has been established, to be included (see the Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, p.45).

²⁶ The terms are also left undefined in the equivalent provisions of the Organized Crime Convention (art. 6).

The knowledge, intent or purpose, as required for these offences, may be inferred from objective factual circumstances (article 28). National drafters could see that their evidentiary provisions enable such inference with respect to the mental state, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven.

Under article 23, States Parties must apply these offences to proceeds generated by “the widest range of predicate offences” (article 23, para. 2(a)).

At a minimum, these must include a “comprehensive range of criminal offences established in accordance with this Convention” (article 23, para. 2(b)). For this purpose, “predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the state where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there” (article 23, para. 2(c)). So, dual criminality is necessary for offences committed in a different national jurisdiction to be considered as predicate offences²⁷.

Many states already have laws on money laundering, but there are many variations in the definition of predicate offences. Some states limit the predicate offences to trafficking in drugs or to trafficking in drugs and a few other crimes. Other states have an exhaustive list of predicate offences set forth in their legislation. Still other states define predicate offences generically as including all crimes, or all serious crimes²⁸, or all crimes subject to a defined penalty threshold.

An interpretative note for the Convention against Corruption states that “money-laundering offences established in accordance with this article are understood to be independent and autonomous offences and that a prior conviction for the predicate offence is not necessary to establish the illicit nature or origin of the assets laundered. The illicit nature or origin of the assets and, in accordance with article 28, any knowledge, intent or purpose may be established during the course of the money-laundering prosecution and may be inferred from objective factual circumstances” (A/58/422/Add.1, para. 32).

The constitutions or fundamental legal principles of some states²⁹ do not permit the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds from that offence. The Convention acknowledges this issue and, only in such cases, allows for the non-application of the money-laundering offences to those who committed the predicate offence (article 23, para. 2(e))³⁰.

Attention should also be paid to some other provisions (articles 26-30 and 42) regarding closely related requirements pertaining to offences established under the Convention.

²⁷ Dual criminality is not required under the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, in which article 6, para. 2(a), states that “it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party”.

²⁸ For the purposes of the Organized Crime Convention, “serious crimes” are considered acts “punishable by a maximum deprivation of liberty of at least four years or more serious penalty” (art. 2, subpara. (b)).

²⁹ For example, Sweden.

³⁰ This practice is sometimes called “self-laundering”. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 is silent on this issue. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime allows States Parties to provide that the money-laundering offences will not apply to persons who committed the predicate offence (art. 6, para. 2(b)).

States Parties must furnish copies of their laws giving effect to article 23 and of any subsequent changes to such laws, or a description thereof, to the Secretary-General of the United Nations (article 23, para. 2(d)). Such materials should be provided to the United Nations Office on Drugs and Crime.

Article 24: Concealment

UNCAC LANGUAGE

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

Overview

The Convention recommends the criminalisation of concealment, which is an offence facilitative of or furthering all other offences established in accordance with the Convention and closely related to the money-laundering provisions of article 23³¹.

Article 24 requires that, without prejudice to the provisions of article 23 of the Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with the Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with the Convention.

Attention should also be paid to some other provisions (articles 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

Article 25: Obstruction of justice

³¹ For specific examples of national legislation and regulations, see Italy, Penal Code, art. 648; France, Penal Code, art. 321-1; Malaysia, Anti-Corruption Act, § 18; South Africa, Prevention and Combating of Corrupt Activities Act, part 6, § 20. The Netherlands considers this as a variant of article 23 of the Convention against Corruption and is therefore not implementing article 24 separately. Relevant international and regional treaties and documents include the African Union Convention on Preventing and Combating Corruption; the Council of Europe Criminal Law Convention on Corruption; the Organization of American States Inter-American Convention against Corruption and model regulations concerning laundering offences connected to illicit drug trafficking and other serious offences; the United Nations Organized Crime Convention; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the United Nations model legislation on laundering, confiscation and international co-operation in relation to the proceeds of crime (for civil law systems); and the United Nations model money-laundering, proceeds of crime and terrorist financing bill (for common law systems).

UNCAC LANGUAGE

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

Overview

1. Obstruction of justice

Both corruptors and corrupted maintain or expand their wealth, power and influence by seeking to undermine systems of justice. No justice can be expected or done if judges, jurors, witnesses or victims are intimidated, threatened or corrupted. No effective national and international co-operation can be hoped for, if such crucial participants in the investigation and law enforcement process are not sufficiently protected to perform their roles and provide their accounts unimpeded. No serious crimes can be detected and punished, if the evidence is prevented from reaching investigators, prosecutors and the court.

It is the legitimacy of the whole law enforcement apparatus from the local to the global level that is at stake and needs to be protected against such corruptive influences. Innocent people would be wrongfully punished and guilty ones would escape penalty, if the course of justice was subverted by skilful manipulators associated with corrupt officials or networks.

So, the Convention against Corruption requires measures ensuring the integrity of the justice process. Under article 25, states must criminalise the use of inducement, threats or force in order to interfere with witnesses and officials, whose role would be to produce accurate evidence and testimony. This article complements the provisions addressing the related issues of protection of witnesses, experts and victims (article 32) and of reporting persons (article 33) and international co-operation (Chap. IV).

Specifically, article 25 requires the establishment of two offences, as described below.

The first offence relates to efforts to influence potential witnesses and others in a position to provide the authorities with relevant evidence. States Parties are required to criminalise the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to the commission of offences established in accordance with the Convention (article 25, subparagraph (a)). The obligation is to criminalise the use both of corrupt means, such as bribery, and of coercive means, such as the use or threat of violence.

The use of force, threats and inducements for false testimony can occur at any time before the commencement of the trial, whether formal proceedings are in progress or not. According to an interpretative note for the equivalent provision in the Organized Crime Convention (article 23), which uses identical language, the term “proceedings” must be interpreted broadly to cover all official governmental proceedings, including pre-trial processes (see A/55/383/Add.1, para. 46).

States are required to apply the offence to all proceedings related to offences established in accordance with the Convention against Corruption.

The second offence states are required to establish is the criminalisation of interference with the actions of judicial or law enforcement officials: the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with the Convention (article 25, subparagraph (b)). The bribery element is not included in this provision, because justice and law enforcement officials are considered to be public officials, the bribery of whom would already be covered by article 15.

While this subparagraph mandates the protection of judicial and law enforcement officials, states are free to have legislation that protects other categories of public officials (article 25, subparagraph (b)).

Attention should also be paid to some other provisions (articles 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

Article 26: Liability of Legal Persons

UNCAC LANGUAGE

- 1) Each State Party shall adopt such measures as may be necessary, consistent with its principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.*
- 2) Subject to the legal principles of the State Party, the liability of the legal persons may be criminal, civil or administrative.*
- 3) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.*
- 4) Each State Party shall, in particular, ensure that legal persons held liable in accordance with this Article are subject to effect, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions*

Overview

The issue of liability of the legal person is a crucial, and yet vexed one. In all jurisdictions, the criminal law evolved as the response of society and the state to the actions of individuals. In the modern world, and in relation to corruption cases, however, it is very often the legal person, the corporation, which drives, and benefits from, corrupt activity. No anti-corruption strategy will succeed unless the enforcement component makes provision for the liability of legal persons.

Article 26, as one would expect from an international instrument in this regard, does not seek to get parties to change the whole basis of their domestic laws, but rather requires them to establish

liability for corruption on the basis of a functional equivalence with the approach in existing domestic law. However, that principle of functional equivalence only applies where a state already has criminal, civil or administrative liability for a legal person. To be compliant with the UNCAC, one of the three forms of liability must be introduced.

The approach to criminalisation will depend on more than one factor: the type of legal system involved (common law jurisdictions displaying a different approach to those countries with a Roman law or Napoleonic code background), and the type of jurisdiction being claimed in relation to corruption offences themselves (be it on a nationality or territorial basis).

What activities does one want to criminalise?

- (i) Promising, offering or giving a bribe by a company.
- (ii) Directing, or authorising by parent company of a bribe to be paid by a domestic subsidiary.
- (iii) Directing, or authorising by a company that a bribe be paid by a foreign subsidiary. (What is the responsibility of a parent company for the activities of a subsidiary? Subject to a due diligence test?)

It will be seen from the above that any question of the liability of the legal person also involves consideration of many of the issues we have touched on already: Jurisdiction, complicity and participation, and responsibility for the acts of an agent.

1. Summary of main requirements

Article 26 of the Convention against Corruption requires the establishment of liability for legal entities, consistent with the state's legal principles, for the offences established in accordance with the Convention.

This liability may be criminal, civil or administrative and it must be without prejudice to the criminal liability of the natural persons who have committed the offence.

Sanctions must be effective, proportionate and dissuasive.

2. Mandatory requirements: obligation to take legislative or other measures

Article 26, paragraph 1, requires that States Parties adopt such measures as may be necessary, consistent with their legal principles, to establish the liability of legal persons for participation in the offences established in accordance with the Convention.

The obligation to provide for the liability of legal entities is mandatory, to the extent that this is consistent with each state's legal principles. Subject to these legal principles, the liability of legal persons may be criminal, civil or administrative (article. 26, para. 2), which is consistent with other international initiatives that acknowledge and accommodate the diversity of approaches adopted by different legal systems. Thus, there is no obligation to establish criminal liability, if

that is inconsistent with a state's legal principles³². In those cases, a form of civil or administrative liability will be sufficient to meet the requirement³³.

Article 26, paragraph 3, provides that this liability of legal entities must be established without prejudice to the criminal liability of the natural persons who have committed the offences. The liability of natural persons who perpetrated the acts, therefore, is in addition to any corporate liability and must not be affected in any way by the latter. When an individual commits crimes on behalf of a legal entity, it must be possible to prosecute and sanction them both (see also the introductory paragraphs on this issue, above)³⁴.

The Convention requires states to ensure that legal persons held liable in accordance with article 26 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (article 26, para. 4)³⁵.

This specific provision complements the more general requirement of article 30, paragraph 1, that sanctions must take into account the gravity of the offence. Given that the investigation and prosecution of crimes of corruption can be quite lengthy, States with a legal system providing for statutes of limitation must ensure that the limitation periods for the offences covered by the Convention are comparatively long (see also article 29).

The most frequently used sanction is a fine, which is sometimes characterised as criminal, sometimes as non-criminal³⁶ and sometimes as a hybrid³⁷. Other sanctions include exclusion from contracting with the government (for example public procurement, aid procurement and export credit financing), forfeiture, confiscation, restitution, debarment or closing down of legal entities. In addition, states may wish to consider non-monetary sanctions available in some jurisdictions, such as withdrawal of certain advantages, suspension of certain rights, prohibition of certain activities, publication of the judgement, the appointment of a trustee, the requirement to establish an effective internal compliance programme and the direct regulation of corporate structures³⁸.

The obligation to ensure that legal persons are subject to appropriate sanctions requires that these be provided for by legislation and should not limit or infringe on existing judicial independence or discretion with respect to sentencing.

Finally, the Convention requires mutual legal assistance to be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party, in cases where a legal entity is subject to a criminal, civil or administrative liability (see article 46, para. 2)³⁹.

³²Note, however, that parties to the OECD Bribery Convention are required to establish the criminal liability of legal persons for the offence of the active bribery of a foreign public official when a party's legal system provides for this possibility.

³³ Examples of non-criminal measures that may be adopted are given in Council of the European Union Framework Decision 2003/568/JHA on combating corruption in the private sector, art. 6.

³⁴ See also para. 320 of the present guide, concerning the possibility of the liability of legal persons being separate from that of natural persons.

³⁵ See the French Penal Code, Title II (Of Criminal Liability).

³⁶ For instance, in Germany

³⁷ As in Switzerland.

³⁸ See, for example, provisions in France and the Netherlands.

³⁹ See the evaluation reports on the first and second rounds of evaluation by GRECO, available on the GRECO website. Noteworthy also is that the OECD Bribery Convention requires that parties provide prompt and effective

Commentary from UNODC Legislative Guide

Serious and sophisticated crime is frequently committed by, through or under the cover of legal entities, such as companies, corporations or charitable organisations. Complex corporate structures can effectively hide the true ownership, clients or specific transactions related to serious crimes, including the corrupt acts criminalised in accordance with the Convention against Corruption. In the context of globalisation, international corporations play an important role. Decision-making processes have become increasingly sophisticated. Decisions leading to corruption can be hard to interpret as they may involve multiple layers of other decisions, making it difficult to say who exactly is responsible or liable. Even when such a determination may be possible, individual executives may reside outside the state where the offence was committed and the responsibility of specific individuals may be difficult to prove. Thus, the view has been gaining ground that the only way to remove this instrument and shield of serious crime is to introduce liability for legal entities.

Criminal liability of a legal entity may also have a deterrent effect, partly because reputational damage and monetary sanctions can be very costly and partly because it may act as a catalyst for more effective management and supervisory structures to ensure compliance with the law.

The principle that corporations cannot commit crimes (*societas delinquere non potest*) used to be universally accepted. This changed initially in some common law systems. Today, the age-old debate on whether legal entities can bear criminal responsibility has shifted more widely to the question of how to define and regulate such responsibility.

There are still concerns over the attribution of intent and guilt, the determination of the degree of collective culpability, the type of proof required for the imposition of penalties on corporate entities and the appropriate sanctions, in order to avoid the penalisation of innocent parties. In some jurisdictions, it is considered artificial to treat a corporation as having a blameworthy state of mind.

Policymakers everywhere follow the ongoing debates on issues such as collective knowledge, the regulation of internal corporate controls, corporate accountability and social responsibility, as well as the application of negligence and other standards.

Nevertheless, national legislation⁴⁰ and international instruments⁴¹ increasingly complement the liability of natural persons with specific provisions on corporate liability. It is also possible to consider the liability of legal persons as separate from the liability of natural persons. For a

legal assistance to another party for non-criminal proceedings within the scope of that Convention brought by a party against a legal person.

⁴⁰ For example, see legislation from Switzerland, available at http://www.admin.ch/ch/f/rs/311_0/a100quater.html and http://www.admin.ch/ch/f/rs/311_0/a100quinquies.html; see also the GRECO website (<http://www.greco.coe.int>).

⁴¹ See, for example, the Organized Crime Convention; also, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, in 1985, recommended for national, regional and international action the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, a recommendation that was reiterated by the General Assembly in paragraph 4 of its Resolution 40/32. Paragraph 9 of the Guiding Principles states: "Due consideration should be given by Member States to making criminally responsible not only those persons who have acted on behalf of an institution, corporation or enterprise, or who are in a policy-making or executive capacity, but also the institution, corporation or enterprise itself, by devising appropriate measures that would prevent or sanction the furtherance of criminal activities." (see *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), Chap. I, sect. B, annex).

variety of reasons, it may be impossible to proceed against the natural persons responsible for corruption offences. In increasingly large and complex structures, operations and decision-making are diffuse. For this reason, corporate entities are frequently used as vehicles for the payment of a bribe. In addition, it is often difficult to identify any particular decision maker within the management chain responsible for the corrupt transaction. Moreover, it may be unfair to apportion blame to one specific individual when a complex, diffuse decision-making structure is involved.

National legal regimes remain quite diverse with respect to liability of legal persons, with some states resorting to criminal penalties against the organisation itself, such as fines, forfeiture of property or deprivation of legal rights, whereas others employ non-criminal or quasi-criminal measures⁴².

As the main questions revolve around the modalities of accountability and the sort of penalties that can be imposed on legal entities, several attempts at harmonisation prior to the Convention against Corruption acknowledged such diversity of approaches.

For example, in its resolution 1994/15 of 25 July 1994, the Economic and Social Council noted the recommendations concerning the role of criminal law in protecting the environment made by the Ad Hoc Expert Group on More Effective Forms of International Co-operation against Transnational Crime, including Environmental Crime, recommendation (g) of which states that support should be given to the extension of the idea of imposing criminal or non-criminal fines or other measures on corporations in jurisdictions in which corporate criminal liability is not currently recognised in the legal system. The same spirit is found in the Convention on the Protection of the Environment through Criminal Law, adopted by the Council of Europe in 1998,⁴³ article 9 of which stipulates that criminal or administrative sanctions or measures could be imposed to hold corporate entities accountable.

International initiatives related to money-laundering include recommendation 2, subparagraph (b), of the FATF Forty Recommendations, as revised in 2003, which states: “Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability are available. Legal persons should be subject to effective, proportionate and dissuasive sanctions. Such measures should be without prejudice to the criminal liability of individuals.” The OAS model regulations concerning laundering offences connected to illicit drug trafficking and other serious offences contain similar provisions in article 15.

Corruption offences have been the subject of similar efforts, such as the OECD in its Bribery Convention, which obliges parties to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official” (article 2). Even if a State Party’s legal system does not apply criminal sanctions to legal persons, it is still required to ensure that they are “subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials” (article 3, para. 2).

⁴² For some examples, see the Council of Europe Group of States against Corruption (GRECO) website at <http://www.greco.coe.int> and the OECD country reports on the implementation of the OECD Bribery Convention, available at http://www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.html.

⁴³ Council of Europe, *European Treaty Series*, No. 172.

A green paper issued by the Commission of the European Communities on criminal-law protection of the financial interests of the Community refers to earlier European initiatives and adds that, on the basis of those initiatives, “heads of businesses or other persons with decision-making or controlling powers within a business could be held criminally liable in accordance with the principles determined by the domestic law, in the event of fraud, corruption or money-laundering the proceeds of such offences committed by a person under their authority on behalf of the business.” The paper also states that “legal persons should be liable for commission, participation (as accomplice or instigator) and attempts as regards fraud, active corruption and capital laundering, committed on their behalf by any person who exercises managerial authority within them” and that provision should be made to hold legal persons liable “where defective supervision or management by such a person made it possible for a person under his authority to commit the offences on behalf of the legal person.” As regards liability of a body corporate, such liability “does not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money-laundering⁴⁴.”

The concern is not theoretical or simply about potential risks. Legal persons have been found repeatedly to commit business and high-level corruption. Normative standards regarding their liability are indispensable. The Organized Crime Convention and the Criminal Law Convention on Corruption of the Council of Europe provide for criminal or other liability of legal persons relative to the offences of active and passive corruption and money-laundering⁴⁵.

Building on such initiatives, the Convention against Corruption requires that liability for offences be established both for natural or biological persons and for legal persons. Article 26 requires States Parties to take the necessary steps, in accordance with their fundamental legal principles, to provide for corporate liability. This liability can be criminal, civil or administrative, thus accommodating the various legal systems and approaches.

At the same time, the Convention requires that the monetary or other sanctions that will be introduced must be effective, proportionate and dissuasive.

Ways in which other countries have addressed criminal liability of legal persons

In considering the common law model, focus will be placed on the UK and Canada. None of the corruption offences in UK law expressly mention liability for legal persons. However, mention of the word “person” in legislation is construed (by the Interpretation Act 1978) as including not only natural persons but also “a body of persons corporate or unincorporated”. An unincorporated body, such as a trust, is capable of committing a criminal offence in the UK, but it is particularly difficult to prosecute such an entity. In essence, it must be proved that each person who is party to, or a member of, the unincorporated body is guilty of the criminal offence. In relation to bribery of a foreign official, however, it should be noted that the changes made by the 2001 Act, referred to previously, do not apply to unincorporated bodies.

Of more importance to the present discussion is the position with corporations. The difficulty faced by the UK, which other jurisdictions would do well to avoid, is the difficulty in attributing criminal acts to a legal person at common law. The concept of criminal liability for a corporation grew up in the 19th Century when, of course, it was relatively straightforward to identify who in fact ran a company. Unfortunately, with a few additional glosses and in the interim, the 19th

⁴⁴ Green Paper No. COM (2001) 715, sect. 5.4, available at http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2001/com2001_0715en01.pdf; see also the Organization of American States model legislation on illicit enrichment and transnational bribery.

⁴⁵ See also Council of the European Union Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, arts. 5 and 6.

Century test remains the one still in place today. In the UK, where an offence involves a mental element such as intent, a finding of liability in relation to a legal person depends on identifying someone in a corporation with an appropriate level of authority who can be said to possess the state of mind of the corporation: in other words, the so-called “directing” or “controlling” mind. The traditional test of who was the controlling mind, was the so-called ‘identification theory’. That worked on the basis that certain officers within a corporation were the embodiment of it when it acted in the course of its business. The acts and states of mind of such company officers were deemed to be those of the company. The leading case is that of *Tesco Supermarkets Limited v Nattrass* [1972] AC 153 which restricts such liability to the acts of “the board of directors, the managing director, and perhaps other superior managers of the company who carry out functions of management, and speak and act as the company”. Thus, on the basis of this test, one needs to consider, inter alia, the constitution of the company, its memorandum or articles of association, the actions of directors in general meetings etc and the extent, if any, of delegation.

However, a more recent attribution test, and perhaps one more akin to the realities of corporate life, is that of the Privy Council case of *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 2 AC 500. There it was held that the test should depend on the purpose of the provisions that create the relevant offence rather than simply a search for a directing mind. It envisaged a broader test, one which sought to identify the purpose of the offence. But, the *Meridian* case related to securities law disclosure not to crime in the conventional sense; what impact does it therefore have on the wider issue of attribution?

Whichever of the above two tests is preferred, the traditional common law stance does not permit the creation of a corporate intent by aggregating the states of mind of more than one person within the company. Even on the *Meridian* test, one individual has to be the company for the purpose of the mental element. In essence, the criminal liability of a legal person depends on proving both the culpable act/omission and the required mental element by a single person within the company, even though a criminal conviction of that particular individual is not a prerequisite.

The traditional common law approach to liability creates another difficulty in relation to anti-corruption enforcement: In the event of a wholly owned foreign subsidiary of a UK parent company paying a bribe, the parent company will, of course, only be liable if it can be shown to have directed or authorised the bribe. Moreover, on the principle of attribution just discussed, any such direction or authorisation will have to be shown to have been carried out by the controlling or directing mind.

Canada, in contrast to the UK, has already taken legislative steps to move away from the tradition of ‘identification theory’. Previously, Canada had been subject to the same restrictions described above. The Supreme Court of Canada case of *Canadian Dredge and Dock Co v The Queen* [1985] 1 SCR 662, had formulated attribution to a company on the basis of the “directing mind” or “ego” of the corporation. The court in that case had provided that the “directing mind” could be located in the board of directors, the managing director, the superintendent, the manager or anyone else to whom the board of directors had delegated the governing executive authority of the corporation.

However in 2002, the Government of Canada accepted the findings of a Standing Committee and decided to introduce legislation on legal liability. That initiative is now reflected in Bill C 45, an Act to amend the Criminal Code (Criminal Liability of Organisations), which came into force on 31 March 2004. It established new rules for attributing to organisations, including corporations, criminal liability. In essence, it criminalises on the basis that: when a senior person with policy or operational authority commits an offence personally, or has the necessary intent and directs the affairs of the corporation in order that lower level employees carry out the illegal

act, or fails to take action to stop criminal conduct of which he or she is aware or wilfully blind, then criminal liability will be attributed to the corporation. Canada is not the only OECD country to have sought a workable reformulation of the test of attribution. New Zealand has also moved away from the strict identification theory generally understood.

In New Zealand, although criminal responsibility of a corporation still depends upon assigning responsibility on the basis of a culpable act and of the requisite state of mind of a representative of the corporation, the position of that representative does not have to be that of a “directing mind”. Rather, the test is whether the director or employee of the corporation had actual authority within it in relation to the area of the alleged conduct. In essence, does the natural person in question have real control on behalf of the legal person, over the activities which relate to the alleged offence? (For the avoidance of doubt, the position in New Zealand remains the common law one that the conviction of the natural person is not needed as a pre-condition to the prosecution of the legal person).

Those wrestling with trying to create a test of attribution might do well to consider alternative approaches. One might, for instance, ask whether domestic law allows for what is essentially criminal vicarious liability to be created. Such an approach best describes the liability of legal persons in the United States.

In the United States, a company is criminally liable for the acts of its directors, officials or employees, whenever they act within the scope of their duties and for the benefit of the company. Importantly, these elements are interpreted broadly to the extent that an argument cannot be advanced on behalf of a company that the act of giving or authorising a bribe is itself outside the scope of duties when the company is the beneficiary of the unlawful conduct.

In a real sense, indeed, the basis for legal person liability in the United States is almost strict, since there is no requirement for any imputed “mental element” by the “mind” of the company. Thus it is irrelevant whether the conduct has been allowed, condoned, or even condemned by the management at a particular level.

The liability described is applicable not just in relation to domestic bribery and offences under the Foreign Corrupt Practices Act 1977, but generally. In relation to preventive measures, however, the advantage of this approach is obvious: companies will react to the legal threat by introducing stringent due diligence practices.

In relation to foreign bribery, it should be noted that the Foreign Corrupt Practices Act 1977 takes the principle further, and also imposes criminal liability on legal persons for foreign bribery committed by third parties acting as agents. Again, due diligence safeguards result.

The Republic of Korea has adopted a similar approach, creating what is in essence a vicarious liability. Article 4 of the Foreign Bribery Prevention Act in International Business Transactions (FBPA) provides:

“In the event that a representative, agent, employee or other individual working for a legal person has committed the offence as set out in Article 3.1 in relation to its business, the legal person shall also be subject to a fine of up to 1 billion won in addition to the imposition of sanctions on the actual performer ... if the legal person has paid due attention or exercised proper supervision to prevent the offence against this act, it shall not be subject to the above sanctions.”

The above provision does, however, beg the question as to what amounts to due attention or proper supervision? In addition, it is on the surface unclear whether the natural person has to be

prosecuted and/or convicted for the legal person to be liable. However, at the OECD Phase 2 review, the lead examiners were informed that the natural person who is the perpetrator must be identified but, if he is not proceeded against, the court is able to make a finding of fact that he bribed a foreign public official. However, in the event that the natural person is proceeded against under the Act, then the legal person may only be found guilty if the natural person perpetrator is him/herself convicted and sanctioned.

Some jurisdictions have chosen to criminalise on the basis of an imputed or deemed liability, rather than on the basis that the legal person him/herself has committed the offence.

Thus, since 1994, the Criminal Code in France has allowed a judge, in respect of active bribery as well as other prescribed offences, to assign criminal responsibility to legal persons. At the same time the French provision does not preclude the prosecution of a natural person or persons.

From the OECD Phase 2 evaluation of France, the underlying principles in relation to France's approach can be stated thus:

- A delegation or sub-delegation of power to an employee or subordinate is sufficient for the employee or subordinate to be treated as a representative of the legal person for the purposes of criminal liability (query, also, whether de facto delegation will suffice ?).
-
- "Legal Person" includes not only commercial companies but also not-for-profit entities such as trade associations and also public law legal persons such as local authorities, semi-public companies and public institutions.
- A legal person might be able to avoid the imputation of criminal liability by allowing him/herself to be taken over.
- The bribe has to be on behalf of the legal person. What, therefore, of the position when, for instance, a legal person has an internal policy of refusing to offer bribes?
- If an employee or insubordinate does not have a delegated authority, it seems uncertain whether there is still a basis for liability: for instance, would an employee have to have acted on the orders, or with the authorisation of, a company representative? Alternatively, will knowledge of the bribe of someone with delegated authority in that particular area be sufficient?
- A natural person will have committed the bribery offence. He/she will be identified.

Some of the examples above highlight central difficulties in attribution: does one look to the post actually held by the person? Is a de facto management function sufficient? Is the key the nature of the function exercised by the natural person (along with any delegated authority) regardless of the de jure or de facto management post held?

Some further assistance is provided by the following:

In Finland, criminal liability of legal persons was introduced in 1995, and required that a person belonging to the management must have been an accomplice or allowed, authorised or directed the offence. However, following an amendment to the Penal Code in 2001, liability was extended to include a natural person exercising a de facto management function regardless of whether that natural person was formally a part of the management.

Norway introduced criminal liability for legal persons in 1991. However, it is governed by a special set of discretionary criteria. Section 48a(1) of the Penal Code provides that when a penal provision is contravened by a person who has acted on behalf of an enterprise, the enterprise may be liable to a penalty: “This applies even if no individual person may be punished for the contravention”. Here, the Penal Code goes on to provide that the word “enterprises” includes “a company, society or other association, one-man enterprise, foundation, and state or public activity”.

In deciding whether the legal person will be liable for a penalty, the court will consider:

- the preventive effect of the penalty,
- the seriousness of the offence,
- whether the enterprise could have prevented the offence by guidelines, instruction, training or control,
- whether the offence had been committed in order to promote the interest of the enterprise,
- whether the enterprise has obtained an advantage by the offence,
- the economic capacity of the enterprise, and
- whether any penalty has been imposed on an individual person.

In principle, Norwegian law does not require the involvement of a leading person within the company or enterprise; thus liability may be triggered by the acts of a single employee who is not part of the management structure. However, one of the discretionary criteria is whether the enterprise could have prevented the offence by guidelines, training, control etc. Depending on the weight a particular court gives to that criterion, the level within the company where the employee who has, for instance, paid the bribe may become of some importance and may, in fact, become a determining factor.

Finally, and although outside the strict scope of ‘criminalisation’, it must be remembered that some countries (for example, Germany and Italy) have introduced/retained administrative liability.

In Germany, under the Administrative Offences Act, a fine may be imposed on the legal person in the course of criminal proceedings against the natural person. However, if a natural person is not prosecuted because he cannot be identified, or has died, it is then possible to sanction the legal person in separate proceedings. The liability of the legal person is regarded as an “incidental consequence” (see OECD Phase II report, p30) of an offence committed by the natural person, and it appears that it is, in fact, very unusual to proceed against the legal person where the natural person has not been proceeded against.

Similarly, in Italy, the theory of administrative liability is that it is attributed to a legal person for certain criminal offences (including bribery) committed by the natural person (Decree 231/2001).

The Italian decree imposes liability on the legal person for offences committed by two categories of natural person: (i) those in senior positions, and (ii) those subject to the management or control of those in (i).

A person is in a senior position if he/she carries out activities of representation, administration or management of the corporate body or one of its autonomous units.

However, the legal person is liable only for offences “committed in its interest and its advantage”. It will not be liable where the natural person acted exclusively in his/her own interests or for a third party (including a subsidiary?).

Article 27: Participation and attempt

UNCAC LANGUAGE

1. *Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.*
2. *Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.*
3. *Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention*

Overview

1. Summary of main requirements

States Parties must establish as a criminal offence the participation as an accomplice, assistant or instigator in the offences established in accordance with the Convention.

2. Mandatory requirements: obligation to take legislative or other measures

Article 27, paragraph 1, requires that States Parties establish as a criminal offence, in accordance with their domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention.

An interpretative note indicates that the formulation of paragraph 1 of article 27 was intended to capture different degrees of participation, but was not intended to create an obligation for States Parties to include all of those degrees in their domestic legislation (A/58/422/Add.1, para. 33).

Implementation of this provision may require legislation. States that already have laws of general application establishing liability for aiding and abetting, participation as an accomplice and similar forms of liability may need only to ensure that these will apply to the new corruption offences.

3. Optional measures: measures States Parties may wish to consider

In addition, States Parties may wish to consider the criminalisation, consistent with their domestic law, of attempts to commit an offence (article 27, para. 2) or the preparation (article 27, para. 3) of an offence established in accordance with the Convention.

Attention should also be paid to some other provisions (articles 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

Article 28: Knowledge, intent and purpose as elements of an offence

UNCAC LANGUAGE.

Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

Overview

Article 28 provides that knowledge, intent or purpose required as an element of an offence established in accordance with the Convention may be inferred from objective factual circumstances. National drafters should see that their evidentiary provisions enable such inference with respect to the mental state of an offender, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven.

Article 29: Statute of limitations

UNCAC LANGUAGE

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

Overview

In accordance with Article 29, States Parties must, where appropriate, establish in their domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with the Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

Generally, such statutes set time limits on the institution of proceedings against a defendant. Many states do not have such statutes, while others apply them across the board or with limited exceptions. The concern underlying this provision is to strike a balance between the interests of swift justice, closure and fairness to victims and defendants and the recognition that corruption offences often take a long time to be discovered and established. In international cases, there is also a need for mutual legal assistance, which may cause additional delays. There are variations among states as to when the limitation period starts and how the time is counted. For example, in some states time limits do not run until the commission of the offence becomes known (for example, when a complaint is made or the offence is discovered or reported) or when the accused has been arrested or extradited and can be compelled to appear for trial.

Where such statutes exist, the purpose is mainly to discourage delays on the part of the prosecuting authorities, or on the part of plaintiffs in civil cases, to take into account the rights

of defendants and to preserve the public interest in closure and prompt justice. Long delays often entail loss of evidence, memory lapses and changes of law and social context, all of which may contribute to some injustice. However, a balance must be achieved between the various competing interests and the length of the period of limitation varies considerably from state to state. Nevertheless, serious offences must not go unpunished, even if it takes a longer period of time to bring offenders to justice. This is particularly important in the case of fugitives, as the delay of instituting proceedings is beyond the control of authorities. Corruption cases may take a long time to be detected and even longer for the facts to be established.

For this reason, the Convention requires States Parties with statutes of limitation to introduce long periods for all offences established in accordance with the Convention and longer periods for alleged offenders that have evaded the administration of justice. These provisions parallel those of the Organized Crime Convention (see article 11, paragraph 5). The Convention against Corruption, however, adds the option of suspending the statute of limitations in the case of those evading the administration of justice.

States Parties may implement this provision either by reviewing the time-length of existing statutes of limitations or by reviewing the method of calculation. The first approach is sometimes a complicated exercise, because it may require altering various procedural and substantive rules, including sanctions. Sometimes, a review of the calculation mechanism (or the authoritative interpretation of the mechanism) may suffice. For instance, the clock for prosecution may start running from the time the offence is discovered, instead of the time the offence was committed.

Article 29 does not require States Parties without statutes of limitation to introduce them.

Some countries impose a limitation on the time that an investigation may take and on the time during which a case may be brought to court.

By their nature, investigations into, and prosecutions of, corruption may take a protracted time (especially if, for example, MLA requests have to be made and executed).

An adequate time period must be allowed for both the investigative and prosecutorial stages.

Article 30: Prosecution, adjudications and Sanctions

UNCAC LANGUAGE

1. *Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.*
2. *Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.*
3. *Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.*
4. *In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.*
5. *Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.*
6. *Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.*
7. *Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*
 - (a) *Holding public office; and*
 - (b) *Holding office in an enterprise owned in whole or in part by the State.*
8. *Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.*
9. *Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.*
10. *States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.*

Overview

Article 30 deals with some of the most important aspects of enforcing the law. It encompasses provisions with regard to the investigation and prosecution and the important as well as complex issue of immunities. The article devotes significant attention to sanctions (both criminal sanctions strictu sensu and “ancillary” sanctions), as well as provisions on disciplinary measures and sanctions relating to the gravity of the offence or linked to the nature of the offence, such as disqualification. Finally, the article deals with the rehabilitation of offenders.

The article requires:

- that States Parties provide for sanctions which take into account the “gravity” of that offence (para. 1);
- that States Parties provide for an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with the Convention (para. 2);
- that decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings (para. 4);
- that a State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences (para. 5).

Besides these mandatory provisions, the article includes as non-mandatory provisions:

- that States Parties consider establishing procedures through which a public official accused of an offence established in accordance with the Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority (para. 6);
- that States Parties consider establishing procedures for the disqualification for a period of time determined by domestic law, of persons convicted of offences established in accordance with this Convention from: (a) holding public office; and (b) holding office in an enterprise owned in whole or in part by the State (para. 7);
- that States Parties endeavour to promote the reintegration into society of persons convicted for offences established pursuant to the Convention (para. 10).

Implementation of the provisions of article 30 adds up to a significant “health check” on a criminal justice system to identify what may need to be done in order to strengthen a sense of a properly functioning rule of law. The provisions are a sensible means of translating administration of justice policies into workable and functioning mechanisms.

Note: Prosecutors in many countries enjoy a discretion; part of that discretion may include a public interest test as to whether a case should be prosecuted. In relation to foreign bribery, in particular, prosecutors should not be influenced in this by considerations of national economic interest, the potential effect upon relations with another state, or the identity of the natural or legal person(s) involved.

Challenges and solutions

1. Sanctions that take into account the gravity of that offence

The term “sanction” encompasses both criminal and non-criminal administrative or civil sanctions. However, in the cases in which the Convention requires establishing certain conduct “as a criminal offence” non-criminal sanctions may accompany criminal sanctions but cannot substitute them.

The Convention requires that States Parties provide for sanctions that take into account the gravity of the offence. While not stipulating any particular form of sanctions, the Convention emphasises that there should be appropriate measures in place to ensure that, whether through fines, imprisonment or other penalties, the punishment reflects the level of the offence. The gravity of the offence may not be determined only by the value of, for example, an undue advantage, but by taking into account other factors, such as the seniority of those involved, the sphere in which the offences occur, the level of trust attached to the public official and so on.

The Convention does not specify the severity of sanctions. Since penalties reflect diverging national traditions and policies, the Convention acknowledges that penalties for similar crimes may diverge across jurisdictions. In fact, sanctions for corruption offences have to be in line with the national legal tradition and suit the general framework of penalties provided for by the criminal law of States Parties. In general, to provide for sanctions that take into account the gravity of the offence, criminal sanctions for corruption offences established in accordance with the Convention should not fall short of the sanctions for comparable economic crimes. States Parties may bear in mind that for trans-border corruption, in which mutual legal assistance and extradition play a major role, it is important that the range of penalties are sufficient to enable effective mutual legal assistance and extradition. For some States Parties, this might require that the offences provide for a certain length of custodial sentence so as to comply with dual criminality demands.

The way that sanctions are applied will vary depending on the legal system of the State Party concerned. In States Parties where sentencing is left to the court with a certain level of discretion, usually within a broad range of possible sanctions, the court will usually start by deciding upon the seriousness of the offence by assessing culpability and harm, taking into account aggravating and mitigating factors (in the case of corruption offences the level of breach of trust may be a significant aggravating factor), personal mitigation and whether there was a guilty plea. This will enable the court to establish whether the threshold for a sanction involving deprivation of liberty has been reached. The courts will also have to adjudicate on compensation orders following a criminal conviction or some form of asset evaluation and confiscation to ensure that the defendant does not benefit financially from the corrupt deal.

States Parties may also wish to consider the sentencing guidance of article 26(4) which (for legal persons) speaks of effective, proportionate and dissuasive sanctions.

The provision of sentencing guidelines may assist significantly in this area. There are many States Parties that have established sentencing guidelines that act as a guide and not as formal instruction to judges.

In the United Kingdom, for example, sentencing guidelines for judges and sentencers⁴⁶ are set by two closely related independent bodies: the Sentencing Advisory Panel and the Sentencing Guidelines Council. They work together to ensure that sentencing guidelines are produced which encourage consistency in sentencing throughout the courts of England and Wales and support judges in their decision-making.

The Sentencing Advisory Panel's role is to advise on sentencing guidelines for particular offences or categories of offences, and other sentencing issues. Following a period of wide consultation, and research if required, the Panel produces advice which is submitted to the Sentencing Guidelines Council for consideration. The Sentencing Guidelines Council receives advice from the Sentencing Advisory Panel on a particular sentencing topic and uses this to formulate sentencing guidelines on the subject. These "draft guidelines" are published, consulted on and then revised.

Final sentencing guidelines are then issued, ready to be used by judges.

Of course in many other States Parties there will be no such "informal" guidelines and the parameters of sentencing will be set out within the criminal code or statute that criminalises the UNCAC offences.

In some States Parties there are often well-documented alternative regimes which might still pass the effective, proportionate and dissuasive sanctions test. For example, in Germany the Criminal Code allows for a wide range of sentencing, for a system of bargaining (*Absprachen*) or penal order proceedings. In terms of the sentencing of legal persons Germany has a system of administrative fines (consisting of the punitive portion and skimming off of the "financial benefit") under the Administrative Offences Act.

2. Immunities or jurisdictional privileges

Immunity falls into two principal categories: non-liability and inviolability. The first type of immunity is understood usually to apply to members of legislative bodies (e.g. parliamentarians) with regard to opinions expressed or votes cast in the course of performing their functions. Its purpose is to guarantee independence and freedom of expression, affording exemption from all court proceedings, but can also be limited, for example, to criminal liability. The second type of immunity concerns the protection of various categories of public officials, when discharging their duties, from legal procedures such as arrest, detention and prosecution, as well as, in some countries, even from police investigation and the use of special investigative techniques.

While most States Parties regard immunities and jurisdictional privileges for senior public officials, such as members of the legislature, as a necessary means to safeguard the functioning of state institutions, immunities can create difficulties as they can appear to render public officials effectively above and beyond the reach of the law. It is not unusual for immunity from prosecution to be perceived as the main cause for increased corruption levels as investigations into high-level corruption may be significantly impeded by claims of political immunity. In view of such implications, several states around the world have amended and are to amend their immunity rules.

Article 30 requires consideration of ways to strike an appropriate balance between any immunities or jurisdictional privileges on the one side and the possibility of effective law

⁴⁶ See www.sentencing-guidelines.gov.uk

enforcement on the other. All forms of immunities or jurisdictional privileges share a common core as they make exceptions from criminal law provisions or criminal law proceedings for certain persons or groups of persons. States Parties may regard such laws as exceptions from equality before the law, which have to be justified.

States Parties may wish to bear in mind that the article follows a “functional” notion of immunities or jurisdictional privileges. In other words, immunities or jurisdictional privileges attach to the office, not the office holder. Accordingly, States Parties may consider that balanced and hence legitimate immunities and other privileges are only those that are a necessary means to safeguard the functioning of institutions of the state. Consequently, States Parties may take into account a number of aspects in order to provide for an appropriate balance between immunities or jurisdictional privileges and the possibility of effective investigations and prosecution:

- States Parties may wish to draw attention to the list of persons enjoying immunities or other privileges and consider if the balance may require a restricted list of privileged public offices and public functions. In general, States Parties may wish to take into account that immunities and jurisdictional privileges are designed to allow the office holder to act without fear of legal consequence. In this case, they may wish to follow those States which grant a limited immunity which does not cover corrupt or otherwise criminal behaviour whether conducted in a private or official capacity. Thus, States Parties may consider applying an immunity rule or a jurisdictional privilege by evaluating whether the granting of immunity or a jurisdictional privilege is essential to assure the execution of the public office or function in question;
- according to the functional notion of immunities or privileges, States Parties may consider applying immunities and jurisdictional privileges only with regard to acts committed in the performance of the public official’s duties, and only where the official has performed the roles and responsibilities of that office under the law. Moreover, States Parties may consider that immunities or jurisdictional privileges should only be granted during the time a public office or a public function is performed. Consequently, immunities and jurisdictional privileges should not extend to acts or omissions committed after the public official has left office or has stopped performing public functions. Correspondingly, immunities and jurisdictional privileges are not in an appropriate balance with the necessity of law enforcement when former office holders enjoy privileges in proceedings that take place after the person has left office. Even in cases in which such proceedings relate to deeds committed during the time of holding office, the person should face equal rights and duties like any other citizen;
- States Parties may wish to consider laws or legal guidelines which specify the necessary conditions and procedures of when and how to lift immunities. With regard to these laws or guidelines, States Parties may wish to take into account the following aspects and models:
 - laws and guidelines to specify the grounds to waive immunities must not allow for politically motivated discretion. States Parties may wish to consider specifying that the commission of corruption offences would constitute a legal reason for the lifting of immunities or privileges;
 - States Parties may bear in mind that proceedings to determine whether immunities would be lifted should be designed in a way that enables expeditious decisions in order to prevent the suspect from escaping or obstructing the investigations;

- States Parties should consider avoiding possible conflicts of interests in the decision-making to waive immunity;
 - in circumstances where it is not possible to lift the immunity or privilege States Parties may consider liaising with foreign jurisdictions who may be in a position to undertake some level of criminal or civil action against the individuals for possible offences committed in that jurisdiction;⁴⁷
- States Parties may wish to consider appropriate rules that enable prosecution and adjudication subsequent to the tenure of office. Most importantly, States Parties may consider suspension of the lapse of time set for statutory limitations during any tenure of office. States Parties that do not provide for a lifting of immunities during the time of holding office may consider this as an appropriate way to meet the balance required by article 30;
 - finally, States Parties may take into consideration that immunities or jurisdictional privileges applying to one person do not frustrate prosecution and adjudication of cases involving other persons implicated in corruption.

3. Discretionary legal powers

Article 30 requires States Parties to provide for a maximum of effectiveness of law enforcement measures with due regard to the need to deter the commission of corruption offences whenever discretionary legal powers are exercised. In this sense, the guiding principle should be that those involved in the policymaking and subsequent drafting of legislation should strive to ensure as efficient, effective and transparent a mechanism as possible reflecting the realistic demands of that State. States Parties could maximise the deterrent effects if they would advise their law enforcement authorities that the investigation and prosecution of corruption offences are the norm, while the dismissal of proceedings are an exception to be justified. However, States Parties may take into consideration the resources of law enforcement bodies. Thus, developing countries with limited resources may wish to focus on major cases, for example those with the involvement of high-level public officials.

In some States Parties laws or guidelines prescribe in which manner a prosecutor should execute his discretionary powers. The laws or guidelines that inform such decision-making should be made publicly available. Some of these laws or guidelines, however, include clauses according to which a prosecutor may abstain from prosecuting when prosecution would not be in “the public interest”. In such circumstances, States Parties may consider either to avoid such general terms or, if they choose to include such broad discretion, they may wish to qualify it through publicly stated criteria so that it is evident what factors have been taken into account to reach such a conclusion. Therefore, States Parties may wish to consider requiring that a prosecutor record his or her decision to dismiss, or not pursue, a case in order to enable appropriate internal or external review. Further, States Parties may regard it as a good way to guarantee transparency and checks and balances by requiring prosecutors to inform the persons whose complaints have initiated the case about the outcome of investigations and the decision whether to prosecute. States Parties may wish to take notice of several models of safeguarding such decisions.

⁴⁷ See the experience of the Metropolitan Police in London and their arrest of serving Nigerian State Governors for suspected money-laundering in the United Kingdom – <http://news.bbc.co.uk/1/hi/world/africa/4462444.stm>.

- States Parties may wish to take into consideration that several states have experienced undue political influence exercised by superior authorities such as the Director of Public Prosecutions, an Attorney-General or Minister of Justice, especially in relation to politically sensitive cases. Moreover, States Parties may wish to take notice of the fact that undue influence on a prosecutor's decision can be enabled by the mere obligation to report to a superior authority before starting investigations or prosecution. Thus, States Parties may wish to evaluate whether there is a necessity to provide for such prerequisites and conditions for investigation and adjudication or even consider their removal for all cases where such authority is not legislatively defined;
- those States Parties which, for one reason or another, provide for a superior's instructions in view of a particular case may regard transparency and impartiality as indispensable. In order to achieve transparency and impartiality, States Parties may require that instructions with regard to a specific case have to be given in written form, thus enabling a review. States Parties may also consider enabling an external supervision of such decisions. With regard to that, they may provide for public access to such information or allow a judicial review on complaint, for example, of the harmed person or institution or the person who has reported the case.

4. Decisions on release pending trial or appeal

The article requires States Parties to provide for appropriate conditions under which a defendant can be free pending trial or appeal. States Parties may regard the provision of bail with legally justified conditions as an appropriate means to ensure attendance at subsequent criminal proceedings. However, States Parties may take into consideration that persons who have committed a corruption offence may have significant financial resources at their disposal which may facilitate a defendant to flee the jurisdiction, especially in cases in which law enforcement bodies have not been able to freeze or confiscate proceeds of the crime or the property used to commit the crime, or where there is a possibility of intimidation of witnesses, interference with evidence, and so on, and the obstruction of justice when an offender is released during a continuing investigation or a pending trial. Courts may also wish to consider imposing appropriate conditions restricting the individual's liberty or freedom of movement. The measures imposed as conditions of the granting of bail may involve, for example, a requirement to report to law enforcement agencies on a regular basis, the handing in of all relevant travel documents including passports (although it is important to bear in mind that some individuals may have access to a number of passports and so a declaration of all passports and travel documents may be a wise condition to impose) and conditions not to contact named witnesses. In serious cases, States Parties should reserve the right, as in other criminal cases, to remand individuals to custody pending trial.

5. Early release or parole of persons

Article 30, paragraph 5, of the Convention obliges States Parties to take into account the gravity of the offences concerned when considering the early release or parole of persons convicted of such offences.

In order to avoid frictions with the individual and the social effects of punishment, an effort should be made to ensure that such measures are applied in balance with the gravity of the crime.

While many States Parties provide for the possibility of early release/release on parole, others have moved away from the parole system, preferring a "true sentence" or a precisely determined

sentencing system. Especially in a situation in which citizens doubt the dissuasiveness and effectiveness of sentences that are reduced, the “true sentence” system could be an option for regaining the confidence of the society in the effectiveness of law and law enforcement. However, again any such considerations should take into account the need to respect human rights and the possibly adverse reactions of a system where parole is never an option for convicted individuals.

6. Removal, suspension or reassignment of office

Caution is needed in order to avoid that such a provision becomes a useful instrument to immobilise or neutralise persons considered a threat (e.g. political competitors, accused falsely of corruption in order to prevent them running for an office) or considered “too honest”. This is unfortunately not uncommon and the risk has to be acknowledged and taken into account by policymakers.

Even the provision suggested by the consultant to introduce a provision in the contract of staff that stipulates the automatic suspension from office, can become a dangerous boomerang if not accompanied by certain safeguards, such as the need to ensure that the suspects are sufficiently substantiated, in order to avoid that this provision becomes an instrument of blind inquisition.

States Parties have the obligation to consider whether to establish procedures that provide for the removal, suspension or reassignment of public officials accused of a corruption offence. Such measures may relate to the launch of an investigation and extend throughout its duration. They may serve to prevent the accused from obstructing the investigation by influencing or intimidating witnesses, as well as tampering with or destroying evidence. In addition, those measures may be appropriate to thwart the misconceived “esprit de corps” which can be an obstacle for investigations. The measures contemplated in this article should not lend themselves to politically motivated reprisals and should not prejudice the principle of presumption of innocence of the public official in question.

7. Disqualification

Article 30, paragraph 7, of the Convention obliges States Parties to consider establishing procedures for the disqualification from holding public office or holding office in an enterprise owned in whole or in part by the state after conviction for a corruption offence. States Parties may take into account that the measures are appropriate ancillary sanctions, an essential component of public office is trust and integrity. States Parties may also bear in mind that such measures may be an effective means to deter corrupt behaviour and prevent corruption in the future by sending a clear signal of determination in fighting corruption to other public officials and to the public. On the other hand, there will be a need for States Parties implementing such measures to consider carefully whether the disqualification should be on a temporary or a permanent basis. Such a decision may reflect the gravity of the offence for which the individual was convicted.

States Parties may wish to consider applying the term “enterprise owned in whole or in part by the State” according to their national rules defining which enterprises shall be regarded as “public”.

8. Reintegration

As mentioned above, article 30, paragraph 10, of the Convention indicates that proportionate criminal and ancillary sanctions are required. The need to promote the reintegration of convicted persons into society follows from the principle of proportionality.

States Parties may consider the paragraph as an element reflecting the overall thrust of the article in favour of striking an appropriate balance between punishment and rehabilitation. Moreover, States Parties may consider that the provision on reintegration addresses a further dimension to sanctions in that States Parties, in addition to the normal provision for supervised release, may resort to sentences that involve integrative conditions, such as mandated community work or voluntary work which applies the competences of public officials for the benefit of society.

Article 31: Freezing, seizure and confiscation

UNCAC LANGUAGE

1. *Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

- (a) *proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;*
- (b) *property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.*

2. *Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of proceeds of crime/property corresponding to such proceeds for the purpose of confiscation can take place, any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.*

3. *Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.*

4. *If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.*

5. *If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.*

6. *Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall*

also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Overview

Article 31 complements article 23. While the latter deals with “who”, this article addresses “what” and “how”. Confiscation – the permanent deprivation of property by order of a court or other competent authority, as defined by article 2 (g) of the Convention – is the most important legal tool to deprive offenders of their ill-gotten gains. The regime promoted by the Convention is organised around the concept of the confiscation of “proceeds of crime,” defined by article 2(e) of the Convention as “any property derived from or obtained, directly or indirectly, through the commission of an offence.”

The confiscation of the proceeds of crime should be differentiated from other types of confiscation already known by most legal systems: the confiscation of the instrumentalities of crime and the confiscation of objects of crime. Although these three types of confiscation are required by article 31(1), confiscation of the proceeds of crime is the centrepiece of this new regime. Article 31 also establishes the minimum scope of the confiscation of the proceeds of crime in paragraphs 4, 5 and 6. As a complementary measure, paragraph 8 recommends that States Parties consider reversing the burden of proof in order to facilitate the determination of the origin of such proceeds, a concept already applied in several jurisdictions – but which needs to be distinguished from a reversal of the burden of proof regarding the elements of the offence which is directly linked with the presumption of innocence.

Notwithstanding these minimum requirements, States Parties still have a range of policy options on how to implement this system in terms of:

- whether to give pre-eminence to an “object-based confiscation system,” as opposed to a “value-based confiscation system”;
- whether to provide for pre-eminence to a civil-based confiscation system in addition to a criminal-based confiscation system;
- whether or under what circumstances the “confiscation of proceeds of corruption” should be considered a criminal sanction as opposed to a reparative or restorative measure; and

- whether to introduce or accentuate in rem procedures as opposed to in personam procedures.

A vital complement of the policy of depriving corrupt offenders from the proceeds of their illegal actions is a system of preliminary measures to seize, freeze or otherwise immobilise property for the purposes of confiscation. Paragraph 2 requires States Parties to implement such measures while paragraph 3 requires implementing systems for administering such property until a court or other competent authority decides its fate.

Article 31 also requires specific measures for two other important elements of the confiscation regime: international co-operation (para. 7) and the protection of third-party rights (para. 9).

Implementation

1. Types of confiscation

Article 31(1) requires States Parties to adopt the necessary measures to enable two different types of confiscation:

- (1) (a) – confiscation of the proceeds of crime;
- (1) (b) – the confiscation of the instrumentalities of crime.

(1) (b) refers to “property, equipment or other instrumentalities” used in or destined for use in offences established in accordance with this Convention .

The theory behind the confiscation of instrumentalities of crime is that the objects have been misused in a harmful way for society and therefore the state must impede this from happening again. It physically associates the objects used to commit the crime with the harmful results it produced. The confiscation of the instrumentalities of crime is therefore a punitive measure in nature, linked to the conviction of the defendant that could only be adopted in personam, as the defendant is – usually in an ancillary fashion – punished with deprivation of his/her “misused” property.

The concept comprises also objects needed to undertake the criminal behaviour – whether directly, such as documentation, templates, software, or indirectly to facilitate the conduct, such as fake passports etc. Such objects are usually destroyed, which shows that the theory underlying the confiscation of such objects is of a preventive nature: such objects are considered vulnerable to misuse and therefore there is a specific interest in destroying them. Further, this type of confiscation has wider protective benefits and is not a punitive matter; thus, drugs are not forfeited to punish the defendant but to protect society.

By contrast, (1)(a) requires States Parties to adopt measures for the confiscation of the proceeds of crime.

As defined by article 2(e) and (g) of the Convention, confiscation of the proceeds of crime implies the permanent deprivation, by court order or other competent authority, of property or other valuable benefit derived from or obtained, directly or indirectly, through the commission of an offence.

2. Models of confiscation

The first policy option presented by paragraph 1(a) refers to the two possible models of confiscation: object confiscation, referred to as the “proceeds of crime derived from offences established in accordance with this Convention” and value confiscation, referred to as “property the value of which corresponds to that of such proceeds.” This distinction concerns the way in which property rights are affected. Object confiscation constitutes a transfer of property to the state, while value confiscation consists of an imposition to pay a certain amount of money, usually equivalent to the undue advantage or benefit from criminal conduct, in whatsoever form it is given or received.

Object confiscation systems are built upon the relationship between the offence and the property. The same model operates for the confiscation of the instrumentalities of crime. A number of considerations must be taken into account:

- object confiscation systems operate regardless of who is the actual possessor of the property, and this needs to devote special attention to protection of bona fide third parties – the subject of paragraph 9, of the article;
- a pure object confiscation system might lead to unjust consequences, as property that has been consumed or spent by the time the confiscation order is made, or property that cannot be traced, will escape confiscation;
- as it is usually enforced in rem, object confiscation may be adjusted to both criminal and civil procedures, and while some jurisdictions consider any confiscation of the proceeds of crime to be of a punitive nature, some others have deemed that confiscation of the proceeds of crime based on civil procedures, and enforced and based on object confiscation models, should be considered to be of a restorative nature.

Finally, in implementing object confiscation systems, one may consider the case in which the offender succeeds in concealing the proceeds within a corporate vehicle or a legal entity. As he/she will no longer be technically in possession, whether the procedure is based on criminal or civil law will be of most relevance in those legal systems where corporate criminal liability is narrow or even non-existent.

Such difficulties might be overcome through value confiscation systems. Unlike object confiscation systems, which are based on the relationship between the property and the offence, value confiscation systems of the proceeds of crime are based on the idea that “crime should not pay.” Therefore, it does not consist of a transfer of property, but of an order (usually a court order) to pay the amount of money equivalent to the value of the proceeds of the crime.

As a starting point, value confiscation systems can be enforced against money or assets that may not be directly connected in any way with criminal activity, but rather acquired with the criminal proceeds. Therefore, there is no need to trace the exact assets obtained through the offence but rather to determine what value may have been gained and confiscate that value from any available asset belonging to the offender or over which the offender exercises control.

Another important practical difference with object confiscation systems is that when using value confiscation systems there is no need to be concerned with direct or indirect proceeds, or with intermingled legal and illegal assets. Once the value to be confiscated is determined, the origin of the property against which it is enforced does not matter.

Third, as value confiscation only operates against property owned by the offender – operating in personam – it will never affect rights acquired after the offence by bona fide third parties. Of course, the obvious drawback of the system is in cases where the offender has transferred all of his/her property to other natural or legal persons and has no property under his/her own name. It can be argued, however, that any person acquiring such property is likely to be committing a money-laundering offence, the proceeds of which are subject to confiscation as proposed in article 23. Therefore, the property could still be confiscated under a value-based system.

Some jurisdictions have given pre-eminence to the value confiscation system, while most jurisdictions belonging to a civil law legal tradition consider value confiscation systems as a subsidiary alternative to object confiscation systems. States Parties may wish to consider adopting both systems and using them alternatively, as is more convenient in any specific situation.

3. What to consider as proceeds of crime for purposes of confiscation

Paragraphs 4, 5 and 6 of article 31 outline the minimum scope of measures to implement the article:

Paragraph 4: This refers to the situation in which proceeds have been transformed or converted into other property. In this case, States Parties are required to subject to confiscation the property transformed or converted, instead of the direct proceeds.

Given that offenders will part as soon as they can with the primary proceeds of crime in order to obstruct investigative efforts to trace such property, the provision is of major relevance when applying an object-based model of confiscation, in order to avoid conflicts with potential bona fide third parties and facilitate investigative and prosecutorial activity. The provision reflects the same theory that lies behind a value-based model of confiscation: what matters is not to allow the offender to enrich him or herself by illegal means.

The provision follows the so-called theory of “tainted property,” whereby, as tainted property is exchanged for “clean property”, the latter becomes tainted. While this may raise issues about receipt in good faith, countries have developed requirements, whereby legislation gives primacy to the irrevocability of the “taint” irrespective of the iterations of transfer, receipt and conversion.

Paragraph 5: This refers to the situation where proceeds of crime have been intermingled with property from legitimate sources. States Parties are required to subject to confiscation any such property up to the assessed value of the proceeds.

As stated above, both situations may pose a problem when the confiscation system operates under an object confiscation system, which requires a determination of property obtained through the offence. When operating a value confiscation system these situations do not pose any problem.

Paragraph 6: This requires States Parties to subject to confiscation not only primary but also secondary proceeds of crime. Primary proceeds are those assets directly obtained through the commission of the offence – e.g. a bribe of \$100,000. The secondary proceeds, by contrast, refer to benefits derived from the original proceeds, like bank interest or the amount increased as a consequence of investment. In this regard, the Convention requires States Parties to provide mandatory confiscation for both the primary and secondary proceeds.

Though the definition of the proceeds of crime given in article 2(g) includes property “obtained through a crime” and property “derived from a crime,” the paragraph explicitly refers to “[I]ncome or other benefits” derived from the proceeds of crime and applies to benefits coming from any of the situations referred into paragraphs 4 and 5 – property transformed or converted and intermingled property. In other words, any appreciation in value of the proceeds of crime, even when not attributable to any criminal activity must also be liable to confiscation.

4. Preliminary measures for eventual confiscations

In order to successfully deprive offenders of the fruits of their illegal actions, paragraph 2 of article 31 requires States Parties to adopt such measures as may be necessary to identify, trace, restrain, seize or freeze property that might be the object of an eventual confiscation order.

Regarding identification and tracing, States Parties may wish to ensure that law enforcement bodies and the competent administrative and judicial authorities are legally empowered to monitor property or rights that are susceptible to confiscation. When establishing the measures to identify assets at the domestic level, authorities must not only be equipped with the necessary investigative powers and access to documentation, but also have access to existing databases for banking, real estate, vehicles, and legal persons. When databases do not exist, States Parties should seriously consider their creation in order to facilitate evidence gathering in a timely fashion. The power to identify and trace property that is subject to confiscation should be considered a basic investigative tool for all law enforcement agencies. The agency enforcing and administering reporting obligations should be in a position to identify and discover potential assets for confiscation, and to make that information available to law enforcement agencies.

In addition, it is advisable that law enforcement officials develop methods for producing evidence about ownership concealed through close associates, family members, corporate vehicles or nominees. Different types of collaboration in exchange for a reduction of the sanction have proved a very useful method for dealing with “figureheads”, as nominees may be charged with concealing or laundering proceeds of crime.

Regarding restraint, freezing and seizing, States Parties may especially consider the following situations.

- Competent authorities should be empowered to adopt provisional measures at the very outset of an investigation. To be effective, restraint, seizure or freezing measures should be taken *ex parte* and without prior notice.
- Where judicial authorisation is required – which is the case of measures impinging on fundamental rights – the procedure should be fashioned in such a manner as not to delay the authorisation and frustrate the procedure. Special attention should be paid to the timely adoption of measures when they need to be co-ordinated with other jurisdictions.
- States Parties must consider the advantages of creating a different system for freezing assets involved in suspicious transaction reports, issued in compliance with anti-money laundering regulations. Apart from the traditional judicial authorisation, there are two other options to be considered: administrative and automatic freezing systems. Under an administrative freezing system, the agency receiving the suspicious report – e.g. the FIU – is empowered to decide upon a provisional freezing, and its decision is subject to judicial confirmation, which must be given within a short period of time. In automatic freezing, the gatekeeper is obligated to freeze the assets involved in the transaction at the time of

reporting, without tipping off its client, and for a short period of time within which a competent authority must decide whether to keep the assets frozen or not. In both cases, the decision is moved forward in order to increase efficiency and allow for timely freezing without compromising any fundamental rights. An intervening option may be the requirement that, as a result of a suspicious transaction report, the FIU would allow normal account activity but require the reporting institution to periodically report transaction activity in case restraint or freezing is precipitated by other events (prior warning of an investigation, for example).

- States Parties with both object and value confiscation models should ensure not only that property “involved in,” “traceable to,” or “related to,” the offence can be seized, but also other property aimed at securing assets for the execution of a money judgment is covered by freezing provisions. By the same token, States Parties may consider the possibility of freezing “unrelated” assets belonging to the defendant when property “related” to the offence is held in a foreign jurisdiction.

Paragraph 7 of article 31 requires States Parties to empower their courts to make bank, financial or commercial records available when a foreign authority requests them for purposes of seizing, freezing or confiscation.

Paragraph 3 of article 31 requires States Parties to adopt the necessary measures for regulating the administration of frozen, seized or confiscated property. There are several issues to be considered in this regard, especially in jurisdictions where criminal procedures may be prolonged.

- First, as the types of property that might be frozen vary considerably, the system should ensure that professionals skilled according to the type of property might be appointed for management and administrative purposes. This would especially be necessary in more complex cases, as for example where an entire business is the object of restraining measures. In the case of money, transferring it to an account held by the competent agency should suffice. In the case of real estate, States Parties may consider whether restraining any transfer but leaving both the use and the maintenance with the owner, will suffice.
- Second, the system must prevent the abuse of frozen assets through appropriate checks and balances and oversight, as well as by means of dissuasive and proportionate sanctions in order to avoid even greater costs to the state. The administration of assets may be costly in itself, and the procedure should also envisage management forms that do not create unaffordable costs for the state.
- Third, States Parties may wish to consider under what circumstances, if any, the owner of the frozen or seized property might be eligible for compensation or damages, if the property ultimately is not confiscated.

5. Reversal/ shifting of the burden of proof

Paragraph 8 recommends that States Parties consider the possibility of shifting the burden of proof in regard to the origin of the alleged proceeds of crime.

This recommendation should be distinguished from a reversal of the burden of proof with respect to the constituent elements of an offence. Jurisdictions that have successfully adopted such a special technique have usually embedded it in specific confiscation procedures, which take place after the conviction.

When considering this recommendation, States Parties may wish to take into account the following.

Some countries have enacted legislation of this type, shifting the burden of proof with respect to proceeds derived from drug offences, organised crime, and money laundering by stating that when a person is convicted of any of these offences, the confiscation of properties held by the person is mandatory if the offender cannot explain the source of the assets and the assets are not commensurate with his/her income or economic activity. In this case, it is not necessary to prove that the assets are derived, directly or indirectly from an offence; assets indirectly derived from such illicit proceeds or even other kinds of assets (except when they belong to third parties) could be forfeited if the convicted person cannot justify their origin.

Other countries foresee automatic forfeiture, which can take place in cases where a person has been convicted of drug crimes, money laundering, terrorism, trafficking in persons and fraud. The relevant provisions create a refutable presumption that any property subjected to a restraining order – any property the convicted person owns or controls – is the proceeds of crime. Upon conviction, to exclude such property from forfeiture, the defence is required to demonstrate the lawful origin of the property. If no evidence is given to prove that the property was not used in, or in connection with, the commission of the offence, the court must presume that the property was used in, or in connection with, the commission of the offence and forfeiture occurs.

A variation of this approach is taken by some countries. Though they do not allow a reversal of the burden of proof, once the prosecution has proved the defendant's guilt beyond a reasonable doubt, the extent of the forfeiture can be established by a preponderance of the evidence standard. Case law has intermittently admitted "net worth" evidence as an indirect method of proving the origin of the proceeds. In practice, the net worth method implies the establishment of a difference between the lawful income and the value of the property owned by the offender, excluding all reasonable explanations, such as inheritance, gifts etc.

In other countries, the penal code establishes a presumption according to which all assets belonging to a person convicted under an organised crime offence are presumed to be under the control of the criminal organisation. The prosecution then does not have to prove the origin of the assets. The fact that the property is assumed to be under the control of a criminal organisation is sufficient for it to be tainted by association, even if it has been obtained legally. The owner can rebut the presumption, but he/she bears the burden of proof.

An "all crimes" system of predicate offences for the purposes of money laundering should facilitate the implementation of the recommendation of the article.

Finally, in addition to the *sui generis* procedures that accept non-criminal standards of evidence after the conviction is reached, a number of jurisdictions have also adopted civil procedures of confiscation that operate *in rem* and are governed by a standard of the preponderance of evidence.

6. Protection of bona fide third parties

Paragraph 9 requires States Parties not to construct any of the provisions of that article as to prejudice the rights of bona fide third parties. The Convention does not, however, specify to what extent third parties should be provided with effective legal remedies in order to preserve

their rights. Thus, in implementing this provision, States Parties may wish to take into account that some jurisdictions have opted to establish a specific procedure for third parties claiming ownership over seized property, in which the prosecution evaluates whether the claimant(s):

- have acted with the purpose of concealing the predicate offence, or are implicated in any of the ancillary offences;
- have legal interest in the property;
- acted diligently according to the law and commercial practice;
- if the property requires a public registration of the transaction or any administrative procedure, such information has been conducted (e.g. real estate, or vehicles);
- if the transaction was onerous, whether it followed real market values.

Article 32: Protection of witnesses, experts and victims

UNCAC LANGUAGE.

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Overview

The Convention regards the protection of witnesses, experts and victims as an important complement to the criminal law provisions such as the offence of obstruction of justice.

Article 32 includes both mandatory and non-mandatory provisions. As a mandatory provision article 32(1) requires that each State Party must take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with the Convention and, as appropriate, for their relatives and other persons close to them. Paragraph 2 specifies certain measures that States Parties may envisage in order to provide for the necessary protection of witnesses and experts as required by paragraph 1. While paragraph 2(a) includes a provision on procedures for the physical protection against intimidation and retaliation, paragraph 2(b) focuses on evidentiary rules ensuring the safety of witnesses and experts with regard to their testimony.

Protection measures can be classified in two categories: first, the procedures for the physical protection of such persons and evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means; secondly, and to the extent necessary and feasible, the State should offer longer-term protection up to and during any trial, as well as the possible subsequent relocation of witnesses and

permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons.

Paragraph 3 is a non-mandatory provision requiring States Parties to consider implementing cross-border witness protection through relocating victims who may be in danger in other countries.

Paragraph 4 requires States Parties to apply the provisions of article 32 to victims insofar as they are witnesses.

Finally, article 32, paragraph 5, requires States Parties to enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders. This provision is relevant in cases in which a victim is not a witness.

Practical challenges and solutions

States Parties should give particular consideration to the following terms:

- witnesses and experts, relatives and other persons close to them;
- effective protection from potential retaliation or intimidation;
- physical protection of such persons, including to the extent necessary and feasible, relocating them and non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
- evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means;
- agreements or arrangements with other States for the relocation of witnesses.

1. Witnesses and experts, relatives and other persons close to them

States Parties would need to consider that the Convention does not define the term “witness”. Thus, the procedural law of the States Parties would determine which persons are to be regarded as witnesses. However, States Parties should take into consideration that article 32 limits the scope to witnesses who give testimony concerning offences established in accordance with the Convention. However, the article does not restrict the scope of its provisions to specific stages of criminal proceedings.

This being so, States Parties may wish to take into consideration the following three models of implementation.

- (i) States Parties may consider implementing the paragraph in a manner according to which only a person that actually gives testimony has to be protected. Accordingly, their protection measures would only cover those persons who testify either in trial or in court hearings that are part of the investigative process. However, States Parties may bear in mind that the status of a person may vary during procedures while its endangerment can be constant. Thus, there could be a need to protect a person at any stage of investigations even when it is still uncertain whether the person will actually (need to) testify.
- (ii) States Parties may consider a broader implementation having in mind that the rationale of the article, that is, protecting persons who are endangered by intimidation or retaliation because of their willingness to co-operate. Correspondingly, States Parties may consider

including those persons who are willing to give testimony at a later stage of proceedings. States Parties may also consider protecting these persons, at least until it becomes apparent that they will not be called upon to testify.

- (iii) States Parties may consider an even broader implementation to include those who give or identify key evidence, such as incriminating documentation, but do not testify in court.

States Parties should consider taking a broad interpretation of the term “expert”. According to such an interpretation, States Parties may regard including all persons that can provide law enforcement bodies and courts with expertise whether during an investigation or as witnesses in court. They should be afforded the same range of protection measures applied to witnesses. Finally the definition of relatives or people close to the witness should normally mean immediate family but, again, a broad implementation and hence a generous inclusion of persons who are close to the witness or expert may be preferable. States Parties should bear in mind that quite often the treatment of relatives and friends may be a crucial factor when a witness has to choose between co-operation and intimidation.

2. Effective protection

States Parties may consider implementing comprehensive witness protection programmes as the most effective means to ensure the safety of witnesses and experts. In this regard, States Parties should bear in mind that some protection measures (for example, the change of name) may require legislation and informal arrangements. Where programmes exist, States Parties should consider adjusting such programmes to the particular importance of witnesses for the successful prosecution of corruption offences.

States Parties should bear in mind that possible ways of intimidation and retaliation are manifold. Thus, when deciding on admitting a person into a witness protection programme, they may not only focus on physical threat. Rather, they should consider applying a wider scope. States Parties may include several additional aspects for their law enforcement agencies to decide whether to protect a person or not. Such aspects may, *inter alia*, be the likelihood that the defendants or their associates would carry out the threat as well as the duration of the threat that could persist long after the investigation and trial have come to an end. Moreover, they should take into consideration whether an organised criminal group is involved, as in such cases the giving of evidence against members with status could lead to significant or continuing forms of retaliation.

As witness protection programmes are expensive and labour-intensive, States Parties may consider providing for a diversified frame of protection measures. States Parties may therefore consider that a full witness protection programme can only be available to a limited number of witnesses and those witnesses have to be central to a successful conviction which is not amenable to other forms of investigative or surveillance techniques, or of presenting evidence. States Parties may bear in mind that the limited access to a comprehensive witness protection programme does not mean leaving other witnesses without any protection. In fact, possible ways of witness protection range from short-term physical security to long-term relocation for a witness and their family. A risk assessment therefore should provide for adequate protective arrangements in any given case. While comprehensive witness protection programmes are particularly intended for long-term protection against retaliation, protection measures in other corruption cases may concentrate on pre-trial intimidation and thus would be more properly addressed by other means to physically safeguard the witness than complete witness protection measures.

With regard to the implementation of witness protection in a specific case, States Parties may wish to pay attention to the fact that some states provide for the possibility of a memorandum of understanding or protocol between the state and the witness, which regulates the protective measures to be taken. The memorandum of understanding or protocol may enhance the effectiveness of the protection and may form a good incentive for co-operation. In any case, the memorandum of understanding or protocol helps in providing clarity and in avoiding possible disagreements regarding the scope of protection. UNODC has developed a set of materials regarding witness protection, including a manual on “Good practices for the protection of witnesses in criminal proceedings involving organised crime”, which is available on its website⁴⁸.

Agreements or arrangements with other States

Depending on its experience on matters relating to witness protection, a State Party may conclude that ad hoc agreements or arrangements with other countries for the relocation of witnesses would be sufficient. However, States Parties may wish to consider that the development of an individual arrangement may take time that is not at its disposal in a continuing criminal proceeding. An approach to deal with this issue may be the development and conclusion of transnational agreements or arrangements which do not only apply for a single case, but serve as a framework for a number of cases that may occur.

States Parties may also consider the development of co-operation agreements or arrangements on a “family of countries” basis as the best way to implement a cross-border witness protection programme. Thus, States Parties would be able to use such states as safe havens that are geographically conterminous or which share common linguistic, economic and cultural characteristics.

Victims

In a number of cases, not all victims would be called to give evidence and in other cases, those who may be victims may extend beyond those who have been subject to direct loss or damage. In assessing the severity of a case, it is possible that the quantum of damage may be addressed by enabling the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings, and in particular after the decision on guilt and before sentencing. This provision is relevant in cases in which a victim is not or cannot be heard as a witness and hence would not be able to present views and concerns since criminal proceedings are brought against the perpetrator by the state.

Article 33: Protection of reporting persons

UNCAC LANGUAGE

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

⁴⁸ <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>

Overview

Article 33 is a non-mandatory provision. However, States Parties may wish to keep in mind that the provision complements the article dealing with the protection of witnesses and experts. Article 33 is intended to cover those individuals who may possess information which is not of such detail to constitute evidence in the legal sense of the word. Such information is likely to be available at a rather early stage of a case and is also likely to constitute an indication of wrongdoing. In corruption cases, because of their complexity, such indications have proved to be useful to alert competent authorities and permit them to make key decisions about whether to launch an investigation.

The Convention uses the term “reporting persons”. This was deemed to be sufficient to reflect the essence of the intended meaning: while making clear that there is a distinction between the persons referred to with this term and witnesses. It was also deemed preferable to the term “whistle-blowers” which is a colloquialism that cannot be accurately and precisely translated into many languages.

Practical challenges and solutions

1. The policy framework

In general terms, States Parties will need to develop a policy framework which will address:

- who and which areas, activities, sectors, and entities are covered;
- who may report;
- to whom the report would be addressed;
- what format would the report have and with what information;
- what constitutes unjustified treatments;
- what types of protection are to be offered to the source of the information; and
- what assurances would be foreseen to deal with malicious or vexatious allegations.

The practical issue regarding implementation of article 33 is to strike the appropriate balance between the rights of the target of the information or allegations and the necessity to protect reporting persons. This balance is to be found in the context of national law and the situation of each society. Correspondingly, the article allows substantial discretion, which enables States Parties to adjust such measures to their national legal system.

2. Engaging public officials

Engaging public officials would involve:

- promoting comprehension of proper conduct – what is right and wrong, at what level, involving whom;
- emphasising the need to avoid misconduct; in particular, having the ability of identifying which conduct is wrong;
- understanding the importance of speaking out; in particular, emphasising the fact that it is the responsibility of all to report conduct that is wrong;

- instilling confidence that:
 - reporting should be regarded in a positive manner;
 - effective and appropriate action will be taken;
 - the gains will outweigh the cost of reporting; and
 - protection to the person making the report would be provided.

3. *Engaging the public*

States Parties may wish to bear in mind the importance of promoting the willingness of the public to report corruption. Therefore, they may wish to consider protecting not only public officials, or employees of legal persons, but any person who reports a suspicion of corruption, irrespective of their status. States Parties may also wish to bear in mind that the protection of journalists is of particular importance in so far as they publish stories within the same criteria as stated by the article.

States Parties may wish to provide for “reporting” guidelines which advise the public which authority they should notify of a corruption suspicion and how they should do that. However, States Parties may bear in mind that until the level of confidence among the public reaches sufficiently high levels, reporting may occur outside established procedures.

4. *Reporting to whom?*

States Parties may wish to identify the competent authority or authorities to receive the reports, but also have the capacity to provide the necessary protection. States Parties will need to be aware that a minor report may be the first step in a complex corruption inquiry and thus reporting may become the responsibility of a number of agencies – all of whom will need to respect the state policy and procedures on protection.

Generally, it has been found useful that there should be at least two levels at which reporting persons can report their concerns. The first level should include entities within the organisation for which the reporting person works, such as supervisors, heads of the organisation or internal or external oversight bodies created specifically to deal with maladministration within the agency where he or she works.

Reporting persons should also be able to turn to another institution if their disclosures to a first-level institution have not produced appropriate results and, in particular, if the person or institution to which the information was disclosed:

- decided not to investigate;
- failed to complete the investigation within a reasonable period of time;
- took no action regardless of the positive results of the investigation; or
- failed to report back to the reporting person within a given period of time.

Reporting persons should also be given the option to address second-level institutions directly if they:

- have reasonable cause to believe that they would be victimised if they raised the matter internally or with the prescribed first-level external body; or
- have reason to fear a cover-up.

Second-level institutions could be an ombudsman, an anti-corruption agency, or an auditor general.

5. Criteria for reporting

The article specifies the conditions for protection to be provided, i.e. that the report was made in good faith and was based on reasonable grounds.

Several items would need to be considered in the application of these criteria. The disclosure must be treated objectively and, even if it proves to be inaccurate, the law must apply as long as the reporting person acted in good faith. It must also apply irrespective of whether the information disclosed was confidential and even if the reporting person may have technically breached confidentiality laws.

Good faith should be presumed in favour of the person claiming protection, but where it is proved that the report was false and not in good faith, there should be appropriate remedies.

Since whistle-blowing can be a double-edged sword, it is necessary to protect the rights and reputation of those against whom reports are made against frivolous, vexatious and malicious allegations. In particular, the law should contain minimum measures to restore a damaged reputation. Criminal codes normally contain provisions penalising those who knowingly come forward with false allegations. It should be made clear to reporting persons that those rules apply also to them if their allegations are not made in good faith. The burden of proof regarding good faith should not be on the reporting person.

Regarding the criterion of reasonable grounds, States Parties may wish to consider that the application of special protection measures should not be denied solely because the report may have turned out to be incorrect *ex post*. Instead, States Parties may regard adopting an *ex ante* approach. Thus, they may question whether the reporting person had reason to believe that information existed to support a report. States Parties may refer to other existing reporting regulations with more general application or a guide to determine whether a report was based on reasonable grounds.

6. Protecting reporting persons

Generally States Parties would need to consider how to determine the form of protection in relation to the identification of the reporting person, the threats such person may face, whether he/she may be asked to obtain more information, whether that person will be required as a witness, what financial or career prospects may be jeopardised and what redress or compensation may be afforded.

Reporting persons may be concerned that they may face a variety of unjustified treatment. Correspondingly, the tools to thwart such treatment are manifold. In general, the measures of protection should be commensurate to the danger, although care must be taken in cases where the reporting person is unaware of the seriousness of the report or of the possibility of subsequent inquiries becoming, as the report is investigated, disproportionate to the initial allegations.

States Parties may wish to consider the feasibility of ensuring anonymity to reporting persons⁴⁹. Where the anonymity cannot be ensured, States Parties may consider whether criminalising threats, intimidation or retaliation would be an effective way of providing protection to reporting persons.

States Parties may consider implementing provisions and procedures offering appropriate legal protection to reporting persons against the loss of employment, such as the possibility of judicial enforcement of continued employment or civil damages. Moreover, States Parties may bear in mind that reporting persons may face the risk of being professionally discriminated against. Consequently, they should consider providing for legal remedies against such forms of reprisal. Measures to protect reporting persons from unfair dismissal must be compatible with the labour laws of the state concerned. In particular, where employers are able to dismiss employees without reason, affording appropriate protection to reporting persons may require exceptions.

Finally, States Parties may wish to consider libel law reform as an important aspect of anti-corruption legislation. This may be particularly relevant to the investigations and reports by journalists.

Article 34: Consequences of acts of corruption

UNCAC LANGUAGE

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action

Overview

Many acts of corruption are committed in order to create or increase economic gain. Corrupt practices are used to facilitate business opportunities, to allow an agreement on favourable conditions in a contract, to obtain favourable administrative acts such as concessions or procurement decisions, to succeed in tenders and to achieve other goals that allow the perpetrator to create business. It is one of the principles set out in the Convention, most clearly in Chapter V on asset recovery that the perpetrator must not benefit from corrupt practices, ensuring that corruption does not pay. However, criminal sanctions may not be sufficient. In order to ensure the consistency of the overall legal system, the condemnation of corrupt practices must be translated into all relevant fields of law: private law, tax law, competition law, administrative law, law of contracts, law of torts, and law of dispute resolution have to contribute to a consistent reaction to corrupt practices. The economic consequences of corruption are often governed by private and administrative law.

⁴⁹ Of relevance here is the jurisprudence of the European Court of Human Rights, according to which the maintenance of the anonymity of the witness does not entail infringement of article 6 of the Convention on fair trial “if the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities” (e.g., questioning the anonymous witness in the presence of counsel by an investigating judge who was aware of the witness’ identity, even if the defence was not) (see *Doorson v. The Netherlands*, Judgement of 26 March 1996, Appl. No. 20524/92, Reports 1996-II, paras. 72-73).

Article 34 is in its first part a mandatory provision. However, the article leaves the specific consequences in civil and administrative law to the discretion of the States Parties. The Convention thus requires the measures addressed in article 34 to be in accordance with the fundamental principles of the States Parties' domestic law, and to pay due regard to the rights of third parties acquired in good faith.

Practical challenges and solutions

Practitioners will be confronted with the consequences of corruption while acting in various functions. More specifically, the practitioners dealing with administrative acts such as concessions, procurement decisions etc. would face the issue in the legal and administrative review of such acts when it turns out that corruption had been involved in a previous decision. Participants in private lawsuits on the consequences of corruption would need to handle the question of (in) validity, (un)enforceability or modification of contracts procured by corruption. In addition, the government officials who design anti-corruption strategies for administration and the judiciary would need to take the problem into account in order to allow the respective institutions to be prepared for the legal proceedings where the consequences of corruption become relevant. The tax officials may need to handle cases of tax deductions where expenditures turn out to be disguised bribes.

1. Types of measures

The Convention leaves the choice of specific kinds of consequences to the discretion of States Parties.

Practitioners should take into account that the consequences foreseen by article 34 are not criminal sanctions. Therefore, it is likely that there would be different procedural rights involved. For example, the principles *in dubio pro reo* or *ne bis in idem* do not apply to civil and administrative proceedings. On the other hand, other fundamental rights such as the right to property, the right to exercise a profession and the freedom of trade need to be taken into account.

In most jurisdictions, the standard of proof required in civil or administrative cases is lower than in criminal cases. Those acting in proceedings on the consequences of corruption may use this for their case strategy. Where criminal confiscation is not viable because the evidence is not sufficient for a criminal conviction or because of the *ne bis in idem* rule, civil proceedings may still be an option. Those dealing with the consequences of corruption need to be aware of the rules governing a specific case.

2. Focusing on prevention

In determining the most appropriate way to apply the measures indicated by the Convention, one key issue is comprehensive documentation of the administrative process that leads to the conclusion of a contract, the granting of the concession or a licence or other similar acts. Documentation should contain guidance on the consequences of the use of corruption in any procedures for such acts, with statements indicating that the act will be the basis for action, and outline the process or legal proceedings that will take place on the evidence of presence of such an act. States Parties may also wish to ensure that all their tender documentation contains appropriately worded statements to that effect and that all those submitting tenders, as well as other bidders for contracts or concessions, sign a declaration not to engage in any act of corruption. The above documentation may also specify that such action may occur at any time

during the life of the contract or concession and that a number of consequences may follow, including – depending on the substantive approach of the legislation – proceedings for the rescinding of contracts and the withdrawal of licences and concessions.

States Parties may bear in mind that the exchange of information between law enforcement agencies and other authorities competent for granting licences, concessions and the conclusion of contracts is crucial. Many States Parties have faced the problem that concessions, licences and contracts are granted to corporations and private persons although they have been convicted of corruption more than once, simply because of an absence of cross-jurisdictional information-sharing.

3. Ensuring that the measures fit with domestic law

All measures that States Parties apply have to be in accordance with the fundamental principles of their domestic law.

In addition to the measures suggested by the Convention, States Parties may consider imposing further consequences such as the withdrawal of subsidies, the cessation of financial support, or bans from tender procedures for a specified period of time. Further, States Parties may wish to think about measures in tax law and competition law, according to the principles of their domestic law.

Article 35: Compensation for damage

UNCAC LANGUAGE

Each State Party shall take such measures as may be necessary, in accordance with the principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

Overview

Article 35 requires that States Parties take such measures as may be necessary, in accordance with the principles of their domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

This does not require that victims should be guaranteed compensation or restitution, but legislative or other measures must provide procedures whereby it can be sought or claimed.

An interpretative note indicates that the expression “entities or persons” is deemed to include states, as well as legal and natural persons (A/58/422/Add.1, para. 37). Another note indicates that article 35 is intended to establish the principle that States Parties should ensure that they have mechanisms permitting persons or entities suffering damage to initiate legal proceedings, in appropriate circumstances, against those who commit acts of corruption (for example, where the acts have a legitimate relationship to the State Party where the proceedings are to be brought). The note continues by stating that, while article 35 does not restrict the right of each State Party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State Party in doing so (A/58/422/Add.1, para. 38).

Article 36: Specialised authorities

UNCAC LANGUAGE

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks

Overview

A number of States Parties have established anti-corruption units (ACU) in compliance with the requirements of article 6 of the Convention, bestowing upon them a broad mandate which extends from responsibilities for preventive measures, including education, awareness-raising and co-ordination, to investigation and prosecution. In other States Parties, such functions are

distributed among a number of agencies, with the investigative and prosecutorial functions vested in law enforcement authorities.

The article mandates the need for entities or persons whose core focus must be that of law enforcement, i.e. investigative and possibly prosecutorial functions. The article, however, does not specify any particular institutional shape, although it raises procedural and resource issues necessary to guide States Parties towards the best institutional approach depending on their specific requirements.

Article 36 is a mandatory provision. However, States Parties should bear in mind that the Convention only sets minimum standards, providing for a scope of discretion which enables States Parties to adjust the requirements of the article to specific domestic situations.

Challenges and solutions

The issues to be addressed are:

- what type of specialised authority;
- added value and role;
- independence and resources.

1. What type of specialised authority

Given the emphasis on law enforcement, States Parties have a choice to establish a special body exclusively in charge of corruption or to provide for specialised expertise within the existing structures of the police, prosecution offices and/or the courts.

Given this scope of discretion, States Parties may wish to evaluate their domestic situation carefully, since models of institutions cannot be easily imported or replicated, but have to suit the structural conditions of the state in question. Consequently, the first step will be to evaluate the domestic situation comprehensively. This would include the magnitude of the corruption problem on the one side and the resources that are at the disposal of the state on the other. As was indicated in the chapter of the Guide on article 6, there are arguments in favour of and against the establishment of new bodies or the concentration of anti-corruption work within a specific agency. States Parties may consider that the advantages of a specific body or bodies referred to in this article may be the impetus to and ownership of anti-corruption efforts, the high degree of specialisation and expertise it can achieve, as well as the more efficient work that a dedicated agency can perform. On the other hand, there are possible disadvantages, such as costs, institutional impediments, co-ordination problems and the potential of diminished returns because of isolation and the perception of undermining existing institutions already engaged in work against corruption.

Attention is necessary to the fact that decisions on whether to have one or more bodies would need to be subsequent to the development of a comprehensive national anti-corruption strategy which should address: the legislative framework; reporting arrangements; relationships between competent institutions; the budget provision; prosecutorial and judicial capacity; and the political context.

The development of the strategy, which has been addressed in detail in the part of the present Guide relating to implementation of article 5, should make it easier for policymakers to make informed decisions based on an assessment of which specific forms of corruption are to be given priority. Policy decisions would be whether to invest law enforcement resources in the fight against “high volume” corruption (such as traffic police or licensed clerks) or “high value” corruption (such as procurement contracts) or a combination of those. Further, States Parties may wish to evaluate the strengths and weaknesses of their existing law enforcement bodies in terms of their ability to accomplish the required tasks.

States Parties may also wish to consider that article 36 lays emphasis on law enforcement specialisation.

States Parties may wish to keep in mind that, according to international experience, one of the strongest motivations behind the establishment of a separate ACU have been perceptions about, or problems with, the independence of existing law enforcement bodies and the public concern about their work. Further, the establishment of a new and separate ACU can signal a “fresh start” in the fight against corruption or can serve to bridge the time until the public has regained confidence in regular law enforcement institutions. Finally, the establishment of a new and separate ACU may guarantee more clarity in the assessment of progress and the evaluation of successes and failures.

However, the establishment of an ACU is not without negative consequences. Such establishment requires substantial investment. There is also the question of whether new agencies can deliver across a range of functions. Moreover, particularly small and developing countries may wish to give due consideration to the problem of a “brain drain”. Since the creation of a separate body requires a management structure populated by experienced law enforcement specialists, recruiting or reassigning of such people could affect the capacity of other law enforcement agencies. Most importantly, States Parties may take into account that the concentration of persons, powers and competencies may hamper performance due to inter-agency competition. Many of the advantages of a separate ACU with a law enforcement mandate, such as specialisation, expertise and the necessary degree of autonomy, can be achieved by establishing dedicated units within existing law enforcement agencies with the resources required to improve their capacity.

2. The added value and role of specialised authorities

States Parties should assess carefully the added value and role of specialised authorities, whether within an independent entity or within a law enforcement agency. To be effective in contemporary investigations of serious and complex cases of corruption and financial crime, specialised authorities would require the appropriate substantive and procedural legal framework. That framework should afford specialised authorities specific contemporary powers on disclosure of documents or other pertinent information and evidence; access to financial reporting; restraint of assets and confiscation. To fulfil their role, specialised authorities would also require powers regarding access to financial and criminal intelligence, criminal investigation, prosecution and civil asset recovery.

Reform of the legislative framework in connection with the establishment or empowerment of specialised authorities against corruption and perhaps also other financial crimes would need, as far as practicable, to be planned as part of a comprehensive criminal justice reform effort. Piecemeal reform directed to one specific type of offence can easily lead to a waste of scarce resources, as specific problem areas – such as corruption or money laundering – are dealt with

separately and in an unco-ordinated manner. Reforms such as those discussed in this Chapter would be more effective if they were part of a longer-term programme of revising and updating substantive and procedural criminal law and the institutions with a role in the investigation, prosecution and adjudication of crime. The need for such a programme in all jurisdictions is now given greater force and urgency by the growth of international obligations derived from the Convention and other agreements.

3. Independence and resources

To ensure that specialised authorities are effective, irrespective of their institutional shape, States Parties may take into account a number of crucial aspects, including the legal and procedural framework to ensure independence, reporting arrangements, and resourcing.

The independence of specialised authorities should be governed by legislation, whereby the recruitment, appointment, disciplinary and removal criteria for the senior management are clearly established (one possible model to follow may be the terms governing the judiciary). States Parties may want to consider fixed-term appointments to avoid dependency on the executive for reappointment. The legislation should also address the responsibility of the head of a specialised authority for the recruitment of staff and the operational performance of the authority's functions.

A further safeguard may be a reliable internal and/or external review system in order to avoid any undue influence. Therefore, States Parties may wish to draw inspiration from the experience of some states which rely on a specialist committee of the legislature for such oversight. Others have established (external) supervision or inspection commissions.

Of particular importance are the provisions that safeguard against undue influence the operational decisions in a criminal investigation or criminal proceeding. In some states, specialised authorities do not have to inform superior authorities such as the Director of Public Prosecutions, the Attorney General or the Ministry of Justice when starting investigations in a specific case. On the other hand, many States Parties still require approval for initiating court proceedings in a specific case and may wish to consider whether such power should be subject to independent verification. In some states, investigating officers, prosecutors and investigative judges cannot be instructed to dismiss a case.

Specialised authorities could be required by law to publish annual reports, including summaries of ongoing cases where arrests have taken place, and submit the report to the legislature, which should have the formal power to call the head of the supervisory authority to account for the work and performance of the authority.

Besides the appointment of the head of the specialised authority, States Parties should consider establishing appropriate procedures for the employment of the staff. In addition, States Parties may consider flanking professional independence by an appropriate functional immunity against civil litigation in order to avoid intimidation.

States Parties may also wish to pay attention to the remuneration system applicable to specialised authorities to ensure recruitment and retention of the best available expertise. With regard to appropriate training, States Parties may consider that investigators, prosecutors and judges who have specialised in combating corruption need to be well grounded in general investigative skills before they start to specialise on investigating corruption offences. While the Convention does

not stipulate any specific measure, States Parties may wish to take note of some models which have been implemented in several States Parties:

- training provided by experienced and seasoned investigators who are still involved in operational measures. Training should be available to all those likely to be involved in the work of the authority, including judges;
- integrating auditors, tax law specialists and management experts into training programmes. Moreover, States Parties may consider providing for lectures concerning professional ethics;
- secondment or exchange of staff on a domestic or cross-jurisdictional basis.

Obtaining the services of specialists who could provide adequate training should be a priority. It is recognised that expertise in the numerous specialised areas where training would be required may be rare and, thus, quite costly. For developing countries, technical assistance may be available through UNODC and other providers.

The strategy and review undertaken by the State Party will determine the budget necessary for the specialised authority. States Parties should, however, ensure availability of resources for ad hoc cases and for complex inquiries over and above the stated budget. In general, States Parties may bear in mind that appropriate funding is not only a question of size, but also a question of planning.

Article 37: Co-operation with law enforcement authorities

UNCAC LANGUAGE

- 1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.*
- 2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial co-operation in the investigation or prosecution of an offence established in accordance with this Convention.*
- 3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial co-operation in the investigation or prosecution of an offence established in accordance with this Convention.*
- 4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.*
- 5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial co-operation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.*

Overview

The Convention includes several provisions that aim to promote the detection, investigation and adjudication of corruption. Keeping in mind that corruption is an opaque form of crime, which takes place in secrecy, the best way of detecting it is to obtain information from a participant in or witness to the corruption offence. Therefore, law enforcement agencies need means to motivate participants to reveal their knowledge which otherwise would remain undisclosed. Consequently, the Convention acknowledges that motivation to co-operate may sometimes come at a price, such as mitigation of punishment or granting immunity from prosecution. In view of the Convention's focus on asset recovery and international co-operation, article 37 encompasses measures to encourage persons to provide assistance in depriving offenders of the proceeds of crime and recovering such proceeds (paragraph 1). It also contains a provision on international support by providing for the possibility for agreements or arrangements between States Parties to extend such incentives to cover cases in which the person who co-operates is in a jurisdiction other than the one where the investigation or adjudication takes place (paragraph 5).

Practical challenges and solutions

Article 37 includes both mandatory and non-mandatory provisions.

As a mandatory provision, article 37 obliges States Parties to take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering the proceeds.

Moreover, article 37 obliges States Parties to protect such persons, *mutatis mutandis*, as provided for in article 32 (4).

The concept comes from the experience that law enforcement authorities have with organised crime cases. Co-operating witnesses and the means to encourage such co-operation have proved useful in helping law enforcement authorities to penetrate, understand and deal with the often complex and multi-layered or compartmentalised structures of organised criminal groups. Much, if not most, of that experience may be applied usefully to corruption cases.

1. Relevant information

The information submitted by the person has to be useful and relevant to the investigation, prosecution or adjudication of a case, or to the recovery of the proceeds of corruption, as appropriate.

States Parties should take appropriate measures to encourage factual, specific help that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds. States Parties may consider that the term "factual, specific help" relates to both factual assistance and information.

States Parties may consider it important that those measures be made public and be covered by programmes of awareness-raising for the purpose of gaining public support.

2. Mitigating punishment

States Parties may implement the term “mitigating punishment” by providing for the possibility to impose a reduced sentence or execute a punishment in a more lenient way. According to that, States Parties may regard that the mitigation of punishment includes two models:

- first, imposition by the court or judge of a sentence that is mitigated compared to a sentence that usually would have been imposed. For example, the court or judge could consider the possibility to substitute imprisonment by a monetary sanction;
- second, the factual mitigation of punishment subsequent to the judgment and during its enforcement. This model could comprise benefits such as early release or parole (see article 30 (5)).

With regard to the procedures, States Parties may choose between several options:

- Bearing in mind the principle of fairness, States Parties may consider providing for proceedings which guarantee that the proposal to mitigate punishment given in advance is indeed honoured by the competent judicial or prosecutorial authorities. States Parties may hence include a provision in their criminal law which makes proposals to mitigate sentences mandatory for courts.
- However, States Parties may regard that the term “mitigating punishment” includes not only prescribed but also the de facto mitigation of punishment on a case-by-case basis. Accordingly, States Parties whose legal system so permits may not be required to introduce a specific rule providing for a mitigated sentence, but can advise their law enforcement agencies to consider negotiating sentences within an established range. Moreover, States Parties could provide for the prosecution office to adjust charges by limiting them to offences carrying reduced sentences. However, with regard to the independence of the judiciary, States Parties may wish to assure the involvement of the court in a plea-bargaining that foregoes the trial and judgment. With regard to such proceedings, States Parties may consider requiring a written agreement signed by all parties that lays out the conditions for mitigating the sentence.
- States Parties may bear in mind the need to strike a balance between granting benefits to offenders and the administration of justice, particularly in view of the public perception. Thus, they may consider linking a mitigation of punishment to substantial co-operation. However, States Parties may consider that substantial co-operation must not mean requiring information without which an investigation and adjudication would not have been possible. On the other hand, they may opt for a broader implementation according to which any substantial information concerning the corruption offence may lead to a mitigation of punishment. Accordingly, they could relate the size of mitigation to the extent and quality of co-operation.
- States Parties may also bear in mind that the possibility of mitigating a sentence may not be only related to the co-operation, but also to the seriousness of the crime and the guilt of the accused persons. Therefore, mitigation of punishment may be excluded in the case of a major corruption offence and the substantial wrongful behaviour of the co-operating person.
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3. Immunity

The article suggests that States Parties consider the implementation of granting immunity from prosecution to a person who provides substantial co-operation. States Parties may wish to take note of two possible models of implementation:

- first, States Parties may introduce new legislation which allows granting immunities. This could be regarded as necessary in legal systems with a mandatory prosecution;
- second, States Parties whose prosecutors have the discretion not to prosecute, may advise their law enforcement authorities that substantial co-operation could be a reason that allows granting immunity within the range of the prosecutor's discretion.

Immunity can be a powerful inducement to a principal witness to co-operate if the case cannot be brought to court without his/her help. On the other hand, the complete exception from punishment may undermine the validity of anti-corruption norms when it is applied too often or – even worse – when the public gets the impression that immunity is granted to persons with political or financial influence. Thus, States Parties may consider that it is necessary to strike a balance between the advantage of granting immunity to deal with specific cases and the necessity to enhance the public's confidence in the administration of justice.

Whether to grant immunity may not depend solely on the nature or extent of the co-operation. Rather, law enforcement may take into consideration the personality of the accused person and the extent of his/her participation in the offence. For example, States Parties may wish to exclude the possibility of immunity for the head of a corruption network or consider that granting immunities to high-ranking accused persons, such as politicians, could have a negative impact on the public's trust in the impartiality of law enforcement.

Further, States Parties may opt to grant immunity solely in exceptional cases in which the accused person has provided information without which an investigation and adjudication would not have been possible.

With regard to the proceedings, States Parties may wish to take into account some aspects of particular importance:

- States Parties that require the enactment of new legislation on granting immunities may wish to provide for clear-cut and indisputable conditions and prerequisites within the law.
- States Parties may wish to include in the same legislation the requirement of a written agreement signed by all parties which lays out the conditions for granting immunity in order to avoid any controversy regarding the duties and prerequisites of immunity on the one side and the rights and benefits on the other.
- While granting immunity is a powerful tool, States Parties may take into consideration the possibility of its abuse. Therefore, law enforcement agencies should try to verify the information provided before granting immunity. This would require law enforcement agencies to make every possible effort to corroborate the information submitted by the person with additional information. Moreover, States Parties may wish to provide for the possibility of withdrawing immunity in case the person has tried to mislead the law enforcement bodies. To this end, they may wish to include appropriate clauses in the

immunity agreement which specify that the agreement would be invalid if the information turns out to be false or malicious.

- Conversely, States Parties should include clear guidance on who may offer any arrangement, on what terms and at which point during an investigation.
- States Parties may wish to include appropriate clauses in any immunity agreement according to which the immunity in one case would not affect any other pending or future case.

4. Agreements or arrangements between States Parties

States Parties may wish to take into account the possibility that an offender in one State Party may be able to provide information or evidence pertinent or useful in a case under investigation in another State Party. Especially in cases of transnational corruption, the question may be how to motivate those persons to disclose their knowledge regarding a corruption offence of which they are currently not accused in the State Party in which they reside.

Consequently, States Parties may wish to consider entering into agreements or arrangements in order to find solutions which reflect the interests of both States Parties, by allowing the law enforcement agencies of one State Party to propose a mitigated sanction or even immunity in exchange for substantial co-operation with regard to a corruption offence committed in another State Party. This might require the implementation of new or the revision of existing rules on granting immunity.

States Parties may wish to consider that ad hoc agreements or arrangements may take time that may be at the expense of a continuing criminal proceeding. Thus, they may wish to consider a framework which can be adapted to individual cases, if and as necessary.

Article 38: Co-operation between national authorities

UNCAC LANGUAGE

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, co-operation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such co-operation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

(b) Providing, upon request, to the latter authorities all necessary information.

Overview

Articles 15, 21 and 23 deal with bribery of national public officials, bribery in the private sector and laundering the proceeds of crime. Early notification of any potential offence to those agencies with the powers and expertise to investigate and prosecute such offences is essential to ensure that perpetrators do not flee the jurisdiction or tamper with evidence and the movement of assets can be prevented or monitored. Many corruption cases are complex and covert; early notification by relevant public bodies or early co-operation at the request of investigative agencies is standard good practice.

Practical challenges and solutions

States Parties may wish to consider appropriate ways of establishing the requirement that senior management of public authorities and public officials understand the purpose of the article and their role in implementing it. Such an understanding may be fostered by training programmes and by regular and structured opportunities to promote co-operation between them and the investigative and prosecuting authorities. At the same time, senior management who either report to the relevant agencies, or co-operate with requests for information, where they have acted in good faith and on reasonable grounds, should be assured of no adverse consequences if the information provided does not lead to further action.

Any arrangements, legislation or regulations enacted in accordance with this article should spell out “reasonable grounds” that the offences concerned have been committed.

Article 39: Co-operation between national authorities and the private sector

UNCAC LANGUAGE

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, co-operation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention

Overview

Article 39 complements article 38 in encouraging the private sector and private individuals to do the same as public officials. Many corruption cases are complex and covert, and will not come to the attention of the relevant authorities or their investigation would be frustrated without the co-operation of private sector entities, especially financial institutions, as well as private citizens. In particular, early notification by relevant private sector bodies or early co-operation with investigative agencies is important to the identification and safeguarding of potential evidence and the initiation of inquiries. Moreover, the role of the financial institutions – or those institutions involved in high-value commercial activity – is central to the effective prevention, investigation and prosecution of offences established in accordance with the Convention. While financial institutions will have obligations to report suspicious activity or transactions, this should not be seen as the limit to co-operation where an institution has suspicions about other activities, such as opening of accounts or other activity.

Challenges and solutions

States Parties should ensure that private sector entities understand the purpose of the article and their role in supporting the Convention. Legal persons or senior management and staff who either report to relevant law enforcement agencies, or co-operate with requests for information should, where they have acted in good faith and on reasonable grounds, have the assurance of confidentiality and, where the allegations do not lead to an investigation, should further enjoy protection from civil suits and claims for damages from those involved in the allegations.

States Parties will need to be specific about which agencies should receive reports, and in which form (including the nature of supporting information or documentation). They should also explore means to promote a degree of reciprocity between the investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, in terms of the value of the information provided. It might also be productive to involve the private sector, in particular financial institutions, in developing standards for the format and contents of material provided (issues discussed in more detail in article 14).

Article 40: Bank secrecy

UNCAC LANGUAGE.

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

Overview

Protecting banking information has been a long-established tradition in the banking industry. At the individual level, the confidentiality due by a bank to its clients is widely considered part of the right to privacy and, more recently, to data privacy. In some jurisdictions, bank confidentiality also amounts to personal security protection, to prevent extortions or kidnappings. At the corporate level, it prevents abuse of unfair competition or antitrust laws. Translated to a public policy level, a sound banking system is based on trust and trust is partially achieved by managing relationships in a confidential manner.

All States Parties continue to a greater or lesser extent, often defined in legislation, the authority and obligation for banks to refuse to disclose customer information to private third parties and to require proper legal authority to allow specified access by public authorities. In many States Parties money-laundering reporting arrangements now amend the levels of secrecy and article 40 addresses wider issues concerning criminal investigations.

States Parties differ with regard to the protection afforded by bank secrecy laws. In most States Parties, bank secrecy is an important aspect of the contractual relationship between the bank and the client and is therefore treated as a private law issue and enforced through the civil remedies applicable to breach of contracts. In other States Parties, the protection of banking information was elevated from a mere contractual relationship to the status of a matter of public interest. Consistently, these jurisdictions have made the breach of bank secrecy a criminal offence.

States Parties are required in article 40 to remove any obstacle that might arise from protective laws and regulations to domestic criminal investigations into the offences established under the Convention. This is already acknowledged by the Convention's requirements on suspicious transaction reporting and the recommended establishment in all States Parties of an FIU. At the same time, the technological capacity of the international banking system makes it significantly more amenable to transnational financial movements rather than States Parties' agencies to monitor and investigate such movements. The article seeks to correct the balance by ensuring that bank secrecy provisions are amended in order to provide information to different domestic law enforcement agencies to effectively fight corruption crimes and to be able to act as expeditiously as those they are investigating.

Challenges and solutions

Effective implementation of article 40 would require an assessment of a range of issues.

1. Who has authority to overcome bank secrecy, under what circumstances and for what purposes?

Deciding which agencies would be empowered to have access to banking information depends on several factors and this is the reason why legislation differs from country to country on this matter.

One important factor is how the crime prevention and control policy is organised in each country and how its priority compares to the importance that bank secrecy plays in the culture and economy of the country. At the minimum, judicial authorities, including prosecutors, acting directly or upon judicial warrant must have access to bank information. The contrary would not be in compliance with article 40.

However, given the role banking information plays as evidence in corruption cases and the laundering of its proceeds, States Parties may consider designing a system for other law enforcement agencies accessing banking information; such an approach is warranted also by articles 14 and 58. In designing such a system, many other factors may be taken into account: the general institutional framework and the legal tradition of the country, the mandate of the agencies concerned and their degree of independence, as well as the skills that officials possess and the existence of adequate safeguards with respect to the responsible use of the information (e.g. preventive controls, sanctions for breaches of confidentiality).

The following is an indicative list of law enforcement agencies that may be authorised to have access to bank information directly or on the basis of a judicial order. In each case, some restrictions on the uses of the information according to regular practices of some jurisdictions are also noted:

- investigative anti-corruption bodies, like those mentioned in article 36 of the Convention, whenever they have authority to perform preliminary investigations, or have legal standing to file criminal reports or to act as an accusing party. Some jurisdictions authorising these bodies to access bank information restrict its use to evidence in a criminal case;
- FIUs empowered to investigate money-laundering offences. Many jurisdictions restrict the use of the information obtained by an FIU to evidence in a money-laundering case or to support a confiscation order in an administrative procedure governed by anti-money-laundering laws;
- taxation and/or customs authorities provided that according to the domestic law tax evasion or violation of customs regulations are criminal offences and the information obtained is not passed on to other agencies;
- police;
- audit institutions;
- parties to the criminal proceedings and/or bailiffs, upon judicial order;
- central banks, whenever they have authority to perform preliminary investigations, have legal standing to file criminal reports, or to act as an accusing party.

Systems restricting the use of information obtained by each agency to its own specific duties – and prohibiting passing it to other agencies – have resulted in an excessive burden for financial institutions, usually facing the pressures and costs of producing the same information several times for different agencies.

2. What is procedurally required to lift bank secrecy?

One obstacle that could be posed by bank secrecy to domestic investigations may arise from procedural issues. While in many jurisdictions it is substantially possible to overcome bank secrecy, the procedural requirements may be so cumbersome as to virtually render this possibility null.

Depending on the agency in question, and the authorised use of the information, States Parties vary on what they require procedurally for access to banking information. In some jurisdictions, a law enforcement order suffices. In others, an authorisation from the regulator or supervisor is

required. In stricter jurisdictions, a judicial order is the only valid authority to lift bank secrecy. Obviously, the standards for obtaining such authorisations vary depending on the authority in question.

3. Automatic disclosure of the information, or upon request

States Parties may wish to consider whether banks and other financial institutions must disclose certain information automatically to designated authorities administering databases, or if secrecy should be lifted only upon administrative or judicial requests. A mixed system may be implemented as well, whereby transactions exceeding a certain threshold or raising suspicion are disclosed routinely.

In the case secrecy is lifted upon administrative or judicial requests, States Parties would have to decide whether to provide direct access to authorised law enforcement agencies through a centralised database or a central institution, or indirectly, through a judicial order. For example, States Parties may consider whether to provide direct access to investigating authorities of the suspicious transactions reports that financial information units receive in connection with their money-laundering control functions.

In taking this decision, States Parties may balance the advantages of saving time in criminal investigations, with entrusting certain control into the hands of independent authorities like the judiciary, which would usually determine whether the requested information is relevant to the case and whether the importance of the information is such that banking secrecy may be lifted.

A review of administrative feasibility and the capability of information systems should be taken to ensure that the procedures are not so burdensome and time-consuming as to act as impediments to access to bank information.

A very practical but common obstacle to domestic investigations is the lack of timely response from banking institutions to requests for information. When the request is made by an authorised agency, in many instances the requesting agency needs to resort to a judicial proceeding to enforce its order. In some jurisdictions, this may create unnecessary delays in the investigative process.

A more effective system should also count on a system of sanctions for non-compliance with authorised agencies: fines, interventions or simplified search and seizure procedures may be considered in this regard.

4. Use of centralised databases

A useful way to avoid some of the mentioned problems and improve domestic investigations is by resorting to a centralised database with levels of access depending on the agency and permitted uses.

Centralised databases can be administered either by central banks, tax authorities or FIUs, having the advantage of saving time in the gathering of the information. The absence of centralised databases can be time-consuming as the process is likely to be conducted “manually”, especially when the information is needed at the early stages of an investigation and, thus, it may take months to gather all the information from the different sources.

A parallel or alternative measure to databases is to implement e-government tools to send the information protected by adequate safeguards. In that case, personal data protection legislation may be reviewed in order to ensure the feasibility of such an approach. In some jurisdictions, banking records cannot be transmitted through information systems without an express authorisation of the data owner.

5. The content of a request

The requirements for the content and form of a request will usually depend on the existence of databases and automatic disclosure systems. When the latter is available, States Parties tend to restrict the number of authorised agencies to which to address requests as well as subject the request to a certain degree of suspicion. Provided that there is legal authority or that the request is supported by sufficient grounds from the investigation, the request may include close relatives or persons with whom the account holder has made certain transactions.

When databases or automatic systems are not available, States Parties may allow wide and open requests concerning any bank account and/or investment of a given natural or legal person. Other limitations may arise from the degree of detail the request may have in order for the bank to identify the bank account holder or its beneficial owner.

Banks may be responsible for gathering information from their branches and local subsidiaries, if the requesting agency does not have such information. In addition, banks may be responsible for identifying all the investments – not only accounts – used by a given individual or legal person and also for identifying beneficial owners as opposed to “account holders”. The latter will diminish the impact of the misuse of corporate vehicles. Thus, for domestic purposes, the name of the individual and his/her ID, or the registered name of the legal person may in principle suffice for identifying banking movements within a given jurisdiction.

6. Implementation of the preventive principles of “know your customer and know your beneficial owner”

The other side of the same problem is a defective implementation of the mandatory provisions of articles 14 and 52 and especially of a sound “know your customer and beneficial owner” (KYCBO) system.

A well-enforced KYCBO system counteracts the problems arising from the use of offshore corporate vehicles, or incomplete client records. Therefore, States Parties should balance between the allowed uses of those legal entities and the degree to which a financial institution is required to understand its clients’ businesses. When allowing foreign corporate vehicles, a sound policy regarding beneficial owners, authorised persons to provide and withdraw funds, as well as an understanding of the business or uses of the entity, should be in place.

Information that authorities may need to obtain from banks for specific cases includes information about the account holder (first, last and middle names, social insurance number, taxation identification number, date of birth, current and former addresses, current employer), signature cards (e.g., to verify the control of a legal entity, to establish links between seemingly unrelated taxpayers) and financial information. This would include sources of income, account balances, account numbers, money transfers, deposits and withdrawals to verify whether there is unreported legally or illegally earned income; determine if a taxpayer has claimed false deductions; determine whether there are back-to-back loan transactions or sham transactions; obtain answers to questions about the origin of funds; and identify bribes and suspicious payments to foreign public officials.

7. Bank secrecy and professionals

Finally, when implementing this provision, States Parties should be aware that bank secrecy may not only apply to customers under investigation but also to the activities of the professional advisers who may claim the benefits of bank secrecy in relation to their activities that may be linked to those of their clients under investigation. Professional secrecy can be an issue, in particular when such secrecy is not interpreted in a functional way. For example, in some States Parties the client-lawyer privilege applies only to information which is exchanged in the specific context of the legal interests of the client; if the lawyer acts as a financial intermediary, the professional secrecy does not apply. States Parties allowing professionals with privilege to hold accounts in the name of their clients should ensure that such provisions would not impede the access of authorised agencies to banking information.

Article 41: Criminal record

UNCAC LANGUAGE

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

Overview

Corruption offences are often committed by repeat offenders. Moreover, in times of increasing international business, corruption acts and corruption offenders cross borders frequently, sometimes under different corporate names. The Convention brings together the consequences of both aspects in one provision. Article 41 suggests that States Parties take into consideration any previous conviction in another state of an alleged offender for the purpose of using such information in criminal proceedings.

Practical challenges and solutions

Article 41 is a non-mandatory provision which suggests that States Parties evaluate whether they regard it as appropriate to take into consideration previous convictions in another state. When deciding on the implementation of the article, States Parties may bear in mind that most states provide for criminal registers which enable competent authorities to take into account previous convictions when deciding on sentences and legal consequences which are adequate and have the necessary preventive effects. Many states regard these means as necessary to guarantee an adequate sentencing to reflect the seriousness of the conduct of the accused and/or other specific circumstances linked to it, taking into account the sentence limits and the appropriate treatment of that person, as prescribed in the law. The criminal record may reflect a tendency to act unlawfully and to commit offences repeatedly, which could affect the specific sentencing. Moreover, paying attention to the criminal record could have preventive effects. Since States Parties may consider that recidivists could constitute a latent danger, they might adjust their legal consequences to this danger by imposing specific rehabilitative sentences on such perpetrators or exclude those individuals from the possibility to hold an office or perform a function which could enable them to commit further corruption offences (see also article 30, paragraph 7, of the

Convention). Finally, States Parties may consider that the consideration of convictions in another state is an adequate response to the mobility of offenders.

Article 41 provides for a wide scope in terms of the convictions abroad as it speaks of “any previous conviction”. Consequently, States Parties may wish to take into account any conviction abroad, in particular for serious offences. In fact, the wide scope may be seen as beneficial since conclusions with regard to the conduct of the perpetrator and his or her willingness to abide by the law can be drawn. However, States Parties may wish to consider relating the weight of the previous conviction on the specific sentence to the type of offence, the severity of the damage, and the time that has passed since the previous conviction.

States Parties should bear in mind that the term “conviction” refers to a conviction abroad which is no longer subject to an appeal (see the Interpretative Note accompanying article 41, A/58/422/Add.1, paragraph 40).

States Parties may wish to enable foreign states to access their criminal registers both legally and technically. With regard to the first, States Parties should evaluate whether their law allows the international transfer of data such as criminal records, and revise it accordingly. With regard to the technical side, States Parties may wish to designate an authority that is in charge of the international exchange of information. It could be advisable to assign this task to the authority which is generally in charge of international co-operation in criminal matters such as mutual legal assistance.

Article 42: Jurisdiction

UNCAC LANGUAGE

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

- *The offence is committed in the territory of that State Party (territorial); or*
- *The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed (deemed extended jurisdiction)*

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

- *The offence is committed against a national of that State Party (passive personality); or*
- *The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory (active personality); or*
- *The offence is one of those established in accordance with article 23, paragraph 1(b)(ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1(a)(i) or (ii) or (b(i), of this Convention within its territory; or*
- *The offence is committed against the State Party (protective personality).*

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to co-ordinating their actions.

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Overview

UNCAC addresses international co-operation in, essentially, four ways: mutual legal assistance; international confiscation/forfeiture co-operation; miscellaneous aspects of international co-operation; extradition.

Any consideration of international co-operation must have in mind the jurisdictional provisions of UNCAC.

A central goal of the Convention is to promote international co-operation in the fight against corruption (see article 1(b) of the Convention). Thus, it includes provisions on bribery of foreign public officials, as well as detailed and ad hoc articles on different modalities of international co-operation in criminal matters, such as extradition, mutual legal assistance, joint investigations and, as a major breakthrough, cross-border asset recovery. On the other hand, article 4(1) stresses that States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of states and that of non-intervention in the domestic affairs of other states. More specifically, article 4(2) states that nothing in this Convention shall entitle a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State Party by its domestic law. Extradition, mutual legal assistance and asset recovery are forms of international co-operation in which the States Parties involved assist each other in supporting investigation, domestic prosecution or other judicial proceedings, but presuppose that domestic legislation has dealt with jurisdictional issues in an appropriate and functional manner.

Practical challenges and solutions

Article 42, paragraph 1, stipulates, as a mandatory provision, that States Parties establish jurisdiction according to the “territoriality principle”, namely jurisdiction for offences committed in their territory or on board a vessel flying the flag of the State or on board an aircraft registered under the law of the State.

Moreover, article 42, paragraph 3, mandates that a State Party should establish its jurisdiction over the corruption offences when the alleged offender is present in its territory and it does not extradite such person solely on the grounds that he or she is one of its nationals. This obligatory requirement is linked to the requirement set forth in article 44, paragraph 11, of the Convention

to initiate domestic prosecutorial process in lieu of extradition if the latter was denied on the grounds of nationality.

Article 42, paragraph 2, includes the non-mandatory requirement that States Parties may establish jurisdiction according to the “active or passive personality principle”, namely jurisdiction for offences committed by or against their nationals respectively. In addition, it urges States Parties to consider establishing jurisdiction for cases of participation, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the money-laundering offences if the participatory act has been committed abroad with a view to committing the main act on the territory of the State Party. Finally, it includes the non-mandatory requirement for States Parties to establish jurisdiction according to the “protection principle”, namely jurisdiction over offences committed against the State Party.

Moreover, article 42, paragraph 4, includes the non-mandatory requirement for States Parties to establish its jurisdiction over corruption offences when the alleged offender is present in its territory and it does not extradite him or her on grounds other than that of nationality.

Finally, article 42, paragraph 6, acknowledges, without prejudice to norms of general international law, any exercise of criminal jurisdiction by a State Party according to its domestic law.

Article 42, paragraph 5, requires that the competent authorities of States Parties, as appropriate, consult one another with a view to co-ordinating their actions, in the case that a State Party has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct.

States Parties may wish to pay attention to the following issues:

- the offence is committed in the territory of the State Party;
- the offence is committed against a national of the State Party;
- the offence is committed by a national of the State Party or a stateless person who has his or her habitual residence in its territory;
- the offence is one of those established in accordance with article 23, paragraph 1(b)(ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1(a)(i) or (ii) or (b)(i), of this Convention within its territory;
- the offence is committed against the State Party;
- to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals;
- to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her on other grounds.
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1. The offence is committed in the territory of the State Party

Article 42(1)(a) provides for States Parties to have jurisdiction over an offence established in accordance with the Convention when the offence is committed in its territory irrespective of the nationality of the offender. Even though the majority of States acknowledge the principle of territorial jurisdiction, the application differs substantially.

States Parties may wish to note that there is no single model of implementation. Some states consider that the offence has been committed in their territory when the perpetrator has acted in that territory. Other states implement the principle of territoriality according to a wider model: territorial jurisdiction can be exerted when at least a part of the crime has been carried out in the territory of the state. Thus, a domestic act of participation can be sufficient even when the main act of corruption has been committed abroad. Moreover, according to a widely accepted view, known as the “doctrine of ubiquity” or “objective territoriality”, states may exert jurisdiction if the crime has effects on their territory. Accordingly, they may have territorial jurisdiction in a case in which the domestic market or the domestic competition is distorted by an act of corruption which has taken place abroad.

2. The offence is committed against a national of the State Party

States Parties may consider establishing jurisdiction for offences committed against their nationals irrespective of the place where the crime has taken place. This passive version of the principle of nationality is closely related to the principle of protection. While the latter aims at the protection of the state itself, the former refers to the protection of citizens of the state.

Some States follow the broad model of implementation covering all corruption offences with effects on the territory and its citizens, while others extend this application to cover cases in which a national has been harmed abroad. States which opt for a narrower implementation of the territorial principle may consider that the implementation of the passive-nationality principle is necessary in order to provide for jurisdiction in cases in which a national or a national corporation has been harmed by a foreign act of corruption.

States Parties may consider implementing the term “national” widely, hence encompassing citizens, as well as legal persons incorporated in their territory, in order to provide for a comprehensive protection.

3. The offence is committed by a national of the State Party or a stateless person who has his or her habitual residence in its territory

States Parties may decide to establish jurisdiction according to the principle of active personality, although they are not required to do so. When deciding on implementing this provision, States Parties may need to recognise the approach necessary to deal with contemporary corruption. Thus, in order to achieve and safeguard a law-abiding attitude of their citizens and to promote comparable standards of behaviour at home and abroad, States Parties may wish to implement jurisdiction according to that principle. Consequently, they may exert jurisdiction over their citizens irrespective of the place they might commit a corruption offence. The same goes for stateless persons who have their habitual residence in the territory of a State Party and hence cannot be extradited.

In deciding whether to establish nationality jurisdiction over the offences in the Convention, States Parties need to be mindful that the offence of bribing a foreign public official in article 16 will normally take place abroad, and thus the effective prosecution of this offence will likely only be possible if nationality jurisdiction can be applied to it.

With regard to legal persons there are a number of issues to be considered. First of all, States Parties may consider implementing the term “national” in a manner which would encompass national legal persons. Second, States Parties may take note of two models of implementation in relation to the nationality principle. Most States Parties exert jurisdiction according to the principle of nationality when a national legal person is liable for a corruption offence. A corporation may be regarded as national, if it has been founded according to the national law or if the corporation resides in the territory. Other States Parties relate the question of jurisdiction to the nationality of the acting natural person, not to the nationality of the legal person. Thus, these states would require that the person who has acted corruptly within the structure or in favour of the legal person is one of its citizens. However, this may cause serious legal loopholes since in the crucial cases of corporate liability investigative agencies may not be able to identify the individual instigator or perpetrator. Moreover, States Parties may consider that the principle of liability of legal persons links legal consequences to the legal entity itself, hence abstracting from individual persons and their nationality.

4. Jurisdiction over preparatory money-laundering offences

States Parties may consider establishing jurisdiction for cases of participation, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the money-laundering offences comprised by article 23, paragraph 1(a)(i), (ii) or (b)(i) even if the participatory act has been committed abroad while the main act has been committed, or is intended to be committed, in the territory of the State Party. Thus, the article implements the Convention’s call for international co-operation in the fight against money laundering by ensuring jurisdiction without legal lacunas.

States Parties may bear in mind that according to a wide model of implementation they might be able to exert jurisdiction in those cases on the basis of the territorial principle.

5. The offence is committed against the State Party

Article 42(2)(d) provides for States Parties to protect themselves and their institutions by establishing criminal jurisdiction. Again, this provision is related to the question according to which model of the territoriality principle States Parties implement. Thus, according to the wide model of implementation of the territorial principle, covering all offences affecting the territory, a national provision implementing the protection principle would have a rather narrow area of application.

States Parties that provide for a narrow interpretation of the territoriality principle may consider implementing the provision of the protection principle in order to avoid any jurisdictional loophole and in order to protect their institutions and proceedings crucial for the welfare of their citizens.

Moreover, States Parties have to consider the relationship with the principle of passive personality. States Parties may consider that the model of passive protection covers offences that are committed against the state itself. In this case, the principle of protection would have a narrow area of application.

Those States Parties whose principle of nationality would not cover those cases may wish to close legal loopholes by implementing the protection principle. They may take note of two possible ways of implementation:

- they may consider that an offence is committed against the State Party when the State itself, that is, its institutions, public entities and public corporations, is affected. Thus, States Parties may regard that offences that affect their citizens are not covered by this provision, but are rather covered by article 42(2)(a);
- on the other hand, a State Party may consider that an offence has been committed against it when one of its public officials has been affected. However, that would require that the public official had been affected in his or her specific role or function representing the State.

6. *Establishment of criminal jurisdiction on the basis of the principle “aut dedere aut judicare”*

According to the principle of *aut dedere aut judicare*, States Parties must ensure domestic prosecution in the case that an alleged offender cannot be extradited. The initiation of domestic criminal proceedings in lieu of extradition should be based on the existence of an appropriate jurisdictional basis and the Convention provides for it, either in a mandatory manner when extradition is denied on the grounds of nationality (see article 42, para. 3) or in an optional way (see article 42, para. 4). Once these provisions are effectively implemented at the domestic level, courts and law enforcement agencies of States Parties are provided with the necessary legal framework to avoid situations in which an alleged offender can neither be prosecuted nor extradited. Particularly with respect to the non-extradition of nationals, States Parties may take into account that offences of their nationals committed abroad might be covered by the principle of active nationality, so that their law enforcement agencies could exert jurisdiction according to this provision. However, they may bear in mind that the principle of nationality may not cover cases in which an offender has received nationality after the commitment of an offence abroad. In order to cover such cases, States Parties may consider implementing article 42(3).

Commentary on Article 42

UNCAC addresses international co-operation in, essentially, four ways: mutual legal assistance; international confiscation/forfeiture co-operation; miscellaneous aspects of international co-operation; extradition.

Any consideration of international co-operation must have in mind the jurisdictional provisions of UNCAC.

The OECD Convention approaches jurisdiction from the traditional territorial basis but seems to encourage a wider construction on jurisdiction under Article 4(4) of the Convention and provides:

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

However the mandatory provisions are contained in Article 4(1) and (2) and require States Parties to ensure that:

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory (territorial)
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles. (active personality)

A State may assert criminal jurisdiction in one or more of the following ways:

- (a) Territorial
- (b) Active personality (nationality of offender)
- (c) Passive personality (nationality of victim)
- (d) Protective personality (National security)
- (e) Universal jurisdiction

The first two bases of asserting jurisdiction have been the bedrock of common law systems, save for piracy which has long been an exception to the territorial rule for criminal jurisdiction under English law – *“whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own national wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but “hostis humani generis” and as such he is justiciable by any State anywhere ...*⁵⁰.

However, the idea of territorial jurisdiction has been subject to revision over the centuries and in 1927, the Permanent Court of Justice in ‘The Lotus case’ observed that:

“Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty ...”

The position under common law, however, remained largely territorial unless jurisdiction was expressly extended by statute. This is in contrast to civil law jurisdictions where the concept of jurisdiction is not seen as a concept separate to and from the aspect of statehood or indeed international law.

Extra-Territorial Jurisdiction

A number of inroads have developed through both common law and statute which allow courts to consider acts or omissions which are not committed within the territory, hence extending the scope of criminal jurisdiction. This is otherwise referred to as “extra-territorial jurisdiction”.

The common law recognised and developed the limits of territorial jurisdiction in the Privy Council decision in **Liangsiriprasert v Government of the United States of America** [1991]:

⁵⁰ Viscount Sankey L.C in Piracy Jure Gentium [1934] AC 586 PC

“crime has ceased to be largely local in origin and effect. Crime is now established on the international scale and the common law must now face this new reality ... there is nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the criminal offences in England ...” per Lord Griffiths.

Extra-territorial jurisdiction can be asserted on the following grounds:

- Active personality (nationality of offender)
- Passive personality (nationality of victim)
- Protective personality (National security)

Active personality (nationality of offender)

In common law systems exceptions to the basic principle of territoriality are based on the principle of active personality and are normally provided by statute.

Examples from the UK are as follows:

Offences Against the Person Act 1861 murder or manslaughter of British or foreign victim outside our territory can be tried if offender is a British national.

Anti-terrorism, Crime and Security Act 2001 Proceedings for an offence committed under section 47 or 50 outside the United Kingdom may be taken, and the offence may, for incidental purposes, be treated as having been committed, in any part of the United Kingdom. However both section 47 and 50 applies to acts done outside the United Kingdom, but only if they are done by a United Kingdom person.

International Criminal Court Act 2001

Most civil law systems in contrast assert criminal jurisdiction on this basis. The rationale being that the state exercises jurisdiction over its own nationals wherever they may commit an offence. Equally, civil law systems would recognise passive personality; but until recently this was not the case in respect of common law systems.

Passive personality (nationality of victim) and Protective personality (national security) as a means of asserting criminal jurisdiction are developing within common law systems particularly in the light of the attacks on nationals by terrorists groups, as illustrated in the extradition matter of **Al Fawwaz & others** [2001] UKHL 69 (an extradition request from the USA following the US Embassy bombings in East Africa).

The application of the protective personality basis was demonstrated in a recent United States anti-corruption case, **Statoil** case [2006]: On 13 October 2006 Statoil ASA agreed to a 3 year deferred prosecution agreement with US Authorities having admitted it had violated US law on bribery of foreign officials, bribes had been used to induce an Iranian official to help Statoil obtain a contract to develop Iranian oil & gas projects. No ‘active’ conduct took place in the United States and the company is registered in Norway where it had already tendered a guilty plea on the same conduct. The United States asserted jurisdiction on the basis that US instrumentalities were used to transfer the bribe payments and Statoil was quoted on the NY Stock Exchange, thereby asserting jurisdiction arguably protective and/or ‘extended’ active personality. FCPA 1977 grants jurisdiction where the legal person is a US issuer.

As crime transcends national boundaries, the United Nations Conventions have sought to reflect this trend through mandatory (where appropriate) and discretionary measures to extend extra-territorial criminal jurisdiction. The rationale is to give effect to the principle of 'extradite or prosecute' [*aut dedere aut judicare*].

Therefore in implementing these Conventions, member states must extend their jurisdiction provisions so as to give effect to the intent of the international community and to provide a truly international response through the denial of safe havens.

For the purposes of UNCAC, the relevant provision is Article 42, as set out above.

Universal Jurisdiction

In contrast, States have, however, recognised and accepted extended jurisdiction in relation to those crimes that were regarded as so abhorrent to mankind that they deserved international condemnation and censure such that any State could assert criminal jurisdiction over individuals wherever they were found. Universal jurisdiction however only applies to a narrow range of offences such as piracy, grave breaches of the Geneva Conventions, torture and slavery. The list is limited and restricted to offences of grave concern.

Universal jurisdiction means exactly that – the power of the State to try an offender irrespective of the nationality of the offender or where the crime occurred; so at first it would appear that no nexus is required between the offender and the State asserting jurisdiction. The International Court of Justice in the **Arrest Warrant case** made it clear that a nexus was required and universal jurisdiction could not be asserted if the offender was not within its territory or there was no other nexus with the State. Hence there are practical limitations to what amounts to universal jurisdiction. The matter has however been reopened before the International Court of Justice in **Certain Criminal Proceedings in France (Republic of the Congo v. France)** when the issue will be revisited.

CHAPTER IV: INTERNATIONAL CO-OPERATION

Article 43: International Co-operation

UNCAC LANGUAGE

1. States Parties shall co-operate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

2. In matters of international co-operation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties

Overview

This Article, and indeed Chapter IV as a whole, is a recognition that ease of travel, the international financial sector and greater ease in many regions of crossing borders provide more opportunity for offenders and their assets to avoid detection and prosecution, and that corruption and economic crimes have become increasingly transnational in both execution and effect. Serious offenders have an increased chance of escaping prosecution and justice. The otherwise comprehensive framework of UNCAC and its provisions on prevention, detection, investigation, prosecution, and asset recovery will, therefore, count for little without effective international co-operation.

The effect of Article 43, paragraph 1 is that States Parties must co-operate in criminal matters in accordance with the measures and procedures set out in Chapter IV. The Chapter addresses extradition, mutual legal assistance, the transfer of criminal proceedings, and co-operation between law enforcement bodies, including joint investigations and the various forms of proactive and covert deployment referred to collectively as special investigative techniques. In addition, States Parties should consider concluding agreements or arrangements for the transfer of sentenced persons.

As a note of caution, however: Chapter IV must be read in conjunction with the provisions for asset tracing and recovery set out in Chapter V.

There needs to be a significant level of working partnership between States Parties that should lead to more effective, responsive and prompt international co-operation to combat corruption. Practical experience has shown that fostering trust and confidence in foreign legal systems was a necessary prerequisite for deepening and expanding such co-operation.

Article 43, paragraph 1, requires States Parties to put in place appropriate and effective systems and mechanisms that allow for efficient international co-operation against corruption in accordance with articles 44-50 of the Convention. This is, first of all, in line with one of the fundamental objectives of the Convention “to promote, facilitate and support international co-operation ... in the prevention of and fight against corruption” (article 1(b) of the Convention). The scope of international co-operation in criminal matters, as foreseen in Chapter IV of the Convention, does not only cover “traditional” forms of co-operation, such as law enforcement co-operation, extradition and mutual legal assistance, but also extends to other relatively new options in transnational criminal justice, including transfer of proceedings in criminal matters,

assistance in establishing joint investigative bodies and co-operation for the appropriate use of special investigative techniques.

Paragraph 1 of article 43 also enables States Parties to expand their co-operation to cover not only criminal matters, but also civil and administrative matters relating to corruption. The explicit reference to the possible use of international co-operation mechanisms in relation to investigations of and proceedings in civil and administrative matters is a significant development. The civil law process, on the one hand, has always been seen as complementary to criminal proceedings. Civil litigation for claims are usually based on property or tort law and primarily focus on compensation for harm caused by criminal conduct. In addition, due to challenges arising from the nature of, and requirements foreseen in, criminal proceedings, many practitioners view the option of the civil process as a viable alternative in certain circumstances to address corruption, especially in cases where criminal prosecution cannot be pursued (e.g., cases of death, absence, immunities or generally inability to bring defendants before the criminal court). Furthermore, article 43, paragraph 1, should be considered in conjunction with article 53 of the Convention which enables the adoption of measures for the direct recovery of property acquired through corruption-related offences by requiring States Parties to, inter alia, ensure that other States Parties may make civil claims in their courts to establish title to, or ownership of, such property.

On the other hand, the Convention enables the inclusion of administrative proceedings relating to corruption within the scope of its provisions on international co-operation. By doing so, mutual assistance mechanisms may be applicable with regard not only to criminal matters and proceedings, but also to proceedings of an administrative nature which are related to corruption. Such proceedings include, for example, cases brought by administrative authorities in respect of acts which are punishable under the national law of both the requesting and requested States Parties, in which the decision to be made may give rise to proceedings before a criminal court having jurisdiction over offences of corruption. This is of relevance where both criminal acts and regulatory infringements/violations are intermingled or where a legal person liable to administrative sanctions is involved in offences covered by the Convention (see article 26 of the Convention). For comparative purposes, it should be noted that the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001) extends its scope to cover administrative proceedings that may give rise to proceedings before a court having jurisdiction in particular in criminal matters (article 1, para. 3, of the Convention). A similar provision is contained in the 2000 European Union Convention on Mutual Assistance in Criminal Matters (article 3, para. 1).

International co-operation has traditionally been governed by treaties or agreements at the bilateral, regional and international levels. In some cases, co-operation may be possible without any such treaty-based framework and on the basis of national legislation, reciprocity or comity. Questions regarding the legal basis for co-operation actually vary depending on the practice followed by national jurisdictions, and in some cases depending on the subject matter involved.

Even where there is a will to engage in meaningful international co-operation to combat corruption, there are many challenges and difficulties in practice that need to be addressed in order to render such co-operation efficient and effective. Such challenges may include the absence of adequate and appropriate legal framework to help States Parties implement their treaty obligations, the existence of overly complex, cumbersome and formalistic procedures that impede the provision of assistance in an expeditious manner, as well as the lack of resources or experienced personnel and the limited institutional capacity to foster co-operation.

States Parties are called to take into account all the necessary legal, procedural and practical issues that may arise in order to implement article 43, paragraph 1. What is clear is that this provision is intended to be broad in its scope and application. Practitioners and authorities involved in related issues in States Parties should bear in mind that the spirit and guiding principles of article 43, paragraph 1, as well as article 1(b) of the Convention, should run through the extensive provisions of its Chapter IV on international co-operation and enable their effective implementation through their broad and flexible interpretation.

1. The specific issue of determining dual criminality

Article 43, paragraph 2, addresses the issue of determination of the “dual criminality” requirement, which has traditionally been treated as a basic principle of international co-operation, particularly in the field of extradition. According to that principle, States Parties are required to extradite fugitives or provide assistance in relation to offences committed outside their jurisdiction on the condition that those acts are criminalised by their own legislation. Focusing particularly on extradition law and practice, the developments in treaty-making practice demonstrated an attempt to ease difficulties associated with the application of the double criminality requirement. Thus, general provisions were inserted into treaties and conventions adopting a “list-of-offences” approach, which, instead of listing acts and requiring that they be punished as crimes by the laws of both states, simply enabled extradition for any conduct criminalised and subject to a certain level of punishment in each state. Establishing double criminality in this manner obviates the need to renegotiate a treaty or supplement it if both states pass laws dealing with a new type of criminal activity, or if an existing list in an extradition treaty inadvertently fails to cover an important type of criminal activity punishable by both states.

Article 43, paragraph 2, takes this further by requiring that, whenever dual criminality is necessary for international co-operation, States Parties must deem this requirement fulfilled, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties, regardless of the legal term used to describe the offence or the category within which such offence is placed. By making it clear that the underlying conduct of the criminal offence neither needs to be defined in the same terms in both States Parties nor does it have to be placed within the same category of offence, the Convention introduces an explanatory clause to reinforce a generic double criminality standard. In doing so, it explicitly minimises the significance of the particular legislative language used to penalise certain conduct and encourages a more pragmatic focus on whether the underlying factual conduct is punishable by both contracting states, even if under differently named statutory categories.

This is an attempt to remove some of the reluctance to international co-operation where the requested State Party does not fully recognise the offence for which the request was submitted. Although some requested States Parties may seek to establish whether they have an equivalent offence in their domestic law to the offence for which international co-operation or other legal assistance is sought (punishable above a certain threshold) the Convention clearly demands that a broad approach to this issue is taken by the requested States Parties. It should be noted that the Model Treaty on Extradition, adopted by General Assembly Resolution 45/116 and subsequently amended by General Assembly Resolution 52/88, includes a similar provision (article 2, paragraph 2), which provides guidance to ensure that, in determining the application of the double criminality requirement, the underlying conduct of the offence will be taken into account regardless of the denomination or categorisation of the offence under the law of the requested and the requesting States Parties.

2. The involvement of a central – or other competent – authority

While the creation of a functional domestic legal and institutional framework with a centralised procedure is increasingly seen as a good practice in overcoming a number of the challenges encountered, the need for and the role of a central (in mutual legal assistance cases, see article 46, paragraph 13, of the Convention) – or other competent (for other forms of international co-operation, including extradition) – authority and its interaction both with domestic authorities and authorities of other States Parties needs to be clearly defined. For example, it would be wise to clarify whether such central/competent authorities should be involved at all stages of international co-operation and whether they should receive and execute requests or transmit them to the responsible authorities/bodies for execution. In general, the delineation of the duties of those authorities is necessary for ensuring consistency in international co-operation practice and for avoiding, to the extent possible, creating another administrative level of bureaucracy, without any value added. In determining appropriate policy and procedures that facilitate more effective co-operation under article 43, paragraph 1, States Parties should assess whether the level of resources and expertise within their central authorities provides the necessary guarantees and safeguards for strengthening international co-operation mechanisms under the Convention.

Particularly with respect to anti-corruption investigations for which the provision of assistance from a foreign state is necessary, it may be advisable to assign central authorities to facilitate the operational contact and co-operation between those authorities handling the investigation or case, particularly where there are other proceedings or parallel investigations such as money laundering. Certainly, allowing direct dealings between the judicial/investigative authorities of different States Parties should be encouraged, especially at the initial stages of an investigation. Similarly, central/competent authorities involved in international co-operation matters could provide the operational framework and conduit for facilitating contacts and co-ordination between anti-corruption agencies and enforcement bodies of co-operating States Parties on issues falling within their competences.

3. Co-operation frameworks

As stated above, the basic requirement for States Parties set forth in article 43, paragraph 1, is to consider carefully and in the broadest sense the domestic legal and institutional frameworks for fostering international co-operation. States Parties should need to consider the adoption of new legislation or the establishment of more streamlined procedures to that effect, and in any case, to strengthen channels of communication among them with a view to affording the widest measure of assistance in investigations, inquiries, prosecutions and judicial proceedings related to corruption. Many examples of good international co-operation practice exist, such as the Southern African Forum against Corruption (SAFAC), which is the culmination of a series of round-table discussions that began in 1998 (Mashatu). Currently SAFAC membership is comprised of anti-corruption agencies in Angola, Botswana, Lesotho, Democratic Republic of the Congo, Malawi, Mauritius, Namibia, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. SAFAC allows those involved to interact in a way that offers a great deal of support in its challenges to defeat regional and international corruption (such as the SADAC Regional Anti-Corruption Programme). This issue is developed in more detail in articles 46 and 59. Another example is the Asian Development Bank – OECD Anti-Corruption Initiative for Asia-Pacific, involving 28 countries in the region. Since 2005, one of its priorities has been to overcome obstacles to effective international co-operation. To achieve this goal, it carried out an in-depth thematic review of the frameworks and practices for mutual legal assistance, extradition and asset recovery in the (then) 27 Asian and Pacific jurisdictions belonging to the Initiative. In addition, it held an international seminar on strengthening co-operation in September 2007.

4. Ways and means to ensure resources and address practical problems in the field of international co-operation in criminal matters

Even when partnership schemes and international co-operation mechanisms are in place, any investigation into a sophisticated crime such as corruption, which often encompasses transnational elements, requires particularly close and continuing co-operation between criminal justice and law enforcement agencies of the states concerned. Ensuring the availability of the necessary human and financial resources, as well as the requisite equipment and infrastructure, are likely to be a core concern for many States Parties. The requisite personnel are likely to include practitioners, lawyers, investigators and financial analysts, entrusted with the task to handle cases involving sensitive and intensive inquiries, banking and auditing techniques, informants and vulnerable witnesses. The lack of suitable personnel may even affect the ability of the State Party to draft its own enabling or effective legislation to implement the requirements of Chapter IV of the Convention.

Some States Parties may also struggle to cope with the volume of incoming requests, whether formal or informal. In order to prevent the overload of requests and the resulting burdens to international co-operation, States Parties need to consult in advance to identify proper measures that can alleviate or overcome the problem. One of these measures may be to limit the number of excessive requests by defining certain “acceptance” criteria and thresholds (by, for example, focusing on the seriousness of the crime concerned or the value of the proceeds of crime). Other difficulties relate to the costs incurred in the execution of extradition or mutual legal assistance requests, as well as the delays executing such requests, which may lead, in some cases, even to the denial of assistance. One potential remedy may be to conclude cost-sharing arrangements which would provide that the requesting State should bear the costs of, for example, translation of documents, providing personnel or equipment, hiring private lawyers, as well as costs of a substantial or extraordinary nature, such as those needed for a videoconference.

On a more systematic basis, it would be advisable for States Parties to conclude bilateral agreements or arrangements for the posting of liaison officers to the central authorities of countries in the same region or of central countries in a region or continent with which there is enough volume or value of co-operation casework for justifying the placement (see also article 48, paragraph 1(e) of the Convention). The role of liaison officers in international co-operation is to provide a direct contact with the competent authorities of the host State Party, develop professional relationships, and foster mutual trust and confidence between agencies of the two States Parties. Although liaison officers do not have any powers in the host State Party, they can nonetheless use their contacts to gather information that may be of benefit in preventing and detecting corruption-related offences and in identifying the offenders responsible and bringing them to justice. They can also use those contacts to advise the law enforcement and prosecutorial authorities of the host State Party, as well as their own corresponding authorities, on how to formulate a formal request for assistance. Once such requests are submitted, the liaison officer can then follow up on the requests in an attempt to ensure that the request is complied with successfully and in a timely manner as well as report progress or reasons for any delay. This is of particular value when the legal systems of the two States Parties differ widely.

5. Capacity-building

Article 60, paragraph 2, of the Convention calls upon States Parties to consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including training and

assistance and the mutual exchange of relevant experience and specialised knowledge, which will facilitate international co-operation between States Parties in the areas of extradition and mutual legal assistance.

Training programmes as a substantive component in these areas could focus on the applicable laws, procedures and practices with regard to investigations and prosecutions of corruption-related cases, including financial investigations, and could be carried out through a wide range of activities, such as:

- lectures and presentations by key anti-corruption players as part of regular training courses or workshops for law enforcement, prosecutors, magistrates or other judicial officers;
- organisation of national, regional and inter-regional workshops on international co-operation for judges, prosecutors, law enforcement and other relevant personnel focusing on problematic cases and the institutional and legal framework to address related issues;
- training of judges and prosecutors resulting in effective preparation and execution of requests relating to the acquisition, provision of evidence, extradition and restraint/confiscation of proceeds of corruption;
- organisation of relevant study tours for such professionals;
- introducing programmes on international co-operation as part of the curriculum for legal and law enforcement basic training;
- awareness-raising of, and training in, the criminalisation and international co-operation provisions of the Convention.

Such training should be complemented by the dissemination and wide distribution of training materials and tools providing guidance on legal, institutional and practical arrangements for international co-operation, including:

- the Model Treaty on Extradition;
- the Model Treaty on Mutual Assistance in Criminal Matters;
- the Model Law on Extradition (2004);
- the Model Law on Mutual Assistance in Criminal Matters (2007);
- the Report on Effective Extradition Casework;
- the Report on Mutual Legal Assistance Casework Best Practice.

Checklist

- Which is the legal basis used by the authorities of the State Party for handling issues of international co-operation?
- In the case of treaty-based co-operation, does the State Party use the Convention as the legal basis for submitting/executing requests for international co-operation? Has the State Party concluded bilateral or multilateral agreements or arrangements to give practical effect to or enhance the provisions on international co-operation of the Convention?
- Is there a central/other competent authority in the State Party to deal with international co-operation requests?

- Is the authority adequately equipped, in terms of expertise, financial resources and technological means to cope with requests for international co-operation?
- Are there communication channels between that authority and its counterparts in other jurisdictions to co-ordinate and find solutions on operational and practical aspects of international co-operation?

Note that:

Even if the dual criminality is not fulfilled, the encouragement is for co-operation to take place. Nevertheless, despite Article 44(2) in relation to extradition (which provides that, if their law permits it, states may grant the extradition of someone sought for a corruption offence which is not punishable under its own law) it is unlikely in practice that a state would extradite in the absence of dual criminality being satisfied.

Conversely, in relation to mutual legal assistance, article 46 9) allows for its extension in the absence of dual criminality, in pursuit of the aims of UNCAC, including asset recovery. In particular, States Parties are required to render mutual legal assistance if non-coercive measures are involved, even when dual criminality is absent. In addition, States Parties are invited to consider adopting measures as necessary to enable them to provide a wider scope of assistance pursuant to article 46 even in the absence of dual criminality (article 46(9)(c)).

Article 44: Extradition

UNCAC LANGUAGE

1. *This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.*
2. *Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.*
3. *If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.*
4. *Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.*
5. *If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.*
6. *A State Party that makes extradition conditional on the existence of a treaty shall:*

At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for co-operation on extradition with other States Parties to this Convention; and

If it does not take this Convention as the legal basis for co-operation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognise offences to which this article applies as extraditable offences between themselves.

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall co-operate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or

punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered.

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Overview

Extradition is the process by which states seek the return of fugitives; meaning the surrender of persons either accused or convicted of crimes, to the state where those crimes were allegedly committed. The practice of extradition has its roots in the idea of territorial jurisdiction; that is, a state could not prosecute or imprison a fugitive who had committed a crime in the territory of another state, as the courts of the state where the fugitive was found did not have jurisdiction over his conduct.

Historically, states entered into bilateral treaties in order to secure the surrender of fugitives. This, of course, had a limited effect, as only parties to the treaty were bound by its terms. As crime became more international in nature and travel became easier, the international community (acting either through the United Nations General Assembly or regionally) adopted a number of multilateral treaties. The advantage of multilateral treaties is that a number of countries may ratify the treaty and every State Party is then fully aware of the obligations of each party and any reservations/declarations they may enter. A classic example of a multilateral treaty is the 1957 European Convention on Extradition (the "ECE"), which is a regional arrangement.

The United Nations-led arrangements have at their core the idea of extending jurisdiction so that states may assert jurisdiction over crimes which were neither committed on, nor necessarily had any direct effect upon, their territory. These arrangements apply particularly to crimes that affect the international community, for example, hostage-taking, torture, drug trafficking and hijacking aircraft. These United Nations conventions invariably contain "prosecute or extradite" clauses, i.e. the state is obliged either to extradite the offender or to prosecute him/her itself. The basic idea is that criminals should not escape trial and punishment simply by absconding to another country.

As extradition is an act of state (hence it has both executive and judicial elements), a state may choose, in the absence of any arrangement between the requesting and requested state to enter into an ad hoc arrangement or simply surrender the fugitives.

In essence the bases of extradition are contained in:

1. bilateral treaties
2. regional multilateral treaties e.g. ECE
3. UN Conventions
4. ad hoc arrangements between states
5. willingness to surrender in the absence of a treaty

Although the treaties may set out the basis for extradition, such treaties must be given effect in domestic law and there is no mandatory requirement on a state to surrender a fugitive. Generally speaking, treaties and domestic law set out safeguards and grounds for refusal, and these include (not an exhaustive list, as this would depend on domestic law):

1. dual criminality
2. political offences
3. fear of persecution
4. request is made to prosecute/punish on account of race, religion, gender, sexual orientation, or political opinions
5. nationals of the state
6. military offences
7. human rights considerations (likely to be subjected to inhuman/cruel treatment if returned);
8. possible penalty - death penalty
9. unjust and oppressive regime;
10. convictions in absence.

Extradition proceedings generally involve both the executive and judiciary. The involvement of the executive is largely dependant on domestic law and arrangements. Certain countries have no executive involvement, requests, for extradition are regarded as a matter for the judiciary. However, most Commonwealth states engage both elements.

The 2009 UNODC Guide contains the following guidance:

“The process of extradition is technically complex and normally involves a number of stages of both a judicial and administrative nature. The requesting State Party contacts the requested State Party, identifying the offender and requesting his/her surrender. It is usually required to provide credible evidence that the person sought has committed the offence(s) for which extradition is requested. The requesting State Party need not make out a full criminal case, but it must at least provide sufficient information of a certain evidentiary standard to support the extradition request. This evidentiary standard varies depending on the different practices and approaches followed under common law and continental law systems and may range from the establishment of a “prima facie evidence of guilt” or other less strict requirements to the notion that the information contained in the extradition documents suffices to justify the request.”

Challenges and solutions

1. Addressing current concerns

In theory, if satisfied with an extradition request, the requested state arrests and detains the offender, conducts judicial and/or administrative proceedings in which the offender is entitled to challenge the request, and, where the person sought is found eligible for extradition, extradites him/her to the requesting State Party. In practice, however, there are a number of impediments and practical challenges that often obstruct or prolong the extradition process.

There is often a mutual lack of awareness of national/international extradition law and practice or of the grounds for refusing an extradition request, as well as the ways and means to improve and expedite the extradition proceedings and the legal alternatives in lieu of extradition to avoid impunity.

In addition, as stated above, divergent evidentiary requirements applicable in the requested states may not be adequately understood by requesting states, thus causing delays and setbacks in extradition proceedings.

There may also be a wide array of procedural issues that cause practical difficulties such as:

- problems with language – translated extradition requests and attached materials are costly;
- tight deadlines, often prone to critical interpretation errors;
- communication and co-ordination problems, both between the competent authorities of the co-operating states or even at the domestic level;
- excessive cost burdens for some requesting and requested States Parties, which may prejudice the efficiency and effectiveness of the process.

2. *Changing contexts*

Recent trends and developments in extradition law have focused on relaxing the strict application of certain grounds for refusal of extradition requests. The reluctance to extradite their own nationals appears, for example, to be lessening in many States Parties. The UNCAC includes a provision that reflects this development: article 44(12), refers to the possibility of temporary surrender of the fugitive on condition that he or she will be returned to the requested State Party for the purpose of serving the sentence imposed. In cases where the requested State Party refuses to extradite a fugitive solely on the grounds that the fugitive is its own national, the State Party has an obligation to bring the person to trial (UNCAC, article 44, paragraph 11). This is an illustration of the principle of *aut dedere aut judicare* (extradite or prosecute) and further requires the establishment of the appropriate jurisdictional basis (see article 42, paragraph 3). Where extradition is requested for the purpose of enforcing a sentence, the requested State Party may also enforce the sentence that has been imposed in accordance with the requirements of its domestic law (UNCAC, article 44, paragraph 13).

Moreover, recent developments suggest that attempts are being made to restrict the scope of the political offence exception or even abolish it. The initial text of the Model Treaty on Extradition, as adopted in 1990, had clearly included this exception as a mandatory ground for refusal (article 3(a)). The revised version included a further restriction to ensure non-application of the political offence exception in cases of serious crimes for which States Parties had assumed the obligation, pursuant to any multilateral convention, to take prosecutorial action where they did not extradite. Furthermore, the increase in international terrorism has led to the willingness of States Parties to limit the extent of the political offence exception, which is generally no longer applicable to crimes against international law. A number of states may not extradite those claiming that the offence may be politically motivated (for example, against a former political leader living abroad), but the increase in international terrorism has led to the willingness of states to limit the scope of the political offence exception, which is generally no longer applicable to heinous crimes for which states had assumed the obligation, pursuant to any multilateral convention, to take prosecutorial action where they did not extradite. There is also an emerging trend to exclude violent crimes from the political offence exception.

The UNCAC excludes the political offence exception in cases where the Convention is used as the legal basis for extradition (article 44(4)).

3. *Setting up the legal framework for extradition*

States should seek to expand their extradition treaty network and/or adjust their relevant legislation, thus ensuring the existence of appropriate legal frameworks to facilitate extradition.

The Convention, in particular, attempts to set a basic minimum standard for extradition and requires States Parties that make extradition conditional on the existence of a treaty to indicate whether the Convention is to be used as a legal basis for extradition matters and, if not, to conclude treaties in order to implement article 44 (article 44, para. 6(b)), as well as bilateral and multilateral agreements or arrangements to enhance the effectiveness of extradition (article 44, paragraph 18). If States Parties do not make extradition conditional on the existence of a treaty, they are required by the Convention to use extradition legislation as the legal basis for the surrender of fugitives and recognise the offences falling within the scope of the Convention as extraditable offences between themselves (article 44, paragraph 7).

The Convention also allows for the lifting of the double criminality requirement by stipulating that a State Party whose law so permits may grant the extradition of a person for any of the offences covered by the Convention which are not punishable under its own domestic legislation (see article 44(2)).

As with a number of other articles in the Convention it is envisaged that legislative changes may be required. Depending on the extent to which domestic law and existing treaties already deal with extradition, this may range from the establishment of entirely new extradition frameworks to less extensive expansions or amendments to include new offences or make substantive or procedural changes to ensure compliance with the Convention. Generally, the extradition provisions are designed to ensure that the Convention supports and complements pre-existing extradition arrangements and does not detract from them.

However, it is noteworthy that in addition to action by states to sign new treaties, some conventions on particular offences contain provisions for extradition (see, for example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (article 10) or the United Nations Convention against Transnational Organized Crime (article 16). In addition, a number of regional instruments dealing ad hoc with extradition are in place to foster this form of co-operation among their States Parties, such as the Inter-American Convention on Extradition, the European Convention on Extradition and its two Additional Protocols, the Economic Community of West African States Convention on Extradition, the Commonwealth Scheme for the Rendition of Fugitive Offenders (1966, as amended in 1990) and the Extradition Agreement of the League of Arab States (1952).

4. Improving procedures

States Parties may wish to consider the adoption of measures to enable the simplification and improvement of the extradition process, including through systems of backing or recognising foreign arrest warrants. The backing of warrants schemes is a simplified form of surrender between states which represents a relatively recent stage in the evolution in extradition, marked by the mutual recognition of arrest warrants whereby an arrest warrant issued by a competent authority in one state is recognised as valid by one or more other states and is to be enforced. One of the best examples of such a scheme is the Commonwealth Scheme, which mainly applies to common-law tradition States Parties. Variants of the scheme are successfully applied between such jurisdictions as Singapore, Malaysia and Brunei; Australia and New Zealand; and the United Kingdom and certain Channel Islands. At the beginning of 2004, a new procedure started being implemented within the European Union introducing the so-called European arrest warrant (EAW), which actually replaces the traditional extradition proceedings among member states with a simplified fast-track common arrest warrant system – to simplify and accelerate surrender procedures between them, as if they were a single jurisdiction.

Checklist

- What is the legal basis used by the State Party for extradition matters?
- Is the Convention used as a legal basis for extradition? If not, or in addition to the Convention, has the State Party concluded bilateral or multilateral agreements or arrangements to facilitate extradition?
- Has the State Party established procedures for the extradition of its nationals to other States Parties for offences covered by the Convention?
- How does the State Party ensure that persons sought do not escape from justice in cases where extradition is denied on the ground of nationality or other grounds?
- Are there in place judicial and/or administrative proceedings in the State Party to ensure a fair extradition hearing?
- Does the State Party have a central or other competent authority in charge of handling extradition requests?

Article 45: Transfer of sentenced persons

UNCAC LANGUAGE

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

Overview

One of the major objectives of the Convention is to promote, facilitate and support international co-operation to combat corruption, including through the effective use of different modalities of co-operation, one of them being the transfer of sentenced persons. Article 45 calls on States Parties to consider concluding bilateral or multilateral agreements or arrangements allowing for the transfer to their territory of offenders who have been convicted and sentenced for offences covered by the Convention in order to serve their sentence there, thus improving the chances for the social rehabilitation of such persons.

This modality of co-operation is actually based on the concept of enforcement of foreign sentences which may also be applicable in extradition proceedings where the surrender of a fugitive is denied on the grounds of nationality. In such cases, the requested State Party may, if its domestic law permits and in conformity with the requirements of such law, enforce the sentence that has been imposed under the domestic law of the requesting State Party (article 44(13)).

Challenges and solutions

Requests to States Parties to engage in such a scheme will normally be made according to the relevant legislative framework or existing agreements or arrangements. Thus, co-operation in this field may be promoted through the conclusion of bilateral treaties or multilateral instruments to which the States Parties concerned are parties. In some cases, an ad hoc arrangement made between the States Parties concerned specifically for the return of the sentenced person in question may also work. A Model Agreement on the Transfer of Foreign Prisoners, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1985, provides guidance on the content of such treaties, agreements or arrangements.

1. The legal framework

States Parties, when developing legislation for providing for the obligation of transferring sentenced persons, should be careful to create this possibility as a right exclusively of the State Party but not of the sentenced person. Further, national legislation should allow for enough flexibility on the side of the requested and the requesting States Parties to make the request/granting of the transfer dependent on the willingness of the convicted person to cooperate. Nevertheless, there may be circumstances where it should be possible to transfer a sentenced person to his or her home State Party even without his or her consent. If a sentenced person has been ordered to be deported from the sentencing State Party after serving his or her sentence, a transfer may be effected regardless of consent.

There are already a number of international conventions that facilitate this aspect of international co-operation. The Commonwealth Scheme for the Transfer of Convicted Offenders is one such example. In the United Kingdom the Repatriation of Prisoners Act 1984 allows for the return or the transfer back of convicted prisoners. Currently the EU is in the process of negotiating a new Framework Decision that will establish a further scheme between EU Member States. A significant framework is already provided by the Council of Europe Convention on the Transfer of Sentenced Persons (drawn up by a committee of governmental experts under the authority of the European Committee on Crime Problems (CDPC)) which came into force in 1985, and is ratified by 62 States, including a number of non-Members of the Council of Europe.

The Council of Europe Convention is intended to provide a framework for ensuring clarity and a coherent approach in this field among its Parties, while at the same time serving the purposes of fostering the proper administration of justice and facilitating the social rehabilitation of sentenced persons who can be transferred to serve their sentence in a more familiar environment. A number of conditions are provided by this instrument, to address the specific needs in each particular case and each request is to be considered on its own facts. However, when all conditions are met and the procedural requirements are met, the requested state is obliged to give effect to the transfer request. The Convention is supplemented by an Additional Protocol which opened for signature in 1997 and entered into force in 2000.

2. Conditions for transferring offenders

The Council of Europe Convention on the Transfer of Sentenced Persons provides some useful indicators regarding the factors that need to be taken into account when dealing with requests for the transfer of sentenced persons. In terms of general principles and transfer requirements the Convention stipulates that the transfer may be requested by either the sentencing State Party or the administering State Party and that a person sentenced may express his/her interest to each of those States Parties in being transferred under the Convention. The following are also conditions for transfer:

- the sentenced person is a national of the administering State Party;
- the judgment is final;
- the act for which the sentence has been imposed constitutes a criminal offence according to the law of the administering state;
- at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence or another measure of deprivation of liberty to serve or if the sentence is indeterminate; however in exceptional cases the States Parties may agree to a transfer even if time to be served by the sentenced person is less than this threshold;
- the sentencing and administering States Parties agree to the transfer;

- the transfer is consented to by the sentenced person or, where in view of his age or physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative.

3. Transfers and sentences

The Council of Europe Convention (CoEC; article 10) stipulates that the receiving State Party should be bound by the legal nature and duration of the sentence as determined by the sentencing State Party. If, however, this sentence is by its nature or duration incompatible with the law of the administering State Party, that State Party may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure should, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State Party, nor exceed the maximum prescribed by the law of the administering State Party. In the case of conversion of sentence, the procedures provided for by the law of the receiving State Party would apply. When converting the sentence, the competent authority should be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State Party. The receiving State Party should not convert a sanction involving deprivation of liberty to a pecuniary sanction, should deduct the full period of deprivation of liberty served by the sentenced person, should not aggravate the penal position of the sentenced person, and should not be bound by any minimum which the law of the administering State Party may provide for the offence or offences committed.

4. Information

It would be wise to establish formal channels of communication between the competent judicial authorities of the co-operating states. This would enable the administering state to provide information to the sentencing state concerning the enforcement of the sentence or the time frame of its completion, as well as any further conditions or orders that have been imposed and other relevant information, including whether the sentenced person has escaped from custody before the enforcement of the sentence.

States Parties may wish to include in any arrangements provisions relating to the enforcement procedure, the related costs and the transportation of the sentenced persons.

Checklist

- Has the State Party concluded any bilateral, or acceded to a multilateral, agreement on transfer of sentenced persons?
- Are there appropriate procedures to ensure the protection of rights of persons involved in such a process?
- Has the State Party concluded agreements or arrangements with other States Parties for the transfer of information about sanctions between their competent authorities?

Article 46: Mutual Legal Assistance

UNCAC LANGUAGE

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

2. 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 the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

a. Taking evidence or statements from persons;

b. Effecting service of judicial documents;

c. Executing searches and seizures, and freezing;

d. Examining objects and sites;

e. Providing information, evidentiary items and expert evaluations;

f. Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

g. Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

h. Facilitating the voluntary appearance of persons in the requesting State Party;

i. Any other type of assistance that is not contrary to the domestic law of the requested State Party;

j. Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

k. The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States parties are strongly encouraged to apply those paragraphs if they facilitate co-operation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. (a) *A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;*

(b) *States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the co-operation or assistance sought is available under other provisions of this Convention;*

(c) *Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality*

10. *A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:*

(a) *The person freely gives his or her informed consent;*

(b) *The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

11. *For the purposes of paragraph 10 of this article:*

(a) *The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorised by the State Party from which the person was transferred;*

(b) *The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;*

(c) *The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;*

(d) *The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

12. *Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.*

13. *Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any*

communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organisation, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing the State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

- *The identity of the authority making the request;*
- *The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;*
- *A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;*
- *A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;*
- *Where possible, the identity, location and nationality of any person concerned; and*
- *The purpose for which the evidence, information or action is sought.*

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requesting State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. *Mutual legal assistance may be refused:*

- *If the request is not made in conformity with the provisions of this article;*
- *If the requested State Party considers the execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;*
- *If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;*
- *If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.*

22. *States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.*

23. *Reasons shall be given for any refusal of mutual legal assistance.*

24. *The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.*

25. *Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.*

26. *Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State party accepts assistance subject to those conditions, it shall comply with the conditions.*

27. *Without prejudice to the applications of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for the period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.*

28. *The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.*

29. *The requested State Party:*

- *Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;*

- *May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.*

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purpose of, give practical effect to or enhance the provisions of this article.

Overview

The increasingly international mobility of offenders and the use of advanced technology and international banking for the commission of offences make it more necessary than ever for law enforcement and judicial authorities to collaborate and assist each other in an effective manner in investigations, prosecutions and judicial proceedings related to such offences.

In order to achieve that goal, states have enacted laws to enable them to provide assistance to foreign jurisdictions and increasingly have resorted to treaties or agreements on mutual legal assistance in criminal matters. Such treaties or agreements usually list the kind of assistance to be provided, the requirements that need to be met for affording assistance, the obligations of the co-operation States, the rights of alleged offenders and the procedures to be followed for submitting and executing the relevant requests.

The Convention generally seeks ways to facilitate and enhance mutual legal assistance, encouraging States Parties to engage in the conclusion of further agreements or arrangements in order to improve the efficiency of mutual legal assistance. In any case, paragraph 1 of article 46 requires States Parties to afford one another the widest measure of mutual legal assistance as listed in article 46(3) in investigations, prosecutions and judicial proceedings⁵¹ in relation to the offences covered by the Convention. If a State Party's current legal framework on mutual legal assistance is not broad enough to cover all the offences covered by the Convention, amending legislation may be necessary.

Article 46(2) mandates States Parties to provide mutual legal assistance with respect to investigations, prosecutions and judicial proceedings in which a legal person is involved (see also under article 26 of the Convention).

Article 46(3) lists the types of assistance to be afforded under the Convention. In order to ensure compliance with this provision, States Parties would need to conduct a thorough review of their legal framework on mutual legal assistance and assess whether such framework is broad enough to cover each form of co-operation listed in paragraph 3. States Parties which have ratified the United Nations Convention against Transnational Organized Crime would normally be in compliance with this provision and, in addition, they need to have in place appropriate mechanisms for providing assistance in cases of identifying, freezing and tracing proceeds of crime and asset recovery (see article 45, para. 3 (j) and (k)).

In the absence of an applicable mutual legal assistance treaty, the Convention provides a mechanism, pursuant to paragraphs 7 and 9-29 of article 46, for the transmission and execution

⁵¹ States Parties have discretion in determining the extent to which they will provide assistance for such proceedings, but assistance should at least be available with respect to portions of the criminal process that in some States Parties may not be part of the actual trial, such as pre-trial proceedings, sentencing proceedings and bail proceedings.

of requests with regard to the types of assistance mentioned above. If a treaty is in force between the States Parties concerned, the rules of the treaty will apply instead, unless the States Parties agree to apply paragraphs 9-29. In any case, States Parties are also encouraged to apply those paragraphs if they facilitate co-operation. In some jurisdictions, this may require legislation to give full effect to the provisions.

Article 46(8) provides that States Parties cannot refuse mutual legal assistance on the grounds of bank secrecy. It is significant that this paragraph is not included among the paragraphs that only apply in the absence of a mutual legal assistance treaty. Instead, States Parties are obliged to ensure that no such ground for refusal may be invoked under their legal regime, including their Criminal Code, Criminal Procedure Code or the banking laws or regulations (see also article 31(7), and articles 55 and 57). Thus, where the legislation of a State Party permits such a ground for refusal to be invoked, amending legislation will be required.

Paragraph 9 requires States Parties to take into account the purposes and spirit of the Convention (article 1) as they respond to requests for legal assistance in the absence of dual criminality. Although States Parties may decline to render assistance in the absence of dual criminality (paragraph 9(b)), they are further encouraged to exercise their discretion and consider the adoption of measures that would broaden the scope of assistance even in the absence of this requirement (paragraph 9(c)).

However, to the extent consistent with the basic concepts of their legal system, States Parties are required to render assistance involving non-coercive action on the understanding that the assistance is not related to matters of a *de minimis* nature or cannot be provided under other provisions of the Convention (paragraph 9(b)).

The Convention also requires the designation of a central authority (see paragraphs 13 and 14) with the power to receive and execute mutual legal assistance requests or transmit them to the competent domestic authorities for execution, thus providing an alternative to diplomatic channels. The judicial authorities of the requesting state can communicate with the central authority directly. Today, to an increasing degree, even more direct channels are being used, in that an official in the requesting state can send the request directly to the appropriate official in the other state.

In those States Parties with a system by which special regions or territories have a separate system of mutual legal assistance, their distinct central authorities should perform the same functions. It may be that many States Parties have already designated a central authority for mutual legal assistance purposes and notified the Secretary-General of the United Nations in accordance with similar provisions of other Conventions. Given the wide and growing range of such international instruments, it is also important for States Parties to ensure that their central authorities under these instruments are a single entity in order to facilitate greater consistency of mutual legal assistance practice for different types of criminal offence and to eliminate the potential for fragmentation or duplication of work in this area.

Paragraphs 4 and 5 of article 46 provide a legal basis for the spontaneous transmission of information whereby a State Party forwards to another State Party information or evidence it believes is important to combat offences covered by the Convention at an early stage where the other State Party has not made a request for assistance and may be completely unaware of the existence of such information or evidence. The aim of these provisions is to encourage States Parties to exchange information on criminal matters voluntarily and proactively. The receiving State Party may subsequently use the information provided in order to submit a formal request for assistance. The only general obligation imposed for the receiving State Party, which is similar

to the restriction applied in cases where a request for assistance has been transmitted, is to keep the information transmitted confidential and to comply with any restrictions on its use, unless the information received is exculpatory to the accused person. In this case the receiving State Party can freely disclose this information in its domestic proceedings.

Another area where enhanced co-operation may be needed relates to the protection of witnesses who may be vulnerable to threats and intimidation. Article 32 of the Convention provides for specific measures in this regard, including the relocation of witnesses, and, as appropriate, their relatives and other persons close to them, and article 46(18) proposes the use of videoconference as a means of providing evidence in cases where it is not possible or desirable for the witness to appear in person in the territory of the requesting State Party to testify.

The brief overview of the basic provisions of article 46 indicates its innovative nature and potential to foster co-operation in the field of mutual legal assistance. However, States Parties may wish to give serious consideration to practical difficulties and challenges that may impede co-operation especially between States Parties with different legal traditions and systems.

Challenges and solutions

1. Addressing current issues

States Parties need to devote attention to the fact that formal channels of mutual legal assistance may not always be necessary and, instead, more informal, faster and flexible channels among law enforcement authorities may be used where coercive action is not required (such as taking voluntary witness statements, search and seizure of documents and production of documents). Such contacts may be supported by INTERPOL, Europol, or through other regional law enforcement organisations or arrangements.

However, States Parties need to bear in mind that problems related to the admissibility of evidence are more likely to arise when evidence is obtained through informal channels. Therefore, whenever law enforcement authorities intend to obtain evidence, it would be appropriate to resort to the established mutual legal assistance channels. Using formal means also ensures a higher measure of protection to sensitive information.

Further, there are several factors that need to be taken into account in the context of mutual legal assistance for corruption offences.

In some States Parties, if an investigation involves an influential politician or business figure in the requested State Party, the requested assistance may not be provided on grounds of “national interest” or immunities accorded to certain public officials (or “protection” provided to politically connected persons). In other States Parties, the person or entity in respect of whom the request for mutual legal assistance was made is entitled to appeal against the sharing of evidence with the requesting State Party. When a right of appeal against disclosure is available, it may well cause lengthy delays and may also “tip off” the suspects.

Moreover, requests for search and/or seizure may prove to be problematic where not enough information is provided to explain why it is believed that the process might produce relevant evidence for the ongoing investigations or judicial proceedings in the requesting State.

Requests may also involve the possibility of disclosing extremely sensitive aspects to an investigation, particularly where the corruption investigation is linked to the activities of organised criminal groups or involves politicians or other prominent persons. As a result, there

may be cases where such sensitive information may need to be included in a formal request for assistance. At the same time, the disclosure of witnesses and other information that could be intimidated and exploited respectively by those under investigation needs to be assessed carefully, taking into account the need for minimising potential risks for witnesses and securing the information for the purposes of the investigation. Therefore, in preparing requests for assistance, competent authorities may need to devote particular attention to confidentiality issues. Sometimes, difficulties can be avoided by issuing a request which leaves out the most sensitive information, but provides enough detail to permit its execution.

Requests may also sometimes be delayed or even ignored because of the limited resources available in the requested State for the provision of assistance. In such circumstances it may be possible for the requesting State Party to provide assistance, including through the posting of liaison officers or the provision of expertise or even some level of financial support.

As a practical matter, a State Party requesting assistance will need to recognise that the case it is pursuing is much more important to it than it is to the requested State Party. It is vital, therefore, that the requesting State makes strenuous efforts to make it as easy as possible for the requested State Party to respond positively. This may involve the following steps:

- identifying the substantive and procedural requirements in the requested State Party for the provision of assistance (since this is often highly resource intensive, it may be necessary to select the highest priority cases and engage external legal assistance to ensure that the research is thorough and accurate);
- contacting the requested State Party directly to ensure that the request will be sent to the proper authority;
- discussing the request informally with the requested State Party in advance, which may require the submission of a preliminary draft of the request, so that the requested State Party can draw attention to errors or advise on the best way to make the request;
- following up the request to ensure it arrives safely, contains no errors and is being properly dealt with.

Since the procedural laws of States Parties differ considerably, the requesting State Party may require special procedures (such as notarised affidavits) that are not recognised under the law of the requested State Party. Traditionally, the almost immutable principle has been that the requested State Party will give primacy to its own procedural law. That principle has led to difficulties, in particular when the requesting and the requested States Parties represent different legal traditions. For example, the evidence transmitted from the requested State Party may be in the form prescribed by the laws of this State Party, but such evidence may be unacceptable under the procedural law of the requesting State Party. The modern trend is to allow more flexibility as regards procedures. According to article 7(12) of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, a request should be executed in accordance with the domestic law of the requested State Party. However, the article also provides that, to the extent not contrary to the domestic law of the requested State Party and where possible, the request should be executed in accordance with the procedures specified in the request. Thus, although the 1988 Convention does not go so far as to require that the requested State Party comply with the procedural form required by the requesting State Party, it clearly encourages the requested State Party to do so. This same provision was taken verbatim into article 18(17) of the Transnational Organized Crime Convention and article 46(17) of the Corruption Convention. In the same context, the Model Treaty on Mutual Assistance in Criminal Matters provides for the

execution of the request in the manner specified by the requesting State Party to the extent consistent with the law and practice of the requested State Party (article 6).

2. Responses to challenges: the broad scope of article 46

Given that the United Nations Convention against Transnational Organized Crime contains a similar provision on mutual legal assistance (article 18), States Parties to that Convention should in general be in a position to comply with the corresponding requirements arising from article 46 of the Corruption Convention. Nevertheless, there are some significant differences between the two instruments.

Firstly, under the Corruption Convention, mutual legal assistance also extends to the recovery of assets, a fundamental principle of this Convention (see articles 1 and 46, paragraph 3 (j) (k), as well as Chapter V of the Convention).

Secondly, in the absence of dual criminality, States Parties are required to render assistance that does not involve coercive action, provided this is consistent with their legal system and that the offence is not of a trivial nature. Such a provision was not incorporated in the Palermo Convention.

In addition, as mentioned under article 43, where dual criminality is required for the purposes of international co-operation in criminal matters, the UNCAC provides for an additional interpretation rule for the application of this rule, which is not contained in the UNTOC. It proposes that dual criminality shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the activity or conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties (article 43(2)). Furthermore, the Convention enables States Parties not to limit themselves to co-operation in criminal matters, but also to assist each other in investigations of and proceedings in civil and administrative matters relating to corruption, where that is appropriate and consistent with their domestic legal system (article 43(1)).

3. Integrating with other relevant Conventions

States Parties may wish to seek guidance on mutual legal assistance by taking into account other multilateral treaties, which either include extensive provisions on this form of co-operation or are dealing ad hoc with related issues.

The former include for example: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (see article 7), the Transnational Organized Crime Convention (article 18), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (see articles 8-10), the Council of Europe Convention on Cybercrime, the Council of Europe Criminal Law Convention on Corruption (see article 26), the Inter-American Convention against Corruption (see article XIV), and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (see article 9).

In addition, ad hoc mutual legal assistance instruments have been drawn up within the framework of the Council of Europe (European Convention on Mutual Assistance in Criminal Matters and its two Additional Protocols of 1978 and 2001), the Commonwealth (The Commonwealth Scheme for Mutual Assistance in Criminal Matters of 1986, as amended in 1990 and 1999), the Organization of American States (Inter-American Convention on the Taking of

Evidence Abroad of 1975 and its Additional Protocol of 1984, as well as the Inter-American Convention on Mutual Assistance in Criminal Matters of 1992 and its Optional Protocol of 1993), the Economic Community of West African States (the ECOWAS Convention on Mutual Assistance in Criminal Matters of 1992), the Southern African States Parties and the European Union (the Convention of 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocol of 2001), and the 1983 Arab League Convention on Mutual Assistance in Criminal Matters.

The United Nations, in turn, has prepared a Model Treaty on Mutual Assistance in Criminal Matters (General Assembly Resolutions 45/117, annex, and 53/112, annex I), which represents a distillation of the international experience gained with the implementation of such mutual legal assistance treaties, in particular between States Parties representing different legal systems.

4. New developments

There have been significant developments in mutual legal assistance over recent years. In fact there is evidence to suggest that many States Parties had significantly expanded their capability to provide international mutual legal assistance particularly since the events of 11 September 2001 in the United States. There have been considerable developments, for example, in the area of mutual legal assistance in the European Union where the pace of change has accelerated dramatically. These include the Mutual Legal Assistance Convention of 2000, and its Protocol of 2001, as mentioned above, Framework Decisions on the use of Joint Investigation Teams (2002), the Mutual Recognition of Orders freezing property or evidence (2003), the confiscation of crime-related proceeds, instrumentalities and property (2005), the application of the principle of mutual recognition to confiscation orders (2006), as well as Decisions of the Council such as the 2002 action setting up Eurojust with a view to reinforcing the fight against serious crime.

In June 2006, the Council of the European Union reached agreement on a general approach on a Framework Decision on the European Evidence Warrant (EEW – the text for which is available at <http://register.consilium.europa.eu/pdf/en/07/st09/st09913.en07>). This new scheme needs to be finalised, adopted and then implemented by Member States. The EEW adopts the same approach to mutual recognition as the Framework Decision on the European Arrest Warrant (EAW – see article 44). Thus, the EEW is a judicial decision that is to be transmitted directly between the issuing judicial authority and the executing authority, with further official communications to be made directly between those two authorities. It will be used for the purpose of obtaining objects, documents or data falling within the certain categories, existing records of intercepted communications, surveillance, interviews with suspects, statements from witnesses and the results of DNA tests.

5. New facilitating mechanisms

The developments that have taken place over the last few years within the European Union could be considered as effective examples of concerted action at the regional level geared towards promoting interstate co-operation and co-ordination in combating transnational organised crime. In this context, the Joint Action of 22 April 1996 (96/277/JHA) created a framework for the exchange of liaison magistrates to improve judicial co-operation between the Member States of the European Union. This Joint Action established a framework for the posting or the exchange of magistrates or officials with special expertise in judicial co-operation procedures, referred to as “liaison magistrates”, between Member States, on the basis of bilateral or multilateral arrangements (article 1). The tasks of the liaison magistrates comprise any activity designed to encourage and accelerate all forms of judicial co-operation in criminal matters, in particular by establishing direct links with the relevant departments and judicial authorities in the

host state. Under arrangements agreed between the home and the host Member States, the tasks of liaison magistrates may also include any activity connected with handling the exchange of information and statistics designed to promote mutual understanding of the legal systems and legal databases of the states concerned and to further relations between the legal professions in each of those states (article 2).

Furthermore, the European Judicial Network was set up in accordance with the Joint Action of 29 June 1998, which was adopted by the European Union Council pursuant to article K.3 of the European Union Treaty (98/428/JHA). It is a network of judicial contact points among the Member States created in order to promote and accelerate co-operation in criminal matters, paying particular attention to the fight against transnational organised crime. According to article 4 of this Joint Action, the contact points function as active intermediaries with the task of facilitating judicial co-operation between the Member States, particularly in action to combat serious crime (organised crime, corruption, drug trafficking and terrorism). They also provide the necessary legal and practical information to the local judicial authorities in their own countries, as well as to the contact points and local judicial authorities in other countries, in order to enable them to prepare an effective request for judicial co-operation or improve judicial co-operation in general. Furthermore, their task is to improve co-ordination of judicial co-operation in cases where a series of requests from the judicial authorities of a Member State necessitates co-ordinated action in another Member State.

Finally, Eurojust was established on 28 February 2002 in accordance with a Decision of the European Union Council (2002/187/JHA) aiming at stimulating and improving co-ordination of investigations and prosecutions in the Member States, improving co-operation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests, as well as supporting otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective (article 3). It consists of a national member appointed by each Member State in his/her capacity as a prosecutor, judge or police officer of equivalent competences (article 2).

However, these examples are often expensive options to improve the flow of information between States Parties. Many jurisdictions have simply chosen to take legislative, judicial or executive initiatives to strengthen their ability to provide, receive and effectively use legal assistance within existing co-operative arrangements, for example SAARC, the South Asian Association for Regional Co-operation, SARPCCO, the Southern African Regional Police Chief Council Organisation and INTERPOL (with 188 member States Parties). Such approaches are discussed in more detail in article 48.

Checklist

- What is the legal basis used by the State Party for mutual legal assistance?
- Is the Convention used as a legal basis for mutual legal assistance? If not, or in addition to the Convention, has the State Party concluded bilateral or multilateral agreements or arrangements to facilitate extradition?
- Does the State Party participate in any practitioner or judicial network?
- Does the State Party have a designated central authority agency responsible for receipt, processing or execution of mutual legal assistance requests?
- Does the central authority have clear guidelines on practical aspects and issues arising in a mutual legal assistance case?

- Are there established procedures in the State Party for dealing with mutual legal assistance requests?

Commentary and Additional Guidance

The UNODC Legislative Guide (at paragraphs 593-5) sets out the principal requirements of Article 46 as follows:

State Parties are required:

- To ensure the widest measure of mutual legal assistance for the purposes listed in article 46, paragraph 3, in investigations, prosecutions, judicial proceedings and asset confiscation and recovery in relation to corruption offences (art. 46, para. 1);
- To provide for mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences for which a legal entity may be held liable under article 26 (art. 46, para. 2);
- To ensure that mutual legal assistance is not refused by it on the ground of bank secrecy (art. 46, para. 8). In this respect, legislation may be necessary if existing laws or treaties governing mutual legal assistance are in conflict;
- To offer assistance in the absence of dual criminality through non-coercive measures subject to the basic concepts of its legal system (art. 46, paragraph 9(b));
- To apply paragraphs 9 to 29 of article 46 to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State Party (art. 46, paragraphs 7 and 9-29). In this respect, legislation may be necessary if existing domestic law governing mutual legal assistance is inconsistent with any of the terms of these paragraphs and if domestic law prevails over treaties;
- To notify the Secretary-General of the United Nations of their central authority designated for the purpose of article 46, as well as of the language(s) acceptable to them in this regard (art. 46, paragraphs 13 and 14);
- To consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of article 46 (art. 46, paragraph 30).

States Parties may provide information on criminal matters to other States Parties without prior request, where they believe that this can assist in inquiries, criminal proceedings or the formulation of a formal request from that State Party (art. 46, paragraphs 4 and 5).

States Parties are also invited to consider the provision of a wider scope of legal assistance in the absence of dual criminality (art. 46, paragraph 9 (c)).

Article 46, paragraph 3, sets forth the following list of specific types of mutual legal assistance that a State Party must enable:

- Taking evidence or statements from persons;
- Effecting service of judicial documents;
- Executing searches and seizures, and freezing;
- Examining objects and sites;
- Providing information, evidentiary items and expert evaluations;
- Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

- Facilitating the voluntary appearance of persons in the requesting State party;
- Any other type of assistance that is not contrary to the domestic law of the requested State party.
- Identifying, freezing and tracing proceeds of crime in accordance with the provisions of Chapter V of this Convention.
- The recovery of assets in accordance with the provisions of Chapter V of this Convention.

As the UNODC Legislative Guide highlights, States Parties should review their current mutual legal assistance treaties to ensure that these are broad enough to cover each form of co-operation listed above.

For some states, domestic law will already provide powers to take the measures necessary to deliver the various forms of assistance set out in Article 46. If domestic law does not, amendments to legislation will be needed.

In order to obtain from, and provide mutual legal assistance to, States Parties in the absence of a mutual legal assistance treaty, a mechanism is provided pursuant to the provisions of article 46, paragraphs 7 and 9-29. The implementation requirements in this situation are described below.

Article 46, paragraph 7, provides that where there is no mutual legal assistance treaty in force between States Parties, the rules of mutual legal assistance set forth in article 46, paragraphs 9-29 will apply for the provision of the types of co-operation listed above in paragraph 3. If a treaty is in force between the States Parties concerned, the rules of the treaty will apply instead, unless the states agree to apply paragraphs 9 to 29.

For States Parties whose legal systems permit direct application of treaties, no implementing legislation will be needed. However, for dualist systems (as is the case for most Commonwealth states), legislation will be required to ensure that in the absence of a mutual legal assistance treaty, the terms of paragraphs 9 to 29 apply to requests made under UNCAC. Such enabling legislation may, of course, be general in nature.

It should be noted that there is a prohibition on the denial of mutual legal assistance on the grounds of bank secrecy by virtue of Article 46. Thus, where a State Party's laws currently permit such ground for refusal, amending legislation will be required.

UNCAC requires the designation of a central authority with the power to receive and execute or transmit mutual legal assistance requests to the competent authorities to handle it in each State Party.

Technical Guidance on Mutual Legal Assistance

Corruption is, increasingly, a transnational crime and, as such, requires investigators and prosecutors to gather evidence across borders. Equally, in a world of financial networks that may straddle many states, the mounting of a purely domestic corruption case will very often demand evidence from foreign jurisdictions. Against that background, the framework and procedures within which both formal assistance via a letter of request (referred to as “mutual legal assistance”) and informal co-operation (referred to as “mutual assistance”) are obtained are often bewildering and very often depend on the attitude and opinions of those on the ground to whom the request is made. With that in mind, what are the real and practical difficulties and what are the solutions?

Mutual Legal Assistance or Mutual Assistance

Prosecutors and investigators sometimes have recourse to mutual legal assistance without exploring whether informal mutual assistance would, in fact, meet their needs. It is often forgotten that the country receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously. Prosecutors must thus ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence.

The extent to which countries are willing to assist with a formal request does, of course, vary greatly. In many cases, it will depend on a particular country's own domestic laws, on the state of the relationship between that country and the requesting state and, it has to be said, the attitude and helpfulness of those on the ground to whom the request is made. The importance of excellent working relationships being built up and maintained transnationally cannot be stressed enough.

Although no definitive list can be made of the type of enquiries that may be dealt with informally, some general observations might be useful. Variations from state to state, must, however, always be borne in mind.

- If the enquiry is a routine one and does not require the country of which the request is made to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request.
- The obtaining of public records, such as land registry documents and papers relating to registration of companies, may often be obtained informally.
- Potential witnesses may be contacted to see if they are willing to assist the authorities of the requesting country voluntarily.
- A witness statement may be taken from a voluntary witness, particularly in circumstances where that witness's evidence is likely to be non-contentious.
- The obtaining of lists of previous convictions and of basic subscriber details from communications and service providers that do not require a court order may also be dealt with in the same, informal way.

Equally, it is possible to draw up a guidance list of the sorts of request where a formal letter will be required:

- obtaining testimony from a non-voluntary witness;
- seeking to interview a suspect under caution;
- obtaining account information and documentary evidence from banks and financial institutions;
- requests for search and seizure;
- internet records and the contents of emails;
- the transfer of consenting persons into custody in order for testimony to be given.

Confusion can be avoided if prosecutors and investigators have regard for the limits of the conventions and treaties that relate to mutual legal assistance. In particular, it should be remembered that the regime of mutual legal assistance is for the obtaining of evidence; thus, the obtaining of intelligence and the locating of witnesses or suspects should only be sought by way of informal mutual assistance to which, of course, agreement may or may not be forthcoming.

It is sometimes forgotten just how many types of evidence and other material may be obtained informally. For example, some countries have directories of telephone account holders available

on the internet (although consideration will need to be given as to whether it is in a form that may be used evidentially).

Sometimes a degree of lateral thinking is required. For instance, it might be quicker, cheaper and easier for the requesting country's investigators to arrange and pay for a voluntary witness to travel to the requesting country to make a witness statement, rather than the investigators themselves travelling to take the statement. Similarly, if the consent of the state in which a country's embassy is situated is obtained, witness statements may be taken by investigators at the requesting country's embassy.

Taking matters one stage further, many states have no objection to an investigator of the requesting state telephoning the witness, obtaining relevant information and sending an appropriately drafted statement by post thereafter for signature and return. Of course, such a method may only be used as long as the witness is willing to assist the requesting authority and in circumstances where no objections arise from the authorities in the foreign state concerned (from whom prior permission must be sought).

There are certain key considerations which a prosecutor must consider when deciding whether evidence is to be sought by informal means from abroad:

- it must be evidence that could be lawfully gathered under the requesting state's law, and there should be no reason to believe that it would be excluded in evidence when sought to be introduced at trial within the requesting state;
- it should be evidence that may be lawfully gathered under the laws of the requested state. The requested state should have no objection;
- the potential difficulty in failing to heed these elements might be that (in states with an exclusionary principle in relation to evidence) such evidence will be excluded;
- in addition, but of no less importance, inappropriate actions by way of informal requests may well irritate the authorities of the foreign state which might therefore be less inclined to assist with any future request.

The golden rule must be: ensure that any informal request is made and executed lawfully.

Any consideration of informal assistance (i.e. mutual assistance) should not overlook the use to which it can be put in order to pave the way for a later, formal request. It might, for instance, be possible to narrow down an enquiry in a formal letter of request by first seeking informal assistance. For example, if a statement is to be taken from an employee of a telephone company in a foreign company, informal measures should be taken to identify the company in question, its address and any other details that will assist and expedite the formal process. It is sometimes overlooked, but should not be, that an expectation always exists among those working in the field of mutual legal assistance that as much preparation work as possible will be undertaken by informal means.

Formal Requests (Mutual Legal Assistance)

In criminal matters, there is no universal instrument or treaty which governs the gathering of evidence abroad. However, the building blocks for formal requests are the conventions, schemes and treaties that states have signed and ratified. For instance, in the field of corruption investigations, the UNCAC makes specific provision for mutual legal assistance and the encouraging of international co-operation.

Prosecutors and judges making a formal request should always assert the international obligation of a requested state to assist where such an obligation exists by way of international instrument.

Equally, the authority upon which the letter of request is written should also be spelt out. To give a practical example, the UK made a statement of good practice in accordance with Article 1 of the Joint Action of 29 June 1998 adopted by the Council of Europe, in which it declared that the UK Home Office (Interior Ministry) will ensure that requests are in conformity with relevant treaties and other international obligations. Prosecutors generally need to take heed of any such declarations of such intent made by their own state and to take action accordingly.

Similarly the person making a request must take care to ensure that his or her own domestic law allows the request that is actually being made. For instance, a piece of domestic legislation might, in fact, disallow some requests or types of requests that many conventions, treaties or other international instruments would appear to allow. For some countries, the domestic legislation will have primacy. To make a request otherwise in accordance with domestic law in such circumstances will be to invite arguments for exclusion of evidence.

Prosecutors and prosecuting authorities are recommended to make early contact with a counterpart in the country to which the request is to be made. Notwithstanding the existence of a convention or treaty and its broad and permissive approach, the requested state may well have entered into reservations that limit the assistance that can in fact be given. For instance, some countries have reserved the right to refuse judicial assistance when the offence is already the subject of a judicial investigation in the requested country. The key principle must be this: regard should always be given to the fact that a requested state will have to comply with its own domestic law, both as regards to whether assistance can be given at all and, if so, how that assistance is, in fact, given.

The Form of the Letter of Request

The requesting authority should compile a letter that is a stand-alone document. It should provide the requested state with all the information needed to decide whether assistance should be given and to undertake the requested enquiries. Of course, depending upon the nature of those enquiries and the type of case, the requested state may be quite content for officers from the requesting state to travel across and to play a part in the investigation.

A problem that occurs in all jurisdictions in respect of both incoming and outgoing requests is that of time. A request may take weeks, sometimes months, and occasionally and unfortunately, years to execute. As soon as grounds emerge to make the request abroad and the need for such a request is clear, then the letter should be issued. It is important that urgent requests be kept to a minimum and that everyone involved in the process should appreciate that an urgent request is urgent and unavoidably so. If a request is urgent the letter should say so clearly and in terms that explain the reasons why.

The material conditions to be satisfied within the letter of request may be summarised as follows:

- If the requested country requires an undertaking of reciprocity on the part of the requesting country, then this should be given. (In this respect, common-law countries are usually more restrictive than those with a civil code).
- A prerequisite for some states is the criminalisation of the act in both the requesting and requested state (the dual-criminality rule). This should therefore be addressed within the letter.
- The assistance must relate to criminal proceedings (whether at an investigative stage or after court proceedings have begun) in the strict and accepted sense; that is to say, an

investigation or proceedings against the perpetrators of a criminal offence under ordinary law.

- Although it need not be specifically asserted within the letter, a prerequisite for formal assistance is the guarantee of a fair trial and respect for the fundamental rights laid down in the International Covenant on Civil and Political Rights (ICCPR) within the legal system of the requesting country.
- Some requested countries may require an assertion that the request does not relate to fiscal, political or military misdemeanours.
- The letter must contain a description of the facts that form the basis of the investigations/proceedings. Such a description must be as detailed as possible and should indicate in what way the evidence being sought is necessary.
- If the requesting and requested state is each a party to a multilateral or bilateral agreement, then the international instrument concerned should be referred to and prayed in aid.

Although a request is executed by a competent judicial authority of the requested country in accordance with its own laws and its own rules and procedures, very often it will be possible for the requesting authority to make an express request that the requested country apply the requesting country's rules of procedure. If such a request is available to the requesting authority, advantage should be taken of it. The reason is obvious. A fundamental difficulty, often overlooked, is that different states have different ways of presenting evidence. The whole purpose of a request is to obtain useable, admissible evidence. That evidence must therefore be in a form appropriate for the requesting country, or as near as possible to that form as circumstances allow. It should be made clear, therefore, by the requesting country in what form, for instance, the testimony of a witness should be taken. The requested state cannot be expected to be familiar with the rules of evidence gathering and evidence adducing in the requesting state.

Further to the above, instruments may contain a provision to the effect that the method of execution specified in the request shall be followed to the extent that it is compatible with the laws and practices of the requested state. If in doubt, the requesting authority should provide examples of what is required to the requested authority.

Particular Problems Experienced in Mutual Legal Assistance Sought in Corruption Cases

If an investigation involves an influential politician or business figure in the requested country, the requested assistance may never be provided. The requested authority may cite "national interest" or immunities enjoyed by certain sections of the community (e.g. ministers of the government or judges).

In some states the person in respect of whom the request for mutual legal assistance is made, is able to appeal against the sharing of evidence with the requesting country. When such an appeal is available it may well cause lengthy delays. In those European countries which have traditionally enjoyed favourable tax and banking conditions, for instance Liechtenstein and Switzerland, an appeal avenue is available in relation to the disclosure of information on a financial position etc. In those countries, in addition, institutions such as banks may have similar rights of appeal.

Requests for confiscation, repatriation of proceeds of crime and extradition have traditionally caused particular difficulty. The UNCAC has addressed these issues in detail and has provided fresh obligations. However, it is still the case that no internationally binding legal instrument sets out a comprehensive mandatory regime for the repatriation of assets.

Search and/or seizure generally can be problematic. Essentially, the authority making the request should be careful to provide as much information as possible about the location of the premises etc. But it must be remembered that different jurisdictions set different thresholds. Search and seizure is a powerful weapon for investigators. It must be assumed that the requested state will only be able to execute a request and search/seizure if it has been demonstrated by the request that reasonable grounds exist to suspect that an offence has been committed and that there is evidence on the premises or person concerned which goes to that offence. These “reasonable grounds” should be specifically set out within the letter therefore. Generally, it will not be enough simply to ask for search and seizure without explaining why it is believed the process might produce evidence. For a request within Europe, it is undeniably good practice to have written regard to the core principles of the European Convention on Human Rights, namely necessity, proportionality and legality. Interference with property and privacy in European countries is now frequently justified only if there are pressing social reasons such as the need to prosecute criminals for serious offences. Even if all these factors are addressed, it may well be that the searching of the person and taking of fingerprints, DNA and other samples will have less chance of success in some jurisdictions.

As corruption becomes increasingly sophisticated and transnational, and as more and more cases involve a link with organised crime, it may well be that there are extremely sensitive aspects to an investigation. Nevertheless, it may be that that sensitive information will have to be included in a formal request for assistance in order to satisfy the requested authority. At the same time, the disclosure of prospective witnesses and other information that could be exploited by criminals, organised crime or those who are otherwise corrupt, needs to be weighed in the balance. In reality, the system for obtaining mutual legal assistance, globally, is inherently insecure. The risk of unwanted disclosure will be greater or lesser depending on the identity of the requested state. When considering the matter, those making the request must have regard to duty of care issues which arise for them. Sometimes, difficulties can be avoided by the issuing of a generalised letter which leaves out the most sensitive information but provides enough detail to allow the request to be executed. Exceptionally, consideration can be given to the issuing of a conditional request for mutual legal assistance; in other words, a request that is only to be executed by the requested authority if it can be executed without requiring sensitive information to be disclosed.

A proposed checklist for the requester on what must be included within the letter of request, should include the following:

- an assertion of authority by the sender of the letter;
- citation of relevant treaties and conventions;
- assurance (i.e. as to reciprocity, dual criminality etc.);
- identification of defendant/suspect;
- present position re the investigation/proceedings; under investigation/prosecution;
- charges/offences under investigation/prosecution;
- summary of facts and how those facts relate to the request being made;
- enquiries to be made;
- assistance required;
- signature of the sender.

Note: A model MLA Law is included as Appendix B hereto.

Appendix C - UNDCP Model Mutual Assistance in Criminal Matters Bill 2000, and
Appendix D - Principles of UNCAC Implementation and the Preservation of Sovereignty
provide additional background information on MLA, Treaty-making generally, and sovereignty.

Other forms of co-operation

Article 47: Transfer of Criminal Proceedings

UNCAC LANGUAGE

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this 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

Overview

A relatively new option in transnational criminal justice is for one state to transfer criminal proceedings to another state. This would be an appropriate solution in cases where the latter state appears to be in a better position to conduct the proceedings or the defendant has closer ties to it because, for example, the defendant is a citizen or resident of this state. It may also be used as an appropriate procedural tool to increase the efficiency and effectiveness of domestic prosecutions initiated and conducted in lieu of extradition (especially in cases where extradition is denied because the person sought is a national of the requested state).

At the normative level, the only multilateral convention which deals on an ad hoc basis with the transfer of criminal proceedings is the European Convention on the Transfer of Proceedings in Criminal Matters, adopted within the framework of the Council of Europe. The Convention opened for signature in 1972 and entered into force in 1978.

The Council of Europe Convention in itself is complicated, but the underlying concept is simple: when a person is suspected of having committed an offence under the law of one State Party, that State Party may request another State Party to take action on its behalf in accordance with the Convention and the latter may take prosecutorial action under its own law. The Convention requires double criminality for that purpose.

In addition, both the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the United Nations Convention against Transnational Organized Crime include specific provisions on the transfer of criminal proceedings (articles 8 and 21 respectively) enabling States Parties to resort to this form of international co-operation where this is in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved and the most appropriate prosecution venue should be identified.

In this sense it is likely to mean that those States Parties that have enacted implementing legislation as parties to the above-mentioned Conventions may not need major amendments in order to comply with the requirements of article 47 of the Corruption Convention.

The United Nations has sought to promote the development of bilateral and multilateral treaties on this subject by preparing a Model Treaty on the Transfer of Proceedings in Criminal Matters (adopted by General Assembly Resolution 45/118). This is only a framework treaty, which has to be adapted to the specific requirements of the two or more States Parties which are negotiating such a treaty.

Challenges and solutions

1. Policy criteria for decisions on transfer

There has always been a great deal of uncertainty once the question turns to determining which is the best or most effective jurisdiction within which to undertake prosecutorial action against criminal offences with transnational dimensions.

Article 47 invites States Parties to consider the transfer to one another of criminal proceedings when this would serve the interests of the proper administration of justice, particularly in cases where several jurisdictions are involved and there is a need to concentrate prosecutorial claims and action in one jurisdiction. The Convention undoubtedly encourages States Parties to enter into agreements or arrangements which may allow the transfer of criminal proceedings and also provide solutions where, for example, a corruption offence has affected more than one jurisdiction and the states involved may wish to determine which is the most convenient forum for an investigation and trial.

Despite the increasing number of transnational crimes, there is little international guidance to assist the prosecutorial and investigative authorities in this determination. In transnational corruption, in particular, a number of real dangers lurk which may reflect different scenarios. Thus, for example, it may be the case that no jurisdiction initiates prosecutorial action on the wrong premise that this would be done by foreign authorities; or that prosecution takes place in the “wrong” (non-convenient) forum; or that two or more states raise conflicting jurisdictional claims.

It would therefore be critical to decide which is the most appropriate jurisdiction to institute criminal proceedings. In this vein, States Parties may wish to consider article 47 jointly with article 42 on jurisdiction and take into account the traditional criteria upon which decisions on jurisdiction are made with a view to determining the most convenient jurisdiction for the criminal process.

In doing so, a list of priorities may need to be established. The starting point in that recommendation was that the state in which the act was committed should have priority to prosecute the offender. Other criteria should be subordinate to this principle. Hence prosecution in the state in which the offender is ordinarily resident would depend on the state where the offence has been committed renouncing prosecution.

The assumption that it is normally most appropriate to prosecute an offence where it has been committed is not justified. Rehabilitation of the offender which is increasingly given weight in modern penal law requires that the sanction be imposed and enforced where the reformatory aim can be most successfully pursued, that is normally in the state in which the offender has family or social ties or will take up residence after the enforcement of the sanction.

On the other hand, it is clear that difficulties in securing evidence will often be a consideration militating against the transmission of proceedings from the state where the offence has been committed to another state. The weight to be given in each case to conflicting considerations cannot be decided by generalities. The decision must be taken in the light of the particular facts of each case. By attempting in this way to arrive at an agreement between the various states concerned it will be possible to avoid the difficulties that they would encounter by a prior acceptance of a system restricting their power to impose sanctions.

States Parties may further need to make decisions at an early stage and may wish to ask when and how the issue of jurisdiction should be considered, as well as which authorities will be

responsible for consultations and agreement. The issue of timing may also be relevant, as the question is raised whether the decision should be made at the beginning of an investigation or after the nature of the case has been shaped and possible admissibility issues have been dealt with.

2. Practical criteria for decisions on transfer

To facilitate decisions on transfer, States Parties should therefore formulate a practical set of criteria which may assist in resolving such complex jurisdictional issues. For instance, the types of questions that States Parties should be asking may include the following:

- Where was the offence committed and where was the offender arrested?
- Where are the most witnesses or most important evidence or victims of the crime concerned located?
- Which jurisdiction has the best/most effective laws?
- Which jurisdiction has the best confiscation laws?
- In which jurisdiction will there be less delay?
- Which jurisdiction provides the best security and custody assurances?
- Which jurisdiction can best deal with sensitive disclosure issues?
- Which jurisdiction can bear the costs of the proceedings?
- In which jurisdiction had the crime substantial effects?
- Where are most of any potentially recoverable assets located?
- Which State Party has the most developed asset-recovery mechanisms?

Checklist

- Has the State Party concluded agreements or arrangements on transfer of criminal proceedings?
- Has the State Party developed policy and practical criteria for decisions on transferring or accepting criminal proceedings?
- Does that policy paper lay out the judicial, operational and sentencing implications of decision-making on these issues?
- Does the policy paper address the implications of decision-making in relation to the proceeds of crime?
- Has the State Party identified and mandated an authority to take lead responsibility for consultations and decision-making on related issues?

Article 48: Law Enforcement Co-operation

UNCAC LANGUAGE

1. States Parties shall co-operate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct co-operation between their law enforcement agencies and, where

such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement co-operation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organisations, to enhance the co-operation between their law enforcement agencies.

3. States Parties shall endeavour to co-operate within their means to respond to offences covered by this Convention committed through the use of modern technology.

Overview

Because law enforcement is one of the most visible and intrusive forms of the exercise of political sovereignty, states have traditionally been reluctant to co-operate with foreign law enforcement agencies. That attitude has slowly changed with the growing understanding both of the shared interest in combating serious crimes and of the importance of co-operation as a response to transnational crime.

Articles 48-50 of the Convention, in particular, intend to promote the close co-operation between law enforcement authorities of the States Parties as an important tool for the successful investigation of transnational corruption. More specifically, article 48 seeks to enhance the effectiveness of law enforcement co-operation and requires States Parties to, inter alia, enhance and, where necessary, establish channels of communication with a view to facilitating the secure and rapid exchange of information relating to all aspects of Convention offences, including their links with other criminal activities.

Paragraph 1 of the article establishes the scope of the obligation to co-operate and identifies those measures that should form the basis of co-operation.

Paragraph 2 calls upon States Parties to consider entering into bilateral or multilateral agreements or arrangements on direct co-operation between their law enforcement agencies, with a view to giving effect to the Convention. It further enables the use of the Convention as the legal basis for such law enforcement co-operation in the absence of specific agreements or arrangements.

Paragraph 3 recognises the increasing use of computer technology to commit many of the offences covered by the Convention and calls upon States Parties to endeavour to co-operate more closely in order to respond to corruption-related offences committed through the use of modern technology.

Challenges and solutions

1. Issues to be addressed

Both informal and formal law enforcement co-operation has been hampered by a number of problems. As a result, for example, of the diversity in approaches and priorities in different jurisdictions, law enforcement agencies from different states may fail to agree on how to deal with a specific cross-border form of crime. Thus, some States Parties may have a requirement that their law enforcement or judicial officials interview the witnesses in their own language or that questions be provided to them in advance. Other States Parties may require that their officials are present at all interviews conducted by officials from a requesting State Party. Other States Parties may refuse to send their law enforcement officers to testify in foreign courts. Finally, the need for operational secrecy in electronic surveillance and undercover operations,

especially when combined with a lack of confidence and trust, may lead to a lack of willingness to share criminal intelligence, both domestically and internationally.

The diversity of law enforcement structures in States Parties may further result in confusion over which foreign law enforcement agency to contact, the duplication of efforts and, in some cases, competition between agencies, thus causing inefficiencies in the use of limited resources.

2. Areas for co-operation

In an effort to address the above-mentioned challenges, States Parties may wish to consider the following as potential areas of mutual benefit and co-operation:

(a) The exchange of strategic and technical information. This should be done within the limits of respective national competencies and in conformity with relevant rules on, for example, confidentiality. The exchanges should be either spontaneous or on request. The information may be stored on a shared database and may be used to support operational analysis carried out by the various agencies involved. The strategic information may include information on trends in criminality, the operational structures of the criminal organisations and individuals under suspicion, and the strategies, modus operandi and criminal techniques involved. It may also extend to information on the financing of the corrupt behaviour and favoured routes to disperse the proceeds of crime. It may further cover the techniques and approaches outlined in article 50 of the Convention.

(b) Co-operation in the field of intelligence and technical support. Again such co-operation should be done within limits of national competencies with a view to ensuring effective co-ordination of respective national activities, in particular in the field of threat assessment and risk analysis. This may extend in some circumstances to the sharing of specific technical tools and materials, and in developing patterns and trends relating to corruption such as the use of falsified documentation and the abuse of corporate and personal identities.

(c) Co-operation in the field of professional training and working groups. The States Parties may wish to further promote co-operation on joint training. In this vein, the organisation of working groups, seminars and workshops would provide the opportunity for broader dissemination of good practices and developing trends and techniques, as well as for the development of networks of anti-corruption law enforcement agencies. Expertise and information should be shared through secondments of personnel and staff exchange. States Parties should also ensure that resources are not wasted or that efforts are not fragmented.

(d) The use of contact points and networks. A system of respective contact points for co-operation between States Parties on a regional basis has proved to be beneficial for effective co-operation. Representatives should meet when necessary to foster mutual trust and confidence, as well as develop common strategies, address new trends, and resolve practical problems encountered in practice.

(e) Participation in joint investigation teams. There are of course many examples of effective law enforcement co-operation between agencies within States Parties, inter-State Party co-operation through, for example, the intelligence-sharing roles of Europol and INTERPOL, numerous regional instruments that seek to facilitate effective law enforcement co-operation and operational agencies such as OLAF or Europol (see article 49).

3. Means of co-operation

In investigations where evidence or intelligence lies overseas, information or intelligence could initially be sought through informal law enforcement channels, which can be faster, cheaper and more flexible than the more formal route of mutual legal assistance. The necessary arrangements for such informal contacts should, however, be subject to appropriate protocols and safeguards. These could range from the use of local crime liaison officers, where memorandums of understanding or similar protocols have been established, to the conclusion of regional arrangements.

Paragraph 1 (e) of article 48 also makes reference to the posting of liaison officers in terms of exchanging personnel. Because of the costs involved in posting a liaison officer to another state, liaison officers tend to be sent only to those states with which the sending state has already had a considerable amount of co-operation. In order to reduce costs, a liaison officer can be made responsible for contacts not only with the host state but also with one or more other states in the region. Another possibility is to have one liaison officer representing several states.

Co-operation within the framework of international structures may further be envisaged. Relevant examples include the work of INTERPOL, Europol, States of the Schengen Agreement and the Southern African Regional Police Chiefs' Co-operation Organisation. In order to enhance co-operation within the framework of such international structures, efforts need to be made to develop more effective systems of information-sharing at the regional and international levels.

- The effectiveness of any information system, such as the INTERPOL system of notices and the Schengen databases, depends on the accuracy and timeliness of the information provided. At the same time, the acquisition, storage, use and international transfer of operational data gives rise to questions of the legitimacy, transparency and accountability of law enforcement actions. If there is an absence of legal controls and judicial supervision, this may lead to a potential for abuse. Mechanisms for the effective gathering, analysis and use of operational data must take into consideration the need for full respect of fundamental rights. Wherever databases are created to assist law enforcement, attention needs to be paid to ensuring that national data protection legislation is adequate and extends to the operation of such databases not only nationally, but also internationally.

Checklist

- Has the State Party concluded any bilateral or agreements or arrangements to facilitate effective co-ordination among law enforcement authorities?
- Has the State Party designated a specific agency or agencies to deal with requests relating to law enforcement co-operation?
- Is this agency authorised to undertake investigative activities on behalf of a foreign State Party in relation to offences under the Convention?
- Is this agency authorised to share information, take lead responsibility in co-ordination and co-operation arrangements with other agencies in foreign States Parties?

Article 49: Joint investigations

UNCAC LANGUAGE

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or

arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected

Overview

The article is non-mandatory but builds upon the requirements set forth in article 48 and further intends to promote closer working relations between States Parties. The article encourages States Parties to consider entering into arrangements that allow for the use of joint investigative bodies, where a number of States Parties may have jurisdiction over the offences involved. Article 49 further enables States Parties to undertake joint investigations on a case-by-case basis when relevant agreements or arrangements do not exist.

Challenges and solutions

1. Operational issues

Joint investigations have been used as a form of international co-operation for many years in cross-border crime, particularly in relation to organised crime. However, this practice appears to have developed almost on the basis of ad hoc arrangements.

Practical experience has shown that such operations raise issues related to the legal standing and powers of officials operating in another jurisdiction, the admissibility of evidence in a State Party obtained in that jurisdiction by an official from another State Party, the giving of evidence in court by officials from another jurisdiction, and the sharing of information between States Parties before and during an investigation.

It was further acknowledged that these practical issues could be addressed through the use of investigative planning approaches that recognise and deal with them in advance. However, in cases of transnational crime and particularly transnational corruption, there is a need for clarity and consistency in the way investigations are conducted and information is exchanged. This would undoubtedly assist in ensuring, for example, that evidence is admissible in the courts, that the rights and duties of foreign members of teams are secured and that the sovereignty of the state in whose territory such investigation is to take place is fully respected, as article 49 expressly requires.

2. Developing a framework

Until recently, there has been no internationally agreed framework for establishing and operating joint investigations and the teams required to undertake the work. The Member States of the European Union put such a framework in place in July 2002 through the adoption by the European Council of the Framework Decision on Joint Investigation Teams. This decision gave support to the implementation of articles 13, 15 and 16 of the 2000 European Union Convention on Mutual Assistance in Criminal Matters (article 13 is dealing with the setting up and operation of a joint investigative team and articles 15 and 16 relate to the criminal and civil liability of those involved).

There are similar provisions on joint investigation teams in articles 20, 21 and 22 of the Second Additional Protocol to the Council of Europe Convention on Mutual Assistance in Criminal Matters, and articles 3, 19 and 24 of the Naples II Convention on Mutual Assistance and Co-operation between Customs Administrations of the Member States.

The European Union approach to joint investigations primarily focuses on the establishment of joint teams for the investigation of serious criminal offences with transnational dimensions. It also requires that a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate co-ordinated and concerted action.

The EU Framework Decision on joint investigation teams serves as a useful guide to address the practical and procedural issues that emerge in the context of a joint investigation.

It was always anticipated by the EU Member States that prosecutors would be consulted by the police at a very early stage in the investigative process and be responsible for providing advice on a wide range of issues such as jurisdiction, disclosure and liaison with other European counterparts. Indeed the team leaders of the participating States Parties are likely to be prosecutors or magistrates.

3. Planning for joint operations

In planning joint investigations, and identifying those issues to be addressed prior to undertaking any work, the issues that may need to be considered include the following:

- the criteria for deciding on a joint investigation, with priority being given to a strong and clearly defined case of serious transnational corruption. The issue here is to ensure that such investigations are handled in a proportionate manner and with due respect to the suspect's human rights;
- the criteria for choosing the location of a joint investigation (near the border, near the main suspects etc.);
- the use of a co-ordination body to steer the investigation if a number of different jurisdictions are involved;
- the designation of a lead investigator to direct and monitor the investigation;
- agreements on the collective aims and outcomes of joint working, the intended contribution of each participating agency, and the relationship between each participating agency and other agencies from the same State Party;
- addressing any cultural differences between jurisdictions;
- assessing the pre-conditions of the investigation as the host State Party should be responsible for organising the infrastructure of the team;
- the liability of officers from a foreign agency who work under the auspices of a joint investigation;
- the level of control exerted by judges or investigators;
- financing and resourcing of joint investigations. In this vein, an agreement may be necessary to provide for the costs directly to be charged to the participating States Parties. For each State Party it should be specified whether the costs are directly charged to the agency allocating the staff, or whether there will be some form of national or international financing;

- identifying the legal rules, regulations and procedures to determine the emerging legal and practical matters, including pooling, storage and sharing information, confidentiality of the activities, the integrity and admissibility of evidence, disclosure issues (a particular concern in the common law jurisdictions), implications of the use of covert operations, appropriate charges and the issue of retention of traffic data for law enforcement purposes;
- ensuring the upgrading of capacity, expertise and experience of developing States Parties in participating in joint investigations.

Flexible and effective agreements or arrangements in this field are mostly based on the political will and determination of the states involved, as the adoption of the EU Framework Decision indicates. However, the implementation of such agreements or arrangements is often subject to the limitations and requirements foreseen in national legislation. Article 49 is intended to provide a legal regime which may overcome such limitations.

Checklist

- Have the authorities of the State Party been involved in joint investigations or joint investigative task forces to deal with multi-jurisdictional cases?
- Is such involvement based on ad hoc arrangements or is there any established framework to authorise it?
- What kind of legal, operational and evidentiary issues are experienced in carrying out joint investigations?

Commentary

Investigations into corruption necessarily require specialisation and resource intensive law enforcement activity. In both common law and civil code jurisdictions, such investigations are becoming increasingly multidisciplinary and reliant on a range of expertise, including forensic and financial investigative skills, financial and communications analysis, covert deployment and specialist searching methods.

The reality of transnational crime is such that, even in small jurisdictions, the undertaking of an investigation requiring a broad base of such skills is now likely. At the same time, however, it is also evident, and entirely understandable, that in those states it is unlikely that a full range of investigatory skills will be present. It may, therefore, be useful to consider the merits of putting together investigative teams on a regional or sub-regional basis.

It needs to be acknowledged at the outset that certain difficulties and challenges will arise. Indeed that of sovereignty is one which will spring immediately to mind, since as soon as two or more states each commit human resources to an investigation, there will need to be a decision as to who will carry out the requisite duties and roles and under which law.

There is international recognition that the establishment of a joint investigation team will be appropriate in certain circumstances. Indeed, the UN Convention Against Transnational Organised Crime 2000 (the Palermo Convention), and UNCAC, provide in identical terms as follows (at Articles 19 and 40 respectively):

It is clear that both Conventions have in mind that states should consider two possible approaches: (i) the establishment of a joint investigative body or unit which will be a standing

resource to be utilised when an appropriate case falls to be investigated; and (ii) the establishment of a joint investigative team to carry out the investigation of a specific case. Each approach will have advantages and disadvantages: in the former, the benefit is that the resource is in existence and can presumably respond quickly, but will require perhaps significant funding (unless it exists as a 'shadow framework' whose members are only brought together when a case arises); in the latter, there will be fewer running costs, but set up, on a case-by-case basis, may take some time. However, it is not difficult to envisage that various hybrids of the two methods might prove attractive to some.

The European Union (EU) turned its attention to the possible use of joint investigation teams in the 1990s, and the EU Convention on Mutual Assistance in Criminal Matters (adopted in May 2000) provides explicit provision for the setting up of such teams. Indeed, such was the impatience of EU Member States with the delay in the EU Convention entering into force (it did not do so until 23 August 2005), that a Framework Decision on Joint Investigation Teams was adopted, to be implemented by 1 January 2003.

The EU's approach is that, in order to carry out a criminal investigation in Member States which necessitates co-ordinated and concerted action, at least two Member States may set up a joint investigation team. To that end, the competent authorities of the relevant Member States will enter into an agreement to determine the procedures to be followed by the joint team. As to the limitations on that team, it must be set up for a specific purpose; and for a limited period (which may be renewed with the agreement of all the states involved).

Those EU Member States that set up the team will decide on its composition, purpose and duration. They may also, by agreement, allow representatives of Europol or OLAF (the EU anti-fraud body), or representatives of other states to take part in the team's activities. Members of the joint investigation team from Member States other than the Member State in which the team operates are referred to as being "seconded" to the team. They may carry out tasks in accordance with the law of the Member State where the team is operating. With respect to offences committed by or against them, officers or agents from a Member State other than the Member State of operation are to be regarded as officials of the Member State of operation.

In determining the nature and extent of co-operation, any agreement between states might be in the form of an agreement establishing a standing body or unit drawn from investigators from the states who are party to the agreement; alternatively states might wish to rely on an ad hoc agreement as the need for an investigation arises. A third possibility might be for states to have a standing agreement between themselves, but with the details being agreed on an ad hoc basis, depending on the demands of a particular case.

A further challenge is which laws will govern a joint investigation. It is suggested that the EU model be followed in that regard, with the investigation being carried out in accordance with the laws of the state in which the investigators are operating. Legislation may, however, be necessary to authorise the operation of the joint team in particular states. It may even be possible for several states to legislate in similar and agreed terms.

Article 50: Special investigative techniques

UNCAC LANGUAGE

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled

delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of co-operation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

Overview

Article 50 requires States Parties to take measures to allow for the appropriate use of special investigative techniques for the investigation of corruption.

Paragraph 1 advocates the use of controlled delivery and, where appropriate, electronic or other forms of surveillance and undercover operations on the understanding that such techniques may be an effective weapon in the hands of law enforcement authorities to combat sophisticated criminal activities related to corruption. However, the deployment of such techniques must always be done to the extent permitted by the basic principles of domestic legal systems and in accordance with the conditions prescribed by domestic laws. Paragraph 1 also obliges States Parties to take measures allowing for the admissibility in court of evidence derived from such techniques.

Paragraph 2 accords priority to the existence of the appropriate legal framework that authorises the use of special investigative techniques and therefore encourages States Parties to conclude bilateral or multilateral agreements or arrangements to foster co-operation in this field, with due respect to national sovereignty concerns.

Paragraph 3 provides a pragmatic approach in that it offers the legal basis for the use of special investigative techniques on a case-by-case basis where relevant agreements or arrangements do not exist.

Paragraph 4 clarifies the methods of controlled delivery that may be applied at the international level and may include methods such as intercepting and allowing goods or funds to continue intact or be removed or replaced in whole or in part. The method to be used may depend on the circumstances of the particular case and may also be affected by the national laws on evidence and its admissibility.

Challenges and solutions

In recent years there has been a significant shift in the use of methods to detect and investigate crime and in the nature of investigations with a greater emphasis on intelligence-driven, proactive investigations. In addition, the technological means whereby investigators can gather information covertly have also advanced rapidly. However, States Parties may wish to take into account that the expanded use of special investigative techniques has to be carefully assessed in the light of human rights protection and the evidentiary requirements of any subsequent legal proceedings.

1. Safeguards

States Parties may wish to give serious consideration to the legal and policy implications of the deployment of special investigative techniques and therefore a careful assessment of the appropriate and proportionate checks and balances to secure human rights protection may be needed. Careful thought should also be given to the question whether oversight of the use of special investigative techniques shall rest with the judiciary or the executive.

2. Resources/ technological competence

The professionalism and competence of the law enforcement agencies involved in special investigative techniques and the level of their training are among the practical aspects that require careful consideration. In addition, in seeking the best methods to enhance international co-operation in this field, it may be appropriate for trained law enforcement agents from overseas to

work in other States Parties with a view to improving capacity and also ensuring admissibility of the evidence derived from the use of the investigative techniques.

3. Admissibility of evidence

Concerns may also be raised with regard to the legality of the use and extent of deployment of special investigative techniques and the resulting admissibility of their results. This will be particularly an issue where a joint operation is involved and therefore the sharing of intelligence, information and resources is likely to require careful handling. In some jurisdictions, the use of special investigative techniques may cause difficulties in that the judges may not be in a position to fully understand the process and the technology involved. This may be resolved through appropriate training and even the use of specialist judges.

4. Techniques

There are a number of other special investigative techniques that States Parties may wish to consider, but II.4.1-II.4.7 summarise a number of widely used techniques. It is also important to ensure the integrity of the evidence obtained through such techniques when used before the courts of States Parties.

4.1. Technical surveillance – telephone intercept, bugging

Also known as intrusive electronic surveillance, this is a formidable tool in the hands of the investigative authorities. However, given that such devices are generally intended to capture the conversations of individuals – some of whom may not be involved in the investigation – particular attention should be paid to requisite safeguards which authorise, and provide detailed conditions for, their use. Electronic surveillance is likely to extend to the use of listening devices, phone or e-mail intercept, and the use of tracking devices.

4.2 Physical surveillance and observation

This technique is likely to be less intrusive than technical surveillance and may extend to placing the suspect under physical surveillance, or following and filming the suspect. However, it may also extend to monitoring bank accounts or even sophisticated methods of monitoring transactions.

4.3. Undercover operations and the use of sting operations

The use of undercover operations, which may or may not extend to the use of a “sting operation”, are extremely valuable in cases where it is very difficult to gain access by conventional means to a corruption conspiracy. The aim of such operations is to engage in contact with the corrupt parties, so that the undercover operatives can witness and expose the corrupt practices. The evidence of an “insider”, whether an undercover police officer or even a co-conspirator, is likely to be critical to a successful prosecution. Furthermore, the effect of such conclusive evidence often brings offers of co-operation and pleas of guilt from defendants, thereby eliminating the need for long and expensive trial processes (see also article 37).

Undercover operations may range from routine practices, such as the undercover officer offering bribes to traffic police or low-level officials, to much more complex and long-term plans which are more sophisticated in both the use of special investigative techniques and the creativity of the investigation itself (such as “creating” a working import/export). However, there are likely to be problems in some States Parties as to the legality of the use of undercover officers and sting

operations, particularly associated with concerns about entrapment, or officers committing a criminal act (such as offering a bribe), as well as concerns about resources, longevity and the cost of such operations.

4.4. Informants

Many States Parties use or recruit informants inside public institutions as sources of information. These are not law enforcement officers but public officials. As sources of information and intelligence within offices not amenable to undercover work or surveillance, such informants may provide effective services. On the other hand, their use may raise issues about payment, dissemination of information, safety and informant-handler relations. Another practical issue that may emerge where the information is sufficient enough to lead the case before a court is the availability of such informants as witnesses.

4.5. Integrity testing

Integrity testing is a method that enhances both the prevention and prosecution of corruption and has proved to be an extremely effective and efficient deterrent to corruption. Integrity testing is usually utilised in circumstances where intelligence exists providing indications that an individual or a number of individuals, usually public officials, are corrupt.

A scenario is created in which, for example, a public civil servant is placed in a typical everyday situation where he or she has the opportunity to use personal discretion in deciding whether or not to engage in criminal or other inappropriate behaviour. The employee may be offered the opportunity to take a bribe by an undercover officer or be presented with an opportunity to solicit a bribe through, for example, an abuse of public functions (see article 19). However, such testing cannot be simply used on an indiscriminate basis but must be based on some level of intelligence to suggest that the employee may be corrupt. Moreover, consideration should be given to existing restrictions intended to prevent “entrapment”, whereby undercover agents are permitted to create opportunities for a suspect to commit an offence, but are not allowed to offer any actual encouragement to do so.

4.6. Financial transaction monitoring

The movement of illicit funds through financial institutions and the level of reporting to FIUs of States Parties provides investigators with information about not only the movement of the funds, but also the relationships of those involved. For the purposes of article 50, States Parties should ensure that the reporting regime of the financial transaction allows, subject to appropriate controls, authority and supervision, for the monitoring of an account by investigators to track the location, movement and dispersal of the financial benefits of corruption.

5. Relevant Conventions

A number of States Parties may already have in place the mechanisms provided for in article 50, particularly in relation to offences such as trafficking in drugs or organised crime, as a result of being Parties to Conventions such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (see article 11 on controlled delivery) and the United Nations Convention against Transnational Organized Crime (see article 20). However, the decisions on whether to use these techniques will depend on the requirements of the domestic legislation, as well as the discretion and resources of the States Parties concerned.

Checklist

- Do the competent authorities of the state have the power to undertake technical forms of surveillance and other special investigative techniques?
- Are there clear guidelines on the use of such techniques?
- Is evidence derived from the use of special investigative techniques admissible in national courts?
- Has the State Party concluded any bilateral, or acceded to multilateral, agreements or arrangements for promoting international co-operation in using special investigative techniques?

Commentary and further examples

Examples of special investigative means

Integrity testing is capable of being an important tool in the detection and eradication of public sector corruption. However, it carries with it a number of legal issues which a prosecutor will need to consider and address. In particular, it is vital for a prosecutor to be satisfied that a planned test has a legal basis, both in domestic law and in relation to human rights instruments/jurisprudence, and, hence, legitimacy before it takes place.

Integrity testing may be divided into two types: The first is sometimes called “random virtue” testing and is used by institutions to highlight the presence of issues or abuses which may not amount to criminal offences but which are of corporate concern. The second type is “intelligence-led” tests which arise when, as the name suggests, there is information or intelligence that a particular individual or group of individuals is committing criminal or serious disciplinary offences.

Either type of test, if carried out, would involve a potential breach of the right to a private life. It is, therefore, important to ensure that, in relation to any test, there is a legal basis for it, it is necessary in the particular circumstances and it is proportionate to the risk or abuse being investigated.

The purpose of these short notes is, however, to concentrate on intelligence-led testing, since, in relation to such operations, experience has been that lessons may be learnt by prosecutors and usefully passed on to prosecutorial colleagues.

Experience by those in a number of jurisdictions suggests that early legal advice is a necessary component of any properly planned integrity test. Indeed, in the UK, law enforcement has developed a best practice whereby a written report is submitted to a prosecutor outlining: intelligence upon which the need for an integrity test is based, the suggested scenario or scenarios and the various authorisations which will need to be sought.

Particular experience has been gained in using integrity testing in relation to corrupt law enforcement officers and officials. Intelligence-led tests have tended to involve allegations that sensitive information is being passed to criminal associates, the drugs or cash (or indeed both) are being stolen from addresses, the drugs are being hived off and sold through criminal associates, or that an officer or official is party to a corrupt relationship with a known criminal

and is assisting that criminal to avoid detection, either by imparting intelligence to him or by seeking to compromise ongoing operations.

Key considerations for a successful test are as follows:

- there is a legal basis (both domestically and in human rights law) for it;
- there is reliable intelligence or information;
- the test seeks to replicate as closely as it can the nature of the intelligence;
- all stages of the test, including preparation, are recorded by the best available means (e.g. audio, video, etc);
- all decisions made as to the nature of the test and its implementation are recorded in a policy or decision log;
- there is a complete audit trail;
- the chosen scenario is feasible and credible;
- the test only runs for as long as is necessary;
- the scenario does not amount to entrapment;
- the involvement of third parties and the risk of collateral intrusion are kept to a minimum;
- presentation in court and disclosure implications are addressed at each stage of planning and implementation;
- each action carried out by the investigative team is capable of justification on established domestic and human rights principles.

Proactive Investigations

Traditionally anti-corruption investigations tended to be reactive, as opposed to the increasingly important proactive investigations discussed in detail in the next section. Reactive investigations, particularly in relation to commercial corruption and corruption in relation to the obtaining of contracts, will often rely on forensic accountancy, asset tracing and financial investigation. However, one of the most compelling pieces of testimony in a corruption case, but equally one of the most dangerous to all sides, is that from the individual who was within the corrupt company or was part of the corrupt criminal network. In the case of the former, we are faced with the so-called ‘whistleblower’ and, in many jurisdictions, there is a specific legislative framework concerning whistleblowers. As for the evidence of the whistleblower, the risk is obvious: is he or she a credible witness or has his/her evidence been distorted or even fabricated through frustration, resentment or in the hope of some other reward? Equally, is he or she simply providing evidence because of some form of inducement? The risks around the evidence of the criminal participant, are, however, even more stark. The same concerns arise, principally those of inducement and credibility, but this time set against a background of quite possible risk to life, manipulation of the process and, very often, a history of past and present criminality and related ‘baggage’.

In a corruption or misconduct in a public office case such a criminal associate or accomplice, perhaps faced with overwhelming evidence, may turn ‘State’s Evidence’ or ‘Queen’s Evidence’ and elect to give evidence against others. No particular difficulties of procedure arise here. It will usually be that a draft witness statement is provided by an accused who has decided to cooperate; as a matter of practice, such a witness statement will not be signed until after a plea of guilty has been entered. Sentence, meanwhile, will usually, but not invariably, be passed after he/she has given evidence at the trial or trials of his/her associates.

In relation to the giving of evidence by an alleged accomplice of an accused, some jurisdictions have abrogated the requirement for a jury to be given a corroboration warning. However it will

still be within the judge's discretion whether it is nonetheless appropriate to give a warning in relation to the evidence of such a witness. It might be appropriate for a warning to be given to a jury to exercise caution in relation to the unsupported evidence of an accomplice (or a complainant in respect of a sexual offence) where there was an evidential basis for the suggestion that the account given by the witness might be unreliable. An evidential basis would not, however, include simply matters put by counsel in cross-examination. Where a judge decides that it is appropriate to give a warning, there is no particular formula to be followed. It is for the judge to decide on the nature of the warning to be given.

Co-operating defendants/protected witnesses/resident informants

The nature of corrupt transactions, particularly those involving corrupt police or law enforcement officials, is such that traditionally reactive measures of investigation are fraught with difficulties. The offer or solicitation of a bribe or other advantage will often be face to face between two parties, with no independent witnesses. Where there is a willing witness, for instance a party who has been solicited by an official, he or she may be unreliable or tainted. There will be circumstances, as discussed above, where a reactive investigation, perhaps with the benefit of whistleblower or protected witness evidence, is the only or most appropriate route. However, since the late 1990s many jurisdictions have recognised the value of an intelligence led, proactive approach. Indeed, very often a proactive investigation, utilising covert methodologies, will be the only way of progressing enquiries. Such an approach is, of course, entirely consistent with the growth of intelligence-led policing.

Covert deployment may form the basis of intelligence gathering, evidence obtaining, or both, in the course of a corruption investigation. The proactive operation might involve information from a source, intelligence and/or evidence from the deployment of an undercover agent or participating source, surveillance or telecommunications product. The investigation might comprise of what is best described as a 'sting' operation or, more specifically, the increasingly useful intelligence-led integrity test (discussed in more detail below).

The Use of Intrusive Techniques & the Impact of Human Rights Considerations

The deployment of covert, intrusive techniques is not new. However, since the early 1990s there has been ever increasing reliance on intelligence-led and proactive criminal investigations. The use of such techniques may well be the only way to investigate alleged corruption in any given instance, whether it is suspected on the part of a law enforcement officer with connections to organised crime or whether it is bribery within the commercial sphere.

Turning to the human rights jurisprudence in more detail, and with investigations into alleged corruption particularly in mind, the following should be noted:

In Accordance with the Law

There must be a basis in domestic law or legislation that provides for the deployment of the covert technique. Such legislation must be accessible to those liable to be affected. In addition, such legislation, including that which authorises the activity liable to interfere with the right to a private life, must have sufficient clarity so as to give a person an indication as to the circumstances and conditions in which covert methods by a public authority may be used.

The European Court of Human Rights (EctHR) has indicated that it expects that there should be a regime of independent supervision of the use of covert, intrusive powers. As to the process

of authorisation, the more independent the authorising or reviewing individual/body is, the more likely that a court will regard the authorising and reviewing regime as appropriate. Indeed, in *Klass_v Germany* the ECtHR noted that judicial control of the authorisation procedure provided 'the best guarantees of independent, impartiality and a proper procedure'. The use by the UK of domestic commissioners and tribunals is capable of satisfying the demands of Article 8.

Necessary in a Democratic Society

The interference with an individual's qualified rights must fulfil a pressing social need, be in pursuit of a legitimate aim and any deployment must be only that which is necessary to achieve what is sought to be achieved (i.e. the detection of the particular crime). In addition, safeguards must be in place to prevent abuse by intrusive techniques and remedies must be available in the event of such abuse.

Proportionality

The interference must be proportionate to the achievement sought from it. Thus, for example, the deployment with a listening device in a target's bedroom may require much greater justification than a deployment in a living room.

CHAPTER V: ASSET RECOVERY

Introduction

Commonwealth states are reminded to have reference to the ten key recommendations of the Commonwealth Expert Working Group on Asset Recovery which reported in 2005:

KEY RECOMMENDATIONS

1. Commonwealth countries should sign, ratify and implement the United Nations Convention against Corruption as a matter of urgency.
2. Commonwealth Heads of State/Government, ministers and other public officials should not have immunity from prosecution in domestic courts for alleged criminal activity. Heads of Government should commit themselves to take active steps to ensure the removal of these immunities.
3. In cases involving allegations of corruption by serving Heads of State/Government the Commonwealth should have an ad hoc peer review mechanism in place.
4. Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction-based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died. Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation⁵².
5. Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement.
6. Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system. Commonwealth countries which have an existing law for enforcing foreign requests for restraint and confiscation should review their legislation and procedures and amend them as necessary to ensure that foreign requests for restraint and confiscation can be effectively and speedily enforced. If the current law does not provide for the enforcement of non-conviction based orders, it should be amended to do so.
7. Commonwealth countries should provide by law, either through a judicial process or executive discretion, for the return of funds minus reasonable expenses to a requesting country:
 - (a) in cases of misappropriation or other unlawful taking of public funds, or the laundering thereof;

⁵² It should, however, be noted that the recommendation to put in place non-conviction based confiscation is a discretionary, not mandatory, provision in UNCAC (at Article 54, (1)(c))

- (b) where the requesting country reasonably establishes its prior ownership of confiscated property; or
 - (c) when the requested country recognises damage to the requesting country.
8. Commonwealth countries should ensure that the law clearly prescribes how public funds may be used including by Heads of State/Government and that there are criminal offences applicable to any misuse of those funds.
 9. Commonwealth countries should allocate sufficient resources to establish and properly fund central authorities and law enforcement and other agencies dealing with asset confiscation and management.
 10. Commonwealth Heads of Government should keep asset repatriation on the agenda for their meetings and commit themselves to periodic review and discussion (by Heads of Government/Law and Finance Ministers) of the progress on implementation of the recommendations in the report.

International Forfeiture Co-operation etc

In addition to Article 31 (Freezing, seizing etc.), which provides for a domestic freezing and confiscation regime in each State Party, UNCAC makes detailed provision for the recovery of property/repatriation of assets.

Article 53 (Measures for direct recovery of property) provides that:

- Each State Party shall, in accordance with domestic law, take such measures as may be necessary to permit another party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
- Each State Party shall, in accordance with its domestic law, take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with the Convention to pay compensation or damages to another party that has been harmed by such offences;
- Each State Party shall, in accordance with its domestic law, take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognise another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance of this Convention.

Article 54 (Mechanisms for recovery of property through international co-operation in confiscation) provides that:

- Each State Party, in order to provide MLA pursuant to Article 55 of the Convention, with respect to property acquired through or involved in a commission of an offence established in accordance with the Convention shall, in accordance with its domestic law:
 - Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

- Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money laundering or such other offence as may be within its jurisdiction, or by other procedures authorised under its domestic law; Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.
- Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence, or in other appropriate cases.
- Each State Party, in order to provide MLA upon a request made pursuant to Article 55 shall, in accordance with its domestic law:
 - Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority or requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to a confiscation order (i.e. to permit its competent authorities to give effect to a confiscation order issued by a court of another State Party);
 - Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested Party to believe that there are sufficient grounds for taking such action and that the property would eventually be subject to an order of confiscation for the purposes of giving effect to an order for confiscation by a court of another State Party;
 - Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Article 55 (International co-operation for purposes of confiscation) finds that:

- A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with the Convention for confiscation of proceeds of crime, property etc situated in its territory shall, to the greatest extent possible within its domestic legal system:
 - Submit the request to its competent authorities for the purpose of obtaining a confiscation order and, if such an order is granted, give effect to it; or
 - Submit to its competent authorities, with a view to giving effect to it to the extent requested, a confiscation order issued by a court in the territory in the requesting State Party in accordance with Articles 31 and 54, insofar as it relates to proceeds of crime, property etc situated in the territory of the requested State Party.
- Following a request made by another State Party, having jurisdiction over an offence established in accordance with the Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property etc for the

purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request made under Article 55, by the requested State Party.

- A description of property to be confiscated, a statement of facts, and a legal admissible copy of the confiscation order shall be provided, as appropriate, by the requesting Party.
- Co-operation under Article 55 may be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence, or if the property is of a de minimis value.
- Before lifting any provisional measure taken pursuant to Article 55, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.
- Article 55 shall not be construed as prejudicing rights of bone fide third parties.

Given the importance of Commonwealth states having in place a comprehensive set of provisions for asset tracing, recovery and return, the detailed guidance produced by UNODC in consultation with a wide range of specialists and stakeholders (including the Commonwealth Secretariat) is set out below. This has been summarised in parts to ensure maximum applicability to Commonwealth states. The reader is, therefore, also referred to paragraphs 66 of the UNODC Legislative Guide for the full text.

Article 51: General provision

UNCAC LANGUAGE

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of co-operation and assistance in this regard.

The return of assets as a fundamental principle

The return of proceeds from corruption to their country of origin is one of the core objectives of the Convention (article 1(b)). Article 51 further establishes the return of the proceeds of corruption as a “fundamental principle” of the Convention.

The Chapter specifies how co-operation and assistance will be provided, how proceeds of corruption are to be returned to a requesting State Party, and how the interests of other victims or legitimate owners are to be considered. In spite of the fact that an interpretative note to the Convention indicating that the expression “fundamental principle” would not have legal consequences on the other provisions of Chapter V of the Convention (A/58/422/Add.1, paragraph 48), article 51 is a statement of intent indicating that any doubt concerning the interpretation of provisions related to asset recovery should be resolved in favour of recovery as a core international co-operation objective of the Convention.

Chapter V on asset recovery must be read in conjunction with a number of provisions contained in Chapters II to IV of the Convention, particularly article 14 on the prevention of money-laundering, article 31 on the establishment of a regime for domestic freezing and confiscation of the proceeds of corruption as a prerequisite for international co-operation and the return of assets, article 39 on co-operation between national authorities and the private sector and articles 43 and 46 on international co-operation and mutual legal assistance. Article 52 also has

significance insofar as it requires States Parties to take reasonable steps to determine the identity of the beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates.

Commentary

The exportation of assets derived from corruption or other illicit sources has serious or even devastating consequences for the country of origin. It undermines foreign aid, drains currency reserves, reduces the tax base, increases poverty levels, harms competition, and undercuts free trade. All public policies, therefore, including those relative to peace and security, economic growth, education, health care and the environment, are possibly undermined. Theft from national treasuries, corruption, bribes, extortion, systematic looting and illegal sale of natural resources or cultural treasures, diversion of funds borrowed from international institutions are a small sample of what have been called 'kleptocratic' practices. In such instances, the confiscation and return of assets stolen (occasionally by top-level public persons) has been a pressing concern for many countries. Consequently, any effective and deterrent response must be global and address the issue of asset return to victimised states or other parties.

The international community and United Nations institutions have been paying attention to this problem for some time. A report of the Secretary-General⁵³ reviewed measures taken by Member States, the United Nations system and relevant organisations, and confirmed the high priority attached by the international community to the fight against corruption in general and to the problem of cross-border transfers of illicitly obtained funds and the return of such funds. Several General Assembly resolutions have emphasised the responsibility of governments and encouraged them to adopt domestic and international policies aimed at preventing and combating corruption and the transfer of assets of illicit origin and at facilitating the return of such assets to the countries of origin upon request and through due process⁵⁴.

The Centre for International Crime Prevention of the United Nations Office on Drugs and Crime issued a report on the prevention of corrupt practices and illegal transfer of funds. This report furnished information on measures taken by Member States and UN bodies toward the implementation of Resolution 55/188 addressing the issue of the transfer of funds of illicit origin and the return of such funds, as well as recommendations on this issue⁵⁵. This was followed up by another report on further progress on the implementation of that resolution and information on additional Member States regarding their anti-corruption programmes⁵⁶.

Economic and Social Council Resolution 2001/13 of 24 July 2001 requested the Secretary-General to prepare for the Ad Hoc Committee a global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption⁵⁷. The study examined problems

⁵³ Report on the "Prevention of corrupt practices and transfer of funds of illicit origin" (A/57/158 and Add.1 and 2), pursuant to General Assembly Resolution 55/188 of 20 December 2000.

⁵⁴ See Resolution 57/244 of 20 December 2002 on the prevention of corrupt practices and illegal transfer of funds, Resolution 55/61 of 4 December 2000 on an effective international legal instrument against corruption, Resolution 55/188 of 20 December 2000 on preventing and combating corrupt practices and illegal transfer of funds and repatriation of such funds to the countries of origin, and Resolution 56/186 of 21 December 2001 on preventing and combating corrupt practices and transfer of funds of illicit origin and returning such funds to the countries of origin.

⁵⁵ See report to the Assembly at its fifty-sixth session (A/56/403 and Add.1).

⁵⁶ This report (A/57/158 and Add.1 and 2) was submitted to the General Assembly in response to Resolution 56/186 of 21 December 2001.

⁵⁷ The Global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption was submitted to the Ad Hoc Committee at its fourth session (A/AC.26/12) in accordance with Economic and Social Council resolution 2001/13.

http://www.unodc.org/pdf/crime/convention_corruption/session_4/12e.pdf.

associated, inter alia, with the transfer of assets of illicit origin, in particular in cases of large-scale corruption causing hardship to victim countries, which were unable to recover those assets. Among the procedural, evidentiary and political obstacles to recovery efforts cited by the report were the following:

- anonymity of transactions impeding the tracing of funds and the prevention of further transfer;
-
- lack of technical expertise and resources;
- lack of harmonisation and co-operation;
- problems in the prosecution and conviction of offenders as a preliminary step to recovery.

Other hurdles include:

- absence of institutional/legal avenues through which to pursue claims successfully, certain types of conduct not criminalised, immunities, third party rights;
- questions of evidence admissibility, type and strength of evidence required, differences regarding in rem forfeiture, time-consuming, cumbersome and ineffective mutual legal assistance treaties (MLATs) when the identification and freezing of assets must be done fast and efficiently;
- limited expertise to prepare and take timely action, lack of resources, training or other capacity constraints;
- lack of political will to take action or co-operate effectively; lack of interest on the part of victim states in building institutional and legal frameworks against corruption;
- corruption offenders are often well connected, skilled and bright. They can afford powerful protections and can seek shelter in several jurisdictions. They have been able to move their assets and criminal proceeds discretely and to invest them in ways that render discovery and recovery almost impossible.

Even in cases where assets were located, frozen, seized and confiscated in the country where they were found, problems often arose with the return and disposal of such assets, such as concerns about the motivation behind recovery efforts and competing claims.

The issues for consideration included transparency and anti-money laundering measures, ways of obtaining adequate resources for states seeking recovery, legal harmonisation, international co-operation, the clarity and consistency of rules relative to the allocation of recovered funds, the handling of conflicting claims, national capacity building, and an enhanced role for the United Nations⁵⁸.

Asset recovery can perform four essential functions, when implemented effectively: a) it is a powerful deterrent measure, as it removes the incentive for people to engage in corrupt practices in the first place; b) it restores justice in the domestic and international arenas by sanctioning improper, dishonest and corrupt behaviours; c) it plays an incapacitative role by depriving serious offenders and powerful networks of their assets and instruments of misconduct; and d) it

⁵⁸ See Report of the Secretary-General entitled Preventing and combating corrupt practices and transfer of funds of illicit origin and returning such assets to the countries of origin (A/58/125).

further the goal of the administration of justice while simultaneously repairing the damage done (to quite often, needy victims and populations) and assisting in the economic development and growth of regions, which are then viewed as more predictable, transparent, well managed, fair, competitive, and thus worthy of investment.

The combination of these effects would be healthier, more open, efficient, well governed and prosperous environments, which would enjoy also more security in the context of new anxieties and fears generated by extremism and terrorism.

Despite numerous visible corruption cases causing scandals around the globe, the history of successful prosecutions, adequate sanctions and return of looted assets to rightful owners leaves much to be desired.

Article 51 declares the return of assets as a “fundamental principle” of this Convention, and States Parties are mandated to afford one another the “widest measure of co-operation and assistance in this regard”. The lesson that “grand” corruption can only be fought through international and concerted efforts based on genuine commitment on the part of governments has been learned. States Parties, thus, are required to take measures and amend domestic laws as necessary in order to meet the goals set forth in each article of this Chapter⁵⁹. All provisions of Chapter V should be read in the light of article 1 on purpose of the CAC:

- To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- To promote, facilitate and support international co-operation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- To promote integrity, accountability and proper management of public affairs and public property.

Technical assistance is, therefore, necessary for the development of national capacity and creation of control bodies with knowledgeable, experienced and skilful personnel. States can obtain such technical assistance from the UNODC⁶⁰.

Article 52: Prevention and detection of transfers of proceeds of crime

UNCAC LANGUAGE

1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

⁵⁹ This is the meaning of the phrase “in accordance with domestic law”, which is repeated throughout the articles of this Chapter.

⁶⁰ See also Anti-corruption toolkit, http://www.unodc.org/pdf/crime/corruption/toolkit/AC_Toolkit_chap8.pdf

2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organisations against money-laundering, shall:

(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

The following commentary and guidance appeared in the July 2008 Commonwealth Strategies Paper:

Overview

While article 14 establishes the basic operational principles of an anti-money-laundering prevention system, article 52 requires States Parties to compel their financial institutions to verify the identity of their customers, to maintain adequate records and accounting systems, to take reasonable steps to determine the beneficial owner of highly valued accounts and to conduct enhanced scrutiny of accounts maintained by so-called politically exposed persons (PEP – defined in paragraph 1(b) as individuals who are, or have been, entrusted with prominent public functions and their family members and close associates). In implementing these requirements, States Parties shall issue advisories to financial institutions on how to carry out these obligations.

Advisories are normally formal and binding in terms of guidance, although the detail of implementation may be left to the advised institution, and may be issued by banking or financial services regulators, finance ministries, FIUs or other designated agencies. Additionally, article 52 recommends avoiding corresponding relationships with shell banks to discourage their use for the transfer, diversion or conversion of illicitly obtained funds.

States Parties may wish first to decide the competent authority to issue such advisories. Given the fact that the laundering methods are constantly evolving, advisories may be issued based on identified patterns constructed from suspicious transaction reports as well as from the expert views of the gatekeepers. That taken into account, and reflecting the recommendations of the Convention, the FIU or the agency charged with the prevention of money-laundering should issue the advisories which should address a range of themes regarding the three mandatory requirements of paragraph 1, as well as the requirements of paragraphs 2(b) and 3. Article 58 describes the structure and roles of FIUs.

The article requires financial institutions to apply higher scrutiny concerning the position of their clients, especially those having prominent public functions and those connected to such individuals, and by complementing the requirements of article 8 in requiring the establishment of financial disclosure systems for appropriate public officials, including ownership of foreign accounts. Ideally, article 52 will prevent the proceeds of corruption from leaving the State Party of origin or at least will alert the authorities of the relevant transactions. When the institutions of the State Party of origin are not able to prevent the transfer, institutions of the receiving State Party will be able either to refuse it or to report it.

Practical challenges and solutions

1. Verification of customer identity

The first requirement of the relevant institutions – verifying the identity of their customers – goes further than a mere formal identification principle. It is not infrequent that “know-your-customer” rules are designed or interpreted in a strictly formal way and thus limited to obtaining a copy of a customer’s identity card or other identity document. To prevent the use of fake documentation in the establishment of a client relationship with financial institutions, paragraph 1 not only requires that financial institutions “identify” their clients but also “verify” the identity provided. Different identification procedures will be required for addressing different types of customers.

When dealing with face-to-face relationships with an individual, examining and making a photocopy of one or two official identification documents with a photograph (passport, identity card, driver’s licence or some similar document) will suffice so long as the institution takes reasonable steps to verify the authenticity of the documentation. In case of non-face-to-face individuals (correspondence or Internet) financial institutions may verify the identity of the potential account holder by obtaining a certified copy of an official identification document – usually provided by a public notary or another financial institution – as well as a confirmation of the address indicated, which is usually done through an exchange of correspondence using in-house, third-party or independent means of verification.

In the case of legal entities, both domestic or based abroad, financial institutions may be required to verify their “identity” either by obtaining an updated copy of the documents of incorporation in the companies’ registry or, when they are publicly listed in official publications or websites, by checking and getting copies of the data of incorporation from public registries, official bulletin registers, bulletins or gazettes.

As these procedures might take some time, and in order not to obstruct business relationships, States Parties may consider if financial institutions may be permitted to open accounts on a provisional basis while the procedure is being completed. However, all the necessary documents and verifications must be completed before allowing transactions above a reasonable level, or forbidding significant transactions, or transfers to and from foreign jurisdictions. In addition, the procedure may also establish the termination of the relationship if the procedure is not completed before a stipulated deadline.

2. Identification of beneficial owners of high-value accounts

The second requirement – taking reasonable steps to determine the beneficial owner of funds deposited in highly valued accounts – aims at impeding the use of third persons holding the proceeds of crime on behalf of corrupt individuals. It requires the establishment of specific procedures, applicable whenever there is any doubt as to whether the account holder is himself the beneficial owner. There are four main elements of such procedures.

First, in defining “beneficial owner,” States Parties may consider prohibiting financial institutions from accepting a corporate vehicle or a legal entity the identity of which cannot be established as a beneficial owner.

Second, it should be determined what kind of financial products will be considered a “highly valued account” (para. 2(a)). Despite the reference to de minimis amounts, States Parties issuing regulations on this matter may consider applying the requirement not only to bank accounts but also to, for example, securities accounts, management agreements for deposits made by third parties, transactions with currencies or precious metals, and other transactions of risk. Here special attention should be paid to four areas: financial products, offshore vehicles, discretionary trusts and professional persons.

Those financial products which may require attention are those where, by their nature, the client does not coincide with the beneficial owner, such as joint accounts, joint securities accounts, investment companies and other collective investments. In these cases, holders of such products may be required to provide financial institutions with, and periodically update, a full list of beneficial owners with all the information required for clients. Exceptions for publicly traded companies are made in several jurisdictions.

Offshore companies are those institutions, corporations, foundations, trusts, or other vehicles that either do not conduct any commercial operation in the State Party where their registered office is located or do not have their own premises or their own staff, or when they have their own staff, those employees engage solely in administrative tasks. For assets held by these corporate vehicles, States Parties must compel their financial institutions to require, in addition to a certified copy of the incorporation documents to verify their identity, a written declaration indicating the beneficial owner(s) of the assets concerned. Again, States Parties may not permit financial institutions to accept corporate vehicles as beneficial owners of other corporate vehicles.

For clients holding assets without specific beneficial owners (e.g. discretionary trusts), financial institutions may require clients to provide a written declaration containing information about those with control over the assets (the actual settler, all persons authorised to instruct the account holder or other authorised agents, persons who are likely to become beneficiaries, curators, protectors etc.).

In issuing advisories, States Parties need to identify in which situations clients bound by professional confidentiality, such as an attorney or notaries, might be required to disclose the beneficiary owner of accounts held by them. Common examples to be addressed are: advances on legal costs, payments to or from parties of a dispute, a pending distribution of inheritance or execution of a will and pending separation of assets in a divorce.

Third, though States Parties may recognise that financial institutions are in the best position to exercise discretion in applying the requirements on beneficial ownership, States Parties may set up a list of situations, cases and examples in which financial institutions are required to apply the procedures. Even though financial institutions are in the best position to decide whether the client and the beneficial owner are the same person, a list of non-exhaustive situations that may be used as a baseline will help. Examples of these situations include circumstances when the assets involved in the transaction are disproportionate to the financial standing of the person wishing to carry out the transaction or when the power of attorney is conferred on someone who evidently does not have sufficiently close links to the account holder.

Fourth, States Parties may advise financial institutions on the situations in which they should terminate a commercial relationship, if the verification criteria are not met, on the grounds of doubts or distrust regarding the true ownership of assets. The grounds may respond to the following situations:

- the bank has cause to doubt the accuracy of the information regarding the identity of the account holder;
- the accuracy of the declaration of beneficial ownership is in doubt;
- there are signs of important unreported changes;
- there is reason to believe that the bank has been deceived when verifying the identity of the account holder;
- the bank was wilfully given false information about the beneficial owner;
- doubts persist with regard to the account holder's declaration upon implementation of the procedure.

3. Enhanced scrutiny over accounts held by politically exposed persons (PEPs)

In addition to the actions under II.1 and II.2 above, States Parties are required to conduct enhanced scrutiny, designed to detect suspicious transactions over accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions, and their family members and close associates (collectively termed PEPs). In issuing the advisories on PEPs required by the article, States Parties should consider a number of issues.

First, States Parties must precisely define a PEP. Given the requirements of paragraphs 5 and 6, and the expectation that States Parties should be both proactive and offer the widest support to other States Parties, States Parties may consider including not only domestic but also foreign political figures, family members and close associates. While including family members does not usually represent a problem – a decision may be based on the degree of family, kin and marriage relationships – a more difficult question usually arises on how to define “close associates”. The answer usually depends on the degree of information available to gatekeepers in the jurisdictions

in question. For example, if regulators may easily access the registry on real estate, vehicles, companies, the advisory may require them to consider associates as those appearing to share registered assets or forming partnerships and other types of commercial associations. In other jurisdictions, the advisory may resort to “public information”, obligating them to check regularly in the media for possible “close associates”.

Second, States Parties must adopt a concept of “enhanced scrutiny”. In recent years, many jurisdictions have moved to require their financial institutions to establish a “client profile” in order to determine when a transaction does not match with the established profile which may then raise suspicion to be reported to the authorities. The use of a client profile approach requires financial institutions to understand the source of wealth, the financial products expected to be used, the pattern and amounts of the expected funds incoming and outgoing the accounts and the performance of the business in the context of a given market. Other jurisdictions have requested their financial institutions to establish reasonable steps to be followed when setting up a relationship with PEPs, including the following minimum requirements:

- a standard application process that identifies potential PEPs from other overseas applicants;
- if the client or the beneficial owner is a PEP, identifying the source of the wealth by checking verifiable sources of income and the plausible reasons for opening an account in that jurisdiction and monitoring receipts of sums from, for example governmental bodies or commercial concerns based in other jurisdictions;
- if no concern arises by this investigation and a relationship is established, the bank may in any case establish regular due diligence procedures over that client and their transactions;
- when the monitoring process gives rise to any concern, it may be immediately reported to the authorities;
- all customer relationships with PEPs should be reviewed regularly by the financial institution’s senior management;
- periodic reviews of both existent accounts and the possibility that an older client has become a PEP after starting the relationship with the bank should be made.

4. Advisories on enhanced scrutiny to domestic financial institutions

Taking into account the difficulties in identifying PEPs – especially because the concept includes their families and close associates – article 52 establishes an innovative provision by which any State Party may notify another State Party of the identity of PEPs so as to require its own financial institutions to enhance due diligence over specific clients. In implementing this provision, States Parties may ascertain that such co-operation and assistance may merit a regular procedure in order to collect relevant information to transmit to recognised foreign authorities, subject to appropriate safeguards as to the integrity and confidentiality and potential use of the information (see also II.8 below). For those jurisdictions where the proceeds of corruption are believed to be regularly diverted, this will be an invaluable tool. Article 56 also encourages States Parties to be proactive in alerting other States Parties about the latter’s PEPs where there may be cause for concern.

5. Record-keeping

Article 52(3) requires the advisories issued in accordance with 2(a) to specify a special record-keeping obligation for high-risk customers and PEPs. While article 14(1) compels States Parties to hold their financial institutions to a general record-keeping obligation, article 52(3) requires a specific additional or enhanced policy for PEPs.

In implementing this provision, States Parties may consider different variables to determine a realistic timescale for the retention of records for a number of reasons. These may include delays between the offence and the initiation of any investigation, the difficulties of tracing the proceeds of an official who was in a position of power or remains in office (where they have immunities or where they can influence investigations), the complexities of the procedures involved in international asset-tracing, and policy decisions adopted when implementing article 29 regarding the statute of limitations for offences established in accordance with the Convention. Many jurisdictions require their regulators to establish an agreed timescale for retention, such as 5 years from the start of each transaction. In a number of cases, the retention should include the originals of all documents. States Parties may wish to consider whether enhanced scrutiny of PEPs should also extend to a prolonged retention of records given that there may be cases when asset recovery can only be initiated when concerned PEPs have left office.

6. Preventing the establishment of, and correspondent relationship with, shell banks

One of the most used financial vehicles to hide assets in the international financial system is the so-called “shell bank.” An internationally accepted definition of shell banks is that they are “banks that have no physical presence (i.e. meaningful mind and management) in the country where they are incorporated and licensed and are not affiliated to any financial services group that is subject to effective consolidated supervision” (Basel Committee, 2003; see also Wolfsberg AML Principles for Correspondent Banking).

Shell banks have frequently been used to channel proceeds of crime out of a jurisdiction, and have particularly been used in significant corruption schemes. For that reason, paragraph 4 requires States Parties to adopt measures to prevent the establishment of shell banks in their jurisdictions.

For a financial institution, not having physical presence is not just the absence of an office. Usually shell banks do maintain an office run by a local agent or by very low-level staff, which provides an address for legal purposes in the jurisdiction of incorporation. For a financial institution, physical presence is usually understood as the place where “the mind and management” of the institution is, so the regulator can exercise its controls. In the case of shell banks, the mind and management are located in a different jurisdiction, either in the offices of an associated entity or even in a private residence. Having the management in a different jurisdiction prevents the regulator at the jurisdiction of incorporation from exercising proper supervision.

The other element of the definition of a shell bank is that they are not affiliated with a supervised financial services group.

Clients of shell banks use them primarily for the anonymity and facilities to disguise the origin of funds and funnel them to other financial institutions. In other words, rarely does money remain deposited in a shell bank for long. For that reason, a further action by States Parties is to adopt measures to prohibit their financial institutions from entering into correspondent banking relationships with shell banks.

Correspondent banking is the provision of banking services from one bank to another. It is an important segment of the banking industry because it enables banks located in one state to conduct business and provide services for their customers in other jurisdictions where the banks have no physical presence. By opening a correspondent account, the foreign bank, called a respondent, can receive many or all of the services offered by the correspondent bank, without the cost associated with being licensed or establishing a physical presence in the correspondent jurisdiction. Today, many of the large international banks located in the major financial centres of the world serve as correspondents for thousands of other banks.

Correspondent banking entails inherent vulnerabilities because a correspondent bank may not be in a position to regularly ask either the extent to which their foreign bank clients allow other foreign banks to use their accounts, or the identity of the owners of the assets (see II.1 and II.2 above) that flow through the correspondent account. Given the fact that their clients are also banks, correspondent banks rely on their compliance with anti-money-laundering regulations practices, the underlying rationale being that enforcing compliance over foreign clients is costly and often not feasible. Moreover, since the correspondent account holder is the foreign bank, the monies flowing through that account may belong to a large number of the foreign banks' clients.

States Parties implementing the recommended measures may consider that they:

- require their financial institutions to conduct risk assessments or due diligence over the respondent bank's management, finances, business activities, reputation, regulatory environment and operating procedures;
- prohibit their financial institutions from entering into correspondent relationships with foreign banks if, as a result of the due diligence procedures, there is doubt as to whether shell banks may have access to them;
- require their financial institutions to obtain and keep a copy of the anti-money-laundering regulations, policies and procedures of respondents' banks;
- require their financial institutions to report all the correspondent relationships to licensing authorities;
- open channels for information exchange with foreign supervisors and FIUs to help their financial institutions check on specific institutions or cases.

7. Financial disclosure systems for appropriate public officials

Paragraphs 5 and 6 recommend States Parties to establish financial disclosure systems for appropriate public officials, including ownership of foreign accounts. This is also discussed in article 8.

States Parties willing to implement this recommendation are encouraged to bear in mind a number of issues raised in article 8. These include, firstly, which agency has the authority to administer and manage the disclosure and verification system (as well as investigate breaches and pursue sanctions). Some States Parties have resorted to the bodies mentioned in articles 6 and 36 of the Convention; in others the relevant systems are managed and administered either by taxation authorities or by designated bodies (such as, a committee in the legislature). Some are

advisory, while others have legal powers. Given the range of approaches, the number of public officials involved, the information to be disclosed, the verification and other procedures, and the application of sanctions, States Parties may wish to give careful consideration to the need for an inclusive institutional approach with effective access to relevant information, robust procedures for verification, and the means to ensure effective compliance.

Secondly, in considering who to include in the concept of “appropriate public officials”, States Parties may not only consider selecting “by rank” but also by “areas of sensitivity” or “vulnerability” (see article 7). Thus, most States Parties include elected officials, political appointees (like ministers, secretaries and under-secretaries of state), senior career public officials, members of the judiciary, and sometimes high-ranking military officials. States Parties may also consider including any officials in the position of buying and spending on behalf of the state, like public procurement departments or managers of state-owned enterprises and sensitive areas such as arms manufacturing, financial services etc. Moreover, many States Parties also require their public officials to disclose their family’s interests in order to prevent the use of family members as holders of or conduits for the proceeds of corruption.

Third, States Parties may wish to consider what information (and level of detail) should be required in the declaration, and how often such information should be submitted. It is not only highly advisable that the system requires as wide a disclosure as possible but also allows disclosure of any information not requested (public officials should not be able to hold an interest where there is a definable conflict of interest but then claim that the failure to require a disclosure has obviated the need to identify it).

Fourth, States Parties are requested to consider taking such measures as may be necessary to permit its competent authorities to share the information obtained through the disclosure system with the competent authorities in other States Parties to facilitate the identification, investigation, restraint, claim, and recovery of proceeds of offences established in accordance with this Convention.

Though sharing sensitive information with foreign authorities depends upon more general considerations of international law and foreign policy, the global administrative exchange of information, such as the system among FIUs, has proved to be expeditious and effective. The key is balancing sound rules for preserving confidentiality when required and for enforcing sanctions for non-compliance when violated. Bilateral agreements or memorandums of understanding for the exchange of information between anti-corruption bodies (or FIUs or any body designated under articles 6 and 36) will need to be reconciled with legislation relating to privacy or, if involving disclosure of bank or tax details, bank secrecy and tax confidentiality legislation. When drafting such agreements it is advisable to include formal channels for transmitting information not only upon request but also spontaneously (see article 56), a measure that will considerably improve the exchange of information. States Parties should consider how this may be co-ordinated if there is a number of domestic agencies involved.

8. Public officials and overseas accounts

A further, specified, disclosure proposal covers, first, the situation in which a public official has a private interest in a foreign account and, second, the situation in which a public official has a power of attorney, authorised signature, or any other authority to represent the state over its financial interests in another State Party, such as foreign accounts of state-owned public enterprises, trading or training accounts, accounts of embassies, diplomatic representations etc.

In the first situation, the same rules apply as those established when implementing the system envisaged by paragraph 5. Special attention would be appropriate regarding the exchange of financial information with foreign authorities. In the second situation, paragraph 6 provides a powerful tool for preventing embezzlement and fraud of public funds, as well as the abuse of trust and discretionary authority. In implementing this provision, States Parties may consider the role of their state audit in reviewing such accounts and whether the agency administering the disclosure system adopted in paragraph 5 will be the appropriate authority for reviewing the disclosed information, and once again, the specific purposes and uses to be given to that information.

As with all aspects of sanctions for non-compliance with disclosure, States Parties may wish to consider providing sanctions for non-compliance in relation to the requirements of paragraph 6. Sanctions should be proportionate to the violation. Thus a range of such sanctions, such as the imposition of a fine, can be dissuasive enough for some officials and for some situations.

Finally, although the system may include criminal offences relating to conflict-of-interest or disclosure systems, States Parties may also wish to take into account that some “appropriate public officials” are likely to enjoy immunity from arrest. In these cases, criminal offences may be reserved upon discovering that the public official lied intentionally, introduced a false statement in the disclosure form, or over-declared with the intention of avoiding having to explain subsequent increases of assets (see articles 15 and 30 on the issue of immunities).

Commentary

State Parties must, in relation to Article 52:

- require financial institutions to verify the identity of customers;
- take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts;
- scrutinise accounts sought or maintained by or on behalf of individuals entrusted with prominent public functions, their family members and close associates;
- report to competent authorities about suspicious transactions detected through the above-mentioned scrutiny (art. 52, para. 1)⁶¹.
- draw on relevant initiatives of regional, interregional and multilateral organisations against money-laundering;
- issue advisories regarding the types of persons to whose accounts enhanced scrutiny will be expected, the types of accounts and transactions to which to pay particular attention and account-opening, maintenance and record-keeping measures for such accounts (art. 52, para. 2, subpara (a));

⁶¹ For specific examples of national implementation: Croatia, Law on the Prevention of Money Laundering, part II, Measures Undertaken by the Obligated Entities for the Detection of Money Laundering; Slovenia, Law on the Prevention of Money Laundering part II (1994); Spain, Law 19/1993 concerning specific measures for preventing the laundering of capital, article 3 (1993). [high value accounts, public official and family accounts or just money laundering? Mainly CDD Basel] Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption; Bank for International Settlements, Basel Committee on Banking Supervision, Prevention of criminal use of the banking system for the purpose of money-laundering; Basel Committee on Banking Supervision – Customer Due Diligence for Banks; Caribbean Financial Action Task Force (CFATF), Nineteen Recommendations Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; European Council Directive on prevention of the use of the financial system for the purpose of money laundering; Organisation for Economic Co-operation and Development in Europe’s Financial Action Task Force’s (FATF) 40 Recommendations; Organisation of American States, Buenos Aires Declaration on Money Laundering; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; United Nations Office on Drugs and Crime (UNODC) Model Money Laundering, Proceeds of Crime and Terrorist Financing Bill 2003.

- notify financial institutions of the identity of particular persons to whose accounts enhanced scrutiny will be expected (art. 52, para. 2, subpara (b));
- ensure that financial institutions maintain adequate records of accounts and transactions involving the persons mentioned in paragraph 1 of this article, including information on the identity of the customer and the beneficial owner (art. 52, para. 3)⁶².
- prevent the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group (art. 52, para. 4).

The implementation of these provisions may require legislation.

States parties are required to consider:

- establishing financial disclosure systems for appropriate public officials and appropriate sanctions for non-compliance (art. 52, para. 5);
- permitting their competent authorities to share that information with authorities in other States Parties when necessary to investigate, claim and recover proceeds of corruption offences (art. 52, para. 5)⁶³;
- requiring appropriate public officials with an interest in or control over a financial account in a foreign country to:
 - report that relationship to appropriate authorities
 - maintain appropriate records related to such accounts
 - provide for sanctions for non-compliance (art. 52, para. 6).

Finally, States parties may wish to consider requiring financial institutions to:

- refuse to enter into or continue a correspondent banking relationship with banks that have no physical presence and that are not affiliated with a regulated financial group; and

⁶² For specific examples of national laws see Croatia, Law on the Prevention of Money Laundering, part IV, Safekeeping and Protection of Information; Zimbabwe, Serious Offences (Confiscation of Profits) Act, §§ 60, 61 (1990). Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption; Bank for International Settlements, Basel Committee on Banking Supervision, Prevention of criminal use of the banking system for the purpose of money-laundering; Basel Committee on Banking Supervision – Customer Due Diligence for Banks; Caribbean Financial Action Task Force (CFATF), Nineteen Recommendations Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; European Council Directive on prevention of the use of the financial system for the purpose of money laundering; Organisation for Economic Co-operation and Development in Europe's Financial Action Task Force's (FATF) 40 Recommendations; Model Money Laundering, Proceeds of Crime and Terrorist Financing Bill 2003.

⁶³ For specific examples of national implementation: Belize, Prevention of Corruption in Public Life Act, No. 24, part III (financial disclosure (1994); Thailand, Constitution, chapter 10, part one (declaration of assets and liabilities) (1998); Ukraine, Law of Ukraine on Struggle against Corruption, article 6. Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption; Bank for International Settlements, Basel Committee on Banking Supervision, Prevention of criminal use of the banking system for the purpose of money-laundering; Basel Committee on Banking Supervision – Customer Due Diligence for Banks; Caribbean Financial Action Task Force (CFATF), Nineteen Recommendations Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; European Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering; Organisation for Economic Co-operation and Development in Europe's Financial Action Task Force's (FATF) 40 Recommendations; Organisation of American States, Buenos Aires Declaration on Money Laundering; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; United Nations Office on Drugs and Crime (UNODC) Model Money Laundering, Proceeds of Crime and Terrorist Financing Bill 2003.

- guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group (art. 52, para. 4).

The implementation of these provisions may require legislation. Provisions in this article are innovative and take many States Parties to a new territory with few precedents to draw on. Examples of national rules and legislation will be provided in the final draft to illustrate ways in which countries may implement this article.

Article 52 builds on the prevention measures of Chapter II, especially those of Article 14 regarding money laundering, and specifies a series of measures States Parties must have, in order to better prevent and detect the transfers of crime proceeds. Paragraphs 1 and 2 address the co-operation and interaction between national authorities and financial institutions.

Under Article 52, paragraph 1, without prejudice to Article 14, State Parties are required to take necessary measures, in accordance with their domestic law, to oblige financial institutions within their jurisdiction to:

- verify the identity of customers,
- take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts; and
- conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates⁶⁴.

These provisions must be seen in the context of the more general regulatory and supervisory regime they must establish against money laundering, in which customer identification, record keeping and reporting requirements feature prominently (see also article 14, para. 1 subpara. (a)).

The duty of financial institutions to know their customers is not new, but part of long-standing internationally accepted standards of due diligence and prudential management of financial institutions⁶⁵.

Offenders often hide their transactions and criminal proceeds behind false names or those of third parties - the duty is to make reasonable efforts to determine the beneficial owner of funds entering high-value accounts. The term “high value” needs to be approached individually in the context of each State Party.

Such enhanced scrutiny must be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer. According to an Interpretative Note, the words “discourage or prohibit financial institutions from doing business with any legitimate customer” are understood to include the notion of not endangering the ability of financial institutions to do business with legitimate customers (A/58/422/Add.1, para. 51).

⁶⁴ An Interpretative Note indicates that the term “close associates” is deemed to encompass persons or companies clearly related to individuals entrusted with prominent public functions (A/58/422/Add.1, para. 50).

⁶⁵ See, for example, the FATF recommendations, the so-called “Basle Principles” first issued in 1988 by the Basle Committee on Banking Regulations and Supervisory Practices (Prevention of Criminal Use of The Banking System for the Purpose of Money-Laundering) and the 2001 Bank for International Settlements guidelines to banks on Customer Due Diligence.

In order to facilitate implementation of these measures, States Parties, in accordance with their domestic law and inspired by relevant initiatives of regional, interregional and multilateral organisations against money-laundering, are required to:

- (a) issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and
- (b) where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

Such practices are likely to enhance the effectiveness and consistency shown by financial institutions as they engage in their due diligence and customer identification activities. In addition, this sort of guidance from national authorities is particularly helpful to financial institutions in their efforts to comply with the regulatory requirements. As an Interpretative Note indicates, the obligation to issue advisories may be fulfilled by the State Party or by its financial oversight bodies (A/58/422/Add.1, para. 52).

Another Interpretative Note indicates that paragraphs 1 and 2 of article 52 should be read together and that the obligations imposed on financial institutions may be applied and implemented with due regard to particular risks of money-laundering. In that regard, States Parties may guide financial institutions on appropriate procedures to apply and whether relevant risks require application and implementation of these provisions to accounts of a particular value or nature, to its own citizens as well as to citizens of other States and to officials with a particular function or seniority. The relevant initiatives of regional, interregional and multilateral organisations against money-laundering shall be those referred to in the note to article 14 in the *travaux préparatoires*⁶⁶ (A/58/422/Add.1, para. 49)⁶⁶.

It is emphasised that the above measures apply both to public officials in the country where the scrutiny occurs and to public officials in other jurisdictions. This is essential not only for the purposes of prevention and transparency, but also for the facilitation of investigations, asset identification and return that may take place in the future⁶⁷.

In accordance with Article 52, paragraph 3, States Parties are required to implement measures ensuring that their financial institutions maintain adequate records, over an appropriate period of

⁶⁶ That Interpretative Note indicates that the words “relevant initiatives of regional, interregional and multilateral organisations” were understood to refer in particular to the Forty Recommendations and the Eight Special Recommendations of the Financial Action Task Force on Money Laundering, as revised in 2003 and 2001, respectively, and, in addition, to other existing initiatives of regional, interregional and multilateral organisations against money laundering, such as the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group, the European Union, the Financial Action Task Force of South America against Money Laundering and the Organisation of American States” (A/58/422/Add.1, para. 21).

⁶⁷ See FATF recommendation No.6 on Politically Exposed Persons (PEPs), a term which is defined in the glossary: <http://www.fatf-gafi.org/dataoecd/42/43/33628117.PDF>. This recommendation makes a distinction between foreign and domestic PEPS. This Convention makes no such distinction. The Commonwealth Working Group on Asset Repatriation has expressed concern over the FATF distinction and preference for this Convention’s provision for the general application of increased scrutiny (see Report of 1st Meeting, 14-16 June 2004).

time, of accounts and transactions involving the persons mentioned in paragraph 1. At a minimum, these records should contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner⁶⁸.

The definition of the period of time over which records must be maintained is left to the States Parties. In this respect, it is important to bear in mind that in several significant cases, corrupt practices occurred over a very long time. The availability of financial records is essential for subsequent investigations, as well as asset identification and return.

The implementation of these provisions may require legislation regarding bank secrecy, confidentiality, data protection and privacy issues. Financial institutions should not be placed in the position where compliance with rules and requirements in one jurisdiction raises conflicts with duties they have in another country.

In accordance with Article 52, paragraph 4, and with the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, States Parties are required to implement appropriate and effective measures to prevent, with the help of their regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group.

Two Interpretative Notes clarify the terms of this paragraph further. The first one indicates that the term “physical presence” is understood to mean “meaningful mind and management” located within the jurisdiction. The simple existence of a local agent or low-level staff would not constitute physical presence. Management is understood to include administration, that is, books and records. (A/58/422/Add.1, para. 54)

The second Interpretative Note indicates that banks that have no physical presence and are not affiliated with a regulated financial group are generally known as “shell banks”. (A/58/422/Add.1, para. 55).

This provision may also require legislation with respect to the conditions under which a financial institution may operate⁶⁹. This paragraph also contains some optional provisions discussed below.

Article 52, paragraphs 5 and 6, require that States Parties consider additional financial disclosure obligations on the part of “appropriate public officials”, in accordance with their domestic law. Under paragraph 5, states must consider the establishment of effective financial disclosure systems and provide for appropriate sanctions in case of non-compliance⁷⁰. It is left to the states

⁶⁸ An Interpretative Note indicates that this paragraph is not intended to expand the scope of paragraphs 1 and 2 of article 52 (A/58/422/Add.1, para. 53).

⁶⁹ See FATF recommendation No. 18.

⁷⁰ For specific examples of national laws: Belize, Prevention of Corruption in Public Life Act, No. 24, part III (financial disclosure) (1994); Thailand, Constitution, chapter 10, part one (declaration of assets and liabilities) (1998); Ukraine, Law on Struggle against Corruption, article 6. Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption; Bank for International Settlements, Basel Committee on Banking Supervision, Prevention of criminal use of the banking system for the purpose of money-laundering; Basel Committee on Banking Supervision – Customer Due Diligence for Banks; Caribbean Financial Action Task Force (CFATF), Nineteen Recommendations Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime; European Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering; Organisation for Economic Co-operation and Development in Europe’s Financial Action Task Force’s (FATF) 40 Recommendations; Organisation of American States, Buenos Aires Declaration on Money Laundering; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; United Nations Office

to determine which public officials would be covered under such systems and how financial disclosure would become thereby more effective. Once such systems are introduced, however, there must be appropriate sanctions against violations of officials reporting duties to ensure compliance.

Paragraph 5 further requires that States Parties consider taking necessary measures to permit their competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention (see also closely related articles 43, 46, 48, 56 and 57). Legislation relative to bank secrecy and privacy issues may be required for the implementation of these provisions.

In the same spirit of encouraging financial disclosure and transparency, States Parties must consider taking necessary measures to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts (art. 52, para. 6). As with the previous provisions, if states decide to introduce such measures, they must also provide for appropriate sanctions for non-compliance.

Article 52 paragraph 4, mandates the adoption of measures regarding the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group, that is, entities known as “shell banks”. The aim of this provision is to promote the prevention and detection of transfers of proceeds from offences established in accordance with this Convention.

Under the same paragraph, States Parties may wish to consider requiring their financial institutions:

- to refuse to enter into or continue a correspondent banking relationship with “shell banks”; and
- to guard against establishing relations with foreign financial institutions that permit their accounts to be used by “shell banks”.

Legislation or amendment of existing laws may be required to implement these provisions (for example, rules specifying for their financial institutions the conditions or criteria they should use to determine whether or not they can enter into or maintain relationships with “shell banks”).

Article 53: Measures for Direct Recovery of Property

UNCAC LANGUAGE

Each State Party shall, in accordance with its domestic law:

- (a) *Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;*

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| <p>(b) <i>Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and</i></p> <p>(c) <i>Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.</i></p> |
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Overview

Article 53 requires States Parties to ensure in their jurisdictions that other States Parties have legal standing for claiming misappropriated assets, to initiate civil actions and other direct means to recover illegally obtained and diverted assets. Prior ownership, damage recovery and compensation are different legal grounds for the victim State Party to claim in the courts of the State Party to where the asset in question was diverted and victim States Parties should be granted appropriate legal standing to act as a plaintiff in a civil action on property, as a party recovering damages caused by criminal offences, or as a third party claiming ownership rights in any civil or criminal confiscation procedure.

Practical challenges and solutions

1. Ensuring legal standing

States Parties are required to permit another State Party to initiate civil action in its courts to establish title to or ownership of any asset acquired directly or indirectly through the commission of an offence established in accordance with the Convention. In implementing this provision, States Parties may consider two actions.

First, States Parties may wish to balance their current provisions on what constitutes legal standing in their civil and criminal jurisdictions against the objective of article 53(a) in order to assess whether any review or revision is needed. Some jurisdictions will need to ensure that States Parties and their legal representatives are recognised in the same way as other foreign legal entities and persons. In those jurisdictions in which legal standing and access to courts is based on restrictive requirements – such as requiring evidence of damage or loss and a close causal connection between these and the conduct complained of – an evaluation of the consequences of these restrictions is advisable for the purposes of implementing the article. When loss or damage over an indirect interest and indirect causation is accepted as a basis for legal standing, States Parties will be in a position of giving access to their courts to another State Party to claim ownership or title of assets acquired not only through embezzlement where there is a direct relationship but also through bribery (where the victim State Party has a less direct relationship) or any other mandatory offence prescribed by the Convention.

Second, States Parties should review the criteria for accessing the courts when the plaintiff is another State Party. In many jurisdictions having a State Party as a plaintiff in a civil action may trigger jurisdictional and procedural issues. Regarding the jurisdictional issues, some jurisdictions consider foreign States Parties a “special category” of plaintiff and grant them original jurisdiction to a higher court than the court of first instance. States Parties may check whether these conditions do not curtail procedural rights, such as the right to appeal. Regarding procedural issues related to legal standing and access to courts, the necessity of retaining domestic legal counsel may be an issue, especially for least developed and many developing

countries, as legal services in these specialised areas tend to be very expensive and may be prolonged.

2. Compensation or damages for corruption offences

States Parties are required to adopt such necessary measures to permit their courts to order those who have committed offences established in accordance with the Convention to pay compensation or damages to another State Party that has been harmed by such offences (see also articles 34 and 35). This innovative provision departs from the notion that proceeds from corruption should be recovered only on confiscation grounds and obligates States Parties to enable their courts to recognise the right of victim States Parties to seek to recover compensation or damages.

States Parties implementing this provision may take into account a number of issues. The first concerns the need to decide the applicable procedure. Two broad options are available:

- States Parties may require the victim State Party to file a claim for damages or compensation, following tort law or other civil doctrines;
- States Parties may permit the criminal court sentencing the offender to establish compensation as an ancillary punishment along with the principal punishment. For States Parties applying “value-based” confiscation systems, this option may be more attractive.

Several States Parties – for instance, parties to the Council of Europe Civil Law Convention on Corruption – have already established the right of individuals and legal persons to compensation for damage resulting from acts of corruption. These might just need to add the standing of another State Party to such a procedure. In States Parties where claiming damages originating from acts of corruption is not an established procedure, however, a specific procedure contemplating rights of the victim State Party, the applicable standard of evidence and the rights of the defence may need to be established.

From the procedural point of view, civil claims may be either asset-based or tort-based depending on the origin of the claimed assets. In cases of fraud and embezzlement of public funds, the plaintiff State claims the rightful ownership of assets on behalf of its population or the Treasury. In cases of bribery, trading in influence and other offences where the claimed assets have a private origin, the claim may be based on the harm caused by the defendants or the right of the State Party to seek the return of any illicit advantage gained from misuse or misrepresentation of public office or any authority vested in it.

In relation to the issue of types of damages to be covered, States Parties need to decide whether requesting States Parties may claim only material damages or also loss of profits and non-pecuniary loss. Loss of profits may be recognised when it is demonstrated that the revenues or profits of the state were diminished as a result of the corrupt deal. Non-material damages or non-pecuniary loss are related to institutional damages produced by corruption. One of the main consequences of corruption is that it severely undermines the legitimacy of the institutional system. As those damages, however, are difficult to quantify, compensation may also consist of contributing to institutional programmes, building anti-corruption capacities and so forth. Moreover, the consequences of corruption may also consist in including indirect damages caused by the act of corruption, such as environmental damages when allowing infrastructure works without proper environmental impact studies, contamination of natural resources, damages to the health of the population when allowing disposal of toxic waste and the like.

3. Recognition of ownership in a foreign confiscation procedure

The article requires States Parties to provide legal standing to other States Parties to claim, as a third party in a confiscation procedure, ownership over assets acquired through the commission of an offence established in accordance with the Convention. Of course it is possible that the concerned State Party may not be aware of the existence of any proceedings, such as a company charged with bribery of a foreign public official in the jurisdiction of the former. States Parties should always be alert to ensuring that other States Parties are notified at an early stage, as any other victim should be. States Parties should therefore consider notifying the concerned State Party of its right to stand and prove its claim, also in line with article 56.

Commentary

Article 53 requires States Parties to

- permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through corruption offences (subpara. a);
- permit their courts to order corruption offenders to pay compensation or damages to another State Party that has been harmed by such offences (subpara. b); and
- permit their courts or competent authorities, when having to decide on confiscation, to recognise another State Party's claim as a legitimate owner of property acquired through the commission of a corruption offence (subpara. c).

The implementation of these provisions may require legislation, amendments to civil procedures, jurisdictional and administrative rules.

States have been unable to provide legal assistance in civil cases, even though there are certain advantages to this approach, particularly in the event criminal prosecution is not possible due to the death or absence of alleged offenders. Other advantages include the possibility of establishing liability on the basis of civil standards without the requirement of a criminal conviction of the person possessing or owning the assets, and the pursuit of assets in cases of acquittal on criminal charges where sufficient evidence meeting civil standards shows that assets were illegally obtained. Of course, it is important not to confuse civil litigation through which a party seeks to recover assets with the use of a non-conviction based system for asset confiscation. These must be kept separate, but the Convention recognises the need to have a range of flexible measures available for the repatriation of assets.

Article 53 focuses on States Parties having a legal regime allowing another State Party to initiate civil litigation for asset recovery or to intervene or appear in domestic proceedings to enforce their claim for compensation. While such measures might not always be feasible for economic or other reasons, the Convention aims to ensure that there are various options open to states in each case.

Article 53 contains three specific requirements with respect to the direct recovery of property, in accordance with their domestic law.

Under subparagraph a, States Parties must take necessary measures to permit another State Party to initiate civil action in their courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention. In this

instance, the State would be a plaintiff in a civil proceeding; it is a direct recovery. States may wish to review their current laws to ensure that there are no obstacles to another state launching such civil litigation.

Under subparagraph b, States Parties must take necessary measures to permit their courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences. National drafters may need to review existing laws on victim compensation or restitution orders to see whether appropriate amendments are necessary in order to cover this situation.

This provision does not specify whether criminal or civil procedures are to be followed. The States Parties involved may be able to agree on which standard applies. It would be the responsibility of the concerned state to meet the evidentiary standard. In order to implement this provision, States Parties must allow other States Parties to stand before their courts and claim damages; how they meet this obligation is left to the states.

In essence, under subparagraph a, the victimised state is a party in a civil action it initiates. Under subparagraph b, there is an independent proceeding at the end of which the victim state must be allowed to receive compensation for damages.

Under subparagraph c, States Parties must take necessary measures to permit their courts or competent authorities, when having to decide on confiscation, to recognise another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention. Again, national drafters may need to review existing domestic proceeds of crime legislation to see whether it accommodates such a claim by another state.

An Interpretative Note indicates that, during the consideration of this paragraph, the representative of the Office of Legal Affairs of the Secretariat drew the attention of the Ad Hoc Committee to the proposal submitted by his Office, together with the Office of Internal Oversight Services and the United Nations Office on Drugs and Crime (see A/AC.261/L.212) to include in this paragraph a reference to the recognition of the claim of a public international organisation in addition to the recognition of the claim of another State Party. Following discussion of the proposal, the Ad Hoc Committee decided not to include such a reference, based upon the understanding that States Parties could, in practice, recognise the claim of a public international organisation of which they were members as the legitimate owner of property acquired through conduct established as an offence in accordance with the Convention (A/58/422/Add.1, para.56).

Article 54: Mechanisms for recovery of property through international co-operation in confiscation

UNCAC LANGUAGE

1. Each State Party, in order to provide mutual legal assistance pursuant to Article 55 of this Convention with respect to property acquired through or in commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

- (a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;*
- (b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering*

or such other offence as may be within its jurisdiction or by other procedures authorised under its domestic law; and

- (c) *Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.*

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

- (a) *Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1(a) of this article;*
- (b) *Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1(a) of this article; and*
- (c) *Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property”*

Overview

Article 54 is yet another advanced approach towards the overall effort of the Convention to help states put in place a robust asset recovery system. Aiming at overcoming obstacles for recovering proceeds of corruption, it requires States Parties to establish procedures to secure the confiscation of the proceeds of corruption originating from another State Party as well as adopting provisional measures with a view to facilitating confiscation procedures or taking proactive measures in anticipation of such requests. As the requesting State Party or States Parties may belong to a range of different legal traditions, article 54 requires States Parties to be able to co-operate across legal systems.

Practical challenges and solutions

1. Enforceability of a foreign confiscation order

Under article 54(1)(a) States Parties are required to adopt procedures for allowing its competent authorities to enforce an order of confiscation issued by a foreign court. Traditionally, these procedures may take two forms. The competent authorities of the requested State Party may either recognise and enforce the foreign confiscation order or institute new proceedings according to domestic law and issue a freezing and/or confiscation order in accordance with that law on behalf of another State Party.

In implementing article 54 (1), States Parties may consider that it also includes property involved in the commission of an offence established in accordance with the Convention and not only acquired through such commission, thus broadening the scope of co-operation. Further, article 54(1)(a), recognising that most States Parties will require a judicial decision for enforcing a foreign confiscation order, refers to “competent authorities”, thus leaving States Parties free to establish appropriate administrative procedures for enforcing a foreign judicial decision.

In this connection, it should be borne in mind that it is very likely that the requested State Party would require the judicial decision issued in the requesting State Party to be definite. Both legal security and the rights of defence require a completed decision, with status of *res judicata*, not subject to appeal.

While the enforcement of foreign judgments is usually preferable to the institution of new confiscation proceedings – a form of transferring criminal proceedings – there are situations in which the institution of new proceedings may be necessary to accommodate the request to the domestic law of the requested State Party. A common situation arises when a State Party requests the enforcement of an order of confiscation against a legal person in a State Party where criminal liability of legal persons is not recognised. A new proceeding, for determining against which individuals to enforce the order, will be required.

Several states have established confiscation procedures that take place independently of the procedures established for assessing guilt in the predicate offence. The purpose of such separate confiscation procedures varies from allowing prosecutorial authorities more time to investigate the origin of proceeds of crime to allowing a lower standard of proof with respect to the origins of the asset subject to confiscation.

2. Confiscation of proceeds of foreign corruption based on money-laundering or related offences

In the last decade, the proceeds of several significant corruption offences have been recovered by bringing money-laundering charges in the jurisdiction to which the illicit proceeds had been diverted.

The Convention emphasises the application of anti-money-laundering mechanisms to prevent, trace, restrain, seize and confiscate proceeds of corruption offences (see articles 14, 23 and 52). Articles 14 and 52 require that financial institutions report transactions suspected of involving proceeds of crime. In addition, article 23(2)(c) requires States Parties to allow domestic legal proceedings involving a money-laundering offence irrespective of the place in which the predicate offence had taken place. Here article 54(1)(b) closes the circle by requiring States Parties to ensure the ability to confiscate the proceeds of foreign predicate offences through legal proceedings involving money-laundering.

3. Confiscation without criminal conviction

Article 54(1)(c) recommends that States Parties adopt measures to allow the confiscation of proceeds of corruption offences committed abroad and diverted to its jurisdiction even when neither the State Party where the alleged or actual offence was committed nor the State Party where the assets are located, have obtained a criminal conviction against the offender(s).

The implementation of this recommendation depends on the punitive or restorative character that each State Party assigns to the concept of confiscation. While several states consider confiscation of proceeds of crime to be exclusively a punitive sanction, many others have also approached confiscation as a remedial, restorative sanction, which under some circumstances applies as a non-criminal remedy.

The Convention recommends, *de minimis*, ensuring remedial action for those cases in which a criminal conviction cannot be obtained by reason of death, flight or absence. In case of death, as it is an established principle that criminal sanctions cannot be passed to heirs, States Parties may portray confiscation as remedial or reparative action on the premise that transfer or conversion cannot alter the illegality of the assets, nor the right of the victim State Party to reclaim them.

The European Court of Human Rights, for example, has delineated the criteria that portray a confiscation either as a penalty or as a civil remedy (European Human Rights Commission, No. 12386/1986 and European Court of Human Rights, Case of Phillips v. the UK, No. 41087/1998). Unlike confiscation in criminal proceedings, civil forfeiture laws do not require proof of illicit origin “beyond reasonable doubt”. Instead, they consider proof on a balance of probabilities or demand a high probability of illicit origin combined with the inability of the owner to prove the contrary.

4. Provisional measures for the eventual confiscation of assets

Paragraph 2 of article 54 requires States Parties to allow their competent authorities to adopt provisional (or interim) measures to be taken at the request of another State Party with a view to the enforcement of freezing or confiscation orders. Article 54(2)(a) recognises that foreign freezing or seizure orders may be issued by competent authorities other than the courts. However, States Parties are not required to enforce or recognise a freezing or seizure order issued by an authority that does not have criminal jurisdiction (see, for comparison, Interpretative Note on article 54(2)(a), A/58/422/Add.1, para. 61).

While articles 54(2)(a) and (b) focus on freezing and seizing as required provisional measures, article 54(2)(c) strongly recommends that States Parties take other measures to permit their competent authorities to preserve assets for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such assets and which may lead to confiscation proceedings. All criminal procedures, for example, provide for measures other than freezing and seizing, such as sequestering, injunctions, restriction orders, monitoring of enterprises or accounts, that allow for temporary restrictions on the disposition, use and enjoyment of assets. States Parties willing to implement this recommendation may consider extending the use of those measures to the early stage in which States Parties get information about a foreign arrest or criminal charge related to the acquisition of such assets (see article 56).

Article 55: International co-operation for purpose of confiscation

UNCAC LANGUAGE

1. *A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:*

- (a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or*
- (b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1(a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.*

2. *Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.*

3. *The provisions of article 46 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:*

- (a) In the case of a request pertaining to paragraph 1(a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;*
- (b) In the case of a request pertaining to paragraph 1(b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;*
- (c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.*

4. *The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.*

5. *Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.*

6. *If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.*

7. Co-operation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a de minimis value.

8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

Commentary

Articles 54 and 55 set forth procedures for international co-operation in confiscation matters. These are important powers, as criminals frequently seek to hide proceeds, instrumentalities and evidence of crime in more than one jurisdiction, in order to thwart law enforcement efforts to locate and seize them.

Article 55 contains obligations in support of international co-operation “to the greatest extent possible” in accordance with domestic law, either by recognising and enforcing a foreign confiscation order, or by bringing an application for a domestic order before the competent authorities on the basis of information provided by another State Party. In either case, once an order is issued or ratified, the requested State Party must take measures to “identify, trace and freeze or seize” proceeds of crime, property, equipment or other instrumentalities for purposes of confiscation (Article 55). Other provisions cover requirements regarding the contents of the various applications, conditions under which requests may be denied or temporary measures lifted, and the rights of bona fide third parties.

Although there are parallels between these articles and provisions in the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the UN Convention against Transnational Organized Crime, this Convention introduces new requirements.

Article 54 recognises the challenges that states have faced in international confiscation cases and breaks new ground by encouraging the use of creative measures to overcome some of these obstacles. One of these measures is confiscation on the basis of money laundering as opposed to predicate offence convictions.

States Parties are also obliged to consider allowing the confiscation of property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law without a criminal conviction, when the offender cannot be prosecuted (art. 54, para.1(c)).

Finally, Article 54, paragraph 2 offers detailed guidance on measures designed to enhance mutual legal assistance relative to confiscation as required under article 55.

The Convention mandates the establishment of a basic regime for domestic freezing, seizure and confiscation of assets (Art. 31), which is a pre-requisite for international co-operation and the return of assets. A domestic infrastructure paves the ground for co-operation in confiscation matters, but it does not cover by itself issues arising from requests for confiscation from another State Party.

Article 54 provides for the establishment of a regime which enables a) the enforcement of foreign freezing and confiscation orders, and b) the issuance of freezing/seizure orders for property eventually subject to confiscation, upon a request from another State Party. Paragraphs

1 and 2 of article 54, thus, provide for the mechanisms that are necessary, so that the options offered in article 55 (paragraph 1, subparagraphs a) and b)) can be exercised in such requests. In essence, article 54 enables the implementation of article 5.

In relation to Articles 54 and 55, States Parties must:

- permit their authorities to give effect to an order of confiscation issued by a court of another State Party (art. 54, para.1(a));
- permit their authorities to order the confiscation of such property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law (art. 54, para.1(b));
- permit their competent authorities to freeze or seize property upon a freezing or seizure order issued by a competent authority of a requesting State Party concerning property eventually subject to confiscation (art. 54, para.2(a));
- permit their competent authorities to freeze or seize property upon a request when there are sufficient grounds for taking such actions regarding property eventually subject to confiscation (art. 54, para.2(b)).

States Parties that receive from another State Party requests for confiscation over corruption offences must, to the greatest extent possible, submit to their competent authorities:

- the request to obtain an order of confiscation and give effect to it (art. 55, para.1(a)); or
- an order of confiscation issued by a court of the requesting State Party in accordance with articles 31(1) and 54(1)(a)) of this Convention insofar as it relates to proceeds of crime situated in their own territory, with a view to giving effect to it to the extent requested (art. 55, para.1(b)).

Upon a request by another State Party with jurisdiction over a corruption offence, States Parties must take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities (see art. 31 para.1) for confiscation by the requesting state or by themselves (art. 55, para.2).

States Parties must apply the provisions of article 46 of the Convention (mutual legal assistance) to article 55 *mutatis mutandis*. In case of a request based on paragraphs 1 or 2 of this article, States Parties must provide for the modalities of article 55 (para.3, subparas. a-c) in order to facilitate mutual legal assistance.

States parties must also consider:

- allowing confiscation of property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law without a criminal conviction, when the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (art. 54, para.1 (c));
- taking additional measures to permit their authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property (art. 54, para.2 (c)).

Legislation may be required to implement the above provisions.

Article 56: Special co-operation

UNCAC LANGUAGE

Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention

Overview

Article 56 constitutes a step forward in the area of international co-operation that has been based traditionally on the principle of providing information or assistance only at the request of another State Party. The Convention introduces the concept of spontaneous co-operation, thus supporting a proactive approach which has significant potential especially in the context of contemporary financial transactions which move at very high speeds. According to article 56, States Parties are encouraged to proactively inform other concerned States Parties, when they believe that such information may be useful in initiating or conducting investigations, prosecutions or judicial proceedings.

Practical challenges and solutions

To implement article 56, States Parties may consider including in their domestic legislation proactive co-operation provisions allowing their competent authorities to forward information considered of interest for the authorities of other States Parties. It is, however, left to the discretion of states to determine how such information may be exchanged. Yet in view of the practicability of the provisions it would appear useful to opt for direct channels of communication allowing relevant authorities to provide such information directly to their respective counterpart agencies. Such information may in particular include suspicious transactions, activities of PEPs or where a public official has a power of attorney, authorised signature, or any other authority to represent the state over its financial interests in another State Party and unusual payments by legal entities.

States Parties may wish to utilise already existing frameworks for information exchange. An example of such a forum for communication can be the Egmont Group. The Egmont Group works to foster the development of financial intelligence units (FIUs) and information exchange. FIUs exchange information with other FIUs on the basis of reciprocity or mutual agreement and consistent with established procedures. Such exchange, either upon request or spontaneously, produces any available information that may be relevant to an analysis or investigation of financial transactions and other relevant information and the persons or companies involved. The exchange of information between FIUs takes place as informally and as rapidly as possible and with no excessive formal prerequisites, while guaranteeing protection of privacy and confidentiality of the shared data. The exchange of information between Egmont FIUs should take place in a secure way. To this end, the Egmont FIUs use the Egmont Secure Web (ESW) where appropriate.

Article 57: Return and disposal of Assets

UNCAC LANGUAGE

1. *Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.*
2. *Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.*
3. *In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:*
 - (a) *In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgment in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;*
 - (b) *In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognises damage to the requesting State Party as a basis for returning the confiscated property;*
 - (c) *In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.*
4. *Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.*
5. *Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property*

Article 57 is one of the most crucial and innovative parts of the Convention. There can be no prevention, confidence in the rule of law and criminal justice processes, proper and efficient governance, official integrity or widespread sense of justice and faith that corrupt practices never pay, unless the fruits of the crime are taken away from the perpetrators and returned to the rightful parties. All spheres of societal life, from justice and the economy to public policy and domestic or international peace and security are interconnected with the chief purposes of this Convention, which culminates with the fundamental principle of asset recovery (articles 1 and 51).

For this reason there is little discretion left to States Parties about this article: States are required to implement these provisions and introduce legislation or amend their law as necessary.

Article 57 requires State Parties to:

- dispose of property confiscated under articles 33 or 55 as provided in paragraph 3 below, including by return to prior legitimate owners (para. 1);
- enable their authorities to return confiscated property upon the request of another State Party, in accordance with their fundamental legal principles and taking into account bona fide third party rights (para. 2);
- in accordance with the above and articles 46 and 55 of the Convention,
 - return confiscated property to a requesting State Party, in cases of public fund embezzlement or laundering of embezzled funds (see arts. 17 and 23), when confiscation was properly executed (see art. 55) on the basis of final judgement in the requesting state (this judgment may be waived by the requested state) (para. 3, subpara. a)
 - return confiscated property to a requesting State Party, in cases of other corruption offences covered by the Convention, when confiscation was properly executed (see art. 55), on the basis of final judgement in the requesting state (which may be waived by the requested state) and upon reasonable establishment of prior ownership by the requesting state or recognition of damage by the requested state (para. 3, subpara. b);
 - in all other cases, give priority consideration to
 - return of confiscated property
 - return such property to its prior legitimate owners compensation of victims (para. 3, subpara. c).

States parties may also consider the conclusion of agreements or arrangements for the final disposition of assets on a case-by-case basis (art. 57, para. 5).

Article 58: Financial intelligence unit

UNCAC LANGUAGE

States Parties shall co-operate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

Overview

Article 58 encourages States Parties to establish financial intelligence units (FIUs) in order to increase the effectiveness of co-operation for asset recovery.

FIUs have been created in more than 110 countries since the 1990s in order to prevent and fight against money-laundering as central, national agencies responsible for receiving (and, as permitted, requesting), sharing, analysing and disseminating to competent authorities disclosures of financial information concerning suspected proceeds of crime and potential financing of terrorism, or required by national legislation or regulation, in order to counter money-laundering and terrorist financing. The Egmont Group is an informal organisation to facilitate the work of FIUs. Among its priorities are the stimulation of information exchanges, and the overcoming of obstacles preventing cross-border information-sharing.

Practical challenges and solutions

1. Roles of FIUs

FIUs normally have three basic functions. First, they operate as a repository to centralise the information on money-laundering coming mostly from financial institutions and other intermediaries and exercising a significant operational degree of control over the use and dissemination of this information. Second, they perform an “analysis function” consisting of processing the information they receive and adding related valuable data on the reported transaction. Such information usually comes from FIUs’ own data, other governmental databases to which FIUs have access, publicly available sources, additional information from reporting entities, and from foreign FIUs. Part of the analysis function can include the performance of research activities with strategic and/or statistical analysis that would be shared with other enforcement authorities, like for example, concerning the development of new trends or typologies in money-laundering, mapping criminal financial activity over large geographic areas, and establishing international linkages that are not apparent in initial investigative activity. Third, FIUs serve as a conduit for facilitating – proactively and reactively – the exchange of information on unusual or suspicious financial transactions between foreign FIUs or domestic law enforcement, regulatory or judicial agencies.

In certain cases, FIUs may be empowered with some additional supervisory responsibilities either over financial institutions or non-financial businesses and professions, or both. In such cases, these units could also be authorised to impose sanctions against entities or persons for failing to comply with their reporting or record-keeping obligations (e.g., fines, or licence suspensions or cancellations). Some FIUs may also be authorised to enact regulations for the implementation of laws against money-laundering and terrorist financing.

Depending on the model of FIU chosen by States Parties (see below), they can be in charge of some preliminary investigations on money laundering, or co-operating with judicial authorities in identifying potential assets to be frozen, seized or confiscated, or with respect to the financial activities of the suspected criminal or his/her accomplices. In some cases, FIUs can undertake the restraining of assets as provisional measures while investigations take place.

They can also provide advice and training to the personnel of financial institutions and non-financial businesses or professions in money-laundering regulations or terrorist financing, domestically, regionally and internationally.

In setting up FIUs, States Parties may consider different models, according to their legal frameworks and economic characteristics, for example:

- the administrative model, which is either attached to a regulatory/supervisory authority, such as the central bank or the ministry of finance, or as an independent administrative authority; the law enforcement model;
- the judicial or prosecutorial model, where the agency is affiliated with a judicial authority or the prosecutor’s office; or
- the hybrid model, which is some combination of the above.

In all cases, however, a core component is agency independence, which could be guaranteed in several ways. In certain instances it could be accomplished by creating the FIU as a separate agency with a protected budget and qualified and sufficient staff for ensuring that its resources

and activities are not directed by another agency that could influence its effectiveness or exploit its functions and information inappropriately. This independence should, however, be accompanied by proper supervisory and accountability mechanisms, such as oversight of intrusive powers or data use, parliamentary reporting, audits, and/or judicial oversight.

2. FIU models: administrative

Administrative-type FIUs may be either public bodies or private bodies (with legislatively defined functions) operating as a separate agency, placed under the supervision of a ministry or administrative agency or not placed under such supervision (independent). By making an administrative authority a “buffer” between the financial institution and other reporting sectors and the law enforcement sectors, authorities can more easily enlist the co-operation of reporting institutions, which are often conscious of the drawbacks vis-à-vis their clients of having direct institutionalised links with law enforcement agencies. The advantages of an administrative-type FIU are that the FIU often acts as an interface between the financial and other sectors subject to reporting obligations, on the one hand, and law enforcement authorities, on the other. This avoids the creation of direct institutional links between reporting parties and law enforcement agencies, while bringing disclosures to the attention of law enforcement agencies. This makes financial institutions and others more confident about disclosing information if they know that dissemination will be limited to cases of money laundering or corruption or terrorist financing and will be based on the FIU’s own analysis, rather than the reporting institution’s limited information. The administrative-type FIU is usually seen as a “neutral”, technical, and specialised interlocutor for the reporting parties; if placed in a regulatory agency, it is the natural interlocutor of the financial institutions. Such FIUs can easily exchange information with all types of FIUs.

On the other hand, because the FIU is not part of the law enforcement administration, there may be a delay in applying law enforcement measures, such as freezing a suspicious transaction or arresting a suspect, on the basis of financial disclosures. The FIU usually does not have the range of legal powers that law enforcement agencies and judicial authorities have to obtain evidence, such as issuing search warrants, intercepting communications or to subpoena witnesses. Some, however, do have regulatory and other sanctions and some may have the authority to request from other public or private entities the submission of documentary evidence. The administrative-type FIUs may be more subject to the direct supervision of political authorities.

3. FIU models: law enforcement

In some States Parties, the emphasis on the law enforcement aspects of the FIU has led to the creation of the FIU as an independent public agency or as part of a law enforcement agency. This has been seen as the easiest way to establish a body with appropriate law enforcement powers without having to design a new entity within a new legal and administrative framework. Operationally, under this arrangement, the FIU will be close to other law enforcement units, such as financial crimes units in other agencies, and will benefit from their expertise and sources of information. In return, information received by the FIU can be accessed more easily by law enforcement agencies and can be used in any investigation, thus increasing its usefulness. Exchanges of information may also be expedited through the use of existing national and international criminal information exchange networks.

The advantages of a law enforcement type of FIU are:

- it is built on an existing infrastructure, so there is no need to set up a new agency;

- maximum law enforcement use can be made of financial disclosure information;
- there is quick law enforcement reaction to indicators of money-laundering and other crimes;
- information can be exchanged using the extensive network of domestic, regional and international criminal information exchange networks;
- with shared law enforcement backgrounds and expertise, staff may be seconded, exchanged or joined into teams or task force work;
- there is relatively easy access to criminal intelligence and to the intelligence community at large.

A law enforcement-type FIU will normally have all the powers of the law enforcement agency itself, without the need for separate, specific legislative authority. These powers include the power to access accounts, monitor transactions and seize assets (with the same degree of judicial supervision as applies to other law enforcement powers in the State Party).

The disadvantages are:

- this type of FIU tends to be more focused on investigations than on analytical or prevention measures;
- law enforcement agencies are not a natural interlocutor for financial institutions; mutual trust must be established, which may take some time, and law enforcement agencies may lack the financial expertise required to carry out such a dialogue, or fail to appreciate the value of relevant and regular feedback to financial institutions;
- gaining access to a financial institution's data (other than the reported transactions) usually requires the launching of a formal investigation or securing judicial authority;
- reporting institutions may be reluctant to disclose information to law enforcement if they know the information could be used in the investigation of any crime (not just money-laundering and corruption offences);
- reporting institutions may be reluctant to disclose information to law enforcement on transactions that are no more than "suspicious".

4. FIU models: judicial or prosecutorial

This type of FIU is generally established within the judicial branch and most frequently under the prosecutor's jurisdiction. Such an arrangement is typically found in those States Parties with a continental law tradition, where public prosecutors are members of the judiciary and have authority over the investigative bodies.

Judicial or prosecutorial-type FIUs can work well in States Parties where banking secrecy laws are so strong that a direct link with the judicial or prosecutorial authorities is needed to ensure the co-operation of financial institutions.

The advantages of a judicial or prosecutorial-type FIU are:

- they usually possess a high degree of independence;
- the disclosure of information is provided directly to the agency authorised to investigate or prosecute the crime;
- the judiciary’s or prosecutors’ powers and expertise (for example, seizing funds, freezing accounts, conducting interrogations, detaining people, conducting searches) are immediately brought into play.

The disadvantages are, generally, the ones mentioned above with regard to law enforcement-type FIUs and apply to judicial or prosecutorial-type FIUs except for the reluctance to disclose information upon “suspicion”.

5. FIU models: hybrid

This last category encompasses FIUs that contain different combinations of the arrangements described in the other three categories. This hybrid type is an attempt to obtain the advantages of the different types of FIUs put together in one organisation. Some FIUs combine the features of administrative-type and law enforcement-type FIUs, while others combine the powers of a customs agency with those of the police. It may be noted that in some FIUs, staff from various regulatory and law enforcement agencies work in the FIU, while continuing to exercise the powers of their own agency, to facilitate information-sharing and synergies.

Article 59: Bilateral and multilateral agreements and arrangements

UNCAC LANGUAGE

States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international co-operation undertaken pursuant to this chapter of the Convention

Overview

Article 59 contains a strong proposal to States Parties to enter into bilateral or multilateral treaties, having in mind the general principle established in article 51 to strengthen the recovery of assets originated by offences established in accordance with the Convention.

Practical challenges and solutions

States Parties that already have enacted domestic legislation to implement multilateral or other regional agreements containing asset recovery provisions may review those provisions in order to introduce amendments according to Chapter V of the Convention. A similar exercise may be done with respect to bilateral agreements, to which signatory States Parties may consider introducing an additional protocol. The review should be undertaken on a priority basis covering first those States Parties with whom mutual legal assistance relations in the context of asset recovery is likely and those whose comparative legal systems are likely to present technical difficulties for co-operation that may be overcome by a bilateral treaty.

Agreements may specify commitments of States Parties on how to implement the provision of Chapter V or to go further than its obligations under Chapter V and implement recommendations under conditions of reciprocity. They may also establish certain limits

concerning the use of the information such as the confidentiality and speciality principles within the implementation of article 56 on special co-operation, or article 58 concerning the co-operation between FIUs. In cases in which the use of the information is restricted with the specialty principle, States Parties providing the information may consider the possibility of authorising its use for other purposes upon request of the recipient State Party.

Other clauses that States Parties may consider to include in bilateral or multilateral treaties according to their domestic legal principles are those establishing formal and informal procedures to exchange information or to handle mutual legal assistance (MLA) requests, implementing modern means of communication with adequate safeguards concerning the origin and the content of the information, and the identification of simultaneous pre-notification to judicial or other authorised agencies with specific responsibilities on the subject matter of the MLA request, notwithstanding formal communications to a central authority through diplomatic channels.

For a wider knowledge of the specific bilateral and multilateral agreements, and the implementing of domestic legislations, regional or international organisations and States Parties may consider publishing these legal provisions in a user-friendly website for citizens in general. In any case, article 55 requires all States Parties to send to the United Nations a copy of all relevant treaties and agreements.

Definition of 'Public Official' and 'Foreign Public Official'
ARTICLE 2: (USE OF TERMS)

“For the purposes of this Convention:

“Public Official” shall mean:

- any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority;*
- any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;*
- any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;*

“Foreign Public Official” shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any other person exercising a public function for a foreign country, including for a public agency or public enterprise;

“Official of public international organisation” shall mean an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation.”

As to the definition of the “public official”, those drafting legislation are advised to consider taking on board the definition contained within Article 2.

In relation to the definition of foreign public official, the preference should be, where possible, to adopt an autonomous definition which follows the provisions of Article 2 (and which does not require proof of how the foreign country defines the individual in question). The aim, after all, is to cover all the categories of foreign public official envisaged within the Article 2 definition. It will be of assistance to have in mind the guidance given within the Commentary (Commentaries 12-18) to the OECD Convention on this point of definition:

“Public Function” includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

“Public Agency” is an entity constituted under public law to carry out specific tasks in the public interest.

“Public Enterprise” is an enterprise, regardless of its legal form, over which a government or governments, may, directly or indirectly, exercise a dominant influence. [Including the position where a government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the

enterprise, or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board].

An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market (i.e. on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidiaries or other privileges).

In certain circumstances some persons (e.g. political party officials in single party states), not formally designated as public officials, may, through their de facto performance of a public function, under the legal principles of some countries, be considered to be foreign public officials.

“Public International Organisation” includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of confidence, including, for example, a regional economic integration organisation such as the European Communities.

“Foreign Country” is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

It will be noted that UNCAC replicates much of the earlier OECD Convention phraseology in its definition of ‘(foreign) public official’. In stressing, then, the benefit provided by an autonomous definition (particularly in relation to the foreign bribery offence), it is worthwhile highlighting some of the comments made by the OECD evaluators during their Phase 2 (implementation) peer reviews of States Parties to the OECD Convention. In the UK, for instance, when the corruption law was extended in 2001 to criminalise the bribery of foreign public officials (on the basis of active personality (nationality) jurisdiction) the legislation simply added what might be described as a “foreign” element to existing definitions of “agent”, “principal”, “public office”, “public body”, and “public authorities”. It has, as a result, been queried whether all the categories set out in the OECD Convention as being required to be covered are in fact provided for. The UK's view is that they are, but states may wish to decide whether such uncertainty might be avoided by other jurisdictions when they consider their legislation on this aspect for the first time.

In the event that domestic law or practice does not accommodate an autonomous definition, care must be taken to ensure that anyone carrying out a public function is in fact regarded as being a public official. Such a result might, for instance, be achieved by the insertion of a specific provision to that effect. One example from outside the Commonwealth is Article 322^{Octies}, paragraph 3 of the Swiss Criminal Code, which provides that “individuals who carry out public functions are deemed to be public officials”.

Those undertaking drafting, or reviewing existing legislation, may wish to consider whether there is any bar in their own criminal code or criminal legal theory to an autonomous definition. Certainly some states do encounter difficulties in addressing the point. For instance, one of the newest members of the OECD Convention and the first country to accede since the Convention's adoption in 1997 (followed, subsequently, by South Africa), Slovenia, had this issue raised as a result of its Phase 1 peer review evaluation. Its definition of foreign public official is not autonomous and the nature of the relevant provisions in Slovenian law indicate that to ascertain whether a person is a foreign public official it is first necessary to determine whether the person would conform to the definition of a Slovenian public official. Such a position does

not, of course, mean in itself there has been convention non-compliance. The Slovenian authorities are of the view that, pending any decision or case law on the point, the substantive criteria in place for domestic public officials is sufficiently wide to cover all conceivable types of foreign public official.

An example of a broad and reasonably thorough definition of “foreign public official” is that contained within South Africa’s legislation. Under section 1(v) of the Prevention and Combating of Corrupt Activities Act 2004, the definition covers all persons “holding a legislative, administrative or judicial office of a foreign state”. Even this, however, does not address all issues of the Article 2 definition. In particular, does it in fact cover all public officials, whether appointed or elected?

In giving effect to Article 2, States should also have in mind the additional guidance contained within the Interpretive Notes to UNCAC. The UNODC Legislative Guide (at paras. 27 and 28) helpfully sets these out as follows:

For the purpose of defining “public official”, each State party shall determine who is a member of the categories mentioned in subparagraph (a)(i) of article 2 and how each of those categories is applied (A/58/422/Add.1, para. 4).

The word “executive” is understood to encompass the military branch, where appropriate (A/58/422/Add.1, para. 2).

The term “office” is understood to encompass offices at all levels and subdivisions of government from national to local. In states where subnational governmental units (for example, provincial, municipal and local) of a self-governing nature exist, including states where such bodies are not deemed to form a part of the state, “office” may be understood by the states concerned to encompass those levels also (A/58/422/Add.1, para. 3).

The term “foreign country” includes all levels and subdivisions of government, from national to local (A/58/422/Add.1, para. 5).

The phrase “assets of every kind” is understood to include funds and legal rights to assets (A/58/422/Add.1, para. 6).

The word “temporarily” in article 2, subparagraph (f), is understood to encompass the concept of renewability (A/58/422/Add.1, para. 7).

ELEMENTS OF THE BRIBERY OFFENCES AND POTENTIAL DIFFICULTIES

The Active Bribery Offence re: National Public Officials (Article 15):

Intentionally

Promising, offering or giving

To a public official

Directly or indirectly

Of an undue advantage

For the official himself or herself or another person/entity

In order that the official act or refrain from acting in the exercise of his/her official duties

The Passive Bribery Offence re: National Public Officials (Article 15):

Intentionally

Solicitation or acceptance

By a public official

Directly or indirectly
Of an undue advantage
For the official himself or herself or another person/entity
In order that the official act or refrain from acting in the exercise of his/her official duties

Active Bribery Offence re: Foreign Public Officials (Article 16):

Intentionally
Promising, offering or giving
To a public official or an official of a public international organisation
Directly or indirectly
Of an undue advantage
For the official himself or herself or another person/entity
In order that the official act or refrain from acting in the exercise of his/her official duties
In order to obtain or retain business or other undue advantage in relation to the conduct of international business

Passive Bribery Offence re: Foreign Public Officials (Article 16):

Intentionally
Solicitation or acceptance
By a foreign public official or an official of a public international organisation
Directly or indirectly
Of an undue advantage
For the official himself or herself or another person/entity
In order that the official act or refrain from acting in the exercise of his/her official duties

Articles 15 and 16 establish a standard which is to be met by parties in respect of the bribery of national public officials (Article 15) and the bribery of foreign public officials (Article 16). There is no requirement to utilise the precise terms of the UNCAC in defining the offence under domestic law, although adoption of a convention's terms in criminalisation will often ensure that difficulties and potential loopholes are avoided. But, of course, a party may use various approaches to fulfil obligations so long as the end result is convention compliance.

Whose behaviour is to be criminalised?

This involves the natural or legal person who promises a bribe to a national public official (Article 15(a)) or to a foreign public official (Article 16(1)), and the national public official who solicits or accepts such a bribe (Article 15(b)). Although, in the case of a legal person, subject to the legal principles of the State Party, liability may be criminal, civil or administrative. In addition, consideration will be given by each State Party to UNCAC to criminalisation of the solicitation or acceptance of a bribe by a foreign public official.

The liability of legal persons and the effect of Article 26 will be examined in due course. At this stage, it would be helpful to note the jurisdictional position applicable to both natural and legal persons.

Jurisdiction is addressed in **Article 42**, which provides as follows:

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

The offence is committed in the territory of that State Party; or

The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

The offence is committed against a national of that State Party; or

The offence is committed by a national of that State Party or a Stateless person who has his or her habitual residence in its territory; or

The offence is one of those established in accordance with article 23, paragraph 1(b)(ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with Article 23, paragraph 1(a)(i) or (ii) or (b)(i), of this Convention within its territory; or

The offence is committed against the State Party.

3. For the purposes of Article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this Article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to co-ordinating their actions.

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

The effect of Article 42 is as follows: UNCAC requires that a State Party shall have jurisdiction over an offence established in accordance with Articles 15 and 16 where the offence is committed within the territory of the State Party (Article 42(1)(a)). Additionally, the principle of deemed extended jurisdiction is addressed in Article 42(1) and means a State Party must also take jurisdiction when an offence is committed on board a ship flying its flag, or on board an aircraft registered under its laws.

In accordance with international expectations generally, it will be envisaged that such territorial jurisdiction is given a broad interpretation. A State Party may decide to establish a nationality jurisdiction, although not required to do so (Article 42(2)(b)). It may also take jurisdiction when a person has committed an offence against one of its nationals or against the state itself; however, in such circumstance it will have to have regard to the sovereignty provisions set out in Article 4.

In establishing over whom to extend jurisdiction for offences criminalised in accordance with the UNCAC, States Parties must also bear in mind that they are required to establish jurisdiction

over an alleged offender when that offender is present within the State Party's territory and the State Party does not extradite solely on the ground that the offender in question is one of its own nationals (Article 42(3)). In these cases, the general principle of *aut dedere aut judicare* (extradite or prosecute) applies (Articles 42, para. 3, and 44, para.11). States Parties may also decide to establish jurisdiction to meet the situation where the alleged offender is present within its territory, and it would not otherwise have territorial or nationality jurisdiction, but it does not extradite the offender in question.

Further, as the UN Legislative Guide makes clear (at paras. 517 & 8), the listing of certain bases for jurisdiction within UNCAC is not exhaustive. States Parties can establish additional bases of jurisdiction without prejudice to norms of general international law and in accordance with the principles of their domestic law:

“Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law” (Art. 42, para. 6).

The intent is not to affect general jurisdictional rules, but rather for States Parties to expand their jurisdiction in order to ensure that serious transnational crimes do not go unprosecuted as a result of jurisdictional shortcomings.

Immunities and Jurisdictional Privileges

Article 30(2) of the UNCAC sets out the following cautionary words in relation to immunities and privileges etc:

“Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, where necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention”.

Promise, Offering or Giving

The promising, offering or giving of a bribe must be criminalised. Those legislating should consider incorporating the three key words themselves into the bribery offence. In the UK, Section 1 of the Prevention of Corruption Act 1906 refers to any person who “... corruptly gives or agrees to give or offers...” and therefore appears to cover the requirements of the UNCAC. While “promise” is not specifically mentioned, any promise must surely involve an offer. However, at the UK's Phase 1 and 1 bis reviews by the OECD Bribery Working Group, it was recommended that any amendment to the UK law should cover the notions of “offering”, “promising” or “giving” specifically. Certainly any criminalisation which does not include those three words explicitly is liable to subsequent argument of interpretation, certainly when monitored and reviewed in an international setting.

The difficulties which some countries have in creating a substantive offence that covers not only ‘giving’, but also ‘promising’ or ‘offering’ a bribe should be noted. For example, under Italian law, acceptance of a bribe by an official is an essential element of the basic substantive offence of bribery (including foreign bribery). However, the international expectation, as we have seen, is broader and anticipates that substantive criminality will reflect not just giving, but offering or promising even when there has been no acceptance. Such difficulties do not automatically mean UNCAC non-compliance (since the criminality might be reflected by complicity, participation or

attempt offences), but States Parties will wish to avoid these problems whenever possible. Real difficulties will arise, however, when a complicity or attempt offence is the only one available, e.g. to reflect an offer, and the available sanctions are much lower and arguably not dissuasive (see the discussion on sanctions, below). Returning to the Italian example, the offence of incitement (*istigazione alla corruzione*) will be available where the public official does not accept an offer or promise of a bribe, whilst attempted bribery will be the appropriate offence where the offer or promise was, in effect, impossible.

The notion of the substantive bribery offence requiring some sort of meeting of minds between briber and public official is not one unique to Italy, but will be faced by many civil code states. In Luxemburg, for instance, the offence of bribery traditionally required the prior existence of a corruption pact concluded before the official performed or abstained from the act in question. Any steps taken unsuccessfully in order to create such a “pact” were only capable of prosecution as an attempt. Thus, even the giving of a bribe might not amount to the substantive offence. Luxemburg has, now, taken steps to address the problem. A new offence of bribery *ex post facto* has now been introduced (Article 249 of the Luxemburg Criminal Code) and it is now an offence where an unlawful corruption pact has been concluded after a public official has performed or abstained from an act. Therefore, payment of a bribe alone will establish the bribery offence, even in the absence of a prior agreement between the parties.

French law displays a similar requirement of a corruption pact. On the face of it, active bribery is made out by an offer or a promise, whether that offer or promise has been accepted or not. However, in examining the bribery of a French public official, the courts in France adopted the notion of a corruption pact by demanding evidence of a meeting of minds between briber and recipient. What is required is not proof of a contract, but rather that the briber knows that the purpose of his proposal is to obtain an act or an omission and that the bribed party is aware that he will receive an undue advantage in doing that act or making that omission. Such a notion is a case law, rather than a statutory, one. However, it seems that the existence of a pact can be established and inferred from a range of evidence; direct, circumstantial, and by way of explanation from the parties involved.

The requirement of a meeting of minds is not unique to continental European jurisdictions, and will need to be considered by those member states with a civil code tradition. To give an example from Asia, in the Republic of Korea, an offer, promise or gift that does not result in the provision of a benefit to a public official or is not accepted by the public official (or does not come to his attention) may not constitute the full offence. In addition, attempts to bribe a foreign public official are not criminalised. Domestically, Article 133(1) of the Republic of Korea’s Criminal Act does establish the offence of promising, delivery or manifesting a will to deliver a bribe to a domestic public official, but, it appears, even that is not intended to cover domestic attempts. Thus, by way of example, an offer not accepted (or at least not received by the public official) and a bribe sent but not received may not amount to criminal offences.

“Directly or Indirectly”

The promise, offering or giving may be direct or indirect, with the bribe or the offer of a bribe made directly to a public official or through an intermediary. As corruption becomes more sophisticated, and increasingly transnational, the use of intermediaries is a reality that needs to be addressed. The active briber must be criminalised when an intermediary is used and, similarly, for the purposes of Article 15(b), the public official who solicits or accepts an undue advantage through the offices of an intermediary must also be brought within the scope of the (passive) bribery offence.

Whilst UNCAC used the terms “directly or indirectly”, the OECD Convention (in Article 1) talks of an offer “whether directly or through intermediaries”. For the purposes of UNCAC, problems will arise if the wording of the offence is couched in terms that do not reflect explicitly “directly or indirectly” or an equivalent such as “directly or through intermediaries”. In the UK, neither the provisions of the 1906 Act, nor those of the common law offence, expressly refer to an offer being made through an intermediary. However, it can be argued that the UK offences do in fact criminalise bribery through an intermediary on two bases: first, in relation to the 1906 Act, that the provision talks of “gives or agrees to give or offers any gift or consideration to any agent...” whilst, in respect of both the statutory and common law offence, a bribe passing through an intermediary (or indeed an offer of a bribe) will be caught since, on general principles, use of an agent (whether innocent or a knowing accomplice) will not allow the principal offender to escape criminal liability. Similarly, in relation to passive bribery, under the UK’s 1906 Act, any agent who corruptly accepts, or obtains a gift or consideration “from any person” will fall prey to the offence.

Where bribery through an intermediary is not to be specifically provided for within the element of the offence, those countries which require there to be an agreement between the briber and the official for the substantive offence of bribery run the risk of convention non-compliance, both in relation to the UNCAC and the OECD Convention. It may well be, though, as in the example of Italy referred to above, that an offence of complicity, such as incitement, can be used. Subject to sufficiency of sanction, this will be in accordance with UNCAC.

Third Party Beneficiaries:

The undue advantage, whether for the active or passive offence, may be for the official himself or for another. Again, as sophistication grows, the advantage may well not even go through the hands of the public official, but may go directly to the third party (perhaps the spouse or an associate). Such activity under UNCAC must be criminalised in relation to active and passive bribery of national public officials and in relation to the active bribery of foreign public officials. Similarly, those parties who put into their legislation the passive foreign bribery offence envisaged at Article 16(2) should also address the same issue. To use the example of the UK, it does not explicitly refer to third party beneficiaries in the existing statutory offence in its 1906 Act. However, on the basis that “corruptly accepting or obtaining for any other person” reflects the position for passive bribery and that giving or offering to give “to any agent” criminalises for the purposes of active bribery, the position is addressed, although perhaps not ideally so.

Those in the process of criminalising must take into account that two scenarios need to be addressed:

The advantage which goes directly to the third party beneficiary without passing through the hands of the public official;

The advantage that goes through the hands of a public official but to, and for the benefit of, the third party beneficiary.

Given the possible limitations which some states’ legislation have in relation to the substantive bribery offence when intermediaries are involved or when there is no agreement between giver and taker, UNCAC’s requirements as to participation and attempt, as set out in Article 27, need to be considered:

1) *Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, an assistant or instigator in an offence established in accordance with this Convention.*

2) *Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.*

3) *Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.*

It follows from the above that there is a requirement that participation/secondary party involvement must be criminalised on the basis of functional equivalence with the criminalisation of participation in other offences in domestic law.

However, in relation to “attempt” and “preparation”, it should be noted that the provision is not mandatory. However, if, for instance, attempt is established as a criminal offence, then again it should be on the basis of functional equivalence with the approach to other offences of criminal attempt in the relevant domestic law.

Undue Advantage

Some jurisdictions may have the difficulty of imprecision in using the term “undue” (see discussion, below, of the UK’s draft Corruption Bill). However, those that do not may wish to follow the wording of UNCAC and incorporate the phrase of “undue advantage” into their legislation. Given the nature of corrupt transactions, it is important that any definition used to convey the UNCAC meaning encompasses both the pecuniary and non-pecuniary. “Undue” clearly refers to something to which the recipient concerned was not entitled. Taking into account the realities of commerce, the giving, obtaining of the intangible and the non-pecuniary is just the sort of situation which should be covered by any definition.

Some examples might help: in Bulgaria, the Penal Code describes the advantage as “a gift or any other material benefit”. However, following the OECD review, this definition was amended to: “gift or any other kind of advantage”. It will be seen that the later amendment made clear that both non-pecuniary and intangible benefits were covered as well as a pecuniary advantage. In Mexico, however, the domestic active bribery offence (Article 222) defines “money or any other advantage”, whilst, in relation to the foreign bribery offence, the definition is “money or any other advantage, whether in assets or services” (Article 222 bis). It would perhaps be wise to avoid the definition favoured by Chile, that of “an economic advantage”, as although such a definition will cover perhaps both tangible and intangible pecuniary advantages, it will not cover non-pecuniary advantage such as providing an admission to a school or university which the official’s child might not otherwise have reached.

“In order that the official act or refrain from acting in the exercise of his or her official duties”

The above requirement is that the act of the public official/foreign public official relates to the performance of his/her official duties. In other words, the expected act or omission must be in his/her official capacity. However, it also carries with it, for common law jurisdictions and for

some others, the notion of intention as to consequence. Thus, Section 105C of the Crimes Amendment Act 2001 in New Zealand applies where a bribe is provided with intent “to influence a foreign public official in respect of any act or omission by that official in his or her official capacity (whether or not the act or omission is within the scope)”. In the UK, the present law has tended to shy away from a thorough discussion of “intent” in relation to the statutory offence of corruption under the 1906 Act. Rather, the courts have envisaged an intent in relation to the giving of the advantage itself and then an ulterior mental element as to consequence which is not dishonesty but rather purposely doing an act which the law forbids (i.e. offering money for an official to exert influence etc).

Legislators must take care to ensure that the wording used to reflect “in order that the official act or refrain from acting” covers all situations, including that of an official being given money in order to do something he or she would/would not have otherwise done.

Given that the wording of UNCAC, just like to the OECD Convention, is phrased to encompass acts which would otherwise have been proper for the official to do/not do had there been no offer or giving of a bribe, care must be taken if legislation is phrased along the lines of “to induce a breach of the official’s duty”. This wording, and similar wording, will cause difficulties in relation to both domestic and foreign bribery offences. In relation to the foreign offence, as Commentary 3 to the OECD Convention makes clear, an offence defined in those terms is capable of being convention compliant so long as it is understood that every public official has a duty to exercise judgement or discretion impartially and that the phrase “to induce...” was therefore an autonomous definition which did not require proof of, for instance, the law governing duty in the particular official’s country. Similarly, for domestic bribery cases, such a wording will cause difficulties unless it is understood that the breach of the duty is the failure to exercise an impartial discretion unaffected by the giving or offering of an advantage; after all, the official may be being bribed to do what he or she would have done in his/her duty in any event.

“In order to obtain or retain business or other undue advantage in relation to the conduct of international business”

Some jurisdictions may choose to limit the foreign bribery offence in accordance with the above; others may choose to leave the offence broader in scope.

This aspect of the wording of Article 16(1) reflects the wording of Article 1 of the OECD Convention. The phrase “other undue advantage” should be noted. The requirement is that the criminalisation must include an advantage such as the company which obtains an operating permit for a factory in circumstances where it clearly fails to meet the statutory requirements usually required for such a grant. In short, obtaining an advantage to which there is clearly no entitlement.

Under this section, it is noteworthy that, in relation to this element of the offence (and unlike the OECD Convention), there is no commentary pursuant to the UNCAC to say that small facilitation payments do not constitute payments made to obtain or retain business or other improper advantage. Given that Commentary 9 to the OECD Convention itself recognises the “corrosive phenomenon” of facilitation payments, the criminalisation process should not include an exemption for these. However, countries will inevitably consider how, in terms of enforcement, they should react to small facilitation payments. To assist that discussion, consideration may be given to the appropriateness or otherwise of the UK’s “concession” made to business in the UK that: it is difficult to envisage circumstances in which a prosecution would take place in relation to a small facilitation payment made in circumstances of extortion.

Intentionally

The requirement of “intentionally” prefaces each of the offences established under Articles 15 and 16. There will, however, be differences of approach as between various legal systems in the way that “intentionally” is reflected in any statute which brings about criminalisation.

For those with a common law tradition, the established approach to intent in relation to corruption will have been to reflect an intent as to the giving of the advantage and an intent as to consequence (i.e. that the official was to do an act or make an omission as a result of the advantage being given). In countries such as New Zealand and the UK, the two mental element components which have been used in corruption legislation have been “corruptly” and “with intent”, (i.e., in the case of New Zealand, as mentioned above, the Section 105C offence which is committed “...with the intent to influence a foreign public official...”).

However, an alternative approach to such jurisdiction is reflected within the provisions of the UK’s draft Corruption Bill, as discussed below.

Some jurisdictions regard “intentionally”, as covering both direct intention and recklessness. Thus, in some states the bribery offence will encompass, for example, the case where a company representative directs an intermediary to obtain a contract from a foreign government “through any means”, without expressly directing the intermediary to offer a bribe, on the basis that such recklessness would be a form of intent.

What then is the minimum international standard? It may be suggested that it is: the giving of an advantage with the direct intent that the official would do an act or make an omission as a result.

The basis of the bribery offence: agent/principal, breach of trust, or a transactional approach?

The efforts of the UK (since 2003) to rationalise its corruption offences is instructive in highlighting the problems and pitfalls that may be faced in criminalisation.

The present UK law on corruption is a combination of statute and common law. The offence of corruption in the UK may be committed by either natural or legal persons. The main statutory offence is to be found in section 1 of The Prevention of Corruption Act 1906 which covers both private and public sector corruption and has, at its heart, the breach of the agent/principal relationship. However, some public officials and office holders (e.g. judges and members of parliament), not being in an agent/principal relationship, are outside the statutory offence, and would fail to be prosecuted either under the common-law offences of either Bribing a Public Official or Misconduct in a Public Office.

Here those considering new legislation may wish to ask: Does the concept of agent/principal have any part to play as a basis of a modern law of corruption? At common law there has been no all-embracing definition of “corruptly”. The courts have been helpful at addressing what corruption is not (i.e. it does not have to involve an element of dishonesty), but rather less successful at saying what it is. As a result, in the case of the UK’s most often used corruption offence (section 1 of the 1906 Act) such implicit definition as there is of “corruption” is intertwined with the notion of the agent/principal relationship.

However, this position is not unique to the UK. Australia, Canada and Ireland each have adopted an agent/principal approach to some of their offences of corruption, whilst several countries, including Germany and Austria, have a concept of private sector corruption based on breach of duty (conceptually very similar to agent/principal). Indeed, breach of duty lies at the heart of the approach to private sector corruption found in international instruments; for example, the Council of Europe Criminal Law Convention, the EU Joint Action and Framework Decision on Private Sector Corruption and UNCAC itself. However, agent/principal is simply one of the approaches open to legislators. Other choices also present themselves: should there be a “generic” offence or a number of different corruption offences to reflect different types of corrupt transactions or relationships?

In answering those questions, consideration will need to be given to how to differentiate a corrupt act from the various kinds of legitimate giving and receiving of advantages that make up ordinary transactions of both business and social life.

For some jurisdictions, it may be difficult to reach a workable definition of “improper” or “undue” as, in English, the general understanding of those words ranges from “incorrect”, “unsuitable”, “unbecoming”, “unlawful (civil or criminal)”, or “criminal”. In particular, there may be concern that to use either “improper” or “undue” might result in a position where any form of agreement between the corrupt parties precluded a corruption charge (on the premise that there was then a legal basis for the advantage). Such a position would clearly risk being a charter for corrupt behaviour.

Some states may choose to qualify the ‘advantage’. For instance, there might be a requirement that the advantage is intended as the primary, or substantial, motivation. For example, if a salesman from a company gives another company’s purchasing officer a free gift, such as a pen, of minimal value as a promotional item, the salesman will not believe that it will be primarily the “gift” of the pen that will influence the purchasing officer to do business. It is, then, the concept of “primarily” or “substantially” that acts as a check to prevent everyday, legitimate transactions from being corrupt. This may be contrasted with the position if the salesman conferred a large sum of money to the purchasing officer. In such circumstance, the primarily/substantially test would, prima facie, render the payment corrupt.

In the event that the agent/principal basis is used, the question of principal’s consent as a defence must be considered. Here it is suggested that the consent of the principal should only be available, for obvious reasons, to the private sector, not to the public. A mundane example to illustrate the point might be a waiter in a restaurant who is given a large tip by a customer in the expectation on the customer’s part that he will be given better or particularly attentive service next time he uses the restaurant. A large tip, in such circumstances, can clearly be shown to have the consent of the principal and is therefore not brought within the definition of corrupt activity.

The “transactional” to criminalising bribery, in other words, defining the offence on the basis of the conferring of an undue advantage in return for a gain is, in the view of many, a method of approach which is best capable of fulfilling obligations under international conventions.

An example of such a formulation might be:

“A person acts corruptly if he offers, agrees to give or gives, directly or indirectly, an undue/improper advantage with the intention of influencing the recipient in the performance of his duties or functions;

A person acts corruptly if he asks for, agrees to receive or receives, directly or indirectly, an undue/improper advantage with the intention that it will influence him in the performance of his duties or functions.”

Is the above an attractive and workable formulation? It retains a transactional approach, but departs from the agent/principal or breach of trust concept. Some would certainly argue that an offence drafted in this way will be capable of encompassing a much wider field of activity, including, for instance, within the private sector, corruption by business chiefs and the receiving of bribes which have indeed been sanctioned by the agent/principal. On the face of it, it also seems to have the attraction of making the definition of corruption less complex.

Each jurisdiction considering such an approach has to ask itself whether corruption ought to be confined, as an offence, to the activity which is essentially the subversion of loyalty to a principal, whether the latter happens to be the public or an individual, such as an employer. One is forced to ask the question “what is corruption?” Is the essence of corrupt activity “cheating” on the person or the entity whose interests the law expects to be safeguarded, or is it the wider notion of criminalising those activities within business, commerce and government which are morally reprehensible to the extent that they should be criminalised, but are not presently capable of being reflected by other existing offences?

To take one example, posed as a question by the Joint Parliamentary Committee in the UK in 2003: what of the situation where the owner of one business gives money to the owner of another in order to induce him not to tender for a particular contract? Should that be corruption or should that be reflected by an anti-competition offence (such as the criminal offence of bid rigging under the Enterprise Act of 2002 in the UK, which would be applicable in this example)?

Possible approaches to criminalisation: Examples from Commonwealth States

The two alternative approaches are:

Alternative 1

An offence which covers:

promise, offer or giving (each as a complete offence); or
solicit or acceptance;
directly and indirectly;
to/by a public official or other person or entity;
for the purpose of the official doing or refraining from doing any act in the exercise of official duties (broadly phrased to cover instances where bribing a person to do their job i.e. the immigration officer to issue the visa).

Alternative 2

An offence of “corruptly” promising, offering or giving or soliciting or accepting gratification, broadly defined, with a rebuttable presumption of “corruptly” in the case of gratification to a public official by a person who has or seeks any dealing with the government or a public body.

NB: In either approach, there can be an optional provision excluding the application of the offence in the case of a gift that is acceptable within a particular cultural setting.

KENYA (THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT, 2003)

(Agent/Principal basis)

38. (1) In this Part —

“agent” means a person who, in any capacity, and whether in the public or private sector, is employed by or acts for or on behalf of another person;

“principal” means a person, whether in the public or private sector, who employs an agent or for whom or on whose behalf an agent acts.

(2) If a person has a power under the Constitution or an Act and it is unclear, under the law, with respect to that power whether the person is an agent or which public body is the agent’s principal, the person shall be deemed, for the purposes of this Part, to be an agent for the Government and the exercise of the power shall be deemed to be a matter relating to the business or affairs of the Government.

(3) For the purposes of this Part —

a Cabinet Minister shall be deemed to be an agent for both the Cabinet and the Government;
and
the holder of a prescribed office or position shall be deemed to be an agent for the prescribed principal.

(4) The regulations made under this Act may prescribe offices, positions and principals for the purposes of subsection (3)(b).

Bribing agents

39. (1) This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, an agent —

doing or not doing something in relation to the affairs or business of the agent’s principal; or showing or not showing favour or disfavour to anything, including to any person or proposal, in relation to the affairs or business of the agent’s principal.

(2) For the purposes of subsection (1)(b), a benefit, the receipt or expectation of which would tend to influence an agent to show favour or disfavour, shall be deemed to be an inducement or reward for showing such favour or disfavour.

(3) A person is guilty of an offence if the person —
corruptly receives or solicits, or corruptly agrees to receive or solicit, a benefit to which this section applies; or
corruptly gives or offers, or corruptly agrees to give or offer, a benefit to which this section applies.

Secret inducements for advice

40. (1) This section applies with respect to a benefit that is an inducement or reward for, or otherwise on account of, the giving of advice to a person.

(2) A person is guilty of an offence if the person —

receives or solicits, or agrees to receive or solicit, a benefit to which this section applies if the person intends the benefit to be a secret from the person being advised; or

gives or offers, or agrees to give or offer, a benefit to which this section applies if the person intends the benefit to be a secret from the person being advised.

(3) In this section, “giving advice” includes giving information.

Deceiving principal

41. (1) An agent who, to the detriment of his principal, makes a statement to his principal that he knows is false or misleading in any material respect is guilty of an offence.

(2) An agent who, to the detriment of his principal, uses, or gives to his principal, a document that he knows contains anything that is false or misleading in any material respect is guilty of an offence.

Conflicts of interest

42. (1) If an agent has a direct or indirect private interest in a decision that his principal is to make the agent is guilty of an offence if —

the agent knows or has reason to believe that the principal is unaware of the interest and the agent fails to disclose the interest; and

the agent votes or participates in the proceedings of his principal in relation to the decision.

(2) A private body may authorise its agent to vote or participate in the proceedings of the private body and the voting or participation of an agent as so authorised is not a contravention of subsection (1).

(3) An agent of a public body who knowingly acquires or holds, directly or indirectly, a private interest in any contract, agreement or investment emanating from or connected with the public body is guilty of an offence.

(4) Subsection (3) does not apply with respect to an employment contract of the agent, or a related or similar contract or agreement or to any prescribed contract, agreement or investment or improper benefits to trustees for appointments.

43. (1) This section applies with respect to a benefit that is an inducement or reward for the appointment of a person as a trustee of property or for joining or assisting in such an appointment.

(2) Subject to subsection (3), a person is guilty of an offence if the person —

receives or solicits, or agrees to receive or solicit, from a trustee of property a benefit to which this section applies; or

gives or offers, or agrees to give or offer, to a trustee of property a benefit to which this section applies.

(3) Subsection (2) does not apply to anything done with the informed consent of every person beneficially entitled to the property or in accordance with an order of a court.

(4) In this section, “trustee of property” includes –

an executor or administrator appointed to deal with the property;
a person who, under a power of attorney or a power of appointment, has authority over the property; and
a person or a member of a committee managing or administering, or appointed or employed to manage or administer, the property on behalf of a person under an infirmity or incapacity of mind.

Bid rigging, etc.

44. (1) This section applies with respect to a benefit that is an inducement or reward for

refraining from submitting a tender, proposal, quotation or bid;
withdrawing or changing a tender, proposal, quotation or bid; or
submitting a tender, proposal, quotation or bid with a specified price or with any specified inclusions or exclusions.

(2) A person is guilty of an offence if the person —

receives or solicits or agrees to receive or solicit a benefit to which this section applies; or
gives or offers or agrees to give or offer a benefit to which this section applies.

Protection of public property and revenue, etc.

45. (1) A person is guilty of an offence if the person fraudulently or otherwise unlawfully:

acquires public property or a public service or benefit;
mortgages, charges or disposes of any public property;
damages public property, including causing a computer or any other electronic machinery to perform any function that directly or indirectly results in a loss or adversely affects any public revenue or service;
fails to pay any taxes or any fees, levies or charges payable to any public body or effects or obtains any exemption, remission, reduction or abatement from payment of any such taxes, fees, levies or charges.
makes payment or excessive payment from public revenues for

sub-standard or defective goods;
goods not supplied or not supplied in full; or
services not rendered or not adequately rendered;

fraudulently or carelessly fails to comply with any law or applicable procedures and guidelines relating to the procurement, tendering of, allocation, sale or disposal of property,

(3) In this section, “public property” means real or personal property, including money, of a public body or under the control of, or consigned or due to, a public body.

Abuse of office

46. A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

Dealing with suspect property

47. (1) A person who deals with property that he believes or has reason to believe was acquired in the course of or as a result of corrupt conduct is guilty of an offence.

(2) For the purposes of this section, a person deals with property if the person —

holds, receives, conceals or uses the property or causes the property to be used; or enters into a transaction in relation to the property or causes such a transaction to be entered into.

(3) In this section, “corrupt conduct” means —

conduct constituting corruption or economic crime; or
conduct that took place before this Act came into operation and which —

at the time, constituted an offence;

and

if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

Custom not a defence

49. In prosecution of an offence under this Part, it shall be no defence that the receiving, soliciting, giving or offering of any benefit is customary in any business, undertaking, office, profession or calling.

Impossibility, no intention, etc. not a defence

50. In a prosecution of an offence under this Part that involves a benefit that is an inducement or reward for doing an act or making an omission, it shall not be a defence —

that the act or omission was not within a person’s power or that the person did not intend to do the act or make the omission; or

that the act or omission did not occur.

LESOTHO (*PREVENTION OF CRIME AND ECONOMIC OFFENCES ACT, 1999*)

(Transactional Approach)

Definition of benefit... "benefit" means

any gift, fee, reward or commission consisting of money, any valuable security or other property or interest in property of any description;

any office, employment or contract;

any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

any other service or favour including protection from any penalty or disability incurred or apprehended, or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted;

the exercise or forbearance from exercise of any right or power or duty; and

any offer, undertaking or promise whether conditional or unconditional, of any benefit within the meaning of the provisions of any of the preceding paragraphs.

Corruption by or with public officer

21. (1) A public officer commits the offence of corruption in relation to the duties of his office if he directly agrees or offers to permit his public conduct as a public officer to be influenced by a gift, promise or prospect of any benefit to be received by him, or by any person, from any person.

(2) A person commits the offence of corrupting a public officer if he endeavours directly to influence the conduct of the public officer in respect of the duties of his office by a gift, promise or prospect of any benefit to be received by the public officer, or by any person, from any person.

Corruption in respect of official transactions

22. (1) A public officer commits the offence of corruption if he accepts, or agrees or offers to accept, for himself, or for any other person a benefit as an inducement or reward for doing or forbearing to do anything in respect of any matter in which he is concerned in his capacity as a public officer.

(2) A person commits the offence of corrupting a public officer if he gives or agrees to offer to give any benefit to a public officer, whether for the benefit of that public officer or of another person as an inducement or reward for doing or forbearing to do anything in respect of any matter in which the public officer is concerned in his capacity as a public officer.

Acceptance of bribe by public officer after doing act

23. If, after a person has done any act as a public officer, he accepts, or agrees to offer to accept for himself or for any other person, any benefit on account of such act, he shall be presumed, until the contrary is shown, to have been guilty of having, before the doing of such act, completed the public office in respect of such act.

Promise of bribe to public officer after doing act

24. If, after a public officer has done any act as such officer, any person agrees or offers to give or procure for him any benefit on account of such act, the person so agreeing or offering shall be presumed, until the contrary is shown, to have been guilty of having, before the doing of such act, corrupted the public officer in respect of such act.

Corrupt transaction by or with agents

25. (1) An agent commits the offence of corruption if he corruptly accepts, or agrees or offers to accept from any person, for himself or for any other person any benefit as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business.

(2) A person commits the offence of corruption if he corruptly gives or agrees to give or offers to give to any agent any benefit as inducement or reward for doing or forbearing to do, any act or for showing or forbearing to show favour.

MAURITIUS (*PREVENTION OF CORRUPTION ACT 2002*)

(Transactional approach)

(Please refer to full Act for numbering of sections; numbers removed herein (as non-sequential) to avoid confusion)

Bribery by public official

(1) Any public official who solicits, accepts or obtains from another person, for himself or for any other person, a gratification for –

doing or abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties;

doing or abstaining from doing, or having done or abstained from doing, an act which is facilitated by his functions or duties;

expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act in the execution of his functions or duties;

expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act by another public official, in the execution of the latter's functions or duties;

assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, another person in the transaction of a business with a public body,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Notwithstanding section 83, where in any proceedings against any person for an offence, it is proved that the public official solicited, accepted or obtained a gratification, it shall be presumed, until the contrary is proved, that the gratification was solicited, accepted or obtained for any of the purposes set out in subsection (1)(a) to (e).

Bribery of public official

(1) Any person who gives, agrees to give, or offers a gratification to a public official for –
doing, or for abstaining from doing, or having done or abstained from doing, an act in the execution of his functions or duties;
doing or abstaining from doing, or for having done or abstained from doing, an act which is facilitated by his functions or duties;
expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act in the execution of his functions or duties;
expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act by another public official in the execution of the latter's functions or duties;
assisting, favouring, hindering or delaying or having assisted, favoured, hindered or delayed another person in the transaction of a business with a public body,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Notwithstanding section 83, where in any proceedings against any person for an offence under subsection (1) it is proved that the accused gave, agreed to give or offered gratification, it shall be presumed, until the contrary is proved, that the accused gave, agreed to give or offered the gratification for any of the purposes set out in subsection (1)(a) to (e).

Taking gratification to screen offender from punishment

(1) Subject to section (2), any person who accepts or obtains, or agrees to accept or attempts to obtain, a gratification for himself or for any other person, in consideration of his concealing an offence, or his screening any other person from legal proceedings for an offence, or his not proceeding against any other person in relation to an alleged offence, or his abandoning or withdrawing, or his obtaining or endeavouring to obtain the withdrawal of, a prosecution against any other person, shall commit an offence and shall, on conviction –

where the offence is a crime, be liable to imprisonment for a term not exceeding 5 years;

where the offence is a misdemeanour, be liable to imprisonment for a term not exceeding one year;

where the offence is a contravention, be liable to imprisonment for a term not exceeding 6 months.

(2) This section shall not extend to any lawful compromise as to the civil interests resulting from the offence, but any such compromise shall not be a bar to any criminal proceedings which may be instituted by the State in respect of the offence.

Public official using his office for gratification

(1) Subject to subsection (3), any public official who makes use of his office or position for a gratification for himself or another person shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) For the purposes of subsection (1), a public official shall be presumed, until the contrary is proved, to have made use of his office or position for a gratification where he has taken any decision or action in relation to any matter in which he, or a relative or associate of his, has a direct or indirect interest.

This section shall not apply to a public official who –

holds office in a public body as a representative of a body corporate which holds shares or interests in that public body; and
acts in that capacity in the interest of that body corporate.

Bribery of or by public official to influence the decision of a public body

(1) Any person who gives, or agrees to give, or offers, to a public official, a gratification for –

voting or abstaining from voting, or having voted or abstained from voting, at a meeting of a public body of which he is a member, director or employee, in favour of or against any measure, resolution or question submitted to the public body;
performing or abstaining from performing, or aiding in procuring, expediting, delaying, hindering or preventing, or having performed or abstained from performing, or having aided in procuring, expediting, delaying, hindering or preventing, the performance of an act of a public body of which he is a member, director or employee;
aiding in procuring, or preventing, or having aided in procuring or preventing, the passing of any vote or the granting of any contract or advantage in favour of any other person,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(1) Any public official who solicits or accepts a gratification for –

voting or abstaining from voting, or having voted or abstained from voting at a meeting of a public body of which he is a member, director or employee, in favour of or against any measure, resolution or question submitted to the public body;
performing or abstaining from performing, or aiding in procuring, expediting, delaying, hindering or preventing, the performance of, an act of a public body of which he is a member, director or employee;
aiding in procuring or preventing, or having aided in procuring or preventing, the passing of any vote or the granting of any contract or advantage in favour of any person,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Public official taking gratification

Any person who exercises any form of violence, or pressure by means of threat, upon a public official, with a view to the performance, by that public official, of any act in the execution of his functions or duties, or the non-performance, by that public official, of any such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Public official taking gratification

(1) Any person who gives or agrees to give or offers a gratification to another person, to cause a public official to use his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Any person who gives or agrees to give or offers a gratification to another person to use his influence, real or fictitious, to obtain work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(3) Any person who gives or agrees to give or offers a gratification to a public official to cause that public official to use his influence, real or fictitious, to obtain work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(4) Any person who solicits, accepts or obtains a gratification from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(5) Any public official who solicits, accepts or obtains a gratification from any other person for himself or for any other person in order to make use of his influence, real or fictitious, to obtain any work, employment, contract or other benefit from a public body, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Public official taking gratification

Any public official who accepts or receives a gratification, for himself or for any other person –

for doing or having done an act which he alleges, or induces any person to believe, he is empowered to do in the exercise of his functions or duties, although as a fact such act does not form part of his functions or duties; or

for abstaining from doing or having abstained from doing an act which he alleges, or induces any person to believe, he is empowered not to do or bound to do in the ordinary course of his function or duty, although as a fact such act does not form part of his functions or duties,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Bribery for procuring contracts

(1) Any person who gives or agrees to give or offers a gratification to a public official in consideration of that public official giving assistance or using influence in –

promoting, executing, or procuring a contract with a public body for the performance of a work, the supply of a service, or the procurement of supplies;
the payment of the price provided for in a contract with a public body;

obtaining for that person or for any other person, an advantage under a contract for work or procurement,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Any public official who solicits, accepts or obtains from any other person, for himself or for any other person, a gratification for giving assistance or using influence in –

promoting, executing, or procuring a contract with a public body for the performance of a work, the supply of a service, or the procurement of supplies;
the payment of the price provided for in a contract with a public body;
obtaining for that person or for any other person, an advantage under a contract for work or procurement,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Conflict of interests

1. Where –

a public body in which a public official is a member, director or employee proposes to deal with a company, partnership or other undertaking in which that public official or a relative or associate of him has a direct or indirect interest; and
that public official and/or his relative or associate of him hold more than 10 per cent of the total issued share capital or of the total equity participation in such company, partnership or other undertaking,

that public official shall forthwith disclose, in writing, to that public body the nature of such interest.

(2) Where a public official or a relation or associate of his has a personal interest in a decision which a public body is to take, that public official shall not vote or take part in any proceedings of that public body relating to such decision.

(3) Any public official who contravenes subsection (1) or (2) shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Treating of public official

Any person who, while having dealings with a public body, offers a gratification to a public official who is a member, director or employee of that public body shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Receiving gift for a corrupt purpose

Any person who, while having dealings with a public body, offers a gratification to a public official who is a member, director or employee of that public body shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Receiving gift for a corrupt purpose

Any public official who solicits, accepts or obtains a gratification for himself or for any other person –

from a person, whom he knows to have been, to be, or to be likely to be, concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with his functions or those of any public official to whom he is subordinate or of whom he is the superior; or

from a person whom he knows to be interested in or related to the person so concerned,

shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Corruption of agent

(1) Any agent who, without the consent of his principal, solicits, accepts or obtains from any other person for himself or for any other person, a gratification for doing or abstaining from doing an act in the execution of his functions or duties or in relation to his principal's affairs or business, or for having done or abstained from doing such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Any person who gives or agrees to give or offers, a gratification to an agent for doing or abstaining from doing an act in the execution of his functions or duties or in relation to his principal's affairs or business or for having done or abstained from doing such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Corruption to provoke a serious offence

(1) Any agent who, without the consent of his principal, solicits, accepts or obtains from any other person for himself or for any other person, a gratification for doing or abstaining from doing an act in the execution of his functions or duties or in relation to his principal's affairs or business, or for having done or abstained from doing such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

(2) Any person who gives or agrees to give or offers, a gratification to an agent for doing or abstaining from doing an act in the execution of his functions or duties or in relation to his principal's affairs or business or for having done or abstained from doing such act, shall commit an offence and shall, on conviction, be liable to penal servitude for a term not exceeding 10 years.

Corruption to provoke a serious offence

Where a person has committed an offence under this Part with the object of committing or facilitating the commission of a crime, that person shall, on conviction, be sentenced to penal servitude.

SINGAPORE

5. Any person who shall by himself or by or in conjunction with any other person —

corruptly solicits or receives, or agrees to receive for himself, or for any other person; or corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,

any gratification as an inducement to or reward for, or otherwise on account of —

- (i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or
- (ii) any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 5 years or to both.

6. If —

any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

any person knowingly gives to an agent, or if an agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal,

he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 5 years or to both.

29/89.

Increase of maximum penalty in certain cases

7. A person convicted of an offence under section 5 or 6 shall, where the matter or transaction in relation to which the offence was committed was a contract or a proposal for a contract with the Government or any department thereof or with any public body or a subcontract to execute any work comprised in such a contract, be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 7 years or to both.

29/89.

Presumption of corruption in certain cases

8. Where in any proceedings against a person for an offence under section 5 or 6, it is proved that any gratification has been paid or given to or received by a person in the employment of the Government or any department thereof or of a public body by or from a person or agent of a person who has or seeks to have any dealing with the Government or any department thereof or

any public body, that gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned unless the contrary is proved.

Acceptor of gratification to be guilty notwithstanding that purpose not carried out, etc.

9. —(1) Where in any proceedings against any agent for any offence under section 6(a), it is proved that he corruptly accepted, obtained or agreed to accept or attempted to obtain any gratification, having reason to believe or suspect that the gratification was offered as an inducement or reward for his doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person in relation to his principal's affairs or business, he shall be guilty of an offence under that section notwithstanding that he did not have the power, right or opportunity to do so, show or forbear or that he accepted the gratification without intending to do so, show or forbear or that he did not in fact do so, show or forbear or that the act, favour or disfavour was not in relation to his principal's affairs or business.

(2) Where, in any proceedings against any person for any offence under section 6(b), it is proved that he corruptly gave, agreed to give or offered any gratification to any agent as an inducement or reward for doing or forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person having reason to believe or suspect that the agent had the power, right or opportunity to do so, show or forbear and that the act, favour or disfavour was in relation to his principal's affairs or business, he shall be guilty of an offence under that section notwithstanding that the agent had no power, right or opportunity or that the act, favour or disfavour was not in relation to his principal's affairs or business.

Corruptly procuring withdrawal of tenders

10. A person —

who, with intent to obtain from the Government or any public body a contract for performing any work, providing any service, doing anything, or supplying any article, material or substance, offers any gratification to any person who has made a tender for the contract, as an inducement or a reward for his withdrawing that tender; or

who solicits or accepts any gratification as an inducement or a reward for his withdrawing a tender made by him for that contract,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 7 years or to both.

29/89.

Bribery of Member of Parliament

11. Any person —

who offers any gratification to a Member of Parliament as an inducement or reward for such Member's doing or forbearing to do any act in his capacity as such Member; or

who being a Member of Parliament solicits or accepts any gratification as an inducement or a reward for his doing or forbearing to do any act in his capacity as such Member,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 7 years or to both.

29/89.

Bribery of member of public body

12. A person —

who offers any gratification to any member of a public body as an inducement or reward for —

the member's voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to that public body;

the member's performing, or abstaining from performing, or his aid in procuring, expediting, delaying, hindering or preventing the performance of, any official act;

or

the member's aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

who, being a member of a public body, solicits or accepts any gratification as an inducement or a reward for any such act, or any such abstaining, as is referred to in paragraph (a)(i), (ii) and (iii),

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 7 years or to both.

29/89.

When penalty to be imposed in addition to other punishment

13. —(1) Where a court convicts any person of an offence committed by the acceptance of any gratification in contravention of any provision of this Act, then, if that gratification is a sum of money or if the value of that gratification can be assessed, the court shall, in addition to imposing on that person any other punishment, order him to pay as a penalty, within such time as may be specified in the order, a sum which is equal to the amount of that gratification or is, in the opinion of the court, the value of that gratification, and any such penalty shall be recoverable as a fine.

(2) Where a person charged with two or more offences for the acceptance of gratification in contravention of this Act is convicted of one or some of those offences, and the other outstanding offences are taken into consideration by the court under section 178 of the Criminal Procedure Code for the purpose of passing sentence, the court may increase the penalty mentioned in subsection (1) by an amount not exceeding the total amount or value of the gratification specified in the charges for the offences so taken into consideration.

Principal may recover amount of secret gift

14. —(1) Where any gratification has, in contravention of this Act, been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or

acquittal of the defendant in respect of an offence under this Act shall operate as a bar to proceedings for the recovery of that amount or money value.

(2) Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property.

Defences

ARTICLE 30(9)

“Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved for domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.”

[There are of course general defences which a defendant may rely on when facing an allegation of domestic or foreign bribery. These may relate to defences which go to state of mind or to showing that money only changed hands because of blackmail, not because of bribery. These answers to charges have, of course a proper place and do not offend against the UNCAC.]

However, what is capable of undermining the thrust of both UNCAC and the OECD Convention is any defence which strikes at the matters addressed in Commentary 7 to the OECD Convention, namely: “it is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage”.

A striking example of a defence which risks undermining UNCAC, both in relation to domestic and foreign bribery, is that of *concussione* in Italian law. Under the Italian criminal provisions, an individual is not guilty of bribery if a public official abuses his functions or power and obliges or induces that individual to unduly give or promise money or other assets either to the official or to a third party. Instead, the official himself is guilty of *concussione* (Article 317 of the Criminal Code), whilst the payer is regarded as a victim and potential witness.

One can, of course, see the rationale in domestic cases for such a provision. If one is trying to eradicate corrupt officials, then the prospect of being able to call as a witness the payer who is, indeed, in many senses a victim, will be an attractive one. However, as corruption moves into an increasingly sophisticated context, the defence of *concussione*, with its threshold set much lower than duress or extortion as many jurisdictions will understand those phrases, becomes somewhat of concern.

The concept of *concussione* is further complicated by the notion of *concussione ambientale*, which was developed by Italian jurisprudence in the 1990s. This form of *concussione* occurs when an individual is in a place or an environment which leads him to believe that he must provide a public official with an advantage, either to avoid harm or to obtain something to which he is entitled. Compelled by the environment itself and without any express demands from the official, the individual then obliges. It seems that in such circumstances the defence is capable of being run, and of succeeding, even when there is no solicitation by an official.

For the domestic offence, it is problematic, but for the foreign bribery offence it appears manifestly to run contrary to Commentary 7. It is entirely acceptable for a court to weigh in the balance the pressure the persuasion exerted by an official over the active briber and there may be circumstances where the sanction against the briber should be reduced accordingly; however the extinguishing of criminal liability at such a low threshold is, if adopted, capable of undermining the very process of criminalisation.

However, the Italian example is not an isolated one. For instance, Chile has a defence of “necessity” which seems capable of being drawn widely, whilst Bulgaria has a defence of blackmail, the extent of which seems, at present, uncertain.

In relation to the Bulgarian example, pursuant to Article 306 of the Bulgarian Penal Code a person who is given a bribe shall not be punished if he has been blackmailed by the official and if he has informed the authorities without delay and voluntarily. It has to be accepted that the latter element has a limiting effect on the ambit of the defence. However, given that the crime of blackmail proper would mean that no offence of bribery had been committed (since the attempt to bribe would not be present) one has to question whether the notion of “blackmail” as envisaged by Article 306 is wide and presents the same difficulties as concussion.

There will be occasions when co-operating defendant programmes are valuable, particularly in relation to the detection and prosecution of domestic bribery. However, care must be taken in relation to providing an absolute defence to those who voluntarily come forward.

By way of example, the Slovenia bribery offence contained in Article 268 is such that, in the event that the public official solicited the bribe, the briber can escape conviction if he reports the act to the Slovenian authorities. Domestically the argument for “effective regret” is a powerful one; very often the mischief to the confronted is that of the passive bribery offence committed by an official. However, in relation to the foreign bribery setting such policy considerations lose their force. It may well be that the passive party, the public official, will never in fact be brought before a court. In addition, in relation to the foreign bribery offence, it must be remembered that such a defence is not within the contemplation of Article 1 of the OECD Convention.

MLA Law: Model Legislative Provisions

UNDCP MODEL MUTUAL ASSISTANCE IN CRIMINAL MATTERS BILL 2000
Bill No of 2000
To be presented by the Minister of Justice

MEMORANDUM OF OBJECTS AND REASONS

The object of this bill is to enable [name of State] to co-operate with foreign States in criminal investigations and proceedings.

An Act to enable the widest range of international co-operation to be given and received by [name of State] in investigations, prosecutions and related proceedings concerning serious offences against the laws of [name of State] or of foreign States.

ENACTED by the President and Parliament of [name of State]

PART 1 – PRELIMINARY

1. Short title, Extent and Commencement

This Act may be called the "Mutual Assistance in Criminal Matters Act 2000."

It shall extend throughout [name of State].

It shall come into force at once.

2. Applicability of the Act

This Act shall apply in relation to mutual assistance in criminal matters between [name of State] and:

any foreign State, subject to any condition, variation or modification in any existing or future agreement with

that State, whether in relation to a particular case or more generally; or

any international criminal tribunal.

3. Definitions

Unless the subject or context otherwise requires, in this Act:

"appeal" includes proceedings by way of discharging or setting aside a judgement, and an application for a new trial or for a stay of execution;

"data" means representations, in any form, of information or concepts;

"document" means any record of information, and includes;

anything on which there is writing;
anything on which there are marks, figures, symbols, or perforations having
meaning for persons qualified to interpret them;
anything from which sounds, images or writings can be produced, with or
without the aid of anything else,
a map, plan, drawing, photograph or similar thing;

"foreign confiscation order" means an order, made by a court in a foreign State, for the
purposes of the:
confiscation or forfeiture of property in connection with; or
recovery of the proceeds of,

a serious offence;

"foreign restraining order" means an order made in respect of a serious offence by a
court in a foreign State for the purpose of restraining a particular person or all
persons from dealing with property;

"foreign State" means:

any country other than [name of State]; and
every constituent part of such country, including a territory, dependency or
protectorate, which administers its own laws relating to international co-
operation;

"interest," in relation to property, means a:

legal or equitable estate or interest in the property; or
right, power or privilege in connection with the property,
whether present or future and whether vested or contingent;

"international criminal tribunal" means any court or tribunal listed in the Schedule to this
Act and includes

any investigatory, prosecutorial or adjudicatory organ of such court or tribunal;

"person" means any natural or legal person;

"place" includes any land (whether vacant enclosed or built upon, or not), and any
premises;

"premises" includes the whole or any part of a structure, building, aircraft, or vessel;

"proceedings" means any procedure conducted by or under the supervision of a judge,
magistrate or judicial officer however described in relation to any alleged or
proven offence, or property derived from such offence, and includes an inquiry,
investigation, or preliminary or final determination of facts;

"property" means real or personal property of every description, whether situated in [name of State] or elsewhere and whether tangible or intangible, and includes an interest in any such real or personal property;

"proceeds of crime" means any property derived or realised directly or indirectly from a serious offence and includes, on a proportional basis, property into which any property derived or realised directly from the offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realised from such property at any time since the offence;

"record" means any material on which data are recorded or marked and which is capable of being read or understood by a person, computer system or other device;

"serious offence" means an offence against a provision of:

any law of [name of State], for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than [12 months] [except/including an offence against a law relating to taxation], or more severe penalty;

a law of a foreign State, in relation to acts or omissions, which had they occurred in [name of State], would have constituted an offence for which the maximum penalty is imprisonment or other deprivation of liberty for a period of not less than [12 months], or more severe penalty [except/including an offence of a purely fiscal character];

(2) A reference in this Act to the law of:

[name of State];
any foreign State,

includes a reference to a written or unwritten law of, or in force in, any part of [name of State] or that foreign State, as the case may be.

PART II – MUTUAL ASSISTANCE

4. Authority to make and act on mutual legal assistance requests

The [Attorney-General] may make requests on behalf of [name of State] to the appropriate authority of a foreign State for mutual legal assistance in any investigation commenced or proceeding instituted in [name of State], relating to any serious offence.

The [Attorney-General] may, in respect of any request from a foreign State for mutual assistance in any investigation commenced or proceeding instituted in that State relating to a serious offence:

grant the request, in whole or in part, on such terms and conditions as he or she thinks fit;

refuse the request, in whole or in part, on the ground that to grant the request would be likely to prejudice the sovereignty, security or other essential public interest of [name of State]; or

after consulting with the competent authority of the foreign State, postpone the request, in whole or in part, on the ground that granting the request immediately would be likely to prejudice the conduct of an investigation or proceeding in [name of State].

Requests on behalf of [name of State] to the appropriate authorities of foreign States for assistance of the kind referred to in section 6 shall be made only by or with the authority of the [Attorney General].

5. Saving provision for other requests or assistance in criminal matters

Nothing in this Act shall be taken to limit:

the power of the [Attorney-General], apart from this Act, to make requests to foreign States or act on requests from foreign States for assistance in investigations or proceedings in criminal matters;

the power of any other person or court, apart from this Act, to make requests to foreign States or act on requests from foreign States for forms of international assistance other than those specified in section 6; or

the nature or extent of assistance in investigations or proceedings in criminal matters which [name of State] may lawfully give to or receive from foreign States.

6. Mutual legal assistance requests by [name of State]

The requests which the [Attorney-General] is authorised to make under section 4 are that the foreign State:

have evidence taken, or documents or other articles produced in evidence in the foreign State;

obtain and execute search warrants or other lawful instruments authorising a search for things believed to be located in that foreign State, which may be relevant to investigations or proceedings in [name of State], and if found, seize them;

locate or restrain any property believed to be the proceeds of crime located in the foreign State;

confiscate any property believed to be located in the foreign State, which is the subject of a confiscation order made under the [Money Laundering and Proceeds of Crime Act, 2000];

transmit to [name of State] any such confiscated property or any proceeds realised therefrom, or any such evidence, documents, articles or things;

transfer in custody to [name of State] a person detained in the foreign State who consents to assist [name of State] in the relevant investigation or proceedings;

provide any other form of assistance in any investigation commenced or proceeding instituted in [name of State], that involves or is likely to involve the exercise of a coercive power over a person or property believed to be in the foreign State; or

permit the presence of nominated persons during the execution of any request made under this Act.

7. Contents of requests for assistance

A request for mutual assistance shall:

give the name of the authority conducting the investigation or proceeding to which the request relates;

give a description of the nature of the criminal matter and a statement setting-out a summary of the relevant facts and laws;

give a description of the purpose of the request and of the nature of the assistance being sought;

in the case of a request to restrain or forfeit assets believed on reasonable grounds to be located in the requested State, give details of the offence in question, particulars of any investigation or proceeding commenced in respect of the offence, and be accompanied by a copy of any relevant restraint or forfeiture order;

give details of any procedure that the requesting State wishes to be followed by requested State in giving effect to the request, particularly in the case of a request to take evidence;

include a statement setting-out any wishes of the requesting State concerning any confidentiality relating to the request and the reasons for those wishes;

give details of the period within which the requesting State wishes the request to be complied with;

where applicable, give details of the property to be traced, restrained, seized or confiscated, and of the grounds for believing that the property is believed to be in the requested State; and

give any other information that may assist in giving effect to the request.

A request for mutual assistance from a foreign State may be granted, if necessary after consultation, notwithstanding that the request, as originally made, does not comply with subsection (1).

8. Foreign requests for an evidence-gathering order or a search warrant

Notwithstanding anything contained in any law for the time being in force, where the [Attorney-General] grants a request by a foreign State to obtain evidence in [name of State], an authorised person may apply to the [name of Court] for:

a search warrant; or
an evidence-gathering order.

The [name of Court] to which an application is made under subsection (1) shall issue an evidence-gathering order or a search warrant under this subsection, where it is satisfied that there are reasonable grounds to believe that:

[a serious offence] has been or may have been committed against the law of the foreign State;

evidence relating to that offence may:

be found in a building, receptacle or place in [name of State]; or
be able to be given by a person believed to be in [name of State];

in the case of an application for a search warrant, it would not, in all the circumstances, be more appropriate to grant an evidence-gathering order.

For the purposes of subsection (2) (a), a statement contained in the foreign request to the effect that [a serious offence] has been or may have been committed against the law of the foreign State is *prima facie* evidence of that fact.

An evidence-gathering order:

shall provide for the manner in which the evidence is to be obtained in order to give proper effect to the foreign request, unless such manner is prohibited under the law of [name of State], and in particular, may require any person named therein to:

make a record from data or make a copy of a record;
attend court to give evidence on oath or otherwise until excused;
produce to the [name of Court] or to any person designated by the Court, any thing, including any document, or copy thereof; or

may include such terms and conditions as the [name of Court] considers desirable, including those relating to the interests of the person named therein or of third parties.

A person named in an evidence-gathering order may refuse to answer a question or to produce a document or thing where the refusal is based on:

a law currently in force in [name of State];
a privilege recognised by a law in force in the foreign State that made the request; or
a law currently in force in the foreign State that would render the answering of that question or the production of that document or thing by that person in its own jurisdiction an offence.

Where a person refuses to answer a question or to produce a document or thing pursuant to subsection (5)(b) or (c), the [name of Court] shall report the matter to the [Attorney General] who shall notify the foreign State and request the foreign State to provide a written statement on whether the person's refusal was well founded under the law of the foreign State.

Any written statement received by the [Attorney-General] from the foreign State in response to a request under subsection (6) shall be admissible in the evidence-gathering

proceedings, and for the purposes of this section be determinative of whether the person's refusal is well-founded under the foreign law.

A person who, without reasonable excuse, refuses to comply with a lawful order of the [name of Court] made under this section, or who having refused pursuant to subsection (5), continues to refuse notwithstanding the admission into evidence of a statement under subsection (7) to the effect that the refusal is not well-founded, commits a contempt of court and is punishable accordingly.

A search warrant shall be in the usual form in which a search warrant is issued in [name of State], varied to the extent necessary to suit the case.

No document or thing seized and ordered to be sent to a foreign State shall be sent until the [Attorney-General] is satisfied that the foreign State has agreed to comply with any terms or conditions imposed in respect of the sending abroad of the document or thing.

9. Foreign requests for a virtual evidence-gathering order by video link, etc

Where the Attorney-General grants a request by a foreign State or international criminal tribunal to compel a person to give evidence on oath or otherwise by means of technology that permits the virtual presence of the person in the territory over which the foreign State or international criminal tribunal has jurisdiction, an authorised person may apply to a Judge in Chambers for an order for the taking of the virtual evidence of the person under this section.

The Judge in Chambers to whom an application is made under subsection (1) may make the order where he or she is satisfied that there are reasonable grounds to believe that:

[a serious offence] has been or may have been committed against the law of the foreign State; or
an international criminal tribunal offence has been or may have been committed; and
evidence relating to an offence referred to in paragraph (a) or (b) may be able to be given by a person believed to be in [name of State].

A virtual evidence-gathering order made under subsection (2) shall order the person:

to attend at a time and place fixed by the Judge in Chambers to give evidence on oath or otherwise by means of the technology, and to remain in attendance until excused by the authorities of the foreign State or international criminal tribunal;
to answer any questions put to the persons by the authorities of the foreign State or international criminal tribunal or persons authorised by those authorities in accordance with the law that applies to that State or tribunal;
to produce at the time and place fixed by the Judge in Chambers pursuant to paragraph (a), any thing, including any document, or copy thereof, or to show it to the authorities by means of the technology.

A person named in an order made under subsection (3) is entitled to be paid the expenses he or she would be entitled to if the person were required to attend as a witness in proceedings before the Supreme Court.

When a witness gives evidence under subsection (2):

the evidence or statement shall be given as though the witness were physically before the court or tribunal outside [name of State] for the purposes of the laws relating to evidence and procedure, but only to the extent that giving the evidence would not disclose information otherwise protected by the [name of State] law of non-disclosure of information or privilege;
the law of [name of State] relating to perjury applies with respect to any evidence given by the person as though the person was a witness before a court or tribunal in [name of State].

When a witness refuses:

to attend at the time and place fixed by the Judge in Chambers; or
to answer a question or produce or show a document or thing, as ordered by the Judge in Chambers under subsection (3), the law of [name of State] relating to contempt of court applies.

10. Foreign requests for consensual transfer of detained persons

Where the [Attorney-General] approves a request of a foreign State to have a person, who is detained in custody in [name of State] by virtue of a sentence or order of a court, transferred to a foreign State to give evidence or assist in an investigation or proceeding in that State relating to [a serious offence], an authorised person may apply to the [name of Court] for a transfer order.

The [name of Court] to which an application is made under subsection (1) may make a transfer order under this subsection where it is satisfied, having considered any documents filed or information given in support of the application, that the detained person consents to the transfer.

A transfer order made under subsection (2):

shall set out the name of the detained person and his current place of confinement;
shall order the person who has custody of the detained person to deliver him into the custody of a person who is designated in the order or who is a member of the class of persons so designated;
shall order the person receiving him into custody to take him to the foreign State and, on return of the detained person to [name of State], to return that person to a place of confinement in [name of State] specified in the order, or to such other place of confinement as the [Attorney-General] may subsequently notify to the foreign State;
shall state the reasons for the transfer; and
shall fix the period of time at or before the expiration of which the detained person must be returned, unless varied for the purposes of the request by the [Attorney-General].

The time spent in custody by a person pursuant to a transfer order shall count toward any sentence required to be served by that person, so long as the person remains in such custody and is of good behaviour.

11. Persons in [name of State] in response to a request

The [Attorney-General] [name of Court] may by written notice authorise:

the temporary detention in [name of State] of a person in detention in a foreign State who is to be transferred from that State to [name of State] pursuant to a request under section 6(f), for such period as may be specified in the notice; and the return in custody of the person to the foreign State when his or her presence is no longer required.

A person in respect of whom a notice is issued under subsection (1) shall so long as the notice is in force:

be permitted to enter [name of State] and remain in [name of State] for the purposes of the request, and be required to leave [name of State] when no longer required for those purposes, notwithstanding any [name of State] law to the contrary; and while in custody in [name of State] for the purposes of the request, be deemed to be in lawful custody.

The [Attorney-General] may at any time vary a notice issued under subsection (1), and where the foreign State requests the release of the person from custody, either immediately or on a specified date, the [Attorney-General] shall direct that the person be released from custody accordingly.

Any person who escapes from lawful custody while in [name of State] pursuant to a request under section 6(f) may be arrested without warrant by any authorised person and returned to the custody authorised under subsection (1)(a).

Where a foreign country has requested that a person be detained in [name of State] in the course of transit between the foreign country and a third country and the [Attorney-General] grants the request, the provisions of this section shall apply *mutatis mutandis* in relation to that person.

No court in [name of State] has jurisdiction to entertain any application by or on behalf of any person in [name of State] pursuant to a request under section 6(f), relating to release from custody or continued presence in [name of State] after his or her presence is no longer required for the purpose of the request.

12. Safe conduct guarantee

Where a person, whether or not a detained person, is in [name of State] in response to a request by the [Attorney-General] under this Act to give evidence in a proceeding or to assist in an investigation, prosecution or related proceeding, the person shall not, while in [name of State], be:

detained, prosecuted or punished; or subjected to civil process, in respect of any act or omission that occurred before the person's departure from the foreign State pursuant to the request.

Subsection (1) ceases to apply to the person when the person leaves [name of State], or has had the opportunity to leave, but remains in [name of State] for [10 days] after the

[Attorney-General] has notified the person that he or she is no longer required for the purposes of the request.

13. Foreign requests for [name of State] restraining orders

Where a foreign State requests the [Attorney-General] to obtain the issue of a restraining order against property some or all of which is believed to be located in [name of State], criminal proceedings have begun in the foreign State in respect of a serious offence, and there are reasonable grounds to believe that the property is located in [name of State], the [Attorney-General] may apply to the [name of Court] for a restraining order under subsection (2).

Where the [Attorney-General] makes application to the [name of Court] under subsection (1), the Court may make a restraining order in respect of the property, and the [Money Laundering and Proceeds of Crime Act, 2000] this Act shall apply in relation to the application and to any restraining order made as a result, as if the serious offence the subject of the order had been committed in [name of State].

14. Requests for enforcement of foreign confiscation or restraining orders

Where a foreign State requests the [Attorney-General] to make arrangements for the enforcement of a:
foreign restraining order; or
foreign confiscation order,
the [Attorney-General] may apply to the [name of Court] for registration of the order.

The [name of Court] shall, on application by the [Attorney-General], register a foreign restraining order if the Court is satisfied that at the time of registration, the order is in force in the foreign State.

The [name of Court] shall, on application by the [Attorney-General], register a foreign confiscation order if the Court is satisfied that:

at the time of registration, the order is in force in the foreign State and is not subject to appeal; and

where the person the subject of the order did not appear in the confiscation proceedings in the foreign State, that:

the person was given notice of the proceedings in sufficient time to enable him or her to defend them; or

the person had absconded or died before such notice could be given.

For the purposes of subsections (2) and (3), a statement contained in the foreign request to the effect that:

the foreign restraining order is in force in the foreign State;

the foreign forfeiture order is in force in the foreign State and is not subject to appeal; or

the person the subject of the foreign forfeiture order was given notice of the proceedings in sufficient time to enable him or her to defend them, or that the person had absconded or died before such notice could be given,

is *prima facie* evidence of those facts, without proof of the signature or official character of the person appearing to have signed the foreign request.

Where a foreign restraining order or foreign confiscation order is registered in accordance with this section, a copy of any amendments made to the order in the foreign State (whether before or after registration), may be registered in the same way as the order, but shall not have effect for the purposes of the [Money Laundering and Proceeds of Crime Act, 2000] until they are so registered.

The [name of Court] shall, on application by the [Attorney-General] cancel the registration of:

- a foreign restraining order, if it appears to the Court that the order has ceased to have effect.
- a foreign confiscation order, if it appears to the Court that the order has been satisfied or has ceased to have effect.

Where a foreign restraining order against property is registered under this section, the Court may, upon application by a person claiming an interest in the property, make an order as to the giving or carrying out of an undertaking by the [Attorney-General], on behalf of [name of State], with respect of the payment of damages or costs in relation to the registration or operation of the order.

Subject to subsection (9), where the foreign restraining order or foreign confiscation order comprises a facsimile copy of a duly authenticated foreign order, or amendment made to such an order, the facsimile shall be regarded for the purposes of this Act as the same as the duly authenticated foreign order.

Registration effected by means of a facsimile ceases to have effect at the end of the period of [14 days] commencing on the date of registration, unless a duly authenticated original of the order has been registered by that time.

(10) Where a foreign restraining order or a foreign confiscation order has been registered pursuant to this section, the [Money Laundering and Proceeds of Crime Act, 2000] shall be deemed to apply in relation to the order as if the serious offence the subject of the order had been committed in [name of State], and the order had been made pursuant to [that Act].

15. Foreign requests for the location of proceeds of crime

Where a foreign State requests the [Attorney-General] to assist in locating property believed to be the proceeds of a serious crime committed in that State, the [Attorney-General] may authorise the making of any application under sections 71, 76 or 78 of the [Money Laundering and the Proceeds of Crime Act, 2000], for the purpose of acquiring the information sought by the foreign State.

16. Sharing confiscated property with foreign States

The [Attorney-General] may enter into an arrangement with the competent authorities of a foreign State for the reciprocal sharing with that State of such part of any property realised:

in the foreign State, as a result of action taken by the [Attorney-General] pursuant to section 6(d); or
in [name of State], as a result of action taken in [name of State] pursuant to section 14(1), as the [Attorney-General] thinks fit.

PART – III – MISCELLANEOUS

17. Privilege for foreign documents

Subject to subsection (2), a document sent to the [Attorney-General] by a foreign State in accordance with a [name of State] request is privileged and no person shall disclose to anyone the document, or its purport, or the contents of the document or any part thereof, before the document, in compliance with the conditions on which it was so sent, is made public or disclosed in the course of and for the purpose of any proceedings.

No person in possession of a document referred to in subsection (1), or a copy thereof, or who has knowledge of any information contained in the document, shall be required, in connection with any legal proceedings to produce the document or copy or to give evidence relating to any information that is contained therein;

Except to the extent required under this Act to execute a request by a foreign State for mutual assistance in criminal matters, no person shall disclose:

the fact that the request has been received; or
the contents of the request.

Penalty: in the case of a natural person, imprisonment not exceeding [P...] standard imprisonment units, fine not exceeding [F...] standard fine units, or both, and in the case of a corporation, fine not exceeding [five] times that maximum:

18. Restriction on use of evidence and materials obtained by mutual assistance

No information, document, article or other thing obtained from a foreign State pursuant to a request made under this Act shall be used in any investigation or proceeding other than the investigation or proceeding disclosed in the request, unless the [Attorney-General] consents after consulting with the foreign State.

19. Confiscated proceeds of drug crime to be credited to Fund for Drug Abuse Prevention and Control

Any proceeds of drug-related crime which have been:

confiscated in a foreign State pursuant to a request by [name of State] under section 6(d);
confiscated in [name of State] pursuant to a request by a foreign State under section 14(1), to the extent available under any sharing of confiscated property arrangement referred to in section 16, or otherwise,

shall be credited to the [Fund for Drug Abuse Prevention and Control], established under the [Drug Abuse Act,2000].

20. Amendment of the Schedule

The Attorney-General may, with the agreement of the minister responsible for the foreign affairs of [name of State], by order add to or delete from the Schedule the name of any international criminal court or tribunal.

THE SCHEDULE

The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, established by Resolution 955 (1994) of the Security Council of the United Nations. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991, established by Resolution 827 (1993) of the Security Council of the United Nations.

UNDCP MODEL MUTUAL ASSISTANCE IN CRIMINAL MATTERS BILL 2000
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A NOTE ON ‘CONVENTIONS’

What is a ‘convention’ and what are the obligations of a State Party under a convention?

UNCAC is an example of a multilateral treaty. The term “convention” is generally used for formal multilateral treaties where there are a broad number of parties and where participation is open to the international community.

The purpose of this section is to provide an overview of the key defining characteristics of a treaty; the different stages of adoption, signature, ratification and accession; and, how treaties are implemented under domestic law, giving them domestic legal effect.

The Vienna Convention on the Law of Treaties 1969, “the Vienna Convention”

The rules governing international treaties used to be based on customary international law, or the general principles of law. However, The Vienna Convention, which entered into force on 27 January 1980, codified these rules and sets out with greater clarity the criteria for the establishment and operation of international treaties.

For the purposes of this Guide, the following provisions of the Vienna Convention are important to note:

Article 2(1)(a) of the Vienna Convention defines “treaty” as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

The terminology that surrounds the treaty-making process can be confusing. It is therefore important to note the distinction between the various procedural terms, as these can determine whether a State has consented to be bound to the terms of the treaty or not.

Adoption

“Adoption” takes place during the treaty-making process, and is the formal act in which participating States consent to the text of a proposed treaty. Article 9 of The Vienna Convention states:

Article 9(1) “The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up...”

Article 9(2) “The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.”

Signature

A State which has signed a treaty subject to ratification, acceptance or approval, does not establish the consent to be bound. Signature is a process of authentication and reflects the willingness of the State to continue in the treaty-making process by qualifying it to proceed to undertake ratification.

A signatory State to a treaty, while not yet bound to its provisions, is nevertheless obligated not to act in any way which would defeat the object and purpose of a treaty prior to its entry into force. Article 18 of The Vienna Convention states:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become party to the treaty...”

Ratification

Ratification is the act whereby a State establishes its consent to be bound to a treaty. In the case of multilateral treaties, the act of ratification is normally done by the deposit of the instruments of ratification to an international organisation or to the Secretary-General of the United Nations, as the depositary. Article 16 of The Vienna Convention holds:

“Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

their exchange between the contracting States;

their deposit with the depositary; or

their notification to the contracting States or to the depositary is so agreed

The process of ratification grants States the necessary time frame required to receive domestic approval for the treaty and to enact domestic legislation giving effect to the treaty.

Accession

Accession has the same legal effect as ratification, but applies when a State becomes party to a treaty after the treaty has already been negotiated and signed by other States. Article 15 of The Vienna Convention outlines when consent of a State to be bound by a treaty is expressed by accession:

1. (a) *the treaty provides that such consent may be expressed by that State by means of accession;*

(b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or

(c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Reservations to international treaties (Articles 19 – 23 of the Vienna Convention)

Many international instruments provide for a State to make a reservation as to its provisions. A treaty can prohibit reservations entirely, or allow only specific reservations to be made. Reservations made under UNCAC must be notified to the Secretary-General of the UN.

A reservation is a declaration made by a State which excludes or alters the legal effect of specified provisions of the treaty to that State. Reflecting the concept of universality, reservations provide a level of flexibility by enabling States to become parties to multilateral treaties whilst permitting the exemption or alteration of certain provisions with which the State may not wish or is unable to comply.

The integrity of the treaty remains intact by virtue of Article 19(c) of the Vienna Convention, which holds:

“A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: ... (c)... the reservation is incompatible with the object and purpose of the treaty.”

However, it should be noted that there is considerable debate surrounding what constitutes the “object and purpose of the treaty”, which renders this provision rather opaque in practice.

Giving Domestic Effect to International Treaties

There are two major approaches as to how international treaties enter into force domestically. This process depends on whether a State subscribes to a **monist** or **dualist** system governing the relationship between international and national law.

Monist systems

Monist systems reflect a unitary nature between international and domestic law, whereby both sources of law are considered to belong to the same legal family. Under this approach, when a State ratifies a treaty, the treaty is given the domestic force of law without the need to enact subsequent, implementing legislation. Democratic processes leading to the domestic approval of a treaty are attained during the treaty-making process. Under monist systems, domestic courts and other public bodies refer to the language of the treaty provisions itself as a source of law.

Monist legal systems exhibit variations in approach. These include:

Systems where only certain treaties are considered to be directly applicable in domestic law and where the treaty provisions share the same level of hierarchy as federal laws, in line with the principle that the latest in time prevails;

Systems where the provisions of certain treaties are superior to later legislation, but which remain lower in status to Constitutional provisions;

Systems where the Constitution provides for the direct applicability of certain treaties and where treaty provisions are considered superior to all laws.

Examples of States with monist legal systems (or variations thereof) include Germany, the Netherlands, and the United States.

However, even in a monist legal system, the effect of the constitution may be that domestic legislation will be needed to address sanctions before any criminal proceedings can be instituted.

Dualist systems

Dualist systems of law stress that international law and domestic law exist separately, and mostly operate independently of each other. Unlike monist systems, when a dualist State expresses its consent to be bound to an international treaty, the treaty does not directly assume the domestic force of law. Rather, the enactment of domestic legislation is first required in order for the treaty to have domestic legal effect.

The process by which an international treaty is given the force of law domestically is referred to as the “act of transformation”; the treaty is expressly transformed into domestic law by the use of relevant constitutional mechanisms (i.e. an Act of Parliament). For example, the United Kingdom, which is a dualist State, ratified the European Convention on Human Rights (ECHR) in 1951, but ECHR provisions did not have the domestic force of law until the process of transformation, which resulted in the Human Rights Act 1998.

Therefore, in dualist systems, a State can express its consent to be bound by a treaty through ratification, placing the State under international legal obligations, but the same treaty provisions would have no domestic legal effect until the act of transformation. Furthermore, before the act of transformation, domestic courts are not strictly bound by the provisions of the treaty, although in practice such sources of law are considered highly persuasive.

Following the British practice, most Commonwealth countries have dualist legal systems. Some have made it their practice to pass a single Act of Parliament simply incorporating their international obligations (even if under more than one instrument) into domestic law, whilst others have chosen to give effect to the treaty by passing comprehensive domestic legislation based on the requirements of the treaty, that establishes the necessary infrastructure or systems, and creates the necessary offences.

THE SCOPE & STRUCTURE OF UNCAC

The UNCAC has three purposes: (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively; (b) To promote, facilitate and support international co-operation and technical assistance in the prevention of and fight against corruption, including asset recovery; and (c) To promote integrity, accountability and proper management of public affairs and public property (Article 1). “Corruption” is not defined in UNCAC.

UNCAC is similar to other international and regional instruments in that it deals with: Prevention (Chapter II, articles 5-14); Criminalisation and Law Enforcement (Chapter III, articles 15-42); International Co-operation (Chapter IV, articles 43-49) and Asset Recovery (Chapter V articles 51-62). It also sets out mechanisms for its implementation (Chapter VII). However, it is much more comprehensive than any instrument before, and provides a wide-ranging framework for the anti-corruption response of a State Party.

Each State Party undertakes to take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under the Convention (article 65(1)). However, as those State representatives negotiating the text of UNCAC were unable to agree on a complete set of mandatory requirements, the instrument is a mixture of both mandatory and non-binding provisions. This is, perhaps, unfortunate, and a missed opportunity, in that it might be said to inhibit the development of consistent international rules and run the risk of producing a patchwork of differing laws and regulations. In addition, UNCAC is a curious mixture of approaches with some Articles providing a detailed set of provisions (e.g. on the measures needed to prevent corruption in the private sector and the provisions relating to mutual legal assistance), whilst others receive minimal comment (e.g. measures to counter corruption in the prosecution service).

PRINCIPLES OF UNCAC IMPLEMENTATION AND THE PRESERVATION OF SOVEREIGNTY

Article 65

Implementation of the Convention

“1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.”

ARTICLE 30

Prosecution, adjudication and sanctions

“9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.”

Some States will incorporate UNCAC into domestic law simply by ratification (‘monist States’), whilst others will need to enact domestic laws (‘dualist States’) in order to give effect to obligations under UNCAC domestically. The effect of Article 65(1) is to emphasise that implementation should be in accordance with the fundamental principles of a Party’s legal system. Implicitly, therefore, in the case of criminalisation, for instance, the offence title and terms as set out in UNCAC do not have to be precisely replicated in a State’s domestic provisions. However, any State who is considering the drafting of new laws or the amendment of old ones will be well-advised to have in mind that the closer the conformity with the wording of UNCAC’s provisions, the more likely that, for example, mutual legal assistance, asset recovery and extradition, will become smoother processes. Similarly, as the mandatory provisions of UNCAC represent a minimum standard, it is quite open to a State to go further and make the law to be more onerous.

Following on from the emphasis on UNCAC compliance through the fundamental principles of a State’s legal system, specific mention is made within UNCAC of the sovereignty of States Parties. In particular, **Article 4** provides that:

Protection of sovereignty

“1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. *Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.*”

Further, **Article 30(9)** provides that:

“Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.”

APPENDIX E to ANNEX C

Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption

Preamble

Good governance is not a luxury but a basic requirement for development.

Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly.

2. Corruption is always a two-way transaction with a supply and a demand side. It occurs in poor, emerging, and developed nations, regardless of the level of social and economic development and in countries with varying forms of government ranging from dictatorships to established democracies.

3. Corruption, which is multi-dimensional, generally occurs at the nexus between the public and private sectors, with actors in the private sector interacting with holders of offices of trust in the public sector. Some aspects of corruption such as fraud and the misappropriation of assets or funds can occur entirely within the private or public sectors. However, with increasing privatisation of public utilities and services, the distinction between the public and private sectors is becoming less relevant in some areas.

4. Corruption is generally defined as the abuse of public office for private gain. As the scope of corruption has widened, this definition has been enlarged to cover the abuse of all offices of trust for private gain. There are many types and levels of corruption including "grand corruption", which involves huge sums paid by major businesses to high-level politicians and/or government officials; widespread systemic corruption which may take the form of substantial bribes to public officials to obtain, for example, licences/permits or to by-pass regulations; and petty corruption which involves modest but recurring payments to avoid delays, jump queues or to obtain goods in controlled markets.

5. All forms of corruption entail high economic and social costs: transaction costs are increased; public revenues are reduced; resource allocation is distorted; investment and economic growth is retarded; and the rule of law is weakened.

6. The Commonwealth should firmly commit itself to the policy of "zero tolerance" of all types of corruption. This policy must permeate national political cultures, governance, legal systems and administration. Where corruption is ingrained and pervasive, especially at the highest political levels, its eradication may require a sustained effort over a protracted period of time. However, the policy of "zero tolerance" should be adopted from the outset, demonstrating a serious commitment to pursue the fight against corruption. The Commonwealth should remain firm in its determination that the high standards and goals enunciated in the 1991 Harare Declaration are upheld and enhanced. Creating an environment that is corruption-free will require vigorous actions at the national and international levels, and within the Commonwealth itself.

7. The term "holders of offices of trust", that is used hereafter in this document, covers the following: politicians (elected and appointed), public/civil servants, judges, officers of the armed forces, officials of bodies providing services (including privatised services) for or on behalf of the government and executive officers of private corporations.

8. These actions should encompass the prevention of corruption, the enforcement of laws against it and the mobilisation of public support for anti-corruption strategies.

NATIONAL ACTIONS

9. All Commonwealth countries, which have not done so, should develop their own national strategies to promote good governance and eliminate corruption. These strategies will require strong political will at the highest levels of government if they are to succeed. Furthermore, they cannot be externally imposed: they must be internally driven and domestically owned, based on the specific concerns and circumstances in each country. National strategies need to be comprehensive in engendering transparency and accountability in all sectors, and in covering all the active and passive actors involved in corruption. To be effective, they should be implemented in a timely manner and include principles from the five inter-related platforms described below.

A. Ethics and Integrity in the Public and Private Sectors

(i) High-level Corruption

10. Corruption at the highest level poses perhaps the greatest threat to the stability and well-being of societies. Its elimination must therefore be given the highest priority in the implementation of effective anti-corruption strategies. Failure to root out high-level political corruption undermines anti-corruption measures at other levels. It perpetuates double standards inimical to the development of an anti-corruption culture.

(ii) Funding of Political Parties

11. The funding of political parties has the potential to become a major source of corruption as well as a vehicle for hiding corruption. Clear links can be drawn between inappropriate or inadequate controls on such funding and the prevalence of corruption. Among those countries which have sought to address the issue of transparency in political funding and the maintenance of the integrity of the political system, there is divergence and the different approaches adopted are largely the result of prevailing political and societal norms. Several factors are relevant in tackling the problems associated with money and politics. They include:

- whether or not there are established political parties;
- the capacity of the state to finance political parties and/or election campaigns, and levels of expenditure on political campaigns;
- limits on financial contributions and the integrity of their sources;
- the role of national and international companies in providing funds to political parties; and
- the national interest in ensuring that foreign interests do not influence domestic political priorities and decisions.

12. Although rules on funding for political parties will vary depending upon national circumstances, in general, it is important that these rules should serve to:

- prevent conflicts of interest and the exercise of improper influence;
- preserve the integrity of democratic political structures and processes;
- proscribe the use of funds acquired through illegal and corrupt practices to finance political parties; and
- enshrine the concept of transparency in the funding of political parties by requiring the declaration of donations exceeding a specified limit.

B. Economic and Fiscal Policies

13. Opportunities for seeking economic rents are a major cause of corruption. These opportunities are greater when there is a lack of transparency and undue administrative discretion. Policy reforms that can help to maximise transparency and certainty and minimise administrative discretion will reduce rent-seeking as well as eliminate incentives which generate corrupt practices. They will help to improve foreign investors' perceptions of the investment environment in many countries. Such policy reforms include:

- liberalising trade regimes through the progressive removal of inefficient quantitative restrictions and import/export licences, as well as high tariffs that shield industries from competition and create artificial monopolies;
- reducing foreign exchange controls and increasing transparency in foreign exchange allocation processes;
- eliminating price controls and poorly targeted subsidies which, by lowering the price of goods below their market values, create artificial scarcities and parallel markets;
- simplifying regulations in order to reduce the scope for bureaucratic discretion (e.g. in customs administration);
- increasing transparency in the allocation of land-use permits and in the zoning of land;
- reducing excessive levels of taxation where they create incentives for tax evasion and fraud and eliminating the use of discretionary authority in tax administration and enforcement which encourages corrupt practices;
- ensuring that fiscal and tax rules do not permit bribes or other illicit payments to be treated as deductible expenses for tax purposes.

C. Management of Services Provided in the Public Interest

14. Improving the management, efficiency and delivery of public services should be an essential element of any national strategy to enhance governance and reduce corruption. When services are provided in an efficient manner, fewer opportunities for corruption arise as citizens are no longer required to compete, often by way of paying bribes, for scarce and inefficient services. In view of the increasing trend towards contracting out and/or privatising services

previously provided by the state, measures to improve management and efficiency should encompass all those who have responsibilities for providing goods and services in the public interest.

The main areas to be covered are:

The Public Service and Providers of Public Services

15. A merit-based, professional and non-partisan civil service which is appropriately sized and well-motivated is of critical importance. Over-sized public administration systems, with bloated and poorly paid bureaucracies, engender corruption. Down-sizing alone is not enough but should be complemented with merit-based recruitment and promotion, career growth policies and incentives to retain the better performers within the civil service. Civil servants need to be adequately paid if they are to maintain the probity, professionalism and integrity that should be required of the public service. They should also be free from political interference.

16. The rule of law should apply to all those involved in the administration and provision of services in the public interest, as it does to the whole of civil society. Those holding offices of trust need to be bound by well-publicised Codes of Conduct with appropriate sanctions for breaches that are enforced consistently and vigorously. These Codes should, *inter alia*, cover: standards of integrity, potential conflicts of interest, acceptance of gifts, and misuse of information for personal gain, and disclosure of assets and financial interests. Ethical standards should be promoted through education and training where necessary which instil pride in the virtues of integrity, professionalism, efficiency, transparency and impartiality in the public service.

Financial Management

17. Sound financial management systems are essential tools of good governance, which enable governments to set macroeconomic targets, to allocate resources and to implement programmes and projects efficiently. Processes for budget preparation, execution and monitoring need to be open and transparent. Clear procedures and criteria should be used for developing public investment programmes and projects, including those by public enterprises, and for allocating recurrent expenditure budgets. There should be rigorous accounting, financial reporting and auditing systems covering all public programmes and investments. Public accounts should be subject to scrutiny by appropriate bodies such as parliamentary committees and Auditors-General. Timely compliance with auditing requirements is important to ensure the legitimacy of public expenditures. Where audits indicate deficiencies or are themselves unsatisfactory, prompt remedial action should be taken. Auditors-General, or other supreme auditing authorities, should be sufficiently independent to allow open criticism of government finances. Countries should be encouraged to adopt codes of fiscal transparency based on the model provided by the “Code of Good practices on Fiscal transparency Declaration of Principle”, adopted by the IMF’s Interim Committee in April 1998.

18. It is also important for countries to have effective regulations for their financial sectors (including private financial institutions and parastatals) that reduce opportunities for corrupt practices. The key aspects of a sound financial system include transparency of the financial system; competent management; effective risk control systems; adequate capital requirements; prudential regulation; supervisory authorities with sufficient autonomy, authority and capacity; and effective supervision of cross-border banking, which is also important in combating money laundering.

Public Procurement

19. Transparency in government procurement practices is not an established norm in many countries. Corruption is widespread, both in the award of contracts and during their implementation. Governments should be encouraged to review their procurement practices and to develop comprehensive guidelines of their own, with transparent processes to cover contracts for goods, civil works and services, and criteria for using all types of procedures ranging from prudent shopping to national and international competitive bidding. In order to increase efficiency, probity and economy in public procurement, governments should adopt standard bidding documents, establish processes for public bid opening, set objective criteria for bid evaluation, and institute a system for the review of awards. The collection and dissemination of data on public procurement prices of goods and services of similar specifications, which are procured by different agencies regularly in large quantities, can have substantial and prompt effects in reducing corruption. An accountable and reviewable process for the black-listing of contractors guilty of resorting to corrupt practices can be a particularly effective anti-corruption weapon.

D. The Judiciary and the Legal System

20. Countries need effective institutional arrangements to resolve disputes between citizens, corporations and governments; to clarify ambiguities in laws and regulations; and to enforce compliance. The rule of law in a country is of vital importance for economic, social and political development. Inherent in the concept of the rule of law are the notions of impartiality, fairness and equality. Strengthening the rule of law will, *inter alia*, require the following actions:

The Judiciary

(i) Entrenching an independent judiciary

21. An independent and competent judiciary, which is impartial, efficient and reliable, is of paramount importance. This requires objective criteria for the selection and removal of judges, adequate remuneration, security of tenure, and independence from the executive and legislative branches of government.

22. However, judicial independence does not imply a lack of accountability. Judges should act properly in accordance with their office and should be subject to the ordinary criminal laws of the land. There should be procedures to discipline or dismiss them if they act improperly or otherwise fail in the performance of their duties to society. These procedures should be transparent and administered by institutions which are themselves independent and impartial.

Strengthening the legal system

(ii) Compliance

23. Vigorous application and enforcement of existing laws and prosecution of offenders is essential if the rule of law is to be respected. Although most countries have at their disposal a wide range of laws which can be used to combat corruption, these laws are often under-utilised and, at times, even ignored. Governments should seek to make effective use of existing criminal and civil laws to obtain the appropriate remedy in each case.

24. Investigative, policing and prosecutorial services, which remain weak in many countries, need to be enhanced to ensure compliance with the law. Independent anti-corruption agencies such as ombudsman offices, inspectors-general, and anti-corruption commissions can be effective if they are genuinely free from being influenced by the executive branch of government and where there is a strong judiciary in place.

(iii) Enforcing Criminal Law

25. As the nature and prevalence of corruption has grown, laws against corruption may need to be strengthened to provide a meaningful deterrent, and complemented in several ways:

- (a) both active and passive corruption should be made criminal offences, comprehensively covering the holders of all offices of trust;
- (b) criminal law should provide for the seizure and forfeiture of the proceeds of corruption;
- (c) there should be legal provisions to protect witnesses and whistle-blowers in cases involving corruption;
- (d) statutes which permit investigators and prosecutors to base criminal proceedings on the discovery of significant increases in the assets of the holder of an office of trust, which cannot be reasonably attributed to lawful sources of income, can be of great assistance;
- (e) the laundering of the proceeds of corruption must be criminalised and laws which provide for the granting of assistance (either extradition or mutual assistance in criminal matters) to other countries investigating or prosecuting money laundering offences must be available to ensure effective international co-operation to combat money laundering.

(iv) Civil, administrative and regulatory laws

- (a) The civil law is the source of many remedies that can be used to combat corruption. For example, the use of damages awards and the facility to void contracts may be appropriate in many cases.
- (b) Administrative action, such as the use of disciplinary procedures, can contribute to the battle against corruption and ease over-burdened court systems by dispensing appropriate sanctions. Relatively minor offences can be dealt with effectively through disciplinary bodies such as public service commissions.
- (c) Regulations requiring declarations of assets and financial interests by holders of offices of trust, which might give rise to potential conflicts of interest, can enhance the integrity of service providers and reduce the opportunities for corruption.
- (d) Non-criminal laws such as those providing for disqualification of directors guilty of improper conduct in the management of corporations, and the regulation of financial institutions to prevent money laundering can be useful.

E. Civil Society

26. Civil society should be seen as an independent and creative partner in the development of effective coalitions to improve governance and combat corruption. Beyond periodic electoral processes, governments that can regularly consult collaborate with, and listen to their citizens are better able to develop national ownership of policies and the political will required to pursue anti-corruption programmes. Important factors that enable civil society to play an effective role are:

- Freedom of association: Citizens should enjoy the right to establish organisations around particular interests (e.g. professional and business associations, labour unions) to pursue general or specific social, economic or political objectives. Such associations can often act as critical watchdogs of the integrity of service providers. At the local level, grassroots community organisations, co-operatives and local NGOs can help the poor and marginalised to get their voices heard in the corridors of power.
- Freedom of the press and media: Transparency in any society requires information to be available freely in the public domain. A free and competent press is essential in this process, and is critical to the success of anti-corruption strategies. Freedom of the press and media calls for access to information; the absence of government controls or censorship (except where national security issues are involved); the liberty to express views; and sufficient financial independence to resist control of editorial policy and news coverage. Civil society should promote genuine competition in the media market place to ensure diversity of ownership, so that alternative outlets can provide a broad range of views on public policy issues. In situations where the media itself may be corrupt or susceptible to corruption, adherence to high standards of integrity in journalism should be promoted, along with the development of professional well-informed media, through self-regulation and training.
- Information technology: advances in information technology help to increase civil society's access to new sources of information and channels of communication, including foreign publications and broadcasts.
- Research and analysis: The development by civil society of independent public policy research institutes and think-tanks can provide increased domestic capacity to analyse deficiencies in the system of governance. Such bodies can help to study the particular types of corruption in a country, and identify country-specific remedial options.

INTERNATIONAL ACTIONS

27. With the increasing globalisation of corruption, several international fora and agencies including the UN General Assembly, the OECD, the IMF, the World Bank, the OAS, the European Union, the Council of Europe and the International Chamber of Commerce, have mounted initiatives to improve governance and combat corruption. These include conventions to limit corruption in transnational business and stronger anti-corruption programmes by international financial institutions and aid agencies. These efforts are important and have the potential to lead to significant results. There are, however, gaps in their coverage, and continuing weaknesses in policies and practices, which need to be addressed. In addition there are some special areas that require further international action.

A. International Initiatives Against Corruption

28. At present, there are three international legally binding conventions against corruption: (i) The 1996 Inter-American Convention Against Corruption, a regional OAS initiative, that covers active and passive corruption as well as illicit enrichment; (ii) The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which focuses on active bribery of foreign public officials; (iii) The 1999 Council of Europe's Criminal Law Convention on Corruption, which covers active and passive bribery of domestic and foreign public and private sector officials, as well as judges and members of public assemblies.

29. Except for the OAS Convention, these initiatives have been promoted by the major developed countries and do not correspond fully to the needs of developing countries. The battle against cross-border corruption should be joined by all nations, both developed and developing, from all parts of the world. This calls for the mobilisation of international support for a global compact against corruption, negotiated under the auspices of the United Nations with universal participation, which builds on the positive elements of existing conventions and other regional and international initiatives.

B. Programmes of International Financial Institutions and Aid Agencies

30. The IMF, the World Bank, the regional development banks and bilateral aid agencies have for many years been aiding countries in improving governance through policy advice, technical assistance, institutional reform and capacity building. As corruption has become increasingly a part of the debate on aid effectiveness, aid agencies have taken on stronger anti-corruption programmes. The World Bank has adopted new anti-fraud/corruption procurement guidelines, and improved disbursement and financial auditing procedures. The IMF is taking a more pro-active stance and has adopted guidelines for promoting good governance (A Guidance Note on The Role of the IMF in Governance Issues was approved by the IMF's Executive Board in July 1998). Both the Bretton Woods institutions are beginning to take corruption explicitly into account in defining their country assistance programmes. Several bilateral donors are designing programmes to assist nations in their anti-corruption efforts. Areas in development assistance that need added scrutiny and further action include greater transparency and accountability, conditionality, procurement, and bilateral aid practices.

(i) Transparency and accountability

- International financial institutions need to be more transparent in their operations, objectives and decision-making processes. There has been greater openness in the past few years and the recent discussions on a new international financial architecture may lead to further progress. To increase national ownership and public participation in reform programmes, key documents such as Policy Framework Papers, Letters of Development Policy and Letters of Intent should be more systematically released by borrowing countries and widely disseminated via the Bretton Woods institutions, unless there are valid reasons for non-disclosure.
- There should be a more open acknowledgement by donors and international financial institutions of their share in the responsibility for the outcomes of the country programmes they help design and for the policy advice they give. When these outcomes are not satisfactory because of flaws in programme design and policy advice, these deficiencies should be rectified and additional financial assistance should be provided.
- The staff of lending agencies should be subjected to greater scrutiny and internal accountability.

(ii) Conditionality

- Domestic ownership and political will to implement measures to improve governance and reduce corruption are paramount. Measures imposed externally as conditions of financial assistance are rarely effective. However, the availability of external funding (both project and non-project related) has the potential to encourage corrupt practices. Hence, the levels of corruption in recipient countries should be taken into account in determining the

quantum and direction of external funding/assistance. Where it is necessary for international financial institutions to take up issues related to governance and corruption in their policy dialogue with countries and in the development of country assistance strategies, this should be done in a manner that is consistent with their mandates. Reforms agreed with the IMF and the World Bank to improve governance and reduce corruption should take account of a country's capacity to implement them within realistic time frames.

- "Floating Tranches", which have been adopted recently in several World Bank structural adjustment loans, should be used more widely to enable governments to sequence reform measures in the light of local circumstances without holding up entire programmes.
- To promote local ownership of reforms, foreign donors should agree with governments on the objectives to be achieved, identify alternative paths for meeting these ends, but leave the route to be selected to the government concerned.
- The IMF should be even-handed by raising issues related to transparency, governance and corruption in developed countries when exercising its surveillance function, as it does in developing countries when it is financing programmes.

(iii) Procurement

- All international financial institutions, multilateral development banks and multilateral agencies providing development assistance should be encouraged to strengthen their procurement guidelines along the lines of the anti-fraud/corruption provisions of the World Bank's 1996 guidelines on procurement. These provide strong sanctions against borrowing countries and firms that engage in corrupt practices, including rejection of contract awards or cancellation of loan funds, and making corporations judged to have engaged in fraudulent or corrupt practices ineligible for future Bank-financed projects (i.e. blacklisting). They also require bidders to disclose commissions made to agents.

(iv) Practices of Agencies Providing Bilateral Development Assistance

- Bilateral development assistance agencies should be encouraged to adopt the antifraud/corruption provisions of the World Bank's 1996 procurement guidelines and to utilise similar standard bidding documents.
- Since the tying of aid to procurement from a donor country reduces the scope for competitive bidding and increases the incentives for corrupt practices, tied aid should be reduced
- Supplier credits should be carefully monitored as they often involve projects with little equity by the promoters, which increase the scope for corrupt payments.
- As part of the negotiations on the OECD Convention, a separate resolution was adopted in 1996 calling on member countries, which allow the tax deductibility of bribes to foreign public officials, to re-examine their tax laws with a view to denying this deductibility. All donor countries that have not already done so should amend their tax laws accordingly.

C. Special Areas Requiring Further Action

(i) Monitoring of Corruption

31. The monitoring of corruption and the ranking of countries based on perceptions of levels of corruption prevailing in them by some NGOs (e.g. Transparency International), has raised awareness of the problem of corruption globally. However, it is important to improve the methodological basis for such quantitative assessments. Moreover, bearing in mind the “supply/demand” dimension of corruption in international business transactions, it would be useful to rank multinational corporations and their subsidiaries in terms of their track records on corruption, thus providing exposure of those known to be engaging in corrupt practices.

(ii) The Arms Trade

32. It is difficult to determine how the arms trade is financed, e.g. through military aid, debt creation, compensatory trade offsets or cash transactions. The secrecy that surrounds the international arms trade often encourages corruption in these transactions. There should be much more transparency in the trade. This could be achieved through:

- wider and more detailed reporting of arms trade transactions in the UN arms register;
- a new international code of conduct for the arms trade, requiring the disclosure of far greater information than is currently provided by all the parties involved; and
- the inclusion of specific clauses in arms sales contracts that reduce the role of middlemen and ban illegal commissions.

(iii) Money Laundering

33. The endorsement by Commonwealth Heads of Government of the 40 Recommendations of the Financial Action Task Force of the OECD, which are designed to combat money laundering through the use of the criminal law and effective regulation of the financial sector, should be replicated globally to ensure that money laundering is tackled on the broadest possible front. As money laundering becomes a global phenomenon, the formation of multi-disciplinary regional groups, such as the Caribbean Financial Action Task Force and the Eastern and Southern African Money Laundering Group should be encouraged in order to strengthen anti-money laundering measures.

- Additional international efforts are required to pursue illicit funds to numerous off-shore financial centres, located in developed and developing countries, which make corruption less risky since the proceeds can be hidden overseas.
- Stronger mechanisms are required to enable the expeditious repatriation of the proceeds of corruption.
- The extent to which countries with large parallel economies are vulnerable to money laundering should be the subject of studies in order to determine appropriate countermeasures.
- Global efforts to assess the effectiveness of anti-money laundering strategies should be enhanced.

COMMONWEALTH ACTIONS

34. In addition to actions taken at national levels, the Commonwealth can also act collectively to improve governance and combat corruption in several ways.

- (i) The Commonwealth's commitment to promote good governance and fight corruption should be credible, tangible and visible. As a first step, Heads of Government should consider adopting a Declaration that commits the Commonwealth to specific principles, standards and goals. In order to ensure that the momentum of such a high level political initiative is maintained, the Declaration could provide for the establishment of a mechanism/process to facilitate its implementation as well as periodic reviews of progress (say, biennially, coinciding with CHOGMs).
- (ii) At the same time, the Commonwealth should also support the development of a truly global compact against corruption that would fill gaps in existing instruments and be universal in its scope, thus creating a level playing field for all countries. For this purpose, in consultation with other interested parties, it could work for the initiation, under the auspices of the United Nations General Assembly, of time bound negotiations for a universal, legally binding intergovernmental convention against corruption. Such a convention would require all signatories to abide with minimum standards and rules (in the case of non-state actors these would apply through legislative and other measures adopted by governments) to foster good governance and fight corruption. These standards and rules should be general enough to accommodate diversity in political, economic, socio-cultural and legal systems, but without compromising the basic policy objective of zero-tolerance for all types of corruption. Pending the adoption of a global convention, countries should be encouraged to become parties to existing anti-corruption conventions that are appropriate to their needs and circumstances.
- (iii) The Commonwealth should ensure that maximum use is made by member countries of its existing and proposed Schemes of Co-operation in the Administration of Justice, and that these Schemes are kept under active review in order to meet the needs of countries seeking to combat corrupt practices.
- (iv) The Commonwealth should work with other international agencies to develop effective standards to ensure that all off-shore financial centres in all parts of the world are not used to launder the proceeds of corrupt practices.
- (v) Given the economic, social, and political benefits to be gained through Commonwealth co-operation, the Commonwealth Secretariat should be given additional resources to enable it to:
 - assist member countries, when requested, with policy advice and technical support to design their own anti-corruption strategies; and
 - compile and disseminate information on emerging good practice in combating corruption and improving governance in key areas such as the funding of political parties, economic reforms and judicial reforms.

Legislation Links

Anti-corruption legislation and bodies

Australia

New South Wales Independent Commission against Corruption

<http://www.icac.nsw.gov.au/>

Independent Commission against Corruption Act, 1988

New South Wales Consolidated Acts

http://www.austlii.edu.au/au/legis/nsw/consol_act/icaca1988442/

Bangladesh

Anti-Corruption Commission Act 2004

<http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019089.pdf>

Botswana

Directorate on Corruption and Economic Crime

<http://www.gov.bw/government/dcec/>

The Gambia

Evaluation of Assets and Properties and the Prevention of Corrupt Practices Act, 1982

Kenya

Kenya Anti Corruption Commission

<http://www.kacc.go.ke>

Anti-Corruption and Economic Crimes Act, 2003, part III

<http://www.tkenya.org/viewdocument.asp?ID=292>

Public Officer Ethics Act, 2003

<http://www.tkenya.org/viewdocument.asp?ID=294>

Lesotho

Directorate on Corruption and Economic Offences

http://www.justice.gov.ls/news/anti_corruption.html

Prevention of Corruption and Economic Offences Act, 1999, parts II and III

<http://www.imolin.org/amlid/showLaw.do?law=6347&language=ENG&country=LES>

Malawi

Anti-Corruption Bureau

<http://www.anti-corruptionbureau.mw/>

Mauritius

Prevention of Corruption Act, 2002

<http://www.gov.mu/portal/sites/ncb/fsc/download/corrupt2002.doc>

Prevention of Corruption Act, 2002, parts III-VI

<https://www.imolin.org/amlid/showLaw.do?law=4877&language=ENG&country=MAR>

Prevention of Corruption (Amendment) Act, 2005

<http://supremecourt.intnet.mu/Entry/Act%202005/No.%20024->

[PREVENTION%20OF%20CORRUPTION%20\(AMENDMENT\)%20ACT%202005.doc](http://supremecourt.intnet.mu/Entry/Act%202005/No.%20024-PREVENTION%20OF%20CORRUPTION%20(AMENDMENT)%20ACT%202005.doc)

Singapore

Corrupt Practices Investigation Bureau

<http://www.cpiib.gov.sg/>

Prevention of Corruption Act (Chapter 241) (revised 1993)

http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-241&doctitle=PREVENTION%20OF%20CORRUPTION%20ACT%0A&date=latest&method=part

Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 65A)

<http://statutes.agc.gov.sg/>

South Africa

Competition Act 89, 1998

<http://www.info.gov.za/view/DownloadFileAction?id=70747>

Financial Disclosure Framework

Promotion of Access to Information Act, 2000

<http://www.info.gov.za/view/DownloadFileAction?id=68186>

Public Finance Management Act, 1999

<http://www.info.gov.za/gazette/acts/1999/a1-99.pdf>

Public Service Anti-Corruption Strategy

http://www.dpsa.gov.za//macc/Public%20service%20anti_corruption_strategy.pdf

Public Service Code of Conduct

<http://www.dpsa.gov.za//macc/Public%20service%20code%20of%20conduct.pdf>

Public Service Act, 1994

<http://www.dpsa.gov.za/documents/acts®ulations/psact1994/PublicServiceAct.pdf>

Constitution of South Africa, 1996

<http://www.polity.org.za/html/govdocs/constitution/saconst10.html?rebookmark=1>

<http://www.polity.org.za/html/govdocs/constitution/saconst13.htmlrebookmark=1>

Special Investigating Units and Special Tribunals Act, 1996

<http://www.polity.org.za/html/govdocs/legislation/1996/act96-074.html?rebookmark=1>

Anti-Corruption Co-ordinating Committee

http://www.dpsa.gov.za/macc/anti%20corruption%20capacity_booklet.pdf

Trinidad and Tobago

Integrity Commission

<http://www.integritycommission.org.tt/faq.html>

Uganda

Inspectorate of Government Act, 2002

<http://www.igg.go.ug/>

Anti--money-laundering legislation

Australia

Financial Transaction Reports Act, 1988

http://www.austlii.edu.au/au/legis/cth/consol_act/ftra1988308/
Financial Transaction Reports Regulations, 1990
<https://www.imolin.org/pdf/imolin/Astlft90.pdf>
Cash Transactions Reports Act, 1988
http://www.unodc.org/unodc/legal_library/au/legal_library_1996-09-12_1996-43.html
Cash Transactions Reports Amendment Act, 1991
<https://www.imolin.org/amlid/showLaw.do?law=6233&language=ENG&country=AUL>

Bangladesh

Money Laundering Prevention Act 2002, amended 2003
<http://www.bangladesh-bank.org/>

Hong Kong Special Administrative Region of China

Prevention of Money-Laundering, Guideline No. 3.3
http://www.info.gov.hk/hkma/eng/guide/guide_no/2guide_33b.htm#Record%20keeping

Kenya

Regulation on Money Laundering, 2000

Mauritius

Financial Intelligence and Anti-Money Laundering Act, 2002
<https://www.imolin.org/amlid/showLaw.do?law=4872&language=ENG&country=MAR>

New Zealand

Financial Transactions Reporting Act, 1996
http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=197496466&infobase=pal_statutes.nfo&jump=a1996-009&softpage=DOC

Seychelles

Anti-Money-Laundering Act, 1996
<https://www.imolin.org/amlid/showLaw.do?law=5112&language=ENG&country=SEY>

Singapore

Guidelines on Prevention of Money-Laundering (2000)
http://www.mas.gov.sg/masmcm/bin/pt1Notice_824_Guidelines_On_Prevention_Of_Money_Laundering.htm#

Swaziland

Money-Laundering (Prevention) Act, 2001
<https://www.imolin.org/amlid/showLaw.do?law=6110&language=ENG&country=SWA>

Criminalisation

Examples of national legislation

Australia

Proceeds of Crime Act, 1987, as amended by the Banking (State Bank of South Australia and Other Matters) Act, 1994
http://www.austlii.edu.au/au/legis/cth/consol_act/poca1987160/

http://www.austlii.edu.au/au/legis/cth/num_act/bbosaaoma1994n691994539/

Criminal Code Amendment (Bribery of Foreign Public Officials) Act, 1999

<http://www.oecd.org/dataoecd/40/36/2027148.pdf>

Independent Commission against Corruption Act, 1988, sect. 8

New South Wales Consolidated Acts

http://www.austlii.edu.au/au/legis/nsw/consol_act/icaca1988442/s8.html

Whistleblowers Protection Act

<http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WhistleblowA94.pdf>

Canada

Witness Protection Act

<http://laws.justice.gc.ca/en/W-11.2/264527.html>

The Gambia

Evaluation of Assets and Properties and the Prevention of Corrupt Practices Act, 1982

http://www.corisweb.org/article/articlestatic/218/1/51/{more_url}

Hong Kong Special Administrative Region of China

Prevention of Bribery Ordinance, Gazette No. 14, 2003, Chapter 201

http://www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/264d1862d9bd0d1ac8256483002833f9?OpenDocument

Independent Commission against Corruption Ordinance, Chapter 204

http://www.legislation.gov.hk/blis_ind.nsf/d2769881999f47b3482564840019d2f9?OpenView&Start=204&Count=30&Expand=204.1#204.1

Kenya

Anti-Corruption and Economic Crimes Act, 2003

http://www.tkenya.org/documents/Economic_Crimes_Act.doc

Narcotic Drugs and Psychotropic Substances (Control Act)

http://www.unodc.org/unodc/legal_library/ke/legal_library_1996-12-17_1996-76.html

Prevention of Corruption Act (revised 1998)

Lesotho

Prevention of Corruption and Economic Offences Act, 1999

<http://www.imolin.org/amlid/showLaw.do?law=6347&language=ENG&country=LES>

Malaysia

Anti-Corruption Act (Act 575), 1997

http://www.ti-bangladesh.org/BP_PDFfiles/Criminal_Law/980953058_malaysianlaw.pdf

Mauritius

Prevention of Corruption Act, 2002, part II (Corruption offences)

<http://www.imolin.org/amlid/showLaw.do?law=4877&language=ENG&country=MAR>

New Zealand

Crimes (Bribery of Foreign Officials) Amendment Act, 2001

<http://www.oecd.org/dataoecd/1/33/2379956.pdf>

Commentary

<http://www.internetnz.net.nz/issues/archive/crimesbill/commentary.htm/view?searchterm=commentary%20and%20bribery%20of%20foreign%20officials%20and%20act>

Pakistan

National Accountability Bureau Ordinance, 1999

http://www.sbp.org.pk/1_frame/NAB_Ord_1999.pdf

Singapore

Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act, Chapter 65A (in particular part II, Confiscation of Benefits of drug trafficking or criminal conduct)

<http://statutes.agc.gov.sg/>

Prevention of Corruption Act (Chapter 241)

<http://statutes.agc.gov.sg/>

South Africa

Prevention and Combating of Corrupt Activities Act, 2003

<http://www.info.gov.za/gazette/acts/2004/a12-04.pdf>

Witness Protection Act

<http://www.info.gov.za/gazette/acts/1998/a112-98.pdf>

Protected Disclosures Act

<http://www.info.gov.za/gazette/acts/2000/a26-00.pdf>

United Kingdom of Great Britain and Northern Ireland

Public Interest Disclosure Act, 1998, Chapter 23

<http://www.opsi.gov.uk/ACTS/acts1998/19980023.htm>

Anti-terrorism, Crime and Security Act 2001, Chapter 24, part 12 (Bribery and Corruption)

<http://www.hmso.gov.uk/acts/acts2001/10024—m.htm>

Criminal Justice Act

<http://www.opsi.gov.uk/acts/acts2003/20030044.htm>

United Republic of Tanzania

Economic and Organized Crime Control Act, 1984

Prevention of Corruption Act, 1971

<http://www.ipocafrika.org/pdfuploads/Prevention%20of%20Corruption%20Act%20No.%2016%20of%201971.pdf>

Prevention of Corruption (Amendment) Act, 1990

[http://www.ipocafrika.org/pdfuploads/Prevention%20of%20corruption%20\(Amendment\)%20Act%20No.%2020%20of%201990.pdf](http://www.ipocafrika.org/pdfuploads/Prevention%20of%20corruption%20(Amendment)%20Act%20No.%2020%20of%201990.pdf)

Zambia

Corrupt Practices Act (1980)

MLAT practice

Examples of national legislation

Australia

Extradition Act, 1998

http://www.austlii.edu.au/au/legis/cth/consol_act/ea1988149/index.html

Mutual Assistance (Transnational Organized Crime) Regulations, 2004
<http://scaleplus.law.gov.au/html/pastereg/3/1829/top.htm>

Canada

International Transfer of Offenders Act, 2004
<http://laws.justice.gc.ca/en/I-20.6/79347.html>
Extradition Act, 1999
<http://laws.justice.gc.ca/en/E-23.01/index.html>
Mutual Legal Assistance in Criminal Matters Act, 1985
<http://laws.justice.gc.ca/en/M-13.6/84636.html#rid-84695>

Mauritius

Prevention of Corruption Act, 2002, see part IX (Extradition) and part VIII (mutual assistance in relation to corruption or money laundering offences)
<http://www.imolin.org/amlid/showLaw.do?law=4877&language=ENG&country=MAR>

Pakistan

National Accountability Bureau Ordinance, 1999
http://www.sbp.org.pk/1_frame/NAB_Ord_1999.pdf
Extradition Act of 1972
http://www.lhc.gov.pk/rulesorder/vol_3/v3ch16-a.htm

Seychelles

Mutual Assistance in Criminal Matters Act, 1995
<http://www.imolin.org/doc/amlid2/SeyCACMA95.pdf>

Singapore

Mutual Assistance in Criminal Matters Act (Chapter 190A)
<http://statutes.agc.gov.sg/>

South Africa

International Co-operation in Criminal Matters Act, 1996
<https://www.imolin.org/amlid/showLaw.do?law=4329&language=ENG&country=SAF>

United Kingdom of Great Britain and Northern Ireland

Criminal Justice (International Co-operation) Act 1990, section 22
http://www.opsi.gov.uk/ACTS/acts1990/Ukpga_19900005_en_1.htm
Regulation of Investigatory Powers Act 2000
<http://www.hmso.gov.uk/acts/acts2000/00023—d.htm>

United Republic of Tanzania

Extradition Act of 1976
Mutual Assistance in Criminal Matters Act 1999

Asset Forfeiture

Australia

Proceeds of Crime Act 1987, sects. 23 and 23A
http://www.austlii.edu.au/au/legis/cth/consol_act/poca1987160/s23.html
http://www.austlii.edu.au/au/legis/cth/consol_act/poca1987160/s23a.html

Canada

Mutual Legal Assistance in Criminal Matters Act, 1985
<http://laws.justice.gc.ca/en/M-13.6/index.html>

Mauritius

Prevention of Corruption Act, 2002, part VIII (Mutual assistance in relation to corruption or money-laundering offences)

<https://www.imolin.org/amlid/showLaw.do?law=4877&language=ENG&country=MAR>

Financial Intelligence and Anti-Money-Laundering Act

<http://www.gov.mu/portal/sites/ncb/fsc/download/fuac02.doc>

New Zealand

Mutual Assistance in Criminal Matters Act:

http://www.unodc.org/doc/enl/2009/New_Zealand_Mutual_Assistance_Criminal_Matters_Act_1992_R09-74.pdf

Nigeria

Corrupt Practices and other Related Offences Act, 2000 (Provisions relating to the Chairman of the Commission)

[http://www.nigeria-](http://www.nigeria-law.org/Corrupt%20Practices%20and%20other%20Related%20Offences%20Act%202000.htm)

[law.org/Corrupt%20Practices%20and%20other%20Related%20Offences%20Act%202000.htm](http://www.nigeria-law.org/Corrupt%20Practices%20and%20other%20Related%20Offences%20Act%202000.htm)

Singapore

Corruption, Drug Trafficking and Other Serious Crime (Confiscation of Benefits) Act (Chapter 65A)

<http://statutes.agc.gov.sg/>

Prevention of Corruption Act (Chapter 241) (revised 1993)

<http://statutes.agc.gov.sg/>

South Africa

Financial Intelligence Centre Act, 2001.

<http://www.fic.gov.za/info/a38-01b.pdf>

Special Investigating Units and Special Tribunals Act, 1996

<http://www.polity.org.za/html/govdocs/legislation/1996/act96-074.html?rebookmark=1>

International Co-operation in Criminal Matters Act, 1996

<https://www.imolin.org/amlid/showLaw.do?law=4329&language=ENG&country=SAF>

Prevention of Organised Crime Act

<http://www.npa.gov.za/npa/PolicyManuals/POCA%20of%201998.pdf>

United Kingdom of Great Britain and Northern Ireland

<http://www.opsi.gov.uk/acts.htm>

United Republic of Tanzania

Prevention of Corruption Act, 1971

<http://www.ipocafrika.org/pdfuploads/Prevention%20of%20Corruption%20Act%20No.%2016%20of%201971.pdf>

Vanuatu

Mutual Assistance in Criminal Matters Act, 1989

http://www.unodc.org/unodc/pt/legal_library/vu/legal_library_1999-07-16_1999-16.html

