DRAFT LEGISLATIVE GUIDE
TO PROMOTE THE IMPLEMENTATION OF THE
UNITED NATIONS CONVENTION AGAINST CORRUPTION

Note from the Secretariat

The present document contains a preliminary draft of the Legislative Guide to Promote the Implementation of the United Nations Convention against Corruption. It is available only in English and only one copy per delegation is distributed. The purpose of this distribution is to invite comments from delegations.

The Secretariat will appreciate receiving such comments by the end of the 14th session of the Commission on Crime Prevention and Criminal Justice, which will be held in Vienna, from 23-27 May 2005.

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Draft Legislative Guide to Promote the Implementation of the United Nations Convention against Corruption

I. Introduction

A. Aim of the Legislative Guide

The United Nations Convention against Corruption (**UN**CAC) was adopted by the General Assembly by resolution 58/4 of 31 October 2003. The objective of this legislative/practical Guide is to assist States seeking to ratify and implement the **UN**CAC by identifying legislative requirements, issues arising from those requirements and various options available to States as they develop and draft the necessary legislation.

While the Guide has been drafted mainly for policy makers and legislators in countries preparing for the ratification and implementation of the Convention, it also aims at providing a helpful basis for bilateral technical assistance projects and other initiatives that will be undertaken as part of international efforts to promote the broad ratification and implementation of the UNCAC.

The Guide has been drafted to accommodate different legal traditions and varying levels of institutional development and provide, where available, implementation options. As the guide is for use primarily by legislative drafters and other authorities in countries preparing for the ratification and implementation of the UNCAC, not every provision is addressed. The major focus is on those provisions which will require legislative change and/or those which will require action prior to or at the time the Convention becomes applicable to the State party concerned.

The Guide lays out the basic requirements of the UNCAC as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider.

Parallel to the need for flexibility there is a need for consistency and a degree of harmonization, at the international level. In this spirit, the guide lists items that are mandatory or optional for States parties and relates each article and provision to other regional or international instruments and to examples of how States with different legal traditions have implemented the Convention.

The guide is not intended to provide definitive legal interpretation of the articles of the UNCAC. The content is not authoritative and, in assessing each specific requirement, the actual language of the provisions should be consulted. Caution should also be used in incorporating provisions from the Convention verbatim into national law, which generally requires higher standards of clarity and specificity so as to enhance implementation, integration with the wider legal system and tradition, and enforcement. It is also recommended that drafters check for consistency with other offences and definitions in existing domestic legislation before relying on formulations or terminology used in the Convention.

The United Nations Office on Drugs and Crime is available to provide assistance in implementing the Convention. The Office can be contacted at the following address:

United Nations Office on Drugs and Crime, United Nations Office at Vienna, Vienna International Centre, P.O. Box 500, A-1400 Vienna, Austria (Fax. (0043-1) 26060 5841 or 6711). The text of the Convention and other relevant information can be obtained at the United Nations Office on Drug and Crime web site: http://www.unodc.org/unodc/en/crime_convention_corruption.html.

B. Aims of the Convention

The greatest impact of corruption is on the poor – those least able to absorb its costs. By illegally diverting state funds corruption undercuts services, such as health, education, public transportation or local policing, that those with few resources are dependent upon. Petty corruption provides additional costs for citizens – not only are service provision inadequate, but 'payment' is required for the delivery of even the most basic government activity, such as the issuing of official documentation.

In many countries, applicants for drivers' licenses, building permits and other routine documents have learned to expect a "surcharge" from civil servants. At a higher level, larger sums are paid for public contracts, marketing rights or to sidestep inspections and red tape. However, the consequences of corruption are more pervasive and profound than these bribes suggest. Corruption causes reduced investment or even disinvestment, with many long-term effects, including social polarization, lack of respect for human rights, undemocratic practices and diversion of funds intended for development and essential services.

The diversion of scarce resources by corrupt parties affects a government's ability to provide basic services to its citizens and to encourage sustainable economic, social and political development. Moreover, it can jeopardize the health and safety of citizens through, for example, poorly designed infrastructure projects and scarce or outdated medical supplies.

Most fundamentally, corruption undermines the prospects for economic investment. Few foreign firms wish to invest in societies where there is an additional level of 'taxation'. National and international companies too by offering bribes to secure business, undercut legitimate economic competition, distort economic growth and reinforce inequalities. In many societies widespread public suspicion that judicial systems are corrupt and that criminal acts are committed by elites in both the private and public spheres undercuts government legitimacy and undermines the rule of law.

Along with the growing reluctance of international investors and donors to allocate funds to countries lacking adequate rule of law, transparency and accountability in government administration, corruption has the greatest impact on the most vulnerable part of a country's population, the poor.

Throughout the world there is a growing tide of awareness recognizing that combating corruption is integral to achieving a more effective, fair and efficient government. More and more countries see that bribery and cronyism hold back development and are asking the UN to help them gain the tools to curb such practices. Since the causes of corruption are many and varied, preventive, enforcement and prosecutorial measures that work in some countries may not work in others.

Article 1

Statement of purpose

The purposes of this Convention are:
(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
(c) To promote integrity, accountability and proper management of public affairs and public property.

C. Structure of the Legislative Guide

The Guide consists of four main parts, presenting issues related to preventive measures (chapter II); criminalization (chapter III); international cooperation (chapter IV); and asset recovery (chapter V).

The sequence of chapters and the internal format is presented thematically rather than following the Convention paragraph by paragraph, in order to make the guide easier to use by national drafters and policy makers, who may need to focus on particular issues or questions. The chapters of the Guide, nevertheless, do correspond to the UNCAC chapters in order to avoid any confusion. The sections of the Guide that cover specific articles of the Convention start by quoting the relevant article or articles of the Convention and are all organized along the same structure, as follows:

1. Introduction
2. Summary of main requirements
3. Mandatory requirements/Obligation to legislate
4. Optional requirements/Obligation to consider
5. Optional/State Parties may wish to consider
6. Information resources

Particular attention should be paid to the sections giving a summary of main requirements relevant to each article, which provide information on the essential requirements of the article concerned.

D. Structure of the Convention

General provisions

A first, short section outlines the aim of the Convention, defines terms employed throughout the text, states the scope of application and reiterates the principle and protection of sovereignty of State Parties.

Prevention

The Convention requires States Parties to introduce effective policies aimed at the prevention of corruption. It devotes an entire chapter to this issue, with a variety of measures concerning both the public and private sectors. The measures range from institutional arrangements, such as the establishment of a specific anti-corruption body, to codes of conduct and policies promoting good governance, the rule of law, transparency and accountability. Significantly, the Convention underscores the important role of the wider society, such as NGOs and community initiatives, by inviting each State Party to actively encourage their involvement and general awareness about the problem of corruption.

Criminalization

The Convention goes on to require the State Parties introduce criminal and other offences to cover a wide range of acts of corruption, to the extent these are not already defined as such under domestic law. The criminalization of some acts is mandatory

under the Convention, which also requires that State Parties consider the establishment of additional offences. An innovation of this Convention is that it addresses not only basic forms of corruption, such as bribery and the embezzlement of public funds, but also acts in support of corruption, obstruction of justice, trading in influence and the concealment or laundering of the proceeds of corruption. Finally, this part of the Convention also deals with private-sector corruption.

International cooperation

The Convention emphasizes that every aspect of anti-corruption efforts (prevention, investigation, prosecution of offenders, seizure and return of misappropriated assets) necessitates international cooperation. The Convention requires specific forms of mutual legal assistance in the collection and transfer of evidence, extradition, and the tracing, freezing, seizing and confiscating proceeds of corruption. In contrast to previous treaties, the Convention also provides for mutual legal assistance in the absence of dual criminality, when such assistance does not involve coercive measures: "In matters of international cooperation, 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" (Art. 43).

Asset recovery

A most significant innovation and a "fundamental principle of the Convention" (Art. 51) is the return of assets. This part of the Convention specifies how cooperation and assistance will be rendered, how proceeds of corruption are to be returned to a requesting State, and how the interests of other victims or legitimate owners are to be considered.

In short, the Convention:

(a) Defines and standardizes certain terms that are used with different meanings in various countries or circles;

(b) Requires States to develop corruption prevention measures involving both the public and private sectors;

(c) Requires States to establish specific offences as crimes and consider others;

(d) Promotes international cooperation, for example through extradition, legal assistance and joint investigations;

(e) Provides for asset recovery;

(f) Provides for training, research and information-sharing measures;

(g) Contains technical provisions, such as for signature and ratification.

As individuals responsible for preparing legislative drafts and other measures examine the priorities and obligations under the Convention, they should bear in mind the guidance presented in the following paragraphs.

In establishing their priorities, national legislative drafters and other policy makers should bear in mind that the provisions of the Convention do not all have the same level of obligation. In general, provisions can be grouped into the following three categories:

(a) Mandatory provisions which consist of obligations to legislate (either absolutely or where specified conditions have been met);

(b) Measures that States Parties must consider applying or endeavour to adopt;

(c) Measures that are optional.

Whenever the phrase "each State Party shall adopt" is used, the reference is to a mandatory provision. Otherwise, the language used in the guide is "shall consider adopting" or "shall endeavour to", which means that States are urged to consider adopting a certain measure and to make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the guide employs the term "may adopt".

Several articles contain safeguard clauses which limit the obligations of States Parties in case of conflicting constitutional or fundamental rules, by providing that States must adopt certain measures "subject to (their) constitution and the fundamental principles of (their) legal system" (e.g. article 20)", "to the extent not contrary to the domestic law of the requested State Party" (e.g. article 46, para. 17), "to the extent that (…) a (convention) requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings" (e.g. article 31, para. 8) or "to the extent permitted by the basic principles of its domestic legal system…"(article 50, para.1)

The summary of main requirements presented in each section lists both measures that are mandatory and measures that States Parties must consider applying or endeavour to apply. In the text that follows, measures that are mandatory are discussed first, followed by a discussion of measures that States Parties must consider or endeavour to apply and optional ones.

In several articles, the Convention refers to criminalization using the expression "such legislative and other measures as may be necessary". The reference to "other" measures is not intended to require or permit criminalization without legislation. Such measures are additional to, and presuppose the existence of, legislation.

It is recommended that drafters check for consistency with other offences, definitions and legislative uses before relying on formulations or terminology contained in the Convention. As an international legal text, the Convention uses general formulations and is addressed to national governments. Drafters should therefore be careful not to incorporate parts of the text verbatim, but are encouraged to adopt the spirit and meaning of the various articles. In order to assist in that process, a number of interpretative notes discussed by the Ad Hoc Committee for the Negotiation of the Convention against Corruption throughout the process of negotiation of the draft Convention will be cited in this guide (A/58/422/Add.1), providing additional context and insight into the intent and concerns of those who negotiated the Convention.

II. General provisions and obligations applicable throughout the United Nations Convention against Corruption

A. Implementation of the Convention

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.

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2. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.

The purpose of article 65, paragraph 1, is to ensure that national legislators act to implement the provisions of this Convention in conformity with the fundamental principles of their legal system.

Implementation may be carried out through new laws or amendments of existing ones. Domestic offences that implement the terms of the Convention, whether based on pre-existing laws or newly established ones, will often correspond to offences under the Convention in name and terms used, but this is not essential. Close conformity is desirable, for example to simplify international cooperation, extradition proceedings, and asset recovery, but is not required, as long as the range of acts covered by the Convention is criminalized.

Article 30, paragraph 9, reiterates the principle that the description of the offences is reserved to the domestic law of States Parties (see also art. 31 (10) and chapter on criminalization, below). Countries may have offences that are different in scope (such as two or more domestic crimes covering one crime covered by the Convention), especially where this reflects pre-existing legislation or case law.

It is emphasized that the mandatory provisions of the Convention serve as a threshold, which States must meet for the sake of conformity. Provided that the minimum standards are met, States Parties are free to exceed those standards and, in several provisions, are expressly encouraged to do so.

Refer to art. 62, para. 1: "shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation".

B. Use of terms

Article 2
Use of terms

For the purposes of this Convention:
(a) "Public official" shall mean: (i) 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; (ii) 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; (iii) 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;

(b) "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 person exercising a public function for a foreign country, including for a public agency or public enterprise;

(c) "Official of a public international organization" shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization;

(d) "Property" shall mean 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;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(f) "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

(h) "Predicate offence" shall mean 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;

(i) "Controlled delivery" shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

Article 2 defines several important terms recurring throughout the Convention. National legislation may include broader definitions but should, as a minimum, cover what is required according to the Convention. Member States are not obliged to incorporate in their national legislation the definitions as they stand in the Convention. All of the terms defined in Article 2 relate to substantive provisions and legislative or other requirements under the Convention[1]. They require therefore thorough consideration to ensure that the entire range of persons defined by Article 2 as "public officials" is adequately covered under national legislation and measures.

For example, the provisions of the Convention regarding "public officials" cover anyone so defined by the domestic law of a State Party. In the event that these are not included in domestic definitions, for the purposes of the Convention, "public official" is also anyone "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 (art. 2 (a) (i)) as well as "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" (art 2 (a) (ii)).

However, for the purpose of some measures included in chapter II of the Convention[2], "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" (Art. 2 (a)).

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).

A number of additional Interpretative Notes indicate the following:

- The word "executive" is understood to encompass the military branch, where appropriate (A/58/422/Add.1, para. 2). Another Interpretative Note indicates

[1] For instance, Article 15 requires the criminalization of bribery of public officials.

[2] See, for example, Article 8, paragraphs (1), (4), (5) (6).

that the term "office" is understood to encompass offices at all levels and subdivisions of government from national to local. In States where sub-national 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)

- *T*he 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)

States Parties may opt for broader or more inclusive definitions than the minimum required by Article 2.

It should be emphasized that it is not necessary for States Parties to incorporate in their legislation the Convention definitions. Given the existence of multiple regional and other instruments against corruption (as well as those against transnational organized crime and terrorism), States Parties are encouraged to take them also into account and ensure their national legislation is compatible with them (for more details, see chapters on preventive measures, criminalization, international cooperation and asset recovery below).

C. Protection of sovereignty

Article 4
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

Lastly, the Convention respects and protects the sovereignty of States parties. Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention. Its provisions are self-explanatory.

Article 4
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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.

An Interpretative Note indicates that the principle of non-intervention is to be understood in the light of Article 2 of the Charter of the United Nations.

There are also other provisions that protect national prerogatives and sovereignty set forth elsewhere in the Convention. For example, pursuant to article 30, paragraph 9, nothing in the Convention affects the principle that the domestic law of a State party governs:

(a) The description of offences established in accordance with the Convention;

(b) Applicable defences;

(c) Legal principles controlling the lawfulness of conduct;

(d) Prosecution and punishment.

Moreover, pursuant to Article 30, paragraph 1, it is up to the State Party concerned to determine the appropriate sanctions, while considering the gravity of the offence.

Finally, Article 31, which covers issues of asset freezing, seizure and confiscation, states that "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" (paragraph 10).

III. Preventive measures

A. Introduction

Corruption, similarly to other crimes, thrives in contexts that provide illicit opportunities, widespread motives to take advantage of such opportunities, and weak social controls. The prevention of corruption is more effective in environments that minimize opportunities, encourage integrity, allow for transparency, enjoy strong and legitimate normative guidance, and integrate the efforts of the public sector, the private sector and civil society together.

The provisions in this section of the guide are the first step towards the achievement of all main objectives of the Convention against Corruption. As stated in Article 1, the purpose of the Convention is to effectively prevent and combat this evil, to enhance international cooperation and mutual assistance, and to promote integrity, accountability and proper management of public affairs and public property.

This chapter focuses on preventive measures, standards and procedures. Article 5 lays out the main goals of prevention and the means to be employed toward their attainment, in accordance with the fundamental principles of domestic law. States parties are asked to introduce or maintain a series of coordinated and effective measures and policies against corruption aimed at the participation of civil society, supportive of the rule of law, proper management of public interests, transparency and accountability. Article 5 goes on to underline the significance of prevention (see also Art. 1 (a)), the need for continuous assessments of existing anti-corruption practices and international collaboration (see also Art. 1 (c)).

The articles that follow illustrate how these general principles can be implemented in accordance with the fundamental legal principles of States parties. Because the preventive policies, measures and bodies may be more effective with public reporting and the participation of civil society, articles 5, 6, 10 and 13 are discussed together in one cluster.

Another section discusses the provisions of articles (7-9), which deal with measures and systems instrumental to the achievement of the specific goal of transparency in the public sector**.**

The chapter moves to measures regarding the prevention of corruption in the judiciary and prosecution services of each country which is followed by a section on preventive measures in the private sector. The chapter concludes with a section on the prevention of money laundering.

B. Preventive anti-corruption policies and practices

Article 5 requires practices rather than legislation. It provides a base for article 6 and a preamble for the chapter.

Article 6 is not intended to refer to the establishment of a specific agency at a specific level. What is needed is the capacity to perform the functions enumerated by the article. [*Drafter's Note: Important to find examples of already established bodies, but more importantly the legislation by which these bodies were constituted, their terms of reference and how the different systems carried it out e.g. Russia, Anti-corruption body established by presidential decree.*]

Article 5
Preventive anti-corruption policies and practices

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anticorruption 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 6
Preventive anti-corruption body or bodies

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 10
Public reporting

Taking into account the need to combat corruption, 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 13
Participation of society

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 organizations and community-based organizations, 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 *ordre public* 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.

1. Summary of main requirements

In accordance with Article 5, States parties are required to

- develop and implement or maintain effective anti-corruption policies that encourage society participation, reflect the rule of law, and promote sound and transparent administration of public affairs (paragraph 1)
- collaborate with each other and relevant international and regional bodies for the pursuit of the above goals (paragraph 4).

In accordance with Article 6, States parties are required to

- have an anti-corruption body or bodies in charge of preventive measures and policies (paragraph 1)
- grant that body independence to ensure it can do its job unimpeded by undue influences and provide it with adequate resources and training (paragraph 2)[3].

In accordance with Article 10, States parties are required to

- 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.

In accordance with Article 13, States parties are required to

- take appropriate measures to promote the participation of civil society, non-governmental organizations and community-based organizations in anti-corruption activities and efforts to increase public awareness the threats, causes and consequences of corruption.

2. Mandatory requirements/obligation to legislate or take other measures

[3] See article 60, Training and technical assistance, para. 1, on training programmes for personnel responsible for preventing and combating corruption.

Article 5 does not introduce specific legislative requirements, but rather mandates the commitment of States parties to develop and maintain a host of measures and policies preventive of corruption, in accordance with the fundamental principles of their legal systems.

Under Article 5, paragraph 1, the requirement is to develop, implement and maintain effective, coordinated measures that

- promote the participation of the wider society in anti-corruption activities and
- reflect the principles of
  - the rule of law
  - proper management of public affairs and public property
  - integrity
  - transparency and
  - accountability

These general aims are to be pursued through a range of mandatory and optional measures outlined in subsequent Convention articles[4].

Article 5, paragraph 4, requires that, in the pursuit of these aims, general prevention and evaluation of implemented anti-corruption measures, States parties collaborate with each other as well as with relevant international and regional organizations, as appropriate and in accordance with their fundamental principles of law.

Article 6 requires the establishment or maintenance of a body or bodies, in accordance with the fundamental principles of each State's legal system, charged with the prevention of corruption by

- implementing policies and measures mandated by article 5 (a)
- where appropriate, overseeing and coordinating the implementation of such policies (a); this oversight and coordination would be most critical in cases where more than one body have responsibilities relative to the prevention of corruption;
- creating and disseminating knowledge about the prevention of corruption (b)[5].

Article 6, paragraph 2, requires that States endow the body in charge of preventive policies and measures

- with "independence to ensure it can do its job unimpeded by undue influences", in accordance with the fundamental principles of their legal system, and
- with adequate material resources, specialized staff, and the training necessary for them to discharge their responsibilities.

The Convention does not mandate the creation of more than one body or organization for the above tasks. It recognizes that, given the range of responsibilities and functions, it may be that these are already assigned to different existing agencies.

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[4] For specific examples of national implementation: Hong Kong, Independent Commission against Corruption (ICAC), broadly, and Bribery Ordinance, Chapter 201; Australia, New South Wales Independent Commission against Corruption, and Independent Commission against Corruption Act (1988); Singapore, Prevention of Corruption Act, Chapter 241 (revised 1993); Russia, Decree of the President of the Russian Federation No.1006 (1994); Kenya, the Anti-Corruption and Economic Crimes Act, parts IV to VIII (2003); Lithuania, The National Anti-Corruption Strategy of the Government of Lithuania.
Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption; Organization of American States, Inter-American Convention against Corruption.

[5] Note also additional obligations, such as to render the general public aware of the existence of such anticorruption bodies (Article 13 (2); see below).

Original legislation may be required to establish the anti-corruption body[6]. The body or bodies referred to in this article may be the same as those referred to in article 36, which deals with law enforcement anti-corruption functions (A/58/422/Add.1, para. 11)[7].

Several articles refer to the institutional framework required for an effective implementation of the convention. Article 6 requires parties to establish an anti-corruption body or bodies entrusted with preventive functions. Article 36 (specialized authorities) requires them to "ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement". In addition article 46 (mutual legal assistance) mandates the designation by States parties of a central authority competent to receive requests for mutual legal assistance (see below) and article 58, (financial intelligence unit) obliges States parties to consider establishing a financial intelligence unit responsible for receiving, analysing and disseminating reports of suspicious financial transactions (see below).

While the Convention deals with preventive and law enforcement functions and corresponding bodies under different articles (Articles 6 and 36 respectively), parties may elect to entrust one body with a combination of preventive and law enforcement functions[8].

Public confidence and accountability in public administration are instrumental to the prevention of corruption and greater efficiency. So, Article 10 requires States to take measures to enhance transparency in their public administration relative to its organization, functioning, decision-making processes and/or other aspects, in accordance with the fundamental principles of their law.

Measures responsive to this general obligation may include the following:

- Introduction of rules and procedures for members of the general public to obtain information 1) on the organization, functioning and decision-making processes of their public administration, when appropriate, and 2) on decisions and legal acts that concern members of the public, with due regard for the protection of privacy and personal data (paragraph a). In this particular task of protecting personal information, national drafters may wish to draw on "principles laid down in the guidelines for the regulation of computerized personal data files adopted by the General Assembly in its resolution 45/95 of 14 December 1990" (A/58/422/Add.1, para. 14).
- Simplification of administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities (paragraph b).
- Publication of information, which may include periodic reports on the risks of corruption in the public administration (paragraph c).

[6] For specific examples of national implementation: Kenya, the Anti-Corruption and Economic Crimes Act, parts III (2003); Latvia, Draft Law on the Anti-Corruption Bureau; Lesotho, Prevention of Corruption and Economic Offences Act, parts II and III (1999); Mauritius, Prevention of Corruption Act, Government, parts III – VI (2002); Nepal, the Constitution of the Kingdom of Nepal, part 12 (1990).
Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption, Article 5(3) and the Southern African Development Community (SADC) Protocol against Corruption, Article 4 (1) (g).

[7] This is the case, for example, with the Hong Kong Independent Commission Against Corruption.

[8] For example, the Hong Kong Independent Commission against Corruption (ICAC) is entrusted with the running of public awareness campaigns but also with the investigation of allegations of corruption and the auditing of government agencies from an anti-corruption perspective. Under the Lithuanian law, the Special Investigations Service also combines preventive and investigative functions. In other cases, the office of the ombudsman assumes the functions of an anti-corruption agency, including prosecution functions.

Depending on existing legal arrangements and tradition, new legislation may be required for the above or other measures aiming at transparency in public administration[9].

Effective anti-corruption strategies necessitate the active participation of the general public. Article 13, paragraph 1, requires that States take appropriate measures encouraging the active participation on the public within its means and in accordance with fundamental principles of their law. Individuals and groups, such as civil society, non-governmental organizations and community-based organizations or groups established or located in the country (A/58/422/Add.1, para. 16), must be encouraged to participate in three areas of anti-corruption efforts:

- Prevention of corruption
- The fight against corruption
- Increasing the public awareness about the existence, causes, seriousness and threats of corruption

Measures responsive to this general obligation may include the following:

> (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 *ordre public* or of public health or morals.

According to the Interpretative Notes, "the intention behind paragraph 1 (d) is to stress those obligations which States Parties have already undertaken in various international instruments concerning human rights to which they are parties and should not in any way be taken as modifying their obligations" (A/58/422/Add.1, para. 17).

Article 13, paragraph 2, requires that States practically encourage the communication between the wider public and the authorities relative to corrupt practices. States are required to take appropriate measures to ensure that the independent anti-corruption body or bodies referred to earlier (Art. 6) are known to the public. States are further mandated to enable public access to this body or bodies for the reporting of incidents and acts constituting offences established under this Convention [see Articles 15ff; insert references]. States must also allow for anonymous reports of such incidents.

For the measures dealing with the involvement of civil society and the wider public in anti-corruption efforts, legislation may be required, depending on the existing legal

[9] For specific examples of national implementation: Australia, New South Wales, Freedom of Information Act (1989); Belize, Freedom of Information Act (1994); Ireland, Access to Information Act (1997); United States of America, Freedom of Information Act, 5 U.S.C., part 552 (1960).
Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption; Inter-American Convention against Corruption, Organization of American States.

arrangements and tradition[10]. National drafters may wish to review current rules on access to information, privacy issues, restrictions and *ordre public* situations to see whether amendments or new legislation are required in order to comply with the Convention.

3. Optional requirements/Obligation to consider

Beyond the mandatory provisions of this section, States parties are required to "endeavour to establish and promote effective practices aimed at the prevention of corruption" (Art. 5, paragraph 2). This is a more general urging/encouragement to develop and introduce measures that can render the preventive policies more effective in the specific context of each State party [11].

Part of the same effort at effective anti-corruption policies is to regularly assess the consequences of existing measures to determine how well they are achieving the desired results. Technological, socio-economic and other circumstances may also change overtime and adjustments may be necessary. Article 5, paragraph 3, requires States parties to "endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption"[12].

4. Optional measures

As seen earlier, article 5, paragraph 4, mandates international collaboration aimed at the prevention of corruption. For this purpose, States parties may wish to consider participating in international programmes and projects.

C. Transparency, measures and systems in the public sector

Articles 7, 8 and 9 address in detail questions relative to transparency in the public sector. The systems and measures States are required to introduce or consider may require new legislation or amendments to existing laws, in accordance with the fundamental principles of their legal systems.

Article 7
Public sector

[10] For specific examples of national implementation: Australia, New South Wales, Independent Commission against Corruption; Hong Kong, Independent Commission against Corruption; Botswana Directorate on Economic Crime and Corruption; Kenya Anti Corruption Commission; Lithuania, National Anti-Corruption Strategy of the Government of Lithuania; etc.
Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption.

[11] For example, the Dutch government (Ministry of Interior) is developing guides and models for an integrity policy for lower governments, that is, provinces and communities; South Africa's Public Service Anti-Corruption Strategy, Public Service Code of Conduct, Public Finance Management Act (1999); the Promotion of Access to Information Act (2000); and the Financial Disclosure Framework provide for preventive measures that go beyond the requirements of the Convention.

[12] This may be accomplished through specialized bodies, academic research, civil society or public sector agencies with oversight responsibilities. See also article 61 (Collection, exchange and analysis of information on corruption), in particular, para.3.

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.

Article 8
Codes of conduct for public officials

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.

Article 9
Public procurement and management of public finances

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.

1. Summary of main requirements

In accordance with Article 7, States parties are required to make a strong effort to

- adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and other non-elected public officials (paragraph 1).
- adopt measures to prescribe criteria concerning candidature for and election to public office (paragraph 2).
- take measures to enhance transparency in the funding of candidatures for elected public office and the funding of political parties (paragraph 3).
- adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest (paragraph 4).

In accordance with Article 8, States are required to

- promote integrity, honesty and responsibility among their public officials (paragraph 1) and
- take note of the relevant initiatives of regional, interregional and multilateral organizations (paragraph 3).

Article 8 also requires States to endeavour to

- apply codes or standards of conduct for the correct, honourable and proper performance of public functions (paragraph 2).
- establish 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 (paragraph 4).
- establish measures and systems requiring public officials to report to appropriate authorities on potential conflicts of interest (paragraph 5).
- take disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article (paragraph 6).

In accordance with Article 9, paragraph 1, States parties are required to establish systems of procurement based on transparency, competition and objective criteria in decision-making, and which are also effective in preventing corruption, in accordance with the fundamental principles of their legal systems.

In accordance with Article 9, paragraph 2, States Parties are required to take measures to promote transparency and accountability in the management of public finances, in accordance with the fundamental principles of their legal system.

2. Mandatory requirements/Obligation to legislate

Article 8 contains both mandatory provisions and obligations to consider certain measures. Mandatory is a commitment to promote integrity in public administration and to synchronize systems, measures and mechanisms introduced in the course of implementing this article with the relevant initiatives of regional, interregional and multilateral organizations.

More specifically, Article 8, paragraph 1, requires States parties to promote, *inter alia*, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of their legal system. The rest of this article provides more specific guidelines and suggestions States must seriously consider, such as the introduction of codes of conduct for the performance of public functions (see discussion of Art. 8, para. 2 below).

Article 8, paragraph 3, requires that, as States implement the provisions of this article, they 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, where appropriate and in accordance with the fundamental principles of their legal system.

The implementation of concrete measures and procedures out of these commitments may require legislation (see section below).

Article 9 focuses on proper and transparent processes relative to public procurement and public finances[13]. Under Article 9, paragraph 1, States parties are required to take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective also in preventing corruption, in accordance with the fundamental principles of their legal system,.

Such systems may take into account appropriate threshold values in their application, for example in order to avoid overly complex procedures for comparatively small amounts. Past experience suggests that excessive regulation can be counter-productive by increasing rather than diminishing its vulnerability to corrupt practices.

The procurement systems are required to address at least the following issues:

(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.

The introduction of these measures may require amendments or new legislation, depending on the existing framework of each State party.

States parties are free to address additional issues. The above listing is only the minimum required by the Convention. At the same time, the Interpretative Notes indicate that "nothing in paragraph 1 shall be construed as preventing any State Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential interests related to national security" (A/58/422/Add.1, para. 13).

Article 9, paragraph 2, requires that States parties take appropriate measures to promote transparency and accountability in the management of public finances, in accordance with the fundamental principles of their legal system. Such measures must include the following, as a minimum:

[13] Relevant international and regional treaties and documents include: European Bank for Reconstruction and Development, Procurement Policies and Rules (August 2000); International Monetary Fund, Revised Good Practices on Fiscal Transparency (2001); International Monetary Fund, Draft Guide on Resource Revenue Transparency.

(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. Optional requirements/Obligation to consider

Article 7, paragraph 1, requires that States parties make a strong effort to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and other non-elected public officials, where appropriate and in accordance with the fundamental principles of their legal system[14]. These systems must

(a) be based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;
(b) 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[15];
(c) promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;
(d) promote education and training programmes to enable officials 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.

The existence or introduction of the systems referred to in paragraph 1 "shall not prevent States Parties from maintaining or adopting specific measures for disadvantaged groups" (A/58/422/Add.1, para. 12).

These measures may require new legislation [examples to be inserted].

Article 7 goes on to require that States parties consider - consistently with the objectives of this Convention and in accordance with the fundamental principles of their domestic law - the adoption of appropriate legislative and administrative measures

- prescribing criteria concerning candidature for and election to public office, (paragraph 2) and
- enhancing transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties (paragraph 3).

These measures may require new legislation [examples to be inserted].

The last requirement of Article 7 is that States parties endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest, in

[14] Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption; Organization of American States, Inter-American Convention against Corruption; ADB-OECD Anti-Corruption Initiative for Asia-Pacific, Anti-Corruption Action Plan for Asia and the Pacific; OECD, Recommendation of the Council on the Guidelines for Managing Conflict of Interest in the Public Sector; OECD, Recommendation on Improving Ethical Conduct in the Public Service.

[15] See example of SCPC in France.

accordance with the fundamental principles of their domestic law. These measures may also require new legislation.

Codes of conduct

Following the general and mandatory provision asking States parties to promote integrity in their public administration, article 8 further requires them to endeavour to apply codes or standards of conduct for the correct, honourable and proper performance of public functions within their institutional and legal systems (paragraph 2). [*insert refs*]

Such codes enhance predictability, support the preparation and training of public officials, and facilitate the resolution of dilemmas and frequent questions as they may arise in the course of their work. Codes of conduct also clarify the standards and rules to be observed, thereby rendering the task of identifying and reporting violations easier (see below and article 33[16]).

The introduction of such codes may require legislation.

Article 8 goes on to require that States consider the establishment of 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, in accordance with the fundamental principles of its domestic law (paragraph 4). Such measures improve detection rates, enhance accountability and support societal confidence in the effective enforcement of the general anti-corruption principles (see also article 33).

The laws of several countries already require such reporting. It should be noted, however, that this provision refers to a specific obligation, under the general provision of preventing corruption. Instead of simply requiring reports on the commission of a crime, the point here is to establish mechanisms, systems and measures facilitating such reporting.

Conflicts of interest as well as perceptions of such conflicts undermine public confidence in the integrity and honesty of civil servants and other officials. As a further enhancement of transparency in public administration, article 8 requires States parties to endeavour, where appropriate and in accordance with the fundamental principles of their domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, as a minimum:

- their outside activities
- employment
- investments
- assets
- substantial gifts or benefits

from which a conflict of interest may result with respect to their functions as public officials (paragraph 5).

Finally, normative standards and processes of detection and transparency need to be accompanied by appropriate sanctions. Article 8 requires that States seriously consider taking, in accordance with the fundamental principles of their domestic law, disciplinary

[16] Article 33 requires States to protect persons who properly report facts or incidents concerning offences established under this Convention.

or other measures against public officials who violate the codes or standards established in accordance with this article (paragraph 6).

4. Optional/States parties may wish to consider

N/a

D. Judiciary and prosecution

Article 11

Measures relating to the judiciary and prosecution services

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.

1. Summary of main requirements

In accordance with Article 11, States parties must take measures to strengthen integrity and prevent corruption in the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary. This option may require legislation (para.1)

Similar measures may be introduced for the prosecution service, where it enjoys independence similar to the judiciary (para. 2)[17].

The introduction of these measures may require legislation, without prejudice to the independence of the judiciary, depending on the existing framework of each State party.

2. Mandatory requirements/Obligation to legislate

The independence of the national authorities fighting transnational crime and corruption was recognized by the UN Convention against Transnational Organized Crime (TOCC), which requires that States take measures ensuring effective action in the prevention, detection and punishment of corruption by public officials, including adequate independence to avoid undue influences (see TOCC art. 9. para.2).

[17] Relevant international and regional treaties and documents include: Centre for the Independence of Judges and Lawyers, Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System; International Association of Penal Law, International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers, Draft Principles on the Independence of the Judiciary; International Bar Association, Minimum Standards of Judicial Independence; United Nations, Basic Principles on the Independence of the Judiciary; United Nations, Draft Universal Declaration on the Independence of Justice; Bangalore Principles on Judicial Integrity (2003).

Article 11, paragraph 1, of the Corruption Convention builds on such provisions and emphasizes the independence of the judiciary and its crucial role in combating corruption. It more specifically requires that States parties take measures, in accordance with the fundamental principles of their legal system and without prejudice to judicial independence

- to strengthen integrity and
- to prevent opportunities for corruption among members of the judiciary.

Such measures may include rules with respect to the appointment and conduct of members of the judiciary. This option may require legislation depending on the tradition, laws and procedures of each State. For instance, it may necessitate revisiting the provisions of the constitution and perhaps assessing the rules and procedures under which judicial appointments are made as well as mechanisms of accountability the judiciary has decided for itself, to ascertain if they fulfill the requirements of article 11.

3. Optional requirements/Obligation to consider

N/A

4. Optional/States parties may wish to consider

Article 11, paragraph 2, invites States parties to consider the introduction and application of similar measures with respect to the prosecution service in States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service. Again, such requirements are not necessarily legislative in nature and will depend on the tradition, laws and procedures of each State[18].

The objective of this provision is to cover prosecution services and their accountability. To the extent that a State party places them under the executive or judiciary, they are already covered by other provisions of the Convention. The point of paragraph 2 is to cover instances where they the other provisions do not cover them[19]. So, this provision calls for measures similar to those applying to the judiciary, if such measures are necessary for the prosecution service, where it enjoys similar independence.

E. Private sector

Article 12
Private sector

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 cooperation between law enforcement agencies and relevant private entities;

[18] Caution: there are some legal systems where the prosecution does form part of the judiciary, but are independent.
Example: Poland [*cite examples of different prosecution and judiciary services; issue of "independence" is delicate. Is there independence when prosecution is within a hierarchy? Croatia?]*

[19] As for example in Argentina and Brazil [*references and text to be inserted*].

(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.

1. Summary of main requirements

In accordance with Article 12 (1), States parties must take measures to

- prevent corruption in the private sector
- enhance accounting and auditing standards in the private sector
- provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures[20].

[20] For specific examples of national implementation: South Africa, Competition Act 89 (1998); Thailand's Competition Act (1999)
Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption**;** European Union, Joint Action on Corruption in the Private Sector; United Nations Declaration against Corruption and Bribery in International Commercial Transactions; ADB-OECD Anti-Corruption Initiative for Asia-

Article 12 (2) offers several examples of measures to achieve these ends:

(a) Promote cooperation between law enforcement and private entities;

(b) Promote the development of standards and procedures, such as codes of conduct and good practices guides;

(c) Promote transparency among private entities;

(d) Prevent the misuse of procedures regulating private entities;

(e) Prevent conflicts of interest;

(f) Ensure that private enterprises have adequate internal auditing controls.

In accordance with Article 12 (3), States parties must take measures 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.

In accordance with Article 12 (4) States parties must disallow the tax deductibility of expenses that constitute bribes (see articles 15 and 16) and other expenses that further corrupt conduct.

2. Mandatory requirements/Obligation to legislate

Article 12 (1) requires that States parties take three types of measures in accordance with the fundamental principles of their law.

The first is a general commitment to take measures aimed at preventing corruption involving the private sector. The provisions in the rest of this paragraph and article are steps towards the achievement of that goal.

The second type of measures mandated by this paragraph aim at the enhancement of accounting and auditing standards. Such standards provide transparency, clarify the operations of private entities, support confidence in its annual and other statements, and help prevent as well as detect malpractices (see several concrete measures States may adopt towards the attainment of prevention of corruption in the private sector and accountability under paragraph 2 discussed below).

The third type of measures States must take relate to the provision, where appropriate, of effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with the accounting and auditing standards mandated above.

Article 12 (3) requires some specific measures relative to accounting practices known to be quite susceptible to abuse. States parties are required to take any necessary measures, in accordance with their 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;

Pacific, Anti-Corruption Action Plan for Asia and the Pacific.

(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.

The implementation of this provision may require legislation.

Article 12 (4) requires that States parties disallow the tax deductibility of expenses that constitute bribes and, where appropriate, other expenses incurred in furtherance of corrupt conduct. This provision aims at the elimination of legal inconsistencies and confusion, which might allow fiscal benefits from corrupt practices. This is consistent with article 15 and 16 of this Convention, which mandate the establishment of bribery of national and foreign public officials or officials of international organizations.

3. Optional requirements/Obligation to consider

N/A

4. Optional/States parties may wish to consider

Article 12 (2) outlines a number of good practices, which have been shown to be effective in the prevention of corruption in the private sector and the enhancement of transparency and accountability.

The measures to achieve these ends may include, *inter alia*:

(a) Promoting cooperation between law enforcement agencies and relevant private entities;

Very often, private enterprises are in the best position to identify and detect irregularities indicative of corrupt conduct. They frequently are also a victim of corrupt practices engaged in by competitors who may thereby gain unfair and illicit advantages. A cooperative relationship between the private sector and law enforcement agencies, thus, is instrumental to both the prevention and deterrence of corruption[21] **(**see also Article 39).

(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[22];

[21] In France, for example, since 1997 the Service Central de Prévention de la Corruption (SCPC) has been developing joint programs with the private sector aimed at identifying best practices to help companies and their employees to prevent them from engaging in malpractices and to adopt a professional behavior consistent with prevailing anti-corruption rules and regulations. Conventions/agreements were signed between public and private companies and the SCPC, in order, to share information, to help companies write or improve their code of Ethics, and to be part of their internal training programs.

[22] For example, information on Australia's and Hong Kong Special Administrative Region of the People's Republic of China's initiatives in this area can be found at p. 10 of the document available at http://www1.oecd.org/daf/asiacom/pdf/ac-policies-asiapacific-str.pdf and at p. 80 of the document available at http://www.adb.org/Documents/Books/Controlling-Corruption/chapter3.pdf.

Codes of conduct can be formal or informal **[Code of ethics of enterprises in the procurement sector**]. They may be developed through private sector or even single company initiatives. They may be introduced under government sponsorship in consultation with the private sector. An important function performed by such codes is to enhance predictability, clarify issues and procedures, provide guidelines and support relative to the correct course of action in frequently arising dilemmas for private officials. Another function is to assist in the training on how to avoid conflicts of interest, what to do when they arise, and establish clear lines between acceptable and unacceptable conduct. Private initiatives are not a substitute for what governments deem necessary and appropriate for regulation, but the States may wish to consider giving official sanction to certain private sector initiatives.

The development and application of such instruments towards higher integrity in private entities and should be encouraged to address areas of competition and vulnerabilities, including the contractual relations of private business with State agencies[23].

> (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;

Risks of corruption and vulnerability relative to many kinds of illicit abuses are higher when transactions and the organizational structure of private entities are not transparent. Where appropriate, it is important to enhance transparency with respect to the identities of persons who play important roles in the creation and management or operations 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;

The areas of subsidies and licensing for certain commercial activities, as with other areas where the state intervenes in one way or another in economic life and the private sector, have been shown to be vulnerable to corrupt practices or other abuse. States are encouraged to pay particular attention to the prevention of corrupt conduct in those areas[24].

> (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 (see also Article 8, paragraph 5; see also subparagraph b above)[25];

> (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

[23] See, for example, OECD publication "Conflict of interest policies in the public sector" http://www1.oecd.org/daf/asiacom/pub_coi.htm. Example from Argentina, Canada, Colombia, France, OAS?

[24] See, for example, annual and special reports by the EU Anti-Fraud Office (OLAF), the EU Court of Auditors, the US General Accounting Office, etc.. See also Regulations on "Pantouflage" in France (Loi N° 94-530 of 28 June 1994), www.legifrance.gouv.fr, and www.ccomptes.fr/Cour-des-comptes/publications/bibliographie/biblio_5.htm

[25] National examples setting limits and time limitations to be inserted (Australia, France, Hong Kong Special Administrative Region of the People's Republic of China, USA).

private enterprises are subject to appropriate auditing and certification procedures.

Corrupt and other illegal practices (as well as mismanagement) can be prevented, detected and remedied through internal audit controls, whereby a person or group is in charge of this responsibility and reports to executives on a regular basis. Simple and small enterprises may not require such arrangements. The States are invited to take into account the structure and size of entities that may be asked to implement such internal controls[26]. Similar, but less formal measures include the rotation of staff, period surveys about awareness of rules and regulations, policies ensuring the maintenance of proper documentation, etc.

F. Prevention of money-laundering

Article 14
Measures to prevent money-laundering

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 customer 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 cooperate 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

[26] It is noteworthy that over-regulation – or perceived over-regulation – can be counter-productive, as they may generate motives and incentives for non-compliance rather than the desired effects.

(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator[27].

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 cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

Introduction

In order for corrupt officials to enjoy the benefits of their illicit activities, they must hide the origin of their funds. In addition to the separate offence of concealment (see art. 24), this is money-laundering, which consists in the disguise of the illegal origin of the proceeds of crime. This is done essentially in three stages: by introducing the proceeds into the financial system ("placement"), engaging in various transactions intended to obfuscate the origin of and path taken by the money ("layering"), and thereby integrating the money into the legitimate economy through apparently legitimate transactions ("integration").

A critical part of money-laundering is placing illicit funds into the financial system. Once that is done, tracing the assets becomes much harder or even impossible. Stopping criminal actors from taking that first step and developing the capacity to track the movement of assets is, therefore, crucial. International cooperation and harmonization is indispensable.

For these reasons, article 14 of the Convention introduces measures aimed at preventing such activities and at enlisting the assistance of financial institutions and others in preventing the introduction of criminal funds into the financial system, in detecting transactions in the system that may be of criminal origin and in facilitating the tracing of the funds involved in such transactions. Such measures have been recommended by FATF and similar regional bodies. Articles 31, 46, 52, 57 and 58 concerning the freezing, seizure, confiscation and disposal/return of proceeds from offences established under the Convention, collection of information and international cooperation are also relevant in this regard.

Article 14 sets out a number of measures - some mandatory and some strongly recommended - that are intended to ensure that States parties have in place a legal and administrative regime to deter and detect money-laundering. The overall objective is to provide a comprehensive regime that facilitates the identification of money-laundering activity and promotes information exchange to a range of authorities dedicated to combating money-laundering.

Financial institutions and other designated entities, including money remitters, are required to take measures to prevent the introduction of criminal funds into the financial system and to provide the means to identify and trace such funds when they are already in the financial system, as well as to link them to their owners to facilitate apprehension and prosecution.

[27] For specific examples of national implementation: Australia, Financial Transaction Reports Act, parts II and III, (1988); Hong Kong, Prevention of Money Laundering, Guideline No. 3.3.

States must adopt and integrate into their financial infrastructure specific measures, such as procedures for financial institutions to know their customers, record-keeping and reporting suspicious transactions to national authorities. These procedures need to be part of a comprehensive regulatory regime that facilitates the required domestic and international cooperative relationships. Many countries have established financial intelligence units to collect, analyze and exchange relevant information efficiently, as needed and in accordance with their laws. States parties are asked to consider the establishment of such units, which entails a more substantial commitment of resources.

The Convention builds on numerous earlier and continuing initiatives at the national, regional and international levels (see more details in the next chapter – discussion of the criminalization of money laundering).

As national drafters implement this Convention, it would be useful to pay attention to other international initiatives and conventions with related or identical requirements. To the extent States consider becoming parties to such conventions also, they may wish to consider planning their implementation work in a way to meet the obligations simultaneously and in a coordinated fashion. In this light, drafters should be aware of the following:

- the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, adopted in 1990
- the 1999 United Nations Convention for the Suppression of the Financing of Terrorism
- the establishment of FATF in 1990 and issuance of Recommendations regarding money laundering and terrorist financing
- the 2000 United Nations Convention against Transnational Organized Crime
- UN Security Council Resolutions 1267, 1373 and 1377 regarding the financing of terrorist acts

For some States such legislative, regulatory and administrative obligations can be more time-consuming to implement than for States that already have structures to combat money laundering. The measures required by this Convention need to be integrated into the general financial infrastructure of each jurisdiction. Therefore, the time required for implementation of these measures will largely depend on the nature and complexity of local financial institutions, as well as the degree to which they are involved in cross-border transactions.

In this process, attention should be focused on the specific context and vulnerabilities of each jurisdiction. In States that do not currently have such measures in place, the process of implementation can proceed contemporaneously with ratification, as long as these measures are in place when the Convention enters into force for the State party concerned.

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 the identification, freezing and confiscation of proceeds of corrupt conduct (art. 31), international cooperation (chapter IV) and asset recover (chapter V). 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.

1. Summary of main requirements

Article 14 contains two mandatory requirements:

- To establish a comprehensive domestic regulatory and supervisory regime to deter money-laundering (para. 1 (a));
- To ensure that agencies involved in combating money-laundering have the ability to cooperate and exchange information at the national and international levels (para. 1 (b)).

In addition, States must consider

- establishing a financial intelligence unit (art. 14 1(b))
- implementing measures to monitor cash movements across their borders (para. 2)
- implementing measures to require financial institutions to collect information on originators of electronic fund transfers, maintain information on the entire payment chain and scrutinize fund transfers with incomplete remitter information (para. 3)
- developing and promoting global, regional and bilateral cooperation among relevant agencies to combat money-laundering (para. 5).

2. Mandatory requirements/Obligation to legislate

Regulatory and Supervisory Regime

Article 14, paragraph 1 (a), requires that States parties establish a regulatory and supervisory regime within their competence in order to prevent and detect money-laundering activities [28]. This regime must be comprehensive, but the precise nature and particular elements of the regime are left to States, provided that they require at a minimum banks and non-bank financial institutions to ensure:

- Effective customer identification;
- Accurate record-keeping;
- A mechanism for the reporting of suspicious transactions[29].

[28] Relevant international and regional treaties and documents include: [**include BIS]** [Commonwealth Model Law For The Prohibition Of Money Laundering; United Nations Political Declaration and Action Plan against Money Laundering; Model Legislation on Laundering, Confiscation and International Co-operation in Relation to the Proceeds of Crime [for civil law jurisdictions]; Model Money Laundering and Proceeds of Crime Bill [for common law jurisdictions]; Organization of American States, CICAD Model regulations concerning laundering offences connected to illicit drug trafficking and related offences; European Union Council Directive on prevention of the use of the financial system for the purpose of money laundering; European Union Directive 2001/97/EC on the prevention of the financial system for the purpose of money laundering; International Association of Insurance Supervisors**,** Anti-Money Laundering Guidance Notes for Insurance Supervisors and Insurance Entities; Organization of American States (OAS)/Inter-American Drug Abuse Control Commission (CICAD**)** Summit of the Americas Ministerial Conference Concerning the Laundering of Proceeds and Instrumentalities of Crime - Ministerial Communiqué; Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses; United Nations Convention against Transnational Organized Crime; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

[29] For specific examples of national implementation: Australia: Cash Transactions Reports Act (1988); Financial Transaction Reports Regulations (1990). Statutory Rules 1990 No. 36 as Amended; Financial Transaction Reports Act (1988); Croatia, Law on the Prevention of Money Laundering (1997); Germany, Act on the Detection of Proceeds from Serious Crimes (Money Laundering Act)(1993); Hong Kong, Prevention of Money Laundering, Guideline No. 3.3; New

The requirements extend to banks, non-bank financial institutions, that is, insurance companies and securities firms, and where appropriate, other bodies particularly susceptible to money-laundering (art. 14, para. 1 (a)). The interpretative notes add that other bodies may be understood to include intermediaries, which in some jurisdictions may include stockbroking firms, other securities dealers, currency exchange bureaux or currency brokers (A/58/422/Add.1, para. 18). An addition to the equivalent provisions in the UN TOCC is that financial institutions include "natural or legal persons that provide formal or informal services for the transmission of money or value". This is a reference to concerns about both formal remitters and informal value transfer systems, such as the "hawala" networks that originated in South Asia and have become global in recent decades. These channels offer valuable services to expatriates and their families, but are also vulnerable to abuse by militant groups and other criminals, including corrupt public officials.

Thus, this regime should apply not only to banking institutions, but also to areas of commerce where high turnover and large volumes make money-laundering likely. Previous experience shows that money-laundering activities have taken place in the real estate sector and in the trade of commodities, such as gold, precious stones and tobacco.

In many fora, the list of institutions is being expanded beyond financial institutions to include such businesses and professions. For example, recommendation 12 of the FATF Forty Recommendations extends, when certain conditions are met, the requirements of customer due diligence and record-keeping to casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals and accountants and trust and company service providers. Similar requirements are set forth in Directive 2001/97/EC adopted by the European Parliament and the Council of the European Union on 4 December 2001.

More recently, increased attention has been focused on money service businesses and informal value transfer systems, such as *hawala* and *hundi*. In a growing number of jurisdictions, these are also subject to a regulatory regime for the purposes of detecting money-laundering, terrorist finance or other offences[30].

Customer identification entails requirements that holders of accounts in financial institutions and all parties to financial transactions be identified and documented. Records should contain sufficient information to identify all parties and the nature of the transaction, identify specific assets and the amounts or values involved and permit the tracing of the source and destination of all funds or other assets.

The requirement for record-keeping means that client and transaction records should be kept for a specified minimum period of time. Under the Forty Recommendations, at least five years is recommended, while for States parties to the International Convention for the Suppression of Financing of Terrorism, retention of records for five years is mandatory.

Suspicious transactions are to be notified to the financial intelligence unit or other designated agency. Criteria for identifying suspicious transactions should be developed

Zealand, Financial Transactions Reporting (1996); Singapore, Guidelines on the Prevention of Money Laundering, articles 3-6 (2000); Turkey, Regulation of Banks to Identify Customers.

[30] See examples of regulations in Australia, Germany, Hong Kong Special Administrative Region of China, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland and the United States.

and periodically reviewed in consultation with experts knowledgeable about new methods or networks used by money launderers.

The Interpretative Notes indicate that the words "suspicious transactions" may be understood to include unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer's business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general" (A/58/422/Add.1, para. 19). The International Convention for the Suppression of the Financing of Terrorism defines suspicious transactions, based on the FATF definition, as all complex, unusually large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose (General Assembly resolution 54/109, annex, art. 18, para. 1 *(b)* (iii)).

The powers to be granted to regulators and staff of the financial intelligence unit to inspect records and to compel the assistance of record keepers in locating the records must also be defined. As some of these records may be covered by confidentiality requirements and banking secrecy laws that prohibit their disclosure, provisions freeing financial institutions from complying with such requirements and laws may be considered. Drafters should also ensure that the inspection and disclosure requirements are written in such a way as to protect financial institutions against civil and other claims for disclosing client records to regulators and financial intelligence units.

The implementation of such measures is likely to require legislation. In particular, the requirement that financial institutions must disclose suspicious transactions and the protection of those who make disclosures in good faith will require legislation to override banking secrecy laws (see also article 52 (paras. 1-3) on the prevention and detection of transfer of proceeds of crime).

Domestic and International Cooperation

Coordination of efforts and international cooperation is as central to the problem of money-laundering as it is to the other offences covered by the Convention. Beyond the general measures and processes such as extradition, mutual legal assistance, joint investigations and asset recovery (which are covered in detail in the sections on international cooperation in chapter IV and asset recovery in chapter V, below), the Convention seeks to strengthen such coordination and cooperation

Article 14, paragraph 1 (b), requires that that administrative, regulatory, law enforcement and other domestic authorities in charge of the efforts against money-laundering are able to cooperate at both the national and international level. This includes the exchange of information within
the conditions prescribed by their domestic law. This must be done without limiting or detracting from, or in the words of the Convention, "without prejudice to", the requirements generated by article 46 on mutual legal assistance.

In order for cooperation to be possible, domestic capabilities must be developed for the identification, collection and interpretation of all relevant information. Essentially, three types of entity may be part of a strategy to combat money-laundering and could, thus, be considered by States:

- Regulatory agencies responsible for the oversight of financial institutions, such as banks or insurance entities, with powers to inspect financial institutions and

enforce regulatory requirements through the imposition of regulatory or administrative remedies or sanctions;
- Law enforcement agencies responsible for conducting criminal investigations, with investigative powers and powers to arrest and detain suspected offenders and that are subject to judicial or other safeguards;
- Financial intelligence units (FIU), which are not required under the Convention, whose powers are usually limited to receiving reports of suspicious transactions, analyzing them and disseminating information to prosecution agencies, although some such units have wider powers (see more on FIUs below).

The authority of each entity to cooperate with national bodies and with other similar agencies in other countries is usually specified in the relevant legislation. If States do have such entities, legislation may be needed to amend existing mandates and the division of labour among these entities, in accordance with each State's constitutional or other principles and the specificities of its financial services sector.

Some of these measures may constitute a strong challenge for countries in which the financial sector is not heavily regulated and the necessary legislation and administrative infrastructure may have to be created. It is essential to note, however, that the relevance and utility of these arrangements are not limited to the control of money-laundering, but also to corruption. They also strengthen confidence in the financial infrastructure, which is instrumental to sustainable social and economic development.

The remaining provisions of this article are closely connected to domestic and international cooperation, but are examined below, as they are not mandatory under the Convention.

3. Optional requirements/Obligation to consider

Financial Intelligence Units (FIUs)

Article 14, paragraph 1 (b), requires States parties to consider the establishment of financial intelligence units to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering. Since the 1990s, many States have established such units as part of their regulatory police or other authorities. There is a wide range of structure, responsibilities, functions and departmental affiliation or independence for such units. According to the interpretative notes, the call for the establishment of a financial intelligence unit is intended for cases where such a mechanism does not yet exist (A/58/422/Add.1, para. 20).

The Egmont Group (an informal association of financial intelligence units) has defined such units as a central, national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating to the competent authorities, disclosures of financial information:
(i) concerning suspected proceeds of crime, or (ii) required by national legislation or regulation, in order to counter money-laundering."[31]

The Convention does not require that a financial intelligence unit be established by law, but legislation may still be required to institute the obligation to report suspicious transactions to such a unit and to protect financial institutions that disclose such information in good faith (See also art. 58 on FIU). In practice, the vast majority of

[31] The website for the Egmont group is: http://www.egmontgroup.org/

financial intelligence units are established by law. If it is decided to draft such legislation, States may wish to consider including the following elements:

- Specification of the institutions that are subject to the obligation to report suspicious transactions and definition of the information to be reported to the unit;
- Legislation defining the powers under which the unit can compel the assistance of reporting institutions to follow up on incomplete or inadequate reports;
- Authorization for the unit to disseminate information to law enforcement agencies when it has evidence warranting prosecution and authority for the unit to communicate financial intelligence information to foreign agencies, under certain conditions;
- Protection of the confidentiality of information received by the unit, establishing limits on the uses to which it may be put and shielding the unit from further disclosure;
- Definition of the reporting arrangements for the unit and its relationship with other government agencies, including law enforcement agencies and financial regulators. States may already have money-laundering controls in place that can be expanded or modified to conform to the requirements of article 14 relating to money-laundering and those of articles 31 relating to freezing, confiscation, seizure, disposal of proceeds, as well as asset recovery, as necessary.

It is worth noting that actions taken to conform to article 14 may also bring States into conformity with other conventions and initiatives, such as Security Council resolution 1373 (2001), the International Convention for the Suppression of the Financing of Terrorism, The United Nations Convention against Transnational Organized Crime and the FATF eight Special Recommendations on Terrorist Financing.

Further information about various options that can be included in laws, regulations and procedures to combat money-laundering can be obtained from the Anti-Money-Laundering Unit of the United Nations Office on Drugs and Crime.

Other Measures

As part of the effort to develop the capacity to provide effective international cooperation, States are required seriously to consider the introduction of feasible measures aimed at monitoring the cross-border movement of cash and other monetary instruments (article 14, para. 2). The goal of such measures would be 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. Generally, structures based on monitoring or surveillance will require legal powers giving inspectors or investigators access to information on cross-border transactions, in particular in cases where criminal behaviour is suspected[32].

Article 14, paragraph 3, contains provisions going beyond the UN Convention against Transnational Organized Crime. It requires that States consider the implementation of measures obliging financial institutions, including money remitters

[32] See http://www1.oecd.org/fatf/pdf/INSR9_BPP_en.pdf For specific examples of national implementation: Australia, Cash Transactions Reports Amendment Act, No. 188 (1991); Financial Transaction Reports Act, part II (1988).

(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

The concern is essentially about the identification of remitters and beneficiaries on the one hand, and the traceability of transaction on the other. There are no exact estimates on how many funds are transferred across national borders, especially with respect to informal remitters, who are popular in many countries. Given that they range in the tens of billions of US dollars, however, it is an area of regulatory concern.

As mentioned above, the Convention builds on parallel international initiatives to combat money-laundering. In establishing a domestic regulatory and supervisory regime, States parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering (article 14, para. 4). An interpretative note states that during the negotiations, the words "relevant initiatives of regional, interregional and multilateral organizations" 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 organizations 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 Organization of American States" (A/58/422/Add.1, para. 21).

Ultimately, States are free to determine the best way to implement this article. However, the development of a relationship with one of the organizations working to combat money-laundering would be important for effective implementation.

In implementing article 14, paragraph 4, States may wish to consider some specific elements relative to the measures that the comprehensive regulatory regime must include. The Forty Recommendations are useful in this regard, as are model regulations that have been prepared by the United Nations Office on Drugs and Crime and the Organization of American States (OAS).

Furthermore, Article 14, paragraph 5 requires that States endeavour to develop and promote global, regional, sub-regional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

4. Optional/States parties may wish to consider

G. Information resources

1. National Legislation and Regulation

Anti-corruption bodies
Australia:
Independent Commission Against Corruption Act 1988:

http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/nsw/consol%5fact/icaca1988442/?query=title+%28+%22independent+commission+against+corruption+act+1988%22+%29

Bangladesh:
Anti Corruption Commission Act 2004:
http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019089.pdf

Malawi:
Anti-Corruption Bureau in Malawi:
http://www.sdnp.org.mw/ruleoflaw/acb/index.html (Link to the Law Library is not working at the moment)
(Art. 18 ff. "Independent Commission Against Corruption")

South Africa:
SPECIAL INVESTIGATING UNITS AND SPECIAL TRIBUNALS ACT 1996 (Act No. 74 of 1996):
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Anti-Corruption_National_Legislation/1017332911__iic10.2.doc

Trinidad andTobago:

INTEGRITY IN PUBLIC LIFE ACT, 2000 (ACT NO. 83 OF 2000)
PART II
ESTABLISHEMENT, POWERS AND FUNCTIONS OF INTEGRITY COMMISSION

4. (1) There is established an Integrity Commission consisting of a Chairman, Deputy Chairman and three other members who shall be persons of integrity and high standing.

(2) At least one member of the commission shall be an attorney-at-law of least ten years experience.

(3) At least one member of the commission shall be a chartered or certified accountant.

(4) The Chairman and other members of the commission shall be appointed by the President after consulting with the Prime Minister and the Leader of the Opposition

(5) A person shall not be qualified to hold office as a member of the Commission where he is a person in public life or a person exercising a public function or a person who is not a citizen of Trinidad and Tobago.

(6) Three members of the commission of whom one shall be the Chairman or Deputy Chairman, shall constitute a quorum.

5. (1) The Commission shall –

(a) carry out those functions and exercise the powers specified in this Act;
(b) receive, examine and retain all declarations filed with it under this Act;
(c) make such inquiries as it considers necessary in order to verify or determine the accuracy of a declaration filed under this Act;
(d) compile an maintain a Register of Interests;
(e) receive and investigate complaints regarding any alleged breaches of this Act or the commission or any suspected offence under the Prevention of Corruption Act;
(f) investigate the conduct of any person falling under the purview of the Commission which, in the opinion of the commission, may be considered dishonest or conductive to corruption;
(g) examine the practices and procedures of public bodies, in order to facilitate the discovery of corrupt practices;

(h) instruct, advise and assist the heads of public bodies of changes in practices or procedures which may be necessary to reduce the occurrence of corrupt practices;
(i) carry out programs of public education intended to foster an understanding of standard of integrity; and
(j) perform such other functions and exercise such powers as are required by this Act.

(2) In the exercise of its powers and performance of its functions under this Act, the Commission –

(a) shall not be subject to the direction or control of any other person or authority;
(b) may in all cases where it considers it appropriate to do so, make use of the services or draw upon the expertise of any law enforcement agency or the Public Service; and
(c) shall have the power to authorize investigations, summon witnesses, require the production of any reports, documents, other relevant information, and to do all such things as it considers necessary or expedient for the purpose of carrying out its functions

…

10. The commission shall, not later than 31st March in each year, make a report to Parliament of its activities in the preceding year and the report shall be tabled in the Senate and the House of Representatives not later than 31st May, so, however, that the reports shall not disclose particulars if any declaration filed with the commission.

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)
https://www.imolin.org/amlid/showLaw.do?law=6232&language=ENG&country=AUL

Cash Transactions Reports Act No. 188 (1991)
https://www.imolin.org/amlid/showLaw.do?law=6233&language=ENG&country=AUL

New South Wales, Independent Commission against Corruption
http://www.icac.nsw.gov.au/

New South Wales, Independent Commission against Corruption Act (1988)
http://www.austlii.edu.au/au/legis/nsw/consol_act/toc-I.html

New South Wales, Freedom of Information Act (1989)
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpsearch2.pl?key=Access_to_information/018.txt

Belize

Freedom of Information Act (1994)

http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Access_to_information/981270987__f1.html

on codes of conduct: PREVENTION OF CORRUPTION IN PUBLIC LIFE ACT; CHAPTER 12:
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Monitoring_Assets_and_Life-Styles_of_Public_Officials/981295982__d8.html
Art. 8; Art. 14 following

Botswana
Directorate on Economic Crime and Corruption
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpsearch2.pl?key=Anti-corruption_agencies/003.txt

Croatia
Law on the Prevention of Money Laundering (1997)
http://www.unodc.org/unodc/legal_library/hr/legal_library_1998-04-22_1998-1.html

France
La formation, SCPC
http://www.justice.gouv.fr/minister/formscpc.htm
SCPC training modules
The SCPC offers training modules to government services and private enterprises, which ask for them.
There are two main types of module on offer:
1. *For control services*, in order to help them detect fraud or corruption, the SCPC has drawn up a diagram of risks and a list of the indicators of fraud making it possible to identify, demonstrate and prove fraudulent arrangements. To this end, the most common such arrangements are analyzed and described, while "fraud cards" are prepared for each accounting heading (between 3 and 10 fraud possibilities per heading). Broadly speaking, the tools used are those of account auditing.

2. *For government services and enterprises*, emphasis is placed rather on the introduction of preventive and effective internal control procedures. Based on the theme "how to structure an effective internal control", the SCPC leads the officials concerned in an analysis of:

-- identifying a system of reference: existing corpus, legislation, regulations or codes, their gaps and limitations;
-- a typology of risks: What are the weak points? What type of corruption? At what level? What are the risk indicators?
-- improving internal controls following an inventory: propositions and approval or otherwise by the SCPC.

For the purposes of such training, the SCPC gathers officials together by profession or by directorate (taking account of sectors and posts with different risks), involves them continuously with the critical examination of their organization (self-assessment by the staff) and waits for them to make reform proposals which it validates (tailored amendments depending on the staff and risks involved). Once the programme of measures has been determined, the SCPC validates it and monitors implementation (by means of inspections).

Some leading examples of SCPC training:

-- mobilization of the SCPC following the scandal of the construction of TGV Nord (high-speed train link);
-- the Ministry of Public Works: 3 years' monitoring of 3 000 senior managers, in *particular those in charge of procurement contracts.*

Germany
Act on the Detection of Proceeds from Serious Crimes (Money Laundering Act) (1993)

Hong Kong Special Administrative Region of China
Independent Commission against Corruption
http://www.unodc.org/unodc/legal_library/hr/legal_library_1998-04-22_1998-1.html

Bribery Ordinance, Chapter 201
http://www.legislation.gov.hk/blis_ind.nsf/CurAllEngDoc?OpenView&Start=201&Count=30&Expand=201.1

Prevention of Money Laundering, Guideline No. 3.3
http://www.info.gov.hk/hkma/eng/guide/guide_no/2guide_33b.htm#Record%20keeping

Ireland
Access to Information Act (1997)

Israel
Prohibition of Money Laundering Law 5760-2000
http://www.justice.gov.il/NR/rdonlyres/2B06AE37-CD76-443C-B10D-F4822108B869/0/MONEYLAUNDERINGLAWmeodkan.doc

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
Anti Corruption Commission

Anti-Corruption and Economic Crimes Act, (2003)
http://www.tikenya.org/documents/Economic_Crimes_Act.doc

Latvia
Draft Law on the Anti-Corruption Bureau
Article 1. Purpose of the Law.

Purpose of the Law is to define legal status and activity of Anti-Corruption Bureau (hereinafter referred to as – ''ACB'') in order to take complex measures in corruption prevention and fighting corruption.

Article 2. Status of the ACB.

(1) Anti-Corruption Bureau is an institution of public administration which within its competence performs the functions of corruption prevention and fighting corruption set forth by this law.
(2) The ACB is under the supervision of the Ministry of Justice and it has an operational account in the State Treasury. The ACB has its own seal with an image of the small state emblem of the Republic of Latvia and its full name.

Lebanon
Law 318 –Fighting Money Laundering
https://www.imolin.org/amlid/showLaw.do?law=4828&language=ENG&country=LEB

Article 4
Institutions not subjected to the provisions of the Banking Secrecy Law of September 3, 1956, including individual institutions, namely exchange offices, financial intermediation companies, leasing companies, mutual funds, insurance companies, as well as companies promoting, building and selling real estate, and merchants dealing with high-value commodities (jewellery, precious stones, gold, art collections, antiques) must keep special records for operations that exceed an amount to be determined by the Banque du Liban in the regulations to be set out under Article 5 of this Law.

They must also ascertain, through official documents, the identity and address of each client, and must keep, for a period of no less than five years, photocopies of these documents, as well as photocopies of the operation-related documents.

Article 5
Institutions subjected to the provisions of the Banking Secrecy Law of September 3, 1956 must control their operations with clients, in order to avoid involvement in what may conceal money laundering operations resulting from any of the offences specified by this Law.

Within one month from the enforcement of this Law, the Banque du Liban shall establish and publish regulations setting out the rules of such control, including, as a minimum, the following obligations to be met by banks and financial institutions:

> To ascertain the true identity of their permanent clients and that of the beneficial owner, when operations are carried out through proxies, through figureheads acting for individuals, institutions or companies, or through numbered accounts.
>
> To apply the same identity verification process to transient clients, when the value of the requested operation or series of operations exceeds a specified amount.
>
> To keep, at least for a five-year period after completing the operations or closing the accounts, photocopies of all operation-related documents, as well as photocopies of official documents about the identity of operators.
>
> To identify signals revealing the existence of money-laundering operations, and set out the principles of due diligence that could detect suspicious operations.
>
> To refrain from delivering incorrect statements that aim at misleading administrative or judicial authorities.

To ensure that their auditors monitor the implementation of regulations to be set out under this Article, and that they report any violation to the Governor of the Banque du Liban.

Article 6
An independent, legal entity with judicial status shall be established at the Banque du Liban, and shall discharge its duties without being under the authority of the Banque du Liban. Its mandate is to investigate money-laundering operations, and to monitor compliance with the rules and procedures stipulated by this Law. It will be named hereafter "the Special Investigation Commission" or "the Commission".

The Special Investigation Commission The Special Investigation Commission shall consist of:

The Governor of the Banque du Liban or, in case of impediment, one of the Vice-Governors designated by him.	Chairman
The President of the Banking Control Commission or, in case of impediment, a member of the Commission designated by him.	Member
The judge appointed to the Higher Banking Commission or, in case of impediment, the alternate judge appointed by the Higher Judicial Council for a period equal to the term of the judge.	Member
A member and his/her alternate, recommended by the Governor of the Banque du Liban and appointed by the Council of Ministers.	Member
A member and his/her alternate, recommended by the Governor of the Banque du Liban and appointed by the Council of Ministers.	Member

The Special Investigation Commission The Special Investigation Commission shall appoint a full-time Secretary, who shall be responsible for the tasks assigned to him by the Commission, and for implementing its decisions. The Secretary shall directly supervise a special body of auditors designated by the Commission for the purpose of controlling and verifying the implementation of the obligations mentioned in the said law. The said control shall be done on a continuous basis. And none of these shall be bound by the provisions of the Banking Secrecy Law of September 3, 1956.

The mission of The Special Investigation Commission is to investigate operations that are suspected to be money-laundering offences, and to decide on the seriousness of evidence and circumstantial evidence related to any such offence or offences.

When accounts opened at banks or financial institutions are suspected to have been used for money-laundering purposes, the lifting of banking secrecy provisions to the benefit of the competent judicial authorities and the Higher Banking Commission represented by its Chairman, shall be the exclusive right of the Commission.

The Commission The Commission is convened by its chairman. It shall meet, at least, twice a month and as needed. The legal quorum requires the presence of three members at least.

The Commission The Commission shall take its decisions at a majority of the attending members. In case of a tie, the Chairman shall have a deciding vote.

The Commission The Commission shall establish, within one month from the enforcement of this Law, its own functioning rules and regulations governing its regular and contractual staff who are subjected to private law, namely the obligation of confidentiality.

In the framework of the budget prepared by the Commission and approved by the Central Council of the Banque du Liban, the expenses of the Commission and of its ancillary bodies shall be borne by the Banque du Liban.

Article 7
The concerned parties referred to in Articles 4 and 5 of this Law must immediately report to the Commission the details of operations they suspect to be concealing money laundering.

In discharging their duties, the auditors of the Banking Control Commission must, through their Chairman, report to the Commission any operations they suspect to be concealing money-laundering operations.

Article 8
Upon receiving information from the concerned parties mentioned in Article 7, or from official Lebanese or foreign authorities, the Commission shall convene immediately to consider the case.

After perusing the received information, the Commission shall, within a period of three working days, take a temporary decision to freeze the suspected account (s) for a one-time renewable period of five working days, when the source of funds remains unknown or suspected to proceed from a money-laundering offence. During the said period, the Commission shall continue the investigation of the suspected account (s) either directly or through a delegated member of the Commission or a designated concerned responsible, or through its Secretary or an appointed bank auditor. All designated persons shall discharge their duties under the obligation of confidentiality, but without being bound by the provisions of the Banking Secrecy Law of September 3, 1956.

After completing its investigations, the Commission shall take, during the temporary freezing period of the suspected account (s), a final decision on whether to free the said account (s) if the source of funds is not found to be illicit, or to lift banking secrecy regarding the account (s) and maintain the freezing. If, at the end of the period stipulated in Paragraph 2 above, the Commission does not render any decision, the said account (s) shall be automatically deemed free. The final decision of the Commission is not subject to any ordinary or extraordinary form of administrative or judicial recourse, including recourse against abuse of authority.

In case of a decision on lifting banking secrecy, the Commission shall send a certified copy of its justified, final decision to the State Prosecutor of the Supreme Court, the Higher Banking Commission through its Chairman, the concerned party, the concerned bank, and the concerned foreign authority. This shall be effected either directly or through the official party through which the information has been received.

Article 9
The Chairman of the Commission or his/her directly designated delegate may communicate with any Lebanese or foreign judicial, administrative, financial, or security authority, in order to request information or know the details of previous investigations

that are linked or related to ongoing investigations by the Commission. And the Lebanese authorities must immediately respond to such an information request.

Article 10
The Commission The Commission shall establish a central system named the Financial Investigation Administrative Unit, which will function as the competent authority and the official center for monitoring, collecting and archiving information on money-laundering offences, and for exchanging information with foreign counterparts.

The Financial Investigation Administrative Unit The Financial Investigation Administrative Unit shall periodically provide the Commission with all available information on money-laundering offences.

The Commission The Commission shall determine the number of the members of this Unit, their functions and their compensation. When necessary, it shall take statutory disciplinary measures, including termination of employment in case of breach of duty, without precluding the possibility of civil or criminal prosecution. All these persons shall be submitted to the same obligations that bind the members of the Commission, especially the obligation of confidentiality.

Article 11
Except for a decision by the Commission to lift banking secrecy, the reporting obligation stipulated by the present Law is absolutely confidential. This absolute confidentiality shall apply to any reporting, natural or moral person, as well as to the documents submitted for this purpose, and to the documents and procedures related to each stage of the investigation.

Article 12
Within the scope of their duties under the provisions of this Law, the Chairman and members of the Commission, and the Commission's staff and delegates, shall enjoy immunity. In consequence, they may not be prosecuted or sued, neither collectively nor individually, for any civil or criminal liability related to the discharging of their duties, including offences specified by the Banking Secrecy Law of September 3, 1956, except when any of them discloses banking secrecy.
In discharging their duties under the provisions of this Law, or according to the decisions of the Commission, the bank and its staff shall enjoy the same immunity.

Article 13
Any person who violates the provisions of Article 4, 5, 7 and 11 of this Law shall be punishable by imprisonment for a period of two months to one year and a fine not exceeding ten million Lebanese pounds, or by either penalty.

Article 14
The State shall confiscate any movable or immovable assets that are proved, by a final court ruling, to be related to, or proceeding from, offences listed in Article 1 of this Law, unless the owners of the said assets prove in court their legal rights thereupon.

Article 15
The reservations specified in Paragraphs 2, 3 and 4 of Article 1 of Law No. 426 of May 15, 1995, related to the ratification of the 1988 United Nations Convention on Fighting Illegal Trade of Narcotics and Psychotropic Drugs, are repealed, as well as the provisions of Article 132 of Law 673 of March 16, 1998, on Narcotics, Psychotropic Drugs and their Raw Materials.

Article 16
Upon entry into force of this Law, any legal provision that is contrary to, or inconsistent with its provisions, especially those specified in the Banking Secrecy Law of September 3, 1956, and those of Law 673 of March 16, 1998, on Narcotics, Psychotropic Drugs and their Raw Materials, shall cease to be operative.

Article 17
This Law shall enter into force on its publication date in the Official Gazette.

Lithuania
National Anti-Corruption Strategy of the Government of Lithuania
Resolution No. 22 (August 2001)

13. In order to involve wider society into the corruption prevention campaign, a permanent Consulting Council should be established to represent wide strata of society, including public institutions, civic society organisations, labour unions, associations of employers, chambers of commerce, etc. At its regular meetings, the council would try to disclose the areas most prone to corruption and those already affected by it. In addition, it would elaborate the joint actions to be taken together with other institutions, including public bodies. Such a civic society commission could operate under the SIS; its composition could be approved by President of the Republic.

Lesotho
Prevention of Corruption and Economic Offences Act, parts II and III (1999)
https://www.imolin.org/amlid/showLaw.do?law=6347&language=ENG&country=LES

PART II ESTABLISHMENT OF DIRECTORATE
Establishment of Directorate
3. (1) There is hereby established a Directorate to be know Directorate on Corruption and Economic Offences which shall 0 Director, two Deputy Directors and such other officers of the Director be appointed.

(2) The Directorate shall be a public office; and according l) sions of the Public Service Act 19951 shall, with such modification~ necessary or set out in this Act, apply to the Directorate and its office!

The Director
4. (1) There shall be a Director who shall be appointed, subjections (2) and (3), by the Prime Minister for a term of 5 years, and ~ responsible for the direction and administration of the Directorate.
(2) No person shall be appointed as a Director unless he is registered as a legal practitioner under the Legal Practitioners Act 19832.
(3) A person holding the office of Director may be removed from office only for inability to exercise the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall. not be removed except in accordance with the provisions of this section.
(4) The Director shall vacate office if the question of his removal has been referred to a tribunal appointed by the Prime Minister under subsection (5) and the tribunal has recommended to the Prime Minister that he ought to be removed for inability as aforesaid or for misbehaviour.
(5) If the Minister represents to the Prime Minister that the question of removing the Director under this section ought to be investigated, then -

(a) the Prime Minister shall appoint a tribunal which shall consist of a Chairman and not less than two other members, selected by the Chief Justice from among persons who hold or have held high judicial office; and

(b) the tribunal shall enquire into the matter and report on the facts thereof to the Prime Minister and recommend to him whether the Director ought to be removed under this section.

(6) If the question of removing the Director has been referred to a tribunal under this section, the Prime Minister, acting in accordance with the advice of

..the Minister, may suspend the Director from the exercise of the functions of his ., office and any such suspension may at any time be revoked by the Prime Minister,

acting in accordance with such advice as aforesaid, and shall in any case cease to have effect if the tribunal recommends to the Prime Minister that the Director should not be removed.

Acting Director

5. (1) If the office of the Director is vacant or the Director is absent from duty for any reason, any of the Deputy Directors shall act as the Director.

(2) If the Director and the Deputy Directors are absent from duty, the Public Service Commission may appoint any other competent person to act as Director until the return to duty of either the Director or any of the I Directors.

PART III FUNCTIONS OF DIRECTORATE

Functions of Directorate

6. The functions of the Directorate shall be-

(a) to receive and investigate any complaints alleging *cot!* in any public body;

(b) to investigate any alleged or suspected offences under or any other offence disclosed during such an investigation

c) to investigate any alleged or suspected contravention I the provisions of the fiscal and revenue laws of Lesotho:

(d) to investigate any conduct of any person, which in the of the Director, may be connected with or conducive to investigation.

(e) to prosecute, subject to section 43, any offence com under this Act;

(f) to assist any law enforcement agency of the Government investigation of offences involving dishonesty or cheat public revenue;

(g) to examine the practices and procedures of public 1 order to facilitate the discovery of corrupt practices an the revision of methods of work or procedures which i ion of the Director, may be conducive to corrupt practice.

(h) to instruct, advise and assist any person, on thematter on ways in which corrupt practices may be eliminate person; (i) to advise heads of public bodies of change in procedures compatible with the effective discharge of the such public bodies which the Director thinks neceSS2 the likelihood of the occurrence of corrupt practices;

(j) to educate the public against the evils of corruption;

(k) to enlist and foster public support in combating corruption;

and

(1) to undertake any other measures for the prevention of corruption and economic offences.

Powers of Director

For the performance of the functions of the Directorate, the Director may-

(a) authorise any officer of the Directorate to conduct an inquiry or investigation into any alleged or suspected offence under this Act;

(b) require any person, in writing, to produce, within a specified time, all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents in relation to the functions of any public or private body.

Mauritius

Prevention of Corruption Act, Government Gazette No. 5, parts III – VI (2002)
https://www.imolin.org/amlid/showLaw.do?law=4877&language=ENG&country=MAR

The Financial Intelligence and Anti-Money Laundering Act, Government Gazette No. 6 (2002)
https://www.imolin.org/amlid/showLaw.do?law=4872&language=ENG&country=MAR

Nepal

Constitution of the Kingdom of Nepal, Part 12 (1990) [still valid?]

New Zealand

Financial Transactions Reporting (1996)

Russian Federation

Decree of the President of the Russian Federation, No.1006 (1994)

Singapore

Prevention of Corruption Act, Chapter 241 (revised 1993)
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Anti-corruption_agencies/981271926__g2.html

Guidelines on the Prevention of Money Laundering (2000)
http://www.mas.gov.sg/masmcm/bin/pt1Notice_824__Guidelines_On_Prevention_Of_Money_Laundering.htm#

Monetary Authority of Singapore 824
22 Feb 2000
NOTICE TO FINANCE COMPANIES
FINANCE COMPANIES ACT, CAP 108
This notice replaces MAS 824 dated 26 May 1999.

Guidelines On Prevention Of Money Laundering

1 INTRODUCTION

1.1 For the preservation, nationally and internationally, of the good name of the financial community in Singapore and recognizing the need to prevent the financial system from being used in furtherance of money laundering activities (described in Section 2) arising from or in connection with drug trafficking or criminal conduct, and taking into account:

i. the provisions of the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Chapter 84A) (***the Act***); and
ii. the Financial Action Task Force 40 Recommendations, in particular Recommendations 9 to 20,

finance companies in Singapore shall comply with the Guidelines issued in this Notice.

1.2 In this Notice, the following terms shall have the meanings ascribed to them in the Act:

i. Terms defined under Section 2 of the Act
   - ***authorised officer***
   - ***criminal conduct***
   - ***drug trafficking***
   - ***drug trafficking offence***
   - ***foreign drug trafficking offence***
   - ***foreign serious offence***
   - ***serious offence***

ii. Terms defined under Section 35 of the Act
   - ***financial transaction document***
   - ***minimum retention period***

2 DESCRIPTION OF MONEY LAUNDERING

2.1 Money laundering is a process intended to mask the benefits derived from drug trafficking or criminal conduct so that they appear to have originated from a legitimate source.

2.2 Generally, the process of money laundering comprises three stages, during which there may be numerous transactions that could alert a finance company to the money laundering activity:

i. ***Placement***: the physical disposal of benefits of drug trafficking or criminal conduct;
ii. ***Layering***: the separation of benefits of drug trafficking or criminal conduct from their source by creating layers of financial transactions designed to disguise the audit trail;
iii. ***Integration***: the provision of apparent legitimacy to benefits of drug trafficking or criminal conduct. If the layering process succeeds, integration schemes place the laundered funds back into the economy so that they re-enter the financial system appearing to be legitimate business funds.

2.3 The chart in Annex 1 illustrates the money laundering stages in greater detail.

3 BASIC PRINCIPLES AND POLICIES TO COMBAT MONEY LAUNDERING

3.1 The Authority seeks to combat money laundering by requiring finance companies to apply the following principles:

i. ***Know your customer***: finance companies shall obtain satisfactory evidence of the customer's identity, and have effective procedures for verifying the bona fides of new customers.
ii. ***Compliance with laws***: management shall ensure that business is conducted in conformity with high ethical standards, that laws and regulations are adhered to, and that service is not provided where there is good reason to suppose that transactions are associated with money laundering activities.
iii. ***Co-operation with law enforcement agencies***: within legal constraints relating to customer confidentiality, finance companies shall co-operate fully with law enforcement agencies. This includes taking appropriate measures allowed by law if there are reasonable grounds for suspecting money laundering. Disclosure of information by finance companies for the purposes of the Act (suspicious transaction reports) shall be made to Head, Suspicious Transactions Reporting Office, Commercial Affairs Department (***STRO***). To facilitate the process, finance companies shall identify a single reference point within their organization (usually a relevant officer of the finance company) to which staff are instructed to report suspected money-laundering transactions promptly.
iv. ***Policies, procedures and training***: each finance company shall adopt policies consistent with the principles set out in this Notice, and ensure that its staff, wherever located, are informed of these policies and adequately trained in matters covered by this Notice. To promote adherence to these principles, finance companies shall implement specific procedures for customer identification, retention of financial transaction documents, and reporting of suspicious transactions.

4 CUSTOMER IDENTIFICATION

General

4.1 Finance companies shall obtain satisfactory evidence of the identity and legal existence of persons applying to do business with them (such as opening an account or a safe deposit facility). Such evidence shall be substantiated by reliable documents or other means. Finance companies should also establish that any applicant claiming to act on behalf of another person is authorized to do so. There should be an explicit policy that significant business transactions will not be conducted with applicants who fail to provide evidence of their identity, but without derogating from the finance companies' obligations to report suspicious transactions. Where initial checks fail to identify the applicant, or give rise to suspicions that the information provided is false, additional verification measures should be undertaken to determine whether to proceed with the business. Details of the additional checks are to be recorded.

4.2 When a finance company acquires the business of another financial sector company or firm, either in whole or as a product portfolio, it is not necessary for the identity of all existing customers to be re-identified, provided that:

i. all customer account records are acquired with the business; and
ii. due diligence enquiries do not raise any doubt as to whether the anti-money laundering procedures previously adopted by the acquired business have satisfied Singapore requirements.

4.3 If during the business relationship, the finance company has reason to doubt:

i. the accuracy of the information relating to the customer's identity;
ii. that the customer is the beneficial owner; or
iii. the intermediary's declaration of beneficial ownership, or if there are any signs of unreported changes, it shall take further measures to verify the identity of the customer or the beneficial owner, as applicable.

Personal Customers

4.4 Finance companies shall obtain from all personal applicants the following information:

- name and/or names used;
- permanent and mailing address;
- date of birth;
- nationality.

4.5 Finance companies shall request applicants to produce original documents of identity issued by an official authority, preferably bearing a photograph of the applicants. Examples of such documents are identity cards and passports. Where practicable, file copies of documents of identity are to be kept. Alternatively, the identity card or passport number and other relevant details are to be recorded.

4.6 In respect of joint accounts where the surnames and/or addresses of the account holders differ, the names and addresses of all account holders are to be verified in accordance with the procedures set out above.

Verification Without Face-to-Face Contact

4.7 Finance companies shall take particular care in opening accounts via the internet, post or telephone. Any mechanism that avoids face-to-face contact with applicants inevitably creates difficulty in customer identification and can be abused by money launderers to gain access to the financial system. For non-face-to-face contact, finance companies should assess the money laundering risk posed by internet, postal and telephone products offered and devise customer identification procedures with due regard to this risk.

4.8 The customer identification procedures for non-face-to-face verification should be at least as stringent as those for face-to-face verification. Reasonable steps should also be taken to avoid fraud and single or multiple fictitious applications. There are a number of checks which, when undertaken successfully, will give finance companies a reasonable degree of assurance as to the identity of the applicant where there is no face-to-face contact. For example,

- telephone contact with the applicant at an independently verified home or business number;
- subject to the applicant's consent, telephone confirmation of the applicant's employment with the employer's personnel department at a listed business number;
- salary details appearing on recent bank statements;

- confirmation of the address through an exchange of correspondence or by other appropriate methods.

An initial deposit cheque drawn on another financial institution regulated by the Authority will provide additional comfort.

4.9 For non-Singapore residents who wish to open accounts without face-to-face contact, correspondent banks in the applicant's country of residence may be used to confirm identity or check identity verification details. Where the finance company has no correspondent relationship in the applicant's country of residence, then a copy of the document of identity, certified by lawyers or notary publics, should be requested.

Corporate and Other Business Customers

4.10 Before establishing a business relationship, a company search and/or other commercial enquiries shall be made to ensure that the corporate/other business applicant has not been, or is not in the process of being, dissolved, struck off, wound-up or terminated. In the event of doubt as to the identity of the company or its directors, or the business or its partners, a search with the Registry of Companies and Businesses shall be made.

4.11 The following relevant documents shall be obtained in respect of corporate/other business applicants which are registered in Singapore:

- copies of the Certificate of Incorporation, Certificate of Partnership, or Certificate of Registration, as appropriate; and
- appropriate directors' resolutions (certified extracts only), signed application forms or account opening authority containing specimen signatures.

4.12 The originals or certified copies of certificates (issued by the Registrar of Companies and Businesses) should be produced for verification.

4.13 For companies, businesses or partnerships registered outside Singapore, comparable documents are to be obtained. However, as different countries have varying standards of control, attention should be paid to the place of origin of the documents and the background against which they are produced. The originals or certified copies of certificates (issued by foreign authorities) should be produced for verification.

4.14 Where the applicant is an unlisted company, or an unincorporated business (e.g. a partnership), and none of the directors/partners is already known to the finance company, the finance company shall identify one or more of the principal directors, partners or shareholders according to customer identification procedures for personal applicants.

4.15 In addition, if significant changes to the company structure or ownership occur subsequently, or suspicions are aroused by a change in the payment profile through a company account, further checks are to be made.

Clubs, Societies and Charities

4.16 If the applicant is a club, society or charity, finance companies shall require the constitution (or other similar documents) of the applicant to be produced to ensure that it is properly constituted and registered. Where there is more than one signatory to the account, the identity of at least two signatories shall be verified according to customer identification

procedures for personal applicants. When signatories change, care should be taken to ensure that the identity of at least two current signatories has been verified.

Shell Companies

4.17 Shell companies are legal entities which have no business substance in their own right but through which financial transactions may be conducted. Finance companies should note that shell companies may be abused by money launderers and therefore be cautious in their dealings with them. In addition to the requirement under paragraph 4.11, finance companies should also obtain satisfactory evidence of the identity of the beneficial owners, bearing in mind the "Know-Your-Customer" principle.

Trust, Nominee and Fiduciary Accounts

4.18 Trust, nominee and fiduciary accounts can be used to avoid customer identification procedures and mask the origin of benefits of drug trafficking or criminal conduct. Finance companies are to establish whether the applicant for business relationship is acting on behalf of another person as trustee, nominee or agent (***intermediary***). If so, finance companies should obtain satisfactory evidence of the identity of intermediaries and authorized signatories, and the nature of their trustee or nominee capacity and duties.

4.19 Where the intermediary is a financial institution authorized and supervised by the Authority in respect of its business in Singapore or is a subsidiary of such an institution, it shall be reasonable for the finance company to rely on the intermediary to verify or confirm the identity of the beneficial owners.

4.20 Where the intermediary is a financial institution supervised by an overseas regulatory authority and is based or incorporated in a country in which there are in force provisions at least equivalent to those in this Notice, it shall be reasonable for finance companies to accept a written assurance from the intermediary that evidence of the identity of the beneficial owners has been obtained, recorded and retained, and that the intermediary is satisfied as to the source of funds. For this purpose, finance companies should obtain a written statement from the intermediary, and affix the statement to the original account opening documentation.

4.21 Where the intermediary does not fall into any of the categories in paragraphs 4.19 and 4.20, finance companies should obtain satisfactory evidence of the identity of the beneficial owners and the source of funds. The finance company should obtain in writing the relevant information from the intermediary, which must at least include the information specified in Appendix I.

4.22 If satisfactory evidence of the beneficial owners cannot be obtained, finance companies shall consider whether to proceed with the business, bearing mind the "Know-Your-Customer" principle. If they decide to proceed, they are to record any misgiving and give extra attention to monitoring the account in question. Suspicious transactions are to be reported in accordance with the procedures in section 6 below.

Client Accounts Opened by Solicitors or Accountants

4.23 Where the intermediary is a firm of solicitors or accountants, its professional code of conduct may preclude it from divulging to finance companies information concerning its clients. It may therefore not be possible for a finance company to establish the identity of the person(s) for whom the intermediary is acting. However, the finance company

should not be precluded from making reasonable enquiries about transactions passing through the intermediary's clients' accounts that give cause for concern or from reporting those transactions if any suspicion is aroused. If a money laundering enquiry arises in respect of such clients' accounts, law enforcement agencies will seek information directly from the intermediary as to the identity of its client and the nature of the relevant transaction.

Transactions Undertaken for Non-account Holders (Occasional Customer)

4.24 Where transactions are undertaken for non-account holders of a finance company, in particular where such transactions involve cash of S$20,000 or more, the customer shall be required to produce positive evidence of identity as in paragraphs 4.4 and 4.11. Copies of the documents of identity or a record of the relevant details shall be treated as part of the financial transaction documents and retained by finance companies.

4.25 Particular care shall be taken in relation to requests for safe deposit facilities. Where such facilities are made available to non-account holders, the customer identification procedures set out above should be followed.

5 RECORD KEEPING

5.1 Finance companies shall prepare and maintain documentation on their customer relationships and transactions such that:

i. requirements of legislation are fully met;
ii. the relevant authorities in Singapore and the internal and external auditors of the finance company will be able to judge reliably the finance company's transactions and its compliance with the Guidelines;
iii. any transaction effected via the finance company can be reconstructed;
iv. it can identify the accounts, savings books and deposit accounts from which any customer is entitled to benefit; and
v. they can satisfy within a reasonable time any enquiry or order from the relevant authorities in Singapore as to disclosure of information, including without limitation (a) whether a particular person is the customer or beneficial owner of funds/assets deposited with the finance companies, and (b) whether the finance companies have effected cash transactions requiring customer identification.

5.2 When setting document retention policy, finance companies must take into account the requirements of the Act. The following document retention periods shall be followed:

i. financial transaction documents relating to the opening of an account are to be kept for 6 years after the date the account is closed;
ii. financial transaction documents relating to the opening of a safe deposit box are to be kept for 6 years after the date the safe deposit box ceases to be used; and

iii. financial transaction documents other than those described in sub-paragraphs (i) and (ii) are to be kept for 6 years after the date on which the transaction takes place.

5.3 Financial transaction documents may be retained as originals or copies, on microfilm, or in electronic form, provided that such forms are admissible in court. Notwithstanding paragraph 5.2, if the records relate to on-going investigations or transactions that have been the subject of a disclosure, they shall be retained beyond the stipulated retention period until it is confirmed that the case has been closed.
5.4 In the case of wire transfer transactions, the records of electronic payments and messages must be treated in the same way as other records in support of entries in the account.

6 SUSPICIOUS TRANSACTIONS

6.1 Each finance company shall clarify the economic background and purpose of any transaction or business relationship if its form or amount appears unusual in relation to the customer, finance company or branch office concerned, or if the economic purpose or legality of the transaction is not immediately clear. In this regard, finance companies should exercise due diligence by implementing adequate systems for identifying and detecting suspicious transactions.
6.2 Examples of suspicious transactions are found in Appendix II. These are not intended to be exhaustive and only provide examples of the most basic ways in which money may be laundered. Identification of any transaction listed in Appendix II should prompt initial enquiries and, if necessary, further investigations on the source of funds.
6.3 Each finance company shall institute a system for reporting suspicious transactions under the Act. This may include appointing one or more senior persons, or an appropriate unit responsible for reporting to STRO. A copy of the suspicious transaction report should also be sent to the Authority. The reporting formats are set out in Appendices III to V. In the event that urgent disclosure is required, particularly when the account concerned is part of an on-going investigation, an initial notification should be made by telephone.
6.4 The obligation to report is on the individual who becomes suspicious of a money laundering transaction. Officers and employees of the finance company who deal with customers should be made aware of the statutory obligation to report suspicious transactions under the finance company's reporting system.
6.5 Where:

i. a customer deposits, seeks to invest funds, or obtains credit against the security of such funds, or
ii. the finance company holds funds on behalf of a customer,

and an employee of the finance company knows that the customer has engaged in drug trafficking or criminal conduct, the matter must be promptly reported to the relevant officer or unit within the organization who, in turn, must immediately report the details to STRO. If the employee suspects or has reasonable grounds to suspect that the customer has engaged in drug trafficking or criminal conduct, the officer or unit, on receiving the employee's report, must promptly evaluate

whether there are reasonable grounds for such belief and must then immediately report the case to STRO unless the officer or unit considers, and records an opinion, that such reasonable grounds do not exist.

6.6 Each finance company shall maintain a complete file on all transactions that have been brought to the attention of the relevant officer or unit, including transactions that are not reported to STRO.

6.7 Where it is known that a report has already been disclosed to STRO and it becomes necessary to make further enquiries of the customer, care should be taken to ensure that the customer does not become aware that his name has been brought to the attention of STRO.

6.8 Under Section 38 of the Act, where finance companies disclose to an authorized officer[1] a knowledge, suspicion or belief that any fund, property or investment is derived from or used in connection with drug trafficking, criminal conduct or any matter on which such a knowledge, suspicion or belief is based, such disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by law, contract or by rules of professional conduct. Furthermore, under Section 38 of the Act, finance companies would not be liable for any loss arising out of such disclosure, or any act or omission, in relation to the fund, property or investment in consequence of the disclosure.

7 COMPLIANCE AND TRAINING

7.1 Each finance company shall appoint one or more senior persons, or an appropriate unit, to advise its management and staff on the issuing and enforcement of in-house instructions to promote adherence to the Guidelines, including personnel training, reporting of suspicious transactions, and generally, all matters relating to the prevention of money laundering.

7.2 Each finance company shall appoint a senior officer as the compliance officer or set up a designated compliance unit headed by a senior officer. The object is to ensure a speedy and appropriate reaction to any matter that requires special attention under the Guidelines and the Act.

7.3 The finance company's in-house audit department shall monitor regularly the effectiveness of the measures taken by the finance company in preventing money laundering.

7.4 The finance company shall train local and overseas staff to be fully aware of their responsibilities in combating money laundering and to be familiar with its system for reporting and investigating suspicious matters.

7.5 All relevant staff should be educated in the importance of the "Know-Your-Customer" requirements to prevent money laundering. Training in this respect should cover not only the need to know the true identity of the applicant for business relationship but also, where a business relationship has been established, the need to know enough about the expected type of business activities of that customer at the outset in order to know what might constitute suspicious activity at a future date. Relevant staff should be alert to any change in the pattern of a customer's transactions or circumstances that might constitute money laundering.

7.6 Although senior management of a finance company may not be involved in the day-to-day procedures, it is important that they understand the statutory duties placed on them, their staff, and the finance company itself. Some form of training to raise general awareness of senior management of their statutory duties is therefore suggested.

7.7 Timing and content of training for various sectors of staff will need to be adapted by the finance company for its own needs. The following is recommended:

i. ***New Staff***

A general appreciation of the background to money laundering, the need to be able to identify suspicious transactions and report such transactions to the appropriate designated point within the finance company, and the offence of "tipping off'" should be provided to all new staff who deal with customers or their transactions, irrespective of the level of seniority.

ii. ***"Front-Line" Staff***

Staff who deal directly with the public are the first point of contact with potential money launderers. Their efforts are therefore vital to the finance company's reporting system for such transactions. Staff should be trained to identify suspicious transactions and on the procedure to be adopted when a transaction is deemed to be suspicious. "Front-line" staff should be made aware of the finance company's policy for dealing with non-regular customers particularly where large cash transactions are involved, and the need for extra vigilance in these cases.

iii. ***Staff Dealing with New Customers***

Staff who deal with account opening, or accept new customers, must receive the training given to "front-line" staff in sub-paragraph (ii) above. In addition, the need to verify the identity of the customer must be understood, and training should be given in the finance company's account opening and customer identification procedures. They should also be aware that the offer of suspicious funds or the request to undertake a suspicious transaction needs to be reported to the relevant authorities whether or not such funds are accepted or transactions proceeded with, and they must know what procedures to follow in these circumstances.

iv. ***Supervisors and Managers***

A higher level of instruction covering all aspects of money laundering procedures should be provided to supervisors and managers. This will include the offences and penalties arising from the Act, procedures relating to service of production and restraint orders, internal reporting procedures, and the requirements for verification of identity and the retention of records.

7.8 Refresher training should be provided at regular intervals to ensure that staff are reminded of their responsibilities and are kept informed of new developments.

8 SUMMARY OF KEY PROVISIONS OF THE ACT

Money laundering offences

8.1 It is an offence for finance companies to:

i. enter into or otherwise be concerned in an arrangement knowing or having reasonable grounds to believe that by that arrangement:
   a. it will facilitate the retention or control of benefits of drug trafficking or criminal conduct by/on behalf of; or
   b. the benefits of drug trafficking or criminal conduct are used to secure funds or acquire property (by way of investment or otherwise) for,

   another person (whom the finance company knows or has reasonable grounds to believe has been/is involved in, or has benefited from, drug trafficking or criminal conduct);

ii. conceal or disguise; or convert, transfer, or remove from the jurisdiction, any property which, in whole or in part, directly or indirectly, represents another person's benefits of drug trafficking or criminal conduct (for the purpose of assisting any person to avoid prosecution for a drug trafficking offence, foreign drug trafficking offence, serious offence or foreign serious offence or the enforcement of a confiscation order issued under the Act); or

iii. acquire any property for no or inadequate consideration, knowing, or having reasonable grounds to believe, that the property, in whole or in part, directly or indirectly, represents another person's benefits of drug trafficking or criminal conduct.

Offences under this paragraph are punishable by a fine not exceeding $200,000, or imprisonment for a term not exceeding 7 years, or both.

Disclosure of Suspicious Transactions

8.2 Finance companies shall disclose suspicious transactions to an authorized officer when they know or have reasonable grounds to suspect that any property:

i. in whole or in part, directly or indirectly, represents proceeds of drug trafficking or criminal conduct; or
ii. was used/will be used in connection with drug trafficking or criminal conduct.

Failure to disclose such knowledge, suspicion, or other related information amounts to an offence which is punishable by a fine not exceeding $10,000.

Tipping Off

8.3 It is an offence for finance companies, knowing or having reasonable grounds to suspect that an investigation under the Act is taking/to take place, to make a disclosure which is likely to prejudice such investigation. This is a tipping off offence punishable by a fine not exceeding $30,000, or imprisonment for a term not exceeding 3 years, or both.

Failure to co-operate with law enforcement agencies

8.4 The following acts constitute an offence under the Act:

i. contravening a production order issued by the Court under the Act without reasonable excuse;
ii. providing material known to be false or misleading in purported compliance with a production order, without:
    a. indicating that the material is false or misleading, and how it is false or misleading; or
    b. providing correct information which is in the finance companies' possession or can reasonably be acquired by them;
iii. hindering or obstructing an authorized officer in the execution of a search warrant issued under the Act; or
iv. obstructing or hindering any authorized officer in the discharge of his duty under the Act.

Offences under paragraphs (i) to (iii) are punishable by a fine not exceeding $10,000, or imprisonment for a term not exceeding 2 years, or both. The offence under paragraph (iv) is punishable by a fine not exceeding $2,000, or imprisonment for a term not exceeding 6 months, or both.

Record Retention

8.5 Finance companies are required to retain each financial transaction document or a copy of it for the relevant minimum retention period. Such documents are to be stored in a manner that is reasonably practicable to retrieve them. In addition, finance companies shall retain a copy, and maintain a register, of financial transaction documents released by the finance company under Section 37 of the Act. Failure to observe any of these requirements amounts to an offence which is punishable by a fine not exceeding $10,000.

8.6 Finance companies should note that some of the statutory obligations and prohibitions, which give rise to the offences described in paragraphs 8.1 to 8.5, also apply to their employees.

8.7 Section 8 of this Notice (or any reference to the Act in other parts of this Notice) does not constitute a legal interpretation of the Act, and should not be construed as an exhaustive write-up on all relevant provisions in the Act applicable to finance companies. Finance companies are advised to seek legal counsel where necessary.

South Africa

Competition Act 89 (1998)

Financial Disclosure Framework

Promotion of Access to Information Act (2000)

Public Finance Management Act (1999)

Public Service Anti-Corruption Strategy

Public Service Code of Conduct

Transparency in Fair and Competitive Public Procurement, Constitution of South Africa, (1994)
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Public_Procurement/981297191__i10.html

Section 187 provides:

> (1) The procurement of goods and services for any level of government shall be regulated by an Act of Parliament and provincial laws, which shall make provision for the appointment of independent and impartial tender boards to deal with such procurements.
> (2) The tendering system referred to in subsection (1) shall be fair, public and competitive, and tender boards shall on request give reasons for their decisions to interested parties.
> (3) No organ of state and no member of any organ of state or any other person shall improperly interfere with the decisions and operations of the tender boards.
> (4) All decisions of any tender board shall be recorded.

Seychelles
Anti-Money Laundering Bill (1996)
https://www.imolin.org/amlid/showLaw.do?law=5112&language=ENG&country=SEY

Swaziland
The Money Laundering (Prevention) Act (2001)
https://www.imolin.org/amlid/showLaw.do?law=6110&language=ENG&country=SWA

United Republic of Tanzania
Arusha Integrity Pledge
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvodocs.cgi?folder=Resolutions,_Declarations,_Pledges&next=6&restricted=&category=Resolutions,_Declarations,_Pledges

WE, participants drawn from a broad spectrum of Tanzanian society attending the 1995 Arusha Workshop on national integrity chaired by the Hon. Judge Mark Bomani and opened by the Hon. Chief Justice F. Nyalali, and organized by, Transparency International (TI) -Tanzania and the Prevention of Corruption Bureau from 11 to 12 August 1995, have after due deliberation reached the following broad conclusions –

1 The national integrity of our country is among the most precious of our society's assets. Without integrity, our hopes and aspirations for meaningful economic and social development for all will not be realized. As we meet on the eve of our historic multi-party elections in October, we are conscious more than ever of the fact that our national integrity is therefore something which we must all, as concerned citizens throughout the country, do everything we can to protect and foster.

2 It is undeniable that for a variety of reasons our country has not realized acceptable levels of social and economic development. As a consequence, too many of our people have been denied, and continue to be denied, the benefits which they deserve and to which they are entitled. In the process, our national integrity and our nation's reputation have suffered. Nor do we seek to apportion blame, for people throughout our society share responsibility.

3 We therefore believe that the restoration, protection and development of our country's integrity must be a priority for all Tanzanians and for the new government, of whatever political persuasion it may be. The new government will need the willing support and participation of civil society, and this we pledge ourselves to do all we can to deliver.

4 We recognize that efforts to develop our country have been dogged, among other things, by piecemeal approaches and a failure to pay a living wage. What is called for now is an holistic approach, with an emphasis on the delivery to the public of efficient and honest services by a civil service of integrity with an emphasis on results.

5 We recognize, too, that the prevention of corruption is much more desirable than sanction after the offence. While enforcement will always remain an essential tool, we believe that major and imaginative efforts must now be made to promote prevention to encourage the development of a society in which corruption is viewed by all as a high risk undertaking. To this end we recognize the need to adopt stern sanctions against all those found guilty of corrupt practices.

6 In the processes of change, we recognize in particular the leading roles to be played by civil society (including the private sector) in the fundamental changes in attitudes towards corruption which must be brought about. This includes the **business community** (e.g. by acting to eradicate improper actions taken in their dealings with government); the **media** (e.g. by ensuring public access to information, by providing responsible and balanced news coverage and not placing sensationalism and business interests above their public duty, subjecting official actions to informed scrutiny and raising public consciousness of the harm done by corruption and what they can do to complain); **educators** at all levels (e.g. by widening knowledge and inculcating an ethos of alertness in the defence of integrity); the **professions** (e.g. by developing and maintaining high ethical standards and disciplining members who transgress them); **non-governmental organizations** (e.g. in mobilizing people in defence of their rights); and **religious leaders** (e.g. by providing moral leadership). There is, too, the need for a firm partnership to be forged between civil society and the government, with civil society as an independent and constructive but critical partner in the process of reform and subsequent monitoring of society's integrity and the fair and efficient delivery of basic services.

Against this background, and mindful of the role which we and all fellow citizens must also play, we call on all **political parties and candidates for elective office** at the forthcoming elections to demonstrate political commitment and to publicly endorse the following outline plan of action for implementation on their part-

(a) by conducting a **free, fair and responsible and corruption-free election campaign** in which they reflect the values of the new participatory society which Tanzanians expect to emerge after the elections;

(b) by developing **parliamentary practices, rules and procedures** which act as an effective check on executive and administrative powers as well as ensuring high standards of probity and integrity among individual Members of Parliament;

(c) by their **leadership** acting as role models by demonstrating at all times their personal support for maintaining the highest standards of conduct in public life (e.g. through promptly disclosing publicly their assets and incomes, and by faithfully adhering to the best practices of electioneering and personal conduct);

(d) by working with civil society to develop a determined **public awareness-raising campaign** to enlist the help of the people of Tanzania to combat corruption on a sustained basis;

(e) by supporting all those whose public duties charge them with monitoring and enforcing laws against corruption, so as to ensure that the **rule of law** is followed and applied firmly but fairly to all, regardless of their position;
(f) by supporting the **independence** of the Judiciary, the Permanent Commission of Inquiry, the Director of Public Prosecutions and the Prevention of Corruption Bureau, and other mechanisms of enforcement which may be established, and ensuring that these operate independent of political control and are properly resourced;
(g) by supporting **civil service reforms** at all levels which will limit the opportunities for corrupt practices wherever these can occur;
(h) by ensuring that **public procurement** is fair and open, assuring the public of the best value for money, and with those tendering for major projects obliged to disclose the names of recipients and the amounts of all commissions paid and with corrupt tenderers liable to be sued for compensation by unsuccessful tenderers;
(i) by **reviewing existing laws** and practices to ensure that these reflect best practice in the promotion of integrity and the containment of corruption;
(j) by providing an **enabling environment** for the media to operate for the benefit of our society, by ensuring that defamation and other laws do not unduly restrict the effectiveness of the media, and that there is public access to a balanced and non-partisan state-owned media;
(k) by forming a **coalition of interests opposed to corruption** and developing an holistic action plan to contain it; and
(l) by respecting the independence of the legal profession and supporting the protection of **human rights** as guaranteed in the constitution.

We invite all candidates for elective office to commit themselves, upon successful election, publicly to meeting with representatives of civil society immediately after the elections to determine how best to implement the above reforms.

We have asked TI-Tanzania to follow-up our deliberations in all practical ways, including publicising the proceedings of our workshop and contacting the political party leaders, and through them their candidates, to invite the pledges we are seeking, and to publish the names of all those who commit themselves to participating actively with us in this endeavour.

Finally, we call on all of our fellow citizens to join with us in building a safe, secure and honest society of which we can all be proud. It is within the power of all of us to bring about the radical change for which so many of us look forward as our country stands at the threshold of a new era in our history.

Thailand
Competition Act (1999)

Turkey
Regulation of Banks to Identify Customers
https://www.imolin.org/amlid/showLaw.do?law=6143&language=ENG&country=TUR

Uganda
The Inspectorate of Government Act, 2002
http://www.esaamlg.org/uganda.htm

United States of America

Freedom of Information Act, 5 U.S.C. Part 552 (1960)

2. International and Regional Documents

African Union
Convention on Preventing and Combating Corruption
http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf#search='african%20union%20convention%20on%20combating%20corruption

Asian Development Bank-Organization for Economic Cooperation and Development (ADB-OECD)
Anti-Corruption Initiative for Asia-Pacific, Anti-Corruption Action Plan for Asia and the Pacific

Centre for the Independence of Judges and Lawyers
Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System

Commonwealth Model Law For The Prohibition Of Money Laundering
http://www.imolin.org/pdf/imolin/Comsecml.pdf

Council of Europe
Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
http://www.imolin.org/imolin/en/coeeng.html

European Bank for Reconstruction and Development
Procurement Policies and Rules (August 2000)
http://www.ebrd.com/about/policies/procure/ppr.pdf

European Union
For a European political and administrative culture: three codes of conduct – the Commissioners.
http://europa.eu.int/comm/codesofconduct/commissioners_en.htm

Joint Action on Corruption in the Private Sector (1998)
http://europa.eu.int/eur-lex/pri/en/oj/dat/1998/l_358/l_35819981231en00020004.pdf#search='Joint%20Action%20on%20Corruption%20in%20the%20Private%20Sector%20and%20european%20union'

European Union Council Directive on prevention of the use of the financial system for the purpose of money laundering (1991)
http://europa.eu.int/eur-lex/en/lif/dat/1991/en_391L0308.html

http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_344/l_34420011228en00760081.pdf

Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns
http://www.cm.coe.int/stat/e/public/2003/adopted_texts/recommendations/2003r4.htm

International Association of Insurance Supervisors
Anti-Money Laundering Guidance Notes for Insurance Supervisors and Insurance Entities (2002)
http://www.iaisweb.org/1/pasc.html

International Association of Penal Law, International Commission of Jurists, and the Centre for the Independence of Judges and Lawyers
Draft Principles on the Independence of the Judiciary

International Bar Association
Minimum Standards of Judicial Independence
http://www.ibanet.org/images/downloads/Minimum%20Standards%20of%20Judicial%20Independence%201982.pdf

International Monetary Fund
Revised Good Practices on Fiscal Transparency (2001)
http://www.imf.org/external/np/fad/trans/code.htm

International Monetary Fund, Draft Guide on Resource Revenue Transparency (2004)
http://www.imf.org/external/np/fad/2004/grrt/eng/guide.pdf

International Criminal Police Organization (Interpol)
Code of Conduct for Law Enforcement Officers
http://www.interpol.int/Public/Corruption/IGEC/Codes/Default.asp

Global Standards to Combat Corruption in Police Forces/Services
http://www.interpol.int/Public/Corruption/Standard/Default.asp

Organization of American States
Inter-American Convention against Corruption
http://www.oas.org/juridico/english/Treaties/b-58.html

Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses (amended; Washington, DC, October 1998)
http://www.cicad.oas.org/Lavado_Activos/ENG/ModelRegulations.asp

Inter-American Drug Abuse Control Commission of the Organization of American States
Model regulations concerning laundering offences connected to illicit drug trafficking and related offences (as amended and adopted 2003)
http://www.cicad.oas.org/Lavado_Activos/ENG/ModelRegulations.asp

Recommendation of the Council on the Guidelines for Managing Conflict of Interest in the Public Sector

Summit of the Americas Ministerial Conference Concerning the Laundering of Proceeds and Instrumentalities of Crime - Ministerial Communiqué (1995)
http://www.cicad.oas.org/en/legal_development/legal-bsas-plan.htm

Organization for Economic Cooperation and Development

Recommendation on Improving Ethical Conduct in the Public Service

23 April 1998 - C(98)70/FINAL

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organization for Economic Co-operation and Development;

Considering that ethical conduct in the public service contributes to the quality of democratic governance and economic and social progress by enhancing transparency and the performance of public institutions;

Considering that increased public concern with confidence in government has become an important public and political challenge for OECD Member countries;

Recognizing that public sector reforms are resulting in fundamental changes to public management that pose new ethical challenges;

Recognizing that although governments have different cultural, political and administrative environments, they often confront similar ethical challenges, and the responses in their ethics management show common characteristics;

Recognizing that Member countries are concerned to address ethical standards in public life by strengthening the efforts made by governments to improve ethical conduct;

Having regard to the political commitment of governments of Member countries, demonstrated by their actions to review and redefine their public service ethics framework;

Considering that public service integrity is essential for global markets to flourish and for international agreements to be respected;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which was signed on 17 December 1997;

Having regard to other recent developments which further advance international understanding and co-operation in promoting ethical culture in the public service, such as the Resolution on Action Against Corruption, including the International Code of Conduct for Public Officials, passed by the United Nations on 12 December 1996, the Inter-American Convention Against Corruption adopted by the Organization of American States in March 1996, the Programme of Action Against Corruption approved by the Council of Europe in November 1996,

including the preparation of a model European Code of Conduct for Public Officials, and the adoption by the European Council of the Action Plan to Combat Organized Crime on 28 April 1997 and the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union on 26 May 1997;

Recognizing the need of Member countries to have a point of reference when combining the elements of an effective ethics management system in line with their own political, administrative and cultural circumstances;

On the proposal of the Public Management Committee;

I. RECOMMENDS that Member countries take action to ensure well-functioning institutions and systems for promoting ethical conduct in the public service.
This can be achieved by:

- developing and regularly reviewing policies, procedures, practices and institutions influencing ethical conduct in the public service;

- promoting government action to maintain high standards of conduct and counter corruption in the public sector;

- incorporating the ethical dimension into management frameworks to ensure that management practices are consistent with the values and principles of public service;

- combining judiciously those aspects of ethics management systems based on ideals with those based on the respect of rules;

- assessing the effects of public management reforms on public service ethical conduct;

- using as a reference the Principles for Managing Ethics in the Public Service set out in the Annex to ensure high standards of ethical conduct.

II.INSTRUCTS the Public Management Committee to:

- analyze information provided by Member countries on how they apply these principles in their respective national contexts. The purpose of the analysis is to provide information on a comparative basis to support Member country actions to maintain well-functioning institutions and systems for promoting ethics;

- provide support to Member countries to improve conduct in the public service by, *inter alia*, facilitating the process of information-sharing and disseminating promising practices in Member countries;

- present a report in two years? time analyzing the experiences, actions and practices in the Member countries that have proved effective in a particular national context.

PRINCIPLES FOR MANAGING ETHICS IN THE PUBLIC SERVICE

Foreword

1. High standards of conduct in the public service have become a critical issue for governments in OECD Member countries. Public management reforms involving greater devolution of responsibility and discretion for public servants, budgetary pressures and new forms of delivery of public services have challenged traditional values in the public service. Globalization and the further development of international economic relations, including trade and investment, demand high recognisable standards of conduct in the public service. Preventing misconduct is as complex as the phenomenon of misconduct itself, and a range of integrated mechanisms are needed for success, including sound ethics management systems. Increased concern about decline of confidence in government and corruption has prompted governments to review their approaches to ethical conduct.

2. In response to the above-mentioned challenges, the attached principles have been developed by the Member countries. The twelve principles are designed to help countries review the institutions, systems and mechanisms they have for promoting public service ethics. They identify the functions of guidance, management or control against which public ethics management systems may be checked. These principles distil the experience of OECD countries, and reflect shared views of sound ethics management. Member countries will find their own ways of balancing the various aspirational and compliance elements to arrive at an effective framework to suit their own circumstances.

3. The principles may be used by management across national and sub-national levels of government. Political leaders may use them to review ethics management regimes and evaluate the extent to which ethics is operationalised throughout government. The principles are intended to be an instrument for countries to adapt to national conditions. They are not sufficient in themselves -- they should be seen as a way of integrating ethics management with the broader public management environment.

Principles for Managing Ethics in the Public Service

1.Ethical standards for public service should be clear.
Public servants need to know the basic principles and standards they are expected to apply to their work and where the boundaries of acceptable behaviour lie. A concise, well-publicised statement of core ethical standards and principles that guide public service, for example in the form of a code of conduct, can accomplish this by creating a shared understanding across government and within the broader community.

2.Ethical standards should be reflected in the legal framework. The legal framework is the basis for communicating the minimum obligatory standards and principles of behaviour for every public servant. Laws and regulations could state the fundamental values of public service and should provide the framework for guidance, investigation, disciplinary action and prosecution.

3.Ethical guidance should be available to public servants. Professional socialisation should contribute to the development of the necessary judgement and skills enabling public servants to apply ethical principles in concrete circumstances. Training facilitates ethics awareness and can develop essential skills for ethical analysis and moral reasoning. Impartial advice can help create

an environment in which public servants are more willing to confront and resolve ethical tensions and problems. Guidance and internal consultation mechanisms should be made available to help public servants apply basic ethical standards in the workplace.

4.Public servants should know their rights and obligations when exposing wrongdoing.
Public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service. These should include clear rules and procedures for officials to follow, and a formal chain of responsibility. Public servants also need to know what protection will be available to them in cases of exposing wrongdoing.

5. Political commitment to ethics should reinforce the ethical conduct of public servants.
Political leaders are responsible for maintaining a high standard of propriety in the discharge of their official duties. Their commitment is demonstrated by example and by taking action that is only available at the political level, for instance by creating legislative and institutional arrangements that reinforce ethical behaviour and create sanctions against wrongdoing, by providing adequate support and resources for ethics-related activities throughout government and by avoiding the exploitation of ethics rules and laws for political purposes.

6.The decision-making process should be transparent and open to scrutiny.
The public has a right to know how public institutions apply the power and resources entrusted to them. Public scrutiny should be facilitated by transparent and democratic processes, oversight by the legislature and access to public information. Transparency should be further enhanced by measures such as disclosure systems and recognition of the role of an active and independent media.

7.There should be clear guidelines for interaction between the public and private sectors.
Clear rules defining ethical standards should guide the behaviour of public servants in dealing with the private sector, for example regarding public procurement, outsourcing or public employment conditions. Increasing interaction between the public and private sectors demands that more attention should be placed on public service values and requiring external partners to respect those same values.

8.Managers should demonstrate and promote ethical conduct.
An organizational environment where high standards of conduct are encouraged by providing appropriate incentives for ethical behaviour, such as adequate working conditions and effective performance assessment, has a direct impact on the daily practice of public service values and ethical standards. Managers have an important role in this regard by providing consistent leadership and serving as role models in terms of ethics and conduct in their professional relationship with political leaders, other public servants and citizens.

9.Management policies, procedures and practices should promote ethical conduct.
Management policies and practices should demonstrate an organization's commitment to ethical standards. It is not sufficient for governments to have

only rule-based or compliance-based structures. Compliance systems alone can inadvertently encourage some public servants simply to function on the edge of misconduct, arguing that if they are not violating the law they are acting ethically. Government policy should not only delineate the minimal standards below which a government official's actions will not be tolerated, but also clearly articulate a set of public service values that employees should aspire to.

10.Public service conditions and management of human resources should promote ethical conduct.
Public service employment conditions, such as career prospects, personal development, adequate remuneration and human resource management policies should create an environment conducive to ethical behaviour. Using basic principles, such as merit, consistently in the daily process of recruitment and promotion helps operationalize integrity in the public service.

11.Adequate accountability mechanisms should be in place within the public service.
Public servants should be accountable for their actions to their superiors and, more broadly, to the public. Accountability should focus both on compliance with rules and ethical principles and on achievement of results. Accountability mechanisms can be internal to an agency as well as government-wide, or can be provided by civil society. Mechanisms promoting accountability can be designed to provide adequate controls while allowing for appropriately flexible management.

12.Appropriate procedures and sanctions should exist to deal with misconduct.
Mechanisms for the detection and independent investigation of wrongdoing such as corruption are a necessary part of an ethics infrastructure. It is necessary to have reliable procedures and resources for monitoring, reporting and investigating breaches of public service rules, as well as commensurate administrative or disciplinary sanctions to discourage misconduct. Managers should exercise appropriate judgement in using these mechanisms when actions need to be taken.

ANNEX

BACKGROUND NOTE

The need to improve ethical conduct in the public service

1. OECD Member countries have introduced significant management reforms which have changed the way the public sector operates. However, it is important to ensure that the gains in efficiency and effectiveness are not achieved to the detriment of ethical conduct. New ways of carrying out the business of government are creating situations in which public servants need to be highly attuned to ethical issues, and where there may be few guidelines as to how they should act. Reforms involving decentralisation of power to organizations at sub-national level, devolution of responsibility and greater managerial discretion, increased commercialisation of the public sector and a changing public/private sector interface place public servants more frequently in situations involving conflicts of interest or objectives. At the same time, many countries are finding that the systems that have traditionally governed and guided the behaviour of

public servants are insufficient for the new managerial roles public servants are expected to play, and are indeed often in conflict with the demands being made on managers and staff in the new public sector environment. These new situations create dilemmas that need to be resolved, and that require ethical analysis and moral reasoning.

2. Of further concern is the apparent decline in confidence in government and public institutions in many countries, and the implications this has for the legitimacy of government and public institutions. Weakening confidence is associated, at least in part, with revelations of inappropriate actions - and in some cases outright corruption - on the part of public officials. It is unclear whether standards of conduct are actually falling, or whether mistakes and misdemeanours are simply more visible in these days of open government, an enquiring media and a more sophisticated public. What is clear is that ethics and standards in public life have become more of a public and political issue in some countries demanding effective action by the governments concerned.

3. Some remedial measures, broadly speaking, have the potential both to promote ethical behaviour and to prevent misconduct. Traditionally, increased regulation and stricter law enforcement have been the first responses to misconduct in the public sector. International initiatives have been concentrated on the development of concrete elements in the ethics infrastructure, mainly to prevent or criminalize certain forms of wrongdoing, such as corruption.

4. OECD Member countries have taken collective actions to criminalize bribery of foreign public officials They adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 21 November 1997. The United Nations passed the Resolution on Action Against Corruption, including the International Code of Conduct for Public Officials, on 12 December 1996. The Organization of American States adopted the Inter-American Convention Against Corruption in March 1996. The European Council adopted an Action Plan to Combat Organized Crime on 28 April 1997 and the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union on 26 May 1997. The Council of Europe approved the Programme of Action Against Corruption in November 1996, including the preparation of a model European Code of Conduct for Public Officials, and which underpins the co-operation of 40 countries in fighting corruption, money laundering, computer crimes and organized crimes.

5. Underlying PUMA's contribution in this area is the conviction that preventing misconduct is as complex as the phenomenon of misconduct itself, and that a combination of interrelated mechanisms, including a robust ethics infrastructure, sound ethics management systems, specific prevention techniques and effective law enforcement are needed for success. An ethics infrastructure to promote ethics and prevent misconduct

6. Significantly, OECD Member countries are increasingly exploring the application of administrative and preventative action. As countries implement more managerial approaches in the public sector, they are finding that a centralized, compliance-based approach to ethics management is incompatible with a devolved, results-based public management system. There is a trend towards a greater reliance on mechanisms that define and promote aspirational values for the public sector and encourage good behaviour.

7. In 1996 and 1997 PUMA conducted two surveys on the management of ethics and conduct in the public sector involving twenty-three Member countries. The first report, "Ethics in the Public Service: Current Issues and Practice", was based on studies of nine countries 1), and identified the factors that affect standards of ethics and conduct in the public service, and the initiatives being taken by governments to strengthen ethics management frameworks. The report identified a set of instruments necessary to governments for promoting integrity and preventing corruption, which was termed an "ethics infrastructure".

8. The key issue addressed in the report is how public servants can be supported in observing the highest standards of integrity and ethics in a rapidly changing public sector environment, without undermining the main thrust of public management reforms, which aim to enhance efficiency and effectiveness. All of the countries included in the study employ a range of tools and processes to regulate against undesirable behaviour and to provide incentives to good conduct

The Ethics Infrastructure

A well-functioning Ethics Infrastructure supports a public sector environment which encourages high standards of behaviour. Each function and element is a separate, important building block, but the individual elements should be complementary and mutually reinforcing. The elements need to interact to achieve the necessary synergy to become a coherent and integrated infrastructure. The elements of infrastructure can be categorised according to the main functions they serve -- guidance, management and control -- noting that different elements may serve more than one function.

Guidance is provided by strong commitment from political leadership; statements of values such as codes of conduct; and professional socialisation activities such as education and training.

Management can be realized through co-ordination by a special body or an existing central management agency, and through public service conditions, management policies and practices.

Control is assured primarily through a legal framework enabling independent investigation and prosecution; effective accountability and control mechanisms; transparency, public involvement and scrutiny. The ideal mix and degree of these functions will depend on the cultural and political-administrative milieu of each country.

9. A second report, based on studies of an additional fourteen countries 2) provides further information on the formulation of the principles as an operational document for Member countries in reviewing the national ethics framework, the functions and elements of an ethics infrastructure. New ethics initiatives by governments of Member countries, particularly over the last five years, signal some common directions, as well as an increased concern by governments to examine the effectiveness of their ethics management regimes in relation to wider public management reforms.

10.The rapidly changing environment requires regular review of policies, practices and procedures affecting public sector ethical conduct. The principles for ethical conduct in the public service, set out in this document, are designed to be a reference for carrying out such reviews and to check the validity of existing functions and elements of the ethics infrastructure.

1) Australia, Finland, Mexico, Netherlands, New Zealand, Norway, Portugal, the United Kingdom and the United States. The individual country reports are available on the OECD Home Page on the Internet at http://www.oecd.org/puma/.

2) The participating countries for the survey were Belgium, the Czech Republic, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Korea, Mexico, Poland, Spain, Sweden and Switzerland. The draft report was provided as a background paper for the OECD Symposium on Ethics in the Public Sector: Challenges and Opportunities for OECD Countries in November 1997.

Recommendation of the Council on improving the quality of government regulation (1995)
http://www.olis.oecd.org/olis/1995doc.nsf/LinkTo/OCDE-GD%2895%2995

Recommendation of the Council on OECD Guidelines for Managing Conflict of Interest in the Public Service (2003)
http://www.oecd.org/dataoecd/3/44/31571341.pdf#search='Recommendation%20of%20the%20Council%20on%20the%20Guidelines%20for%20Managing%20Conflict%20of%20Interest%20in%20the%20Public%20Sector'

Southern African Development Community
Protocol against Corruption
http://www1.oecd.org/daf/nocorruptionweb/pdf/SADC.pdhf

United Nations

Basic Principles on the Independence of the Judiciary
http://www1.umn.edu/humanrts/instree/i5bpij.htm

International Code of Conduct for Public Officials
http://www.un.org/documents/ga/res/51/a51r059.htm

Convention against Transnational Organized Crime (2000)
http://www.unodc.org/adhoc/palermo/convmain.html

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
http://www.incb.org/e/conv/1988/

Declaration against Corruption and Bribery in International Commercial Transactions (1996)
http://www.un.org/documents/ga/res/51/a51r191.htm

Draft Universal Declaration on the Independence of Justice

Model Legislation on Laundering, Confiscation and International Co-operation in Relation to the Proceeds of Crime [for civil law jurisdictions]
http://www.imolin.org/ml99eng.htm

Model Money Laundering and Proceeds of Crime Bill [for common law jurisdictions]
http://www.imolin.org/poc2000.htm

Political Declaration and Action Plan against Money Laundering (1998)
https://www.imolin.org/ungadec.htm

Wolfsberg Group

Anti Money Laundering (AML) Principles on Private Banking
http://www.wolfsberg-principles.com/corresp-banking.html

Anti Money Laundering (AML) Principles on Correspondent Banking
http://www.wolfsberg-principles.com/corresp-banking.html

IV. Criminalization, law enforcement and jurisdiction

A. Introduction

States parties are required to take several legislative and administrative steps towards the implementation of this Convention. This chapter of the guide addresses

a) the substantive criminal law requirements of the Convention and

b) the necessary measures and procedures aimed at effective law enforcement against corruption.

States parties must establish a number of offences as crimes in their domestic law, if these do not already exist. States with relevant legislation already in place must ensure that the existing provisions conform to the Convention requirements and amend their laws, if necessary.

Given that corrupt practices know no border and leave no country immune to at least some them, the international community and the wider public have been persistently demanding more openness and accountability from the holders of public office. Consequently, many national, regional and international initiatives have focused on various aspects of the problem of corruption in recent years[33].

From the Organization for Economic Cooperation and Development (OECD) and the World Bank to the European Union and non-governmental organizations, virtually every

[33] Relevant international and regional treaties and documents include: [**add Asia Pacific and OECD Conventions here**]; African Union Convention on Preventing and Combating Corruption; Council of Europe Criminal Law on Corruption; Council of Europe Civil Law on Corruption; United Nations Convention against Transnational Organized Crime; International Chamber of Commerce Rules of Conduct to Combat Extortion and Bribery in International Business Transactions; Organization of American States, Inter-American Convention against Corruption; Southern African Development Community Protocol against Corruption.

major body has been concerned with this problem (see also sect. E, Information resources, below).

The United Nations has played a prominent role in international efforts to fight corruption. In 1996, by its resolution 51/191 of 16 December 1996, the General Assembly adopted the Declaration against Corruption and Bribery in International Commercial Transactions. By its resolution 51/59 of 12 December 1996, the Assembly adopted the International Code of Conduct for Public Officials. More recently, by its resolution 56/261 of 31 January 2002, the General Assembly has invited Governments to consider and use, as appropriate, plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century, and has published a draft manual on anti-corruption policy. Quite importantly, the UN Convention against Transnational Organized Crime, which has entered into force as of September 2003, covers many substantive and procedural issues relative to corruption[34].

While many States are part of the initiatives listed in the preceding paragraphs, some may require support to implement the measures that have been agreed. More importantly, there are many provisions introducing mandatory legislative or other measures, which were not required in earlier instruments.

Although many provisions of the United Nations Transnational Organized Crime Convention use identical language to describe several offences (e.g. article 8 of the UN TOCC compared to Art. 15 of this Convention), there are important differences. For example, the definition of 'public official' is broader in this Convention (see article 2 (a)) than the UN TOCC. Also the criminalization of corruption of foreign officials is mandatory in this Convention, whereas it was non-mandatory under the TOCC. This convention also covers the private sector, which was not addressed on the TOCC[35]. Consequently, national drafters should pay close attention to all of the provisions of this Convention, even if their current legal system cover some of the same ground following the implementation of the TOCC or other conventions and instruments.

The section on criminalization is divided into two main parts. The first part focuses on mandatory criminalization, the offences that State parties must establish, which include bribery of national public officials, bribery of foreign public officials and officials of public international organizations, embezzlement, misappropriation or other diversion of property by a public official, laundering of proceeds of crime, and obstruction of justice (articles 15, 16(1), 17, 23, 25).

The activities covered by these offences are vital to the commission of corrupt acts and the ability of offenders to make illicit gains and to protect themselves from law enforcement authorities. They constitute, therefore, the most urgent and basic part of a global and coordinated effort to counter corrupt practices.

The second part of the criminalization section outlines the offences that States parties are required to consider establishing and covers articles 16(2), 18, 19, 20, 21, 22, 24. The Convention introduces minimum standards, but States parties are free to go beyond them. It is indeed "recognized that States may criminalize or have already criminalized conduct other than the offences listed in this chapter as corrupt conduct" (A/58/422/Add.1, para. 22).

[34] insert mention of UN Congresses and code of conduct cross reference.

[35] This Convention also contains and additional article regarding "concealment of property" (article 24).

The issue of the liability of legal persons is dealt with separately because such liability may be criminal, civil or administrative in nature.

The last part of this section addresses the issues of participation, attempt and preparation with respect to all other offences established in accordance with the Convention.

The chapter continues with a section on law enforcement, which covers the rest of the articles with the exception of article 42, addressing the issue of jurisdiction, which is discussed under a separate section.

B. Criminalization

1. Obligations to criminalize: mandatory offences

Article 15
Bribery of national public officials

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 or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

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

Article 16(1)
Bribery of foreign public officials and officials of public international organizations

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 organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

Article 17
Embezzlement, misappropriation or other diversion of property by a public official

Each State Party shall adopt such legislative and other measures as may be 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 or her position.

Article 23
Laundering of proceeds of crime

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.

Article 25
Obstruction of justice

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.

2. Summary of main requirements

In accordance with Article 15, States parties must establish as criminal offences the following

- 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.
- 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.

In accordance with Article 16(1), States parties must establish as criminal offence the promise, offering or giving of an undue advantage to a foreign public official, or official of an international organization, in order:

(a) to obtain or retain business or other undue advantage in international business; and

(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.

In accordance with Article 17, State parties are required to establish as a criminal offence the embezzlement, misappropriation or diversion of property, funds, securities, any other item of value entrusted to a public official in his or her official capacity, for the official's benefit or the benefit of others. Legislation is required to implement this provision

In accordance with Article 23, States parties must establish the following offences as crimes:

(a) Conversion or transfer of proceeds of crime (para.. 1 (a) (i));

(b) Concealment or disguise of the nature, source, location, disposition, movement or ownership of proceeds of crime (para. 1 (a) (ii)).

Subject to the basic concepts of their legal systems, States must also criminalize:

(a) Acquisition, possession or use of proceeds of crime (para. 1 (b) (i));

(b) Participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counseling the commission of any of the offences mandated by article 23 (para. 1 (b) (ii)).

Under article 23, States parties must also apply these offences to proceeds generated by a wide range of predicate offences (para. 2 (a)-(c)).

In accordance with Article 25, States parties must establish the following two criminal offences:

(a) Use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage either to induce false testimony or to interfere in the

giving of testimony or the production of evidence in proceedings in relation to offences covered by the Convention (article 25, subpara. (a));
(b) 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 offences covered by the Convention (art. 25, subpara. (b)).

The criminalization of the acts under these provisions is to be done through legislative and other measures. That is, the criminal offences must be established by criminal law covering all required elements of the offences and not simply by other measures, which would be additional to the proscribing legislation.

See also other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

3. Mandatory requirements/Obligation to legislate

Article 15 requires the establishment of two offences, active and passive bribery of national public officials.

Active bribery

States parties must establish as criminal offence, when committed intentionally,
the promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties (para. a)[36].

It is reiterated that for the purposes of the Convention, with the exception of some measures under chapter II, "public official" means

- 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;
- (ii) 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;
- (iii) any other person defined as a "public official" in the domestic law of a State Party (Article 2 (a)).

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. 24)

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 it is not a gift or

[36] For specific examples of national implementation, see: Australia, New South Wales Consolidated Acts, Independent Commission against Corruption Act 1988, §8; Hong Kong Special Administrative Region of China, Prevention of Bribery Ordinance, Ch. 201, §4.1; Kenya, The Anti-Corruption and Economic Crimes Act, 2003, Kenya Gazette Supplement No. 41 (Acts No. 4), §39;Mauritius Prevention of Corruption Act, Government Gazette No. 5, 2002, Part II – Corruption Offences, §5; United States of America, 18 U.S.C. § 201 (Bribes and Gratuities);

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 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 organization. Some national legislation 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 promise (which implies an agreement between the bribe giver and the bribe taker) and offer (which 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 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, 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".
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Passive bribery

States parties must establish as 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 or her official duties (para. b)[37].

This offence is the passive version of the first offence. The required 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 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.

National drafters should also pay attention to further provisions (articles 26-30, 42) regarding closely related requirements pertaining to the above offences[38].

[37] For specific examples of national implementation, see: United States of America: 18 U.S.C. § 201 (Bribes and Gratuities); Mauritius Prevention of Corruption Act, Government Gazette No. 5, 2002,, 2002, Part II – Corruption Offences, §4; Kenya, The Anti-Corruption and Economic Crimes Act, 2003, Kenya Gazette Supplement No. 41 (Acts No. 4), §39; Hong Kong Special Administrative Region of China, Prevention of Bribery Ordinance, Ch. 201, §4.2. [**references to civil law examples, France, Germany, Greece]**

[38] Especial attention is also drawn to article 27, which addresses the question of participation in the offences established under the Convention. Participation was mandated as a separate offence under the UN TOCC (art. 8(2)).

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

Article 16 (1) requires the establishment of bribery of foreign public officials and officials of public international organizations

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 organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.[39]

As noted in chapter I, "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 (b)).

An "Official of public international organizations" is defined as "an international civil servant or any person who is authorized by such an organization to act on behalf of that organization" (article 2 (c)).

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 organization, 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 (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 element remain the same as above.

The offence of passive bribery by foreign public officials or officials of a public international organization is non mandatory and discussed below. The Interpretative Notes indicate that "a statute that defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard set forth in each of these paragraphs [16(1) and (2)], 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 organization" (A/58/422/Add.1, para. 24).

[39] For specific examples of national implementation, see: Australia, Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999; United Kingdom, United States of America, Foreign Corrupt Practices Act, 1977;

Relevant international and regional treaties and documents include: OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union; Southern African Development Community Protocol against Corruption; United Nations International Code of Conduct for Public Officials; United National Declaration against Corruption and Bribery in International Commercial Transactions; United Nations Convention against Transnational Organized Crime

It is reiterated that the definition of a "foreign public official" is "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 (b)). State parties' domestic legislation will have to cover this definition, as it would not be adequate to consider that foreign public officials are public officials as defined under the legislation of the concerned foreign country. Article 16 does not require that bribery of foreign public officials constitute an offence under the domestic law of the concerned foreign country

The definition of an "official of a public international organization" is that of "an international civil servant or any person who is authorized by such an organization to act on behalf of that organization" (Article 2 (c)).

The provisions of article 16 do not affect any immunities that foreign public officials or officials of public international organizations 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 (2) regarding immunities of national public officials).

National drafters should also pay attention to further provisions (articles 26-30, 42) regarding closely related requirements pertaining to the above offences[40].

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

Article 17 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 position.[41]

The required elements of the offence are the embezzlement, misappropriation or other diversion[42] 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).

[40] Especial attention is also drawn to article 27, which addresses the question of participation in the offences established under the Convention. Participation was mandated as a separate offence under the UN TOCC (art. 8(2)).

[41] For specific examples of national implementation, see: Australia, Crimes Act, Embezzlement by Clerks or Servants, §157; United States of America, 18 U.S.C. § 641 (theft of federal property), §657 (federal bank officials or employees), §659 (interstate (province) commerce, §666 (programs receiving federal (national) funds.

Relevant international and regional treaties and documents include: African Union Convention on Preventing and Combating Corruption; Southern African Development Community Protocol against Corruption

[42] The term "diversion" is "understood in some countries 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).

For the purposes of this Convention, it is reminded that "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 asset" (article 2 (d)).

See also other sections of the guide (articles 26-30, 42 and particularly article 57) regarding closely related requirements pertaining to offences established in accordance with this convention.

Money Laundering

Article 23 requires the establishment of two 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 on money laundering were discussed in the previous chapter.

In the context of globalization, 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 whole.

As noted in the previous chapter, this goal can only be achieved through international and cooperative efforts. It is essential for countries and regions to try make compatible their approaches, standards and legal systems to this offence, so as to enable themselves to cooperate 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 seeks to provide a minimum standard for all countries[43].

The Convention recognizes the link specifically 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 repressive and preventive measures and the Convention follows the same pattern (see previous chapter and below).

Most importantly among them, the UN TOCC 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.

[43] See also UN TOC Convention, article 6.

"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 (h)).

As a result of all these initiatives, many countries already have money laundering laws. Nevertheless, such laws may be limited in scope and 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 this Convention.

The provisions of the Convention addressing the seizure, freezing and confiscation of proceeds (see article 31) and the recovery of assets (see chapter V of the Convention and esp. art. 57) are 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 international cooperation (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 following four offences related to money laundering.

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 (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, 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 (e)).

With respect to the mental 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, knowledge intent or purpose may be inferred from objective factual circumstances.

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 property.

Here, with respect to the mental 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 origin[44].

The next two offences related to money laundering are mandatory subject to the basic concepts of the legal systems of each State party.

Acquisition, possession or use of proceeds of crime

The third offence is the acquisition, possession or use of 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 property.

The mental 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.

Participation in, association with or conspiracy to commit, attempt to commit, aiding, abetting, facilitating and counselling the commission of any of the foregoing

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

These terms are not defined in the Convention[45], 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 systems and ensure that they apply to the other offences established pursuant to this article.

The knowledge, intent or purpose, as required for these offences, may be inferred from objective factual circumstances (art. 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.

[44] In the equivalent article in the UN TOCC, the language was identical and an Interpretative Note indicated that concealment of illicit origin should be understood to be covered by what is here article 23, paragraphs 1 (a) and (b).It added that national drafters should also consider concealment for other purposes, or in cases where no purpose has been established, to be included (See UN TOCC Legislative Guides, p. 45).

[45] The terms are also left undefined in the equivalent provisions of the UN TOCC (Art. 6).

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

At a minimum, these must include "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 the consideration of offences committed in a different national jurisdiction as predicate offences[46].

Many countries 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 crimes[47], or all crimes subject to a defined penalty threshold.

An interpretative note 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 States[48] 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 (art. 23, para. 2 (e))[49].

National drafters should also pay attention to further provisions (articles 26-30, 42) regarding closely related requirements pertaining to the above offences.

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 (art. 23, para. 2 (d)). Such materials should be provided to the United Nations Office on Drugs and Crime.

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[46] 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".

[47] For the purposes of the UN TOCC, "serious crimes" were considered those acts "punishable by a maximum deprivation of liberty of at least four years or a more serious penalty" (Art. 2(b).

[48] For example, Sweden.

[49] 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)).

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 cooperation 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 additional corruptive influences. Innocent people would be wrongfully punished and guilty ones would escape penalty, if the course of justice were subverted by skilful manipulators associated with corrupt officials or networks.

So, the Convention requires measures ensuring the integrity of the justice process. Under article 25, States must criminalize the use of inducement, threats or use of 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 and victims (art. 32), reporting persons (art. 33) and international cooperation (chapter IV).

Specifically, article 25 requires the establishment of two offences.

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 criminalize 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 covered by the Convention (article 25, subpara. (a)). The obligation is to criminalize 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 UN Convention against Transnational Organized Crime (see art. 23), which uses identical language indicated that the term "proceedings" must be interpreted broadly to cover all official governmental proceedings, including pretrial 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 this Convention.

The second offence States are required to establish is the criminalization 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 covered by the Convention (article 25, subpara. (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, subpara. (b))

See also other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

4. Optional requirements/Obligation to consider

5. Optional/States parties may wish to consider

N/A

6. Obligations to consider criminalization: non-mandatory offences

Article 16(2)
Bribery of foreign public officials and officials of public international organization

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 organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 18
Trading in influence

Each State Party 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 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.

Article 19
Abuse of functions

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 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 himself or herself or for another person or entity.

Article 20
Illicit enrichment

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 or her lawful income.

Article 21
Bribery in the private sector

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.

Article 22
Embezzlement of property in the private sector

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.

Article 24
Concealment

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.

1. Summary of main requirements

In accordance with Article 16 (2), States parties must consider establishing as a criminal offence the passive bribery of foreign public officials and officials of public international organizations.

In accordance with Article 18, States must consider establishing as criminal offences

a. Promising, offering, or giving a public official an undue advantage in exchange for said person abusing his/her influence with an administration, public authority or State authority in order to gain an advantage for the instigator.

b. Solicitation or acceptance by a public official, of an undue advantage in exchange for that official abusing his/her influence in order to obtain an undue advantage from an administration, public authority, or State authority.

In accordance with Article 19, States must consider establishing as a criminal offence the abuse of functions or position, i.e. the performance of, or failure to perform an act in violation of law by a public official in order to obtain an undue advantage.

In accordance with Article 20, States parties must consider establishing as a criminal offense illicit enrichment, i.e. a significant increase in assets of a public official that cannot reasonably be explained as being the result of his/her lawful income.

In accordance with Article 21, States parties must consider establishing as a criminal offense:

a. Promising, offering, or giving an undue advantage to a person who directs or works for a private sector entity, in order that he or she take action or refrain from acting in a manner that breaches a duty. (para. a).

b. Soliciting or accepting undue advantage to or by a person who directs or works for a private sector entity, in order that he or she take action or refrain from acting in a manner that breaches a duty (para. b.).

In accordance with Article 22, States parties must consider establishing as a criminal offense the intentional embezzlement by a person who directs or works in a private sector entity, of property, private funds, or other thing of value entrusted to him/her by virtue of his or her position.

In accordance with Article 24, States parties must consider establishing as a criminal offense other concealment or continued retention of property in other situation besides those set forth in Article 23, where the person knows that said property is a violation of offenses established in this Convention.

The establishment of these offences may require new legislation or amendments to existing laws.

2. Mandatory requirements/Obligation to legislate

N/A

3. Optional requirements/Obligation to consider

Corruption can manifest itself in a variety of ways. In order to cover as many types of misconduct, the Convention provides for a series of additional non-mandatory offences, which States are required to consider.

Passive bribery of foreign public officials and officials of public international organizations[50]

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

This is the mirror provision of Article 15 (b), which mandates the criminalization of passive bribery of national public officials, so the discussion of that article above applies to 16 (2) mutatis mutandis. In this respect, drafters of national legislation may wish to consult the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

We have also seen that the offence of active bribery of foreign public officials and officials of public international organizations is mandatory. As the Interpretative Notes indicate, Article 16 paragraph 1 requires that States Parties criminalize active bribery of foreign public officials and paragraph 2 requires only that States Parties "consider" criminalizing solicitation or acceptance of bribes by foreign officials in such circumstances. "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 the following points:

The provisions of this article 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 defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard set forth in each of these paragraphs [16(1) and (2)], 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 organization" (A/58/422/Add.1, para. 24).

The negotiating delegations considered it quite important that "any State Party that had not established this offence should, insofar as its laws permitted, provide assistance and cooperation with respect to the investigation and prosecution of this offence by a State

[50] **Refer to Resolution 58/4 of UN General Assembly para. 6, which** mandates the conference of the parties to consider criminalizing the passive bribery of foreign public officials and officials of public international organization.

Party that had established it in accordance with the Convention and 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 is not intended to imply any weakening of the commitment contained in paragraph 2, as it is recognized that a foreign public official cannot "unintentionally" solicit or accept a bribe" (A/58/422/Add.1, para. 27).

Finally, drafters should also pay attention to some other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

Active and passive trading in influence

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.[51]

The provisions of this article mirror those of article 15, which mandates the criminalization 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 these offences are the same as those of article 15.

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 organization. The undue advantage or bribe must be linked to the official's influence over an administration or public authority of the State.

[51] For specific examples of national legislation and regulation, see: Mauritius Prevention of Corruption Act, Government Gazette No. 5, 2002, entry into force per Proclamation No. 18 (2002), Part II – Corruption Offences, §10.

The mental 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 r 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 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.

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 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[52].

See also other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

Abuse of functions

Article 19 requires that States parties consider the establishment as 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 laws, 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 entity[53].

This provision encourages the criminalization 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)[54].

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[52]For specific examples of national legislation and regulation, see: Kenya, Prevention of Corruption Act, §3 (revised 1998); South Africa, Prevention and Combating of Corrupt Activities Act part 6, §20 (2004). **[more statutes: France, Germany, etc.]**
Relevant international and regional treaties and documents include: African Union, Convention on Preventing and Combating Corruption (2003); Council of Europe, Criminal Law Convention on Corruption (1999); United Nations, International Code of Conduct for Public Officials.

[53] Insert Mauritius example. See also Article 3(1) (c) of the SADC Protocol for a similar provision.

An example of national legislation is Article 130 of the Macau Chief Executive Law, Law No 3/2004 (http://www.imprensa.macau.gov.mo/bo/i/2004/14/lei03_en.asp#a130). [See **China**]

[54] For other specific examples of national legislation and regulation, see: French Code penal : Concussion Art.432-10 and Abus d'autorité dirigés contre l'administration Art.432-1 www.legifrance.gouv.fr; Kenya, Prevention of Corruption Act. §3 (revised 1998); Zambia, Corrupt Practices Act, §30 (1980). The Netherlands considers this offence as a variant of that of

See also other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

Illicit enrichment

Subject to 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)[55].

See also other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

The establishment of illicit enrichment as an offence has been found helpful in a number of jurisdictions[56]. It addresses the difficulty faced by the prosecution when it must prove that a public official solicited or accepted bribes in cases where his/her enrichment is so disproportionate to his/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 introduction, on safeguard clauses). This effectively recognizes that the illicit enrichment offence, in which the defendant has to provide a reasonable explanation for the "significant increase in (his/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 made clearly 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. Once such a case is made, the defendant can then offer a reasonable or credible explanation.

Bribery in the private sector

The Convention introduces also the active and passive bribery in the private sector, an important innovation compared to the UN Convention against Transnational Organized Crime or other international instruments. Article 21 points out the importance of requiring integrity and honesty in economic, financial or commercial activities[57].

Article 15 and is not being implemented separately.
Relevant international and regional treaties and documents include: Council of Europe, Criminal Law Convention on Corruption (1999); United Nations, International Code of Conduct for Public Officials.

[55] Inter-American Convention against Corruption.

[56] See, for example, Inter American Convention against Corruption, Anti-Corruption Convention of the African Union adopted in July 2003 in Maputo; see also national examples in Argentina, El Salvador, Hong Kong Special Administrative Region of China Bill of Rights Ordinance, article 11(1), the Philippines [see also OSCE document on Best Practices in Combatting Corruption: http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019187.pdf.

[57] See also COUNCIL FRAMEWORK DECISION 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, Article 2 of which makes the criminalization of active and passive corruption in the private sector mandatory.

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.

As the above provisions mirror those of article 15, the discussion regarding article 15 applies here mutatis mutandis[58] [**perhaps it would be useful to reiterate here**]. This article, as well as article 22 on embezzlement of property, intends to cover conduct confined entirely within the private sector, where there is no contact to the public sector at all[59].

This article intends to cover conduct exhausted within the private sector and which involves no contact with the public sector[60].

See also other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

Embezzlement of property in the private sector

Beyond the active and passive bribery offences, Article 22 urges States to consider criminalizing, 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 above)[61].

See also other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

Concealment

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[58] For specific examples of national legislation and regulation, see: Hong Kong Special Administrative Region of China, ICAC, Corporate Code of Conduct; Zambia, Corrupt Practices Act, §30 (1980).
Relevant international and regional treaties and documents include: African Union, Convention on Preventing and Combating Corruption (2003); Council of Europe, Criminal Law Convention on Corruption (1999); European Union, Council Framework Decision on combating corruption in the private sector (2003); International Chamber of Commerce, Rules of Conduct to Combat Extortion and Bribery in International Business Transactions (1999); Organization for Economic Cooperation and Development (OECD), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); United Nations Declaration against Corruption and Bribery in International Commercial Transactions (1966).

[59] See for example, fraud and honest services law in the USA.

[60] For example, see US honest services fraud USC 1341, 1343.

[61] The Netherlands considers the embezzlement of property by public officials or in the private sector are 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 cooperation by facilitating dual criminality.

Finally, the Convention recommends the criminalization 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 23[62].

Article 24 requires that, "[w]ithout 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".

See also other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

3. Liability of legal persons

Article 26
Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal 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 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 effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Introduction

Serious and sophisticated crime is frequently committed through or under the cover of legal entities, such as corporation or charitable organizations. Complex corporate structures can effectively hide the true ownership, clients or particular transactions related to serious crimes including the corrupt acts criminalized in accordance with this Convention. Individual executives may reside outside the country where the offence was

[62] For specific examples of national legislation and regulation, see: Italy, article 648; France, Code pénal Art. 321-1 www.legifrance.gouv.fr; Malaysia, Anti-Corruption Act §§18 (1997); South Africa, Prevention and Combating of Corrupt Activities Act part 6, §20 (2004). The Netherlands considers this as a variant of Article 23 and is not being implemented separately.
Relevant international and regional treaties and documents include: African Union, Convention on Preventing and Combating Corruption (2003); Council of Europe, Criminal Law Convention on Corruption (1999);Organization of American States (OAS), Inter-American Convention against Corruption (1996); OAS, Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses (amended1998); United Nations Convention against Transnational Organized Crime (2000); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); United Nations Model Legislation on Laundering, Confiscation and International Co-operation in Relation to the Proceeds of Crime [for civil law jurisdictions]; United Nations Model Money Laundering and Proceeds of Crime Bill [for common law jurisdictions].

committed and responsibility for 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 can be very costly and partly because it may act as a catalyst for more effective management and supervisory structures to ensure compliance.

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 penalization of innocent parties.

Policy makers 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 legislation[63] and international instruments[64] increasingly complement the liability of natural persons with specific provisions on corporate liability. At the same time, national legal regimes remain quite diverse relative to corporate liability, with some States resorting to criminal penalties against the organization itself, such as fines, forfeiture of property or deprivation of legal rights, whereas others employ non-criminal or quasi-criminal measures[65].

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 harmonization prior to this Convention acknowledged such diversity of approaches.

For example, in its resolution 1994/15, the Economic and Social Council noted the recommendations of the Ad Hoc Expert Group on More Effective Forms of International Cooperation against Transnational Crime, including Environmental Crime, concerning the role of criminal law in protecting the environment, 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

[63] For example, Swiss legislation can be found at http://www.admin.ch/ch/f/rs/311_0/a100quater.html and http://www.admin.ch/ch/f/rs/311_0/a100quinquies.html
insert Spanish laws; Greco website.

[64] See, for example, the UN Convention against Transnational Crime. 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, paragraph 9 of which 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." That recommendation was subsequently reiterated by the General Assembly in paragraph 4 of its resolution 40/32. 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.

[65] refer to Spanish and Swiss laws; refer to country reports to the Council of Europe on proceeds of crime; special study by CoE on liability of legal person to be cited

criminal liability is not currently recognized in the legal systems. The same spirit is found in the 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law, 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 (b) of the Forty Recommendations agreed by FATF, 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"[66] The OAS Model Regulations concerning Laundering Offences connected to Illicit 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 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 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" (Art. 2)[67]. 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 (Art. 3, para. 2).

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 an accomplice or an instigator) and attempt in respect of 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-laundering[68].

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 UN Convention against Transnational Organized Crime and the Criminal Law Convention 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-laundering[69].

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[66] http://www1.oecd.org/fatf/40Recs_en.htm#Transparency.

[67] http://www.imf.org/external/np/gov/2001/eng/091801.pdf.

[68] See also such as the OAS model legislation with respect to corporate liability for transnational bribery.

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

Building on such initiatives, this Convention 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, accommodating thus 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.

The liability of legal persons is handled in this Guide separately from other mandatory provisions because the Convention allows such liability to be criminal, civil or administrative.

1. Summary of main requirements

Article 26 of the Convention requires the establishment of liability for legal entities, consistently with the State's legal principles, for the offences established in accordance with this Convention.

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

Sanctions must be effective, proportionate and dissuasive.

2. Mandatory requirements/Obligation to legislate

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 this 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 principles. In those cases, a form of civil or administrative liability will be sufficient to meet the requirement[70].

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 at all by the latter. When an individual commits crimes on behalf of a legal entity, it must be possible to prosecute and sanction them both.

[70] Examples of non-criminal measures that may be adopted are given in the European Union Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, Article 6; see also below.

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) [71].

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 legal systems providing for statutes of limitation must ensure that the limitation periods for the offences covered by the Convention are comparatively long (see art. 29).

The most frequently used sanction is a fine, which is sometimes characterized as criminal, sometimes as non-criminal[72] and sometimes as a hybrid[73]. Other sanctions include exclusion from public bidding, 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 and the appointment of a trustee and the direct regulation of corporate structures[74].

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 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 (2))[75].

4. Participation and attempt

Article 27
Participation and attempt

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.

1. Summary of main requirements

[71] France, Penal Code, Title II. "Of Criminal Liability";

[72] For instance, in Bulgaria, Germany and Poland.

[73] As in Spain and Switzerland.

[74] See, for example, provisions in France, the Netherlands and Spain

[75] [**more on models can be obtained from the Council of Europe study on the options to implement this]** see also phase 1 and phase 2 reports.

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 legislate

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 this Convention.

An Interpretative Note indicates that the formulation of this paragraph 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[76].

3. Optional measures

In addition, States parties may wish to consider the criminalization, consistently with their domestic law, of attempts to commit (article 27, para. 2) or the preparation (art. 27, para. 3) of an offence established in accordance with this Convention.

See also other provisions in this chapter (articles 26-30, 42) covering closely related requirements pertaining to offences established under this convention.

C. Law enforcement

Article 28
Knowledge, intent and purpose as elements of an offence

Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

Article 29
Statute of limitations

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.

Article 30

[76] A similar requirement is contained also in the UN Convention against Transnational Organized Crime (Art. 8, para. 3).

Prosecution, adjudication and sanctions

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.

Article 31
Freezing, seizure and confiscation

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 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.

Article 32
Protection of witnesses, experts and victims

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.

Article 33
Protection of reporting persons

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.

Article 34
Consequences of acts of corruption

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.

Article 35
Compensation for damage

Each State Party shall take such measures as may be necessary, in accordance with 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.

Article 36
Specialized authorities

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.

Article 37
Cooperation with law enforcement authorities

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 cooperation 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 cooperation 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 cooperation 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.

Article 38
Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation 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 cooperation 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.

Article 39
Cooperation between national authorities and the private sector

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation 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.

Article 40
Bank secrecy

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.

Article 41
Criminal record

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.

Introduction

Prevention and criminalization of corrupt practices need to be supported by measures and mechanisms enabling the other parts of the overall anti-corruption efforts: detection, prosecution, punishment and reparation. In the following section, the Convention provides for a series of procedural measures that support criminalization.

Because of the length and detail of these provisions, this section of the Guide will start with a summary of all main requirements, but then moves on to an article by article discussion.

These are the provisions related to the prosecution of corruption offenses and enforcement of national anticorruption laws, such as:

- evidentiary standards, statute of limitations and rules for adjudicating corruption offenses (Articles 28-30);
- cooperation between national law enforcement authorities, specialized anticorruption agencies, and the private sector (Articles 37-39);
- use of special investigative techniques (Article 50);
- protection of witnesses, victims and whistleblowers (Articles 32-33);
- allowing the freezing, seizure and confiscation of proceeds and instrumentalities of corruption (Article 31);
- overcoming obstacles that may arise out of the application of bank secrecy laws (Article 40); and
- addressing the consequences of acts of corruption (Article 34), including through compensating for damages caused by corruption (Articles 35).

1. Summary of main requirements

States must ensure that knowledge, intent or purpose element of offences established in accordance with the Convention can be established through inference from objective factual circumstances (Article 28).

States must establish long statutes of limitation for Convention offences and suspend them or establish longer ones for alleged offenders evading the administration of justice (article 29).

In accordance with Article 30, States must

- ensure that offences covered by the Convention are subject to adequate sanctions taking the gravity of each offence into account (para. 1);
- maintain a balance between immunities provided to their public officials and their ability to effectively investigate and prosecute offences established through this Convention (para. 2);
- ensure that pre-trial and pre-appeal release conditions take into account the need for the defendants' presence at criminal proceedings, consistently with domestic law and the rights of the defence (para. 4);
- take into account the gravity of the offences when considering early release or parole of convicted persons (para 5);

Article 30 also mandates that States consider or endeavour to

- ensure that any discretionary legal powers relating to the prosecution of Convention offences maximize the effectiveness of law enforcement in respect of these offences and act as a deterrent (para. 3)
- establish procedures through which a public official accused on such offense may be removed, suspended or reassigned (para. 6);

- establish procedures for the disqualification of person convicted of offense established through this Convention from:
    i. public office or
    ii. office in an enterprise owned in whole or in part by the State (para. 7);
- promote the reintegration of persons convicted of these offenses into society (para. 10).

In accordance with Article 31, States parties must, to the greatest extent possible under their domestic system, have the necessary legal framework to enable:

- The confiscation of proceeds of crime derived from offences covered by the Convention or property the value of which corresponds to that of such proceeds (para. 1 (a));
- The confiscation of property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention (para. 1 (b));
- The identification, tracing and freezing and/or seizure of the proceeds and instrumentalities of crime covered by the Convention, for the purpose of eventual confiscation (para. 2);
- The administration of frozen seized or confiscated property (para. 3);
- The application of confiscation powers to transformed or converted property and proceeds intermingled with legitimately obtained property (to the value of the proceeds in question) and to benefits or income derived from the proceeds (paras. 4-6);
- The courts or other competent authorities to order that bank, financial or commercial records be made available or seized. Bank secrecy shall not be a legitimate reason for failure to comply (para. 7).

In accordance with Article 32 and bearing in mind that some victims may also be witnesses (para. 4), States are required to:

- Provide effective protection for witnesses, within available means. This may include (para. 1):
    (i) Physical protection (para. 2 (a));
    (ii) Domestic or foreign relocation (para. 2 (a));
    (iii) Special arrangements for giving evidence (para. 2 (b));
- Consider foreign relocation agreements (para. 3)
- Provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law;

Article 33 requires States to consider providing measure to protect persons who report offenses established in the Convention to competent authorities.

Article 34 requires States to address the consequences of corruption. In this context, States may wish to consider annulling or rescinding a contract, withdrawing a concession or similar instruments, or taking other remedial action.

Article 35 requires that States ensure that entities or individuals who have suffered damages as a result of corruption have the right to initiate legal proceedings to obtain damages from those responsible.

Article 36 requires States in accordance with the fundamental principles of their legal system, to:

- ensure they have a body or persons specializing in combating corruption through law enforcement;

- grant the body or persons the necessary independence to carry out its functions effectively without undue influence; and
- provide sufficient training and resources to such body or persons.

Under Article 37, States must:

- take appropriate measures to encourage persons who participate or who have participated in Convention offences:
  - (i) to supply information for investigative and evidentiary purposes;
  - (ii) to provide concrete assistance towards depriving offenders of the proceeds of crime and recovering such proceeds (para. 1);
- consider allowing mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of Convention offences (para. 2);
- consider providing for the possibility of granting immunity from prosecution to a person who provides substantial cooperation (this may require legislation in systems not providing prosecutorial discretion)
- provide to such persons the protection of witnesses (see art. 32).

Article 38 requires that States take measures to encourage cooperation between their public authorities and their law enforcement. Such cooperation may include

- informing law enforcement authorities when there are reasonable grounds to believe that offenses established in accordance with articles 15 (bribery), 21 (private sector bribery) and 23 (money laundering) have been committed; and
- providing such authorities all necessary information upon request.

Article 39 requires States to

- take measures consistent with its laws encouraging cooperation between its private sector authorities (financial institutions, in particular) and law enforcement authorities regarding the commission of Convention offences (para. 1);
- consider encouraging its nationals and habitual residents to report the commission of such offences to their law enforcement authorities (para. 2).

Article 40 requires States to ensure that, in cases of domestic criminal investigations of Convention offences, their legal system has appropriate mechanisms to overcome obstacles arising out of bank secrecy laws.

Finally, States parties may allow the consideration of an alleged offender's convictions in another State in their own criminal proceedings (article 41).

2. Mandatory requirements/Obligation to legislate

This section of the Convention addresses a host of provisions and measures contributing to the effective identification, apprehension, prosecution, adjudication and sanctioning of those engaged in corrupt practices. For these goals as well as those of ensuring that justice is meted out and offenders are prevented from enjoying fruits of their misconduct, measures designed to locate and seize proceeds of crime, alongside compensation for damages, are vital. Instrumental and necessary in this respect is also the adequate protection of witnesses, victims and others who collaborate in the investigation or prosecution of Convention offences. Finally, all of these goals can only be achieved through national and international cooperation not only among relevant public authorities, but also between the national authorities and the private sector.

The provisions discussed in this section need to be seen also in conjunction with those regarding prevention of corruption (see previous chapter) and international cooperation (see next chapter). If one of the Convention's fundamental principles, asset recovery (see art. 51 and chapter V), is to be pursued realistically, all of the above efforts must be concerted and synchronized locally and globally.

This must be borne in mind, as the rest of this section examines article by article the provisions regarding law enforcement of Convention offences.

Knowledge, intent and purpose as elements of an offence

Article 28 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". 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

Statute of limitations

In accordance with Article 29, States party 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 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".

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 such provisions is a balance between the interests for swift justice, closure and fairness to victims and defendants and the recognition that corruption often takes time to be discovered and established[77]. There are variations among States as to when the limitation period starts and how the time is counted. For example, in some countries 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, and therefore increase the possibilities of 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 longer periods of time to bring offenders to justice. This is particularly important in cases of fugitives, as the delay of instituting proceedings is beyond the control of authorities. Corruption cases may take long to be detected and even longer for the facts to be established.

[77] Many legal systems and international conventions, for example the International Covenant on Civil and Political Rights in its article 14, paragraph 3 *(c),* also include clauses for trial without undue delays.

For this reason, the Convention requires States with statutes of limitation to introduce long periods for all Convention offences and longer periods for alleged offenders that have evaded the administration of justice. These provisions parallel those of the UN Convention against Transnational Organized Crime (see art. 11, (5)). This Convention, however, adds the option of suspending the statutes of limitations in the case of those evading the administration of justice.

Article 29 does not require States without statutes of limitation to introduce them.

Prosecution, adjudication and sanctions

Harmonizing legal provisions on corruption, detecting the offences, identifying and arresting the culprits, enabling jurisdiction to be asserted and facilitating smooth coordination of national and international efforts are all indispensable components of a concerted, global strategy against serious crime. Yet they are not sufficient. After all of the above has taken place, it is also necessary to ensure that the prosecution, treatment and sanctioning of offenders around the world is also comparatively symmetric and consistent with the harm they have caused and with the benefits they have derived from their criminal activities.

The penalties provided for similar crimes in various jurisdictions diverge significantly, reflecting different national traditions, priorities and policies. It is essential, however, to ensure that at least a minimum level of deterrence is applied by the international community to avoid the perception that certain types of crimes "pay", even if the offenders are convicted. In other words, the sanctions must clearly outweigh the benefits of the crime. Therefore, in addition to harmonizing substantive provisions, States need to engage in a parallel effort with respect to the issues of prosecution, adjudication and punishment.

International initiatives have sought to do this with respect to particular offences, as for example, the UN Convention against Transnational Organized Crime (art. 11), the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) (General Assembly resolution 45/110, annex).

Article 30 addresses this important aspect of the fight against corruption and complements the provisions relative to the liability of legal persons (art. 26), the freezing, seizure and confiscation of proceeds of crime (arts. 31), and the recovery of assets (chapter V). This article requires that States parties give serious consideration to the gravity of the Convention offences when they decide on the appropriate punishment and possibility of early release or parole. It also requires that States make an effort to ensure that any discretionary powers they have under domestic law is used to deter these offences. This article also requires that States properly balance the immunities their public officials enjoy with their ability to investigate and prosecute corruption offences.

Sophisticated corrupt actors are frequently considered likely to flee the country where they face legal proceedings. For this reason, the Convention requires that States take measures to ensure that those charged with offences established in accordance with this Convention appear at criminal proceedings consistently with their law and the rights of the defence. This relates to decisions on the defendants' release before trial or appeal.

Further, article 30 mandates the consideration of measures to be taken against accused or convicted public officials, as appropriate and consistently with their fundamental principles of law. States are required to endeavour to promote the social reintegration of persons convicted of Convention offences.

Article 30 contains both mandatory and non-mandatory provisions, which will be examined in turn.

1. Mandatory requirements

The Convention requires that States parties make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence (para. 1).

The severity of the punishment for the offences established in accordance with the Convention is left to the States parties, but they must take into account the gravity of the offence. The primacy of national law in this respect is affirmed by article 30, paragraph 9. States must also endeavour to ensure that the grave nature of the offence and the need to deter its commission is taken into account in prosecution, adjudication and correctional practices and decisions[78]. The Convention also clarifies that this provision will not prejudice the exercise of disciplinary powers by the competent authorities against civil servants (art. 30, paragraph 8).

This requirement is general and applies to both natural persons and legal entities. As noted above, there are additional and more specific provisions regarding legal entities in article 26, paragraph 4, which requires that States ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Along the same spirit of fairness and deterrence, the Convention encourages a strict post-conviction regime. Article 30, paragraph 5, requires States to take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of Convention offences[79].

Paragraph 2 requires States to establish or maintain, in accordance with their legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to their 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.

It would be highly damaging to the legitimacy of the overall anti-corruption strategy, public perceptions of justice, private business functioning and international cooperation, if corrupt public officials were able to shield themselves from accountability and investigation or prosecution for serious offences. The objective of this provision is to eliminate or prevent such cases as much as possible.

[78] Should national drafters of States parties to the TOC Convention wish it to apply to corruption offences not specifically covered by the TOCC, they need to provide for a maximum penalty of at least four years' deprivation of liberty, so that these offences can be considered "serious crime".

[79] Many jurisdictions allow for an early release or parole of incarcerated offenders, while others completely prohibit it. The Convention does not ask States to introduce such a programme, if their systems do not provide for it. It does, however, urge those States which provide for early release or parole to consider increasing the eligibility period, bearing in mind the gravity of the offences, which may be done through consideration of aggravating circumstances that may be listed in domestic laws or other conventions.

An Interpretative Note indicates "the understanding that the appropriate balance referred to in this paragraph would be established or maintained in law and in practice" (A/58/422/Add.1, para. 34).

Under paragraph 4, States must take appropriate measures – with respect to Convention offences, in accordance with their 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. According to an Interpretative Note, "the expression "pending trial" is considered to include the investigation phase" (A/58/422/Add.1, para. 35).

The illegal transactions engaged in by some corrupt actors can generate substantial profits. Consequently, significant resources may be available to defendants, to the effect that they can post bail and avoid detention before their trial or their appeal. The dissuasive effect of bail is correspondingly diminished. National drafters, therefore, must take into account the risk that law enforcement may thus be undermined. Article 30, paragraph 4, points to the risk of imprudent use of pretrial and pre-appeal releases and requires that States take appropriate measures consistent with their law and the rights of defendants to ensure that they do not abscond.

2. Non-mandatory requirements

Article 30, paragraph 3, requires that States endeavour to ensure that any discretionary legal powers under their 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.

This provision refers to discretionary prosecutorial powers available in some States. These States must make an effort to encourage the application of the law to the maximum extent possible in order to deter the commission of Convention offences.

To the extent consistent with the fundamental principles of their legal system, States parties must 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 (art. 30, para. 6).

The next provision addresses further consequences for convicted offenders. Where warranted by the gravity of the offence and to the extent consistent with the fundamental principles of their legal system, States are required to consider establishing procedures for the disqualification of persons convicted of offense established in accordance with this Convention from public office or office in an enterprise owned in whole or in part by the State (art. 30, para. 7). Such disqualifications could be executed by court order or other appropriate means. The duration of disqualifications is also left to the discretion of the States, consistently with their domestic law.

Finally, the Convention recognizes that, just as with persons found guilty and punished for other kinds of misconduct, reintegration into the society is an important goal of control systems. Consequently, States parties must endeavour to promote the

reintegration into society of persons convicted of offenses established in accordance with this Convention (Art. 30, para. 10).

Freezing, seizure and confiscation

Criminalizing the conduct from which substantial illicit profits are made does not adequately punish or deter organized criminal groups. Even if arrested and convicted, some of these offenders will be able to enjoy their illegal gains for their personal use or other purposes. Despite some sanctions, the perception would still remain that crime pays in such circumstances and that Governments have been ineffective in removing the incentive for corrupt practices.

Practical measures to keep offenders from profiting from their crimes are necessary. One of the most important ways to do this is to ensure that States have strong confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property. Specific international cooperation mechanisms are also necessary to enable countries to give effect to foreign freezing and confiscation orders and to provide for the most appropriate use of confiscated proceeds and property.

Significant variation exists in the methods and approaches employed by different legal systems. Some opt for a property-based system, others for a value-based system, while still others combine the two. The first one allows confiscation of property found to be proceeds or instrumentalities; that is, used for the commission of crime. The second allows the determination of the value of proceeds and instrumentalities of crime and the confiscation of an equivalent value. Some States allow for value confiscation under certain conditions (for example, the proceeds have been used, destroyed or hidden by the offender).

Other variations relate to the range of offences with respect to which confiscation can take place, the requirement of a prior conviction of the offender[80], the required standard of proof (to the criminal or lower civil level)[81], whether and the conditions under which third-party property is subject to confiscation and the power to confiscate the products or instrumentalities of crime[82].

The need for integration and the beginnings of a more global approach is clear. To this end, the Convention devotes three articles to the issue. Articles 31, 55 and 57 of the Convention cover domestic and international aspects of identifying, freezing, confiscating and, very importantly, recovering the proceeds and instrumentalities of corrupt conduct[83].

The terms "property", "proceeds of crime", "freezing", "seizure", and "confiscation" are defined in Article 2, subparagraphs (d)-(g), as follows:

[80] Some countries allow confiscation without conviction, if the defendant has been a fugitive for a certain period of time and there is proof to the civil standard that the property is the proceeds or instrumentalities of crime. Other countries allow confiscation ordered through civil or administrative proceedings (for example, Colombia, Germany, South Africa and the United States).

[81] Some jurisdictions provide for a discretionary power to reverse the burden of proof, in which case the offenders have to demonstrate the legal source of the property (for example, Hong Kong Special Administrative Region of China).

[82] See also FATF Special Recommendation III and Interpretative Note and UN Security Council Resolutions 1267, 1373 and 1377 relative to the financing of terrorism.

[83] For specific examples of national implementation, see: Albania, Criminal Code, Article 36; Australia, Proceeds of Crime Act 1991; Colombia, Law No. 33, Establishing Provisions for the Extinction of Ownership of Illicitly Acquired Property; Germany, Criminal Code, §§73, 74;

(d) "Property" shall mean 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;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(f) "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority

Article 31 requires States parties to adopt measures, to the greatest extent possible within their legal system, to enable the confiscation of proceeds, equivalent value of proceeds and instrumentalities of offences covered by the Convention, and to regulate the administration of such property. The term "to the greatest extent possible within their domestic legal systems" is intended to reflect the variations in the way that different legal systems carry out the obligations imposed by this article. Nevertheless, countries are expected to have a broad ability to comply with the provisions of article 31. Article 31 also obligates States parties to enable the identification, tracing, freezing and seizing of items for the purposes of confiscation and recovery. In addition, it obliges each State party to empower courts or other competent authorities to order the production of bank records and other evidence for purposes of facilitating such identification, freezing, confiscation and recovery[84]

Detailed provisions similar to those of this Convention can be found in the UN Convention against transnational Organized Crime (articles, 12-14) in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (article 5), the International Convention for the Suppression of the Financing of Terrorism, Security Council resolution 1373 (2001) and the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. States that have enacted legislation to implement their obligations as parties to those conventions may not need major amendments to fulfill the requirements of this Convention[85], with the exception of the major innovation of asset recovery (see below chapter V).

Conversely, implementing the provisions of the Organized Crime Convention would bring States closer to conformity with the other conventions.

At the same time, article 31 reiterates 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.

1. Mandatory requirements

[84] In addition, States parties will have to ensure that the police, prosecutors and judicial authorities are properly trained; the lack of training has been identified as a major impediment to effective law enforcement in this complex area (see in this regard article 60,(Training and information exchange), para. 1 (e) to (g) and para. 20).

[85] In addition, the FATF Forty Recommendations provide guidance to countries on means of identifying, tracing, seizing and forfeiting the proceeds of crime.

Article 31 sets out the primary legislative obligations to create powers that enable confiscation and seizure of proceeds of crime[86].

The substantive obligations to enable confiscation and seizure are found in article 31, paragraphs 1, 3, 4, 5 and 6, while procedural powers to trace, locate gain access to and administer assets are found in the remaining paragraphs[87]. Special mention is also made to the important issue of third party rights protection.

Substantive obligations

Article 31, paragraph 1 (a), requires that States parties enable, to the greatest extent possible within their domestic legal systems, the confiscation of:

- proceeds of crime derived from offences covered by the Convention or property the value of which corresponds to that of such proceeds;
- property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention[88].

Given the Convention's "fundamental principle" of asset recovery, paragraph 3 introduces an obligation for States to regulate the administration of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article. This is a provision not found in earlier instruments with very similar requirements, such as the UN Convention against Transnational Organized Crime. So, even States parties to that Convention may need legislation or amendments to existing laws in order to meet this obligation.

Paragraphs 4 and 5 cover situations in which the source of proceeds or instrumentalities may not be immediately apparent, because the offenders have made their detection more difficult by mingling them with legitimate proceeds or by converting them into different forms. These paragraphs require States parties to enable the confiscation of property into which such proceeds have been converted, as well as intermingled proceeds of crime up to their assessed value.

An Interpretative Note indicates that the provision of paragraph 5 "is intended as a minimum threshold and that States Parties would be free to go beyond it in their domestic legislation" (A/58/422/Add.1, para. 36).

Paragraph 6, further provides that "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".

So, States parties are requires to ensure that income or other benefits derived from investing proceeds of crime are also liable to confiscation[89].

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[86] Article 55 covers international cooperation, while article 57 provides for asset return.

[87] For specific examples of national legislation and regulation, see: Albania, Criminal Code, Article 36; Australia, Proceeds of Crime Act (1991); Colombia, Law No. 33, Establishing Provisions for the Extinction of Ownership of Illicitly Acquired Property; Germany, Criminal Code, §§73, 74.

[88] An interpretative note to article 12 of the UN TOCC, which contained identical language indicated that the words "used in or destined for use in" are meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a crime (A/55/383/Add.1, para. 22).

[89] An Interpretative note to the identical wording in the UN TOCC indicated that the words "other benefits" are intended to encompass material benefits as well as legal rights and interests of an enforceable nature that are subject to confiscation (A/55/383/Add.1, para. 23).

Many States already have such measures in place with respect to transnational organized crimes, and specific offences, including corruption, by virtue of legislation they enacted to implement the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. These States will need to review that legislation to determine whether it requires amendments to comply with the crimes established in accordance with this Convention and with respect to the administration and return of confiscated crime proceeds.

Obligations to adopt procedural powers

The investigative capability needed to implement article 31 (as well as articles 55 and 57) fully will depend to a large degree on non-legislative measures, such as ensuring that law enforcement agencies and prosecutors are properly trained and provided with adequate resources. In most cases, however, legislation will also be necessary to ensure that adequate powers exist to support the tracing and other investigative measures needed to locate and identify assets and link them to relevant crimes. Criminals who become aware that they are under investigation or charges will try to hide property and shield it from law enforcement actions. Sophisticated corrupt officials engage in such practices well before any investigation is instituted. Without the ability to trace such property as offenders move it about, law enforcement efforts will be frustrated.

The legislation required by article 31paragraphs 2 and 7 involves:

- Such measures as may be necessary to enable the identification, tracing, freezing or seizure of proceeds or other property (art. 31, para. 2);
- Powers for courts or other competent authorities to order that bank, financial or commercial records be made available or be seized (art. 31, para. 7).

Article 31, paragraph 7, sets forth procedural law requirements to facilitate the operation of the other provisions of this article and of article 55 (on international cooperation). It requires States parties to ensure that bank records, financial records (such as those of other financial services companies) and commercial records (such as of real estate transactions or shipping lines, freight forwarders and insurers) are subject to compulsory production, for example through production orders and search and seizure or similar means that ensure their availability to law enforcement officials for purposes of carrying out the measures called for in articles 31 and 55. The same paragraph establishes the principle that bank secrecy cannot be raised by States as grounds for not implementing that paragraph. As will be seen, the Convention applies the same rule with respect to mutual legal assistance matters (see art. 46, para. 8; see also art. 55 and chapter IV of this guide).

Again, these measures are very similar to the United Nations Convention against Transnational Organized Crime and to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Thus, many States already have such measures in place, at least with respect to narcotics offences, by virtue of legislation implementing that treaty. States will need to review that legislation in order to ensure that it covers the crimes established in accordance with this Convention.

Third parties (article 31, paragraph 9)

Article 31, paragraph 9, requires that the seizure and forfeiture requirements be interpreted as not prejudicing the rights of bona fide third parties, which would at a minimum exclude those with no knowledge of the offence or connection with the offender(s).

The system of confiscation intentionally constitutes an interference with the economic interests of individuals. For this reason, particular care must be taken to ensure that the system developed by States parties maintains the rights of bona fide third parties who may have an interest in the property in question[90].

2. Optional issues

Burden of proof

In creating the judicial powers to order seizure and forfeiture, national drafters should consider issues relating to the applicable burden of proof. In some systems, confiscation is treated as a civil matter, with the attendant balance of probabilities standard. In other systems, confiscation is considered a criminal punishment, for which the higher beyond a reasonable doubt standard should be applied and may in some cases be required by constitutional or other human rights standards.

To some extent, this may depend on whether there have already been one or more convictions in related criminal prosecutions. Since these entail a judicial finding that the crime was committed based on the high criminal standard of proof, the lower civil standard may then apply in subsequent confiscation proceedings on the question of whether the property involved was derived from, used in, or destined for use in the committed offence.

Article 31, paragraph 8, suggests that States may wish to consider shifting the burden of proof to the defendant to show that alleged proceeds of crime were actually from legitimate sources. Because countries may have constitutional or other constraints on such shifting of the burden of proof, countries are only required to consider implementing this measure to the extent that it is consistent with the fundamental principles of their law.

Similarly, legislative drafters may wish to consider adopting the related practice in some legal systems of not requiring a criminal conviction as a prerequisite to obtaining an order of confiscation, but providing for confiscation based on a lesser burden of proof to be applied in proceedings. For example, the laws of Ireland and the United Kingdom of Great Britain and Northern Ireland provide for such a system, with a lower burden of proof for deprivation of property than is required for deprivation of liberty.

Finally, Article 31, paragraph 10, provides that "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". So, the Convention recognizes that, because of wide variations in domestic legal systems, States parties are not bound to implement the provisions of article 31 by

[90] An interpretative note to the equivalent provisions of the UN TOCC (Art. 12) indicated that the interpretation of article 12 should take into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State (A/55/383/ Add.1, para. 21). The same note went on to indicate that it is not the intention of the Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations.

following any particular formula, but have the flexibility to carry out their obligations in ways consistent with their domestic legal framework.

Protection of witnesses, experts, victims and reporting persons

The provisions of articles 32 and 33 (as well as 35) address the protection of witnesses, thereby complementing efforts regarding the prevention of public and private corruption, obstruction of justice, confiscation and recovery of criminal proceeds, and cooperation at the national and international level. Unless people feel free to testify and communicate their expertise, experience or knowledge to the authorities, all objectives of the Convention could be undermined.

Consequently, States are mandated to take appropriate measures, within their means and consistently with their legal system, against potential retaliation or intimidation of witnesses, victims and experts. States are also encouraged to take procedural and evidentiary rules strengthening those protections as well as extending some to persons reporting in good faith to competent authorities about corrupt acts.

Corruption generally victimizes the entire society and the international community. There may also be specific victims of corrupt practices The Convention recognizes the importance of alleviating the impact of corruption on individuals, groups or organizations and requires States to take measures to protect victims against retaliation or intimidation and to ensure that they introduce procedures for compensation and restitution. In addition, States will have to consider the perspective of victims, in accordance with domestic legal principles and consistently with the rights of defendants.

1. Summary of main requirements

Bearing in mind that some victims may also be witnesses, States are required to:

- Provide effective protection for witnesses and experts, within available means. This may include:
  - (i) Physical protection
  - (ii) Domestic or foreign relocation
  - (iii) Allow non-disclosure of identity or whereabouts of witnesses
  - (iv) Special arrangements for giving evidence.

- Establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention;
- Provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law;
- Consider relocation agreements with other States
- Consider measures protecting persons reporting acts relative to corruption offences in good faith to competent authorities

2. Mandatory requirements

Article 32, paragraph 1, requires that States parties take appropriate measures within their means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences established in accordance with the Convention and, as appropriate, for their relatives and other persons close to them.

These measures may include:

- Establishing procedures for the physical protection of such persons, such as relocating them and permitting limitations on the disclosure of information concerning their identity and whereabouts (article 32, para. 2, sub para. a);
- Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness (article 32, para. 2, sub para. b).

These provisions also apply to victims insofar as they are witnesses (article 32, paragraph 4).

These requirements are mandatory, but only where appropriate, necessary, without prejudice to the rights of defendants and within the means of the State party concerned[91].

This means that the obligation to provide effective protection for witnesses is limited to specific cases or prescribed conditions where, in the view of the implementing State party, such means are appropriate. For instance, officials might be given discretion to assess the threat or risks in each case and to extend protection accordingly. The obligation to provide protection also arises only where such protection is within the means, such as available resources and the technical capabilities, of the State party concerned.

The term "witness" is not defined, but article 32 limits the scope of witnesses to whom the obligations apply to witnesses who give testimony concerning offences established in accordance with the Convention, and, as appropriate, for their relatives or other persons close to them[92].

Interpreted narrowly, this would only apply where testimony is actually given, or when it is apparent that testimony will be given, although the requirement to protect witnesses from potential retaliation may lead to a broader interpretation.

The experience of States with witness-protection schemes suggests that a broader approach to implementing this requirement will be needed to guarantee sufficient protection to ensure that witnesses are willing to cooperate with investigations and prosecutions. In addition to witnesses who have actually testified, protection schemes should generally seek to extend protection in the following cases:

- to persons who cooperate with or assist in investigations until it becomes apparent that they will not be called upon to testify; and

[91] For specific examples of national implementation, see: Albania, Criminal Code, article 311 (threat to remain silent), article 79 (murder for reasons of special qualities of the victim); Canada, Witness Protection Program Act; 1996; France, Penal Code, Article 434-8, 434-9, 434-11, 434-15; South Africa, Witness Protection Act, 112 (1998); United States of Amierca, 18 U.S.C. §§1501-1518.

Relevant international and regional treaties and documents include: Rome Statute of the International Criminal Court; United Nations UNODOC model Witness protection bill; the United Nations Convention against Transnational Crime.

[92] For specific examples of national legislation and regulation, see: Albania, Criminal Code, article 311 (threat to remain silent), article 79 (murder for reasons of special qualities of the victim); Canada, Witness Protection Program Act, (1996); France, Penal Code, article 434-8, 434-9, 434-11, 434-15; South Africa, Witness Protection Act, 112 (1998); United States of America, 18 U.S.C. §§1501-1518.

Relevant international and regional treaties and documents include: African Union, African Union Convention on Preventing and Combating Corruption (2003); Convention against Corruption (Council of Europe, Criminal Law Convention on Corruption (1999); Rome Statute of the International Criminal Court; United Nations UNODOC model witness protection bill; United Nations Convention against Transnational Organized Crime (2000).

- to persons who provide information that is relevant but not required as testimony or not used in court because of concerns for the safety of the informant or other persons.

Legislators may therefore wish to make provisions applicable to any person who has or may have information that is or may be relevant to the investigation or prosecution of a corruption offence, whether this is produced as evidence or not.

It should be noted that this obligation also applies to the protection of persons who participate or have participated in the offences established in accordance with the Convention and who then cooperate with or assist law enforcement, whether or not they are witnesses (see art. 37, para. 4).

Depending on the constitutional or other legal requirements of States parties, two significant constraints may exist on what may be done to implement article 32. Both involve the basic rights of persons accused of crimes. Accordingly, article 32, paragraph 2, provides that the measures implemented should be without prejudice to the rights of the defendant. For example, in some States, the giving of evidence without the physical presence of witnesses or while shielding their identity from the media and the defendants may have to be reconciled with constitutional or other rules allowing defendants the right to confront the accuser. Another example would be that in some States the constitution or other basic legal rules include the requirement that either all information possessed by prosecutors, or all such information which may be exculpatory to the accused, must be disclosed in order to enable an adequate defence to the charges. This may include personal information or the identities of witnesses to permit proper cross-examination.

In cases where these interests conflict with measures taken to protect the identity or other information about a witness for safety reasons, the courts may be called upon to fashion solutions specific to each case that meet basic requirements regarding the rights of the accused while not disclosing enough information to identify sensitive investigative sources or endanger witnesses or informants. Legislation establishing and circumscribing judicial discretion in such cases could be considered. Some options include the following measures:

- Statutory limits on disclosure obligations, applicable where some basic degree of risk has been established;
- Judicial discretion to review and edit written materials, deciding what does not have to be disclosed and can be edited out;
- Closed hearings of sensitive evidence, from which the media and other observers can be excluded.

Some elements of witness protection may be related to the offence of obstructing justice (art. 25), which includes the application of physical force, threats and intimidation against witnesses.

Article 32, paragraph 5, requires States, subject to their domestic laws, to 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.

In States where such opportunities do not already exist, amendments to laws governing trial procedures may be necessary.

Such legislation should take the following factors into consideration:

- The obligation only extends to victims of offences covered by the Convention,
- Whether a person who sought to make his or her views or concerns known was a victim of such an offence or not would normally be a question of fact for the court hearing the case or conducting the proceedings to decide. If a victim is to be given the opportunity to appear prior to the final determination of the court as to whether the offence actually occurred and the person accused is convicted of that offence, legislation should allow the court to permit the participation based on the claims of the victim, but without making any finding prejudicial to the eventual outcome in the case. If the victim is only permitted to appear in the event that the accused is convicted and prior to or after a sentence is imposed, this issue does not arise;
- Legislation should both allow for some form of expression on the part of the victim and require that it actually be considered by the court;
- The obligation is to allow concerns to be presented, which could include either written submissions or viva voce statements. The latter may be more effective in cases where the victim is able to speak effectively. The victim is not normally prepared or represented by legal counsel, however, and there is a risk that information that is not admissible as evidence will be disclosed to those deciding matters of fact. This is of particular concern in proceedings involving lay persons such as juries and where statements may be made prior to the final determination of guilt;
- The obligation is to allow participation at appropriate stages and in a manner not prejudicial to the rights of the defence. This may require precautions to ensure that victims do not disclose information that has been excluded as evidence because defence rights had been infringed, or which was so prejudicial as to infringe the basic right to a fair trial. Many States that allow victims to appear (other than as witnesses) consider that the only appropriate stage is following a conviction. If the victim's evidence is needed, then he or she is called as an ordinary witness. If the accused is acquitted, the victim's statements become irrelevant. If the accused is convicted, however, information relating to the impact of the crime on the victim is often highly relevant to sentencing

3. Non-mandatory requirements

Article 32, paragraph 3, requires that States parties consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article. Insofar as victims are witnesses, this provision applies to them too (art. 32, para. 4).

Article 33 requires that States parties consider incorporating into their 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[93].

[93] For specific examples of national legislation and regulation, see: Australia, Whistleblowers Protection Act (1994); Hong Kong Special Administrative Region of China, Prevention of Bribery Ordinance, 201, §30A; United Kingdom Public Interest Disclosure Act, Chapter 23 (1998); United StatesWhistleblower Reinforcement Act (1998).
For specific examples of national legislation and regulation, see: Kenya, Prevention of Corruption Act**,** chapter 65, §11A (revised 1998) [**changed**];
Relevant international and regional treaties and documents include: Council of Europe, Civil Law Convention on Corruption (1999); Council of Europe, Criminal Law Convention on Corruption (1999); Organization of American States, Inter-American Convention against Corruption (1996);

So, the Convention acknowledges the potential of useful contributions made by persons who observe or otherwise come into contact with corrupt practices. In such instances, protection should be considered for those making reports on acts relative to corruption offences are made in good faith, on reasonable grounds and to appropriate authorities

Consequences of acts of corruption

Consistent with the Convention's objectives relative to prevention, law enforcement, and asset return is the concern about the economic, social or other effects of corruption. For this reason, Article 34 contains a general obligation for States parties to take measures to address the consequences of corruption[94].

These measures must be adopted with due regard to the rights of third parties acquired in good faith and in accordance with the fundamental principles of the domestic law of each State party.

In this context, Article 34 suggests that States parties may wish to 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.

Compensation for damage

Closely related to the previous article is the mandate to ensure access to compensation and restitution for victims of offences established in accordance with the Convention[95].

So, Article 35 requires that States parties take such measures as may be necessary, in accordance with 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 are 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). While article 35 does not restrict the right of each State Party to determine the circumstances under which it will

[94] Relevant international and regional treaties and documents include: Council of Europe, Civil Law Convention on Corruption (1999); United Nations Declaration against Corruption and Bribery in International Commercial Transactions (1966).

[95] Relevant international and regional treaties and documents include: Council of Europe, Civil Law Convention on Corruption (1999); Council of Europe, Criminal Law Convention on Corruption (1999); United Nations Convention against Transnational Organized Crime (2000).

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).

Specialized authorities

Article 36 requires that States Parties, in accordance with the fundamental principles of their 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 must 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. This body or bodies may be the same as those referred to in article 6 (A/58/422/Add.1, para. 39).[96]

Important in this context is to relate the domestic law enforcement functions of such a body must be seen in conjunction with the overall anti-corruption efforts, such as prevention (see previous chapter of this guide) and collaboration at the domestic and international levels (see next chapter).

Cooperation with law enforcement authorities

Also central to the goals of prevention and international cooperation are the provisions of Article 37, which mirror those of the UN Convention against Transnational Organized Crime (cf. art. 26).

The investigation of sophisticated offenders and the process of enforcing the law against them can be greatly assisted by the cooperation of participants in corrupt acts. The same applies to the prevention of serious crimes, where inside information can lead to the foiling of planned criminal operations.

These are special witnesses, as they are subject to prosecution themselves by means of their direct or indirect participation in corruption offences. Some States have sought to promote the cooperation of such witnesses through the granting of immunity from prosecution or comparative lenience, under certain conditions, which vary from State to State.

This Convention requires that States take measures to encourage such cooperation in accordance with their fundamental legal principles. The specific steps to be taken are left to the discretion of States, which are asked, but not obliged, to adopt immunity or leniency provisions[97].

1. Summary of main requirements

[96] Relevant international and regional treaties and documents include: African Union, African Union Convention on Preventing and Combating Corruption (2003).
A specific national legislation is law Nº 25.233, which created The Anti-Corruption Office of Argentina. See also Croatia's Law on the Office for the suppression of Corruption and Organized crime - September 2001.

[97] Relevant international and regional treaties and documents include: African Union, African Union Convention on Preventing and Combating Corruption (2003); Council of Europe, Criminal Law Convention on Corruption (1999); United Nations Convention against Transnational Organized Crime (2000).

In accordance with Article 37, States parties must:

- Take appropriate measures to encourage persons who participate or who have participated in corruption offences
  a) to supply information for investigative and evidentiary purposes;
  b) to provide factual, specific help contributing to depriving offenders of the proceeds of crime (para. 1);
- Consider providing for the possibility of mitigating punishment of an accused person who provides substantial cooperation (para. 2)
- Consider providing for the possibility of granting immunity from prosecution to a person who provides substantial cooperation (para. 3; this may require legislation in systems not providing prosecutorial discretion).
- Protect such persons against threats and intimidation (para. 4).

2. Mandatory requirements

Under article 37, States parties are required to take appropriate measures to encourage persons who participate or who have participated in the commission of any offence established in accordance with this Convention:

- to supply information useful to competent authorities for investigative and evidentiary purposes on a variety of matters;
- to provide factual, specific help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.

Generally, the inducements and protections needed to encourage persons to assist investigators or prosecutors can be provided without legislative authority, but some provisions will have to be enacted if they do not already exist. States parties are required to take appropriate measures, but the substance of such measures is left to national drafters.

Article 37, paragraph 4, requires that States extend the protections of article 32 (regarding witnesses and victims) to persons providing substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention. This means that such protective measures must be within the means of States parties and provided when necessary, appropriate, and consistently with domestic law.

3. Non-mandatory requirements/Obligation to consider

States are required to consider the options of immunity and mitigation of sentences for those who cooperate under article 37, paragraphs 2 and 3. The experience of certain jurisdictions has highlighted the merits of such provisions in the fight against organized criminal groups involved in serious crime, including corruption[98]. That is why the Convention encourages the adoption of such options, consistently with domestic fundamental legal principles.

Possible legislative measures include the following:

- Judges may require specific authority to mitigate sentences for those convicted of offences but who have cooperated and exceptions may have to be made for any otherwise applicable mandatory minimum sentences. Provisions that require

[98] See, for example, the Italian experience.

judges to impose more lenient sentences should be approached with caution, as they may raise concerns about judicial independence and create potential for the corruption of prosecutors;
- Affording immunity from prosecution (art. 37, para. 3), if implemented, may require legislation either creating discretion not to prosecute in appropriate cases or structuring such prosecutorial discretion as already exists. Some form of judicial review and ratification may have to be provided for, in order to set out the terms of any informal arrangements and ensure that decisions to confer immunity are binding;
- As noted above, the physical protection and safety of persons who cooperate is the same as for witnesses under article 32 (art. 37, para. 4).

4. Optional/States parties may wish to consider

Where a person can provide important information to more than one State for purposes of combating corruption, article 37, paragraph 5, encourages States parties to consider the possibility of reaching an agreement on mitigated punishment or immunity to the person with respect to charges that might be brought in those States.

In order to increase their ability to do so, States parties may wish to consider the possibility of mitigated punishment for such persons or of granting them immunity from prosecution. This is an option that States may or may not be able to adopt, depending on their fundamental principles. It is important to note, however, that in jurisdictions where prosecution is mandatory for all offences, such measures may need additional legislation.

Cooperation between national authorities

Essential to the overall anti-corruption effort is the collaboration between officials and their agencies with those in charge of enforcing the relevant laws.

Consequently, Article 38 requires that States parties to take any necessary measures to encourage, in accordance with their domestic law, cooperation between
- their public authorities and public officials, and,
- their authorities responsible for investigating and prosecuting criminal offences[99].

Such cooperation may include:
- 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
- Providing, upon request, to the latter authorities all necessary information.

Cooperation between national authorities and the private sector

The role of the private sector in preventing, detecting and prosecuting actors involved in corrupt practices cannot be underestimated. It is often competitors who observe irregularities and suspicious transactions in the course of their routine financial and commercial activities. People specializing in particular context or operations are well placed to identify vulnerabilities or uncommon patterns that may serve as indicators of abuse. Authorities in charge of anti-corruption activities would benefit from such insights

[99] Relevant international and regional treaties and documents include: African Union, African Union Convention on Preventing and Combating Corruption (2003); United Nations Convention against Transnational Organized Crime (2000).

and could turn attention to areas and sectors of priority more easily. Actors in the private sector may also be in a position to play a vital role in the identification of criminal proceeds and their return to legitimate owners. A consensual relationship between the private sector and national authorities is, thus, instrumental to the effective fight against corruption and its adverse consequences.

The benefits of a corruption-free economic environment are clear to private industry as a whole, but their concrete collaboration with public authorities needs to institutionalized and framed properly, in order to avoid cross-jurisdictional or other conflicts enterprises may face, for example, relative to privacy, confidentiality or bank secrecy rules[100].

The Convention recognizes this need and requires States to foster a cooperative relationship with the private sector[101].

Article 39, paragraph 1, requires States parties to take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation 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.

Paragraph 2 of the same article requires that States 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.

A precedent and growing practice in many States that national drafters may wish to use as a model is that of placing a duty on certain private entities to report to appropriate authorities suspicious transactions. This applies to formal and informal financial institutions as well as businesses in particular sectors (e.g., precious stones).

Bank secrecy

Bank secrecy rules have often been found to be a major hurdle in the investigation and prosecution of serious crimes with financial aspects. As a result, several initiatives have sought to establish the principle that bank secrecy cannot be used as grounds for refusing to implement certain provisions of international or bi-lateral agreements[102] or refusing to provide mutual legal assistance to requesting States[103]. The same applies to this Convention as we have seen above with respect to seizure and confiscation of proceeds of crime (article 31, para. 7; see also on mutual legal assistance article 46, para. 8).

Article 40 requires that, in cases of domestic investigations of offences established in accordance with this Convention, States parties have appropriate mechanisms available within their domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws[104].

[100] See also the related protection of Article 33 for persons reporting facts concerning corruption offences.

[101] Relevant international and regional treaties and documents include: African Union, African Union Convention on Preventing and Combating Corruption (2003).

[102] For example, UN Convention against Transnational Organized Crime, Article 12, para. 6.

[103] See, for example, UN TOCC, Article 18, para. 8.

[104] For specific examples of national legislation and regulation, see: Switzerland, "A Guide to Swiss Banking Secrecy." Relevant international and regional treaties and documents include: African Union, African Union Convention on Preventing and Combating Corruption (2003); Organization of American States, Inter-American Convention against

Criminal record

In accordance with Article 41, States parties may wish to consider adopting 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.

The term "conviction" should be understood to refer to a conviction no longer subject to appeal (A/58/422/Add.1, para. 40).

D. Jurisdiction

Article 42
Jurisdiction

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:

(a) The offence is committed in the territory of that State Party; or

(b) 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:

(a) The offence is committed against a national of that State Party; or

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is 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

(d) 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.

Corruption (1996); United Nations Convention against Transnational Organized Crime (2000); United Nations Convention against Illicit Traffic in Narcotic Drugs and
Psychotropic Substances (1988); United Nations Declaration against Corruption and Bribery in International Commercial Transactions (1966).

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 coordinating 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.

1. Introduction

In the context of globalization, offenders frequently try to evade national regimes by moving between States or engaging in acts in the territories of more than one State. This is especially so in the case of serious corruption, as offenders can be very power, sophisticated and mobile.

The international community wishes to ensure that no serious crimes go unpunished and that all parts of the crime are punished wherever they took place. Jurisdictional gaps that enable fugitives to find safe havens need to be reduced or eliminated. Another concern is to ensure that in cases where a criminal group is active in several States that may have jurisdiction over the conduct of the group, there is a mechanism available for those States to facilitate coordination of their respective efforts.

The jurisdiction to prosecute and punish such crimes is addressed in article 42 of the Convention. The following chapter provides a framework for cooperation among States that have already exercised such jurisdiction. It is anticipated that there will be cases in which many States parties will be called upon to cooperate in the investigation, but only a few of them will be in a position to prosecute the offenders.

The Convention requires that States establish jurisdiction when the offences are committed in their territory or on board aircraft and vessels registered under their laws[105]. States are also required to establish jurisdiction in cases where they cannot extradite a person on grounds of nationality. In these cases, the general principle *aut dedere aut judicare* (extradite or prosecute) would apply (see arts. 42, para. 3, and 44, para.11).

In addition, States are invited to consider the establishment of jurisdiction in cases where their nationals are victimized, where the offence is committed by a national or stateless person residing in their territory, where the offence is linked to money-laundering planned to be committed in their territory, or the offence is committed against the State (art. 15, para. 2). Finally, States are required to consult with other interested States in appropriate circumstances in order to avoid, as much as possible, the risk of improper overlapping of exercised jurisdictions.

[105] See also the 2002 UN TOCC (art. 15) and the 1982 United Nations Convention on the Law of the Sea (especially arts. 27, 92, para. 1, 94 and 97), which entered into force in November 1994.

Provisions similar to those of this Convention can be found in other international legal instruments, such as the United Nations Convention against Transnational Organized Crime of 2000 (art. 15), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (art. 4), the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (art. 4) and the 1996 Inter-American Convention against Corruption (art. V). States that have enacted implementing legislation as parties to those conventions may not need major amendments for meeting the requirements of this Convention[106].

2. Summary of main requirements

In accordance with article 42, paragraph 1, each State party must be able to assert jurisdiction over the offences established in accordance with the Convention when these are committed:

- In its territory;
- On board a ship flying its flag;
- On board an aircraft registered under its laws.

States are invited to consider the establishment of jurisdiction in cases where

- their nationals are victimized,
- the offence is committed by a national or stateless person residing in their territory,
- the offence is linked to money-laundering planned to be committed in their territory, or
- the offence is committed against the State (art. 15, para. 2).

Under article 42, paragraph 3, in cases where an alleged offender is in the territory of a State and the State does not extradite him or her solely on the ground that he or she is their national (see art. 44, para. 11), that State must be able to assert jurisdiction over offences established in accordance with the Convention committed even outside of its territory.

States may already have jurisdiction over the specified conduct, but they must ensure that they have jurisdiction for conduct committed both inside and outside of their territory by one of their nationals. Therefore, legislation may be required.

Each State Party must also, as appropriate, consult with other States parties that it has learned are also exercising jurisdiction over the same conduct in order to coordinate their actions (art. 15, para. 5).

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[106] For specific examples of national legislation and regulation, see: Germany, Penal Code, Title I, §§3-6; Iceland, General Penal Code§§ 4 and 5.
Relevant international and regional treaties and documents include: African Union, African Union Convention on Preventing and Combating Corruption (2003); Council of Europe, Criminal Law Convention on Corruption (1999); European Union; Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (1998); Organization of American States, Inter-American Convention against Corruption (1996); Organisation for Economic Cooperation and Development (OECD), Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); United Nations Convention against Transnational Organized Crime (2000); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988); United Nations Declaration against Corruption and Bribery in International Commercial Transactions (1966).

3. Mandatory requirements

States are required to establish jurisdiction where the offence involved is actually committed in their territory and aboard vessels flying their flag or aircraft registered in them. They must also have jurisdiction to prosecute offences committed outside their territory, if the offender is one of their nationals who cannot be extradited for prosecution elsewhere for that reason, that is, they must be able to apply the principle of *aut dedere aut judicare* (articles 42, para. 3, and 44, para. 11).

Article 42, paragraph 1, requires that States assert jurisdiction on the basis of the territorial principle. This paragraph requires each State party to establish its jurisdiction over the offences established in accordance with the Convention, when committed:

- In their territory;
- On board a ship flying their flag;
- On board an aircraft registered under their laws.

An Interpretative Note reflects the understanding that "the offence might be committed in whole or in part in the territory of the State Party" (A/58/422/Add.1, para. 41)

States parties whose penal jurisdiction does not currently extend to all of the offences established in accordance with this Convention committed in their territory or on board the above-described ships or aircraft, will need to supplement their existing jurisdiction regime.

Article 42, paragraph 3, requires that States be able to assert jurisdiction over corruption offences committed outside their territory by their own nationals, when extradition is denied on grounds of nationality.

This provision requires States to assert jurisdiction over the offences established in accordance with the Convention in order to be able to meet the obligation under article 44, paragraph 11, which is that they must submit a case for domestic prosecution if extradition has been refused on grounds of the nationality of the offender. In order to understand the nature of the obligation imposed by this paragraph, a review of a number of factors is necessary.

Firstly, paragraph 1 already requires States parties to have jurisdiction over offences committed in their territory and on their ships and aircraft.

This paragraph requires States to go further, by establishing jurisdiction over offences committed abroad by their nationals. Since most extradition requests that would trigger application of this paragraph can be expected to involve conduct that took place in another country, this application is an essential component of the obligation imposed by article 44, paragraph 11.

Secondly, the obligation to establish jurisdiction over offences committed abroad is limited to the establishment of jurisdiction over that State party's nationals, when extradition has been refused solely on the ground of nationality. States parties are not required to establish jurisdiction over offences committed by non-nationals under the terms of this paragraph.

Article 42, paragraph 5 contains specific obligations with respect to the coordination of effort when more than one State investigates a particular offence. It requires States that

become aware that other States parties are investigating or prosecuting the same offence to consult with those countries, where appropriate, to coordinate their actions.

In some cases, this coordination will result in one State party deferring to the investigation or prosecution of another. In other cases, the States concerned may be able to advance their respective interests through the sharing of information they have gathered. In yet other cases, States may each agree to pursue certain actors or offences, leaving other actors or related conduct to the other interested States. This obligation to consult is operational in nature and, in most cases, does not require any domestic implementing legislation.

3. Optional measures

Beyond the mandatory jurisdiction addressed above, the Convention encourages States parties to consider establishing jurisdiction in additional instances, in particular when their national interests have been harmed.

Article 42, paragraph 2, sets forth a number of further bases for jurisdiction that States parties may assume when:

- The offence is committed against one of their nationals (subpara. *(a)*);
- The offence is committed by one of their nationals or a habitual resident in their territory (art. 15, subpara. *(b)*);
- The offence 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 (subpara. c)
- The offence is committed against the State Party (subpara. d).

The offences established under article 23, paragraph 1 (b) (ii) are participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of money laundering offences (see above and art. 23, para. 1 (a) and (b)).

Article 42, paragraph 4, sets forth an additional non-mandatory basis for jurisdiction that States parties may wish to consider. In contrast to the mandatory establishment of jurisdiction provided for in paragraph 3 to enable domestic prosecution in lieu of extradition of its nationals, paragraph 4 allows the establishment of jurisdiction over persons whom the requested State party does not extradite for other reasons.

States seeking to establish such bases for jurisdiction may refer to the laws cited in section 5 below for guidance.

Finally, the Convention makes clear that the listing of these bases for jurisdiction 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 does 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 of organized criminal groups do not escape prosecution as a result of jurisdictional gaps.

5. Information resources

(a) Related provisions and instruments

(i) Conventions against Corruption

(ii) Other instruments

2003 African Union Convention on Preventing and Combating Corruption.
http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf#search='african%20union%20convention%20on%20combating%20corruption

2003 Additional Protocol to the Criminal Law Convention on Corruption
Council of Europe, European Treaty Series, No. 191
http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm

2001 Southern African Development Community Protocol against Corruption
http://www.sadc.int/index.php?lang=english&path=legal/protocols/&page=p_corruption

2000 United Nations Convention against Transnational Organized Crime
General Assembly resolution A/55/383, annex 1
http://www.unodc.org/adhoc/palermo/convmain.html

1999 Criminal Law Convention on Corruption
Council of Europe, *European Treaty Series,* No. 173
http://conventions.coe.int/treaty/en/Treaties/Html/173.htm

1999 Civil Law Convention on Corruption
Council of Europe, *European Treaty Series*, No. 174
http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm

ADB/OECD Anti-Corruption Action Plan for Asia and the Pacific
http://www1.oecd.org/daf/asiacom/actionplan.htm

1999 Economic Community of West African States Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security
http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/ConflictMecha.pdf

1999 International Chamber of Commerce Rules of Conduct to Combat Extortion and Bribery in International Business Transactions.
http://www.iccwbo.org/home/statements_rules/rules/1999/briberydoc99.asp

1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
United Nations, Treaty Series, vol. 1582, No. 27627
http://www.unodc.org/pdf/convention_1988_en.pdf

1998 Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union

Official Journal of the European Communities, C 195, 25 June 1997
http://europa.eu.int/scadplus/printversion/en/lvb/l33027.htm

Istanbul Action Plan
http://www.anticorruptionnet.org/indexgr.html

1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Organisation for Economic Cooperation and Development, DAFFE/IME/BR(97)20
http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

1996 Inter-American Convention against Corruption
Organization of American States
http://www.oas.org/juridico/english/Treaties/b-58.html

1983 European Convention on the Compensation of Victims of Violent Crimes
Council of Europe*, European Treaty Series*, No. 116
http://conventions.coe.int/Treaty/EN/WhatYouWant.asp?NT=116&CM=8&DF=26/09/03

Organization of American States (OAS)/Inter-American Drug Abuse Control Commission (CICAD)
Model Regulations Concerning Laundering Offenses Connected to Illicit Drug Trafficking and Other Serious Offenses *(amended; Washington, DC, October 1998)*
http://www.cicad.oas.org/en/legal_development/legal-regulations-money.pdf

1966 United Nations Declaration against Corruption and Bribery in International Commercial Transactions
General Assembly resolution 51/191, annex
http://www.un.org/documents/ga/res/51/a51r191.htm

United Nations
1999 Model Legislation on Laundering, Confiscation and International Co-operation in Relation to the Proceeds of Crime [for civil law jurisdictions]
http://www.imolin.org/ml99eng.htm

2000 Model Money Laundering and Proceeds of Crime Bill [for common law jurisdictions]
http://www.imolin.org/poc2000.htm

European Bank for Reconstruction and Development
Business Standards and Sound Business Practices – a Set of Guidelines
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Codes_of_Conduct_-_Private_Sector/980423990__ebrd.doc

European Union

Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector
http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_192/l_19220030731en00540056.pdf

Council Framework Decision 2003/568/JHAof 22 July 2003 on combating corruption in the private sector

Article 2
Active and passive corruption in the private sector

1. Member States shall take the necessary measures to ensure that the following intentional conduct constitutes a criminal offence, when it is carried out in the course of business activities:
(a) promising, offering or giving, directly or through an intermediary, to a person who in any capacity directs or works for a private-sector entity an undue advantage of any kind, for that person or for a third party, in order that that person should perform or refrain from performing any act, in breach of that person's duties;
(b) directly or through an intermediary, requesting or receiving an undue advantage of any kind, or accepting the promise of such an advantage, for oneself or for a third party, while in any capacity directing or working for a private-sector entity, in order to perform or refrain from performing any act, in breach of one's duties.
2. Paragraph 1 applies to business activities within profit and non-profit entities.
3. A Member State may declare that it will limit the scope of paragraph 1 to such conduct which involves, or could involve, a distortion of competition in relation to the purchase of goods or commercial services.
4. Declarations referred to in paragraph 3 shall be communicated to the Council at the time of the adoption of this Framework Decision and shall be valid for five years as from 22 July 2005.
5. The Council shall review this Article in due time before 22 July 2010 with a view to considering whether it shall be possible to renew declarations made under paragraph 3.

Article 5
Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for offences referred to in Articles 2 and 3 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:
(a) a power of representation of the legal person;
(b) an authority to take decisions on behalf of the legal person; or
(c) an authority to exercise control within the legal person.
2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of an offence of the type referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are involved as perpetrators, instigators or accessories in an offence of the type referred to in Articles 2 and 3.

Article 6
Penalties for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(1) is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties such as:
(a) exclusion from entitlement to public benefits or aid;
(b) temporary or permanent disqualification from the practice

of commercial activities;
(c) placing under judicial supervision; or
(d) a judicial winding-up order.
2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 5(2) is punishable by penalties or measures which are effective, proportionate and dissuasive.

(b) Examples of national legislation

on anti-corruption bodies:

Australia:
Independent Commission Against Corruption Act 1988:
http://www.austlii.edu.au/cgi-bin/disp.pl/au/legis/nsw/consol%5fact/icaca1988442/?query=title+%28+%22independent+commission+against+corruption+act+1988%22+%29

Bangladesh:
Anti Corruption Commission Act 2004:
http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019089.pdf

Malawi:
Anti-Corruption Bureau in Malawi:
http://www.sdnp.org.mw/ruleoflaw/acb/index.html (Link to the Law Library is not working at the moment)
(Art. 18 ff. "Independent Commission Against Corruption")

South Africa:
Bangladesh
SPECIAL INVESTIGATING UNITS AND SPECIAL TRIBUNALS ACT 1996 (Act No. 74 of 1996):
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Anti-Corruption_National_Legislation/1017332911__jic10.2.doc

Trinidad andTobago:

INTEGRITY IN PUBLIC LIFE ACT, 2000 (ACT NO. 83 OF 2000)
PART II
ESTABLISHEMENT, POWERS AND FUNCTIONS OF INTEGRITY COMMISSION

4. (1) There is established an Integrity Commission consisting of a Chairman, Deputy Chairman and three other members who shall be persons of integrity and high standing.

(2) At least one member of the commission shall be an attorney-at-law of least ten years experience.

(3) At least one member of the commission shall be a chartered or certified accountant.

(4) The Chairman and other members of the commission shall be appointed by the President after consulting with the Prime Minister and the Leader of the Opposition

(5) A person shall not be qualified to hold office as a member of the Commission where he is a person in public life or a person exercising a public function or a person who is not a citizen of Trinidad and Tobago.

(6) Three members of the commission of whom one shall be the Chairman or Deputy Chairman, shall constitute a quorum.

6. (1) The Commission shall –

(k) carry out those functions and exercise the powers specified in this Act;
(l) receive, examine and retain all declarations filed with it under this Act;
(m) make such inquiries as it considers necessary in order to verify or determine the accuracy of a declaration filed under this Act;
(n) compile an maintain a Register of Interests;
(o) receive and investigate complaints regarding any alleged breaches of this Act or the commission or any suspected offence under the Prevention of Corruption Act;
(p) investigate the conduct of any person falling under the purview of the Commission which, in the opinion of the commission, may be considered dishonest or conductive to corruption;
(q) examine the practices and procedures of public bodies, in order to facilitate the discovery of corrupt practices;
(r) instruct, advise and assist the heads of public bodies of changes in practices or procedures which may be necessary to reduce the occurrence of corrupt practices;
(s) carry out programs of public education intended to foster an understanding of standard of integrity; and
(t) perform such other functions and exercise such powers as are required by this Act.

(2) In the exercise of its powers and performance of its functions under this Act, the Commission –

(d) shall not be subject to the direction or control of any other person or authority;
(e) may in all cases where it considers it appropriate to do so, make use of the services or draw upon the expertise of any law enforcement agency or the Public Service; and
(f) shall have the power to authorise investigations, summon witnesses, require the production of any reports, documents, other relevant information, and to do all such things as it considers necessary or expedient for the purpose of carrying out its functions

…

10. The commission shall, not later than 31st March in each year, make a report to Parliament of its activities in the preceding year and the report shall be tabled in the Senate and the House of Representatives not later than 31st May, so, however, that the reports shall not disclose particulars if any declaration filed with the commission.

On other matters

Albania
Criminal Code of the Republic of Albania
http://pbosnia.kentlaw.edu/resources/legal/albania/crim_code.htm

Article 256
Misusing state contributions
Misusing contributions, subsidies or financing given by the state or state institutions to be used in works and activities of public interest, is sentenced to a fine or up to three years of imprisonment.

Article 257
Illegal benefiting from interests
Direct or indirect holding, retaining or benefiting from any sort of interest by persons holding state functions or public service in an enterprise or operation in which, at the time of conducting the act, he was holding the capacity of supervisor, administrator or liquidator, is sentenced to a fine or up to four years of imprisonment.

Article 258
Breaching the equality of participants in public bids or auctions
Committing actions in breach of the laws which regulate the freedom of participants and the equality of citizens in bids and public auctions, by a person holding state functions or public service in order to create illegal advantage or benefits for third parties, is sentenced to a fine or up to three years of imprisonment.

Article 259
Asking for kickbacks
A person holding state functions or public service who asks or commands remunerations for which he is not entitled or which exceed the amount allowable by law, is sentenced to a fine or up to seven years of imprisonment.

Article 260
Receiving a bribe
Receiving remunerations, gifts or other benefits by a person holding state functions or public service and during their exercise, in order to carry out or to avoid carrying out an act related to the function or service, or to exercise his influence toward different authorities in order to provide to any person favors, gratuities, jobs and other benefits, is sentenced from three to ten years of imprisonment.

Australia
Proceeds of Crime Act, No.87 of 1987, as amended by the Banking (State Bank of South Australia and Other Matters) Act 1994 (Act No. 69 of 1994)
http://www.austlii.edu.au/au/legis/cth/consol_act/poca1987160/

New South Wales Consolidated Acts, Independent Commission against Corruption Act 1988, §8
http://www.austlii.edu.au/au/legis/nsw/consol_act/icaca1988442/s8.html

China
Criminal Law of the People's Republic of China
Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997.
http://www.qis.net/chinalaw/prclaw60.htm#Chapter%20VIII2

El Salvador
Illicit Enrichment: LEY SOBRE EL ENRIQUCIMIENTTO ILICITO DE FUNCIONAROS Y EMPLEADOS PUBLICOS
http://www.csj.gob.sv/leyes.nsf/ed400a03431a688906256a84005aec75/dfff264f302218600625644f0067fc1f?OpenDocument&Highlight=0,2833

France

www.legifrance.gouv.fr

Hong Kong Special Administrative Region of China
Prevention of Bribery Ordinance, Gazette No. 14, 2003, Ch. 201, §4.1
http://www.icac.org.hk/eng/main/
alternative link:
http://www.legislation.gov.hk/blis_ind.nsf/e1bf50c09a33d3dc482564840019d2f4/d633a1ae45ff3a8fc8256483002835ac?OpenDocument

ICAC Corporate Code of Conduct
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Codes_of_Conduct_-_Private_Sector/981272040__k5.html

France
Liability of moral persons
Code Pénal
Article 121-2
http://www.jura.uni-sb.de/BIJUS/codepenal/livre1/index.html

Italy
http://www.imolin.org/lawitaly.htm
Article 648. Receiving stolen goods
Except in cases of participation in the [predicate] offence, any person acquiring, receiving or concealing money or goods that are the proceeds of a criminal offence, or at all events seeking to allow such money or goods to be acquired, received or concealed, in order to obtain profits for himself/herself or for other persons, shall be liable to imprisonment of two to eight years and to a fine of Lit 1 million to Lit 20 million.
The penalty shall be imprisonment of up to six years and a fine of up to Lit 1 million if the offence is not serious.
The provisions of this article shall also apply when the person committing the offence of which the said money or goods are the proceeds is not indictable or is not liable to punishment, or when the said offence cannot be prosecuted.

Article 648 bis. Money-laundering
Except in cases of participation in the [predicate] offence, any person substituting or transferring money, goods or assets obtained by means of intentional criminal offences, or any person seeking to conceal the fact that the said money, goods or assets are the proceeds of such offences, shall be liable to imprisonment of four to twelve years and to a fine of Lit 2 to Lit 30 million.
The penalty shall be increased when the offence is committed in the course of a professional activity.
The penalty shall be decreased if the money, goods or assets are the proceeds of a criminal offence for which the penalty is imprisonment of up to five years.
The final paragraph of article 648 shall apply.
Article 648 ter. Use of money, goods or assets of unlawful origin
Except in cases of participation in the [predicate] offence and in the cases provided for in articles 648 and 648bis, any person using for economic or financial activities money, goods or assets obtained by means of a criminal offence, shall be liable to imprisonment of four to twelve years and to a fine of Lit 2 to Lit 30 million.
The penalty shall be increased when the offence is committed in the course of a professional activity.
The penalty shall be decreased pursuant to paragraph 2 of article 648.
The final paragraph of article 648 shall apply.

Kenya
The Anti-Corruption and Economic Crimes Act, 2003
Kenya Gazette Supplement No. 41 (Acts No. 4)
http://www.tikenya.org/documents/Economic_Crimes_Act.doc

Prevention of Corruption Act (revised 1998).

Lesotho
Prevention of Corruption and Economic Offences Act, 1999
https://www.imolin.org/amlid/showLaw.do?law=6347&language=ENG&country=LES

Malaysia
Anti-Corruption Act 575 (1997)
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Criminal_Law/980953058__malaysianlaw.pdf

Mauritius
Prevention of Corruption Act, Government Gazette No. 5, 2002, entry into force per Proclamation No. 18, 2002.
Part II – Corruption Offences
https://www.imolin.org/amlid/showLaw.do?law=4877&language=ENG&country=MAR

Mexico:
Federal Criminal Code
http://www.oecd.org/dataoecd/40/60/2739935.pdf (Articles 212 ff)

New Zealand:
http://www.oecd.org/dataoecd/1/33/2379956.pdf Crimes (Bribery of Foreign Officials) Amendment Act
commentary: http://www.internetnz.net.nz/issues/crimes-amend-bill-6/commentary.htm

Singapore
G3 Corruption (Confiscation of Benefits) Act
Part II
http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-65A&doctitle=CORRUPTION,%20DRUG%20TRAFFICKING%20AND%20OTHER%20SERIOUS%20CRIMES%20(CONFISCATION%20OF%20BENEFITS)%20ACT&date=latest&method=part
alternative Link: http://statutes.agc.gov.sg/non_version/html/homepage.html

South Africa
Prevention and Combating of Corrupt Activities Act (2004)
http://www.info.gov.za/gazette/acts/2004/a12-04.pdf

Tajikistan

Protection of witnesses, reporting persons and victims
LAW OF THE REPUBLIC OF TAJIKISTAN ON THE FIGHT AGAINST CORRUPTION
Article 7. Immunity of persons collaborating in the fight against corruption

Any person reporting an offence of corruption or otherwise offering assistance in the fight against corruption shall enjoy the protection of the state.

Information on a person offering assistance in the fight against corruption shall be treated as a State secret to be disclosed, with the consent of such person, only at the request of the authorities indicated in the second part of article 6 of this Law or at the request of a court in accordance with the procedures established by law. Disclosure of such information shall carry the penalties established by law.

If necessary, the authorities responsible for combating corruption shall ensure the personal safety of persons collaborating in the fight against corruption.

The provisions of this article shall not extend to persons who knowingly report false information, for which they shall bear liability in accordance with the law.

United Kingdom of Great Britain and Northern Ireland
Public Interest Disclosure Act 1998, Chapter 23
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?Whistleblowers~URL~http://www.hmso.gov.uk/acts/acts1998/19980023.htm

http://www.hmso.gov.uk/acts/acts2001/10024--m.htm Anti-terrorism, Crime and Security Act 2001, Chapter 24, Part 12 [on Bribery of foreign public officials]

United States of America
Whistleblower Reinforcement Act of 1998
D.C. ACT 1.2-398, in the Council of the District of Columbia

Bribery and Gratuities
Bribery and gratuity laws involve prohibitions against providing things of value to public officials in order to influence their actions. These laws criminalize both the solicitation of and receipt of gifts and other things of value.

18 U.S.C. § 201 (Bribes and Gratuities)1
15 U.S.C. §§ 77, 78 (Foreign Bribes)
18 U.S.C. § 666 (Bribes involving state and local programs that receive federal funds)
18 U.S.C. § 872 (Extortion)
18 U.S.C. § 1341 (Mail fraud)
18 U.S.C. § 1343 (Wire fraud)
18 U.S.C. § 1346 (Honest services fraud)
18 U.S.C. § 1951 (Hobbs Act Extortion)
18 U.S.C. § 1952 (Travel Act)
41 U.S.C. §§ 51-58 (Kickbacks)

Conflicts of Interest
Conflicts of interest laws criminalize official actions by public officials and former public officials. These laws, like the bribery and gratuity laws, protect the integrity of government employees and their official activities.

18 U.S.C. § 203 (Compensation to public officials in matters affecting the government)
18 U.S.C. § 205 (Activities of public officials in claims against the government)

18 U.S.C. § 207 (Post-employment restrictions)
18 U.S.C. § 208 (Official acts affecting a personal financial interest)
18 U.S.C. § 209 (Supplementing the salary of public officials)

Fraud

Fraud laws criminalize acts, mostly financial crimes, where individuals obtain money through deceitful or false representations to others. These white collar crimes criminalize individual and corporate fraud and theft.

18 U.S.C. § 287 (False claims)
18 U.S.C. § 371 (Conspiracy)
18 U.S.C. § 641 (Theft of government property)
18 U.S.C. § 654 (Theft by government officials)
18 U.S.C. § 666 (Theft from state and local programs that receive federal funds)
18 U.S.C. § 1001 (False statements to a government agency)
18 U.S.C. § 1030 (Computer fraud)
18 U.S.C. § 1031 (Major frauds)
18 U.S.C. § 1341 (Mail fraud)
18 U.S.C. § 1343 (Wire fraud)
18 U.S.C. § 1344 (Bank fraud)
18 U.S.C. § 1962 (Racketeering)
18 U.S.C. §§ 1956, 1957 (Money Laundering)

Obstruction of Justice and Perjury

Obstruction of justice and perjury laws are designed to protect witnesses from intimidation, and to punish individuals or corporations that seek to destroy documents or evidence or make misrepresentations during official proceedings.

18 U.S.C. § 1503 (Obstruction of court or grand jury proceeding)
18 U.S.C. § 1505 (Obstruction of agency or congressional proceeding)
18 U.S.C. § 1510 (Obstruction of criminal investigations)
18 U.S.C. § 1512 (Tampering with witnesses)
18 U.S.C. § 1519 (Destruction of records)
18 U.S.C. §§ 1621, 1623 (Perjury)

Election Crime Laws

Election crime laws are designed to protect the integrity of the election process by punishing efforts to corrupt that process. Campaign financing laws also protect the integrity of the election process, by requiring public disclosure of contributions and expenditures, by limiting certain contributions, and by prohibiting contributions from certain sources, such as corporations, banks, and foreign nationals.

2 U.S.C. § 434 (Campaign reporting)
2 U.S.C. § 441a (Limitations on contributions and expenditures)
2 U.S.C. § 441b (Contributions or expenditures by national banks, corporations, or labor organizations)
2 U.S.C. § 441c (Contributions by government contractors)
2 U.S.C. § 441d (Political endorsements and solicitations)
2 U.S.C. § 441e (Contributions by foreign nationals)

2 U.S.C. § 441f (Conduit contributions)
2 U.S.C. § 441g (Limitation on contribution of currency)
2 U.S.C. § 441h (Fraudulent misrepresentation of campaign authority)
18 U.S.C. §§ 241, 242 (Conspiring/acting under color of law to prevent voting)
18 U.S.C. § 1030 (Corrupting vote tabulation computing equipment)
18 U.S.C. §§ 611, 911 and 1015(f) (Voting by noncitizens)
18 U.S.C. §§ 1341, 1343 (Mail/wire fraud to obtain salary of elected official)
18 U.S.C. § 592 (Stationing armed men at polls)
42 U.S.C. § 1973gg-10; 18 U.S.C. § 594, § 245(b)(1)(A), § 610 (Voter intimidation)
42 U.S.C. § 1973i(c), § 1973gg-10, 18 U.S.C. § 597 (Vote buying)
42 U.S.C. § 1973i(e) (Multiple voting)

Zambia
Corrupt Practices Act (1980)
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Anti-Corruption_National_Legislation/1017845218__ivc19.5.doc

V. International cooperation

Article 43
International cooperation

1. States Parties shall cooperate 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 cooperation, 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.

A. Introduction

Ease of travel from country to country provides serious offenders a way of escaping prosecution and justice. Processes of globalization allow offenders to more easily cross borders, physically or virtually, to break up transactions and obscure investigative trails, to seek a safe haven for their person, and to shelter the proceeds of crime. Prevention, investigation, prosecution, punishment, recovery and repatriation of illicit gains cannot be achieved without effective international cooperation.

Article 43, paragraph 1, requires that States Parties must cooperate in criminal matters in accordance with all articles in this chapter. That is, extradition, the transfer of sentenced persons, mutual legal assistance, the transfer of criminal proceedings, and law enforcement, including joint investigations and special investigative techniques. As

will be seen, however, the application of this requirement extends beyond this chapter to those of confiscation and asset recovery.

The same paragraph goes on to require that States consider such cooperation also in investigations of and proceedings in civil and administrative matters relating to corruption. Experience shows that there are several advantages to the option of civil litigation for claims usually based on property or tort law. A State could claim ownership of property improperly taken away from it or seek compensation for harm caused by corruption and mismanagement. These avenues may be pursued when criminal prosecution is impossible (e.g. in cases of death or absence of defendants). Paragraph 1 addresses the problem encountered in the past, where States could provide legal assistance and cooperation in criminal matters, but not in civil cases[107].

The Convention then addresses the important question of "dual criminality", which affects international cooperation. Under this principle, for example, States are not required to extradite persons sought for acts they are alleged to have committed abroad, which are not criminalized in their own territory. The acts need not be defined in exactly the same terms, but requested States establish whether they have an equivalent offence in their domestic law to the offence for which extradition or other legal assistance is sought (punishable above a certain threshold).

Article 43, paragraph 2, requires that, whenever dual criminality is necessary for international cooperation, 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. The Convention makes it clear that the underlying conduct of the criminal offence neither needs to be defined in the same terms in both countries nor does have to be placed within the same category of offence[108].

In essence, the Convention codifies extensive current practice regarding dual criminality. Bi-lateral agreements have been providing that there is no need for identical description of offences in both countries[109].

This does not mean, however, that States cannot cooperate if dual criminality is not fulfilled. For instance, Article 44 (2) 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.

Further, article 46 (9) allows for the extension of mutual legal assistance in the absence of dual criminality, in pursuit of the goals of the Convention, including asset recovery. States are required to render assistance through non-coercive measures, even when dual criminality is absent, consistently with their legal systems (see also 46 (9)(c) and below). An example of such a measure even in the absence of dual criminality is the exchange of information regarding the offence of bribery of foreign officials or officials of international organizations, when such cooperation is essential to bringing corrupt

[107] See also article 53, subparagraph a, which requires each State party to ensure that other States may make civil claims in its courts to establish ownership of property acquired through a corruption offence; subparagraph (b) requires that courts have the power to order the payment of damages to another State party, and subparagraph (c) requires that courts considering criminal confiscation also take into consideration the civil claims of other countries.

[108] This is consistent with Convention article 23, para. 2 (c) regarding money laundering and predicate offences.

[109] Pakistan example? European extradition convention, others from Gino; concrete examples helpful here; The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 9, para. 2, provides: "Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention".

officials to justice (see Interpretative Note A/58/422/Add.1, para. 26, which relates to Convention article 16 (2)). [cross-reference confiscation issues too].

Given the novelty of this and extensive discussion during the negotiations, make more comments on 46(9) and state that legislation may be required

As these examples make clear, this chapter does not exhaust all international cooperation issues covered by this Convention. Rather, its provisions need to be seen and implemented in view of the principal purposes of the Convention (article 1) and the other chapters.

B. Extradition

Article 44
Extradition[110]

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

[110] Relevant international and regional treaties and documents include: Council of Europe, European Convention on Extradition; Commonwealth Scheme for the Rendition of Fugitive Offenders; United Nations Convention on Psychotropic Substances; Organization of American States Inter-American Convention on Extradition; Arab League Convention on Mutual Assistance in Criminal Matters; Nations Model Treaty on Extradition; Economic Community of West African States Convention on Extradition; Convention drawn up on the basis of article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union; United Nations Model Extradition (amendment) Bill; United Nations Convention on Transnational Organized Crime; African Union Convention on Preventing and Combating Corruption.
For specific examples of national legislation: Albania, Criminal Code, Article 11; Australia, Extradition Act 1998; Canada, Extradition Act, S.C. 1999, c. 18; Mauritius, Prevention of Corruption Act, Part IX, Extradition; United Kingdom, Criminal Justice (International Co-operation) Act 1990, §22; 1997 Extradition Treaty Between the United States of America and the Argentine Republic; 2001 Extradition Treaty Between Lithuania and the United States.

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:

(a) 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 cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation 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 recognize 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 cooperate 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 to involve fiscal matters.

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.

1. Introduction

As perpetrators of corruption offences may flee a jurisdiction to avoid prosecution, extradition proceedings are necessary to bring them to justice in the prosecuting State.

Extradition is a formal and, most frequently, a treaty-based process, leading to the return or delivery of fugitives to the jurisdiction in which they are wanted.[111] Since the late nineteenth century, States have signed bi-lateral extradition treaties in their efforts to eliminate safe shelters for serious offenders. Treaty provisions vary from State to State and do not always cover the same offences.

Diverse national definitions of offences can give rise to serious impediments to extradition efforts and effective international cooperation. In the past, treaties commonly have contained a list of offences covered, which created difficulties every time a new type of crime emerged with the advancement of technology and other social and economic changes. For this reason, more recent treaties are based on the principle of dual criminality, which applies when the same conduct is criminalized in both the requesting and requested States and the penalties provided for it are above a defined threshold, for example, one year of deprivation of liberty.

In this way, authorities do not have to update their treaties constantly for the coverage of unanticipated and entirely new offences. This generated the need for a model extradition treaty, in response to which the United Nations adopted the Model Treaty on Extradition (General Assembly resolution 45/116, annex). However, in addition to action by States to amend old treaties and sign new ones, some conventions on particular

[111] In some instances, extradition may take place voluntarily (e.g., Colombia may offer extradition of an alleged offender without a request from another State) or on the basis of reciprocity and in the absence of a treaty between the States concerned. This, however, does not occur frequently.

offences contain provisions for extradition, as well as jurisdiction and mutual assistance. One such example is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (see art. 10 of the Convention). Another example is the United Nations Convention against Transnational Organized Crime (see art. 16).

In addition, the need for a multilateral approach has led to several regional initiatives, such as the Inter-American Convention on Extradition, the European Convention on Extradition, the Economic Community of West African States Convention on Extradition and others.

The Convention sets a basic minimum standard for extradition for the offences it covers and also encourages the adoption of a variety of mechanisms designed to streamline the extradition process. The Convention encourages States to go beyond this basic standard in bilateral or regional extradition arrangements to supplement article 44, paragraph 1 (see also art. 65, para. 2, relative to harsher measures).

Significantly, the Convention also allows for the lifting of dual criminality, whereby a person may be extradited even if the conduct is not criminalized in the State party from which he or she is sought (art. 44, para. 2).

Some 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 conform to this Convention.

In making legislative changes, drafters should note that the intention of the Convention is to ensure the fair treatment of those whose extradition is sought and the application of all existing rights and guarantees applicable in the State party from whom extradition is requested (see art. 44, para 14).

Generally, the extradition provisions are designed to ensure that the Convention supports and complements pre-existing extradition arrangements and does not detract from them.

2. Summary of main requirements

States Parties must ensure that offences established in accordance with the Convention are deemed extraditable offences. Provided dual criminality is fulfilled (art. 44, para. 1).

If their domestic law allows it, States may grant extradition for corruption offences even without dual criminality (art. 44, para. 2).

If states parties use the Convention as basis for extradition, they will not consider corruption offences as political offences (art. 44, para. 4).

States parties that require a treaty basis for extradition

- may consider this Convention as the legal basis for extradition to another State party regarding corruption offences (art. 44, para. 5)
- must notify the Secretary-General of the United Nations on whether they will permit the Convention to be used as a basis for extradition to other States parties (art. 44, para. 6 (c))

- and do not use the Convention as the legal basis for it, must seek to conclude treaties with other States parties (art. 44, para. 6 (b)).

States parties with a general statutory extradition scheme must ensure that the corruption offences are deemed extraditable (art. 44, para. 7).

A State party must endeavour to expedite extradition procedures and simplify evidentiary requirements relating to corruption offences (art. 44, para. 9).

Legislation may be required if current legislation is not sufficiently broad.

A State party that denies an extradition request on the ground that the person is its national must submit the case for domestic prosecution. In doing so, it shall ensure that the decision to prosecute and any subsequent proceedings are conducted with the same diligence as a serious domestic offence and shall cooperate with the requesting State party to ensure the efficiency of the prosecution (art. 44, para. 11). Legislation may be required if current law does not permit evidence obtained from foreign sources to be used in domestic proceedings.

States parties can discharge its obligation to submit a case for prosecution pursuant to article 44, para. 11, by temporary surrender (44, para. 12).

If States deny extradition for enforcement of a sentence on grounds of nationality, they must consider enforcing the sentence (art. 44, para. 13).

States parties must ensure fair treatment for persons facing extradition proceedings pursuant to article 44, including enjoyment of all rights and guarantees provided by their domestic law (art. 44, para. 14). Legislation may be required if no specific domestic extradition procedures are provided for.

States parties may not refuse extradition on the ground that the offence also involves fiscal matters (art. 44, para. 16). Legislation may be required.

Prior to refusing extradition, a requested State party must, where appropriate, consult with the requesting State party to provide it with the opportunity to present information and views on the matter (art. 44, para. 17).

3. Mandatory requirements/Obligation to legislate

(a) Scope

Extradition must be granted with respect to the offences covered by the Convention, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting and the requested State parties (article 44, paragraph 1).

Dual criminality will automatically be fulfilled with respect to offences established in accordance with the Convention. Note also that States may extradite without dual criminality, if their domestic law allows it (art. 44, para.2).

(b) Extraditable offences in extradition treaties (article 44, paragraph 4)

Article 44, paragraph 4, requires States parties to deem the offences described in paragraph 1 as automatically included in all existing extradition treaties between them. In addition, the parties undertake to include them in all future extradition treaties between them.

By virtue of this paragraph, the offences are automatically incorporated by reference into extradition treaties. Accordingly, there would normally be no need to amend them. However, if treaties are considered subordinate to domestic extradition statutes under the legal system of a particular country and its current statute is not broad enough to cover all offences established in accordance with the Convention, amending legislation may be required.

Moreover, this paragraph requires States parties whose law so permits not to consider any of these (corruption) offences as a political offence, when they use the Convention as the basis for extradition.

(c) Notification regarding application or non-application of paragraph 5 (relevant to countries in which a treaty basis is a prerequisite to extradition, article 44, paragraph 6)

Article 44, paragraph 6, does not apply to States parties that can extradite to other countries pursuant to a statute. It applies only to States parties for which a treaty is a prerequisite to extradition. Such countries are required to notify the Secretary-General of the United Nations as to whether or not they will use this Convention to be used as a basis for extradition. The notification should be provided to the United Nations Office on Drugs and Crime. They are also, where appropriate, requested to conclude additional extradition treaties in order to expand the number of States parties to which fugitives can be extradited in accordance with this article.

(d) Extradition on the basis of a statute (relevant to countries that provide for extradition by statute, article 44, paragraph 7)

Article 44, paragraph 7, mandates States parties that do not require a treaty basis for extradition (that is, States parties that provide for extradition pursuant to a statute) to include the offences established in accordance with this Convention as extraditable offences under their applicable statute governing international extradition in the absence of a treaty.

Thus, where the existing statute in a particular State party governing international extradition is not sufficiently broad in scope to cover the corruption offences, it will be required to enact legislation to broaden the offences covered by the statute.

(e) Conditions to extradition (article 44, paragraph 8)

Article 44, paragraph 8, provides that grounds for refusal and other conditions to extradition (such as the minimum penalty required for an offence to be considered as extraditable) are governed by the applicable extradition treaty in force between the requesting and requested States or, otherwise, the law of the requested State. The paragraph thus establishes no implementation requirements separate from the terms of domestic laws and treaties governing extradition.

(f) Prosecution where a fugitive is not extradited on grounds of nationality (article 44, paragraph 11)

Article 44, paragraph 11, provides that where a requested State party does not extradite a person found in its territory for an offence set forth in article 16, paragraph 1, on grounds that the person is its national, that State 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 are to 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 are to cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.

In essence, the obligation to submit a case for domestic prosecution consists of a number of distinct elements:

(a) An extradition request concerning a corruption offence must have been denied because the fugitive is a national of the requested State;

(b) The State party seeking extradition must have requested submission for domestic prosecution in the requested State;

(c) The State party that denied extradition must thereafter:

(i) Submit the case to its authorities for prosecution without undue delay;

(ii) Take the decision and conduct the proceedings in the same way as a serious domestic crime;

(iii) Cooperate with the other State party in order to obtain the necessary evidence and otherwise ensure the efficiency of the prosecution.

Such domestic prosecutions are time consuming and resource intensive, as the crime will normally have been committed in another country. It will generally be necessary to obtain most or all of the evidence from abroad and to ensure that it is in a form that can be introduced into evidence in the courts of the State party conducting the investigation and prosecution.

To carry out such prosecutions, the State party concerned will first need to have a legal basis to assert jurisdiction over offences committed abroad, as required by article 42, paragraph 3, of the Convention. In addition, effective implementation of paragraph 11 requires a State conducting a domestic prosecution in lieu of extradition to have mutual legal assistance laws and treaties in order to obtain evidence from abroad. At a minimum, effective implementation of article 46 should suffice for this purpose. Drafters of national legislation should also ensure that domestic laws permit such evidence obtained abroad to be validated by its courts for use in such proceedings.[112]

Implementation of paragraph 11 also requires allocation of adequate human and budgetary resources to enable domestic prosecution efforts to succeed. Thus, the Convention requires the investigation and prosecution to be given the same priority as would be given to a grave domestic offence.

An optional method of meeting the requirements of this paragraph is the temporary surrender of a fugitive (see art. 44, para. 12).

(g) Guarantees of persons undergoing the extradition process (Article 44, paragraph 14).

Article 44, paragraph 14, requires a State party to provide fair treatment to the fugitive during extradition proceedings it is conducting, including by allowing enjoyment of all

[112] See for example, the Mutual Legal Assistance in Criminal Matters Act of Canada.

rights and guarantees that are provided for by that State's law with respect to such proceedings. In essence, this paragraph mandates that States parties have procedures to ensure fair treatment of fugitives and that the fugitives are given the opportunity to exercise such legal rights and guarantees.

(h) Prohibition on denial of extradition for fiscal offences (article 44, paragraph 16)

Article 44, paragraph 16, provides that States parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters. States parties must therefore ensure that no such grounds for refusal may be invoked under their extradition laws or treaties.

Thus, where a State party's laws currently permit such ground for refusal, amending legislation should be enacted to remedy this. Where such a ground for refusal is included in any of a State party's extradition treaties, normally the act of that country becoming party to the Convention, or the enactment of domestic amending legislation, would automatically invalidate the contrary provisions of an earlier treaty. In this light, only rarely, if at all, should amendments to particular treaties be required. With respect to future extradition treaties, States parties must not include such grounds for refusal.

(i) Consultations prior to refusing (article 44, paragraph 17)

Article 44, paragraph 17, provides that, where appropriate, the requested State party shall consult with the requesting State party before refusing extradition. This process could enable the requesting State party to present additional information or explanations that may result in a different outcome. Since there may be some cases in which additional information could never bring about a different result, the obligation is not categorical and the requested State party retains a degree of discretion to determine when it would be appropriate to do so.

(j) Conclusion of new agreements and arrangements (article 44, paragraph 18)

Article 44, paragraph 18, requires States parties to seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition. States that wish to expand their network of extradition treaties are invited to review the instruments described in section 5 below as examples of treaties that may be instructive. With respect to arrangements to enhance the effectiveness of extradition, States may wish to review consultation provisions provided for under some of these treaties.

4. Other measures, including optional issues

(a) Scope of application

Article 44, paragraph 2, extends the scope of application for this article by giving States parties the option to lift the requirement of dual criminality for offences established in accordance with the Convention, if their law so allows.

Article 44, paragraph 3, addresses the eventuality of an extradition request for multiple offences, at least one of which is extraditable under this article and others non-extraditable on grounds of their short period of imprisonment. If the latter are related to an offence established in accordance with the Convention, requested States parties have the option to extend the application of this article to those offences too.

(b) Extradition on the basis of this Convention (article 44, paragraphs 5 and 6 (b))

Article 44, paragraph 5, allows States parties to use the Convention as the legal basis for extradition, if a treaty basis is prerequisite to extradition. Alternatively, States would have to seek the conclusion of treaties on extradition with other States parties to the Convention in order to implement article 44 (art. 44, para. 6 (b)),

(c) Expediting extradition procedures (Article 44, paragraph 9)

Article 44, paragraph 9, provides that States parties shall, subject to their domestic laws, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of the offences to which this article applies. Modern extradition practice has been to simplify requirements with respect to the form of and channels of transmission for extradition requests, as well as evidentiary standards for extradition.

(d) Detention pending extradition proceedings (article 44, paragraph 10)

Article 44, paragraph 10, provides the requested State party may take a fugitive into custody or take other appropriate measures to ensure his or her presence for purposes of extradition. Provisions on provisional arrest and detention pending extradition are standard features of extradition treaties and statutes and States parties should have an appropriate legal basis for such custody. However, the article imposes no specific obligation to take persons into custody in specific cases.

(e) Conditional extradition as a basis for satisfying paragraph 11 (article 44, paragraph 12)

Rather than conduct a domestic prosecution of a national in lieu of extradition (see paragraph 11), Article 44, paragraph 12, provides the option of temporarily surrendering the fugitive to the State party requesting extradition for the sole purpose of conducting the trial, with any sentence to be served in the State party that denied extradition.

(f) Enforcement of a foreign sentence where extradition is refused on the ground of nationality (Article 44, paragraph 13)

Article 44, paragraph 13, calls upon a State party that has denied, on the ground of nationality, a request by another State party to extradite a fugitive to serve a sentence, to consider enforcing the sentence itself. However, the paragraph imposes no obligation on a party to enact the legal framework to enable it to do so, or to actually do so under specific circumstances.

(g) No obligation under the Convention to extradite where there are substantial grounds for believing a fugitive will be discriminated against (Article 44, paragraph 15)

Article 44, paragraph 15, provides that nothing in the Convention is to 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 those reasons.

This provision preserves the ability to deny extradition on such grounds, unless such ground of refusal is not provided for in its extradition treaty in force with the requesting State party, or in its domestic law governing extradition in the absence of a treaty.

C. Mutual legal assistance

Article 46
Mutual legal assistance[113]

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;

[113] Relevant international and regional treaties and documents include, generally: Council of Europe, European Convention on Mutual Assistance in Criminal Matters; Council of Europe, Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters; Arab League Convention on Mutual Assistance in Criminal Matters; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime; Organization of American States, Inter-American Convention on Mutual Legal Assistance in Criminal Matters; Organization of American States, Optional Protocol Related to the Inter-American Convention on Mutual Legal Assistance in Criminal Matters; Organization of American States, Inter-American Convention against Corruption; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Organisation for Economic Cooperation and Development; Commonwealth Scheme relating to Mutual Assistance in Criminal Matters (The Harare Scheme, as amended,1999); Convention on Mutual Assistance in Criminal Matters between the Member
States of the European Union; Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders; Revised United Nations model treaty on mutual legal assistance in criminal matters; Commentary on the United Nations model treaty; United Nations model foreign evidence bill; Commentary on the United Nations model foreign evidence bill; Council of Europe, Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters; Council of Europe, Council of Europe Convention on Cybercrime; European Union, Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union; Economic Community of West African States Convention on Mutual Assistance in Criminal Matters.
For examples of national legislation see: Australia, Mutual Assistance (Transnational Organized Crime) Regulations (2004); Hong Kong, Mutual Legal Assistance in Criminal Matters Ordinance (1997); also see, Mutual Legal Assistance in Criminal Matters (Singapore) Order, Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Singapore Concerning Mutual Legal Assistance in Criminal Matters (2004); Mauritius, Prevention of Corruption Act, part VII, Mutual Assistance in Relation to Corruption or Money Laundering Offences (2002); Seychelles, Mutual Assistance in Criminal Matters Act (1995), South Africa, International Co-operation in Criminal Matters Act, 75 (1996); Switzerland, International Mutual Assistance in Criminal Matters – Guideline (1988) and "Checklist for Foreign Requests for Mutual Assistance in Criminal Matters."

(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 cooperation.

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 cooperation 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 authorized 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 Organization, 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 that 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:

(a) The identity of the authority making the request;

(b) 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;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) 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 requested 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:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) 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;

(d) 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 application 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 a 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 fulfill 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:

(a) 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;

(b) 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 purposes of, give practical effect to or enhance the provisions of this article.

1. Introduction

In the context of globalization, national authorities increasingly need the assistance of other States for the successful investigation, prosecution and punishment of offenders, particularly those who have committed offences with transnational aspects. Corrupt practices often involve mobile actors, participants in more than one country or transactions that cross national borders. The ability of a State to assert jurisdiction and secure the presence of an accused offender in its territory accomplishes an important part of the task, but does not complete it.

The international mobility of offenders and the use of advanced technology, among other factors, make it more necessary than ever that law enforcement and judicial authorities collaborate and assist the State that has assumed jurisdiction over the matter.

In order to achieve that goal, States have enacted laws to enable them to provide such international cooperation and increasingly have resorted to treaties related to mutual legal assistance in criminal matters. Such treaties commonly list the kind of assistance to be provided, the rights of the requesting and requested States relative to the scope and manner of cooperation, the rights of alleged offenders and the procedures to be followed in making and executing requests.

These bilateral instruments enhance law enforcement in several ways. They enable authorities to obtain evidence abroad in a way that it is admissible domestically. For example, witnesses can be summoned, persons located, documents and other evidence produced and warrants issued. They supplement other arrangements on the exchange of information (for example, information obtained through the International Criminal Police Organization (Interpol), police-to-police relationships and judicial assistance and letters rogatory). They also resolve certain complications between countries with different legal traditions, some of which restrict assistance to judicial authorities rather than prosecutors[114].

There have been some multilateral efforts through treaties aimed at mutual legal assistance in criminal matters with respect to particular offences, such as the United Nations Convention against Transnational Organized Crime (see art. 18), the United

[114] The mutual legal assistance treaty between Argentina and the United States is one example.

Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (see art. 7), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (see arts. 8-10), the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the Council of Europe Convention on Cybercrime, the Inter-American Convention against Corruption (see art. XIV), the Inter-American Convention on Mutual Legal Assistance and optional Protocol thereto and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (see art. 9). There have also been some regional initiatives, such as the Schengen Implementation Agreement,[115] the European Convention on Mutual Assistance in Criminal Matters, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters and the 1983 Arab League Convention on Mutual Assistance in Criminal Matters.

In its article 46, paragraph 1, the Convention against Corruption builds on these initiatives, calls for the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings, and expands the scope of application to all offences established in accordance with the Convention.

Legal assistance may be requested for taking evidence or statements, effecting service of judicial documents, executing searches and seizures, examining objects and sites, providing information, evidence and expert evaluations, documents and records, tracing proceeds of crime, facilitating the appearance of witnesses and any other kind of assistance not barred by domestic law. Quite importantly, Article 46 applies also to international cooperation in the identification, tracing and seizure of proceeds of crime, property and instrumentalities for the purpose of confiscation and return of assets to legitimate owners (see art. 46, para. 3 subparas (j) and (k), art. 31, para. 1, as well as chapter V of the Convention, particularly articles 54-55).

The Convention against Corruption recognizes the diversity of legal systems and allows States to refuse mutual legal assistance under certain conditions (see art. 46, para. 21). However, it makes clear that assistance cannot be refused on the ground of bank secrecy (art. 46, para. 8) or for offences considered to involve fiscal matters (art. 46, para. 22). States are required to provide reasons for any refusal to assist. Otherwise, States must execute requests expeditiously and take into account possible deadlines facing the requesting authorities (for example, expiration of a statute of limitation).

Given that the United Nations Convention against Transnational Organized Crime contains many similar provisions (see art. 18), States parties to that Convention would be compliant to much of article 46 of the Convention against Corruption. Nevertheless, it is two significant differences are emphasized. Firstly, mutual legal assistance now extends to the recovery of assets, a fundamental principle of this Convention (see articles 1 and 51). Secondly, in absence of dual criminality, States are required to render assistance through non-coercive measures, provided this is consistent with their legal system and the offence is not of a trivial nature. States are encouraged to extend as wide a scope of assistance as possible in the pursuit of the main goals of the Convention, even in absence of dual criminality (art. 46, para 9 and art. 1).

2. Summary of main requirements

[115] Often cited as the Schengen Convention, which binds all European Union member States with the exception of the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland. See also the 1996 Agreement between the European Community and the United States of America on Customs Cooperation and Mutual Assistance in Customs Matters, especially Title IV, art. 11 ff (http://www.eurunion.org/partner/agreemen.htm).

The Convention requires States parties to

- ensure the widest measure of mutual legal assistance as 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);
- 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);
- ensure that mutual legal assistance is not refused by it on the ground of bank secrecy (art. 46, para. 8). [Legislation may be necessary if existing laws or treaties governing mutual legal assistance are in conflict].
- offer assistance in absence of dual criminality through non-coercive measures (art. 46, para 9, subpara (b).
- provide for article 46, paragraphs 9-29, to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State party (art. 46, paras. 7 and 9-29). [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]
- 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 each State party in this regard (art. 46, paras. 13 and 14);
- consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of this article (art. 46, para. 30).

States parties are also invited to consider the provision of a wider scope of legal assistance in the absence of dual criminality (art. 46, para. 9, subpara. c).

3. Mandatory requirements

(a) Scope (article 46, paragraph 1)

Article 46, paragraph 1, establishes the scope of the obligation to provide mutual legal assistance.

States parties are required to provide the widest measure of mutual legal assistance in investigations, prosecutions, judicial proceedings, freezing of proceeds of crime and asset recovery in relation to the offences covered by the Convention as provided in article 3. Thus, each State party must ensure that its mutual legal assistance treaties and laws provide for assistance to be provided for cooperation with respect to investigations, prosecutions and judicial proceedings. The term "judicial proceedings" is separate from investigations and prosecutions and connotes a different type of proceeding. Since it is not defined in the Convention, 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 countries may not be part of the actual trial, such as pretrial proceedings, sentencing proceedings and bail proceedings. These investigations, prosecutions or proceedings must relate to offences established in accordance with this Convention as provided in article 3.

If a State party's current mutual legal assistance laws and treaties are not broad enough to cover all of the corruption offences covered by the Convention, amending legislation may be necessary.

In drafting legislation creating powers to execute assistance requests, legislators should note that the criterion for the requests and provision of legal assistance is slightly broader than that applying to most other Convention obligations. The provisions of article 1 should also be kept in mind.

(b) Mutual legal assistance for proceedings involving legal persons (article 46, paragraph 2)

Article 46, paragraph 2, provides mutual legal assistance shall be furnished to the fullest extent possible under relevant laws, treaties, agreements and arrangements 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 (see also chapter 3 of the present guide).

Thus, a State party should have the ability to provide a measure of mutual legal assistance with respect to investigations, prosecutions and judicial proceedings into the conduct of legal persons. Here too, some discretion is granted to States parties regarding the extent to which assistance is to be provided. Where a State party presently lacks any legal authority to provide assistance with respect to investigations, prosecutions and judicial proceedings against legal persons, amending legislation should be considered[116].

(c) Purposes for which mutual legal assistance is to be provided (article 46, paragraph 3)

Article 46, paragraph 3, sets forth the following list of specific types of mutual legal assistance that a State party must be able to provide:

(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.

States parties should review their current mutual legal assistance treaties to ensure that these sources of legal authority are broad enough to cover each form of cooperation listed above. States parties to the United Nations Convention against Transnational

[116] An Interpretative Note to the mirror provisions in the UN Convention against Transnational Organized Crime (art. 18, para. 2) indicated that the term "judicial proceedings" refers to the matter for which mutual legal assistance is requested and is not intended to be perceived as in any way prejudicing the independence of the judiciary (A/55/383/Add.1, para. 36).

Organized Crime would likely be in compliance with all but subparagraphs (j) and (k) above.

Attention is drawn to the international cooperation provisions of article 54, 55 and 57 (especially paragraph 3) of this Convention regarding additional modalities relative to the confiscation, return and disposal of assets.

Generally, mutual legal assistance treaties provide for similar forms of cooperation. However, in cases where a form of cooperation listed in article 46, paragraph 3, or in articles 54, 55 and 57 is not provided for (in particular in countries in which treaties are considered subordinate to mutual legal assistance laws and with respect to asset recovery), then the States parties should consider such mutual legal assistance treaties as being automatically supplemented by those forms of cooperation. Alternatively, under some legal systems, amending legislation or other action may be required.

In some cases, domestic law already provides powers to take the measures necessary to deliver the above types of assistance. If not, such powers must be created. If they exist, amendments are necessary to ensure that they can be used in legal assistance cases. For example, search and seizure powers limited to cases where judicial authorities are satisfied that a domestic crime has been committed and that the search for evidence is warranted, would have to be amended to allow search warrants for alleged foreign offences evidence of which is believed to be in the requested State. More significant amendments would be required for the assistance relative to the confiscation and return of crime proceeds, property and instrumentalities.

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.

(d) Procedure to be followed in the absence of a treaty (article 46, paragraph 7)

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, apply for the provision of the types of cooperation 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 9-29.

For States parties, whose legal systems permit direct application of treaties, no implementing legislation will be needed. If the legal system of a State party does not permit direct application of these paragraphs, legislation will be required to ensure that in the absence of a mutual legal assistance treaty, the terms of paragraphs 9-29 apply to requests made under the Convention, rather than rules that may otherwise apply. Such an enabling statute may be general in nature, consisting of a reference to the effect that in cases falling within the scope of article 46, and in the absence of a treaty with the State party concerned, the rules of paragraphs 9-29 apply.

States are strongly urged to apply any of the paragraphs 9-29, if they facilitate their cooperation efforts (e.g., by going beyond existing mutual legal assistance treaties), especially with respect to innovative provisions regarding lack of dual criminality in paragraph 9.

(e) Prohibition of denial of mutual legal assistance on the ground of bank secrecy (article 46, paragraph 8)

In accordance with article 46, paragraph 8, provides States parties cannot decline to render mutual legal assistance pursuant to article 46 for bank secrecy reasons. 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 mutual legal assistance laws or treaties. See also closely related provisions in article 31, paragraph 7 (freezing, seizing confiscating crime proceeds) and articles 55 and 57 (on asset recovery).

Thus, where a State party's laws currently permit such ground for refusal, amending legislation will be required. Where such a ground for refusal is included in any State party's mutual legal assistance treaties, the act of that country's becoming party to the Convention against Corruption should as a matter of treaty law automatically invalidate the contrary provisions of an earlier treaty. Should a State party's legal system provide that treaties are not applied directly, domestic legislation may be required.

(f) Measures to be applied in the absence of a treaty (article 46, paragraphs 9-29)

The actions required in order to implement article 46, paragraphs 9-29, which provide certain procedures and mechanisms that must be applied in the absence of a mutual legal assistance treaty between the States parties concerned, are discussed above in general terms in relation to article 46, paragraph 7. Some States parties will usually apply these paragraphs directly where they are relevant to a particular request for assistance, because under their legal system the Convention's terms can be directly applied. Otherwise, it may be easiest for a general legislative grant of authority to be enacted to permit direct application of paragraphs 9-29 for countries in which treaties are not directly applied.

Paragraph 9, however, needs some further examination, as it departs from earlier conventions (cf. UN Convention against Transnational Organized Crime, art. 18, para. 9).

Subparagraph (a) requires States parties to take into account the overall purposes of the Convention (art. 1) as they respond to requests for legal assistance in the absence of dual criminality (see also subpara. (c)).

States parties still have the option to refuse such requests on the basis of lack of dual criminality. At the same time, to the extent this is consistent with the basic concepts of their legal system, States parties are required to render assistance involving non-coercive action (art. 46, para. 9, subpara. (b)). The Interpretative Notes indicate that the requested State Party would define "coercive action", taking into account the purposes of the Convention (A/58/422/Add.1, para. 42) [need examples here – information exchanges?].

The same subparagraph (b) allows the denial of assistance in cases of trivial nature (de minimis) or where the assistance can be provided under other provisions of this Convention (e..g., art. 31, para. 7 or art. 55).

Further, subparagraph (c) encourages States parties to exercise their discretion and consider the adoption of additional measures to widen the scope of assistance pursuant to article 46, even in the absence of dual criminality.

An Interpretative Note to the equivalent provisions in the UN TOCC (art. 18, para 10) with respect to the transfer of detained or convicted persons to another State party (see art. 46, paragraph 10 (b)) may be helpful to consider: among the conditions to be determined by States parties for the transfer of a person, States parties may agree that the requested State party may be present at witness testimony conducted in the territory of the requesting State party (A/55/383/Add.1, para. 39).

The Convention 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[117]. The competent authorities may be different at different stages of the proceedings for which mutual legal assistance is requested. See the closely related measures and processes from articles 6 (preventive anti-corruption body), 36 (specialized authorities), 38 (cooperation between national authorities), 39 (private sector cooperation with national authorities), 56 (special cooperation) and 58 (financial intelligence unit). It is noted that the designation of a central authority for mutual legal assistance purposes is also required under the UN TOCC; hence, States parties to that Convention may wish to consider designating the same authority for the purposes of this Convention.

The central authority, as well as its acceptable language(s) to be used for requests, should be notified to the Secretary-General of the United Nations at the time of signature or deposit (art. 46, paras. 13 and 14). The notification should be provided to the United Nations Office on Drugs and Crime.

An Interpretative Note regarding paragraph 19 reflects the understanding that the requesting State Party would be under an obligation not to use any information received that was protected by bank secrecy for any purpose other than the proceedings for which that information was requested, unless authorized to do so by the requested State Party (A/58/422/Add.1, para. 43).

Finally, an interpretative Notes to paragraph 28 dealing with ordinary costs of legal assistance requests indicates that many of the costs arising in connection with compliance with requests made pursuant to article 46, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature. Developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article (A/58/422/Add.1, para. 44)

4. Other measures, including optional issues

(a) Spontaneous transmission of information

Article 46, paragraphs 4 and 5, provide a legal basis for a State party to forward to another State party information or evidence it believes is important for combating the offences covered by the Convention, where the other country has not made a request for assistance and may be completely unaware of the existence of the information or

[117] In countries with a system by which special regions or territories have a separate system of mutual legal assistance, their central authorities will perform the same functions.

evidence. However, there is no obligation to do so in a particular case. For those States parties whose legal system permits direct application of treaties, these paragraphs empower them to transmit information spontaneously where such transmissions are not otherwise possible under domestic law and no new legislation is needed.

If a State party does not already have a domestic legal basis for such spontaneous transmissions and under its legal system the terms of these paragraphs cannot be directly applied, it is strongly encouraged, but not obliged, to take such steps as may be necessary to establish such a legal basis.

(b) Savings clause for mutual legal assistance treaties

Article 46, paragraph 6, provides that the article does not preclude or affect the independent obligations that may arise under other treaties that govern mutual legal assistance. At the same time, becoming a party to the Convention against Corruption gives rise to separate obligations that States parties must comply with among themselves.

(c) Testimony by videoconferencing

Provision of testimony via videoconferencing is not mandatory. Note should also be taken of article 46, paragraph 28, which provides for consultations regarding the allocation of the costs of mutual legal assistance of a substantial or extraordinary nature.

Article46, paragraph 18, requires States parties to make provision wherever possible and consistent with the fundamental principles of domestic law for the use of videoconferencing as a means of providing viva voce evidence in cases where it is impossible or undesirable for a witness to travel. This may require the following legislative changes:

(a) Legislative powers allowing authorities to compel the attendance of a witness, administer oaths and subjecting witnesses to criminal liability for non-compliance (for example, using contempt-of-court or similar offences);

(b) Amendments to evidentiary rules to allow for the basic admissibility of evidence provided by videoconferencing and setting technical standards for reliability and verification (for example, identification of the witness);

(c) Expansion of perjury offences, putting in place legislation to ensure that:

(i) A witness physically in the country who gives false evidence in foreign legal proceedings is criminally liable;

(ii) A witness in a foreign country who gives false evidence in a domestic court or proceeding via videoconferencing is criminally liable;

(iii) Persons alleged to have committed perjury via videoconferencing can be extradited into and out of the jurisdiction, as applicable;

(iv) An untruthful witness can be extradited for having committed perjury in the jurisdiction of the foreign tribunal.

(d) Paragraph 30: conclusion of new agreements and arrangements

Article 46, paragraph 30, calls upon States parties to consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article.

D. Other forms of international cooperation

Article 45
Transfer of sentenced persons

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.

Article 47
Transfer of criminal proceedings[118]

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.

Article 48
Law enforcement cooperation[119]

1. States Parties shall cooperate 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, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

[118] Relevant international and regional treaties and documents include: Commonwealth Scheme for the Rendition of Fugitive Offenders (as amended in 1990); European Convention on the Transfer of Proceedings in Criminal Matters (1972); Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001); Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000); Inter-American Convention on Mutual Legal Assistance in Criminal Matters; Organization of American States, Treaty Series, No. 75 (1992); United Nations Model Treaty on the Transfer of Proceedings in Criminal Matters (1990); United Nations Convention on Transnational Organized Crime (2000); revised United Nations model treaty on mutual legal assistance in criminal matters (2000); Commentary on the United Nations model treaty.
Canada, Mutual Legal Assistance in Criminal Matters Act, §§ 24-29 (1985) and International Transfer of Offenders Act (2004);

[119] Relevant international and regional treaties and documents include: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990); European Union, Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001); Interpol Model [bilateral] Police Cooperation Agreement; Organization of American States, Inter-American Convention against Corruption (1996); United Nations Convention on Transnational Crime (2000).
For examples of national legislation, see: Israel, International Legal Assistance Law 5758-1998, §§28, 31, 39; Singapore, Mutual Assistance in Criminal Matters Act; Switzerland, International Mutual Assistance in Criminal Matters – Guideline, §1.2.4 (1998).

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification 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 cooperation 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 cooperation 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 organizations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

Article 49
Joint investigations[120]

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.

Article 50

[120] Relevant international and regional treaties and documents include: Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990); European Union, Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001); Interpol Model [bilateral] Police Cooperation Agreement; Organization of American States, Inter-American Convention against Corruption (1996); United Nations Convention on Transnational Crime (2000).

For examples of national legislation, see section B above on extradition and Israel, International Legal Assistance Law 5758-1998; Mauritius, Prevention of Corruption Act, part VII, Mutual Assistance in Relation to Corruption or Money Laundering Offences.

Special investigative techniques[121]

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 cooperation 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.

1. Introduction

The Convention provides for a number of other mandatory and non-mandatory mechanisms to further enhance international cooperation with respect to investigation and law enforcement in corruption cases.

Discussed in this section are the transfer of sentenced persons (art. 45), the transfer of criminal proceedings (art. 47), law enforcement assistance (art. 48), joint investigations (art. 49) and special investigative techniques (art. 50).

Article 50 of the Convention against Corruption specifically endorses the investigative techniques of controlled delivery, electronic surveillance and undercover operations. These techniques are especially useful in dealing with sophisticated organized criminal groups because of the dangers and difficulties inherent in gaining access to their operations and gathering information and evidence for use in domestic prosecutions, as well as providing mutual legal assistance to other States parties. In many cases, less

[121] Relevant international and regional treaties and documents include: Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990); European Union, Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001); Interpol Model [bilateral] Police Cooperation Agreement; Organization of American States, Inter-American Convention against Corruption (1996); Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990); United Nations Convention on Transnational Crime (2000).
For examples of national legislation see: United Kingdom, Regulation of Investigatory Powers Act, part II (2000).

intrusive methods will simply not prove effective, or cannot be carried out without unacceptable risks to those involved.

Controlled delivery is useful in particular in cases where contraband is identified or intercepted in transit and then delivered under surveillance to identify the intended recipients or to monitor its subsequent distribution throughout a criminal organization. Legislative provisions are often required to permit such a course of action, however, as the delivery of the contraband by a law enforcement agent or other person may itself be a crime under domestic law. Undercover operations may be used where it is possible for a law enforcement agent or other person to infiltrate a criminal organization to gather evidence. Electronic surveillance in the form of listening devices or the interception of communications performs a similar function and is often preferable where a close-knit group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators. Given its intrusiveness, electronic surveillance is generally subject to strict judicial control and numerous statutory safeguards to prevent abuse.

Article 50, paragraph 1, pertains to investigative methods that are to be applied at the domestic level. Article 50, paragraphs 2-4, provide for measures to be taken at the international level.

2. Summary of main requirements

In accordance with article 47, States parties must consider the transfer to one another of criminal proceedings when this would be in the interest of the proper administration of justice relative to corruption offences, especially those involving several jurisdictions.

Under article 48, States parties must:

- Consistent with their respective domestic legal and administrative systems, adopt effective measures for purposes of effective investigation with respect to the offences established by the Convention, including:
    - (i) Enhancing and, where necessary, establishing channels of communication between their respective law enforcement agencies;
    - (ii) Cooperating with other States parties in their inquiries concerning:
        - a. The identity, whereabouts and activities of particular persons;
        - b. The movement of proceeds or property derived from the commission of offences and of property, equipment and other instrumentalities used or intended for use in the commission of offences;
    - (iii) Providing, when appropriate, items and substances for analytical or investigative purposes;
- Consider bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of this article;
- Endeavour to cooperate in order to respond to corruption-related offences committed by use of modern technology.

Under article 49 a State party must consider bilateral or multilateral agreements or arrangements regarding an establishment of joint investigative bodies, while ensuring that the sovereignty of the State party in whose territory such investigation is to take place is fully respected.

Under article 50, a State party must:

- Establish controlled delivery as an investigative technique available at the domestic and international level, if permitted by the basic principles of its domestic legal system;
- Have the legal ability to provide on a case-by-case basis international cooperation with respect to controlled deliveries, where not contrary to the basic principles of its domestic legal system
- Where appropriate, establish electronic surveillance and undercover operations as an investigative technique available at the domestic and international level.

3. Mandatory requirements

Transfer of proceedings (article 47)

Article 47 addresses an issue frequently arising in transnational crime cases, including those involving corrupt practices: the operation of offenders in or through several jurisdictions. In such instances, it is more practical, efficient and fairer to all parties concerned (including offenders and victims) to consolidate the case in one place.

Thus, taking also into account the objectives of the convention (art. 1), States Parties are required to 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 (art. 47).

Scope of law enforcement cooperation (article 48)

Article 48, paragraph 1, establishes the scope of the obligation to cooperate. States parties are required to work closely with one another in terms of law enforcement (police-to-police) cooperation in a number of areas set forth in subparagraphs (a) through (f) of paragraph 1.

This general obligation to cooperate is not absolute; rather, it is to be conducted consistent with their respective domestic legal and administrative systems. This clause gives States parties the ability to condition or refuse cooperation in specific instances in accordance with their respective requirements.

Subject to this general limitation, States parties are to strengthen the channels of communication among their respective law enforcement authorities (para. 1 (a)); undertake specific forms of cooperation in order to obtain information about persons, the movements of proceeds and instrumentalities of crime (para. 1 (b)); provide to each other items or quantities of substances for purposes of analysis or other investigative purposes (para. 1 (c)); promote exchanges of personnel including the posting of liaison officers (para. 1 (d)); exchange information on a variety of means and methods used in related offences (para. 1 (e)); and conduct other cooperation for purposes of facilitating early identification of offences (para. 1 (f)).

More specifically, States parties are required:

> (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, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity[122], whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities[123];

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

Special Investigative Techniques (article 50)

Article 50, paragraph 1, requires States parties to establish the special investigative technique of controlled delivery, provided that this is not contrary to the basic principles of their respective domestic legal systems.

According to article 2, subparagraph i, the term "controlled delivery" means the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

Many States will already have this mechanism available at least with respect to certain transnational crimes, trafficking in narcotics or organized crime, as it was provided for in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the United Nations Convention against Transnational Organized Crime. The decision on whether to use this technique in a specific circumstance is left to the law, discretion and resources of the State concerned, as reflected by the phrase "within its possibilities and under the conditions prescribed by its domestic law".

In order to implement this provision, States parties must ensure the admissibility of evidence developed through such technique. This may require legislation.

[122] The Interpretative Notes indicate that the term "identity" should be understood to include such features or other pertinent information as might be necessary to establish a person's identity (A/58/422/Add.1, para. 45).

[123] An Interpretative Note indicates that this subparagraph does not imply that the type of cooperation described therein would not be available under the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I) (A/58/422/Add.1, para. 46).

Article 50, paragraph 3, provides that in the absence of an agreement or arrangement, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis. This formulation requires a State party to have the ability to cooperate on a case-by-case basis at least with respect to controlled delivery, the establishment of which is mandatory pursuant to paragraph 1, where this is not contrary to the basic principles of the legal system of the State concerned. For a number of countries, this provision will itself be a sufficient source of legal authority for case-by-case cooperation.

Paragraph 4 clarifies that among the methods of controlled delivery that may be applied at the international level are to intercept and allow goods to continue intact, to intercept and remove goods, or to intercept and replace goods in whole or in part. It leaves the choice of method to the State party concerned. The method applied may depend on the circumstances of the particular case.

4. Non mandatory requirements, including optional issues

(a) Transfer of Sentenced Persons (article 45)

In accordance with Article 45, States Parties may wish to 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.

(b) Joint investigations (article 49)

Article 49 encourages, but does not require, States to enter into agreements or arrangements to conduct joint investigations, prosecutions and proceedings in more than one State, where a number of States parties may have jurisdiction over the offences involved.

The second sentence of the article provides a grant of legal authority to conduct joint investigations, prosecutions and proceedings on a case-by-case basis, even without a specific agreement or arrangement. The domestic laws of most countries already permit such joint activities and for those few countries whose laws do not so permit, this provision will be a sufficient source of legal authority for case-by-case cooperation of this sort. Given the identical provisions of the United Nations Convention against Transnational Organized Crime, which is ratified by a large number of States, only a few countries will require new legislation to take part in such (non-mandatory) activities.

(c) Establishment of bilateral or multilateral agreements or arrangements on law enforcement cooperation (article 48, paragraph 2)

The first sentence of article 48, paragraph 2, calls upon States parties to consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies, with a view to giving effect to the Convention. States parties may refer to the examples of agreements set forth in section E below when doing so. The second sentence provides a grant of legal authority for such cooperation in the absence of a specific agreement or arrangement. The domestic laws of most countries already permit such cooperation (indeed, virtually all countries are members of Interpol, a multilateral arrangement by which such cooperation can

generally be carried out). For any States parties whose laws do not so permit, this provision will be a sufficient source of legal authority for this type of cooperation on a case-by-case basis. Again, many parties to the UN Convention against Transnational Organized Crime would be already compliant with that.

(d) Cooperation through use of modern technology (article 48, paragraph 3)

Article 48, paragraph 3, calls upon States to endeavour to conduct law enforcement cooperation in order to respond to corruption-related offences committed through the use of modern technology. Criminals may use computer technology to commit such crimes as theft, extortion and fraud and to communicate with one another, or maintain their criminal operations computer systems.

An Interpretative Note indicates that, "in considering a proposal made by Chile for a provision on jurisdiction and cooperation with regard to offences committed through the use of computer technology (A/AC.261/L.157 and Corr.1), there was general understanding that article 42, paragraph 1 (a), already covered the exercise of jurisdiction over offences established in accordance with the Convention that were committed using computers if all other elements of the offence were met, even if the effects of the offence occurred outside the territory of a State Party. In that regard, States Parties should also keep in mind the provisions of article 4 of the Convention. The second part of the proposal of Chile suggested that States Parties should note the possible advantage of using electronic communications in exchanges arising under article 46. That proposal noted that States Parties might wish to consider the use of electronic communications, when feasible, to expedite mutual legal assistance. However, the proposal also noted that such use might raise certain risks regarding interception by third parties, which should be avoided" (A/58/422/Add.1, para. 47).

Not mandatory but encouraged by article 50, paragraph 1, is the use of electronic surveillance and undercover operations. It must be emphasized that these techniques may be the only way law enforcement can gather the necessary evidence to obstruct the activities of mostly secretive corrupt actors and networks.

Article 50, paragraph 2, encourages, but does not require, States parties to enter into agreements or arrangements to enable special investigative techniques, such as undercover investigations, electronic surveillance and controlled deliveries, to be conducted on behalf of another State, as a form of international cooperation.

E. Information resources

1. National regulations and 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, S.C., c. 18 (1999)
http://laws.justcie.gc.ca/en/E-23.01

Mutual Legal Assistance in Criminal Matters Act, R.S., 1985, c. 30 (4th Supp.) (1985)
http://laws.justice.gc.ca/en/M-13.6/84636.html#rid-84695

Hong Kong Special Administrative Region of China

Mutual Legal Assistance in Criminal Matters Ordinance (1997)
http://www.legislation.gov.hk/eng/home.htm

Mutual Legal Assistance in Criminal Matters (Singapore) Order, Agreement between the Government of the Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Singapore Concerning Mutual Legal Assistance in Criminal Matters (2004)
http://www.legislation.gov.hk/eng/home.htm

Israel

International Legal Assistance Law 5758-1998
http://www.justice.gov.il/NR/rdonlyres/35ED6B1F-10AE-4621-BA25-84AC427272EC/0/NewLegalAssistanceLawTranslationtoEnglishMEH.doc

Mauritius

Prevention of Corruption Act, Government Gazette No. 5 (2002), entry into force per Proclamation No. 18, (2002).
https://www.imolin.org/amlid/showLaw.do?law=4877&language=ENG&country=MAR

Seychelles

Mutual Assistance in Criminal Matters Act (1995)
https://www.imolin.org/amlid/browse.jsp?country=SEY

Singapore

Mutual Assistance in Criminal Matters Act, Chapter 190A
http://statutes.agc.gov.sg/

South Africa

International Co-operation in Criminal Matters Act, 75 (1996)
https://www.imolin.org/amlid/showLaw.do?law=4329&language=ENG&country=SAF

Switzerland

International Mutual Assistance in Criminal Matters – Guideline (1998)
http://www.ofj.admin.ch/themen/rechtshilfe/wegl-str-e.pdf#search='International%20Mutual%20Assistance%20in%20Criminal%20Matters%20Guideline%20switzerland'

Checklist for Foreign Requests for Mutual Assistance in Criminal Matters (Swiss Federal Office of Police)
http://www.rhf.admin.ch/themen/rechtshilfe/index-rh-e.html

Requests for Mutual Assistance in Criminal Matters addressed to Switzerland must correspond the following requirements and contain the following indications:

1.Legal bases

-European Convention on Mutual Assistance in Criminal Matters of 20th April 1959 / other agreements containing prescriptions on mutual assistance: or
-bilateral treaty, or
-declaration / agreement on reciprocity.

2-Requesting Authority

-Indicate the competent investigating or prosecuting authority; and
-State the office / authority from which the request emanates. It is recommendable to indicate the person dealing with the case (name as well as telephone and telefax numbers).

3.Object of the request

-Investigation or criminal proceeding before a judicial authority; or
-Preliminary enquiries of an authority which is authorized by law to investigate or to prosecute offences, provided that an appeal to a judge can be made in the foreign proceeding.

4.Person who is the target of the investigation or proceeding

Furnish as far as possible exact and complete identifying data of the accused/incriminated person (family name, first name, nationality, date and place of birth, profession, address, etc.).

5.Summary of the facts/legal qualification of the offence

-Give a summary of the relevant facts indicating the place, the time and the manner of the perpetration of the offence. In a voluminous and complicated case, a resume of the most important facts has to be added; and
-Indicate the legal qualification of the facts (murder, theft, fraud, etc.).

6.Reason for the request

-Point out the connection between the foreign proceeding and the required measures;
-Indicate exactly the evidences sought and the acts requested (blocking of the account X by the bank Y, seizure / surrender of the documents XY, interview of the witness Z, etc.);
-In case of examination of witnesses a questionnaire has to be elaborated;
-In case of search for persons or premises, for seizure or surrender of objects a confirmation has to be added that these measures are permitted in the requesting State (does only apply to States with whom exists no agreement on Mutual Assistance in Criminal Matters).

7.Application of the foreign law at the execution (exception)

-Show the need for the application of the foreign prescription at the execution; and
-Reproduce the legal prescription to be applied.

8.Presence of parties to the foreign proceedings at the execution (exception)

-Give the reasons for the presence of these persons at the execution; and
-Indicate exactly the identity and the status (office) of these persons.

9.Form of the request
-Written;
-A legalisation of the official records is not necessary.

10.Language/Translation
-Draft the request in German, French or Italian; otherwise
-Enclose a translation into one of these three official languages.

11.Channels of Transmission
-By diplomatic channels to the Federal Office for Police Matters of the Federal Department of Justice and Police in Berne, if there is no agreement regarding other channels (through the Ministry of Justice or direct contact with the requested authority);
-In urgent cases through Interpol: the request has to be confirmed in writing and its original must be transmitted later on through ordinary channels to the Federal Office for Police Matters.

United Kingdom of Great Britain and Northern Ireland
Criminal Justice (International Co-operation) Act (1990)
http://www.unodc.org/unodc/en/legal_library/gb/legal_library_1990-08-13_1990-17.html

Supplementary
22.—
(1) The offences to which an Order in Council under section 2 of the Extradition Act 1870 can apply shall include drug trafficking offences.
(2) [1989 c. 33.]
In paragraph 15 of Schedule 1 to the Extradition Act 1989 (extradition offences treated as within jurisdiction of foreign states) after paragraph (i) there shall be inserted—
"(j) [1986 c. 32.]
a drug trafficking offence within the meaning of the Drug Trafficking Offences Act 1986, [2/] or
(k) [1987 c. 41.]
an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates;".
(3) At the end of subsection (2) of section 22 of the said Act of 1989 (extradition offences under Conventions) there shall be inserted—
"(h) the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which was signed in Vienna on 20th December 1988 ("the Vienna Convention")."
and at the end of subsection (4) of that section there shall be inserted "and
(h) in relation to the Vienna Convention—
(i) any drug trafficking offence within the meaning of the Drug Trafficking Offences Act 1986, [2/] and
(ii) an offence to which section 1 of the Criminal Justice (Scotland) Act 1987 relates;".

Regulation of Investigatory Powers Act (2000)
http://www.hmso.gov.uk/acts/acts2000/00023--d.htm

Zimbabwe
Criminal Matters (Mutual Assistance) Act, 1990
https://www.imolin.org/amlid/showLaw.do?law=6175&language=ENG&country=ZIM

PART II ASSISTANCE IN RELATION TO TAKING OF EVIDENCE PRODUCTION OF DOCUMENTS OR OTHER ARTICLES

4. Aspects of mutual assistance

For the purposes of this Act, mutual assistance in criminal matters shall include-.

(a) the obtaining of evidence, documents or other article;
(b) the provision of documents and other records;
(c) the location and identification of witnesses or suspects;
(d) the execution of requests for search and seizure;
(e) the making of arrangements for person to give evidence or assist in investigations;
(f) the forfeiture or confiscation of property in respect of offences;
(g) the recovery of pecuniary penalties in respect of offences;
(h) he interdicting of dealings in property, or the freezing of assets, that may be forfeited or confiscated, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences;
(i) the location of property that may be forfeited, or that may be needed to satisfy pecuniary penalties imposed, in respect of offences; and
(j) the service of documents.

5. Act not to prevent other provision of mutual assistance

Nothing in this Act shall be construed as preventing the provision or obtaining of assistance in criminal matters otherwise than as provided in this Act..

6. Refusal of assistance

(1) A request by a foreign country for assistance under this Act shall be refused if, in the opinion of the Attorney-General—
(a) the request relates to the prosecution or punishment of a person for an offence that is, by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political character; or
(b) there are reasonable grounds for believing that the request has been made with a view to prosecuting or punishing a person for an offence of a political character; or
(c) there are reasonable grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, sex, religion, nationality or political opinions; or
(d) the request relates to prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Zimbabwe, would have constituted an offence under the military law of Zimbabwe but not under the ordinary criminal law of Zimbabwe; or
(e) the granting of the request would prejudice public safety, public order, defence or the economic interests of Zimbabwe; or
(f) the request relates to the prosecution of a person for an offence in a case where the person has been acquitted or pardoned by a competent court or authority in the foreign country, or has undergone the punishment provided by the law of that country, in respect of that offence or of another offence constituted by the same act or omission as that offence; or
(g) except in the case of a request under section *eleven*, the foreign country is not a country to which this Act applies.
(2) A request by a foreign country for assistance under this Act may be refused if in the opinion of the Attorney-General—

(a) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Zimbabwe, would not have constituted an offence against the law of Zimbabwe; or

(b) the request relates to the prosecution or punishment of a person in respect of an act or omission that occurred, or is alleged to have occurred, outside the foreign country and a similar act or omission occurring outside Zimbabwe in similar circumstances would not have constituted an offence against the law of Zimbabwe; or

(c) the request relates to the prosecution or punishment in respect of an act or omission where, if it had occurred in Zimbabwe at the same time and had constituted an offence against the law of Zimbabwe, the person responsible could no longer be prosecuted by reason of lapse of time or any other reason; or

(d) the provision of the assistance could prejudice an investigation or proceedings in relation to a criminal matter in Zimbabwe; or

(e) the provision of the assistance would, or would be likely to, prejudice the safety of any person, whether in or outside Zimbabwe; or

(f) the provision of the assistance would impose an excessive burden on the resources of Zimbabwe:

7. Assistance may be conditional.

Assistance in terms of this Act may be provided to a foreign country subject to such conditions as the Attorney-General may determine.

8. Request by Zimbabwe

Any request by Zimbabwe for assistance in any criminal matter in terms of this Act shall be made by the Attorney-General.

9. Request for assistance by foreign country.

(1) A request by the appropriate authority of a foreign country for assistance in a criminal matter shall be made to the Attorney-General

(2) A request made in terms of subsection (1) shall contain or be accompanied by a document giving the following information-

(a) the name of the authority concerned with the criminal matter to which the request relates; and

(b) a description of the nature of the criminal matter and a summary of the relevant facts and laws; and

(c) a description of the purpose of the request and of the nature of the assistance being sought; and

(d) details of the procedure that the foreign country wishes to be followed by Zimbabwe in giving effect to the request, including details of the manner and form in which any information, document or thing is to be supplied to the foreign country pursuant to the request; and

(e) the wishes of the foreign country concerning the confidentiality of the request and the reasons for those wishes; and

(f) details of the period within which the foreign country wishes that the request be complied with; and

(g) if the request involves a person travelling from Zimbabwe to the foreign country, details of allowances to which the person will be entitled and of the arrangements for accommodation for the person, while the person is in the foreign country pursuant to the request; and

(h) any other information required to be included with the request under a treaty or other arrangement between Zimbabwe and the foreign country; and

(i) any other information that may assist in giving effect to the request;

but failure to comply with this subsection shall not be a ground for refusing the request.

…

10. Request by Zimbabwe.

The Attorney-General may request an appropriate authority of a foreign country to arrange for-

(a) evidence to be taken in the foreign country; or

(b) documents or other articles in the foreign country to be produced;

for the purposes of proceeding in relation to a criminal matter in Zimbabwe.

11. Request for evidence, etc., by foreign country.

(1) Where a request is made by the appropriate authority of a foreign country for-

(a) evidence to be taken in Zimbabwe; or

(b) documents or other articles in Zimbabwe to be produced;

for the purposes of proceeding in relation to a criminal matter in the foreign country, the Attorney-General may, subject to such terms and conditions as he may determine, authorize the taking of the evidence or the production of the documents or other articles, and the transmission of the evidence, documents or other articles to the foreign country.

(2) Where the Attorney-General authorizes the taking of evidence or the production of documents or other articles in terms of subsection (1)—

(a) in the case of the taking of evidence, a magistrate may take the evidence on oath of each witness appearing before him to give evidence in relation to the matter, and shall—

(i) cause the evidence to be put in writing and certify that the evidence was taken by him; and

(ii) cause the evidence so certified to be sent to the Attorney-General; or

(b) in the case of the production of documents or other articles, a magistrate may, subject to subsection (6), require the production of the documents or other articles and shall send the documents, or copies of the documents certified by him to be true copies, or the other articles, to the Attorney-General.

(3) The evidence of any witness may be taken in the presence or absence of the person to whom the proceedings in the foreign country relate or in the presence of his legal representative, if any.

(4) The magistrate conducting proceedings in terms of subsection (2) may permit —

(a) any other person giving evidence or producing documents or other articles at the proceedings before him; and

(b) the appropriate authority of the foreign country; to be legally represented at the proceedings.

(5) The certificate by the magìstrate made in terms of subsection (2) shall state whether, when the evidence was taken or the documents or other articles were produced

(a) the person, to whom the proceedings in the foreign country relate or his legal representative: or

(b) any person other than the person giving evidence or producing documents ,or other articles or his legal representative;

was present.

(6) Subject to subsection (7). the laws of Zimbabwe with respect to the compelling of persons to attend, before a magistrate, and to give evidence, answer questions and produce documents other articles, upon the hearing of a charge against a person for any offence shall, *mutatis mutandis*, apply with respect to the compelling of persons to attend before a magistrate, and to giving

evidence, answering questions and the production of documents or other articles, for the purposes of this Section.

(7) For the purposes of this section, the person to whom the proceedings in the foreign country relate shall be compete but not compellable to give evidence.

PART-III ASSISTANCE IN RELATION SEARCH AND SEIZURE

12. Requests by Zimbabwe for search and seizure.

(1) This section applies to proceedings or investigations relating to a serious offence against the law of Zimbabwe if there are reasonable grounds to believe that a thing relevant to the proceedings or investigations may be located in a foreign country to which this Act applies.

(2) Subject to subsection (1), the Attorney-General may request an appropriate authority of a foreign country to obtain a warrant, or other instrument authorizing the search for a thing relevant to the proceedings or investigation and, if such a thing, of any other thing that is or may be relevant to the proceedings or investigation, as the case may be, is found pursuant to such a search, authorizing the seizure of that thing.

(3) A request shall be accompanied by an affidavit by a person verifying the grounds on which the request is made.

13. Requests by foreign countries for search and seizure.

(1) Where—

(a) proceedings have, or an investigation relating to a a criminal matter involving a serious offence has, commenced in a foreign country; and

(b) there are reasonable grounds to believe that a thing relevant to the proceedings or investigation is located in Zimbabwe; and

(c) the appropriate authority of the foreign country requests the Attorney-General, arrange for the issue of a search warrant in terms of this section in relation to that thing;

the Attorney-General may, in writing, authorize a police officer to apply to a magistrate in the province in which that thing is believed to be located for the search warrant requested by the foreign country.

(2) Where a police officer authorized under subsection (1) has reason to believe that the thing to which the request relate is or will be, at a specified time-

(a) on a person; or

(b) in the clothing that is being worn by a person; or

(c) otherwise in a person immediate control;

the police officer may lay before a magistrate information on oath setting out the grounds for that belief and apply for the issue of a warrant in terms of this section to search the person for that thing.

(3) Where an application is made in terms of subsection (2), the magistrate, may, subject to subsection (6), issue a warrant authorizing a police officer-

(a) to search the person for the thing; and

(b) to seize anything found in the course of the search that the police officer believes, on reasonable grounds, to be relevant to the proceedings or investigation.

(4) Where a police officer authorized in terms of subsection (1) has reason to believe that the thing to which the request relates is or will be at a specified time, upon any land, or upon or in any premises, the police officer may—

(a) lay before a magistrate information on oath setting out the grounds for that belief; and

(b) apply for the issue of a warrant in terms of this section to search the land or premises for that thing.

(5) Where an application is made in terms of subsection (4), the magistrate may, subject to subsection (6), issue a warrant authorizing a police officer—

(a) to enter upon the land, or upon or into the premises; and

(b) to search the land or premises for the thing; and

(c) to seize anything found in the course of the search that the police officer believes, on reasonable grounds, to be relevant to the proceedings or investigation.

(6) A magistrate shall not issue a warrant in terms of this section unless—

(a) the informant or some other person has given to the magistrate, either orally or by affidavit, such further information, if any, as the magistrate may require concerning the grounds on which the issue of the warrant is sought; and

(b) the magistrate is satisfied that there are reasonable grounds for issuing the warrant.

(7) There shall be stated in a warrant issued in terms of this section—

(a) the purpose for which the warrant is issued, including a reference to the nature of the criminal matter in relation to which the search is authorized; and

(b) whether the search is authorized at any time of the day or night or during specified hours of the day or night; and

(c) a description of the kind of things authorized to be seized; and

(d) a day, not being later than one month after the issue of the warrant, on which the warrant ceases to have effect.

(8) If in the course of searching under a warrant issued in terms of this section for a thing of a kind specified in the warrant, the police officer finds another thing that the police officer believes on reasonable grounds-

(a) to be relevant to the proceedings or investigation in the foreign country or to afford evidence as to the commission of an offence in Zimbabwe; and

(b) is likely to be concealed, lost or destroyed if it is not seized;

the warrant shall be deemed authorize the police officer to seize the other thing.

(9) Where a police officer finds, as a result of a search in accordance with a warrant issued in terms of this section, a thing which the police officer seizes wholly or partly because he believes on reasonable grounds the thing to be relevant to the proceedings or investigation in the foreign country, the police officer shall deliver the thing into the custody and control of the Commissioner of Police.

(10) Where a thing is delivered into the custody and control of the Commissioner of Police in terms of subsection (9), the Commissioner of Police shall arrange for the thing to be kept for a period not exceeding one month from the day on which the thing was seized, pending a direction in writing from the Attorney-General as to the manner in which the thing is to be dealt with, which may include a direction that the thing be sent to an authority of a foreign county.

(11) A police officer who executes a search warrant issued in terms of subsection (3) or (5) shall, as soon as practicable after the execution of the warrant, give to the person searched, or to the owner or occupier of the land or premises searched, or leave in a prominent position on such land or at such premises, as the case requires, a notice setting out-

(a) the name and rank of the police officer; and

(b) the name of the magistrate who issued the warrant and the day on which it was issued; and

(c) a description of anything seized and removed in accordance with the warrant.

(12) A police officer acting in accordance with a warrant issued in terms of subsection (3) may remove, or require a person to remove, any of the clothing that the person is wearing but only if the removal of the clothing is necessary and reasonable for an effective search of the person in terms of the warrant.

(13) A person shall not be searched under a warrant issued in terms of subsection (3) except by a person of the same sex and the search shall be conducted with strict regard to decency.

(14) Nothing in this section shall be taken to authorize a police officer, in executing a warrant issued in terms of subsection (3), to carry out a search by way of an examination of a body cavity of a person.

(15) Where a police officer is authorized under a warrant issued in terms of subsection (3) to search a person, the police officer may also search-

(a) the clothing that is being worn by the person; and

(b) any property in, or apparently in, the person's immediate control

PART IV ARRANGEMENTS FOR PERSONS TO GIVE EVIDENCE OR ASSIST IN INVESTIGATIONS

14.

(1) Where—

(a) proceedings relating to a criminal matter have commenced in Zimbabwe; and

(b) the Attorney-General is of the opinion that a person who is in a foreign country to which this Act applies—

(i) is a foreign prisoner; and

(ii) is capable of giving evidence relevant to the proceedings; and

(iii) has given his consent to being removed to Zimbabwe for the purpose of giving evidence in the proceedings:

the Attorney-General may request the appropriate authority of the foreign country to authorize the attendance of the person at the proceedings relating to or in connection with the criminal matter.

(2) Where—

(a) an investigation relating to a criminal matter has commenced in Zimbabwe; and

(b) the Attorney-General is of the opinion that a person who is in a foreign country to which this Act applies-

(i) is a foreign prisoner; and

(ii) is capable of giving assistance in relation to the investigation; and

(iii) has given his consent for being removed to Zimbabwe for the purpose of giving assistance in relation to the investigation;

the Attorney-General may request the appropriate authority of the foreign country to authorize the removal of the person to Zimbabwe for the purpose of giving assistance in relation to the investigation.

(3) Where the Attorney-General makes a request in terms of subsection (1) or (2), he may make arrangements with an appropriate authority of the foreign country for—

(a) the removal of the person to Zimbabwe; and

(b) the custody of the person while in Zimbabwe; and

(c) the return of the person to the foreign country; and

(d) any other relevant matter.

D. Other Forms of International Cooperation [articles: 44, 47, 48, 49, 50, 50[1] requirement to create admissibility of evidence; p162-180 plagiarize intelligently]

2. International and Regional Documents

African Union

African Union Convention on Preventing and Combating Corruption (2003)
http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf#search='african%20union%20convention%20on%20combating%20corruption'

Arab League

Arab League Convention on Mutual Assistance in Criminal Matters (1983)

Commonwealth

Commonwealth Scheme for the Rendition of Fugitive Offenders (as amended in 1990)
http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B717FA6D4-0DDF-4D10-853E-D250F3AE65D0%7D_London_Amendments.pdf

Commonwealth Scheme relating to Mutual Assistance in Criminal Matters
The Harare Scheme (as amended in 1999)
http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B0484868D-02C9-49F8-BC11-59822B00DD2F%7D_Harare_Scheme.pdf

Council of Europe

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)
Council of Europe, *European Treaty Series*, No. 141
http://conventions.coe.int/Treaty/EN/Treaties/Html/141.htm

European Convention on the Transfer of Proceedings in Criminal Matters (1972)
http://conventions.coe.int/treaty/en/Treaties/Html/073.htm

Convention on Cybercrime (2001)
Council of Europe, *European Treaty Series*, No. 185
http://conventions.coe.int/Treaty/en/Treaties/Word/185.doc

European Convention on Extradition (1957)
Council of Europe, European Treaty Series, No. 24
http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm

European Convention on Mutual Assistance in Criminal Matters (1959)
Council of Europe, *European Treaty Series,* no. 30.
http://conventions.coe.int/treaty/en/Treaties/Html/030.htm

Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (1978)
Council of Europe, *European Treaty Series*, No. 99
http://conventions.coe.int/Treaty/en/Treaties/Html/099.htm

Economic Community of West African States

Economic Community of West African States Convention on Extradition (1994)
http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/4ConExtradition.pdf

Economic Community of West African States Convention on Mutual Assistance in Criminal Matters(1992)

European Union

Convention drawn up on the basis of article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union (1995)

Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000)
Official Journal of the European Communities, No. C 197, 12 July 2000
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0712(01)&model=guichett

Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (2000)
Official Journal of the European Communities, No. L 239, 22 September 2000
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42000A0922(02)&model=guichett

Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001)
Council of Europe, *European Treaty Series*, No. 182
http://conventions.coe.int/Treaty/en/Treaties/Html/182.htm

Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2001)
Official Journal of the European Communities, No. C 326, 21 November 2001
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=42001A1121(01)&model=guichett

Interpol

Interpol Model [bilateral] Police Cooperation Agreement
http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/Model.asp

MODEL [BILATERAL]
POLICE CO-OPERATION
AGREEMENT

PREAMBLE

XXX

and

XXX

Hereinafter referred to as the Parties,

Desirous of strengthening their police co-operation capacities,

Aware of the need to create a privileged co-operation space between them,

Wishing to make good use of their membership of the International Criminal Police Organization - Interpol, thereby strengthening the services provided by that Organization,

Aware of the need for police co-operation to respect human rights,

Deeming it useful to be able to share their expertise and experience in police matters,

HAVE AGREED AS FOLLOWS:

Definitions

For the purposes of this Agreement, "right of observation" shall mean the possibility available to police officers of one Party to observe, in the territory of the other Party and in accordance with the conditions defined in Article 10 of the present Agreement, the movements of an individual who is the subject of a police investigation.

For the purposes of this Agreement, "right of pursuit" shall mean the possibility available to police officers of one Party to pursue an individual with a view to his apprehension in the territory of the other Party, under the conditions defined in Article 11 of the present Agreement.

CHAPTER 1

GENERAL PROVISIONS

Article 1

The Parties hereby establish an Agreement on police co-operation.

Article 2

(1) The present Agreement comes within the framework of the co-operation system set up by the ICPO-Interpol, and the Parties are Interpol Member States.

(2) The aims of the Agreement are to:
   (a) Create a privileged police co-operation space between the Parties;
   (b) Set up machinery to facilitate co-operation and to create specific operational structures for that purpose.

Article 3

(1) Without prejudice to Article 5 below, the Interpol National Central Bureaus (hereinafter referred to as the NCBs) shall act as a liaison channel between the various law enforcement services of the Parties.

(2) The NCBs' telecommunications equipment shall be used for co-operation under the terms of the present Agreement.

(3) In order to facilitate the co-operation covered by the present Agreement, each Party may, if necessary, request the assistance of the Sub-Regional Bureau for [*specify*].

(4) The law enforcement services referred to in paragraph (1) shall be:

   (a) as regards [*Party A*]: [*list of services*]

   (b) as regards [*Party B*]: [*list of services*]

CHAPTER II

EXCHANGE OF INFORMATION

Article 4

(1) The Parties undertake to ensure that, when requested, their police authorities shall, in compliance with national legislation and within the limits of their responsibilities, communicate to each other information for preventing ordinary law crime, locating offenders and bringing them to justice. This Article shall not apply where the national legislation of the requested Party stipulates that the request has to be made to the judicial authorities.

(2) Paragraph (1) shall not prevent the Parties, in compliance with their national legislation, from communicating to each other, on their own initiative, potentially useful information, particularly in the interests of maintaining law and order or protecting victims.

Article 5

(1) Requests for information and replies to such requests shall be communicated through the Parties' NCBs.

(2) Where the request cannot be made in good time by the above procedure or where circumstances so demand, it may be addressed by the competent service of the requesting Party directly to the competent service of the requested Party, which may reply directly. In such cases, the requesting authority shall as soon as possible inform its country's NCB of its direct application.

(3) Requests for information and replies to such requests transmitted in application of paragraph (2) above shall be communicated to the NCB of each Party.

Article 6

The requesting Party (the NCB or some other competent law enforcement service) shall guarantee the level of confidentiality attributed to information by the requested Party (the NCB or other competent law enforcement service).

CHAPTER III

PROTECTION OF PERSONAL DATA

Article 7

(1) In application of the present Agreement, the transmission and processing of personal data shall be subject to the national legislation of each Party and to the relevant rules in force within Interpol.

(2) Without prejudice to paragraph (1) above, the following rules shall apply to the processing of personal data transmitted in application of the present Agreement:

(a) The data may be used by the recipient Party solely for the purposes for which the present Agreement stipulates that such data may be transmitted; such data may be used for other purposes only with the prior authorization of the Party which transmitted the data and in compliance with the legislation of the recipient Party.

(b) Data may only be used by judicial or police authorities or any other law enforcement authority designated by the Party concerned, a list of which shall be communicated to the other Party.

(c) The Party transmitting the data shall be obliged to ensure the accuracy thereof; should it note that the data is inaccurate or should not have been transmitted, the recipient Party must be informed thereof forthwith; the latter shall then be obliged to correct or destroy the data concerned.

(d) A Party may not plead that another Party had transmitted inaccurate data in order to avoid its liability under its national legislation vis-à-vis an injured party.

(e) The transmission and receipt of personal data shall be recorded. Parties shall communicate to each other a list of authorities or services authorized to consult such records.

(f) Communication of and access to data shall be governed by the national legislation of the Party, which has been asked for such communication or access by the person concerned. However, data may only be communicated to that person with the authorization of the Party, which originally supplied the data.

(3) Each Party shall monitor the use made of information communicated by the other Party in order to prevent and sanction any abuse, which could infringe on individual rights. For this purpose, Parties may designate a specific independent supervisory authority.

(3) The assessment body set up by virtue of Article 19 below shall be competent to deal with any problems arising from the application or interpretation of the provisions of the present Article. If necessary, this body shall consult with the bodies created by the Parties in application of paragraph (3) above.

CHAPTER IV

RIGHT OF OBSERVATION AND PURSUIT

Article 8

(1) Police officers of one of the Parties who, within the framework of a criminal investigation, are keeping under observation in their country a person who is presumed to have taken part in a criminal offence referred to in paragraph (8) below, shall be authorized to pursue their observation in the territory of the other Party where the latter has authorized cross-border observation in response to a request for assistance which has previously been submitted. The request for assistance and the authorization shall be forwarded through the NCB or directly by the authority referred to in paragraph (7) below. Under some circumstances, conditions may be attached to the authorization.

(2) On request, the observation will be entrusted to officers of the Party in whose territory it is carried out.

(3) Where, for urgent reasons, prior authorization of the other Party cannot be requested, the officers conducting the observation shall be authorized to continue beyond the border the observation of a person as referred to in paragraph (1)

above. Exercising the right of observation is subject to the following general conditions:

(a) The NCB of the Party in whose territory the observation is to be continued must be notified immediately, during the observation, that the border has been crossed.

(b) A request for judicial assistance submitted in accordance with paragraph (1) above and outlining the grounds for crossing the border without prior authorization shall be submitted without delay.

(c) When a Party notifies the NCB that the border has been crossed, it should mention whether the officers conducting the observation are carrying their service weapons.

(4) Observation shall cease as soon as the Party in whose territory it is taking place so requests, following the notification referred to in (3,a) or the request referred to in (3,b) or where authorization has not been obtained [*twelve*] hours after the border was crossed.

(5) The observation referred to in this Article shall be carried out only under the following general conditions:

(a) The officers conducting the observation must comply with the provisions of this Article and with the law of the Party in whose territory they are operating; they must obey the instructions of the local responsible authorities.

(b) Except in the situations provided for in paragraph (3) above, the officers shall, during the observation, carry a document certifying that authorization has been granted.

(c) The officers conducting the observation must be able at all times to provide proof that they are acting in an official capacity.

(d) The officers conducting the observation may carry their service weapons during the observation save where specifically otherwise decided by the requested Party; their use shall be prohibited save in cases of legitimate self-defence.

(e) Entry into private homes and places not accessible to the public shall be prohibited.

(f) The officers conducting the observation may neither challenge nor arrest the person under observation.

(g) All observation operations shall be the subject of a report to the authorities of the Party in whose territory they took place; the officers conducting the observation may be required to appear in person.

(6) The officers referred to in paragraphs (1), (2), (3) and (5) above shall be:

(a) as regards [*Party A*]: [*list of authorized officers*]

(b) as regards [*Party B*]: [*list of authorized officers*]

(7) The authority empowered to authorize observation in application of paragraph (1) above shall be:

(a) as regards [*Party A*]: [*authority responsible for authorizing observation*]

(b) as regards [*Party B*]: [*authority responsible for authorizing observation*]

Option 1

(8) Observation as referred to above may take place only in connection with offences likely to result in extradition proceedings between the Parties.

Option 2

(8) Observation as referred to above may take place only in connection with the following offences:

[*list of offences*]

Article 9

(1) Officers of one of the Parties following, in their country, an individual caught in the act of committing one of the offences referred to in paragraph (7) below, or participating in one of those offences, shall be authorized to continue pursuit in the territory of the other Party without prior authorization where, given the urgency of the situation, it was not possible to notify the competent authorities of the other Party or where these authorities have been unable to reach the scene in time to take over the pursuit.

(2) The same shall apply where the person pursued has escaped from provisional custody or while serving a custodial sentence.

(3) The pursuing officers shall, not later than when they cross the border, notify the competent authorities of the Party in whose territory the pursuit is to take place. The pursuit will cease as soon as the Party in whose territory the pursuit is taking place so requests. At the request of the pursuing officers, the competent local authorities shall apprehend the pursued person so that he can be arrested.

(4) NCBs shall be informed, not later than when the border is crossed, of the cross-border pursuit and shall in turn notify:

(a) as regards [*Party A*]: [*competent authority*],

(b) as regards [*Party B*]: [*competent authority*].

(5) The officers pursuing an individual in conformity with the terms of this Article shall not have the right to apprehend that person.

(6) Pursuit may be carried out for as long as it takes to achieve the desired result and without limit in space (subject to the restriction provided for in paragraph (8,c) of the present Article).

Option 1

(7) Pursuit as referred to above may take place only in connection with offences likely to result in extradition proceedings between the Parties.

Option 2

(7) Pursuit as referred to above may take place only in connection with the following offences:

[*list of offences*]

(8) Pursuit as referred to in the present Article shall be subject to the following general conditions:

(a) The pursuing officers must comply with the provisions of this Article and with the law of the Party in whose territory they are operating; they must obey the instructions of the local responsible authorities.

(b) Pursuit shall be solely over land borders, including lakes and waterways.

(c) Entry into private homes and places not accessible to the public shall be prohibited.

(d) The pursuing officers shall be easily identifiable, either by their uniform or by means of an armband or by accessories fitted to their vehicle; the use of civilian clothes combined with the use of unmarked vehicles without the aforementioned identification is prohibited; the pursuing officers must at all times be able to prove that they are acting in an official capacity.

(e) The pursuing officers may carry their service weapons; their use shall be prohibited save in cases of legitimate self-defence.

(f) After a pursuit, the pursuing officers shall present themselves before the local competent authorities of the Party in whose territory they were operating and shall give an account of their mission; at the request of those authorities, they must remain at their disposal until the circumstances of their action have been adequately elucidated; this condition shall apply even where the pursuit has not resulted in the arrest of the pursued person.

(g) The authorities of the Party from which the pursuing officers have come shall, at the request of the authorities of the Party in whose territory the pursuit took place, assist the enquiry subsequent to the operation in which they took part, including legal proceedings.

(9) The officers referred to in the previous paragraphs shall be:

(a) as regards [*Party A*]: [*list of authorized officers*]

(b) as regards [*Party B*]: [*list of authorized officers*]

Article 10

(1) During cross-border observation or pursuit, officers shall be subject to the same legal provisions in terms of traffic regulations as the officers of the Party in whose territory the observation or pursuit is being carried out. The Parties shall inform each other (through their NCBs) of the legislation in force in this area.

(2) Technical resources to facilitate cross-border observation or pursuit may be used, provided that this is authorized by the legislation of the Party in whose territory the observation or pursuit is being carried out.

(3) The Parties undertake to establish conditions for law enforcement services to use aircraft for observation, pursuit or other cross-border operations decided on in conjunction with the relevant services.

Article 11

During the operations referred to in Articles 8 and 9 above, the agents on mission in the territory of the other Party shall be subject to the law on civil liability and criminal responsibility of the Party in whose territory they are operating.

Article 12

(1) Where, in accordance with Articles 8 and 9 above, officers of one Party are operating in the territory of the other Party, the first Party shall be responsible for any damage caused by them during the course of their mission, in accordance with the law of the Party in whose territory they are operating.

(2) The Party in whose territory the damage referred to in paragraph (1) above occurs shall repair such damage under the conditions applicable to damage caused by its own officers.

(3) The Party whose officers have caused damage to anyone in the territory of the other Party shall reimburse in full to the latter any sums the latter has paid out to the victims or other entitled persons.

(4) Without prejudice to the exercise of its rights vis-à-vis third parties and without prejudice to paragraph (3) above, each Party shall refrain, in the case provided for in paragraph (1) above, from requesting reimbursement of the amount of damages it has sustained from the other Party.

CHAPTER V

MISSIONS, PARTICIPATION IN INVESTIGATIONS SPECIAL INVESTIGATIVE TECHNIQUES

Article 13

(1) Officers from one Party may enter the territory of the other Party in order to assist in investigations being carried out in that territory.

(2) When officers are on mission in application of the present Article, they shall act as observers.

(3) Officers on mission shall be authorized to be present during:

(a) searches of premises,

(b) searches of persons,

(c) questioning and hearings,

(d) autopsies.

(4) Officers on mission may be authorized to ask questions during questioning and hearings. However, only officers from the territory in which the procedure is taking place shall be authorized to decide what action to take.

(5) Missions shall be organized by the Parties' NCBs.

Article 14

(1) Parties shall take the necessary measures to co-ordinate the implementation of special investigative techniques, such as controlled deliveries, surveillance and undercover operations, for the purpose of gathering evidence so that the competent authorities may take legal action against persons involved in an offence targeted by these techniques.

(2) Officers of one Party involved in this type of investigation shall respect the conditions agreed on with the Party in whose territory that investigation is taking place.

(3) Parties shall agree on the extent to which the implementation of the provisions of the present Article may give rise to financial compensation or a sharing of the costs involved.

Article 15

(1)The Parties shall consult each other on the creation of mixed teams to implement the provisions of the present Chapter.

(2)Officers of the Parties who are members of such teams shall comply with the instructions of the competent authorities of the Party in whose territory the operation is taking place.

CHAPTER VI

OTHER FORMS OF CO-OPERATION

Article 16

(1) The Parties shall co-operate in forensic science and other technical matters. In this respect, each Party shall make available to the other Party its material and human resources for carrying out investigations in this area.

(2) To this effect, when necessary the Parties shall provide each other with evidence, or the quantities of substances required for analysis or investigation.

(3) The Parties shall also co-operate in the identification of victims of major disasters.

(4) The Parties shall agree on whether the use of such resources provided by one Party to another shall give rise to financial compensation.

Article 17

(1) The Parties shall organize reciprocal visits between their respective border units.

(2) A Party may invite officers selected by the other Party to attend its seminars and in-house training courses in subject areas such as:

- Methods used to prevent, detect and combat offences,
- Routes and modus operandi used by individuals suspected of committing offences,
- Control of import/export of contraband,
- Gathering evidence,
- Law enforcement equipment and techniques (electronic surveillance, controlled deliveries, undercover operations, etc.).
  (non-exhaustive list)

(3) The Parties shall consider associating all those involved in law enforcement, including judges and customs officers, in the above-mentioned visits and training.

(4) A Party shall send officers as interns to the other Party in order to familiarize them with the latter's structure and practices.

Article 18

The Parties shall encourage appropriate language training for officers likely to be in contact with officers from the other Party (particularly NCB officers).

CHAPTER VII

IMPLEMENTATION ASSESSMENT AND RESOLVING IMPLEMENTATION PROBLEMS

Article 19

<u>Option 1</u>

(1) A common body shall be responsible for assessing the co-operation implemented under the present Agreement on a yearly basis.

(2) The common assessment body shall communicate its findings to the competent government authorities of each Party, who shall take any necessary measures to resolve problems arising from the implementation of the present Agreement.

(3) [*Name and composition of this common body*]

<u>Option 2</u>

(1) A common body shall be responsible for assessing the co-operation implemented under the present Agreement on a yearly basis.

(2) The common assessment body shall be composed of representatives of the Ministers responsible for the implementation of the present Agreement, Heads of NCBs and heads of the services referred to in Article 3(1) above.

Article 20

(1) Difficulties arising from the application or interpretation of the present Agreement shall be the subject of consultation between the authorities of the Parties in the context of the common body created by virtue of Article 19 above.

(2) Each Party may request that a meeting of experts be held to resolve problems related to the application of the present Agreement and to submit to the common body proposals for developing co-operation.

CHAPTER VIII

FINAL PROVISIONS

Article 21

The present Agreement shall not affect the application of agreements already in force between the Parties.

Article 22

(1) The present Agreement shall enter into force on the date of notification of the second instrument of ratification.

(2) The present Agreement has no expiry date.

(3) Denunciation shall be notified in writing to the other Party or at least six months before it is to take effect. Denunciation shall in no way detract from the Parties' rights and obligations resulting from co-operation carried on under the terms of the present Agreement.

Organization of American States

Inter-American Convention on Extradition (1981)
Organization of American States, Treaty Series, No. 60
http://www.oas.org/juridico/english/treaties/b-47(1).html

Inter-American Convention on Mutual Legal Assistance in Criminal Matters
Organization of American States, Treaty Series, No. 75 (1992)
http://www.oas.org/juridico/english/Treaties/a-55.html

Optional Protocol Related to the Inter-American Convention on Mutual Legal Assistance in Criminal Matters (1993)

Organization of American States, Treaty Series, No. 77
http://www.oas.org/juridico/english/treaties/A-59.htm

Inter-American Convention against Corruption
Organization of American States (1996)
http://www.oas.org/juridico/english/Treaties/b-58.html

Organization for Economic Cooperation and Development
Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Organisation for Economic Cooperation and Development, DAFFE/IME/BR(97)20 (1997)
http://www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

United Nations

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1971)
http://www.unodc.org/pdf/convention_1971_en.pdf

United Nations Model Treaty on Extradition (1990)
General Assembly resolution 45/116
http://www.un.org/documents/ga/res/45/a45r116.htm

United Nations Model Treaty on the Transfer of Proceedings in Criminal Matters (1990)
General Assembly resolution 45/118
http://www.unhchr.ch/html/menu3/b/51.htm

United Nations Model Extradition (amendment) Bill (1998)
http://www.imolin.org/ex98.htm

United Nations Convention on Transnational Organized Crime (2000)
http://www.unodc.org/adhoc/palermo/convmain.html

Revised United Nations model treaty on mutual legal assistance in criminal matters (2000)
http://www.unodc.org/pdf/lap_mutual-assistance_2000.pdf

Commentary on the United Nations model treaty
http://www.unodc.org/pdf/lap_mutual-assistance_commentary.pdf

United Nations model foreign evidence bill (2000)
http://www.unodc.org/pdf/lap_foreign-evidence_2000.pdf

Commentary on the United Nations model foreign evidence bill
http://www.unodc.org/pdf/lap_foreign-evidence_commentary.pdf

VI. Asset recovery

Article 51

General provision

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 cooperation and assistance in this regard[124].

A. Introduction

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 victimized 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 General[125] reviewed measures taken by Member States, the United Nations system and relevant organizations, 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 emphasized 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 process[126].

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 issue[127]. This was followed up by another report on further progress on the implementation of that resolution and

[124] An Interpretative Note indicates that the expression "fundamental principle" would not have legal consequences on the other provisions of this chapter (A/58/422/Add.1, para. 48).

[125] 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.

[126] 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.

[127] See report to the Assembly at its fifty-sixth session (A/56/403 and Add.1).

information on additional Member States regarding their anti-corruption programmes[128].

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 corruption[129]. The study examined problems 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 harmonization and cooperation
- 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 criminalized, 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 cooperate 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 harmonization, international cooperation, the clarity and consistency of

[128] 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.

[129] 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.261/12) in accordance with Economic and Social Council resolution 2001/13.
http://www.unodc.org/pdf/crime/convention_corruption/session_4/12e.pdf.

rules relative to the allocation of recovered funds, the handling of conflicting claims, national capacity building, and an enhanced role for the United Nations[130].

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 behaviors; c) it plays an incapacitative role by depriving serious offenders and powerful networks of their assets and instruments of misconduct; and d) it furthers the goal of 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 extremisms 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.

This Convention recognizes the above problems and shows that the international community is now prepared to take practical steps remedying the identified weaknesses. Not only does the Convention devote a separate chapter on asset recovery, but it addresses comprehensively the impediments to effective preventive, investigative and remedial action on a global level.

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 cooperation 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 takes measures and amend domestic laws as necessary in order to meet the goals set forth in each article of this chapter[131]. 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 cooperation 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.

As noted earlier, the nature of corruption and the possibility of co-opted or corrupt law enforcement agents in a given country render more important the preventive measures and international controls, including assistance from the

[130] 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).

[131] This is the meaning of the phrase "in accordance with domestic law", which is repeated throughout the articles of this chapter.

private sector and financial institutions. Those issues were addressed in chapter II of the Convention. This chapter builds on such provisions (for example, see art. 14 on the prevention of money laundering, art. 39 on cooperation between private sector and national authorities or arts. 43 and 46 on mutual legal assistance) and adds more specific preventive measures regarding both countries from which assets may depart and countries where crime proceeds assets may transit or get invested (see art. 52, para. 1).

Several provisions in this chapter set forth procedures and conditions for asset recovery, including the facilitation of civil and administrative actions (art. 53), recognition of and action on the basis of foreign confiscation orders (art. 54-55), return property to requesting States in cases of embezzled public funds or other damaging corruption offences, return of property to legitimate owners and compensation of victims (art. 57). Article 57 contains important provisions governing the disposal of assets depending on the offence, the strength of evidence provided on prior ownership, claims of legitimate owners other than a State, the existence of other corruption victims that may be compensated (para. 3), and agreements between States parties concerned (para. 5). This article departs from earlier treaties, such as the UN Convention against Transnational Organized Crime, under which the confiscating State has ownership of the proceeds[132].

Effective and efficient asset recovery on the basis of these provisions will contribute greatly to reparation of harm and reconstruction efforts in victim countries, to the cause of justice and to prevention of grand corruption by conveying the message that dishonest officials can no longer hide their illegal gains.

The confiscation of crime proceeds is comparatively recent, even though it has been gaining ground internationally since the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and – most recently and for a much wider range of offences – the United Nations Convention against Transnational Organized Crime.

This chapter, however, goes beyond previous conventions, breaks new ground and contains provisions, which require legislation. For many countries, this entails significant changes in domestic law and institutional arrangements.

Technical assistance is, therefore, necessary for the development of national capacity and creation of control bodies with knowledgeable, experienced and skillful personnel. States can obtain such technical assistance from the UNODC[133].

B. Prevention

Article 52
Prevention and detection of transfers of proceeds of crime

[132] Article 14, paragraph 1, of the UN TOC Convention leaves the return or other disposal of confiscated assets to the discretion of the confiscating State.
[133] See also Anti-corruption toolkit.

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.

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 organizations 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.

1. Summary of main requirements

States parties must

- 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;
  - scrutinize 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) [134].
- draw on relevant initiatives of regional, interregional and multilateral organizations against money-laundering to
  - 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);
  - 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).[135]

[134] 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: 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; Organization for Economic Cooperation and Development in Europe's Financial Action Task Force's (FATF) 40 Recommendations; Organization 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.

[135] For specific examples of national implementation: 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).

- 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[136].

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)[137].
- 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
- 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 (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.

2. Mandatory requirements/Obligation to legislate

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; Organization for Economic Cooperation and Development in Europe's Financial Action Task Force's (FATF) 40 Recommendations; Model Money Laundering, Proceeds of Crime and Terrorist Financing Bill 2003.

[136] National examples to be inserted

[137] 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; Organization for Economic Cooperation and Development in Europe's Financial Action Task Force's (FATF) 40 Recommendations; Organization 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.

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 cooperation and interaction between national authorities and financial institutions.

Under article 52, paragraph 1, without prejudice to article 14, States 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 associates[138].

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 art. 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 institutions[139].

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).

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 organizations 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

[138] An Interpretative Notes 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).

[139] 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.

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 with which 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 Notes 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 organizations against money-laundering shall be those referred to in the note to article 14 in the travaux préparatoires" (A/58/422/Add.1, para. 49)[140].

It is emphasized 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 future[141].

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 time, of accounts and transactions involving the persons mentioned in paragraph 1. At a minimum, these records

[140] That Interpretative Note indicates that the words "relevant initiatives of regional, interregional and multilateral organizations" 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 organizations 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 Organization of American States" (A/58/422/Add.1, para. 21).

[141] 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).

should contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner[142].

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 operate[143]. This paragraph also contains some optional provisions discussed below.

3. Optional requirements/Obligation to consider

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-compliance[144]. It is left to the States to

[142] 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).

[143] See FATF recommendation No. 18. [Drafter Note: need to insert examples. For instance, State supervisory authorities may consider requiring online banks and other financial institutions to provide evidence of consolidated supervision by an authority in another country.]

[144] 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 on Struggle against Corruption, article 6.

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 Parts 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.

4. Optional/States parties may consider

As mentioned earlier, 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").

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; Organization for Economic Cooperation and Development in Europe's Financial Action Task Force's (FATF) 40 Recommendations; Organization 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; Wolfsberg Group Global Anti-Money Laundering Guidelines for Private Banking.

C. Direct recovery

Article 53
Measures for direct recovery of property

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;

(b) 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

(c) 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.

1. Summary of main requirements

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 recognize 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[145].

2. Mandatory requirements/Obligation to legislate

As mentioned earlier, 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 to establish liability on 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 even though sufficient evidence meeting civil standards shows that assets were illegally obtained.

[145] National examples of implementation to be inserted

In the previous chapter of this guide, we saw that article 43, paragraph 1, requires States to consider cooperating also in investigations of and proceedings in civil and administrative matters relating to corruption.

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[146].

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.

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 State parties to stand before their courts and claim damages; how they meet this obligation is left to the States[147].

In essence, under subparagraph a, the victimized 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 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.

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 organization 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, recognize the claim of a public international organization 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).

[146] Insert examples of measures for each subparagraph; highlight amendment that may be necessary in civil procedure.

[147] Article 35 of the Convention may be relevant in this respect in some countries, even though the aim of art. 53 is different. Insert examples of implementation.

D. Mechanisms for recovery and international cooperation

Article 54
Mechanisms for recovery of property through international cooperation in confiscation

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 involved in the 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 authorized 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.

Article 55
International cooperation for purposes of confiscation

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. Cooperation 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.

1. Introduction

Articles 54 and 55 set forth procedures for international cooperation 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.

In article 54, the Convention mandates the establishment of a basic regime for domestic freezing, seizure and confiscation of assets. This article practically assists in the implementation of article 55, as the creation of a domestic infrastructure paves the ground for requests for cooperation for purposes of confiscation. Paragraphs 1 and 2 provide for the required enabling mechanisms, so that the option offered in article 55 (paragraph 1, subparas. a and b) can be exercised in such requests.

Article 55 contains parallel obligations in support of international cooperation "to the greatest extent possible" in accordance with domestic law, either by submitting a foreign confiscation order for enforcement in the requested State Party, or by bringing a foreign application for a domestic order before the competent authorities. 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. For example, States parties are 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))[148].

[148] Elaborate more on points of departure from previous conventions.

2. Summary of main requirements

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; or (art. 55, para.1(a))
- 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[149].

[149] For specific examples of national implementation: Canada, Mutual Legal Assistance in Criminal Matters Act (RS, c30 (4th Supp.)), part I, §§9 –16 (1985); Mauritius, Prevention of Corruption Act, Government Gazette No. 5, Part VIII, (2002);

3. Mandatory requirements/Obligation to legislate

The Convention addresses the question of how to facilitate the execution of international requests for seizure and confiscation without undue delay. Experience has indicated that there are two possible approaches, in general. Either evidence can be submitted by the requesting State in support of an application for a domestic order or the requesting State's order may be allowed to be executed directly as a domestic order, as long as certain conditions are met.

The Convention provides both for the direct enforcement of a foreign seizure order and the seeking of such an order by a State party in the requested State. In this respect, it is similar to the United Nations Convention against Transnational Organized Crime (see UN TOC article 12, para.2). This Convention, however, provides more detail on how freezing or seizure should be sought and obtained for the purposes of confiscation (article 54, para.2)[150].

Domestic regime

Under article 54, paragraph 1, as States parties must provide legal assistance relative to property acquired through or involved in the commission of an offence established in accordance with this Convention (see art. 55), in accordance with their domestic law, they are required to take necessary measures to allow their competent authorities to give effect to an order of confiscation issued by a court of another State Party (art. 54, para.1 (a) and 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).

So, the first obligation is to enable domestic authorities to recognize and act on another State party's court order of confiscation. An Interpretative Note indicates that the reference to an order of confiscation in this paragraph may be interpreted broadly, as including monetary confiscation judgements, but should not be read as requiring enforcement of an order issued by a court that does not have criminal jurisdiction (A/58/422/Add.1, para.57).

The second obligation is to enable domestic authorities to order the confiscation of foreign origin property either on the basis of a money laundering or other offence over which they have jurisdiction, or through procedures provided by domestic law. An Interpretative Note indicates that this paragraph (1 (b)) must be interpreted as meaning that the obligation contained in this provision would be

New Zealand, Mutual Assistance in Criminal Matters Act, part III (1992); Vanuatu, the Mutual Assistance in Criminal Matters Act, No. 52, Part III, Requests by Commonwealth Countries to Vanuatu for Assistance, particularly §§20, 24, 25 (1989); Zimbabwe, Criminal Matters (Mutual Assistance) Act, §32 (1990).

[150] Both Conventions also provide for the confiscation of other offence-related property. The UN TOCC speaks of "proceeds of crime derived from offences covered by this Convention…" and "…property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention…". This Convention is slightly different, extending to "…property acquired through or involved in the commission of an offence established in accordance with this Convention…" The major reason for the differences is that the range of criminal offences in the two instruments is different, with some of the offences in the Convention against Corruption being optional. This Convention only obliges countries to provide for domestic criminal confiscation and assistance to other States parties seeking domestic criminal confiscation, in respect of those optional offences they actually adopt in domestic law [cite toolkit].

fulfilled by a criminal proceeding that could lead to confiscation orders (A/58/422/Add.1, para.58)[151].

Under article 54, paragraph 2, in order for States parties to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55, they are required, in accordance with their domestic law to

> (a) Take such measures as may be necessary to permit their 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.

An Interpretative Note indicates that the term "sufficient grounds" used in paragraph 2 (a) of this article should be construed as a reference to a prima facie case in countries whose legal systems employ this term (A/58/422/Add.1, para. 60).

With respect to the same subparagraph, another Interpretative Note indicates that a State Party may choose to establish procedures either for recognizing and enforcing a foreign freezing or seizure order or for using a foreign freezing or seizure order as the basis for seeking the issuance of its own freezing or seizure order. Reference to a freezing or seizure order in paragraph 2 (a) of this article should not be construed as requiring enforcement or recognition of a freezing or seizure order issued by an authority that does not have criminal jurisdiction (A/58/422/Add.1, para. 61).

International cooperation

Article 55, paragraph 1, mandates States Parties to provide assistance "to the greatest extent possible" within their domestic legal system, when they receive 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[152] referred to in article 31, paragraph 1, of this Convention situated in its territory. In such instances, States parties must:

> (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

[151] A non-mandatory provision applies to cases where confiscation without conviction must be considered, if prosecution is impossible due to death, flight, absence or in other appropriate cases (see art. 54, para. 1, subpara. c and below).

[152] An Interpretative Note indicate that the term "instrumentalities" should not be interpreted in an overly broad manner (A/58/422/Add.1, para. 63).

(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.

An Interpretative Note indicates that references in this article to article 31, paragraph 1, should be understood to include reference to article 31, paragraphs 5-7 (A/58/422/Add.1, para. 62).

In accordance with article 55, paragraph 2, upon a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party is required to 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.

Under article 55, paragraph 3, the provisions of article 46 of this Convention are applicable *mutatis mutandis* to this article[153].

In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article must 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;

An Interpretative Note indicates that the statement of facts may include a description of the illicit activity and its relationship to the assets to be confiscated (A/58/422/Add.1, para. 63).

(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.

[153] Insert details from 46?

Further, under article 55, the decisions or actions provided for in paragraphs 1 and 2 of this article must 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 (para. 4)[154].

In accordance with article 55, paragraph 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 must consider this Convention the necessary and sufficient treaty basis.

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.

4. Optional requirements/Obligation to consider

Under article 54, paragraph 1, subparagraph c, in order to provide mutual legal assistance pursuant to article 55 with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, States parties must, in accordance with their 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.

An Interpretative Note indicates that, in this context, the term "offender" might in appropriate cases be understood to include persons who may be title holders for the purpose of concealing the identity of the true owners of the property in question (A/58/422/Add.1, para. 59).

Under article 54, paragraph 2, subparagraph c, in order to provide mutual legal assistance upon a request made pursuant to article 55, para. 2, States parties must, in accordance with its domestic law, consider taking additional measures to permit their competent authorities to preserve property for confiscation, such as

[154] Article 55 also requires States Parties to furnish copies of their 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 (para. 5).

on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Note that subparagraph 2(c) introduces the concept of "preservation of property" for the first time.

5. Optional/States parties may consider

In accordance with article 55, paragraph 7, cooperation 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. An Interpretative Note reflects the understanding that the requested State Party will consult with the requesting State Party on whether the property is of *de minimis* value or on ways and means of respecting any deadline for the provision of additional evidence (A/58/422/Add.1, para. 65).

E. Special cooperation and financial intelligence units

Article 56
Special cooperation

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.

Article 58
Financial intelligence unit

States Parties shall cooperate 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, analyzing and disseminating to the competent authorities reports of suspicious financial transactions.

1. Summary of main requirements

States parties must endeavour to enable themselves to forward information on proceeds of corruption offences to another State Party without prior request, when such disclosure might assist the receiving State in investigations, prosecutions or judicial proceedings or might lead to a request by that State under this chapter of the Convention (art. 56).

States Parties must cooperate with one another to prevent and combat the transfer of proceeds of corruption offences and to promote the recovery of such proceeds.

To this end, States must consider establishing a financial intelligence unit to be responsible for receiving, analyzing and disseminating to the competent authorities reports of suspicious financial transactions (art. 58).

2. Mandatory requirements/Obligation to legislate

N/A

3. Optional requirements/Obligation to consider

The provisions of article 56 constitute an addition to the precedents of the 1988 UN Drugs and the UN TOC Conventions. Under this article and without prejudice to their domestic law, States Parties must endeavour to take measures to permit them to forward, without prejudice to their 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 they 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.[155]

This article requires States Parties to endeavour to take measures which would permit the spontaneous or proactive disclosure of information about proceeds, if they consider that such information might be useful to another State Party in any investigation, prosecution, or judicial proceeding, or in preparing a request relating to asset recovery. The principle of spontaneous information-sharing is found in the mutual legal assistance provisions of the UN TOCC (Article 18, paragraphs 4 and 5), and has now been extended specifically to asset-recovery.

In accordance with article 58, States Parties must cooperate 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. To that end, article 58 requires States parties to consider the establishment of financial intelligence units to serve as a national centre for the collection, analysis and dissemination of suspicious financial transactions to the competent authorities. Since the 1990s, many States have established such units as part of their regulatory, police or other authorities. There is a wide range of structure, responsibilities, functions and departmental affiliation or independence for such units[156].

An Interpretative Note indicates that each State Party may consider creating a new financial intelligence unit, establishing a specialized branch of an existing financial intelligence unit or simply using its existing financial intelligence unit. Further, the travaux préparatoires will indicate that this article should be

[155] 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, article 14; Slovenia, Law on the Prevention of Money Laundering (1994), part II, article 17; Spain, Law 19/1993 concerning specific measures for preventing the laundering of capital (1993), article 16.

[156] For specific examples of national implementation: Mauritius, Financial Intelligence and Anti-Money Laundering Act (2002); Republic of South Africa Financial Intelligence Centre Act (2001); see also FATF recommendations 13, 14 and 26.

interpreted in a manner consistent with paragraph 1 (b) of article 14 of the Convention (A/58/422/Add.1, para. 71).

The Egmont Group (the informal association of financial intelligence units) has defined such units as a central, national agency responsible for receiving (and, as permitted, requesting), analyzing and disseminating to the competent authorities, disclosures of financial information: (i) concerning suspected proceeds of crime, or (ii) required by national legislation or regulation, in order to counter money-laundering"[157].

The Convention does not require that a financial intelligence unit be established by law, but legislation may still be required to institute the obligation to report suspicious transactions to such a unit and to protect financial institutions that disclose such information in good faith. In practice, the vast majority of financial intelligence units are established by law. If it is decided to draft such legislation, States may wish to consider including the following elements:

(a) Specification of the institutions that are subject to the obligation to report suspicious transactions and definition of the information to be reported to the unit;

(b) Legislation defining the powers under which the unit can compel the assistance of reporting institutions to follow up on incomplete or inadequate reports;

(c) Authorization for the unit to disseminate information to law enforcement agencies when it has evidence warranting prosecution and authority for the unit to communicate financial intelligence information to foreign agencies, under certain conditions;

(d) Protection of the confidentiality of information received by the unit, establishing limits on the uses to which it may be put and shielding the unit from further disclosure;

(e) Definition of the reporting arrangements for the unit and its relationship with other government agencies, including law enforcement agencies and financial regulators.

4. Optional/States parties may consider

N/A

F. Return of assets: agreements and arrangements

Article 57
Return and disposal of assets

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,

[157] See the web site of the Egmont Group (http://egmontgroup.org/).

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 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;

(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 recognizes 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.

1. Introduction

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.

Most of the provisions of this Convention regarding the freezing, seizure and confiscation measures build on and expand on earlier initiatives, notably the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the United Nations Convention against Transnational Crime. Article 57,

however, marks a clear departure as it deals with the disposal and return of assets.

A key issue relative to the disposal of confiscated proceeds of corruption is whether States acquire basic rights of ownership by virtue of the confiscation or such assets are the property of victim States seeking their repatriation. In some instances, the claim of pre-existing property ownership is very strong, such as in cases of embezzled State funds. In other instances, the claim may be one of compensation rather than ownership.

The Convention generally prefers the repatriation of confiscated proceeds to the requesting State, in accordance with the fundamental principle of article 51. Article 57, paragraph 3, specifies in greater detail the disposal of confiscated corruption-related assets, allows for compensation for damage to requesting States parties or other victims of corruption offences, and recognizes claims of other prior legitimate owners. Paragraphs 4 and 5 of the same article provide for the coverage of expenses of the confiscating State party and ad hoc agreements on asset disposal between concerned States parties.

2. Summary of main requirements

In accordance with article 57, States parties are required 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 art. 17 and 23), when confiscation was properly executed (see art. 55) on the basis of final judgement in the requesting State (this judgement 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).

3. Mandatory requirements/Obligation to legislate

In accordance with article 57, paragraph 1, property confiscated by a State party pursuant to article 31 (on freezing, seizure and confiscation) or article 55 (on international cooperation for purposes of confiscation) of this Convention shall be disposed of by that State party, in accordance with the provisions of this Convention and its domestic law. This includes the disposal by return of property to its prior legitimate owners, pursuant to article 57, paragraph 3 (see below).

An Interpretative Note indicates that prior legitimate ownership will mean ownership at the time of the offence (A/58/422/Add.1, para. 66).

Paragraph 2 requires that State parties take the necessary measures to ensure that property they have confiscated can be returned to another State Party upon request, in accordance with this Convention.

More specifically, paragraph 2 requires that State parties adopt such legislative and other measures as may be necessary to enable their competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention.

An Interpretative Note indicates that return of confiscated property may in some cases mean return of title or value (A/58/422/Add.1, para. 67).

As States parties adopt these legislative and other necessary measures, in accordance with the fundamental principles of their domestic law, they must take into account the rights of bona fide third parties[158].

An Interpretative Note indicates that the domestic law referred to in paragraph 1 and the legislative and other measures referred to in paragraph 2 would mean the national legislation or regulations that enable the implementation of this article by States Parties (A/58/422/Add.1, para. 68).

Paragraph 3 of article 57 contains the main principles governing the disposal of confiscated property. As mentioned earlier, debates have focused on whether, when and to what extent victim States can claim ownership of such property. This paragraph retains the preference for the return to requesting State parties, in accordance with the fundamental principle of this Convention (art. 51). At the same time, it recognizes that claims of requesting States are stronger in some cases than in others.

For example, if senior officials steal funds from the State bank or divert profits from state-owned enterprises or tax revenues to a private bank account they control, it can be argued that they have come to possess funds which belong to the State.

On the other hand, a requesting State may not be able to establish prior ownership or claim to be the only party damaged by some corruption offences. Proceeds from certain offences, such as bribery and extortion, involve criminal harm caused to the State, but the proceeds are not funds to which the State was ever entitled. Consequently, claims to these proceeds would be of a compensatory nature rather than based on pre-existing property ownership.

[158] Insert elaboration, as well as examples of issues to confronted and of national legislation.

Claims of prior legitimate owners and other victims of such corruption offences need therefore to be considered alongside those of States parties.

Paragraph 3 recognizes these eventualities and sets proceeds disposal rules according to the type of corruption offences involved, the strength of evidence and claims presented, the rights of prior legitimate owners of property and victims other than the State parties,

Specifically, in accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of article 57, the requested State Party is required to do the following:

- It must return the confiscated property to the requesting State Party in cases 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 judgement in the requesting State Party – this is a requirement that can be waived by the requested State Party (subpara. a);

- It must return the confiscated property to the requesting State Party in the case of proceeds of any other Convention offences, 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, 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 recognizes damage to the requesting State Party as a basis for returning the confiscated property - again, the requirement to establish prior ownership can be waived by the requested State Party (subpara. b);

An Interpretative Note indicates that subparagraphs (a) and (b) of paragraph 3 of this article apply only to the procedures for the return of assets and not to the procedures for confiscation, which are covered in other articles of the Convention. The requested State Party should consider the waiver of the requirement for final judgement in cases where final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (A/58/422/Add.1, para. 69).

- In all other cases, the requested State party must give priority consideration to returning confiscated property not only to the requesting State Party, but also to its prior legitimate owners or compensating the victims of the crime (subpara. c).

This set of rules constitutes a significant departure from the earlier conventions, according to which the confiscating State had exclusive property in the proceeds was dominant[159].

4. Optional/States parties may consider

[159] See UN Convention against Transnational Organized Crime, Article 14, paragraph 1, where the return or other forms of disposal is a discretionary consideration.

As a result of this change of disposal rules and in view of the occasionally costly recovery efforts of confiscating States, the Convention allows the deduction of reasonable costs from the proceeds or other assets before they are returned.

In accordance with article 57, paragraph 4, unless States Parties decide otherwise, where appropriate, 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[160].

An Interpretative Note indicates that "reasonable expenses" are to be interpreted as costs and expenses incurred and not as finders' fees or other unspecified charges. Requested and requesting States Parties are encouraged to consult on likely expenses (A/58/422/Add.1, para. 70).

In this context, it is important to note a provision in article 62, which relates to the funding of technical assistance offered by the United Nations to developing countries and economies in transition. States parties must endeavour to make voluntary contributions to an account specifically designated for that purpose. In addition to that, States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to that account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention (article 62, paragraph, 2, subpara. c).

Finally, the Convention allows for ad hoc arrangements between concerned State parties. In accordance with paragraph 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.

G. Information resources

1. National legislation and regulations

Australia
Proceeds of Crime Act 1987 – Sect. 23
http://www.austlii.edu.au/au/legis/cth/consol_act/poca1987160/s23.html

Registered foreign and international forfeiture orders
(1) If:

(a) a foreign forfeiture order is registered in a court in Australia under the Mutual Assistance Act; or

(b) an order is registered in a court in Australia under section 45 of the *International War Crimes Tribunals Act 1995* ;

Division 2 applies in relation to the order as if subsections 19(5) and 20(3), (4), (5) and (6) and sections 21 and 22 were omitted.

(2) If:

[160] An example of national law in this respect is the Swiss Loi fédérale sur l'entraide internationale en matière pénale 351.1; art 31.

(a) a foreign forfeiture order against property is registered in a court in Australia under the Mutual Assistance Act; or

(b) an order against property is registered in a court in Australia under section 45 of the *International War Crimes Tribunals Act 1995* ; the property may, subject to section 23A, be disposed of, or otherwise dealt with, in accordance with any direction of the Attorney-General or of a person authorized by the Attorney-General in writing for the purposes of this subsection.

PROCEEDS OF CRIME ACT 1987 - SECT 23A
http://www.austlii.edu.au/au/legis/cth/consol_act/poca1987160/s23a.html

Effect on third parties of registration of foreign or international forfeiture order

(1) This section applies where, after the commencement of this section, a court in Australia registers under the Mutual Assistance Act a foreign forfeiture order against property.

(1A) This section also applies if a court registers under section 45 of the *International War Crimes Tribunals Act 1995* an order against property.

(2) On registering the foreign or international forfeiture order, the court shall direct the DPP to give or publish notice of the registration:

(a) to specified persons (other than a person convicted of a foreign or international offence in respect of which the order was made) the court has reason to believe may have an interest in the property; and

(b) in the manner and within the time the court considers appropriate.

(3) A person (other than a person convicted of a foreign or international offence in respect of which the foreign or international forfeiture order was made) who claims an interest in the property may apply to the court for an order under subsection (7).

(4) A person who was given notice of, or appeared at, the hearing held in connection with the making of the foreign or international forfeiture order is not entitled, except with the leave of the court, to apply under subsection(3).

(5) The court may grant leave under subsection (4) if satisfied that there are special grounds for doing so.

(6) Without limiting the generality of subsection (5), the court may grant a person leave under subsection (4) if the court is satisfied that:

(a) the person, for a good reason, did not attend the hearing referred to in subsection (4) although the person had notice of the hearing; or

(b) particular evidence that the person proposes to adduce in connection with the proposed application under subsection (3) was not available to the person at the time of the hearing referred to in subsection (4).

(7) If, on an application for an order under this subsection, the court is satisfied that:

(a) the applicant was not, in any way, involved in the commission of a foreign or international offence in respect of which the foreign or international forfeiture order was made; and

(b) if the applicant acquired his, her or its interest in the property at the time of or after the commission of such an offence—the applicant acquired the interest:

(i) for sufficient consideration; and

(ii) without knowing, and in circumstances such as not to arouse a reasonable suspicion, that the property was, at the time of the acquisition, tainted property in relation to a foreign or international offence; the court shall make an order:

(c) declaring the nature, extent and value (as at the time when the order is made) of the applicant's interest in the property; and
(d) either:
(i) directing the Commonwealth to transfer the interest to the applicant; or
(ii) declaring that there is payable by the Commonwealth to the applicant an amount equal to the value declared under paragraph (c).

(8) Subject to subsection (9), an application under subsection (3) shall be made before the end of 6 weeks beginning on the day when the foreign or international forfeiture order is registered in the court.
(9) The court may grant a person leave to apply under subsection (3) outside the period referred to in subsection (8) if the court is satisfied that the person's failure to apply within that period was not due to any neglect on the person's part.
(10) A person who applies under subsection (3) shall give to the DPP and the Minister notice, as prescribed, of the application.
(11) The DPP shall be a party to proceedings on an application under subsection (3) and the Minister may intervene in such proceedings.
(12) In this section: "foreign or international forfeiture order" means:
(a) the foreign forfeiture order mentioned in subsection (1) in relation to which this section applies; or
(b) the order mentioned in subsection (1A) in relation to which this section applies;
as the case may be.
"foreign or international offence" means:
(a) a foreign serious offence; or
(b) a Tribunal offence within the meaning of the *International War Crimes Tribunals Act 1995* ;
as the case requires.

Belize
Prevention of Corruption in Public Life Act, No. 24 of 1994, part III (financial disclosure)

Canada
Mutual Legal Assistance in Criminal Matters Act (R.S. 1985, c. 30 (4th Supp.))
http://laws.justice.gc.ca/en/M-13.6/index.html

Mauritius
Prevention of Corruption Act, Government Gazette No. 5, 2002, entry into force per Proclamation No. 18, 2002.
Part VII. Mutual Assistance in Relation to Corruption or Money Laundering Offences
https://www.imolin.org/amlid/showLaw.do?law=4877&language=ENG&country=MAR

Croatia
Law on the Prevention of Money Laundering

Nigeria
Federal Government of Nigeria

The Corrupt Practices and other Related Offences Act, 2000
Provisions Relating to the Chairman of the Commission

46. Where the Chairman of the Commission is satisfied that any property is the subject-matter of an offence under this Act or was used in the commission of the offence, and such property is held or deposited outside Nigeria, he may make an application by way of an affidavit to a Judge of the High Court for an order prohibiting the person by whom the property is held or with whom it is deposited

47. In any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject-matter of the offence or to have been used in the commission of the offence where-

(a) the offence is proved against the accused; or

(b) the offence is not proved against the accused but the court is satisfied;

(i) that the accused is not the true and lawful owner of such property; and (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused or the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to the amount of the gratification or is, in the opinion of the court, the value of the gratification received by the accused, and any such penalty shall be recoverable as a fine from dealing with the property.

Singapore
The Statutes of the Republic of Singapore Corruption (Confiscation of Benefits Act) Chapter 65A

Slovenia
Law on the Prevention of Money Laundering (1994)

South Africa
Republic of South Africa Financial Intelligence Centre Act, 2001.
http://www.esaamlg.org/southafrica.htm

International Co-operation in Criminal Matters Act, 75 of 1996
https://www.imolin.org/amlid/showLaw.do?law=4329&language=ENG&country=SAF

CHAPTER 4
19. Request to foreign State for assistance in enforcing confiscation order
(1) When a court in the Republic makes a confiscation order, such court may on application to it issue a letter of request in which assistance in enforcing such order in a foreign State is sought if it appears to the court that a sufficient amount to satisfy the order cannot be realized in the Republic and that the person against whom the order has been made owns property in the foreign State concerned. (2) The amount to be levied by such request shall be sufficient to cover, in addition to the amount of the confiscation order, all costs and expenses incurred in the issuing and the executing of the request.

(3) A letter of request contemplated in subsection (i) shall be sent to the Director-General for transmission-

(a) to the court or tribunal specified in the request; or
(b) to the appropriate government body in the requested State.

20. Registration of foreign confiscation order
(1) When the Director-General receives a request for assistance in executing a foreign confiscation order in the Republic, he or she shall, if satisfied-
(a) that the order is final and not subject to review or appeal;
(b) that the court which made the order had jurisdiction;
(c) that the person against whom the order was made, had the opportunity of defending himself or herself;
(d) that the order cannot be satisfied in full in the country in which it was imposed;
(e) that the order is enforceable in the requesting State; and
(f) that the person concerned holds property in the Republic,
submit such request to the Minister for approval.

(2) Upon receiving the Minister's approval of the request contemplated in subsection (1), the Director-General shall lodge with the clerk of a 15 magistrate's court in the Republic a certified copy of such foreign confiscation order.

(3) When a certified copy of a foreign confiscation order is lodged with a clerk of a magistrate's court in the Republic, that clerk of the court shall register the foreign confiscation order-
(a) where the order was made for the payment of money, in respect of the balance of the amount payable thereunder; or
(b) where the order was made for the recovery of particular property in respect of the property which is specified therein.

(4) The clerk of the court registering a foreign confiscation order shall forthwith issue a notice in writing addressed to the person against whom the order has been made-
(a) that the order has been registered at the court concerned; and
(b) that the said person may, within the prescribed period and in the prescribed manner, apply to that court for the setting aside of the registration of the order.
(5)
(a) Where the person against whom the foreign confiscation order has been made is present in the Republic, the notice contemplated in subsection (4) shall be served on such person in the prescribed manner.
(b) Where the said person is not present in the Republic, he or she shall in the prescribed manner be informed of the registration of the foreign confiscation order.

21. Effect of registration of foreign confiscation order
(1) When any foreign confiscation order has been registered in terms of section 20, such order shall have the effect of a civil judgment of the court at which it has been registered in favour of the Republic as represented by the Minister.

(2) A foreign confiscation order registered in terms of section 20 shall not be executed before the expiration of the period within which an application in terms of section 20(4)(b) for the setting aside of the registration may be made, or if such application has been made, before the application has been finally decided.

(3) The Director-General shall, subject to any agreement or arrangement between the requesting State and the Republic, pay over to the requesting State any amount recovered in terms of a foreign confiscation order, less all expenses incurred in connection with the execution of such order.

22. Setting aside of registration of foreign confiscation order
(1) The registration of a foreign confiscation order in terms of section 20 shall, on the application of any person against whom the order has been made, be set aside if the court at which it was registered is satisfied-

(a) that the order was registered contrary to a provision of this Act;
(b) that the court of the requesting State had no jurisdiction in the matter;
(c) that the order is subject to review or appeal;
(d) that the person against whom the order was made did not appear at the proceedings concerned or did not receive notice of the said proceedings as prescribed by the law of the requesting State or, if no such notice has been prescribed, that he or she did not receive reasonable notice of such proceedings so as to enable him or her to defend him or her at the proceedings;
(e) that the enforcement of the order would be contrary to the interests of justice; or
(f) that the order has already been satisfied.

(2) The court hearing an application referred to in subsection (1) may at any time postpone the hearing of the application to such date as it may determine.

Thailand
Constitution (1998)
http://www.ti-bangladesh.org/cgi-bin/cgiwrap/Wtiban/bpvoview.cgi?../BP_PDFfiles/Monitoring_Assets_and_Life-Styles_of_Public_Officials/981129946__thai.pdf

Ukraine
Law of Ukraine on Struggle against Corruption
Vidomosti Verkhovnoyi Rady (VVR) 1995, N 34, Art. 22. Entered into force through the Act of VR N 357/95 - VR of 05.10.95, VVR 1995, N 34, Art.267. With amendments introduced pursuant to the Law N 171/97 - VR of 03.04.97, VVR, 1997, N 19, Art.136.

Article 6. Financial control
Person's income authorized to carry out functions of the State shall be declared in compliance with the procedures and on the bases envisaged by Article 13 of the Law of Ukraine «On Civil Service» (3723-12).

If hard currency account is opened in a foreign bank a government employee or other person authorized to carry out functions of the State shall respectively inform a tax service within ten days in writing indicating account number and a location of a foreign bank.

Information on incomes, securities, immovable and valuable movable property and bank deposits of officials specified in part one of Article 9 of the Law of Ukraine «On Civil Service» and members of their families shall be publication in official issues of state bodies of Ukraine. Before a nominee has been elected or

appointed for respective position this information shall be submitted in advance to a body/official which/who elects or appoints for these positions.
(Part three of Article 6 with amendments introduced pursuant to the Law N 171/97 - VR of 03.04.97)

Zimbabwe
Criminal Matters (Mutual Assistance) Act, 1990
https://www.imolin.org/amlid/showLaw.do?law=6175&language=ENG&country=ZIM

PART VI PROCEEDS OF CRIME
30. Request for enforcement of orders
The Attorney-General may request an appropriate authority of a foreign country to which this Act applies to make arrangements for the enforcement of—

(a) a forfeiture order made in Zimbabwe against property that is believed to be located in that country; or

(b) a pecuniary penalty order made in Zimbabwe where some or all the property available to satisfy the order is believed to be located in that country; or

(c) an interdict made in Zimbabwe against property that is believed to be located in that country;

if the order is in respect of a specified offence.

31. Request for issue of orders in foreign countries.
Where criminal proceedings or criminal investigations have commenced in Zimbabwe in relation to a specified offence, Attorney-General may request an appropriate authority of a foreign country to which this Act applies to direct the issue of a warrant, order or other instrument similar in nature to any of the following warrants and orders under the Serious Offences (Confiscation of Profits) Act, 1990, in respect of the specified offence

(a) a search warrant for tainted property;

(b) an interdict;

(c) a production order in respect of a property-tracking document;

(d) a search warrant in respect of a property-tracking document; or

(e) a monitoring order.

32. Registration of orders.

(1) Where-

(a) an appropriate authority of a foreign country requests the Attorney-General to make arrangements for the enforcement of-

(i) a foreign forfeiture order made in respect of a foreign specified offence against property, that is believed to be located in Zimbabwe; or

(ii) a foreign pecuniary penalty order made in respect of a foreign specified offence where some or all of the property available to satisfy the order is believed to be located in Zimbabwe;

and

(b) the Attorney-General is satisfied that—

(i) a person has been convicted of the offence; and

(ii) the conviction and the order are not subject to appeal in the foreign country;

the Attorney-General may, on application, obtain the registration of the order with the High Court

(2) Where an appropriate authority of a foreign country requests the Attorney-General to make arrangements for the enforcement of a foreign

interdict issued in respect of a foreign specified offence against property that is believed to be located in Zimbabwe, the Attorney-General may, on application, obtain the registration of the order with the High Court.
(3) If, on an application in terms of subsection (1) or (2), the High Court is satisfied from the documents filed on record, or from any other evidence, that the foreign forfeiture order, the foreign pecuniary penalty order or the foreign interdict, as the case may be—
(a) was properly made against the person concerned; and
(b) the person concerned was given an adequate opportunity to make representations in regard to the registration of any such order;
the High Court may register the order.
(4) If the High Court is not satisfied as provided in subsection (3), it may adjourn the proceedings of make such other order as will enable the person concerned to make representations in regard to the registration of the order.
(5) The High Court may regard any evidence adduced in a foreign court as conclusive of any matter or fact stated in the documents.
(6) A foreign forfeiture order registered with the High Court in terms of this section shall have effect, and may be enforced, as if it were a forfeiture order made by a court under the
Serious Offences (Confiscation of Profits) Act, 1990, at the time of registration.
(7) A foreign pecuniary penalty order registered with the High Court in terms of this section shall have effect, and may be enforced, as if it were a pecuniary penalty order made by a court under the Serious Offences (Confiscation of Profits) Act, 1990, at the time of registration and requiring the payment to Zimbabwe of the amount payable under the order.
(8) A foreign interdict registered with the High Court in terms of this section shall have effect, and may be enforced, as if it were an interdict made by a court under the Serious Offences (Confiscation of Profits) Act, 1990, at the time of registration.
(9) Where any order is registered with the High Court in terms of this section, any amendments made to the order, whether before or after registration, may be registered in the same way as the order and amendments shall not, for the purposes of this Act and the Serious Offences (confiscation of Profits) Act, 1990, have effect until they are registered.
(10) A copy of the appropriate order or amendment sealed or authenticated by the court or other authority making that order or amendment or a copy of that order or amendment duly authenticated in accordance with subsection (2) of section *thirty-nine*, shall be filed with the High Court on registration of the order or amendment.
(11) A sealed or authenticated copy of an order or amendment shall be regarded for the purposes of this Act as the same as the sealed or authenticated original copy but registration effected by means of a copy shall cease to have effect at the end of twenty-one days unless the sealed or authenticated original copy has been subsequently registered.
(12) The Attorney-General may apply to the High Court for the cancellation of any registration made in terms of this section.
(13) Without limiting the generality of subsection (12), the Attorney-General may apply for a cancellation in terms of that subsection if he is satisfied that—

(a) the order has ceased to have effect in the foreign country in which it was made; or

(b) cancellation of the order is appropriate having regard to the arrangements entered into between Zimbabwe and the foreign country in relation to the enforcement of orders of the kind.

(14) Where an application is made to the High Court for cancellation of a registration in terms of subsection (12), the High Court shall cancel the registration accordingly.

33.

(1) Where—

(a) criminal proceedings or criminal investigations have commenced in a foreign country in respect of a foreign specified offence; and

(b) there are reasonable grounds for believing that tainted property in relation to the offence is located in Zimbabwe; and

(c) the appropriate authority of the foreign country requests the Attorney-General to obtain the issue of a search warrant under the Serious Offences (Confiscation of Profits) Act, 1990, in relation to the tainted property;

the Attorney-General may, in writing, authorize a police officer to apply to a magistrate of a specified province for the search warrant requested by the appropriate authority of the foreign country.

(2) the province shall be the province in which the tainted property, or some or all of the tainted property, is believed to be located.

34. Requests for interim interdicts.

Where—

(a) criminal proceedings have commenced in a foreign country in respect of a foreign specified offence; and

(b) there are reasonable grounds for believing that tainted property that may be made, or is about to be made, the subject of an interdict is located in Zimbabwe; and

(c) the appropriate authority of, the foreign country requests the Attorney-General to obtain the issue of an interdict under the Serious Offences (Confiscation of Profits) Act, 1990, against the property;

the Attorney-General may authorize an application to the High Court for the issue of the interdict requested by the appropriate authority of the foreign country.

Spain

Law 19/1993 concerning specific measure for preventing the laundering of capital (1993)

Vanuatu

The Mutual Assistance in Criminal Matters Act (1989)

Zimbabwe

Serious Offences (Confiscation of Profits) Act, 1990
https://www.imolin.org/amlid/showLaw.do?law=6176&language=ENG&country=ZIM

PART IX OBLIGATIONS OF FINANCIAL INSTIUTIONS

60. Retention of records by financial institutions

(1) Subject to section *sixty-one*, every financial institution financial transaction in its original form for a minimum period of ten years.

(2) Subsection (I) shall not apply to a financial transactions relating to an amount not exceeding two hundred dollars, or such other amount as the Minister may prescribe.

(3) Any financial institution which contravenes this section shall be guilty of an offence and liable to, a fine not exceeding ten thousand dollars.

(4) This section shall not be construed as limiting any other obligation of a financial institution in terms of any other enactment to retain documents.

61. Register of original documents.

(1) Where a financial institution is required by any enactment to release a document referred to in subsection (1) of section sixty before the period of ten years has elapsed, the institution shall retain a copy of the document.

(2) A financial institution shall maintain a register of documents released in terms of subsection (1).

(3) Any financial institution which contravenes this section shall be guilty of an offence and liable to a fine not exceeding ten thousand dollars.

62. Communication of information to police.

(1) Where a financial institution has reasonable grounds for believing that information about an account held with it may to be relevant to an investigation of, or the prosecution of a person for, an offence, the institution may give the information to a police officer.

(2) No action shall lie against a financial institution or a director, officer, employee or agent of the financial institution acting in the course of his employment in relation to any

2. Select national financial intelligence units

Argentina: Unidad de Informaci=n Financiera (UIF)
http://www.uif.gov.ar

Australia: Australian Transaction Reports and Analysis Centre (AUSTRAC)
http://www.austrac.gov.au/

Barbados: Financial Intelligence Unit
http://www.barbadosfiu.gov.bb/

Belgium: CTIF-CFI
http://www.ctif-cfi.be/

Bolivia: UIF ù Unidad de Investigaciones Financieras
http://www.uifbol.gov.bo

Brazil: COAF ù Conselho de Controle de Atividades Financieras
http://www.fazenda.gov.br/coaf

British Virgin Islands: Reporting Authority
http://www.bvifsc.vg/

Bulgaria: Bureau of Financial Intelligence
http://www.fia.minfin.bg/

Canada: FINTRAC
http://www.fintrac.gc.ca/

Chile: CDE / Departamento de Control de Trafico Ilfcito de Estupefacientes
http://www.cde.cl

Colombia: UIAF- Unidad de Informaci=n y Anßlisis Financiero
http://www.uiaf.gov.co

Croatia: Financijska Policija / Ured za Sprjecavanje Pranja Novca
http://www.crofin.tel.hr

Czech Republic: FAU ù Financnf analytick·tvar
http://www.mfcr.cz

Finland: Keskusrikospoliisi / Rahanpesun selvittelykeskus
http://www.polsii.fi/nybi

France: Traitment du Renseignement et Action Contre les Circuits Financiers Clandestins (TRACFIN)
http://www.minefi.gouv.fr/minefi/publique/politique_financiere/index.htm

Germany: Zentralstelle fnr Verdachtsanzeigen
http://www.bka.de/fiu/

Guatemala: Intendencia de Verificaci=n Especial (IVE)
http://www.sib.gob.gt/Enlaces/Lavado_activos/lavado_activos.htm

Hong Kong Special Administrative Region of China: Hong Kong Joint Financial Intelligence Unit
http://www.jfiu.gov.hk/

Ireland: An Garda Sfochßna / Bureau of Fraud Investigation
http://www.garda.ie/angarda/gbfi.html

Israel: Israel Money Laundering Prohibition Authority (IMPA)
http://www.impa.justice.gov.il/MojHeb/HalbantHon/

Italy: UIC (SAR)
http://www.uic.it/en/uic-index-en.htm

Japan: JAFIO-Japan financial Intelligence Office
http://www.fsa.go.jp/fiu/fiue.html

Republic of: Korea Financial Intelligence Unit (KoFIU)
http://www.kofiu.go.kr/

Lebanon: Special Investigation Commission (SIC) Fighting Money Laundering
http://www.sic.gov.lb/

Lithuania: Mokesciu Policiuos Departamentas Prie Vidaus Riekalu Ministerijos
http://www.fntt.lt/eng/

Monaco: SICCFIN
http://www.siccfin.gouv.mc/

Netherlands: MOT
http://www.justitie.nl/mot/

New Zealand: NZ Police Financial Intelligence Unit
http://www.police.govt.nz/service/financial/

Norway: KOKRIM / Hvitvaskingsenheten
http://www.police.govt.nz/service/financial/

Poland: Generalny Inspektor Informacij Finansowej (GIIF)
http://www.mf.gov.pl/

Russian Federation: MK - Financial Monitoring Committee of the Russian Federation (FMC)
http://www.kfm.ru/

Slovenia: MF-UPPD / Office for Money Laundering Prevention
http://www.gov.si/mf/angl/uppd/medn_sodelovanje.htm

Switzerland: Money Laundering Reporting Office - Switzerland (MROS)
http://internet.bap.admin.ch/e/themen/geld/i_index.htm

Taiwan Province of China: Money Laundering Prevention Center
http://www.mjib.gov.tw/

Thailand: Anti Money Laundering Office (AMLO)
http://www.amlo.go.th/

Turkey: Mali Sutlan Arastirma Kurulu, MASAK
http://www.maska.gov.tr

United Arab Emirates: Anti Money Laundering and Suspicious Cases Unit (AMLSCU)
http://www.cbuae.gov.ae/

United Kingdom: NCIS / ECU
http://www.ncis.co.uk/ec.asp

United States: Financial Crimes Enforcement Network (FinCEN)
http://www.fincen.gov/

Venezuela: UNIF ù Unidad Nacional de Inteligencia Financiera
http://www.sudeban.gov.ve

3. International and regional documents

African Union
African Union Convention on Preventing and Combating Corruption (2003)
http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf#search='african%20union%20convention%20on%20combating%20corruption

Bank for International Settlements, Basel Committee on Banking Supervision
Customer Due Diligence for Banks *(*2001*)*
http://www.bis.org/publ/bcbs85.htm

Prevention of criminal use of the banking system for the purpose of money-laundering (1988)
http://www.fatf-gafi.org/pdf/basle1988_en.pdf

Council of Europe
Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990)
European Treaty Series, No. 141
http://conventions.coe.int/treaty/EN/WhatYouWant.asp?NT=141&CM=8&DF=28/08/00

European Convention on Mutual Assistance in Criminal Matters (1959)
European Treaty Series, no*.* 30.
http://conventions.coe.int/treaty/en/Treaties/Html/030.htm

Caribbean Financial Action Task Force (CFATF)
Nineteen Recommendations (1990)
http://www.cfatf.org/eng/recommendations/cfatf/

European Union,
European Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (91/308/EEC)
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31991L0308&model=guichett

Organization for Economic Development (OECD), Financial Action Task Force (FATF)
FATF 40 Recommendations
http://www1.oecd.org/fatf/pdf/40Recs-2003_en.pdf

Organization of American States
Buenos Aires Declaration on Money Laundering

United Nations
International Convention for the Suppression of the Financing of Terrorism (1999)
General Assembly resolution 54/109, annex
http://www.un.org/law/cod/finterr.htm

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)
http://www.unodc.org/pdf/convention_1988_en.pdf

United Nations Office on Drugs and Crime (UNODC) Model Money Laundering, Proceeds of Crime and Terrorist Financing Bill 2003

United Nations Model Money Laundering and Proceeds of Crime Bill [for common law jurisdictions] (2000)
http://www.imolin.org/poc2000.htm

United Nations Model Legislation on Laundering, Confiscation and International Co-operation in Relation to the Proceeds of Crime [for civil law jurisdictions](1999)
http://www.imolin.org/ml99eng.htm

Wolfsberg Group
Global Anti-Money Laundering Guidelines for Private Banking [The Wolfsberg AML Principles] (revised May 2002)
http://www.wolfsberg-principles.com/pdf/wolfsberg_aml_principles2.pdf

The Suppression of the Financing of Terrorism [The Wolfsberg Statement](2002)
http://www.wolfsberg-principles.com/pdf/ws_on_terrorism.pdf

For additional resources on asset freezing, seizure and confiscation, please refer to chapter six.

APPENDIX

List of requirements of States parties to notify the Secretary-General of the United Nations

The following is a list of the notifications States parties are required to make to the Secretary-General of the United Nations.

Article 6
Preventive anti-corruption body or bodies

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 23
Laundering of proceeds of crime

2.
…
(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;

Article 44
Extradition

6. A State Party that makes extradition conditional on the existence of a treaty shall:
(a) 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 cooperation on extradition with other States Parties to this Convention;

Article 46
Mutual legal assistance

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… 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.…

14. …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….

Article 55
International cooperation for purposes of confiscation

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.

Article 66
Settlement of disputes

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that this does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 67
Signature, ratification, acceptance, approval and accession

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its Member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organization of which at least one Member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 69
Amendment

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and transmit it to the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the States Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

Article 70
Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.