



# TECHNICAL GUIDE TO THE UNITED NATIONS CONVENTION AGAINST CORRUPTION





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**TECHNICAL GUIDE TO THE  
UNITED NATIONS  
CONVENTION AGAINST  
CORRUPTION**



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## INTRODUCTION

The United Nations Convention against Corruption (UNCAC) is the first global legally binding instrument in the fight against corruption. It was adopted by General Assembly resolution 58/4 of 31 October 2003 and entered into force on 14 December 2005. In a remarkable demonstration of commitment and determination of the international community, to date the Convention has acquired 122 Parties. The objectives of the Convention are 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; and to promote integrity, accountability, and proper management of public affairs and property. The Convention requires the establishment of a range of offences associated with corruption and devotes a separate chapter to its prevention. It further attaches particular importance to strengthening international cooperation to combat corruption and, in a major breakthrough, includes innovative and far-reaching provisions on asset recovery, as well as on technical assistance and implementation.

The present Technical Guide to the provisions of the United Nations Convention against Corruption is the result of a collaborative effort by the United Nations Office on Drugs and Crime and the United Nations Interregional Crime and Justice Research Institute (UNICRI), designed to promote the implementation of the Convention by States Parties. A group of experts from around the world held two meetings for developing the draft content of the Guide, one in Turin, Italy, in May 2006 and one in Vienna, Austria, in September 2006. In elaborating the final version of the Guide, thorough consideration was given by the Secretariat to comments, amendments and suggestions received as a result of wide consultations.

Following the elaboration of the Legislative Guide for the implementation of the Convention, which was made available in 2006, the present Technical Guide primarily focuses on the provision to anti-corruption practitioners and authorities of relevant technical advice, tools and examples of good practices to make the articles of the Convention operational. The two Guides actually complement each other: the Legislative Guide had been drafted for use mainly by legislators and policymakers in States preparing themselves for the ratification and implementation of the Convention. The Technical Guide focuses not so much on guidance in relation to the necessary legislative changes for the incorporation of the Convention into the domestic legal system of the States concerned, but attempts to highlight policy issues, institutional aspects and operational frameworks related to the full and effective implementation of the provisions of the Convention.

In view of this complementarity, the Technical Guide has to be considered in conjunction with the Legislative Guide. This is why the Technical Guide resorts to cross-references to the content of the Legislative Guide on several occasions (especially in relation to the criminalization provisions of chapter III

and some of the provisions of chapter V of the Convention). In any case, both Guides are to be used jointly as components of a comprehensive package of tools aimed at enhancing the knowledge and capacity of stakeholders, in particular of anti-corruption agencies, as well as criminal justice and law enforcement authorities, on specific aspects related to the implementation of the Convention.

The joint consideration and use of the two Guides entails significant advantages for both Member States and the Secretariat: on the one hand, national authorities that need to acquire a full understanding of the provisions of the Convention will profit by the existence of a consultative framework provided by the Guides. The Secretariat, on the other, can use the Guides as a helpful basis for more comprehensive technical assistance activities encompassing a broader range of policy and institutional challenges that need to be addressed for the full implementation of the Convention.

The objective of the present Guide is to lay out a range of policy options and considerations that each State Party needs, or may wish, to take into account in national efforts geared towards implementation of the Convention. Thus, the Guide intends only to raise and highlight issues pertinent to such implementation and by no means purports to be used as a complete and exhaustive counselling material for national policymakers, especially in view of the different legal systems and traditions and the varying levels of institutional capacity among States Parties.

The structure of the Guide follows the text of the Convention and its main parts correspond to the different chapters of the instrument. This is in recognition of the fact that the four pillars of the Convention (prevention, criminalization and law enforcement, international cooperation and asset recovery) are constituent elements of a comprehensive and multidisciplinary anti-corruption strategy.

The breadth and comprehensive scope of the provisions of the Convention will certainly require much more detailed tools. The United Nations Office on Drugs and Crime, in its capacity as the guardian of the Convention and Secretariat to the Conference of the States Parties, and the United Nations Interregional Crime and Justice Research Institute, as a leading United Nations institute in applied research and crime prevention, are committed to continue work on the development of a full set of such tools, in collaboration with a broad range of partners.

**PREVENTIVE MEASURES**  
**(Chapter II, articles 5-14)**



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

### **I. Overview**

Article 5 states that each State Party must put in place the overall context and framework to prevent corruption, as required by the Convention, by developing and implementing a comprehensive anti-corruption strategy. This will be achieved through the promotion of the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

Further, each State Party is asked to endeavour to review the relevant institutional, legal and procedural provisions to strengthen a coherent and coordinated anti-corruption strategy. In doing this, it is advisable that the planning and implementation of the strategy benefit from the participation of a broad range of stakeholders, including civil society organizations and the private sector. The State Party should work with other States Parties to share good practice and elaborate regional and international arrangements to facilitate cooperation and mutual support.

### **II. Practical challenges and solutions**

This article is designed to cover the general aspects of action to prevent corruption. It is the first article in a chapter intended to address a broad range of issues such as proper management of public affairs (article 9), transparency in the public sector (article 10), prevention of corruption in the private sector (article 12) and participation of society (article 13). States Parties should design the strategy on the basis of a risk assessment that should be founded on relevant

information or statistical data. Useful data may include audit reports on public bodies which may give indications of corrupt use of public funds or demonstrate deficiencies in control or accounting procedures. Other statistical data appropriate to the circumstances of the State will also be relevant. Special research to identify causes, trends and vulnerabilities should be commissioned. The information and data should form the basis of a risk or vulnerability assessment that identifies the trends, causes, types, pervasiveness and seriousness or impact of corruption. This will help develop a better knowledge of the activities and sectors exposed to corruption, and the basis for the development of a preventive strategy, buttressed with relevant policies and practices for better prevention and detection of corruption.

### *II.1. Preventive anti-corruption policies and practices*

Many countries may put emphasis on control measures in such fields as legislation, investigation and prosecution. Such an approach is only a part of effective anti-corruption policies; it is also expensive and focuses on the failings of and abuse of rules, procedures and public funds. Emphasis should be given to prevention because it not only safeguards the integrity of government and the political system and ensures the application of rules, procedures and funds, but has wider benefits in promoting public trust and managing the conduct of public officials.

### *II.2. Effective and coordinated policies*

The UNCAC approach to prevention of corruption is premised on the need for a coherent framework that moves from general principles to clear and realistic strategies, action plans and procedures, and regular monitoring of implementation of measures to apply the strategy. This requires a comprehensive and coordinated approach, from the systematic collection and collation of quantitative and qualitative information on the basic situation in the country, to a strategy that sets overall goals that are then translated into objectives and action plans in order to enable comparison with the results achieved and enable adjustments to the policies and their implementation. The processes of drafting, adoption, implementation and monitoring and assessment of the strategy should be planned, led and coordinated among all relevant stakeholders (public and private sectors, civil society) and cover the full range of sectors or areas where corruption might occur.

### *II.3. The promotion of the participation of society*

An effective strategy would include means for awareness-raising in the general public of the impact of and threats posed by corruption. Active participation of society in supporting such a strategy in its development and subsequent implementation, has to be ensured by its active and early involvement. Therefore, the policy has to envisage specific ways in which representatives of society will be included in all processes of its design, content,



development, endorsement, implementation, and review – issues discussed in article 13 – as well as the means to measure progress.

#### *II.4. Using the Guide*

Article 5 sets the scene for the implementation of the preventive measures of the Convention by promoting a strategic comprehensive approach. This reflects the consensus among policymakers and practitioners alike that in the case of prevention and control of corruption, a comprehensive array of measures is essential, especially in view of the multifaceted nature of the phenomenon. The various components of such a strategy are described in subsequent articles of chapter II of the Convention. Policymakers are, however, invited to ensure that they fully appreciate the holistic nature of the Convention and plan strategies so that its components reflect all parts of the Convention.

#### *II.5. International cooperation*

States Parties should keep in mind the need to strive for improvements of practical efforts for the prevention of corruption – those described in the strategy itself and the various programmes and action plans – as well as means to assess what works and why. Measures with a proven effect have to be developed further, disseminated among all interested parties and effectively introduced into more general use. States Parties should develop and put in place means of identifying, obtaining, analysing, disseminating and adapting good practices at all levels.

### **III. Developing the strategy**

Overall, the key issues for decision makers in Governments will concern:

- Who is the main developer of the strategy?
- Does such development require coalition-building in order to ensure participation of a broad range of government entities and non-governmental actors or will consultation suffice?
- Who will own or oversee implementation?
- How will progress be assessed?
- How will the strategy be reviewed and revised, as required?

The main responsibility for developing an anti-corruption strategy rests with the Government and such development must demonstrably enjoy the highest support. Similarly, such support must be unequivocally communicated both within Government and the general public through a clear and specific mandate to the entity(ies) or individual(s) who will be charged with the task. This mandate would need to be accompanied with the required delegation of authority and the resources needed for completion of the task. The development process should be a consultative and inclusive endeavour. Participation of civil

society and the private sector would enhance the content and acceptability of the strategy. The development should have as point of departure the collection, collation, and analysis of information on where corruption occurs, and why.

The strategy should set out clear and achievable goals, timelines and the sequence in which specific goals should be accomplished. These should be made public, ensuring overall transparency and helping to mobilize popular support. There should be a process to allow for review and revision according to a predetermined and public schedule, to assist in planning future actions and evaluating past or ongoing actions.

The strategy should reflect an overall approach that incorporates the requirements and perspectives of public bodies, takes fully into account these specificities, as well as the views and needs of the private sector and civil society. Thus, the strategy can become a practical, prioritized and measurable framework that is owned by the institutions involved and suitable for monitoring, review and revision.

The application and oversight of the strategy would fall within the responsibility of the body or bodies foreseen for that purpose under article 6. While issues related to the mandate of such body or bodies will be discussed under the respective chapter, it is important to note here that the breadth of the mandate of the body or bodies would need to be taken into account in determining the responsibility to apply the strategy. The strategy is intended to provide overall guidance. That guidance should lead to the development and implementation of specific action plans by individual sectors or institutions to ensure that the strategy cascades down through all public bodies. Action plans should ensure that the strategy is not a mere declaration of intent. In order to be credible they must be coordinated and comprise definite, measurable objectives. It must be ensured that they are implemented and periodically evaluated and adapted. In particular, one of the pivotal means of fighting corruption is the existence of an effective and continuing means of monitoring, review, and revision. This will need to be institutionally organized and coordinated. Therefore, the establishment of an independent body for the purpose of prevention strategy is indispensable.

#### **IV. Strategy structure**

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

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

## **Article 6: Preventive anti-corruption body or bodies**

*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.*

### **I. Overview**

Article 6 requires an institutional focus to the anti-corruption prevention strategy mandated under article 5. The Convention does not prescribe whether responsibility for institutional focus should be rested in a single agency or in more than one agency. In considering implementation of this article, attention needs to be paid also to article 36 which foresees the need for establishment of a specialist investigative anti-corruption agency. In article 6, the main focus of the body or bodies is on prevention, and specifically in relation to implementing the prevention policies of article 5.

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

## **II. Practical challenges and solutions**

### *II.1. Preventive anti-corruption body or bodies*

To ensure implementation of the strategy and policies established pursuant to article 5, the body or bodies need to address: how they will create an equitable and consistent approach across various sectors; the legislative context to ensure a body or bodies have the power to work across sector boundaries with equal authority; means to ensure the coordinated implementation of policies and undertake the necessary actions which may include inquiries, research and reviews; measures to ensure the transparency, probity and impartiality of appointments, as well as security of tenure for staff; operational independence to allow the effective performance of the body's mandate; and appropriate budgetary and reporting arrangements.

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

Factors in favour of a new body include:

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

On the other hand, the following points are in favour of existing bodies:

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

- The creation of a new body poses a dilemma as to whether to maintain or abolish existing bodies – maintenance creates tensions and potential for conflict, abolition would inevitably be opposed by those with vested interests in the old body.

## *II.2. Mandate and powers*

The body or bodies shall be given the task of developing, maintaining, revising and monitoring the implementation of effective, coordinated anti-corruption policies within the framework provided by the strategy developed in accordance with article 5. This strategy might designate responsibilities across the public sector, the private sector, the voluntary or NGO sector, and civil society.

Within the remit of the strategy, the body or bodies should ensure that it or they establish and promote effective practices aimed at the prevention of corruption. There should be reasonably frequent periodic evaluations of relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

Experience shows that there is a variety of mandates entrusted to anti-corruption bodies. This is a choice that the Convention leaves to States in recognition of the fact that such bodies should be responsive to the particular systems (administrative as well as legal) and circumstances prevailing in each country. Thus, there are anti-corruption bodies charged only with prevention while others are given powers that range from prevention to investigation and prosecution.

Whatever the breadth of the mandate, the body or bodies will require formal legislative authority to perform their functions. Some of the elements that such legislative framework could include are:

- Providing the body or bodies with the statutory authority to develop policies and practices outlined in the Convention;
- Enabling the body to publish manuals of guidance and develop codes of conduct;
- Allowing the body to make recommendations for future legislation and providing that it should be consulted before any anti-corruption legislation is introduced;
- Where investigative powers are conferred, allowing the body the ability to commence an inquiry on its own initiative,<sup>1</sup> and not requiring that any matter for inquiry be referred to it before it may act;

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<sup>1</sup> This is important both for agencies with investigative powers and preventive agencies. The former can instigate a case and the latter will be able to use this information to revise or create policy.

- Resting it with subpoena powers to obtain documentation, information, testimonies or other evidence;
- Ensuring the exchange of information with appropriate bodies, domestically and internationally, involved in anti-corruption work, including the relevant law enforcement authorities when required;
- Ensuring the appropriate independence to fulfil its functions;
- Ensuring that the staff of the body are protected from civil action when carrying out their duties in good faith;
- Providing for appropriate levels of accountability and reporting;
- Ensuring appropriate leadership for the body;
- Ensuring the appropriate level of resources.

### *11.3. Functions*

Within an appropriate legislative framework, the body or bodies would be able to perform functions which, depending on the particulars and breadth of their mandate, would include: requiring public sector institutions to produce specific plans of action and guiding/reviewing their implementation; undertaking evaluations or inspections of institutions; receiving and reviewing complaints from the public, receiving audit, investigative or parliamentary reports from those bodies responsible for anti-corruption investigations; undertaking research into legislation and administrative procedures; undertaking public opinion surveys, and developing other sources of information; and taking evidence on and conducting hearings for periodic reviews of progress on the anti-corruption plans. Finally, the body or bodies should be able to enter into agreements to facilitate collaboration with other agencies and with relevant international and regional organizations in promoting and developing the measures referred to in the article, and participate in international programmes and projects aimed at the prevention of corruption.

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

When their primary focus is on prevention policy and practices, the body or bodies should ensure that it or they take appropriate measures to coordinate work with other agencies, including how to deal with individual allegations (especially to avoid jeopardizing law enforcement inquiries and possible future prosecutions), develop longer-term strategic perspectives and balance a consensual approach with a robust independence.

#### *II.4. Independence and accountability*

The legislative framework should ensure operational independence of the body or bodies so that they may determine its or their own work agenda and how it or they perform their mandated functions. In addressing independence, consideration would need to be given to the following issues:

Rules and procedures governing the appointment, tenure and dismissal of the Director and other designated senior personnel; the composition of the body and/or any supervisory board; suitable financial resources and remuneration for staff; an appropriate budget; suitable recruitment, appointment/election, evaluation and promotion procedures; periodic reporting obligations to another public body, such as the legislature; formal paths to allow cooperation and exchange of information with other agencies; arrangements to determine the involvement of civil society and the media. The body and its staff should be protected from civil litigation for actions performed within their mandate as long as those actions have been carried out under the authority of the agency and in good faith (although this protection should not inhibit proper judicial review, as noted below).

The means to secure independence and accountability should be enshrined in law rather than executive decrees (which can easily create such a body but also abolish it). Establishment by law or, as experience shows, constitutional guarantees of independence enhance the likelihood that the body or bodies will have sufficient powers to promote effective policies and ensure implementation, as well as conveying a sense of stability. The body or bodies should have the authority to follow up on whether and how its recommendations have been implemented and they should be able to develop and retain staff that have the necessary expertise against corruption. It or they should be designated as the focal point and resource known by, and available to, public officials and the public, and finally they should be able to issue periodic public reports on their work.

Independence should not be perceived as contradictory to accountability. Anti-corruption bodies should operate within an established governance system that includes appropriate and functioning checks and balances and in which nobody and nothing is above the law. Independence needs to be balanced by mechanisms to ensure the transparency and accountability of the body or bodies, such as through reporting to or being the subject of review by competent institutions, such as parliamentary committees, or by being subject to reporting to parliament, annual external audit and where relevant to the courts through judicial review.

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

Part of the independence of the body or bodies, and also a means to ensure public visibility, should be the right to determine how it or they conduct their work. In particular, the body or bodies should be entitled to determine the public nature of their work, through public hearings, which can be an important tool in exposing evidence of corruption and educating the community about corruption.

At the same time, private hearings can be used to maintain the integrity of the inquiry, protect the identity of a witness or informant, receive information that may be used for further criminal and disciplinary charges, avoid interference with other proceedings, and avoid unnecessary harm to individual reputations. The body or bodies, however, should have a general policy of publishing its findings and reports to emphasize its role in upholding public integrity.

### *II.5. Resources*

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

Although there are many other arrangements to ensure appropriate resources, the focus should be on maintaining the independence of the anti-corruption body or bodies.

### *II.6. Specialized staff and training*

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



## **Article 7: Public sector**

*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.*

### **I. Overview**

In article 2, the Convention contains a broad and comprehensive definition of the term “public official”, which embraces the staff of all public sector services and all those holding an elected public office. Appointed public office should be based, on recruitment and throughout a career, on merit with transparent policies and procedures. Those elected to public office should also uphold standards similar to those expected from appointed public officials. Thus ethical and anti-corruption requirements are an integral part of public office and

concern all types of elected or appointed public officials as defined in article 2. Article 8 addresses more detailed issues relating to conflict of interest while articles 10 and 13 cover freedom of information, accessibility of public records and transparent decision-making.

## **II. Practical challenges and solutions**

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

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

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

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

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

## *II.2. Procedures for the selection and training for positions vulnerable to corruption*

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

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

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

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

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

## *II.3. Adequate remuneration and payscales*

One major area of concern, particularly for developing countries or countries with economies in transition, is ensuring adequate remuneration for

public officials. Both the level and certainty of payment may encourage a range of unacceptable conduct, from taking time from official responsibilities to undertake secondary employment to the susceptibility to bribery. “Adequate” means that, at the least, pay scales should allow public officials to enjoy the means to meet living costs commensurate with their position and responsibilities and comparable with similar positions in other sectors. States Parties should also ensure that the pay scales are linked to career progression, qualifications and promotion opportunities. The method of determining public sector pay and the criteria by which it is determined should be public.

#### *II.4. Training public officials in ethics*

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

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

- Reports on the willingness of staff to report suspicions.

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

### *II.5. Candidature for and election to public office criteria*

While II.1 to II.4 address those appointed to public office, States Parties should consider that the same themes and issues are addressed in relation to elected officials. Most States Parties will have constitutional and legal criteria frameworks that stipulate the requirements for standing for any election, as well as laws and regulations governing the integrity of the electoral process. States Parties, however, may also wish to consider ensuring that those seeking or holding public office also adhere to high ethical standards. This may involve laws or regulations that limit the political involvement, such as party membership or standing for elected office, for certain categories of public official. They may list those existing elected and appointed posts that would be incompatible with seeking a new or additional elected public office. They may have provisions to debar those with convictions for certain criminal activity, including corruption, from seeking or holding public office. They may require candidates to make a full disclosure of their assets and include provisions to void elections if a candidate or the candidate's party or supporters are involved in electoral corruption.

### *II.6. Transparency in campaign and political party financing*

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

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

access funding), and access to public broadcasting. Finally there need to be robust legal provisions and institutional procedures to deal with adjudication over contested candidatures and contested elections.

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

### *II.7. Transparency and the prevention of conflicts of interest*

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

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

## **Article 8: Codes of conduct for public officials**

*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.*

## **I. Overview**

States Parties are required to actively promote personal standards – integrity, honesty and responsibility – and professional responsibilities – correct, impartial, honourable and proper performance of public functions – among all public officials. To achieve this, States Parties must provide guidance on how public officials should conduct themselves in relation to those standards and how they may be held accountable for their actions and decisions. Specifically the article indicates that all States Parties provide public reporting legislation, conflict-of-interest rules and procedures, a code of conduct, and disciplinary requirements for public officials.

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

Conversely the code or equivalent public statement, together with the training, warns of the consequences of failing to act ethically, thus providing the basis of disciplinary action, including dismissal, in cases where an employee breaches or fails to meet a prescribed standard (in many cases, codes include descriptions of conduct that is expected or prohibited as well as procedural rules and penalties for dealing with breaches of the code).

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

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

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

## **II. Practical challenges and solutions**

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

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



## *II.2. Standards of behaviour and codes of conduct*

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

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

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

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

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

protecting non-public information). Finally codes should deal with post-resignation and post-employment restrictions (e.g., restrictions on former public officials representing a new employer before their former agency or taking confidential information to new employers).

### *II.3. Applicability*

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

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

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

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

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

- Senior public officials support the code and lead by example;
- Staff are involved in all stages of code development and implementation;
- Support mechanisms are in place to encourage the use of the code;
- Compliance with the code may be taken into account in relation to career progression etc.;
- Compliance with the code is monitored regularly through appropriate verification means;
- Code of conduct (and general corruption-awareness) training is regular and comprehensive;

- The organization continually promotes its ethical culture (a code of conduct is an important but not the only tool for this);
- The code is enforced through disciplinary action when necessary;
- The code is regularly reviewed for currency, relevance and accessibility;
- The code is devised with a style and structure that meets the particular needs of their organization;
- The code becomes an integral aspect for influencing decisions, actions and attitudes in the workplace (see article 10).

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

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

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

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

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

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

### **III. Reporting by public officials of acts of corruption**

An important means of breaking the collusion and silence that often surrounds breaches of a code is to introduce an effective system for reporting suspicions of breaches in general, and corruption in particular (often termed “whistle-blowing” but also described as public interest disclosure, public reporting or professional standards reporting). States Parties are required to establish adequate rules and procedures facilitating officials to make such reports. These are intended to: encourage an official to report, to know to whom to report, and to be protected from possible retaliation for such reporting by superiors.

Part of the purpose of a code is to impress on public officials, including through training, the responsibilities and professional nature of their work and responsibilities and thus their duty to report lapses or breaches of those standards by other public officials and members of the public. There should be the creation of specific reporting procedures and means of reporting in private such as through specified mail boxes, telephone hotlines or designated third-party agencies. Close attention must be paid to the security and confidentiality of any reporting through the establishment of systems to ensure those who report suspicions of corruption and malpractice in good faith are fully protected against open or disguised reprisals. Further protection is necessary to protect the officials concerned from any form of “disguised” discrimination and damage to their careers at any time in the future as a result of having made allegations of corruption or other infringements in public administration. States Parties are invited to take note of specific developments on this issue in GRECO’s 2006 activity report at [http://www.coe.int/t/dg1/greco/documents/2007/Greco\(2007\)1\\_act.rep06\\_EN.pdf](http://www.coe.int/t/dg1/greco/documents/2007/Greco(2007)1_act.rep06_EN.pdf) and the website of the NGO Public Concern at Work at <http://www.pcaw.co.uk/>.

States Parties will therefore need to consider legislation and procedures intended to make clear to whom allegations will be made; in what format (for example, in written form, or anonymously); by which media (by telephone, by

e-mail or by letter); with procedural safeguards to protect the source; how allegations are investigated; and means to avoid retaliation or retribution.

#### **IV. Disclosure systems**

States Parties are required to introduce general provisions on conflict of interest, incompatibilities and associated activities.

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

In general terms conflict-of-interest regulations should cover major types of conflict of interest, which have been the source of concern in a given country. Appropriate procedures need to exist for action when a conflict of interest is likely to occur or is already detected. In situations where conflicts of interest cannot be avoided (e.g., in small communities), there must be procedures which safeguard the public interest without paralyzing the work of the agency in question. Public officials who are subject to the regulations should be aware of, understand and accept the concept of conflict of interest and of applicable regulations. Information and consultations should be available for public officials on how to act in case of doubt about their possible conflict of interest. It would be useful to put in place an informal consultation process or mechanism of which public officials can readily avail themselves to seek clarifications and advice in particular situations. A body/bodies should be assigned to investigate and obtain all necessary information regarding possible conflicts of interest. Legislation, delegated authority and/or contracts of employment should provide appropriate penalties for failure to comply with conflict-of-interest regulations. Information about the conflict-of-interest requirements for public officials should be available to the public.

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

- Disclosure covers all substantial types of incomes and assets of officials (all or from a certain level of appointment or sector and/or their relatives);
- Disclosure forms allow for year-on-year comparisons of officials' financial position;
- Disclosure procedures preclude possibilities to conceal officials' assets through other means or, to the extent possible, held by those against whom a State Party may have no access (such as overseas or held by a non-resident);

- A reliable system for income and asset control exists for all physical and legal persons – such as within tax administration – to access in relation to persons or legal entities associated with public officials;
- Officials have a strong duty to substantiate/prove the sources of their income;
- To the extent possible, officials are precluded from declaring non-existent assets, which can later be used as justification for otherwise unexplained wealth;
- Oversight agencies have sufficient manpower, expertise, technical capacity and legal authority for meaningful controls;
- Appropriate deterrent penalties exist for the violations of these requirements.

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

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

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

- Permission to receive a gift, invitation or hospitality;
- Information required for a register;
- Access to the register;

- Ownership of any gift;
- Verification of information;
- Means of investigating breaches or allegations;
- Sanctions.

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

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

## **V. Disciplinary measures**

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

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

## **Article 9: Public procurement and the 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.*

*3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or*



*other documents related to public expenditure and revenue and to prevent the falsification of such documents.*

## I. Overview

Procurement is acknowledged to be a process vulnerable to corruption, collusion, fraud and manipulation. States Parties are required to develop procurement procedures which incorporate 1 (a) to (e) above. States Parties are invited to take note of special developments on this issue in recent OECD publications such as *Bribery in Public Procurement: Methods, Actors and Counter-Measures*, OECD, 2007 at [http://www.oecd.org/document/60/0,3343,en\\_2649\\_37447\\_38446908\\_1\\_1\\_1\\_37447,00.html](http://www.oecd.org/document/60/0,3343,en_2649_37447_38446908_1_1_1_37447,00.html). Also, *Integrity in Public Procurement: Good Practice from A to Z* (OECD, 2007) and *Fighting Corruption and Promoting Integrity in Public Procurement* (OECD, 2005), policy and research papers published by Transparency International at <http://www.transparency.org>, and the World Bank at <http://go.worldbank.org/KVOEGWC8Q0>.

It is important to note that public procurement regulation is not about anti-corruption per se – the common objectives of most procurement systems include value for money, integrity, accountability, fair treatment, and social/industrial development.<sup>2</sup> Balancing these objectives, some of which may conflict, is the challenge in procurement regulation. Nonetheless, there is agreement that procurement systems should reflect the requirements set out in article 9 (1) above. There is a range of agencies providing guidance on procurement, including UNCITRAL (the United Nations Commission on International Trade Law), which has published a Model Law on Procurement of Goods, Services and Construction and an accompanying explanatory Guide to Enactment and the World Bank, which has published procurement and related guidelines.<sup>3</sup> Other international and regional groupings that have procurement regulations, which could be taken into account when drafting national legislation in member States, include the Asia-Pacific Economic Cooperation (APEC), the European Union (EU, which adopted two procurement directives in 2004 – Directive 2004/17/EC (contracts awarded in the utilities sectors) and Directive 2004/18/EC (contracts awarded by public authorities)), the draft Free Trade Area of the Americas Agreement (FTAAA), the North American Free Trade Agreement (NAFTA), the Organization of American States (OAS) and the

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

<sup>3</sup> See “Guidelines: Procurement under IBRD Loans and IDA Credits”, and other documents regarding the Bank’s procurement policies and procedures, available at <http://go.worldbank.org/9P6WS4P5E1>.

World Trade Organization's (WTO) Agreement on Government Procurement (GPA).<sup>4</sup>

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

## **II. Practical challenges and solutions**

### *II.1. Procurement*

#### *II.1.1. The principles*

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

#### *II.1.2. Measures to enhance transparency*

Transparency is one of the main means to achieve integrity in the procurement process. There are three main stages of the procurement procedure: procurement planning and the decision to procure, including the preparation of operational-technical requirements (specifications); organization and allocation

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<sup>4</sup> The working group of all WTO members addressing transparency in government procurement has discontinued its work. See the General Council's decision on the Doha Agenda work programme (the "July package", at [http://www.wto.org/english/tratop\\_e/dda\\_e/draft\\_text\\_gc\\_dg\\_31july04\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm)), of 1 August 2004, stating inter alia that there will be no negotiation on the Singapore issue of transparency in government procurement. However, it is hoped that the working group will be revived in the future.

of public procurement through open procedures (unless there are exceptional circumstances justifying alternative procedures) and the completion of contract; and closure of the contracts through post-award performance and payment. The article lays down guidance on areas to be regulated.

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

For the exceptional circumstances in which the above methods are not appropriate or feasible, most systems, including the UNCITRAL Model Law, offer some alternative methods of procurement that can be used upon justification. Justification is required because these alternative methods involve some degree of restriction on the numbers of suppliers that are invited to compete for the relevant contract, or other aspects of transparency, and may include sole source procurement. The circumstances justifying the use of alternative methods include situations in which it is not feasible for the procuring entity to formulate specifications to the degree of precision or finality required for tendering proceedings, urgent needs due to catastrophic events, technically complex or specialized goods, construction or services available from only a limited number of suppliers and procurement of such a low value that it is justified to restrict the number of tenders that would have to be considered by the procuring entity. It is vital that appropriate guidance is given regarding which alternative methods can be used, and in which circumstances. Nonetheless, under all methods provided for in the UNCITRAL Model Law and those commonly found in most procurement texts on the international stage, including in those that do not require public advertisement of the procurement, the conditions and criteria for participation and selection must be objective, predetermined and disclosed to participants, and the award of the contract published (subject in

some cases to a *de minimis* threshold). It is particularly important in non-open proceedings that these transparency measures are respected.

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

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

There should be publicly stated measures to regulate matters regarding personnel responsible for procurement, such as risk management, audit trails, specific appointment processes, specific codes of conduct and training requirements. Consideration must be given to ensuring that legislative committees and State Audit have access to contract documentation and public officials. States Parties should develop and publicize 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 are not followed. One consequence may be the debarment of contractors for proven non-compliance with procurement processes or corrupt conduct. For examples of effective sanctions procedures see [http://www.eipa.eu/files/repository/eipascope/Scop06\\_3\\_3.pdf](http://www.eipa.eu/files/repository/eipascope/Scop06_3_3.pdf). There should be possible measures against procurement officials, who may be the originators of the corrupt behaviour.

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

- Access to and monitoring of bidding and implementation procedures;
- Attending any part of the procurement process;
- Identifying fraud indicators, which might point to corrupt activity at an early stage;

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

### *II.1.3. Rules of the tender and review process*

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

- How procurement procedures are selected – e.g., open, restricted, sole-source, negotiated, emergency procedure etc. and how to choose between them;
- How contracts are structured – e.g., framework or master agreements, or one-time contracts;
- Tender and award procedures: bid preparation and budget planning; solicitation and selection; contract delivery, variation and performance, and approved lists;
- Award criteria; price, price/quality etc.;
- Tendering frameworks: threshold limits, prime, cost-plus, term etc.;
- Use of standard verification, validation and audit controls, including: no-collusion and no-bribe clauses, debarment policies, data matching and mining, product benchmarking for supplies, evidence of company economic stability and capacity proportionate to contract. The standardization of procurement systems necessitates that all elements used for oversight need to be integrated – e.g., using e-procurement systems;
- Fraud indicator controls specific procedures to address areas or activities of risk or vulnerability (ranging, for example, from the artificial splitting of contract specifications to substitution of counterfeit goods);
- Asset declaration requirements of all public officials involved in procurement;

- Post-resignation or post-employment requirements of all public officials involved in procurement (e.g., to avoid pre-resignation negotiations with suppliers by procurement officials to get a good job);
- Contract variation;
- Contract verification;
- Use of Internet as one means for contract information dissemination;
- Liaison with law enforcement agencies on allegations of corruption and criminal behaviour such as bribery and facilitation payments;
- Debarment procedures.

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

#### *II.1.4. Personnel responsible for procurement*

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

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

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

As noted in II.1.3, the body responsible for procurement would also, in consultation with other bodies, such as external auditors and including those agencies designated under articles 6 and 36, develop a management Corruption

and Fraud Risk Register as a potential warning or fraud indicator system, which prompts a closer inspection of a particular area of the public procurement process, or a debarment register covering companies and personnel involved in non-compliant or corrupt conduct. It would also provide or promote specialist training for managers, auditors, and investigators to ensure a good working knowledge, working practices, and procurement procedures to facilitate their work.

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

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

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

Proper budget preparation at the individual procuring entity level is an essential feature of procurement planning, and vice versa. Inadequate or non-existent procurement planning is a well-documented source of abuse in procurement, for example leading to unjustifiable recourse to non-open procedures (because non-urgent procurement becomes “urgent”), or to unnecessary procurement (if budgeted funds are viewed as lost if not spent). Additionally, essential procurement can be withheld because of lack of funds.

## *II.2. Public finance*

### *II.2.1. Management of public finances*

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

- Transparency of sources of public income;
- Predictability of taxation requirements;

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

### *II.2.2. Procedures for the adoption of the national budget*

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

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

First States Parties should provide the context – the economic assumptions underlying the budget estimate report should be made in accordance with standard budget practice and the budget should include a discussion of intended revenue streams. The budget should also contain a comprehensive discussion of the government's financial assets and liabilities, non-financial assets, employee pension obligations and contingent funding.



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

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

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

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

### *II.2.3. Timely reporting on revenue and expenditure*

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

All States Parties should ensure the effective execution of the budget, in accordance with the workplans, to ensure that the spending ministries, departments and agencies receive reliable information on availability of funds within which they can commit expenditure for recurrent and capital inputs. All

States Parties should ensure the timely delivery of consolidated year-end financial statements which are critical for transparency in the financial management system. To be complete they must be based on details for all ministries, independent departments and devolved units. In addition, the ability to prepare year-end financial statements in a timely fashion is a key indicator of how well the accounting system is operating, and the quality of records maintained. In some systems, individual ministries, departments and devolved units issue financial statements that are subsequently consolidated by the ministry of finance. In more centralized systems, all information for the statements is held by the ministry of finance.

#### *II.2.4. Accounting, auditing and oversight*

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

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

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

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

In brief, Internal Audit is established by the management of the public body within State Party guidelines and, although operating independently, is part of the overall management function of the organization.

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

State Audit agencies may turn for guidance on competences and work to international organizations such as International Organization of Supreme Audit

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

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

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

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

The legislature has a key role in exercising scrutiny over the execution of the budget that it previously approved. A common way in which this is done is through a legislative committee(s) or commission(s), which examine the external audit reports and question responsible parties about the findings of the reports. The operation of the committee(s) will depend on adequate financial and technical resources, the right to call for public officials and relevant documentation, and on adequate time being allocated to keep up to date on reviewing audit reports. Hearings should as far as possible be in public. The

committee may also recommend actions and sanctions to be implemented by the Executive, in addition to adopting the recommendations made by the external auditors. The committee should have the authority to monitor corrective actions taken.

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

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

### *II.2.5. Risk management and internal control systems*

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

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

Internal audit has its own part to play in the scrutiny function. Apart from its role as a component in the internal control environment as noted above, it can act as an organization's own watchdog on matters of propriety. Internal audit's focus on risk and internal controls and detailed knowledge of its organization places it in a powerful position to detect issues of propriety. Close liaison with

an organization's internal audit is therefore likely to greatly help external auditors, and those bodies involved with the prevention and investigation of corruption designated under articles 6 and 36, undertaking a review of propriety to achieve a thorough understanding of the business. States Parties should ensure that State Audit has the right to exchange information and cooperate with the bodies.

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

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

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

- Reviewing documentation of the decision-making processes at senior level;
- Assessing the entity's control environment, particularly the absence of policies and procedures in relation to areas where there are significant risks of fraud, corruption or other impropriety;
- Reviewing organizational culture, public official reporting arrangements;
- Reviewing the results of internal audit examinations;
- Performing substantive tests of details of transactions or balances.

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

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

#### *II.2.6. Measures to preserve the integrity of relevant documentation*

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

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

### **Article 10: Public reporting**

*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.*

## **I. Overview**

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

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

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

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

## **II. Practical challenges and solutions**

### *II.1. Measures to enhance transparency in public administration*

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

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

The key characteristics of effective access are:

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

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

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

## *II.2. Access to information concerning public administration*

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

It would be useful to approach the issue from a positive angle. In that vein, access to information on policies would depart from the principle that all documentation should be accessible and then specify on which grounds access should be restricted or denied. Such grounds may include: national security, defence and international relations; public safety; the prevention, investigation and prosecution of criminal activities; protection of privacy and other legitimate



private interests; the equality of parties concerning court proceedings; State economic, monetary and exchange rate policies; the confidentiality of deliberations within or between public authorities during the internal preparation of public policy.

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

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

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

In many cases procedures may become outdated, conflict or duplicate newer procedures or become disproportionately expensive. This often means bureaucratic and burdensome paperwork requirements on citizens, opacity in terms of the decision-making process, and a duplication of information required of citizens – often to the same department. As well as being a hindrance to the development of a free and fair market and attracting foreign investment, such practices can also set the conditions for public officials to manipulate the authority of their office in which fraud and corruption can flourish. States Parties should regularly review the issuing of, for example, licences and permissions to see whether the required procedures are necessary, whether fees are proportionate to the cost of issuing them and whether multiple agencies or services should be involved in their issuance. A key aspect of addressing such issues is the quality, accuracy and accessibility of the records and record management systems used by departments, and how far ICT allows interactive use by a range of departments to avoid duplication and excessive delays in decision-making.

In any case, there should be closer liaison between ministries/departments to reduce the regulatory burden on all citizens seeking information and services from the State. States Parties can ensure a more effective approach to this by including in all legislation on licences, permissions or concessions sunset or review clauses and reducing procedural complexity. States Parties can consider de-layering and other restructuring procedures, including one-stop shops, especially in “service-delivery” areas involving extensive contact with private individuals, companies and other elements of civil society, not only to reduce the

potential for corruption but to increase the cost-effectiveness of administrative activity. These provide a means to combine types of licences and permissions or combining the same basic processes and procedures to be carried out in the issuing of different licences and permissions to build up expertise, use of complementary databases and provide economies of scale.

#### *II.4. Periodic public reporting, including risks of corruption*

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

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

### **Article 11: Measures relating to the judiciary and prosecution services**

*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.*

#### **I. Overview**

The article requires measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary, which may include measures to regulate the conduct of the members of the judiciary. Such

requirements have also been made applicable to prosecution services. For the purposes of this Guide, much of the guidance is applicable to both the judiciary and the prosecution services. In relation to the judiciary, the guidance is also intended to be applicable to all court personnel. States Parties would also draw inspiration from existing guidance, including The Bangalore Principles of Judicial Conduct 2002, Report of the Fourth Meeting of the Judicial Integrity Group, UNODC, 2005, the United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, 2005, the UN Guidelines on the Role of Prosecutors, 1990, and the 1999 International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors. The overall framework of implementation is the independence of the judiciary and that should be taken into account at all times in designing, promulgating and implementing relevant measures.

## **II. Practical challenges and solutions**

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

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

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

## *II.1. Measures to strengthen integrity of judges*

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

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

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

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

Judicial independence does not require that judges should enjoy immunity from the application of laws, except to the extent that a judge may enjoy

personal immunity from civil suits for alleged improper acts or omissions in the exercise of judicial functions. In many countries, judges, like other citizens, are subject to the criminal law. They have, and should have, no immunity from obedience to the general law. Where reasonable cause exists to warrant investigation by police and other public bodies of suspected criminal offences on the part of judges and court personnel, such investigations should take their ordinary course, according to law.

Other countries provide immunities from prosecution for judges. Where such immunities are provided, the preferred approach, in order to limit the potential for judges to avoid prosecution for corruption and so as not to undermine the credibility of the judiciary, is a “functional” approach, so that judges are only immune from prosecution for offences that take place in the course of carrying out their judicial duties. In order to ensure that the “functional” approach cannot be misused to avoid criminal liability, it is also essential to provide a process for lifting the immunity in appropriate circumstances, along with safeguards for ensuring that the process is transparent, fair and consistently applied.

## *II.2. Measures to prevent opportunities for corruption in the judiciary*

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

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

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

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

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

Judges must take responsibility for reducing delay in the conduct and conclusion of court proceedings and discourage undue delay. Judges should institute transparent mechanisms to allow the legal profession and litigants to know the status of court proceedings. (One possible method is the monthly circulation among judges of a list of pending judgments.) Where no legal requirements already exist, standards should be adopted by the judges themselves and publicly announced in order to ensure due diligence in the administration of justice.

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

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

religion, minority involvement and other features of the judge. Such rotation should be adopted to avoid the appearance of partiality.

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

### *II.3. Codes and standards*

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

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

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

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

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

Yet another measure concerns the responsibility of Bar Associations or Law Societies to promote professional standards. Such bodies have an obligation to report to the appropriate authorities instances of corruption which are reasonably

suspected. They also have the obligation to explain to clients and the public the principles and procedures for handling complaints against judges and court personnel. Such bodies also have a duty to institute effective means to discipline their own members who are alleged to have been engaged in corruption of the judiciary or court personnel. In the event of proof of the involvement of a member of the legal profession in corruption, whether of a judge or of court personnel or of each other, appropriate means should be in place for investigation and, where proved, disbarment of the persons concerned.

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

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

#### *II.4. Measures to strengthen the integrity of prosecutors*

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

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



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

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

## *II.6. Codes and standards of conduct for prosecutors*

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

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

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

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

Prosecutors should always serve and protect the public interest, and respect, protect and uphold the universal concept of human dignity and human rights.

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

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

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

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

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

## **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;*

(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.*

## **I. Overview**

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

## **II. Practical challenges and solutions**

### *II.1. Measures to prevent corruption involving the private sector*

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

### *II.2. Measures to enhance accounting and auditing standards*

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

systems; audits reviewing the legality of transactions and the safeguards against fraud and corruption; a full risk-management-based audit.

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

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

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

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

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

### *II.4. Measures to promote cooperation between law enforcement and the private sector*

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

seminars, establishing single points of contact, as well as providing preventive advice.

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

While the extent of Government regulation of the private sector may be the subject of debate, the private sector itself should be aware of the need for corporate integrity, business ethics and corporate social responsibility to stakeholders (such as customers, clients, citizens, employees and shareholders). The ability to deal with issues of business conduct and/or shape the activities around the responsibilities and duties of an organization are, however, complex challenges. Business organizations exist to make a profit. At the same time, businesses increasingly have obligations imposed on them by stakeholders – including regulators, suppliers, buyers and the public at large – that go beyond the profit motive. One of the methods that organizations are utilizing to address these seemingly differing obligations is through the development of codes of conduct, or ethics or corporate governance programmes, and a closer alignment with the requirements and expectations placed on the public sector. Several sets of principles or models have been developed in recent years<sup>5</sup> to provide useful sources of inspiration. As a result of a recent initiative, many of these principles are currently under review intended to bring them in line with the principles enshrined in the UNCAC.

### *II.6. Transparency in the establishment and management of corporate entities*

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

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<sup>5</sup> Example of such principles are: the OECD Principles on Corporate Governance, as reviewed in 2004 ([http://www.oecd.org/document/49/0,3343,en\\_2649\\_34813\\_31530865\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/49/0,3343,en_2649_34813_31530865_1_1_1_1,00.html)); the ICC Rules of Conduct and Recommendations on Combating Extortion and Bribery (<http://www.icc.se/policy/mutor/iccrules2005.pdf>); the PACI Principles for Countering Bribery, endorsed within the context of the World Economic Forum Partnering Against Corruption Initiative (PACI) ([http://www.weforum.org/pdf/paci/PACI\\_PrinciplesWithoutSupportStatement.pdf](http://www.weforum.org/pdf/paci/PACI_PrinciplesWithoutSupportStatement.pdf)); and the Transparency International Business Principles for Countering Bribery ([http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles)).

## *II.7. Preventing the misuse of procedures regulating private entities*

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

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

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

All States Parties should have formal procedures governing the move of public officials on resignation or retirement to those private sector entities with whom they have had dealings while in public service or for whom they may hold confidential or commercial information or where they may be employed to influence their former employers or colleagues. Such procedures should apply to both appointed and elected officials. States Parties should consider prescribing measures that would have specific consequences for public officials who attempt to:

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

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

- Permission being included in all terms and conditions of appointment;
- The right to impose conditions on use of information and contact with previous employers;

- The right to notify private sector competitors of a move of a significant public official to a rival firm;
- The right to debar any private sector entity from dealings with a State Party if any conditions are breached.

In drafting such provisions, States Parties should consider:

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

### *II.9. Internal auditing and certification procedures*

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

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

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

### *II.11. Prohibition of tax-deductibility of bribes and related expenses*

States Parties should legislate to ensure that entities cannot claim tax relief on payments that may be construed as a bribe. The prohibition of tax-deductibility of “bribes” includes bribes to foreign public officials. The prohibition against claiming a tax deduction for bribe payments should be extended to individuals. The prohibition against claiming a tax deduction for a



bribe payment needs to be clearly stated, and the tax authorities must be careful to ensure that bribe payments cannot be concealed under legitimate categories of expenses, such as “social and entertainment costs” or “commissions”. The role of tax measures in the detection of corruption offences can only be served if State revenue or tax authorities are obligated or at least permitted to report their suspicions of corruption to the law enforcement authorities.

## **Article 13: Participation of society**

*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.*

### **I. Overview**

Preventing and controlling corruption is a means to the promotion of good governance and wider reform to public services to make them more efficient and effective, decision-making more transparent and equitable, and budgets and laws more aligned to the needs and expectations of society in general and its poorer

and more vulnerable members in particular. Those affected by corruption indirectly, from the misuse of public funds and resources, and directly, through having to pay bribes to obtain public services, should be involved in processes designed to determine what needs to be addressed, in what sequence, and by whom.

## **II. Practical challenges and solutions**

### *II.1. Promoting the participation of society in the prevention of corruption*

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

### *II.2. Raising public awareness on corruption*

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

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

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

### *II.4. Public information and education*

Bodies noted in articles 6 and 36 should undertake publicity campaigns and ensure appropriate contact points for allegations from citizens. The campaigns may include leaflets and posters, clearly displayed in all public bodies. All public

bodies should also publish their own information on their services and functions, including information on how to report allegations of corruption.

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

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

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

#### ***II.6. Raising public awareness on anti-corruption bodies***

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

#### ***II.7. Public access to information***

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

## *II.8. (Anonymous) reporting of corruption*

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

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

### **Article 14: Measures to prevent money-laundering**

*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*

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

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

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

## **I. Overview**

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

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

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

## **II. Challenges and solutions**

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

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

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

For this reason, States Parties may vary the components of their domestic “regulatory and supervisory regimes”. For the purposes of this article, and bearing in mind the prescriptions of article 58, States Parties may wish to assess or determine the general institutional framework of their preferred regime and build the appropriate preventive and international cooperation approaches accordingly.

An effective anti-money-laundering regime must combine:

- Financial and non-financial institutions must be required to take steps to prevent the use of their services by potential launderers. The steps include sufficient customer due diligence to enable the institution to build a profile of a customer and expected activity, to monitor the activity and to report suspicious or unusual actions that do not conform to the profile.
- Reports from financial institutions and intelligence from other sources must be collated, shared as appropriate with other domestic and international authorities and analysed so as to form the basis for enforcement action.
- Allegations of laundering should be investigated and where appropriate, result in asset freezing and seizure, and prosecutions.

Most countries have already established regulatory and supervisory bodies with the responsibility of imposing standards of conduct on financial institutions, such as banks, insurance companies, securities firms and currency exchanges. Such bodies are likely to have appropriate powers of supervision and regulation, are familiar with the business of the financial institutions, monitor the capacity and propriety of the institutions and their management and focus on achieving high standards of corporate governance, internal controls, staff ethics and appropriate behaviour. Consequently, many countries charge such bodies with the responsibility for imposing measures designed to prevent the laundering of the proceeds of corruption. On the other hand, some countries allocate this task to a separate body (usually the financial intelligence unit (FIU) established

to carry out the second of the listed functions). This approach has the advantage of concentrating the expertise on the laundering of the proceeds of corruption, but such an organizational model must be carefully designed to avoid the danger of conflicting instructions to institutions, and duplication of the examination of capacity and propriety, corporate governance controls and records.

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

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

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

States Parties should adopt the model that best suits their legal, constitutional, and administrative arrangements. There are advantages in all models and States Parties should make sure that the arrangements for staff training, the provision of statutory powers and the coordination between agencies is designed to maximize the advantages and minimize the risks identified above.

From a different perspective, one can differentiate preventive systems according to the degree of functions performed by private sector institutions as opposed to public agencies. In the models described above, the regulatory and supervisory functions rest with public agencies. Some States Parties have adopted self-regulating models, in which existing private bodies with regulatory functions (such as business associations or professional associations) take the “day-to-day” regulatory role and public agencies oversee those private bodies and conduct random supervision over the regulation they perform. Others may give such bodies more formal powers with which to enforce regulation. States Parties adopting these systems usually do not suffer from extensive domestic

economic crime but rather from the misuse of their financial systems by illicit transaction activity. Given these circumstances, the sector has special incentives to implement a functional self-regulating system based on reputational considerations and States Parties may consider lighter-touch supervision.

## *II.2. Who should be subject to preventive obligations?*

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

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



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

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

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

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

States Parties shall also require their gatekeepers to keep original records of the financial transactions. This obligation is a key nexus between the preventive and the investigative approaches as the records constitute the most relevant evidence for money-laundering investigations and prosecutions. States Parties are encouraged to carefully evaluate the period of time for which financial records will be required to be kept, in what format and what constitutes a “record” for retention and evidential purposes. The practical and costly burden that record-keeping represents for gatekeepers should be balanced against the fact that many corruption investigations do not start until the defendant(s) have

left office – a reason for article 29 to require a sufficiently long statute of limitations. In this regard, States Parties may consider extending the record-keeping obligation for transactions carried out by the persons mentioned in article 52.

Finally, States Parties shall require its gatekeepers to report suspicious transactions. In implementing a system for reporting suspicious transactions, States Parties may consider a balance between the margin of discretion given to gatekeepers to decide when a transaction is suspicious and the capacity of its FIU to process, analyse and use in a meaningful fashion all the information required to be reported. Some countries tend to establish objective reporting systems with a minimum value threshold over which every transaction must be reported. For this model to work properly, the FIU should be provided with sufficient resources for receiving, processing and analysing all the information received from the regulated sector. Virtually all States Parties, including all those who impose minimum cash transaction reporting systems, have considered that the gatekeepers are in the best position to decide when a transaction is to be considered suspicious, and have adopted “subjective” systems in which the gatekeepers make the decision and the public bodies supervise compliance within established criteria. In this model, regulated institutions have specific incentives to preserve their reputation and to keep their environment free from money of dubious origin. The routine information provided by a threshold-based system is used as raw material for creating financial databases which proved to be useful for investigations carried out on the basis of transactions reported as suspicious by the gatekeepers.

#### *II.4. Promoting reporting*

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

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

reports and work with institutions on the refining and prioritization of the information being submitted. The ultimate goal would be creating a collaborative environment between public and private actors, which will vary depending on existing practices, institutions and the goals of the system to be implemented.

### *II.5. Exchanging financial information*

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

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

Most countries have rules governing evidence in criminal proceedings. These include restrictions on the way information can be collected and used as evidence. A requirement that private institutions and public agencies must report suspicions will mean that private information, which has been collected by the institution or agency for other commercial or public purposes, may become available to authorities with an interest in a prosecution connected to corruption. This information would not have been collected as part of a formal investigation and may not have been collected in a way that matches the legal or constitutional safeguards surrounding the collection and use of evidence in criminal proceedings. Such information would often be unacceptable as evidence in criminal proceedings. In most countries, this difficulty is resolved by treating information gathered through public and private agencies and passed to the FIU as intelligence rather than evidence. It can be used only to prompt a formal investigation in which evidence can be collected in the appropriate manner. Countries are likely to have different legal and constitutional provisions in this area and must make arrangements for the protection and use of financial intelligence in a way that respects the rights of those against whom offences are alleged.

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

is used for public policy purposes, such as the provision of public services and the collection of tax on income.

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

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

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

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

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

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

proceedings in its raw form. It can, however, be the basis for an investigation (which may ultimately include an international request for evidence through the mutual legal assistance channels). Usually, agreements between FIUs are guided by the following principles:

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

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

#### *II.6. Cross-border movement of cash and negotiable instruments*

Paragraph 2 of article 14 requires States Parties to consider the adoption of measures to detect and monitor the cross-border movement of cash as well as of “appropriate negotiable instruments”. The transportation of currency, negotiable instruments and valuables that are easily liquidated – such as bank guarantees or precious stones – is of strong concern to any anti-money-laundering preventive system. The reason is quite simple: once borders have been crossed, disguising the origins of ill-gotten gains becomes easier because tracing its origin requires the use of international cooperation, which usually proceeds more slowly than investigations within a single jurisdiction.

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

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

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

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

When suspicious currency instruments are discovered, it is good practice to keep the baggage/cargo intact with the currency to preserve evidence. When inspecting for currency which may be falsely declared or undisclosed, or which

may be related to money-laundering, it is good practice to give particular attention to the potential use of counterfeit currencies. Some States Parties have established mechanisms to detect counterfeit currency. For example, when encountering questionable or suspicious euro notes authorities can check these notes using the European Central Bank website ([www.eur.ecb.int/en/section/recog.html](http://www.eur.ecb.int/en/section/recog.html)). In the case of U.S. dollars, authorities can check them against the U.S. Secret Service Counterfeit Note Search Website ([www.usdollars.usss.gov](http://www.usdollars.usss.gov)).

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

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

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

## *II.7. Money transfers*

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

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

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

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

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



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

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

## *II.8. Implementation*

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

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

The Caribbean Financial Action Task Force, created in 1993 ([www.cfatf.org](http://www.cfatf.org));

The Asia Pacific Group against Money Laundering, created in 1997 (<http://www.apgml.org>);

The Select Committee of Experts on the Evaluation of Anti-Money-Laundering Measures (MONEYVAL), created in 1997 ([www.coe.int/moneyval](http://www.coe.int/moneyval));

The Eurasian Group, created in 2004 (<http://www.eurasiangroup.org/index-1.htm>);

The Eastern and South African Anti-Money-Laundering Group, created in 1999 (<http://www.esaamlg.org/index.php>);

The GAFISUD, created in 2000; and

The Middle East & North Africa Financial Action Task Force (MENAFATF), created in 2004 (<http://www.menafatf.org/Home.asp>).

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

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



**CRIMINALIZATION AND LAW  
ENFORCEMENT  
(Chapter III, articles 15-42)**

For more information and analysis on the content and structure of, and the requirements set forth in, articles 15-29 of the Convention, see the relevant chapter of the Legislative Guide for the Implementation of the United Nations Convention against Corruption

## **Article 30: 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.*

## I. Overview

Article 30 deals with some of the most important aspects of enforcing the law. It encompasses provisions with regard to the investigation and prosecution and the important as well as complex issue of immunities. The article devotes significant attention to sanctions (both criminal sanctions *strictu sensu* and “ancillary” sanctions), as well as provisions on disciplinary measures and sanctions relating to the gravity of the offence or linked to the nature of the offence, such as disqualification. Finally, the article deals with the rehabilitation of offenders.

The article requires:

- That States Parties provide for sanctions which take into account the “gravity” of that offence (para. 1);
- That States Parties provide for an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with the Convention (para. 2);
- That decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings (para. 4);
- That a State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences (para. 5).

Besides these mandatory provisions, the article includes as non-mandatory provisions:

- That States Parties consider establishing procedures through which a public official accused of an offence established in accordance with the Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority (para. 6);
- That States Parties consider establishing procedures for the disqualification for a period of time determined by domestic law, of persons convicted of

offences established in accordance with this Convention from: (a) holding public office; and (b) holding office in an enterprise owned in whole or in part by the State (para. 7);

- That States Parties endeavour to promote the reintegration into society of persons convicted for offences established pursuant to the Convention (para. 10).

Implementation of the provisions of article 30 adds up to a significant “health check” on a criminal justice system to identify what may need to be done in order to strengthen a sense of a properly functioning rule of law. The provisions are a sensible means of translating administration of justice policies into workable and functioning mechanisms.

## **II. Challenges and solutions**

### *II.1. Sanctions that take into account the gravity of that offence*

The term “sanction” encompasses both criminal and non-criminal administrative or civil sanctions. However, in the cases in which the Convention requires establishing certain conduct “as a criminal offence” non-criminal sanctions may accompany criminal sanctions but cannot substitute them.

The Convention requires that States Parties provide for sanctions that take into account the gravity of the offence. While not stipulating any particular form of sanctions, the Convention emphasizes that there should be appropriate measures in place to ensure that, whether through fines, imprisonment or other penalties, the punishment reflects the level of the offence. The gravity of the offence may not be determined only by the value of, for example, an undue advantage, but by taking into account other factors, such as the seniority of those involved, the sphere in which the offences occur, the level of trust attached to the public official and so on.

The Convention does not specify the severity of sanctions. Since penalties reflect diverging national traditions and policies, the Convention acknowledges that penalties for similar crimes may diverge across jurisdictions. In fact, sanctions for corruption offences have to be in line with the national legal tradition and suit the general framework of penalties provided for by the criminal law of States Parties. In general, to provide for sanctions that take into account the gravity of the offence, criminal sanctions for corruption offences established in accordance with the Convention should not fall short of the sanctions for comparable economic crimes. States Parties may bear in mind that for transborder corruption, in which mutual legal assistance and extradition play a major role, it is important that the range of penalties are sufficient to enable effective mutual legal assistance and extradition. For some States Parties, this might require that the offences provide for a certain length of custodial sentence so as to comply with dual criminality demands.

The way that sanctions are applied will vary depending on the legal system of the State Party concerned. In States Parties where sentencing is left to the court with a certain level of discretion, usually within a broad range of possible sanctions, the court will usually start by deciding upon the seriousness of the offence by assessing culpability and harm, taking into account aggravating and mitigating factors (in the case of corruption offences the level of breach of trust may be a significant aggravating factor), personal mitigation and whether there was a guilty plea. This will enable the court to establish whether the threshold for a sanction involving deprivation of liberty has been reached. The courts will also have to adjudicate on compensation orders following a criminal conviction or some form of asset evaluation and confiscation to ensure that the defendant does not benefit financially from the corrupt deal.

States Parties may also wish to consider the sentencing guidance of article 26 (4) which (for legal persons) speaks of effective, proportionate and dissuasive sanctions.

The provision of sentencing guidelines may assist significantly in this area. There are many States Parties that have established sentencing guidelines that act as a guide and not as formal instruction to judges.

In the United Kingdom, for example, sentencing guidelines for judges and sentencers<sup>6</sup> are set by two closely related independent bodies: the Sentencing Advisory Panel and the Sentencing Guidelines Council. They work together to ensure that sentencing guidelines are produced which encourage consistency in sentencing throughout the courts of England and Wales and support sentencers in their decision-making.

The Sentencing Advisory Panel's role is to advise on sentencing guidelines for particular offences or categories of offences, and other sentencing issues. Following a period of wide consultation, and research if required, the Panel produces advice which is submitted to the Sentencing Guidelines Council for consideration. The Sentencing Guidelines Council receives advice from the Sentencing Advisory Panel on a particular sentencing topic and uses this to formulate sentencing guidelines on the subject. These "draft guidelines" are published, consulted on and then revised.

Final sentencing guidelines are then issued, ready to be used by sentencers.

Of course in many other States Parties there will be no such "informal" guidelines and the parameters of sentencing will be set out within the criminal code or statute that criminalizes the UNCAC offences.

In some States Parties there are often well-documented alternative regimes which might still pass the effective, proportionate and dissuasive sanctions test. For example, in Germany the Criminal Code allows for a wide range of sentencing, for a system of bargaining (*Absprachen*) or penal order proceedings. In terms of the sentencing of legal persons Germany has a system of

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<sup>6</sup> See [www.sentencing-guidelines.gov.uk](http://www.sentencing-guidelines.gov.uk).



administrative fines (consisting of the punitive portion and skimming off of the “financial benefit”) under the Administrative Offences Act.

## *II.2. Immunities or jurisdictional privileges*

Immunity falls into two principal categories: non-liability and inviolability. The first type of immunity is understood usually to apply to members of legislative bodies (e.g., parliamentarians) with regard to opinions expressed or votes cast in the course of performing their functions. Its purpose is to guarantee independence and freedom of expression, affording exemption from all court proceedings, but can also be limited, for example, to criminal liability. The second type of immunity concerns the protection of various categories of public officials, when discharging their duties from legal procedures, such as arrest, detention and prosecution, as well as, in some countries, even from police investigation and the use of special investigative techniques.

While most States Parties regard immunities and jurisdictional privileges for senior public officials, such as members of the legislature, as a necessary means to safeguard the functioning of State institutions, immunities can create difficulties as they can appear to render public officials effectively above and beyond the reach of the law. It is not unusual for immunity from prosecution to be perceived as the main cause for increased corruption levels as investigations into high-level corruption may be significantly impeded by claims of political immunity. In view of such implications, several States around the world have amended and are to amend their immunity rules.

Article 30 requires consideration of ways to strike an appropriate balance between any immunities or jurisdictional privileges on the one side and the possibility of effective law enforcement on the other. All forms of immunities or jurisdictional privileges share a common core as they make exceptions from criminal law provisions or criminal law proceedings for certain persons or groups of persons. States Parties may regard such laws as exceptions from equality before the law which have to be justified.

States Parties may wish to bear in mind that the article follows a “functional” notion of immunities or jurisdictional privileges. In other words, immunities or jurisdictional privileges attach to the office, not the office holder. Accordingly, States Parties may consider that balanced and hence legitimate immunities and other privileges are only those which are necessary means to safeguard the functioning of institutions of the State. Consequently, States Parties may take into account a number of aspects in order to provide for an appropriate balance between immunities or jurisdictional privileges and the possibility of effective investigations and prosecution:

- States Parties may wish to draw attention to the list of persons enjoying immunities or other privileges and consider if the balance may require a restricted list of privileged public offices and public functions. In general, States Parties may wish to take into account that immunities and jurisdictional privileges are designed to allow the office holder to act

without fear of legal consequence. In this case, they may wish to follow those States which grant a limited immunity which does not cover corrupt or otherwise criminal behaviour whether conducted in a private or official capacity. Thus, States Parties may consider applying an immunity rule or a jurisdictional privilege by evaluating whether the granting of immunity or a jurisdictional privilege is essential to assure the execution of the public office or function in question.

- According to the functional notion of immunities or privileges, States Parties may consider applying immunities and jurisdictional privileges only with regard to acts committed in the performance of the public official's duties, and only where the official has performed the roles and responsibilities of that office under the law. Moreover, States Parties may consider that immunities or jurisdictional privileges should only be granted during the time a public office or a public function is performed. Consequently, immunities and jurisdictional privileges should not extend to acts or omissions committed after the public official has left office or has stopped performing public functions. Correspondingly, immunities and jurisdictional privileges are not in an appropriate balance with the necessity of law enforcement when former office holders enjoy privileges in proceedings that take place after the person has left office. Even in cases in which such proceedings relate to deeds committed during the time of holding office, the person should face equal rights and duties like any other citizen.
- States Parties may wish to consider laws or legal guidelines which specify the necessary conditions and procedures of when and how to lift immunities. With regard to these laws or guidelines, States Parties may wish to take into account the following aspects and models:
  - Laws and guidelines to specify the grounds to waive immunities must not allow for politically motivated discretion. States Parties may wish to consider specifying that the commission of corruption offences would constitute a legal reason for the lifting of immunities or privileges.
  - States Parties may bear in mind that proceedings to determine whether immunities would be lifted should be designed in a way that enables expeditious decisions in order to prevent the suspect from escaping or obstructing the investigations.
  - States Parties should consider avoiding possible conflicts of interests in the decision-making to waive immunity.
  - In circumstances where it is not possible to lift the immunity or privilege States Parties may consider liaising with foreign jurisdictions who may be in a position to undertake some level of

criminal or civil action against the individuals for possible offences committed in that jurisdiction.<sup>7</sup>

- States Parties may wish to consider appropriate rules that enable prosecution and adjudication subsequent to the tenure of office. Most importantly, States Parties may consider suspension of the lapse of time set for statutory limitations during any tenure of office. States Parties that do not provide for a lifting of immunities during the time of holding office may consider this as an appropriate way to meet the balance required by article 30.
- Finally, States Parties may take into consideration that immunities or jurisdictional privileges applying to one person do not frustrate prosecution and adjudication of cases involving other persons implicated in corruption.

### *II.3. Discretionary legal powers*

Article 30 requires States Parties to provide for a maximum of effectiveness of law enforcement measures with due regard to the need to deter the commission of corruption offences whenever discretionary legal powers are exercised. In this sense, the guiding principle should be that those involved in the policymaking and subsequent drafting of legislation should strive to ensure as efficient, effective and transparent a mechanism as possible reflecting the realistic demands of that State. States Parties could maximize the deterrent effects if they would advise their law enforcement authorities that the investigation and prosecution of corruption offences are the norm, while the dismissal of proceedings are an exception to be justified. However, States Parties may take into consideration the resources of law enforcement bodies. Thus, developing countries with limited resources may wish to focus on major cases, for example those with the involvement of high-level public officials.

In some States Parties laws or guidelines prescribe in which manner a prosecutor should execute his discretionary powers. The laws or guidelines that inform such decision-making should be made publicly available. Some of these laws or guidelines, however, include clauses according to which a prosecutor may abstain from prosecuting when prosecution would not be in “the public interest”. In such circumstances, States Parties may consider either to avoid such general terms or, if they choose to include such broad discretion, they may wish to qualify it through publicly stated criteria so that it is evident what factors have been taken into account to reach such a conclusion. Therefore, States Parties may wish to consider requiring that a prosecutor record his or her decision to dismiss, or not pursue, a case in order to enable appropriate internal or external review. Further, States Parties may regard it as a good way to guarantee transparency and checks and balances by requiring prosecutors to inform the persons whose

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<sup>7</sup> See the experience of the Metropolitan Police in London and their arrest of serving Nigerian State Governors for suspected money-laundering in the United Kingdom – <http://news.bbc.co.uk/1/hi/world/africa/4462444.stm>.

complaints have initiated the case about the outcome of investigations and the decision whether to prosecute. States Parties may wish to take notice of several models of safeguarding such decisions.

- States Parties may wish to take into consideration that several States have experienced undue political influence exercised by superior authorities such as the Director of Public Prosecutions, an Attorney-General or Minister of Justice, especially in relation to politically sensitive cases. Moreover, States Parties may wish to take notice of the fact that undue influence on a prosecutor's decision can be enabled by the mere obligation to report to a superior authority before starting investigations or prosecution. Thus, States Parties may wish to evaluate whether there is a necessity to provide for such prerequisites and conditions for investigation and adjudication or even consider their removal for all cases where such authority is not legislatively defined.
- Those States Parties which, for one reason or another, provide for superior's instructions in view of a particular case may regard transparency and impartiality as indispensable. In order to achieve transparency and impartiality, States Parties may require that instructions with regard to a specific case have to be given in written form, thus enabling a review. States Parties may also consider enabling an external supervision of such decisions. With regard to that, they may provide for public access to such information or allow a judicial review on complaint, for example, of the harmed person or institution or the person who has reported the case.

#### *II.4. Decisions on release pending trial or appeal*

The article requires States Parties to provide for appropriate conditions under which a defendant can be free pending trial or appeal. States Parties may regard the provision of bail with legally justified conditions as an appropriate means to ensure attendance at subsequent criminal proceedings. However, States Parties may take into consideration that persons who have committed a corruption offence may have significant financial resources at their disposal which may facilitate a defendant to flee the jurisdiction, especially in cases in which law enforcement bodies have not been able to freeze or confiscate proceeds of the crime or the property used to commit the crime, or where there is a possibility of intimidation of witnesses, interference with evidence, and so on, and the obstruction of justice when an offender is released during a continuing investigation or a pending trial. Courts may also wish to consider imposing appropriate conditions restricting the individual's liberty or freedom of movement. The measures imposed as conditions of the granting of bail may involve, for example, a requirement to report to law enforcement agencies on a regular basis, the handing in of all relevant travel documents including passports (although it is important to bear in mind that some individuals may have access to a number of passports and so a declaration of all passports and travel documents may be a wise condition to impose) and conditions not to contact

named witnesses. In serious cases, States Parties should reserve the right, as in other criminal cases, to remand individuals to custody pending trial.

### *II.5. Early release or parole of persons*

Article 30, paragraph 5, of the Convention obliges States Parties to take into account the gravity of the offences concerned when considering the early release or parole of persons convicted of such offences.

In order to avoid frictions with the individual and social effects of punishment, an effort should be made to ensure that such measures are applied in balance with the gravity of the crime.

While many States Parties provide for the possibility of early release/release on parole, others have moved away from the parole system, preferring a “true sentence” or a precisely determined sentencing system. Especially in a situation in which citizens doubt the dissuasiveness and effectiveness of sentences which are reduced, the “true sentence” system could be an option for regaining the confidence of the society in the effectiveness of law and law enforcement. However, again any such considerations should take into account the need to respect human rights and the possibly adverse reactions of a system where parole is never an option for convicted individuals.

### *II.6. Removal, suspension or reassignment of office*

Caution is needed in order to avoid that such a provision becomes a useful instrument to immobilize or neutralize persons considered a threat (e.g., political competitors, accused falsely of corruption in order to prevent them to run for an office) or considered “too honest”. This is unfortunately not uncommon and the risk has to be acknowledged and taken into account by policymakers.

Even the provision suggested by the consultant to introduce a provision in the contract of staff that stipulates the automatic suspension from office, can become a dangerous boomerang if not accompanied by certain safeguards, such as the need to ensure that the suspects are sufficiently substantiated, in order to avoid that this provision becomes an instrument of blind inquisition.

States Parties have the obligation to consider whether to establish procedures which provide for the removal, suspension or reassignment of public officials accused of a corruption offence. Such measures may relate to the launch of an investigation and extend throughout its duration. They may serve to prevent the accused from obstructing the investigation by influencing or intimidating witnesses, as well as tampering with or destroying evidence. In addition, those measures may be appropriate to thwart misconceived “esprit de corps” which can be an obstacle for investigations. The measures contemplated in this article should not lend themselves to politically motivated reprisals and should not prejudice the principle of presumption of innocence of the public official in question.

## *II.7. Disqualification*

Article 30, paragraph 7, of the Convention obliges States Parties to consider establishing procedures for the disqualification from holding public office or holding office in an enterprise owned in whole or in part by the State after conviction for a corruption offence. States Parties may take into account that the measures are appropriate ancillary sanctions as an essential component of public office is trust and integrity. States Parties may also bear in mind that such measures may be effective means to deter corrupt behaviour and prevent corruption in the future by sending a clear signal of determination in fighting corruption to other public officials and to the public. On the other hand, there will be a need for States Parties implementing such measures to consider carefully whether the disqualification should be on a temporary or a permanent basis. Such a decision may reflect the gravity of the offence for which the individual was convicted.

States Parties may wish to consider applying the term “enterprise owned in whole or in part by the State” according to their national rules defining which enterprises shall be regarded as “public”.

## *II.8. Reintegration*

As mentioned above, article 30, paragraph 10, of the Convention indicates that proportionate criminal and ancillary sanctions are required. The need to promote the reintegration of convicted persons into society follows from the principle of proportionality.

States Parties may consider the paragraph as an element reflecting the overall thrust of the article in favour of striking an appropriate balance between punishment and rehabilitation. Moreover, States Parties may consider that the provision on reintegration addresses a further dimension to sanctions in that States Parties, in addition to the normal provision for supervised release, may resort to sentences that involve integrative conditions, such as mandated community work or voluntary work which applies the competences of public officials for the benefit of society.

## **Article 31: Freezing, seizure and confiscation**

*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.*

## **I. Overview**

Article 31 complements article 23. While the latter deals with “who”, this article addresses “what” and “how”. Confiscation – the permanent deprivation of property by order of a court or other competent authority, as defined by

article 2 (g) of the Convention – is the most important legal tool to deprive offenders of their ill-gotten gains. The regime promoted by the Convention is organized around the concept of the confiscation of “*proceeds of crime*,” defined by article 2 (e) of the Convention as “*any property derived from or obtained, directly or indirectly, through the commission of an offence.*”

The confiscation of the proceeds of crime should be differentiated from other types of confiscation already known by most legal systems: the confiscation of the instrumentalities of crime and the confiscation of objects of crime. Although these three types of confiscation are required by article 31 (1), confiscation of the proceeds of crime is the centrepiece of this new regime. Article 31 also establishes the minimum scope of the confiscation of the proceeds of crime in paragraphs 4, 5 and 6. As a complementary measure, paragraph 8 recommends that States Parties consider reversing the burden of proof in order to facilitate the determination of the origin of such proceeds, a concept already applied in several jurisdictions – but which needs to be distinguished from a reversal of the burden of proof regarding the elements of the offence which is directly linked with the presumption of innocence.

Notwithstanding these minimum requirements, States Parties still have a range of policy options on how to implement this system in terms of:

- Whether to give pre-eminence to an “object-based confiscation system,” as opposed to a “value-based confiscation system”;
- Whether to provide for pre-eminence to a civil-based confiscation system in addition to a criminal-based confiscation system;
- Whether or under what circumstances the “confiscation of proceeds of corruption” should be considered a criminal sanction as opposed to a reparative or restorative measure, and;
- Whether to introduce or accentuate to in rem procedures as opposed to in personam procedures.

A vital complement of the policy of depriving corrupt offenders from the proceeds of their illegal actions is a system of preliminary measures to seize, freeze or otherwise immobilize property for the purposes of confiscation. Paragraph 2 requires States Parties to implement such measures while paragraph 3 requires implementing systems for administering such property until a court or other competent authority decides its fate.

Article 31 also requires specific measures for two other important elements of the confiscation regime: international cooperation (para. 7) and the protection of third-party rights (para. 9).

## **II. Types of confiscation**

Article 31 (1) requires States Parties to adopt the necessary measures to enable two different types of confiscation:



(1) (a) – confiscation of the proceeds of crime;

(1) (b) – the confiscation of the instrumentalities of crime.

(1) (b) refers to “property, equipment or other instrumentalities” used in or destined for use in offences established in accordance with this Convention.

The theory behind the confiscation of instrumentalities of crime is that the objects have been misused in a harmful way for society and therefore the State must impede this from happening again. It physically associates the objects used to commit the crime with the harmful results it produced. The confiscation of the instrumentalities of crime is therefore a punitive measure in nature, linked to the conviction of the defendant that could only be adopted in personam, as the defendant is – usually in an ancillary fashion – punished with deprivation of his/her “misused” property.

The concept comprises also objects needed to undertake the criminal behaviour – whether directly, such as documentation, templates, software, or indirectly to facilitate the conduct, such as fake passports etc. Such objects are usually destroyed, which shows that the theory underlying the confiscation of such objects is of a preventive nature: such objects are considered vulnerable to misuse and therefore there is a specific interest in destroying them. Further, this type of confiscation has wider protective benefits and is not a punitive matter; thus, drugs are not forfeited to punish the defendant but to protect society.

By contrast, 1 (a) requires States Parties to adopt measures for the confiscation of the proceeds of crime.

As defined by article 2 (e) and (g) of the Convention, confiscation of the proceeds of crime implies the permanent deprivation, by court order or other competent authority, of property or other valuable benefit derived from or obtained, directly or indirectly, through the commission of an offence.

### **III. Models of confiscation**

The first policy option presented by paragraph 1 (a) refers to the two possible models of confiscation: object confiscation, referred to as the “*proceeds of crime derived from offences established in accordance with this Convention*” and value confiscation, referred to as “*property the value of which corresponds to that of such proceeds.*” This distinction concerns the way in which property rights are affected. Object confiscation constitutes a transfer of property to the State, while value confiscation consists of an imposition to pay a certain amount of money, usually equivalent to the undue advantage or benefit from criminal conduct, in whatsoever form it is given or received.

Object confiscation systems are built upon the relationship between the offence and the property. The same model operates for the confiscation of the instrumentalities of crime. A number of considerations must be taken into account:

- Object confiscation systems operate regardless of who is the actual possessor of the property, and this needs to devote special attention to protection of bona fide third parties – the subject of paragraph 9, of the article.
- A pure object confiscation system might lead to unjust consequences, as property that has been consumed or spent by the time the confiscation order is made, or property that cannot be traced, will escape confiscation.
- As it is usually enforced in rem, object confiscation may be adjusted to both criminal and civil procedures, and while some jurisdictions consider any confiscation of the proceeds of crime to be of a punitive nature, some others have deemed that confiscation of the proceeds of crime based on civil procedures, and enforced and based on object confiscation models, should be considered to be of a restorative nature.

Finally, in implementing object confiscation systems, one may consider the case in which the offender succeeds in concealing the proceeds within a corporate vehicle or a legal entity. As he/she will no longer be technically in possession, whether the procedure is based on criminal or civil law will be of most relevance in those legal systems where corporate criminal liability is narrow or even non-existent.

Such difficulties might be overcome through value confiscation systems. Unlike object confiscation systems, which are based on the relationship between the property and the offence, value confiscation systems of the proceeds of crime are based on the idea that “crime should not pay.” Therefore, it does not consist of a transfer of property, but of an order (usually a court order) to pay the amount of money equivalent to the value of the proceeds of the crime.

As a starting point, value confiscation systems can be enforced against money or assets that may not be directly connected in any way with criminal activity, but rather acquired with the criminal proceeds. Therefore, there is no need to trace the exact assets obtained through the offence but rather to determine what value may have been gained and confiscate that value from any available asset belonging to the offender or over which the offender exercises control.

Another important practical difference with object confiscation systems is that when using value confiscation systems there is no need to be concerned with direct or indirect proceeds, or with intermingled legal and illegal assets. Once the value to be confiscated is determined, the origin of the property against which it is enforced does not matter.

Third, as value confiscation only operates against property owned by the offender – operating in personam – it will never affect rights acquired after the offence by bona fide third parties. Of course, the obvious drawback of the system is in cases where the offender has transferred all of his/her property to other natural or legal persons and has no property under his/her own name. It can be argued, however, that any person acquiring such property is likely to be committing a money-

laundering offence, the proceeds of which are subject to confiscation as proposed in article 23. Therefore, the property could still be confiscated under a value-based system.

Some jurisdictions have given pre-eminence to the value confiscation system, while most jurisdictions belonging to a civil law legal tradition consider value confiscation systems as a subsidiary alternative to object confiscation systems. States Parties may wish to consider to adopting both systems and using them alternatively, as is more convenient in any specific situation.

#### **IV. What to consider as proceeds of crime for purposes of confiscation**

Paragraphs 4, 5 and 6 of article 31 outline the minimum scope of measures to implement the article.

##### *Paragraph 4*

This refers to the situation in which proceeds have been transformed or converted into other property. In this case, States Parties are required to subject to confiscation the property transformed or converted, instead of the direct proceeds.

Given that offenders will part as soon as they can with the primary proceeds of crime in order to obstruct investigative efforts to trace such property, the provision is of major relevance when applying an object-based model of confiscation, in order to avoid conflicts with potential bona fide third parties and facilitate investigative and prosecutorial activity. The provision reflects the same theory that lies behind a value-based model of confiscation: what matters is not to allow the offender to enrich him or herself by illegal means.

The provision follows the so-called theory of “tainted property,” whereby, as tainted property is exchanged for “clean property”, the latter becomes tainted. While this may raise issues about receipt in good faith, countries have developed requirements, whereby legislation gives primacy to the irrevocability of the “taint” irrespective of the iterations of transfer, receipt and conversion.

##### *Paragraph 5*

This refers to the situation where proceeds of crime have been intermingled with property from legitimate sources. States Parties are required to subject to confiscation any such property up to the assessed value of the proceeds.

As stated above, both situations may pose a problem when the confiscation system operates under an object confiscation system, which requires a determination of property obtained through the offence. When operating a value confiscation system these situations do not pose any problem.

##### *Paragraph 6*

This requires States Parties to subject to confiscation not only primary but also secondary proceeds of crime. Primary proceeds are those assets directly

obtained through the commission of the offence – e.g., a bribe of \$100,000. The secondary proceeds, by contrast, refer to benefits derived from the original proceeds, like bank interest or the amount increased as a consequence of investment. In this regard, the Convention requires States Parties to provide mandatory confiscation for both the primary and secondary proceeds.

Though the definition of the proceeds of crime given in article 2 (g) includes property “obtained through a crime” and property “derived from a crime,” the paragraph explicitly refers to “[I]ncome or other benefits” derived from the proceeds of crime and applies to benefits coming from any of the situations referred into paragraphs 4 and 5 – property transformed or converted and intermingled property. In other words, any appreciation in value of the proceeds of crime, even when not attributable to any criminal activity must also be liable to confiscation.

## **V. Preliminary measures for eventual confiscations**

In order to successfully deprive offenders of the fruits of their illegal actions, paragraph 2 of article 31 requires States Parties to adopt such measures as may be necessary to identify, trace, restrain, seize or freeze property that might be the object of an eventual confiscation order.

Regarding identification and tracing, States Parties may wish to ensure that law enforcement bodies and the competent administrative and judicial authorities are legally empowered to monitor property or rights that are susceptible to confiscation. When establishing the measures to identify assets at the domestic level, authorities must not only be equipped with the necessary investigative powers and access to documentation, but also have access to existing databases for banking, real estate, vehicles, and legal persons. When databases do not exist, States Parties should seriously consider their creation in order to facilitate evidence gathering in a timely fashion. The power to identify and trace property that is subject to confiscation should be considered a basic investigative tool for all law enforcement agencies. The agency enforcing and administering reporting obligations should be in the position to identify and discover potential assets for confiscation, and to make that information available to law enforcement agencies.

In addition, it is advisable that law enforcement officials develop methods for producing evidence about ownership concealed through close associates, family members, corporate vehicles or nominees. Different types of collaboration in exchange of a reduction of the sanction have proved a very useful method for dealing with “figureheads”, as nominees may be charged with concealing or laundering proceeds of crime.

Regarding restraint, freezing and seizing, States Parties may especially consider the following situations:

- Competent authorities should be empowered to adopt provisional measures at the very outset of an investigation. To be effective, restraint, seizure or freezing measures should be taken ex parte and without prior notice.
- Where judicial authorization is required – which is the case of measures impinging on fundamental rights – the procedure should be fashioned in such a manner as not to delay the authorization and frustrate the procedure. Special attention should be paid to the timely adoption of measures when they need to be coordinated with other jurisdictions.
- States Parties must consider the advantages of creating a different system for freezing assets involved in suspicious transaction reports, issued in compliance with anti-money-laundering regulations. Apart from the traditional judicial authorization, there are two other options to be considered: administrative and automatic freezing systems. Under an administrative freezing system, the agency receiving the suspicious report – e.g., the FIU – is empowered to decide upon a provisional freezing, and its decision is subject to judicial confirmation, which must be given within a short period of time. In automatic freezing, the gatekeeper is obligated to freeze the assets involved in the transaction at the time of reporting, without tipping off its client, and for a short period of time within which a competent authority must decide whether to keep the assets frozen or not. In both cases, the decision is moved forward in order to increase efficiency and allow for timely freezing without compromising any fundamental rights. An intervening option may be the requirement that, as a result of a suspicious transaction report, the FIU would allow normal account activity but require the reporting institution to periodically report transaction activity in case restraint or freezing is precipitated by other events (prior warning of an investigation, for example).
- States Parties with both object and value confiscation models should ensure not only that property “involved in,” “traceable to,” or “related to,” the offence can be seized, but also other property aimed at securing assets for the execution of a money judgment is covered by freezing provisions. By the same token, States Parties may consider the possibility of freezing “unrelated” assets belonging to the defendant when property “related” to the offence is held in a foreign jurisdiction.

Paragraph 7 of article 31 requires States Parties to empower their courts to make bank, financial or commercial records available when a foreign authority requests them for purposes of seizing, freezing or confiscation.

Paragraph 3 of article 31 requires States Parties to adopt the necessary measures for regulating the administration of frozen, seized or confiscated property. There are several issues to be considered in this regard, especially in jurisdictions where criminal procedures may be prolonged:

- First, as the types of property that might be frozen vary considerably, the system should ensure that professionals skilled according to the type of property might be appointed for management and administrative purposes.

This would especially be necessary in more complex cases, as for example where an entire business is the object of restraining measures. In the case of money, transferring it to an account held by the competent agency should suffice. In the case of real estate, States Parties may consider whether restraining any transfer but leaving both the use and the maintenance with the owner, will suffice.

- Second, the system must prevent the abuse of frozen assets through appropriate checks and balances and oversight, as well as by means of dissuasive and proportionate sanctions in order to avoid even greater costs to the State. The administration of assets may be costly in itself, and the procedure should also envisage management forms that do not create unaffordable costs for the State.
- Third, States Parties may wish to consider under what circumstances, if any, the owner of the frozen or seized property might be eligible for compensation or damages, if the property ultimately is not confiscated.

## **VI. Reversal/shifting of the burden of proof**

Paragraph 8 recommends that States Parties consider the possibility of shifting the burden of proof in regard to the origin of the alleged proceeds of crime.

This recommendation should be distinguished from a reversal of the burden of proof with respect to the constituent elements of an offence. Jurisdictions that have successfully adopted such a special technique have usually embedded it in specific confiscation procedures which take place after the conviction.

When considering this recommendation, States Parties may wish to take into account the following:

Some countries have enacted legislation of this type, shifting the burden of proof with respect to proceeds derived from drug offences, organized crime, and money-laundering by stating that when a person is convicted of any of these offences, the confiscation of properties held by the person is mandatory if the offender cannot explain the source of the assets and the assets are not commensurate with his/her income or economic activity. In this case, it is not necessary to prove that the assets are derived, directly or indirectly from an offence; assets indirectly derived from such illicit proceeds or even other kinds of assets (except when they belong to third parties) could be forfeited if the convicted person cannot justify their origin.

Other countries foresee automatic forfeiture, which can take place in cases where a person has been convicted of drug crimes, money-laundering, terrorism, trafficking in persons and fraud. The relevant provisions create a refutable presumption that any property subjected to a restraining order – any property the convicted person owns or controls – is the proceeds of crime. Upon conviction, to exclude such property from forfeiture, the defence is required to demonstrate the lawful origin of the property. If no evidence is given to prove that the

property was not used in, or in connection with, the commission of the offence, the court must presume that the property was used in, or in connection with, the commission of the offence and forfeiture occurs.

A variation of this approach is taken by some countries. Though they do not allow a reversal of the burden of proof, once the prosecution has proved the defendant's guilt beyond a reasonable doubt, the extent of the forfeiture can be established by a preponderance of the evidence standard. Case law has intermittently admitted "net worth" evidence as an indirect method of proving the origin of the proceeds. In practice, the net worth method implies the establishment of a difference between the lawful income and the value of the property owned by the offender, excluding all reasonable explanations, such as inheritance, gifts etc.

In other countries, the penal code establishes a presumption according to which all assets belonging to a person convicted under an organized crime offence are presumed to be under the control of the criminal organization. The prosecution then does not have to prove the origin of the assets. The fact that the property is assumed to be under the control of a criminal organization is sufficient for it to be tainted by association, even if it has been obtained legally. The owner can rebut the presumption, but he/she bears the burden of proof.

An "all crimes" system of predicate offences for the purposes of money-laundering should facilitate the implementation of the recommendation of the article.

Finally, in addition to the sui generis procedures that accept non-criminal standards of evidence after the conviction is reached, a number of jurisdictions have also adopted civil procedures of confiscation that operate in rem and are governed by a standard of the preponderance of evidence.

## **VII. Protection of bona fide third parties**

Paragraph 9 requires States Parties not to construct any of the provisions of that article as to prejudice the rights of bona fide third parties. The Convention does not, however, specify to what extent third parties should be provided with effective legal remedies in order to preserve their rights. Thus, in implementing this provision, States Parties may wish to take into account that some jurisdictions have opted to establish a specific procedure for third parties claiming ownership over seized property, in which the prosecution evaluates whether the claimant(s):

- Have acted with the purpose of concealing the predicate offence, or are implicated in any of the ancillary offences;
- Have legal interest in the property;
- Acted diligently according to the law and commercial practice;

- If the property requires a public registration of the transaction or any administrative procedure, such information has conducted (e.g., real estate, or vehicles);
- If the transaction was onerous, whether it followed real market values.

## **Article 32: Protection of witnesses, experts and victims**

*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.*

### **I. Overview**

The Convention regards the protection of witnesses, experts and victims as an important complement to the criminal law provisions such as the offence of obstruction of justice.

Article 32 includes both mandatory and non-mandatory provisions. As a mandatory provision article 32 (1) requires that each State Party must take appropriate measures in accordance with its domestic legal system and within its



means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with the Convention and, as appropriate, for their relatives and other persons close to them. Paragraph 2 specifies certain measures that States Parties may envisage in order to provide for the necessary protection of witnesses and experts as required by paragraph 1. While paragraph 2 (a) includes a provision on procedures for the physical protection against intimidation and retaliation, paragraph 2 (b) focuses on evidentiary rules ensuring the safety of witnesses and experts with regard to their testimony.

Protection measures can be classified in two categories: first, the procedures for the physical protection of such persons and evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means; secondly, and to the extent necessary and feasible, the State should offer longer-term protection up to and during any trial, as well as the possible subsequent relocation of witnesses and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons.

Paragraph 3 is a non-mandatory provision requiring States Parties to consider implementing cross-border witness protection through relocating victims who may be in danger in other countries.

Paragraph 4 requires States Parties to apply the provisions of article 32 to victims insofar as they are witnesses.

Finally, article 32, paragraph 5, requires States Parties to enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders. This provision is relevant in cases in which a victim is not a witness.

## **II. Practical challenges and solutions**

States Parties should give particular consideration to the following terms:

- Witnesses and experts, relatives and other persons close to them;
- Effective protection from potential retaliation or intimidation;
- Physical protection of such persons, including to the extent necessary and feasible, relocating them and non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
- Evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means;

- Agreements or arrangements with other States for the relocation of witnesses.

### *II.1. Witnesses and experts, relatives and other persons close to them*

States Parties would need to consider that the Convention does not define the term “witness”. Thus, the procedural law of the States Parties would determine which persons are to be regarded as witnesses. However, States Parties should take into consideration that article 32 limits the scope to witnesses who give testimony concerning offences established in accordance with the Convention. However, the article does not restrict the scope of its provisions to specific stages of criminal proceedings.

This being so, States Parties may wish to take into consideration the following three models of implementation:

- First, States Parties may consider implementing the paragraph in a manner according to which only a person that actually gives testimony has to be protected. Accordingly, their protection measures would only cover those persons who testify either in trial or in court hearings that are part of the investigative process. However, States Parties may bear in mind that the status of a person may vary during procedures while its endangerment can be constant. Thus, there could be a need to protect a person at any stage of investigations even when it is still uncertain whether the person will actually (need to) testify.
- Second, States Parties may consider a broader implementation having in mind that the rationale of the article, that is, protecting persons who are endangered by intimidation or retaliation because of their willingness to cooperate. Correspondingly, States Parties may consider including those persons who are willing to give testimony at a later stage of proceedings. States Parties may also consider protecting these persons, at least until it becomes apparent that they will not be called upon to testify.
- Finally, States Parties may consider an even broader implementation to include those who give or identify key evidence, such as incriminating documentation, but do not testify in court.

States Parties should consider taking a broad interpretation of the term “expert”. According to such an interpretation, States Parties may regard including all persons that can provide law enforcement bodies and courts with expertise whether during an investigation or as witnesses in court. They should be afforded the same range of protection measures applied to witnesses. Finally the definition of relatives or people close to the witness should normally mean immediate family but, again, a broad implementation and hence a generous inclusion of persons who are close to the witness or expert may be preferable. States Parties should bear in mind that quite often the treatment of relatives and friends may be a crucial factor when a witness has to choose between cooperation and intimidation.

## *II.2. Effective protection*

States Parties may consider implementing comprehensive witness protection programmes as the most effective means to ensure the safety of witnesses and experts. In this regard, States Parties should bear in mind that some protection measures (for example, the change of name) may require legislation and informal arrangements. Where programmes exist, States Parties should consider adjusting such programmes to the particular importance of witnesses for the successful prosecution of corruption offences.

States Parties should bear in mind that possible ways of intimidation and retaliation are manifold. Thus, when deciding on admitting a person in a witness protection programme, they may not only focus on physical threat. Rather, they should consider applying a wider scope. States Parties may include several additional aspects for their law enforcement agencies to decide whether to protect a person or not. Such aspects may, inter alia, be the likelihood that the defendants or their associates would carry out the threat as well as the duration of the threat that could persist long after the investigation and trial have come to an end. Moreover, they should take into consideration whether an organized criminal group is involved, as in such cases the giving of evidence against members with status could lead to significant or continuing forms of retaliation.

As witness protection programmes are expensive and labour-intensive, States Parties may consider providing for a diversified frame of protection measures. States Parties may therefore consider that a full witness protection programme can only be available to a limited number of witnesses and those witnesses have to be central to a successful conviction which is not amenable to other forms of investigative or surveillance techniques, or of presenting evidence. States Parties may bear in mind that the limited access to a comprehensive witness protection programme does not mean leaving other witnesses without any protection. In fact, possible ways of witness protection range from short-term physical security to long-term relocation for a witness and their family. A risk assessment therefore should provide for adequate protective arrangements in any given case. While comprehensive witness protection programmes are particularly intended for long-term protection against retaliation, protection measures in other corruption cases may concentrate on pretrial intimidation and thus would be more properly addressed by other means to physically safeguard the witness than complete witness protection measures.

With regard to the implementation of witness protection in a specific case, States Parties may wish to pay attention to the fact that some States provide for the possibility of a memorandum of understanding or protocol between the State and the witness which regulates the protective measures to be taken. Such memorandum of understanding or protocol may enhance the effectiveness of the protection and may form a good incentive for cooperation. In any case, such memorandum of understanding or protocol help in providing clarity and in avoiding possible disagreements regarding the scope of protection. UNODC has developed a set of materials regarding witness protection, including a manual on

“Good practices for the protection of witnesses in criminal proceedings involving organized crime”, which is available on its website.<sup>8</sup>

### **III. Agreements or arrangements with other States**

Depending on its experience on matters relating to witness protection, a State Party may conclude that ad hoc agreements or arrangements with other countries for the relocation of witnesses would be sufficient. However, States Parties may wish to consider that the development of an individual arrangement may take time that is not at its disposal in a continuing criminal proceeding. An approach to deal with this issue may be the development and conclusion of transnational agreements or arrangements which do not only apply for a single case, but serve as a framework for a number of cases that may occur.

States Parties may also consider the development of cooperation agreements or arrangements on a “family of countries” basis as the best way to implement a cross-border witness protection programme. Thus, States Parties would be able to use such States as safe havens that are geographically conterminous or which share common linguistic, economic and cultural characteristics.

### **IV. Victims**

In a number of cases, not all victims would be called to give evidence and in other cases, those who may be victims may extend beyond those who have been subject to direct loss or damage. In assessing the severity of a case, it is possible that the quantum of damage may be addressed by enabling the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings, and in particular after the decision on guilt and before sentencing. This provision is relevant in cases in which a victim is not or cannot be heard as a witness and hence would not be able to present views and concerns since criminal proceedings are brought against the perpetrator by the State.

### **Article 33: Protection of reporting persons**

*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.*

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<sup>8</sup> <http://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf>.

## I. Overview

Article 33 is a non-mandatory provision. However, States Parties may wish to keep in mind that the provision complements the article dealing with the protection of witnesses and experts. Article 33 is intended to cover those individuals who may possess information which is not of such detail to constitute evidence in the legal sense of the word. Such information is likely to be available at a rather early stage of a case and is also likely to constitute an indication of wrongdoing. In corruption cases, because of their complexity, such indications have proved to be useful to alert competent authorities and permit them to make key decisions about whether to launch an investigation.

The Convention uses the term “reporting persons”. This was deemed to be sufficient to reflect the essence of the intended meaning: while making clear that there is a distinction between the persons referred to with this term and witnesses. It was also deemed preferable to the term “whistle-blowers” which is a colloquialism that cannot be accurately and precisely translated into many languages.

## II. Practical challenges and solutions

### *II.1. The policy framework*

In general terms, States Parties will need to develop a policy framework which will address:

- Who and which areas, activities, sectors, and entities are covered;
- Who may report;
- To whom the report would be addressed;
- What format would the report have and with what information;
- What constitutes unjustified treatments;
- What types of protection are to be offered to the source of the information;
- And what assurances would be foreseen to deal with malicious or vexatious allegations.

The practical issue regarding implementation of article 33 is to strike the appropriate balance between the rights of the target of the information or allegations and the necessity to protect reporting persons. This balance is to be found in the context of national law and the situation of each society. Correspondingly, the article allows substantial discretion which enables States Parties to adjust such measures to their national legal system.

## *II.2. Engaging public officials*

Engaging public officials would involve:

- Promoting comprehension of proper conduct – what is right and wrong, at what level, involving whom;
- Emphasizing the need to avoid misconduct; in particular, having the ability of identifying which conduct is wrong;
- Understanding the importance of speaking out; in particular, emphasizing the fact that it is the responsibility of all to report conduct that is wrong;
- Instilling confidence that:
  - Reporting should be regarded in a positive manner;
  - Effective and appropriate action will be taken;
  - The gains will outweigh the cost of reporting; and
  - Protection to the person making the report would be provided.

## *II.3. Engaging the public*

States Parties may wish to bear in mind the importance of promoting the willingness of the public to report corruption. Therefore, they may wish to consider protecting not only public officials, or employees of legal persons, but any person who reports a suspicion of corruption, irrespective of their status. States Parties may also wish to bear in mind that the protection of journalists is of particular importance in so far as they publish stories within the same criteria as stated by the article.

States Parties may wish to provide for “reporting” guidelines which advise the public which authority they should notify of a corruption suspicion and how they should do that. However, States Parties may bear in mind that until the level of confidence among the public reaches sufficiently high levels, reporting may occur outside established procedures.

## *II.4. Reporting to whom?*

States Parties may wish to identify the competent authority or authorities to receive the reports, but also have the capacity to provide the necessary protection. States Parties will need to be aware that a minor report may be the first step in a complex corruption inquiry and thus reporting may become the responsibility of a number of agencies – all of whom will need to respect the State policy and procedures on protection.

Generally, it has been found useful that there should be at least two levels at which reporting persons can report their concerns. The first level should include entities within the organization for which the reporting person works, such as supervisors, heads of the organization or internal or external oversight bodies

created specifically to deal with maladministration within the agency where he or she works.

Reporting persons should also be able to turn to another institution if their disclosures to a first-level institution have not produced appropriate results and, in particular, if the person or institution to which the information was disclosed:

- Decided not to investigate;
- Failed to complete the investigation within a reasonable period of time;
- Took no action regardless of the positive results of the investigation; or
- Failed to report back to the reporting person within a given period of time.

Reporting persons should also be given the option to address second-level institutions directly if they:

- Have reasonable cause to believe that they would be victimized if they raised the matter internally or with the prescribed first-level external body; or
- Have reason to fear a cover-up.

Second-level institutions could be an ombudsman, an anti-corruption agency, or an auditor general.

### *II.5. Criteria for reporting*

The article specifies the conditions for protection to be provided, i.e. that the report was made in good faith and was based on reasonable grounds.

Several items would need to be considered in the application of these criteria. The disclosure must be treated objectively and, even if it proves to be inaccurate, the law must apply as long as the reporting person acted in good faith. It must also apply irrespective of whether the information disclosed was confidential and even if the reporting person may have technically breached confidentiality laws.

Good faith should be presumed in favour of the person claiming protection, but where it is proved that the report was false and not in good faith, there should be appropriate remedies.

Since whistle-blowing can be a double-edged sword, it is necessary to protect the rights and reputation of those against whom reports are made against frivolous, vexatious and malicious allegations. In particular, the law should contain minimum measures to restore a damaged reputation. Criminal codes normally contain provisions penalizing those who knowingly come forward with false allegations. It should be made clear to reporting persons that those rules apply also to them if their allegations are not made in good faith. The burden of proof regarding good faith should not be on the reporting person.

Regarding the criterion of reasonable grounds, States Parties may wish to consider that the application of special protection measures should not be denied solely because the report may have turned out to be incorrect *ex post*. Instead, States Parties may regard adopting an *ex ante* approach. Thus, they may question whether the reporting person had reason to believe that information existed to support a report. States Parties may refer to other existing reporting regulations with more general application or a guide to determine whether a report was based on reasonable grounds.

## *II.6. Protecting reporting persons*

Generally States Parties would need to consider how to determine the form of protection in relation to the identification of the reporting person, the threats such person may face, whether he/she may be asked to obtain more information, whether that person will be required as a witness, what financial or career prospects may be jeopardized and what redress or compensation may be afforded.

Reporting persons may be concerned that they may face a variety of unjustified treatment. Correspondingly, the tools to thwart such treatment are manifold. In general, the measures of protection should be commensurate to the danger, although care must be taken in cases where the reporting person is unaware of the seriousness of the report or of the possibility of subsequent inquiries becoming, as the report is investigated, disproportionate to the initial allegations.

States Parties may wish to consider the feasibility of ensuring anonymity to reporting persons.<sup>9</sup> Where the anonymity cannot be ensured, States Parties may consider whether criminalizing threats, intimidation or retaliation would be an effective way of providing protection to reporting persons.

States Parties may consider implementing provisions and procedures offering appropriate legal protection to reporting persons against the loss of employment, such as the possibility of judicial enforcement of continued employment or civil damages. Moreover, States Parties may bear in mind that reporting persons may face the risk of being professionally discriminated. Consequently, they should consider providing for legal remedies against such forms of reprisal. Measures to protect reporting persons from unfair dismissal must be compatible with the labour laws of the State concerned. In particular,

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<sup>9</sup> Of relevance here is the jurisprudence of the European Court of Human Rights, according to which the maintenance of the anonymity of the witness does not entail infringement of article 6 of the Convention on fair trial “if the handicaps under which the defence laboured were sufficiently counterbalanced by the procedures followed by the judicial authorities” (e.g., questioning the anonymous witness in the presence of counsel by an investigating judge who was aware of the witness’ identity, even if the defence was not) (see *Doorson v. The Netherlands*, Judgement of 26 March 1996, Appl. No. 20524/92, Reports 1996-II, paras. 72-73).



where employers are able to dismiss employees without reason, affording appropriate protection to reporting persons may require exceptions.

Finally, States Parties may wish to consider libel law reform as an important aspect of anti-corruption legislation. This may be particularly relevant to the investigations and reports by journalists.

## **Article 34: Consequences of acts of corruption**

*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.*

### **I. Overview**

Many acts of corruption are committed in order to create or increase economic gain. Corrupt practices are used to facilitate business opportunities, to allow an agreement on favourable conditions in a contract, to obtain favourable administrative acts such as concessions or procurement decisions, to succeed in tenders and to achieve other goals that allow the perpetrator to create business. It is one of the principles set out in the Convention, most clearly in chapter V on asset recovery, that the perpetrator must not benefit from corrupt practices, ensuring that corruption does not pay. However, criminal sanctions may not be sufficient. In order to ensure the consistency of the overall legal system, the condemnation of corrupt practices must be translated into all relevant fields of law: private law, tax law, competition law, administrative law, law of contracts, law of torts, and law of dispute resolution have to contribute to a consistent reaction to corrupt practices. The economic consequences of corruption are often governed by private and administrative law.

Article 34 is in its first part a mandatory provision. However, the article leaves the specific consequences in civil and administrative law to the discretion of the States Parties. The Convention thus requires the measures addressed in article 34 to be in accordance with the fundamental principles of the States Parties' domestic law, and to pay due regard to the rights of third parties acquired in good faith.

### **II. Practical challenges and solutions**

Practitioners will be confronted with the consequences of corruption while acting in various functions. More specifically, the practitioners dealing with administrative acts such as concessions, procurement decisions etc., would face the issue in the legal and administrative review of such acts when it turns out

that corruption had been involved in a previous decision. Participants in private lawsuits on the consequences of corruption would need to handle the question of (in)validity, (un)enforceability or modification of contracts procured by corruption. In addition, the government officials who design anti-corruption strategies for administration and the judiciary would need to take the problem into account in order to allow the respective institutions to be prepared for the legal proceedings where the consequences of corruption become relevant. The tax officials may need to handle cases of tax deductions where expenditures turn out to be disguised bribes.

### *II.1. Types of measures*

The Convention leaves the choice of specific kinds of consequences to the discretion of States Parties.

Practitioners should take into account that the consequences foreseen by article 34 are not criminal sanctions. Therefore, it is likely that there would be different procedural rights involved. For example, the principles *in dubio pro reo* or *ne bis in idem* do not apply to civil and administrative proceedings. On the other hand, other fundamental rights such as the right to property, the right to exercise a profession and the freedom of trade need to be taken into account.

In most jurisdictions, the standard of proof required in civil or administrative cases is lower than in criminal cases. Those acting in proceedings on the consequences of corruption may use this for their case strategy. Where criminal confiscation is not viable because the evidence is not sufficient for a criminal conviction or because of the *ne bis in idem* rule, civil proceedings may still be an option. Those dealing with the consequences of corruption need to be aware of the rules governing a specific case.

### *II.2. Focusing on prevention*

In determining the most appropriate way to apply the measures indicated by the Convention, one key issue is comprehensive documentation of the administrative process that leads to the conclusion of a contract, the granting of the concession or a licence or other similar acts. Documentation should contain guidance on the consequences of the use of corruption in any procedures for such acts, with statements indicating that the act will be the basis for action, and outline the process or legal proceedings that will take place on the evidence of presence of such an act. States Parties may also wish to ensure that all their tender documentation contains appropriately worded statements to that effect and that all those submitting tenders, as well as other bidders for contracts or concessions, sign a declaration not to engage in any act of corruption. The above documentation may also specify that such action may occur at any time during the life of the contract or concession and that a number of consequences may follow, including – depending on the substantive approach of the legislation – proceedings for the rescinding of contracts and the withdrawal of licences and concessions.

States Parties may bear in mind that the exchange of information between law enforcement agencies and other authorities competent for granting licences, concessions and the conclusion of contracts is crucial. Many States Parties have faced the problem that concessions, licences and contracts are granted to corporations and private persons although they have been convicted of corruption more than once, simply because of an absence of cross-jurisdictional information-sharing.

### *II.3. Ensuring that the measures fit with domestic law*

All measures that States Parties apply have to be in accordance with fundamental principles of their domestic law.

In addition to the measures suggested by the Convention, States Parties may consider imposing further consequences such as the withdrawal of subsidies, the cessation of financial support, or bans from tender procedures for a specified period of time. Further, States Parties may wish to think about measures in tax law and competition law, according to the principles of their domestic law.

For more information and analysis on the content and structure of, and the requirements set forth in, article 35 of the Convention, see the relevant chapter of the Legislative Guide for the Implementation of the United Nations Convention against Corruption

## **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.*

### **I. Introduction**

A number of States Parties have established anti-corruption units (ACU) in compliance with the requirements of article 6 of the Convention, bestowing upon them a broad mandate which extends from responsibilities for preventive measures, including education, awareness-raising and coordination, to investigation and prosecution. In other States Parties, such functions are distributed among a number of agencies, with the investigative and prosecutorial functions vested in law enforcement authorities.

The article mandates the need for entities or persons whose core focus must be that of law enforcement, i.e. investigative and possibly prosecutorial functions. The article, however, does not specify any particular institutional shape, although it raises procedural and resource issues necessary to guide States Parties towards the best institutional approach depending on their specific requirements.

Article 36 is a mandatory provision. However, States Parties should bear in mind that the Convention only sets minimum standards, providing for a scope of discretion which enables States Parties to adjust the requirements of the article to specific domestic situations.

### **II. Challenges and solutions**

The issues to be addressed are:

- What type of specialized authority;
- Added value and role;
- Independence and resources.

#### *II.1. What type of specialized authority*

Given the emphasis on law enforcement, States Parties have a choice to establish a special body exclusively in charge of corruption or to provide for

specialized expertise within the existing structures of the police, prosecution offices and/or the courts.

Given this scope of discretion, States Parties may wish to evaluate their domestic situation carefully, since models of institutions cannot be easily imported or replicated, but have to suit the structural conditions of the State in question. Consequently, the first step will be to evaluate the domestic situation comprehensively. This would include the magnitude of the corruption problem on the one side and the resources that are at the disposal of the State on the other. As was indicated in the chapter of the Guide on article 6, there are arguments in favour and against the establishment of new bodies or the concentration of anti-corruption work within a specific agency. States Parties may consider that the advantages of a specific body or bodies referred to in this article may be the impetus to and ownership of anti-corruption efforts, the high degree of specialization and expertise it can achieve, as well as the more efficient work that a dedicated agency can perform. On the other hand, there are possible disadvantages, such as costs, institutional impediments, coordination problems and the potential of diminished returns because of isolation and the perception of undermining of existing institutions already engaged in work against corruption.

Attention is required to the fact that decisions on whether to have one or more bodies would need to be subsequent to the development of a comprehensive national anti-corruption strategy which should address: the legislative framework; reporting arrangements; relationships between competent institutions; the budget provision; prosecutorial and judicial capacity; and the political context.

The development of the strategy, which has been addressed in detail in the part of the present Guide relating to implementation of article 5, should make it easier for policymakers to make informed decisions based on an assessment of which specific forms of corruption are to be given priority. Policy decisions would be whether to invest law enforcement resources in the fight against “high-volume” corruption (such as traffic police or licensed clerks) or “high-value” corruption (such as procurement contracts) or a combination of those. Further, States Parties may wish to evaluate the strengths and weaknesses of their existing law enforcement bodies in terms of their ability to accomplish the required tasks.

States Parties may also wish to consider that article 36 lays emphasis on law enforcement specialization.

States Parties may wish to keep in mind that, according to international experience, one of the strongest motivations behind the establishment of a separate ACU have been perceptions about, or problems with, the independence of existing law enforcement bodies and the public concern about their work. Further, the establishment of a new and separate ACU can signal a “fresh start” in the fight against corruption or can serve to bridge the time until the public has regained confidence in regular law enforcement institutions. Finally, the

establishment of a new and separate ACU may guarantee more clarity in the assessment of progress and the evaluation of successes and failures.

However, the establishment of an ACU is not without negative consequences. Such establishment requires substantial investment. There is also the question of whether new agencies can deliver across a range of functions. Moreover, particularly small and developing countries may wish to give due consideration to the problem of a “brain drain”. Since the creation of a separate body requires a management structure populated by experienced law enforcement specialists, recruiting or reassigning of such people could affect the capacity of other law enforcement agencies. Most importantly, States Parties may take into account that the concentration of persons, powers and competencies may hamper performance due to inter-agency competition. Many of the advantages of a separate ACU with a law enforcement mandate, such as specialization, expertise and the necessary degree of autonomy, can be achieved by establishing dedicated units within existing law enforcement agencies with the resources required to improve their capacity.

## *II.2. The added value and role of specialized authorities*

States Parties should assess carefully the added value and role of specialized authorities, whether within an independent entity or within a law enforcement agency. To be effective in contemporary investigations of serious and complex cases of corruption and financial crime, specialized authorities would require the appropriate substantive and procedural legal framework. That framework should afford specialized authorities specific contemporary powers on disclosure of documents or other pertinent information and evidence; access to financial reporting; restraint of assets and confiscation. To fulfil their role, specialized authorities would also require powers regarding access to financial and criminal intelligence, criminal investigation, prosecution and civil asset recovery.

Reform of the legislative framework in connection with the establishment or empowerment of specialized authorities against corruption and perhaps also other financial crimes would need, as far as practicable, to be planned as part of a comprehensive criminal justice reform effort. Piecemeal reform directed to one specific type of offence can easily lead to a waste of scarce resources, as specific problem areas – such as corruption or money-laundering – are dealt with separately and in an uncoordinated manner. Reforms such as those discussed in this chapter would be more effective if they are part of a longer-term programme of revising and updating substantive and procedural criminal law and the institutions with a role in the investigation, prosecution and adjudication of crime. The need for such a programme in all jurisdictions is now given greater force and urgency by the growth of international obligations derived from the Convention and other agreements.

### *II.3. Independence and resources*

To ensure that specialized authorities are effective, irrespective of their institutional shape, States Parties may take into account a number of crucial aspects, including the legal and procedural framework to ensure independence, reporting arrangements, and resourcing.

The independence of specialized authorities should be governed by legislation, whereby the recruitment, appointment, disciplinary and removal criteria for the senior management are clearly established (one possible model to follow may be the terms governing the judiciary). States Parties may want to consider fixed-term appointments to avoid dependency on the executive for re-appointment. The legislation should also address the responsibility of the head of a specialized authority for the recruitment of staff and the operational performance of the authority's functions.

A further safeguard may be a reliable internal and/or external review system in order to avoid any undue influence. Therefore, States Parties may wish to draw inspiration from the experience of some States which rely on a specialist committee of the legislature for such oversight. Others have established (external) supervision or inspection commissions.

Of particular importance are the provisions which safeguard against undue influence the operational decisions in a criminal investigation or criminal proceeding. In some States, specialized authorities do not have to inform superior authorities such as the Director of Public Prosecutions, the Attorney General or the Ministry of Justice when starting investigations in a specific case. On the other hand, many States Parties still require approval for initiating court proceedings in a specific case and may wish to consider whether such power should be subject to independent verification. In some States, investigating officers, prosecutors and investigative judges cannot be instructed to dismiss a case.

Specialized authorities could be required by law to publish annual reports, including summaries of ongoing cases where arrests have taken place, and submit the report to the Legislature, which should have the formal power to call the head of the supervisory authority to account for the work and performance of the authority.

Besides the appointment of the head of the specialized authority, States Parties should consider establishing appropriate procedures for the employment of the staff. In addition, States Parties may consider flanking professional independence by an appropriate functional immunity against civil litigation in order to avoid intimidation.

States Parties may also wish to pay attention to the remuneration system applicable to specialized authorities to ensure recruitment and retention of the best available expertise. With regard to appropriate training, States Parties may consider that investigators, prosecutors and judges specialized in combating corruption need to be well grounded in general investigative skills before they



start to specialize on investigating corruption offences. While the Convention does not stipulate any specific measure, States Parties may wish to take note of some models which have been implemented in several States Parties:

- Training provided by experienced and seasoned investigators who are still involved in operational measures. Training should be available to all those likely to be involved in the work of the authority, including judges.
- Integrating auditors, tax law specialists and management experts into training programmes. Moreover, States Parties may consider providing for lectures concerning professional ethics.
- Secondment or exchange of staff on a domestic or cross-jurisdictional basis.

Obtaining the services of specialists who could provide adequate training should be a priority. It is recognized that expertise in the numerous specialized areas where training would be required may be rare and, thus, quite costly. For developing countries, technical assistance may be available through UNODC and other providers.

The strategy and review undertaken by the State Party will determine the budget necessary for the specialized authority. States Parties should, however, ensure availability of resources for ad hoc cases and for complex inquiries over and above the stated budget. In general, States Parties may bear in mind that appropriate funding is not only a question of size, but also a question of planning.

### **Article 37: 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.*

## **I. Overview**

The Convention includes several provisions which aim to promote the detection, investigation and adjudication of corruption. Keeping in mind that corruption is an opaque form of crime which takes place in secrecy, the best way of detecting it is to obtain information from a participant in or witness to the corruption offence. Therefore, law enforcement agencies need means to motivate participants to reveal their knowledge which otherwise would remain undisclosed. Consequently, the Convention acknowledges that motivation to cooperate may sometimes come at a price, such as mitigation of punishment or granting immunity from prosecution. In view of the Convention's focus on asset recovery and international cooperation, article 37 encompasses measures to encourage persons to provide assistance in depriving offenders of the proceeds of crime and recovering such proceeds (para. 1). It also contains a provision on international support by providing for the possibility for agreements or arrangements between States Parties to extend such incentives to cover cases in which the person who cooperates is in a jurisdiction other than the one where the investigation or adjudication takes place (para. 5).

## **II. Practical challenges and solutions**

Article 37 includes both mandatory and non-mandatory provisions.

As a mandatory provision, article 37 obliges States Parties to take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering the proceeds.

Moreover, article 37 obliges States Parties to protect such persons, *mutatis mutandis*, as provided for in article 32 (4).

The concept comes from the experience that law enforcement authorities have with organized crime cases. Cooperating witnesses and the means to encourage such cooperation have proved useful in helping law enforcement authorities penetrate, understand and deal with the often complex and multilayered or compartmentalized structures of organized criminal groups.

Much, if not most, of that experience may be applied usefully to corruption cases.

### *II.1. Relevant information*

The information submitted by the person has to be useful and relevant to the investigation, prosecution or adjudication of a case, or to the recovery of proceeds of corruption, as appropriate.

States Parties should take appropriate measures to encourage factual, specific help that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds. States Parties may consider that the term “factual, specific help” relates to both factual assistance and information.

States Parties may consider it important that those measures be made public and be covered by programmes of awareness-raising for the purpose of gaining public support.

### *II.2. Mitigating punishment*

States Parties may implement the term “mitigating punishment” by providing for the possibility to impose a reduced sentence or execute a punishment in a more lenient way. According to that, States Parties may regard that the mitigation of punishment includes two models:

- First, imposition by the court or judge of a sentence that is mitigated compared to a sentence that usually would have been imposed. For example, the court or judge could consider the possibility to substitute imprisonment by a monetary sanction.
- Second, the factual mitigation of punishment subsequent to the judgment and during its enforcement. This model could comprise benefits such as early release or parole (see article 30 (5)).

With regard to the procedures, States Parties may choose between several options:

- Bearing in mind the principle of fairness, States Parties may consider providing for proceedings which guarantee that the proposal to mitigate punishment given in advance is indeed honoured by the competent judicial or prosecutorial authorities. States Parties may hence include a provision in their criminal law which makes proposals to mitigate sentences mandatory for courts.
- However, States Parties may regard that the term “mitigating punishment” includes not only prescribed but also the de facto mitigation of punishment on a case-by-case basis. Accordingly, States Parties whose legal system so permits may not be required to introduce a specific rule providing for a mitigated sentence, but can advise their law enforcement agencies to consider negotiating sentences within an established range. Moreover, States Parties could provide for the prosecution office to adjust charges by

limiting them to offences carrying reduced sentences. However, with regard to the independence of the judiciary, States Parties may wish to assure the involvement of the court in a plea-bargaining that foregoes the trial and judgment. With regard to such proceedings, States Parties may consider requiring a written agreement signed by all parties that lays out the conditions for mitigating the sentence.

- States Parties may bear in mind the need to strike a balance between granting benefits to offenders and the administration of justice, particularly in view of the public perception. Thus, they may consider linking a mitigation of punishment to substantial cooperation. However, States Parties may consider that substantial cooperation must not mean requiring information without which an investigation and adjudication would not have been possible. On the other hand, they may opt for a broader implementation according to which any substantial information concerning the corruption offence may lead to a mitigation of punishment. Accordingly, they could relate the size of mitigation to the extent and quality of cooperation.
- States Parties may also bear in mind that the possibility of mitigating a sentence may not be only related to the cooperation, but also to the seriousness of the crime and the guilt of the accused persons. Therefore, mitigation of punishment may be excluded in the case of a major corruption offence and a substantial wrongful behaviour of the cooperating person.

### *11.3. Immunity*

The article suggests that States Parties consider the implementation of granting immunity from prosecution to a person who provides substantial cooperation. States Parties may wish to take note of two possible models of implementation:

- First, States Parties may introduce new legislation which allows granting immunities. This could be regarded as necessary in legal systems with a mandatory prosecution.
- Second, States Parties whose prosecutors have the discretion not to prosecute, may advise their law enforcement authorities that substantial cooperation could be a reason that allows granting immunity within the range of the prosecutor's discretion.

Immunity can be a powerful inducement to a principal witness to cooperate if the case cannot be brought to court without his/her help. On the other hand, the complete exception from punishment may undermine the validity of anti-corruption norms when it is applied too often or – even worse – when the public gets the impression that immunity is granted to persons with political or financial influence. Thus, States Parties may consider that it is necessary to strike a balance between the advantage of granting immunity to deal with specific cases

and the necessity to enhance the public's confidence in the administration of justice.

Whether to grant immunity may not depend solely on the nature or extent of the cooperation. Rather, law enforcement may take into consideration the personality of the accused person and the extent of his/her participation in the offence. For example, States Parties may wish to exclude possibility of immunity for the head of a corruption network or consider that granting immunities to high-ranking accused persons, such as politicians, could have a negative impact on the public's trust in the impartiality of law enforcement.

Further, States Parties may opt to grant immunity solely in exceptional cases in which the accused person has provided information without which an investigation and adjudication would not have been possible.

With regard to the proceedings, States Parties may wish to take into account some aspects of particular importance:

- States Parties that require the enactment of new legislation on granting immunities may wish to provide for clear-cut and indisputable conditions and prerequisites within the law.
- States Parties may wish to include in the same legislation the requirement of a written agreement signed by all parties which lays out the conditions for granting immunity in order to avoid any controversy regarding the duties and prerequisites of immunity on the one side and the rights and benefits on the other.
- While granting immunity is a powerful tool, States Parties may take into consideration the possibility of its abuse. Therefore, law enforcement agencies should try to verify the information provided before granting immunity. This would require law enforcement agencies to make every possible effort to corroborate the information submitted by the person with additional information. Moreover, States Parties may wish to provide for the possibility of withdrawing immunity in case the person has tried to mislead the law enforcement bodies. To this end, they may wish to include appropriate clauses in the immunity agreement which specify that the agreement would be invalid if the information turns out to be false or malicious.
- Conversely, States Parties should include clear guidance on who may offer any arrangement, on what terms and at which point during an investigation.
- States Parties may wish to include appropriate clauses in any immunity agreement according to which the immunity in one case would not affect any other pending or future case.

#### *II.4. Agreements or arrangements between States Parties*

States Parties may wish to take into account the possibility that an offender in one State Party may be able to provide information or evidence pertinent or

useful in a case under investigation in another State Party. Especially in cases of transnational corruption, the question may be how to motivate those persons to disclose their knowledge regarding a corruption offence of which they are currently not accused in the State Party they reside.

Consequently, States Parties may wish to consider entering into agreements or arrangements in order to find solutions which reflect the interests of both States Parties, by allowing the law enforcement agencies of one State Party to propose a mitigated sanction or even immunity in exchange for substantial cooperation with regard to a corruption offence committed in another State Party. This might require the implementation of new or the revision of existing rules on granting immunity.

States Parties may wish to consider that ad hoc agreements or arrangements may take time that may be at the expense of a continuing criminal proceeding. Thus, they may wish to consider a framework which can be adapted to individual cases, if and as necessary.

## **Article 38: 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.*

### **I. Overview**

Articles 15, 21 and 23 deal with bribery of national public officials, bribery in the private sector and laundering the proceeds of crime. Early notification of any potential offence to those agencies with the powers and expertise to investigate and prosecute such offences is essential to ensure that perpetrators do not flee the jurisdiction or tamper with evidence and the movement of assets can be prevented or monitored. Many corruption cases are complex and covert; early notification by relevant public bodies or early cooperation at the request of investigative agencies is standard good practice.

## **II. Practical challenges and solutions**

States Parties may wish to consider appropriate ways of establishing the requirement that senior management of public authorities and public officials understand the purpose of the article and their role in implementing it. Such an understanding may be fostered by training programmes and by regular and structured opportunities to promote cooperation between them and the investigative and prosecuting authorities. At the same time, senior management who either report to the relevant agencies, or cooperate with requests for information, where they have acted in good faith and on reasonable grounds, should be assured of no adverse consequences if the information provided does not lead to further action.

Any arrangements, legislation or regulations enacted in accordance with this article should spell out “reasonable grounds” that the offences concerned have been committed.

### **Article 39: 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.*

#### **I. Overview**

Article 39 complements article 38 in encouraging the private sector and private individuals to do the same as public officials. Many corruption cases are complex and covert, and will not come to the attention of the relevant authorities or their investigation would be frustrated without the cooperation of private sector entities, especially financial institutions, as well as private citizens. In particular, early notification by relevant private sector bodies or early cooperation with investigative agencies is important to the identification and safeguarding of potential evidence and the initiation of inquiries. Moreover, the role of the financial institutions – or those institutions involved in high-value commercial activity – is central to the effective prevention, investigation and prosecution of offences established in accordance with the Convention. While financial institutions will have obligations to report suspicious activity or transactions, this should not be seen as the limit to cooperation where an

institution has suspicions about other activities, such as opening of accounts or other activity.

## **II. Challenges and solutions**

States Parties should ensure that private sector entities understand the purpose of the article and their role in supporting the Convention. Legal persons or senior management and staff who either report to relevant law enforcement agencies, or cooperate with requests for information should, where they have acted in good faith and on reasonable grounds, have the assurance of confidentiality and, where the allegations do not lead to an investigation, should further enjoy protection from civil suits and claims for damages from those involved in the allegations.

States Parties will need to be specific about which agencies should receive reports, and in which form (including the nature of supporting information or documentation). They should also explore means to promote a degree of reciprocity between the investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, in terms of the value of the information provided. It might also be productive to involve the private sector, in particular financial institutions, in developing standards for the format and contents of material provided (issues discussed in more detail in article 14).

## **Article 40: Bank secrecy**

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.

### **I. Overview**

Protecting banking information has been a long-established tradition in the banking industry. At the individual level, the confidentiality due by a bank to its clients is widely considered part of the right to privacy and, more recently, to data privacy. In some jurisdictions, bank confidentiality also amounts to personal security protection, to prevent extortions or kidnappings. At the corporate level, it prevents abuse of unfair competition or antitrust laws. Translated to a public policy level, a sound banking system is based on trust and trust is partially achieved by managing relationships in a confidential manner.

All States Parties continue to a greater or lesser extent, often defined in legislation, the authority and obligation for banks to refuse to disclose customer information to private third parties and to require proper legal authority to allow specified access by public authorities. In many States Parties money-laundering



reporting arrangements now amend the levels of secrecy and article 40 addresses wider issues concerning criminal investigations.

States Parties differ with regard to the protection afforded by bank secrecy laws. In most States Parties, bank secrecy is an important aspect of the contractual relationship between the bank and the client and is therefore treated as a private law issue and enforced through the civil remedies applicable to breach of contracts. In other States Parties, the protection of banking information was elevated from a mere contractual relationship to the status of a matter of public interest. Consistently, these jurisdictions have made the breach of bank secrecy a criminal offence.

States Parties are required in article 40 to remove any obstacle that might arise from protective laws and regulations to domestic criminal investigations into the offences established under the Convention. This is already acknowledged by the Convention's requirements on suspicious transaction reporting and the recommended establishment in all States Parties of an FIU. At the same time, the technological capacity of the international banking system makes it significantly more amenable to transnational financial movements rather than States Parties' agencies to monitor and investigate such movements. The article seeks to correct the balance by ensuring that bank secrecy provisions are amended in order to provide information to different domestic law enforcement agencies to effectively fight corruption crimes and to be able to act as expeditiously as those they are investigating.

## **II. Challenges and solutions**

Effective implementation of article 40 would require an assessment of a range of issues.

### *II.1. Who has authority to overcome bank secrecy, under what circumstances and for what purposes?*

Deciding which agencies would be empowered to have access to banking information depends on several factors and this is the reason why legislation differs from country to country on this matter.

One important factor is how the crime prevention and control policy is organized in each country and how its priority compares to the importance that bank secrecy plays in the culture and economy of the country. At the minimum, judicial authorities, including prosecutors, acting directly or upon judicial warrant must have access to bank information. The contrary would not be in compliance with article 40.

However, given the role banking information plays as evidence in corruption cases and the laundering of its proceeds, States Parties may consider designing a system for other law enforcement agencies accessing banking information; such an approach is warranted also by articles 14 and 58. In designing such a system, many other factors may be taken into account: the

general institutional framework and the legal tradition of the country, the mandate of the agencies concerned and their degree of independence, as well as the skills that officials possess and the existence of adequate safeguards with respect to the responsible use of the information (e.g., preventive controls, sanctions for breaches of confidentiality).

The following is an indicative list of law enforcement agencies that may be authorized to have access to bank information directly or on the basis of a judicial order. In each case, some restrictions on the uses of the information according to regular practices of some jurisdictions are also noted:

- Investigative anti-corruption bodies, like those mentioned in article 36 of the Convention, whenever they have authority to perform preliminary investigations, or have legal standing to file criminal reports or to act as an accusing party. Some jurisdictions authorizing these bodies to access bank information restrict its use to evidence in a criminal case;
- FIUs empowered to investigate money-laundering offences. Many jurisdictions restrict the use of the information obtained by an FIU to evidence in a money-laundering case or to support a confiscation order in an administrative procedure governed by anti-money-laundering laws;
- Taxation and/or customs authorities provided that according to the domestic law tax evasion or violation of customs regulations are criminal offences and the information obtained is not passed on to other agencies;
- Police;
- Audit institutions;
- Parties to the criminal proceedings and/or bailiffs, upon judicial order;
- Central banks, whenever they have authority to perform preliminary investigations, have legal standing to file criminal reports, or to act as an accusing party.

Systems restricting the use of information obtained by each agency to its own specific duties – and prohibiting passing it to other agencies – have resulted in an excessive burden for financial institutions, usually facing the pressures and costs of producing the same information several times for different agencies.

## *II.2. What is procedurally required to lift bank secrecy?*

One obstacle that could be posed by bank secrecy to domestic investigations may arise from procedural issues. While in many jurisdictions it is substantially possible to overcome bank secrecy, the procedural requirements may be cumbersome as to virtually render this possibility null.

Depending on the agency in question, and the authorized use of the information, States Parties vary on what they require procedurally for access to banking information. In some jurisdictions, a law enforcement order suffices. In others, an authorization from the regulator or supervisor is required. In stricter

jurisdictions, a judicial order is the only valid authority to lift bank secrecy. Obviously, the standards for obtaining such authorizations vary depending on the authority in question.

### *II.3. Automatic disclosure of the information, or upon request*

States Parties may wish to consider whether banks and other financial institutions must disclose certain information automatically to designated authorities administering databases, or if secrecy should be lifted only upon administrative or judicial requests. A mixed system may be implemented as well, whereby transactions exceeding a certain threshold or raising suspicion are disclosed routinely.

In the case secrecy is lifted upon administrative or judicial requests, States Parties would have to decide whether to provide direct access to authorized law enforcement agencies through a centralized database or a central institution, or indirectly, through a judicial order. For example, States Parties may consider whether to provide direct access to investigating authorities of the suspicious transactions reports that financial information units receive in connection with their money-laundering control functions.

In taking this decision, States Parties may balance the advantages of saving time in criminal investigations, with entrusting certain control in the hands of independent authorities like the judiciary, which would usually determine whether the requested information is relevant to the case and whether the importance of the information is such that banking secrecy may be lifted.

A review of administrative feasibility and the capability of information systems should be taken to ensure that the procedures are not so burdensome and time-consuming as to act as impediments to access to bank information.

A very practical but common obstacle to domestic investigations is the lack of timely response from banking institutions to requests for information. When the request is made by an authorized agency, in many instances the requesting agency needs to resort to a judicial proceeding to enforce its order. In some jurisdictions, this may create unnecessary delays in the investigative process.

A more effective system should also count on a system of sanctions for non-compliance with authorized agencies: fines, interventions or simplified search and seizure procedures may be considered in this regard.

### *II.4. Use of centralized databases*

A useful way to avoid some of the mentioned problems and improve domestic investigations is by resorting to a centralized database with levels of access depending on the agency and permitted uses.

Centralized databases can be administered either by central banks, tax authorities or FIUs, having the advantage of saving time in the gathering of the information. The absence of centralized databases can be time-consuming as the

process is likely to be conducted “manually”, especially when the information is needed at the early stages of an investigation and, thus, it may take months to gather all the information from the different sources.

A parallel or alternative measure to databases is to implement e-government tools to send the information protected by adequate safeguards. In that case, personal data protection legislation may be reviewed in order to ensure the feasibility of such an approach. In some jurisdictions, banking records cannot be transmitted through information systems without an express authorization of the data owner.

### *II.5. The content of a request*

The requirements for the content and form of a request will usually depend on the existence of databases and automatic disclosure systems. When the latter is available, States Parties tend to restrict the number of authorized agencies to which to address requests as well as subject the request to a certain degree of suspicion. Provided that there is legal authority or that the request is supported by sufficient grounds from the investigation, the request may include close relatives or persons with whom the account holder has made certain transactions.

When databases or automatic systems are not available, States Parties may allow wide open requests concerning any bank account, investment of a given natural or legal person. Other limitations may arise from the degree of detail the request may have in order for the bank to identify the bank account holder or its beneficial owner.

Banks may be responsible for gathering information of their branches and local subsidiaries, if the requesting agency does not have such information. In addition, banks may be responsible for identifying all the investments – not only accounts – used by a given individual or legal person and also for identifying beneficial owners as opposed to “account holders”. The latter will diminish the impact of the misuse of corporate vehicles. Thus, for domestic purposes, the name of the individual and his/her ID, or the registered name of the legal person may in principle suffice for identifying banking movements within a given jurisdiction.

### *II.6. Implementation of the preventive principles of “know your customer and know your beneficial owner”*

The other side of the same problem is a defective implementation of the mandatory provisions of articles 14 and 52 and especially of a sound “know your customer and beneficial owner” (KYCBO) system.

A well-enforced KYCBO system counteracts the problems arising from the use of offshore corporate vehicles, or incomplete client records. Therefore, States Parties should balance between the allowed uses of those legal entities and the degree to which a financial institution is required to understand its clients’ businesses. When allowing foreign corporate vehicles, a sound policy regarding

beneficial owners, authorized persons to provide and withdraw funds, as well as an understanding of the business or uses of the entity, should be in place.

Information that authorities may need to obtain from banks for specific cases includes information about the account holder (first, last and middle names, social insurance number, taxation identification number, date of birth, current and former addresses, current employer), signature cards (e.g., to verify the control of a legal entity, to establish links between seemingly unrelated taxpayers) and financial information. This would include sources of income, account balances, account numbers, money transfers, deposits and withdrawals to verify whether there is unreported legally or illegally earned income; determine if a taxpayer has claimed false deductions; determine whether there are back-to-back loan transactions or sham transactions; obtain answers to questions about the origin of funds; and identify bribes and suspicious payments to foreign public officials.

### *II.7. Bank secrecy and professionals*

Finally, when implementing this provision, States Parties should be aware that bank secrecy may not only apply to customers under investigation but also to the activities of the professional advisors who may claim the benefits of bank secrecy in relation to their activities that may be linked to those of their clients under investigation. Professional secrecy can be an issue, in particular when such secrecy is not interpreted in a functional way. For example, in some States Parties the client-lawyer privilege applies only to information which is exchanged in the specific context of the legal interests of the client; if the lawyer acts as a financial intermediary, the professional secrecy does not apply. States Parties allowing professionals with privilege to hold accounts in the name of their clients should ensure that such provisions would not impede the access of authorized agencies to banking information.

## **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.*

### **I. Overview**

Corruption offences are often committed by repeat offenders. Moreover, in times of increasing international business, corruption acts and corruption offenders cross borders frequently, sometimes under different corporate names. The Convention brings together the consequences of both aspects in one provision. Article 41 suggests States Parties to take into consideration any

previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings.

## **II. Practical challenges and solutions**

Article 41 is a non-mandatory provision which suggests that States Parties evaluate whether they regard it as appropriate to take into consideration previous convictions in another State. When deciding on the implementation of the article, States Parties may bear in mind that most States provide for criminal registers which enable competent authorities to take into account previous convictions when deciding on sentences and legal consequences which are adequate and have the necessary preventive effects. Many States regard these means as necessary to guarantee an adequate sentencing to reflect the seriousness of the conduct of the accused and/or other specific circumstances linked to it, taking into account the sentence limits and the appropriate treatment of that person, as prescribed in the law. The criminal record may reflect a tendency to act unlawfully and to commit offences repeatedly which could affect the specific sentencing. Moreover, paying attention to the criminal record could have preventive effects. Since States Parties may consider that recidivists could constitute a latent danger, they might adjust their legal consequences to this danger by imposing specific rehabilitative sentences on such perpetrators or exclude those individuals from the possibility to hold an office or perform a function which could enable them to commit further corruption offences (see also article 30, para. 7, of the Convention). Finally, States Parties may consider that the consideration of convictions in another State is an adequate response to the mobility of offenders.

Article 41 provides for a wide scope in terms of the convictions abroad as it speaks of “any previous conviction”. Consequently, States Parties may wish to take into account any conviction abroad, in particular for serious offences. In fact, the wide scope may be seen as beneficial since conclusions with regard to the conduct of the perpetrator and his or her willingness to abide by the law can be drawn. However, States Parties may wish to consider relating the weight of the previous conviction on the specific sentence to the type of offence, the severity of the damage, and the time that has passed since the previous conviction.

States Parties should bear in mind that the term “conviction” refers to a conviction abroad which is no longer subject to an appeal (see the Interpretative Note accompanying article 41, A/58/422/Add.1, para. 40).

States Parties may wish to enable access of foreign States to their criminal registers both legally and technically. With regard to the first, States Parties should evaluate whether their law allows the international transfer of data such as criminal records, and revise it accordingly. With regard to the technical side, States Parties may wish to designate an authority which is in charge of the international exchange of information. It could be advisable to assign this task to the authority which is generally in charge of international cooperation in criminal matters such as mutual legal assistance.

## 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.*

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.*

## I. Overview

A central goal of the Convention is to promote international cooperation in the fight against corruption (see article 1 (b) of the Convention). Thus, it includes provisions on bribery of foreign public officials, as well as detailed and ad hoc articles on different modalities of international cooperation in criminal matters, such as extradition, mutual legal assistance, joint investigations and, as a major breakthrough, cross-border asset recovery. On the other hand, article 4 (1) stresses that States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States. More specifically, article 4 (2) states that nothing in this Convention shall entitle a State Party to undertake in the territory of another State Party the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State Party by its domestic law. Extradition, mutual legal assistance and asset recovery are forms of international cooperation in which the States Parties involved assist each other in supporting investigation, domestic prosecution or other judicial proceedings, but presuppose that domestic legislation has dealt with jurisdictional issues in an appropriate and functional manner.

## II. Practical challenges and solutions

Article 42, paragraph 1, stipulates, as a mandatory provision, that States Parties establish jurisdiction according to the “territoriality principle”, namely jurisdiction for offences committed in their territory or on board a vessel flying the flag of the State or on board an aircraft registered under the law of the State.

Moreover, article 42, paragraph 3, mandates that State Party should establish its jurisdiction over the corruption offences when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals. This obligatory requirement is linked to the requirement set forth in article 44, paragraph 11, of the Convention to initiate domestic prosecutorial process in lieu of extradition if the latter was denied on the grounds of nationality.

Article 42, paragraph 2, includes the non-mandatory requirement that States Parties may establish jurisdiction according to the “active or passive personality principle”, namely jurisdiction for offences committed by or against their nationals respectively. In addition, it urges States Parties to consider establishing jurisdiction for cases of participation, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the money-laundering offences if the participatory act has been committed abroad with a view to committing the main act on the territory of the State Party. Finally, it includes the non-mandatory requirement for States Parties to establish jurisdiction according to the “protection principle”, namely jurisdiction over offences committed against the State Party.



Moreover, article 42, paragraph 4, includes the non-mandatory requirement for States Parties to establish its jurisdiction over corruption offences when the alleged offender is present in its territory and it does not extradite him or her on grounds other than that of nationality.

Finally, article 42, paragraph 6, acknowledges, without prejudice to norms of general international law, any exercise of criminal jurisdiction by a State Party according to its domestic law.

Article 42, paragraph 5, requires that the competent authorities of States Parties, as appropriate, consult one another with a view to coordinating their actions, in the case that a State Party has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct.

States Parties may wish to pay attention to the following issues:

- The offence is committed in the territory of that State Party;
- The offence is committed against a national of that State Party;
- 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;
- The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory;
- The offence is committed against the State Party;
- To establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals;
- To establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her on other grounds.

### *II.1. The offence is committed in the territory of the State Party*

Article 42 (1) (a) provides for States Parties to have jurisdiction over an offence established in accordance with the Convention when the offence is committed in its territory irrespective of the nationality of the offender. Even though the majority of States acknowledge the principle of territorial jurisdiction, the application differs substantially.

States Parties may wish to note that there is no single model of implementation. Some States consider that the offence has been committed in their territory when the perpetrator has acted in that territory. Other States implement

the principle of territoriality according to a wider model: territorial jurisdiction can be exerted when at least a part of the crime has been carried out in the territory of the State. Thus, a domestic act of participation can be sufficient even when the main act of corruption has been committed abroad. Moreover, according to a widely accepted view, known as the “doctrine of ubiquity” or “objective territoriality”, States may exert jurisdiction if the crime has effects on their territory. Accordingly, they may have territorial jurisdiction in a case in which the domestic market or the domestic competition is distorted by an act of corruption which has taken place abroad.

## *II.2. The offence is committed against a national of that State Party*

States Parties may consider establishing jurisdiction for offences committed against their nationals irrespective of the place where the crime has taken place. This passive version of the principle of nationality is closely related to the principle of protection. While the latter aims at the protection of the State itself, the former refers to the protection of citizens of the State.

Some States follow the broad model of implementation covering all corruption offences with effects on the territory and its citizens, while others extend this application to cover cases in which a national has been harmed abroad. States which opt for a narrower implementation of the territorial principle may consider that the implementation of the passive-nationality principle is necessary in order to provide for jurisdiction in cases in which a national or a national corporation has been harmed by a foreign act of corruption.

States Parties may consider implementing the term “national” widely, hence encompassing citizens, as well as legal persons incorporated in their territory, in order to provide for a comprehensive protection.

## *II.3. 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*

States Parties may decide to establish jurisdiction according to the principle of active personality, although they are not required to do so. When deciding on implementing this provision, States Parties may need to recognize the approach necessary to deal with contemporary corruption. Thus, in order to achieve and safeguard a law-abiding attitude of their citizens and to promote comparable standards of behaviour at home and abroad, States Parties may wish to implement jurisdiction according to that principle. Consequently, they may exert jurisdiction over their citizens irrespective of the place they might commit a corruption offence. The same goes for stateless persons who have their habitual residence in the territory of a State Party and hence cannot be extradited.

In deciding whether to establish nationality jurisdiction over the offences in the Convention, States Parties need to be mindful that the offence of bribing a foreign public official in article 16 will normally take place abroad, and thus the

effective prosecution of this offence will likely only be possible if nationality jurisdiction can be applied to it.

With regard to legal persons there are a number of issues to be considered. First of all, States Parties may consider implementing the term “national” in a manner which would encompass national legal persons. Second, States Parties may take note of two models of implementation in relation to the nationality principle. Most States Parties exert jurisdiction according to the principle of nationality when a national legal person is liable of a corruption offence. A corporation may be regarded as national, if it has been founded according to the national law or if the corporation resides in the territory. Other States Parties relate the question of jurisdiction to the nationality of the acting natural person, not to the nationality of the legal person. Thus, these States would require that the person who has acted corruptly within the structure or in favour of the legal person is one of its citizens. However, this may cause serious legal loopholes since in the crucial cases of corporate liability investigative agencies may not be able to identify the individual instigator or perpetrator. Moreover, States Parties may consider that the principle of liability of legal persons links legal consequences to the legal entity itself, hence abstracting from individual persons and their nationality.

#### *II.4. Jurisdiction over preparatory money-laundering offences*

States Parties may consider establishing jurisdiction for cases of participation, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the money-laundering offences comprised by article 23, paragraph 1 (a) (i), (ii) or (b) (i) even if the participatory act has been committed abroad while the main act has been committed, or is intended to be committed, in the territory of the State Party. Thus, the article implements the Convention’s call for international cooperation in the fight against money-laundering by ensuring jurisdiction without legal lacunas.

States Parties may bear in mind that according to a wide model of implementation they might be able to exert jurisdiction in those cases on the basis of the territorial principle.

#### *II.5. The offence is committed against the State Party*

Article 42 (2) (d) provides for States Parties to protect themselves and their institutions by establishing criminal jurisdiction. Again, this provision is related to the question according to which model States Parties implement the territoriality principle. Thus, according to the wide model of implementation of the territorial principle, covering all offences affecting the territory, a national provision implementing the protection principle would have a rather narrow area of application.

States Parties which provide for a narrow interpretation of the territoriality principle may consider implementing the provision on the protection principle in order to avoid any jurisdictional loophole and in order to protect their institutions and proceedings crucial for the welfare of their citizens.

Moreover, States Parties have to consider the relationship with the principle of passive personality. States Parties may consider that the model of passive protection covers offences which are committed against the State itself. In this case, the principle of protection would have a narrow area of application.

Those States Parties whose principle of nationality would not cover those cases may wish to close legal loopholes by implementing the protection principle. They may take note of two possible ways of implementation:

- They may consider that an offence is committed against the State Party when the State itself, that is, its institutions, public entities and public corporations, is affected. Thus, States Parties may regard that offences which affect their citizens are not covered by this provision, but are rather covered by article 42 (2) (a).
- On the other hand, a State Party may consider that an offence has been committed against itself when one of its public officials has been affected. However, that would require that the public official has been affected in his or her specific role or function representing the State.

#### *II.6. Establishment of criminal jurisdiction on the basis of the principle “aut dedere aut judicare”*

According to the principle of *aut dedere aut judicare*, States Parties must ensure domestic prosecution in the case that an alleged offender cannot be extradited. The initiation of domestic criminal proceedings in lieu of extradition should be based on the existence of an appropriate jurisdictional basis and the Convention provides for it, either in a mandatory manner when extradition is denied on the grounds of nationality (see article 42, para. 3) or in an optional way (see article 42, para. 4). Once these provisions are effectively implemented at the domestic level, courts and law enforcement agencies of States Parties are provided with the necessary legal framework to avoid situations in which an alleged offender can neither be prosecuted nor extradited. Particularly with respect to the non-extradition of nationals, States Parties may take into account that offences of their nationals committed abroad might be covered by the principle of active nationality, so that their law enforcement agencies could exert jurisdiction according to this provision. However, they may bear in mind that the principle of nationality may not cover cases in which an offender has received nationality after the commitment of an offence abroad. In order to cover such cases, States Parties may consider implementing article 42 (3).

**INTERNATIONAL COOPERATION**  
**(Chapter IV, articles 43-50)**



## **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.*

### **I. Overview**

There needs to be a significant level of working partnership between States Parties that should lead to more effective, responsive and prompt international cooperation to combat corruption. Practical experience has shown that fostering trust and confidence in foreign legal systems was a necessary prerequisite for deepening and expanding such cooperation.

Article 43, paragraph 1, requires States Parties to put in place appropriate and effective systems and mechanisms that allow for efficient international cooperation against corruption in accordance with articles 44-50 of the Convention. This is, first of all, in line with one of the fundamental objectives of the Convention “to promote, facilitate and support international cooperation ... in the prevention of and fight against corruption” (article 1 (b) of the Convention). The scope of international cooperation in criminal matters, as foreseen in chapter IV of the Convention, does not only cover “traditional” forms of cooperation, such as law enforcement cooperation, extradition and mutual legal assistance, but also extends to other relatively new options in transnational criminal justice, including transfer of proceedings in criminal matters, assistance in establishing joint investigative bodies and cooperation for the appropriate use of special investigative techniques.

Paragraph 1 of article 43 also enables States Parties to expand their cooperation to cover not only criminal matters, but also civil and administrative matters relating to corruption. The explicit reference to the possible use of international cooperation mechanisms in relation to investigations of and proceedings in civil and administrative matters is a significant development. The civil law process, on the one hand, has always been seen as complementary to criminal proceedings. Civil litigation for claims are usually based on property or tort law and primarily focus on compensation for harm caused by criminal conduct. In addition, due to challenges arising from the nature of, and requirements foreseen in, criminal proceedings, many practitioners view the

option of the civil process as a viable alternative in certain circumstances to address corruption, especially in cases where criminal prosecution cannot be pursued (e.g., cases of death, absence, immunities or generally inability to bring defendants before the criminal court). Furthermore, article 43, paragraph 1, should be considered in conjunction with article 53 of the Convention which enables the adoption of measures for the direct recovery of property acquired through corruption-related offences by requiring States Parties to, *inter alia*, ensure that other States Parties may make civil claims in their courts to establish title to, or ownership of, such property.

On the other hand, the Convention enables the inclusion of administrative proceedings relating to corruption within the scope of its provisions on international cooperation. By doing so, mutual assistance mechanisms may be applicable with regard not only to criminal matters and proceedings, but also to proceedings of an administrative nature which are related to corruption. Such proceedings include, for example, cases brought by administrative authorities in respect of acts which are punishable under the national law of both the requesting and requested States Parties, in which the decision to be made may give rise to proceedings before a criminal court having jurisdiction over offences of corruption. This is of relevance where both criminal acts and regulatory infringements/violations are intermingled or where a legal person liable to administrative sanctions is involved in offences covered by the Convention (see article 26 of the Convention). For comparative purposes, it should be noted that the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001) extends its scope to cover administrative proceedings that may give rise to proceedings before a court having jurisdiction in particular in criminal matters (article 1, para. 3, of the Convention). A similar provision is contained in the 2000 European Union Convention on Mutual Assistance in Criminal Matters (article 3, para. 1).

## **II. Challenges and solutions**

International cooperation has traditionally been governed by treaties or agreements at the bilateral, regional and international levels. In some cases, cooperation may be possible without any such treaty-based framework and on the basis of national legislation, reciprocity or comity. Questions regarding the legal basis for cooperation actually vary depending on the practice followed by national jurisdictions, and in some cases depending on the subject matter involved.

Even where there is a will to engage in meaningful international cooperation to combat corruption, there are many challenges and difficulties in practice that need to be addressed in order to render such cooperation efficient and effective. Such challenges may include the absence of adequate and appropriate legal framework to help States Parties implement their treaty obligations, the existence of overly complex, cumbersome and formalistic procedures that impede the provision of assistance in an expeditious manner, as



well as the lack of resources or experienced personnel and the limited institutional capacity to foster cooperation.

States Parties are called to take into account all the necessary legal, procedural and practical issues that may arise in order to implement article 43, paragraph 1. What is clear is that this provision is intended to be broad in its scope and application. Practitioners and authorities involved in related issues in States Parties should bear in mind that the spirit and guiding principles of article 43, paragraph 1, as well as article 1 (b) of the Convention, should run through the extensive provisions of its chapter IV on international cooperation and enable their effective implementation through their broad and flexible interpretation.

### *II.1. The specific issue of determining dual criminality*

Article 43, paragraph 2, addresses the issue of determination of the “double criminality” requirement, which has traditionally been treated as a basic principle of international cooperation, particularly in the field of extradition. According to that principle, States Parties are required to extradite fugitives or provide assistance in relation to offences committed outside their jurisdiction on the condition that those acts are criminalized by their own legislation. Focusing particularly on extradition law and practice, the developments in treaty-making practice demonstrated an attempt to ease difficulties associated with the application of the double criminality requirement. Thus, general provisions were inserted into treaties and conventions adopting a “list-of-offences” approach, which, instead of listing acts and requiring that they be punished as crimes by the laws of both States, simply enabled extradition for any conduct criminalized and subject to a certain level of punishment in each State. Establishing double criminality in this manner obviates the need to renegotiate a treaty or supplement it if both States pass laws dealing with a new type of criminal activity, or if an existing list in an extradition treaty inadvertently fails to cover an important type of criminal activity punishable by both States.

Article 43, paragraph 2, takes this further by requiring that, whenever dual criminality is necessary for international 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, regardless of the legal term used to describe the offence or the category within which such offence is placed. By making it clear that the underlying conduct of the criminal offence neither needs to be defined in the same terms in both States Parties nor does it have to be placed within the same category of offence, the Convention introduces an explanatory clause to reinforce a generic double criminality standard. In doing so, it explicitly minimizes the significance of the particular legislative language used to penalize certain conduct and encourages a more pragmatic focus on whether the underlying factual conduct is punishable by both contracting States, even if under differently named statutory categories. This is an attempt to remove some of the reluctance to international cooperation where the requested State Party does not fully recognize the offence for which

the request was submitted. Although some requested States Parties may seek to establish whether they have an equivalent offence in their domestic law to the offence for which international cooperation or other legal assistance is sought (punishable above a certain threshold) the Convention clearly demands that a broad approach to this issue is taken by the requested States Parties. It should be noted that the Model Treaty on Extradition, adopted by General Assembly resolution 45/116 and subsequently amended by General Assembly resolution 52/88, includes a similar provision (article 2, para. 2), which provides guidance to ensure that, in determining the application of the double criminality requirement, the underlying conduct of the offence will be taken into account regardless of the denomination or categorization of the offence under the law of the requested and the requesting States Parties.

## *II.2. The involvement of a central – or other competent – authority*

While the creation of a functional domestic legal and institutional framework with a centralized procedure is increasingly seen as a good practice in overcoming a number of the challenges encountered, the need for and the role of a central (in mutual legal assistance cases, see article 46, para. 13, of the Convention) – or other competent (for other forms of international cooperation, including extradition) – authority and its interaction both with domestic authorities and authorities of other States Parties needs to be clearly defined. For example, it would be wise to clarify whether such central/competent authorities should be involved at all stages of international cooperation and whether they should receive and execute requests or transmit them to the responsible authorities/bodies for execution. In general, the delineation of the duties of those authorities is necessary for ensuring consistency in international cooperation practice and for avoiding, to the extent possible, creating another administrative level of bureaucracy, without any value added. In determining appropriate policy and procedures that facilitate more effective cooperation under article 43, paragraph 1, States Parties should assess whether the level of resources and expertise within their central authorities provide the necessary guarantees and safeguards for strengthening international cooperation mechanisms under the Convention.

Particularly with respect to anti-corruption investigations for which the provision of assistance from a foreign State is necessary, it may be advisable to assign central authorities to facilitate the operational contact and cooperation between those authorities handling the investigation or case, particularly where there are other proceedings or parallel investigations such as money-laundering. Certainly, allowing direct dealings between the judicial/investigative authorities of different States Parties should be encouraged, especially at the initial stages of an investigation. Similarly, central/competent authorities involved in international cooperation matters could provide the operational framework and conduit for facilitating contacts and coordination between anti-corruption agencies and enforcement bodies of cooperating States Parties on issues falling within their competences.

### *II.3. Cooperation frameworks*

As stated above, the basic requirement for States Parties set forth in article 43, paragraph 1, is to consider carefully and in the broadest sense the domestic legal and institutional frameworks for fostering international cooperation. States Parties should need to consider the adoption of new legislation or the establishment of more streamlined procedures to that effect, and in any case, to strengthen channels of communication among them with a view to affording the widest measure of assistance in investigations, inquiries, prosecutions and judicial proceedings related to corruption. Many examples of good international cooperation practice exist, such as the Southern African Forum against Corruption (SAFAC), which is the culmination of a series of round-table discussions that began in 1998 (Mashatu). Currently SAFAC membership is comprised of anti-corruption agencies in Angola, Botswana, Lesotho, Democratic Republic of the Congo, Malawi, Mauritius, Namibia, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. SAFAC allows those involved to interact in a way that offers a great deal of support in its challenges to defeat regional and international corruption (such as the SADAC Regional Anti-Corruption Programme). This issue is developed in more detail in articles 46 and 59. Another example is the Asian Development Bank – OECD Anti-Corruption Initiative for Asia-Pacific, involving 28 countries in the region. Since 2005, one of its priorities has been to overcome obstacles to effective international cooperation. To achieve this goal, it carried out an in-depth thematic review of the frameworks and practices for mutual legal assistance, extradition and asset recovery in the (then) 27 Asian and Pacific jurisdictions belonging to the Initiative. In addition, it held an international seminar on strengthening cooperation in September 2007.

### *II.4. Ways and means to ensure resources and address practical problems in the field of international cooperation in criminal matters*

Even when partnership schemes and international cooperation mechanisms are in place, any investigation into a sophisticated crime such as corruption, which often encompasses transnational elements, requires particularly close and continuing cooperation between criminal justice and law enforcement agencies of the States concerned. Ensuring the availability of the necessary human and financial resources, as well as the requisite equipment and infrastructure, are likely to be a core concern for many States Parties. The requisite personnel is likely to include practitioners, lawyers, investigators and financial analysts, entrusted with the task to handle cases involving sensitive and intensive inquiries, banking and auditing techniques, informants and vulnerable witnesses. The lack of suitable personnel may even affect the ability of the State Party to draft its own enabling or effective legislation to implement the requirements of chapter IV of the Convention.

Some States Parties may also struggle to cope with the volume of incoming requests, whether formal or informal. In order to prevent the overload of requests

and the resulting burdens to international cooperation, States Parties need to consult in advance to identify proper measures that can alleviate or overcome the problem. One of these measures may be to limit the number of excessive requests by defining certain “acceptance” criteria and thresholds (by, for example, focusing on the seriousness of the crime concerned or the value of the proceeds of crime). Other difficulties relate to the costs incurred in the execution of extradition or mutual legal assistance requests, as well as the delays executing such requests which may lead, in some cases, even to the denial of assistance. One potential remedy may be to conclude cost-sharing arrangements which would provide that the requesting State should bear the costs of, for example, translation of documents, providing personnel or equipment, hiring private lawyers, as well as costs of a substantial or extraordinary nature, such as those needed for a videoconference.

On a more systematic basis, it would be advisable for States Parties to conclude bilateral agreements or arrangements for the posting of liaison officers to the central authorities of countries in the same region or of central countries in a region or continent with which there is enough volume or value of cooperation casework for justifying the placement (see also article 48, para. 1 (e) of the Convention). The role of liaison officers in international cooperation is to provide a direct contact with the competent authorities of the host State Party, develop professional relationships, and foster mutual trust and confidence between agencies of the two States Parties. Although liaison officers do not have any powers in the host State Party, they can nonetheless use their contacts to gather information that may be of benefit in preventing and detecting corruption-related offences and in identifying the offenders responsible and bringing them to justice. They can also use those contacts to advise the law enforcement and prosecutorial authorities of the host State Party, as well as their own corresponding authorities, on how to formulate a formal request for assistance. Once such requests are submitted, the liaison officer can then follow up on the requests in an attempt to ensure that the request is complied with successfully and in a timely manner as well as report progress or reasons for any delay. This is of particular value when the legal systems of the two States Parties differ widely.

### *II.5. Capacity-building*

Article 60, paragraph 2, of the Convention calls States Parties to consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including training and assistance and the mutual exchange of relevant experience and specialized knowledge, which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.

Training programmes as a substantive component in these areas could focus on the applicable laws, procedures and practices with regard to investigations

and prosecutions of corruption-related cases, including financial investigations, and could be carried out through a wide range of activities, such as:

- Lectures and presentations by key anti-corruption players as part of regular training courses or workshops for law enforcement, prosecutors, magistrates or other judicial officers;
- Organization of national, regional and inter-regional workshops on international cooperation for judges, prosecutors, law enforcement and other relevant personnel focusing on problematic cases and the institutional and legal framework to address related issues;
- Training of judges and prosecutors resulting in effective preparation and execution of requests relating to the acquisition, provision of evidence, extradition and restraint/confiscation of proceeds of corruption;
- Organization of relevant study tours for such professionals;
- Introducing programmes on international cooperation as part of the curriculum for legal and law enforcement basic training;
- Awareness-raising and training on the criminalization and international cooperation provisions of the Convention.

Such training should be complemented by the dissemination and wide distribution of training materials and tools providing guidance on legal, institutional and practical arrangements for international cooperation, including:

- The Model Treaty on Extradition;
- The Model Treaty on Mutual Assistance in Criminal Matters;
- The Model Law on Extradition (2004);
- The Model Law on Mutual Assistance in Criminal Matters (2007);
- The Report on Effective Extradition Casework;
- The Report on Mutual Legal Assistance Casework Best Practice.

### **III. Checklist**

- Which is the legal basis used by the authorities of the State Party for handling issues of international cooperation?
- In case of treaty-based cooperation, does the State Party use the Convention as the legal basis for submitting/executing requests of international cooperation? Has the State Party concluded bilateral or multilateral agreements or arrangements to give practical effect to or enhance the provisions on international cooperation of the Convention?
- Is there a central/other competent authority in the State Party to deal with international cooperation requests?

- Is the authority adequately equipped, in terms of expertise, financial resources and technological means to cope with requests of international cooperation?
- Are there communication channels between that authority and its counterparts in other jurisdictions to coordinate and find solutions on operational and practical aspects of international cooperation?

## **Article 44: Extradition**

*1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.*

*2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.*

*3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.*

*4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.*

*5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.*

*6. A State Party that makes extradition conditional on the existence of a treaty shall:*

*(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.*

## **I. Overview**

Extradition is a traditional form of international cooperation and defined as the procedure that should be followed in the requested State for surrendering a fugitive to a requesting State for the purpose of prosecution or enforcement of a sentence.

The process of extradition is technically complex and normally involves a number of stages of both judicial and administrative nature. The requesting State Party contacts the requested State Party, identifying the offender and requesting his/her surrender. It is usually required to provide credible evidence that the person sought has committed the offence(s) for which extradition is requested. The requesting State Party need not make out a full criminal case, but it must at least provide sufficient information of a certain evidentiary standard to support the extradition request. This evidentiary standard varies depending on the different practices and approaches followed under common law and continental law systems and may range from the establishment of a "prima facie evidence of guilt" or other less strict requirements to the notion that the information contained in the extradition documents suffices to justify the request.



## II. Challenges and solutions

### II.1. Addressing current concerns

In theory, if satisfied with an extradition request, the requested State arrests and detains the offender, conducts judicial and/or administrative proceedings in which the offender is entitled to challenge the request, and, where the person sought is found eligible for extradition, extradites him/her to the requesting State Party. In practice, however, there are a number of impediments and practical challenges that often obstruct or prolong the extradition process.

There is often a mutual lack of awareness of national/international extradition law and practice or of the grounds for refusing an extradition request, as well as the ways and means to improve and expedite the extradition proceedings and the legal alternatives in lieu of extradition to avoid impunity.

In addition, as stated above, divergent evidentiary requirements applicable in the requested States may not be adequately understood by requesting States, thus causing delays and setbacks in extradition proceedings.

There may also be a wide array of procedural issues which cause practical difficulties such as:

- Problems with language – translated extradition requests and attached materials are costly;
- Tight deadlines, often prone to critical interpretation errors;
- Communication and coordination problems, both between the competent authorities of the cooperating States or even at the domestic level;
- Excessive cost burdens for some requesting and requested States Parties, which may prejudice the efficiency and effectiveness of the process.

### II.2. Changing contexts

Recent trends and developments in extradition law have focused on relaxing the strict application of certain grounds for refusal of extradition requests. The reluctance to extradite their own nationals appears, for example, to be lessening in many States Parties. The UNCAC includes a provision that reflects this development: article 44 (12), refers to the possibility of temporary surrender of the fugitive on condition that he or she will be returned to the requested State Party for the purpose of serving the sentence imposed. In cases where the requested State Party refuses to extradite a fugitive solely on the grounds that the fugitive is its own national, the State Party has an obligation to bring the person to trial (UNCAC, article 44, para. 11). This is an illustration of the principle of *aut dedere aut judicare* (extradite or prosecute) and further requires the establishment of the appropriate jurisdictional basis (see article 42, para. 3). Where extradition is requested for the purpose of enforcing a sentence, the requested State Party may also enforce the sentence that has been imposed in

accordance with the requirements of its domestic law (UNCAC, article 44, para. 13).

Moreover, recent developments suggest that attempts are being made to restrict the scope of the political offence exception or even abolish it. The initial text of the Model Treaty on Extradition, as adopted in 1990, had clearly included this exception as a mandatory ground for refusal (article 3 (a)). The revised version included a further restriction to ensure non-application of the political offence exception in cases of serious crimes for which States Parties had assumed the obligation, pursuant to any multilateral convention, to take prosecutorial action where they did not extradite. Furthermore, the increase in international terrorism has led to the willingness of States Parties to limit the extent of the political offence exception, which is generally no longer applicable to crimes against international law. A number of States may not extradite those claiming that the offence may be politically motivated (for example, against a former political leader living abroad), but the increase in international terrorism has led to the willingness of States to limit the scope of the political offence exception, which is generally no longer applicable to heinous crimes for which States had assumed the obligation, pursuant to any multilateral convention, to take prosecutorial action where they did not extradite. There is also an emerging trend to exclude violent crimes from the political offence exception.

The UNCAC excludes the political offence exception in cases where the Convention is used as legal basis for extradition (article 44 (4)).

### *II.3. Setting up the legal framework for extradition*

States should seek to expand their extradition treaty network and/or adjust their relevant legislation, thus ensuring the existence of appropriate legal frameworks to facilitate extradition. The Convention, in particular, attempts to set a basic minimum standard for extradition and requires States Parties that make extradition conditional on the existence of a treaty to indicate whether the Convention is to be used as a legal basis for extradition matters and, if not, to conclude treaties in order to implement article 44 (article 44, para. 6 (b)), as well as bilateral and multilateral agreements or arrangements to enhance the effectiveness of extradition (article 44, para. 18). If States Parties do not make extradition conditional on the existence of a treaty, they are required by the Convention to use extradition legislation as legal basis for the surrender of fugitives and recognize the offences falling within the scope of the Convention as extraditable offences between themselves (article 44, para. 7).

The Convention also allows for the lifting of the double criminality requirement by stipulating that a State Party whose law so permits may grant the extradition of a person for any of the offences covered by the Convention which are not punishable under its own domestic legislation (see article 44 (2)).

As with a number of other articles in the Convention it is envisaged that legislative changes may be required. Depending on the extent to which domestic law and existing treaties already deal with extradition, this may range from the

establishment of entirely new extradition frameworks to less extensive expansions or amendments to include new offences or make substantive or procedural changes to ensure compliance with the Convention. Generally, the extradition provisions are designed to ensure that the Convention supports and complements pre-existing extradition arrangements and does not detract from them.

However, it is noteworthy that in addition to action by States to sign new treaties, some conventions on particular offences contain provisions for extradition (see, for example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (article 10) or the United Nations Convention against Transnational Organized Crime (article 16). In addition, a number of regional instruments dealing ad hoc with extradition are in place to foster this form of cooperation among their States Parties, such as the Inter-American Convention on Extradition, the European Convention on Extradition and its two Additional Protocols, the Economic Community of West African States Convention on Extradition, the Commonwealth Scheme for the Rendition of Fugitive Offenders (1966, as amended in 1990) and the Extradition Agreement of the League of Arab States (1952).

#### *II.4. Improving procedures*

States Parties may wish to consider the adoption of measures to enable the simplification and improvement of the extradition process, including through systems of backing or recognizing foreign arrest warrants. The backing of warrants schemes is a simplified form of surrender between States which represents a relatively recent stage in the evolution in extradition, marked by the mutual recognition of arrest warrants whereby an arrest warrant issued by a competent authority in one State is recognized as valid by one or more other States and is to be enforced. One of the best examples of such a scheme is the Commonwealth Scheme, which mainly applies to common-law tradition States Parties. Variants of the scheme are successfully applied between such jurisdictions as Singapore, Malaysia and Brunei; Australia and New Zealand; and the United Kingdom and certain Channel Islands. At the beginning of 2004, a new procedure started being implemented within the European Union introducing the so-called European arrest warrant, which actually replaces the traditional extradition proceedings among member States.

The Framework Decision on the EAW and the surrender procedures between Member States of the European Union (EAW – Introduced by the Council of the European Union on 13 June 2002) is based on the principle of mutual recognition of judicial decisions, which is considered as the cornerstone of judicial cooperation in criminal matters within the European Union. These apply both to judgments and other decisions of judicial authorities. The Framework Decision defines “European arrest warrant” as any judicial decision issued by a Member State with a view to the arrest or surrender of a requested person by another Member State, for the purposes of conducting a criminal

prosecution or executing a custodial sentence or a detention order (article 1 (1)). The EAW may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least 4 months (article 2, para. 1).

The EAW process replaces traditional extradition procedures between those ratifying EU Member States with a simplified fast-track common arrest warrant system – to simplify and accelerate surrender procedures between them, as if they were a single jurisdiction. It introduces the following innovative procedures:

- *Expeditious proceedings*: The final decision on the execution of the EAW should be taken within a maximum period of 90 days after the arrest of the requested person. If that person consents to the surrender, the decision shall be taken within 10 days after consent has been given (article 17).
- *Abolition of double criminality requirement in prescribed cases*: The deeply ingrained double criminality principle in traditional extradition law is no longer verified for a list of 32 offences, which, according to article 2, paragraph 2, of the Framework Decision, should be punishable in the issuing Member State for a maximum period of at least 3 years of imprisonment and defined by the law of this Member State. These offences include, inter alia, corruption and laundering of the proceeds of crime. For offences that are not included in this list or do not fall within the 3-year threshold, the double criminality principle still applies (article 2, para. 4).
- *“Judicialization” of the surrender*: The new surrender procedure based on the EAW is removed outside the realm of the executive and has been placed in the hands of the judiciary. Both the issuing and executing authorities are considered to be the judicial authorities which are competent to issue or execute a EAW by virtue of the law of the issuing or executing Member State (article 6). Consequently, since the procedure for executing a EAW is primarily judicial, it abolishes the administrative stage inherent in extradition proceedings, i.e. the competence of the executive authority to render the final decision on the surrender of the person sought to the requesting State Party.
- *Surrender of nationals*: The European Union Member States can no longer refuse to surrender their own nationals. The Framework Decision does not include nationality as either a mandatory or optional ground for non-execution. Furthermore, article 5, paragraph 3, provides for the option of making execution conditional on a guarantee that, upon conviction, the individual is returned to his/her State of nationality to serve the sentence there.
- *Abolition of the political offence exception*: The political offence exception is not enumerated as mandatory or optional ground for non-execution of an EAW. The sole remaining element of this exception is confined to the

recitals in the preamble of the Framework Decision (recital 12) and takes the form of a modernized version of a non-discrimination clause.

- *Additional deviation from the rule of speciality*: Article 27, paragraph 1, of the Framework Decision enables Member States to notify the General Secretariat of the Council that, in their relations with other Member States that have given the same notification, consent is presumed to have been given for the prosecution, sentencing or detention with a view to carrying out of a custodial sentence or detention order for an offence committed prior to surrender, other than that for which the person concerned was surrendered.

With effect from January 2004, the EAW also replaced existing extradition treaties and agreements between EU member States (insofar as they relate to extradition, these included: the 1957 European Extradition Convention and its protocols; the 1978 European Convention on the Suppression of Terrorism; the 1989 Agreement between the then 12 EU Member States on simplifying the transmission of extradition requests; the relevant provisions of the 1990 Schengen Agreement; the 1995 Simplified Extradition Convention; and the 1996 Extradition Convention). However those States can still enter into bilateral or multilateral agreements to further simplify or facilitate the surrender procedures.

Despite an undeniable initial delay, the European Arrest Warrant is now operational in most of the cases provided for. Its impact is positive, since the available indicators with regard to judicial control, effectiveness and speed are favourable, while fundamental rights are basically observed. In relation to the expeditious manner in which surrenders are carried out, it is provisionally estimated that, as a result of the entry into force of the Framework Decision, the average time taken to execute a warrant has fallen from more than nine months to 43 days. This does not include those frequent cases where the person consents to his/her surrender, for which the average time taken is 13 days. This overall success should not make one lose sight of the effort that is still required for certain Member States of the European Union to comply fully with the Framework Decision and for the Union to fill certain gaps in the system (see the most recent report of the Commission of the European Communities based on article 34 of the Framework Decision, Brussels, 26 January 2006, 5706/06).

### **III. Checklist**

- What is the legal basis used by the State Party for extradition matters?
- Is the Convention used as a legal basis for extradition? If not, or in addition to the Convention, has the State Party concluded bilateral or multilateral agreements or arrangements to facilitate extradition?
- Has the State Party established procedures for the extradition of its nationals to other States Parties for offences covered by the Convention?

- How does the State Party ensure that persons sought do not escape from justice in cases where extradition is denied on the ground of nationality or other grounds?
- Are there in place judicial and/or administrative proceedings in the State Party to ensure a fair extradition hearing?
- Does the State Party have a central or other competent authority in charge of handling extradition requests?

## **Article 45: Transfer of sentenced persons**

*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.*

### **I. Overview**

One of the major objectives of the Convention is to promote, facilitate and support international cooperation to combat corruption, including through the effective use of different modalities of cooperation, one of them being the transfer of sentenced persons. Article 45 calls States Parties to consider concluding bilateral or multilateral agreements or arrangements allowing for the transfer to their territory of offenders who have been convicted and sentenced for offences covered by the Convention in order to serve their sentence there, thus improving the chances for the social rehabilitation of such persons.

This modality of cooperation is actually based on the concept of enforcement of foreign sentences which may also be applicable in extradition proceedings where the surrender of a fugitive is denied on the ground of nationality. In such cases, the requested State Party may, if its domestic law permits and in conformity with the requirements of such law, enforce the sentence that has been imposed under the domestic law of the requesting State Party (article 44 (13)).

### **II. Challenges and solutions**

Requests to States Parties to engage in such a scheme will normally be made according to the relevant legislative framework or existing agreements or arrangements. Thus, cooperation in this field may be promoted through the conclusion of bilateral treaties or multilateral instruments to which the States Parties concerned are parties. In some cases, an ad hoc arrangement made between the States Parties concerned specifically for the return of the sentenced person in question may also work. A Model Agreement on the Transfer of Foreign Prisoners, adopted by the Seventh United Nations Congress on the

Prevention of Crime and the Treatment of Offenders in 1985, provides guidance on the content of such treaties, agreements or arrangements.

### *II.1. The legal framework*

States Parties, when developing legislation for providing for the obligation of transferring sentenced persons, should be careful to create this possibility as a right exclusively of the State Party but not of the sentenced person. Further, national legislation should allow for enough flexibility on the side of the requested and the requesting States Parties to make the request/granting of the transfer dependent on the willingness of the convicted person to cooperate. Nevertheless, there may be circumstances where it should be possible to transfer a sentenced person to his or her home State Party even without his or her consent. If a sentenced person has been ordered to be deported from the sentencing State Party after serving his or her sentence, a transfer may be effected regardless of consent.

There are already a number of international conventions that facilitate this aspect of international cooperation. The Commonwealth Scheme for the Transfer of Convicted Offenders is one such example. In the United Kingdom the Repatriation of Prisoners Act 1984 allows for the return or the transfer back of convicted prisoners. Currently the EU is in the process of negotiating a new Framework Decision that will establish a further scheme between EU Member States. A significant framework is already provided by the Council of Europe Convention of the Transfer of Sentenced Persons (drawn up by a committee of governmental experts under the authority of the European Committee on Crime Problems (CDPC)) which came into force in 1985, and is ratified by 62 States, including a number of non-Members of the Council of Europe.

The Council of Europe Convention is intended to provide a framework for ensuring clarity and a coherent approach in this field among its Parties, while at the same time serving the purposes of fostering the proper administration of justice and facilitating the social rehabilitation of sentenced persons who can be transferred to serve their sentence in a more familiar environment. A number of conditions are provided by this instrument to address specific needs in each particular case and each request is to be considered on its own facts. However, when all conditions are met and the procedural requirements are met, the requested State is obliged to give effect to the transfer request. The Convention is supplemented by an Additional Protocol which opened for signature in 1997 and entered into force in 2000.

### *II.2. Conditions for transferring offenders*

The Council of Europe Convention on the Transfer of Sentenced Persons provides some useful indicators regarding the factors that need to be taken into account when dealing with requests for the transfer of sentenced persons. In terms of general principles and transfer requirements the Convention stipulates that the transfer may be requested by either the sentencing State Party or the

administering State Party and that a person sentenced may express his/her interest to each of those States Parties in being transferred under the Convention. The following are also conditions for transfer:

- The sentenced person is a national of the administering State Party.
- The judgment is final.
- The act for which the sentence has been imposed constitutes a criminal offence according to the law of the administering State.
- At the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence or another measure of deprivation of liberty to serve or if the sentence is indeterminate; however in exceptional cases the States Parties may agree to a transfer even if time to be served by the sentenced person is less than this threshold.
- The sentencing and administering States Parties agree to the transfer.
- The transfer is consented to by the sentenced person or, where in view of his age or physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative.

### *II.3. Transfers and sentences*

The Council of Europe Convention (CoEC; article 10) stipulates that the receiving State Party should be bound by the legal nature and duration of the sentence as determined by the sentencing State Party. If, however, this sentence is by its nature or duration incompatible with the law of the administering State Party, that State Party may, by a court or administrative order, adapt the sanction to the punishment or measure prescribed by its own law for a similar offence. As to its nature, the punishment or measure should, as far as possible, correspond with that imposed by the sentence to be enforced. It shall not aggravate, by its nature or duration, the sanction imposed in the sentencing State Party, nor exceed the maximum prescribed by the law of the administering State Party. In the case of conversion of sentence, the procedures provided for by the law of the receiving State Party would apply. When converting the sentence, the competent authority should be bound by the findings as to the facts insofar as they appear explicitly or implicitly from the judgment imposed in the sentencing State Party. The receiving State Party should not convert a sanction involving deprivation of liberty to a pecuniary sanction, should deduct the full period of deprivation of liberty served by the sentenced person, should not aggravate the penal position of the sentenced person, and should not be bound by any minimum which the law of the administering State Party may provide for the offence or offences committed.

### *II.4. Information*

It would be wise to establish formal channels of communication between the competent judicial authorities of the cooperating States. This would enable



the administering State to provide information to the sentencing State concerning the enforcement of the sentence or the time frame of its completion, as well as any further conditions or orders that have been imposed and other relevant information, including whether the sentenced person has escaped from custody before the enforcement of the sentence.

States Parties may wish to include in any arrangements provisions relating to the enforcement procedure, the related costs and the transportation of the sentenced persons.

### **III. Checklist**

- Has the State Party concluded any bilateral, or acceded to a multilateral, agreement on transfer of sentenced persons?
- Are there appropriate procedures to ensure the protection of rights of persons involved in such a process?
- Has the State Party concluded agreements or arrangements with other States Parties for the transfer of information about sanctions between their competent authorities?

## **Article 46: Mutual legal assistance**

*1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.*

*2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.*

*3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

- (a) Taking evidence or statements from persons;*
- (b) Effecting service of judicial documents;*
- (c) Executing searches and seizures, and freezing;*
- (d) Examining objects and sites;*
- (e) Providing information, evidentiary items and expert evaluations;*
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*

(g) *Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*

(h) *Facilitating the voluntary appearance of persons in the requesting State Party;*

(i) *Any other type of assistance that is not contrary to the domestic law of the requested State Party;*

(j) *Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*

(k) *The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

4. *Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.*

5. *The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

6. *The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.*

7. *Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate 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 fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.*

29. *The requested State Party:*

(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.*

## **I. Overview**

The increasingly international mobility of offenders and the use of advanced technology and international banking for the commission of offences make it more necessary than ever for law enforcement and judicial authorities to collaborate and assist each other in an effective manner in investigations, prosecutions and judicial proceedings related to such offences.

In order to achieve that goal, States have enacted laws to enable them to provide assistance to foreign jurisdiction and increasingly have resorted to treaties or agreements on mutual legal assistance in criminal matters. Such treaties or agreements usually list the kind of assistance to be provided, the requirements that need to be met for affording assistance, the obligations of the cooperation States, the rights of alleged offenders and the procedures to be followed for submitting and executing the relevant requests.

The Convention generally seeks ways to facilitate and enhance mutual legal assistance, encouraging States Parties to engage in the conclusion of further agreements or arrangements in order to improve the efficiency of mutual legal assistance. In any case, paragraph 1 of article 46 requires States Parties to afford one another the widest measure of mutual legal assistance as listed in article 46 (3) in investigations, prosecutions and judicial proceedings<sup>10</sup> in relation to the offences covered by the Convention. If a State Party's current legal framework on mutual legal assistance is not broad enough to cover all the offences covered by the Convention, amending legislation may be necessary.

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<sup>10</sup> States Parties have discretion in determining the extent to which they will provide assistance for such proceedings, but assistance should at least be available with respect to portions of the criminal process that in some States Parties may not be part of the actual trial, such as pretrial proceedings, sentencing proceedings and bail proceedings.

Article 46 (2) mandates States Parties to provide mutual legal assistance with respect to investigations, prosecutions and judicial proceedings in which a legal person is involved (see also under article 26 of the Convention).

Article 46 (3) lists the types of assistance to be afforded under the Convention. In order to ensure compliance with this provision, States Parties would need to conduct a thorough review of their legal framework on mutual legal assistance and assess whether such framework is broad enough to cover each form of cooperation listed in paragraph 3. States Parties which have ratified the United Nations Convention against Transnational Organized Crime would normally be in compliance with this provision and, in addition, they need to have in place appropriate mechanisms for providing assistance in cases of identifying, freezing and tracing proceeds of crime and asset recovery (see article 45, para. 3 (j) and (k)).

In the absence of an applicable mutual legal assistance treaty, the Convention provides a mechanism, pursuant to paragraphs 7 and 9-29 of article 46, for the transmission and execution of requests with regard to the types of assistance mentioned above. If a treaty is in force between the States Parties concerned, the rules of the treaty will apply instead, unless the States Parties agree to apply paragraphs 9-29. In any case, States Parties are also encouraged to apply those paragraphs if they facilitate cooperation. In some jurisdictions, this may require legislation to give full effect to the provisions.

Article 46 (8) provides that States Parties cannot refuse mutual legal assistance on the ground of bank secrecy. It is significant that this paragraph is not included among the paragraphs that only apply in the absence of a mutual legal assistance treaty. Instead, States Parties are obliged to ensure that no such ground for refusal may be invoked under their legal regime, including their Criminal Code, Criminal Procedure Code or the banking laws or regulations (see also article 31 (7), and articles 55 and 57). Thus, where the legislation of a State Party permits such a ground for refusal to be invoked, amending legislation will be required.

Paragraph 9 requires States Parties to take into account the purposes and spirit of the Convention (article 1) as they respond to requests for legal assistance in the absence of dual criminality. Although States Parties may decline to render assistance in the absence of dual criminality (para. 9 (b)), they are further encouraged to exercise their discretion and consider the adoption of measures that would broaden the scope of assistance even in the absence of this requirement (para. 9 (c)).

However, to the extent consistent with the basic concepts of their legal system, States Parties are required to render assistance involving non-coercive action on the understanding that the assistance is not related to matters of a *de minimis* nature or cannot be provided under other provisions of the Convention (para. 9 (b)).

The Convention also requires the designation of a central authority (see paras. 13 and 14) with the power to receive and execute mutual legal assistance



requests or transmit them to the competent domestic authorities for execution, thus providing an alternative to diplomatic channels. The judicial authorities of the requesting State can communicate with the central authority directly. Today, to an increasing degree, even more direct channels are being used, in that an official in the requesting State can send the request directly to the appropriate official in the other State.

In those States Parties with a system by which special regions or territories have a separate system of mutual legal assistance, their distinct central authorities should perform the same functions. It may be that many States Parties have already designated a central authority for mutual legal assistance purposes and notified the Secretary-General of the United Nations in accordance with similar provisions of other Conventions. Given the wide and growing range of such international instruments, it is also important for States Parties to ensure that their central authorities under these instruments are a single entity in order to facilitate greater consistency of mutual legal assistance practice for different types of criminal offence and to eliminate the potential for fragmentation or duplication of work in this area.

Paragraphs 4 and 5 of article 46 provide a legal basis for the spontaneous transmission of information whereby a State Party forwards to another State Party information or evidence it believes is important to combat offences covered by the Convention at an early stage where the other State Party has not made a request for assistance and may be completely unaware of the existence of such information or evidence. The aim of these provisions is to encourage States Parties to exchange information on criminal matters voluntarily and proactively. The receiving State Party may subsequently use the information provided in order to submit a formal request for assistance. The only general obligation imposed for the receiving State Party, which is similar to the restriction applied in cases where a request for assistance has been transmitted, is to keep the information transmitted confidential and to comply with any restrictions on its use, unless the information received is exculpatory to the accused person. In this case the receiving State Party can freely disclose this information in its domestic proceedings.

Another area where enhanced cooperation may be needed relates to the protection of witnesses who may be vulnerable to threats and intimidation. Article 32 of the Convention provides for specific measures in this regard, including the relocation of witnesses, and, as appropriate, their relatives and other persons close to them, and article 46(18) proposes the use of videoconference as a means of providing evidence in cases where it is not possible or desirable for the witness to appear in person in the territory of the requesting State Party to testify.

The brief overview of the basic provisions of article 46 indicates its innovative nature and potential to foster cooperation in the field of mutual legal assistance. However, States Parties may wish to give serious consideration to practical difficulties and challenges that may impede cooperation especially between States Parties with different legal traditions and systems.

## **II. Challenges and solutions**

### *II.1. Addressing current issues*

States Parties need to devote attention to the fact that formal channels of mutual legal assistance may not always be necessary and, instead, more informal, faster and flexible channels among law enforcement authorities may be used where coercive action is not required (such as taking voluntary witness statements, search and seizure of documents and production of documents). Such contacts may be supported by INTERPOL, Europol, or through other regional law enforcement organizations or arrangements.

However, States Parties need to bear in mind that problems related to the admissibility of evidence are more likely to arise when evidence is obtained through informal channels. Therefore, whenever law enforcement authorities intend to obtain evidence, it would be appropriate to resort to the established mutual legal assistance channels. Using formal means also ensures a higher measure of protection to sensitive information.

Further, there are several factors that need to be taken into account in the context of mutual legal assistance for corruption offences.

In some States Parties, if an investigation involves an influential politician or business figure in the requested State Party, the requested assistance may not be provided on grounds of “national interest” or immunities accorded to certain public officials (or “protection” provided to politically connected persons). In other States Parties, the person or entity in respect of whom the request for mutual legal assistance was made is entitled to appeal against the sharing of evidence with the requesting State Party. When a right of appeal against disclosure is available, it may well cause lengthy delays and may also “tip off” the suspects.

Moreover, requests for search and/or seizure may prove to be problematic where not enough information is provided for explaining why it is believed that the process might produce relevant evidence for the ongoing investigations or judicial proceedings in the requesting State.

Requests may also involve the possibility of disclosing extremely sensitive aspects to an investigation, particularly where the corruption investigation is linked to activities of organized criminal groups or involves politicians or other prominent persons. As a result, there may be cases where such sensitive information may need to be included in a formal request for assistance. At the same time, the disclosure of witnesses and other information that could be intimidated and exploited respectively by those under investigation needs to be assessed carefully, taking into account the need for minimizing potential risks for witnesses and securing the information for the purposes of the investigation. Therefore, in preparing requests for assistance, competent authorities may need to devote particular attention to confidentiality issues. Sometimes, difficulties

can be avoided by issuing a request which leaves out the most sensitive information, but provides enough detail to permit its execution.

Requests may also sometimes be delayed or even ignored because of the limited resources available in the requested State for the provision of assistance. In such circumstances it may be possible for the requesting State Party to provide assistance, including through the posting of liaison officers or the provision of expertise or even some level of financial support.

As a practical matter, a State Party requesting assistance will need to recognize that the case it is pursuing is much more important to it than it is to the requested State Party. It is vital, therefore, that the requesting State makes strenuous efforts to make it as easy as possible for the requested State Party to respond positively. This may involve the following steps:

- Identifying the substantive and procedural requirements in the requested State Party for the provision of assistance (since this is often highly resource intensive, it may be necessary to select the highest priority cases and engage external legal assistance to ensure that the research is thorough and accurate);
- Contacting the requested State Party directly to ensure that the request will be sent to the proper authority;
- Discussing the request informally with the requested State Party in advance, which may require the submission of a preliminary draft of the request, so that the requested State Party can draw attention to errors or advise on the best way to make the request;
- Following up the request to ensure it arrives safely, contains no errors and is being properly dealt with.

Since the procedural laws of States Parties differ considerably, the requesting State Party may require special procedures (such as notarized affidavits) that are not recognized under the law of the requested State Party. Traditionally, the almost immutable principle has been that the requested State Party will give primacy to its own procedural law. That principle has led to difficulties, in particular when the requesting and the requested States Parties represent different legal traditions. For example, the evidence transmitted from the requested State Party may be in the form prescribed by the laws of this State Party, but such evidence may be unacceptable under the procedural law of the requesting State Party. The modern trend is to allow more flexibility as regards procedures. According to article 7 (12) of the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, a request should be executed in accordance with the domestic law of the requested State Party. However, the article also provides that, to the extent not contrary to the domestic law of the requested State Party and where possible, the request should be executed in accordance with the procedures specified in the request. Thus, although the 1988 Convention does not go so far as to require that the requested State Party comply with the procedural form required by the requesting State

Party, it clearly encourages the requested State Party to do so. This same provision was taken verbatim into article 18 (17) of the Transnational Organized Crime Convention and article 46 (17) of the Corruption Convention. In the same context, the Model Treaty on Mutual Assistance in Criminal Matters provides for the execution of the request in the manner specified by the requesting State Party to the extent consistent with the law and practice of the requested State Party (article 6).

### *II.2. Responses to challenges: the broad scope of article 46*

Given that the United Nations Convention against Transnational Organized Crime contains a similar provision on mutual legal assistance (article 18), States Parties to that Convention should in general be in a position to comply with the corresponding requirements arising from article 46 of the Corruption Convention. Nevertheless, there are some significant differences between the two instruments.

Firstly, under the Corruption Convention, mutual legal assistance also extends to the recovery of assets, a fundamental principle of this Convention (see articles 1 and 46, para. 3 (j) (k), as well as chapter V of the Convention).

Secondly, in the absence of dual criminality, States Parties are required to render assistance which does not involve coercive action, provided this is consistent with their legal system and that the offence is not of a trivial nature. Such a provision was not incorporated in the Palermo Convention.

In addition, as mentioned under article 43, where dual criminality is required for the purposes of international cooperation in criminal matters, the UNCAC provides for an additional interpretation rule for the application of this rule which is not contained in the UNTOC. It proposes that dual criminality shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the activity or conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties (article 43 (2)). Furthermore, the Convention enables States Parties not to limit themselves to cooperation in criminal matters, but also to assist each other in investigations of and proceedings in civil and administrative matters relating to corruption, where that is appropriate and consistent with their domestic legal system (article 43 (1)).

### *II.3. Integrating with other relevant Conventions*

States Parties may wish to seek guidance on mutual legal assistance by taking into account other multilateral treaties which either include extensive provisions on this form of cooperation or are dealing ad hoc with related issues.

The former include for example: the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (see article 7), the Transnational Organized Crime Convention (article 18), the

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (see articles 8-10), the Council of Europe Convention on Cybercrime, the Council of Europe Criminal Law Convention on Corruption (see article 26), the Inter-American Convention against Corruption (see article XIV), and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (see article 9).

In addition, ad hoc mutual legal assistance instruments have been drawn up within the framework of the Council of Europe (European Convention on Mutual Assistance in Criminal Matters and its two Additional Protocols of 1978 and 2001), the Commonwealth (The Commonwealth Scheme for Mutual Assistance in Criminal Matters of 1986, as amended in 1990 and 1999), the Organization of American States (Inter-American Convention on the Taking of Evidence Abroad of 1975 and its Additional Protocol of 1984, as well as the Inter-American Convention on Mutual Assistance in Criminal Matters of 1992 and its Optional Protocol of 1993), the Economic Community of West African States (the ECOWAS Convention on Mutual Assistance in Criminal Matters of 1992), the Southern African States Parties and the European Union (the Convention of 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocol of 2001), and the 1983 Arab League Convention on Mutual Assistance in Criminal Matters.

The United Nations, in turn, has prepared a Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolutions 45/117, annex, and 53/112, annex I), which represents a distillation of the international experience gained with the implementation of such mutual legal assistance treaties, in particular between States Parties representing different legal systems.

#### *II.4. New developments*

There have been significant developments in mutual legal assistance over the recent years. In fact there is evidence to suggest that many States Parties had significantly expanded their capability to provide international mutual legal assistance particularly since the events of 11 September 2001 in the United States. There have been considerable developments, for example, in the area of mutual legal assistance in the European Union where the pace of change has accelerated dramatically. These include the Mutual Legal Assistance Convention of 2000, and its Protocol of 2001, as mentioned above, Framework Decisions on the use of Joint Investigation Teams (2002), the Mutual Recognition of Orders freezing property or evidence (2003), the confiscation of crime-related proceeds, instrumentalities and property (2005), the application of the principle of mutual recognition to confiscation orders (2006), as well as Decisions of the Council such as the 2002 action setting up Eurojust with a view to reinforcing the fight against serious crime.

In June 2006, the Council of the European Union reached agreement on a general approach on a Framework Decision on the European Evidence Warrant (EEW – the text for which is available at <http://register.consilium.europa>).

eu/pdf/en/07/st09/st09913.en07). This new scheme needs to be finalized, adopted and then implemented by Member States. The EEW adopts the same approach to mutual recognition as the Framework Decision on the European Arrest Warrant (EAW – see article 44). Thus, the EEW is a judicial decision that is to be transmitted directly between the issuing judicial authority and the executing authority, with further official communications to be made directly between those two authorities. It will be used for the purpose of obtaining objects, documents or data falling within the certain categories, existing records of intercepted communications, surveillance, interviews with suspects, statements from witnesses and the results of DNA tests.

### *II.5. New facilitating mechanisms*

The developments taking place over the last years within the European Union could be considered as effective examples of concerted action at the regional level geared towards promoting interstate cooperation and coordination in combating transnational organized crime. In this context, the Joint Action of 22 April 1996 (96/277/JHA) created a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union. This Joint Action established a framework for the posting or the exchange of magistrates or officials with special expertise in judicial cooperation procedures, referred to as “liaison magistrates”, between Member States, on the basis of bilateral or multilateral arrangements (article 1). The tasks of the liaison magistrates comprise any activity designed to encourage and accelerate all forms of judicial cooperation in criminal matters, in particular by establishing direct links with the relevant departments and judicial authorities in the host State. Under arrangements agreed between the home and the host Member States, the tasks of liaison magistrates may also include any activity connected with handling the exchange of information and statistics designed to promote mutual understanding of the legal systems and legal databases of the States concerned and to further relations between the legal professions in each of those States (article 2).

Furthermore, the European Judicial Network was set up in accordance with the Joint Action of 29 June 1998, which was adopted by the European Union Council pursuant to article K.3 of the European Union Treaty (98/428/JHA). It is a network of judicial contact points among the Member States created in order to promote and accelerate cooperation in criminal matters, paying particular attention to the fight against transnational organized crime. According to article 4 of this Joint Action, the contact points function as active intermediaries with the task of facilitating judicial cooperation between the Member States, particularly in action to combat serious crime (organized crime, corruption, drug trafficking and terrorism). They also provide the necessary legal and practical information to the local judicial authorities in their own countries, as well as to the contact points and local judicial authorities in other countries, in order to enable them to prepare an effective request for judicial cooperation or improve judicial cooperation in general. Furthermore, their task is to improve

coordination of judicial cooperation in cases where a series of requests from the judicial authorities of a Member State necessitates coordinated action in another Member State.

Finally, Eurojust was established on 28 February 2002 in accordance with a Decision of the European Union Council (2002/187/JHA) aiming at stimulating and improving coordination of investigations and prosecutions in the Member States, improving cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests, as well as supporting otherwise the competent authorities of the Member States in order to render their investigations and prosecutions more effective (article 3). It consists of a national member appointed by each Member State in his/her capacity as a prosecutor, judge or police officer of equivalent competences (article 2).

However, these examples are often expensive options to improve the flow of information between States Parties. Many jurisdictions have simply chosen to take legislative, judicial or executive initiatives to strengthen their ability to provide, receive and effectively use legal assistance within existing cooperative arrangements, for example SAARC, the South Asian Association for Regional Cooperation, SARPCCO, the Southern African Regional Police Chief Council Organisation and INTERPOL (with 186 member States Parties). Such approaches are discussed in more detail in article 48.

### **III. Checklist**

- What is the legal basis used by the State Party for mutual legal assistance?
- Is the Convention used as a legal basis for mutual legal assistance? If not, or in addition to the Convention, has the State Party concluded bilateral or multilateral agreements or arrangements to facilitate extradition?
- Does the State Party participate in any practitioner or judicial network?
- Does the State Party have a designated central authority agency responsible for receipt, processing or execution of mutual legal assistance requests?
- Does the central authority have clear guidelines on practical aspects and issues arising in a mutual legal assistance case?
- Are there established procedures in the State Party for dealing with mutual legal assistance requests?

### **Article 47: Transfer of criminal proceedings**

*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.*

## I. Overview

A relatively new option in transnational criminal justice is for one State to transfer criminal proceedings to another State. This would be an appropriate solution in cases where the latter State appears to be in a better position to conduct the proceedings or the defendant has closer ties to it because, for example, the defendant is a citizen or resident of this State. It may also be used as an appropriate procedural tool to increase the efficiency and effectiveness of domestic prosecutions initiated and conducted in lieu of extradition (especially in cases where extradition is denied because the person sought is a national of the requested State).

At the normative level, the only multilateral convention which deals on an ad hoc basis with the transfer of criminal proceedings is the European Convention on the Transfer of Proceedings in Criminal Matters, adopted within the framework of the Council of Europe. The Convention opened for signature in 1972 and entered into force in 1978.

The Council of Europe Convention in itself is complicated, but the underlying concept is simple: when a person is suspected of having committed an offence under the law of one State Party, that State may request another State Party to take action on its behalf in accordance with the Convention and the latter may take prosecutorial action under its own law. The Convention requires double criminality for that purpose.

In addition, both the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the United Nations Convention against Transnational Organized Crime include specific provisions on the transfer of criminal proceedings (articles 8 and 21 respectively) enabling States Parties to resort to this form of international cooperation where this is in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved and the most appropriate prosecution venue should be identified.

In this sense it is likely to mean that those States Parties that have enacted implementing legislation as parties to the above-mentioned Conventions may not need major amendments in order to comply with the requirements of article 47 of the Corruption Convention.

The United Nations has sought to promote the development of bilateral and multilateral treaties on this subject by preparing a Model Treaty on the Transfer of Proceedings in Criminal Matters (adopted by General Assembly resolution 45/118). This is only a framework treaty, which has to be adapted to the specific requirements of the two or more States Parties which are negotiating such a treaty.



## **II. Challenges and solutions**

### *II.1. Policy criteria for decisions on transfer*

There has always been a great deal of uncertainty once the question turns to determining which is the best or most effective jurisdiction within which to undertake prosecutorial action against criminal offences with transnational dimensions.

Article 47 invites States Parties to consider the transfer to one another of criminal proceedings when this would serve the interests of the proper administration of justice, particularly in cases where several jurisdictions are involved and there is a need to concentrate prosecutorial claims and action in one jurisdiction. The Convention undoubtedly encourages States Parties to enter into agreements or arrangements which may allow the transfer of criminal proceedings and also provide solutions where, for example, a corruption offence has affected more than one jurisdictions and the States involved may wish to determine which is the most convenient forum for an investigation and trial.

Despite the increasing number of transnational crimes, there is little international guidance to assist the prosecutorial and investigative authorities in this determination. In transnational corruption, in particular, a number of real dangers lurk which may reflect different scenarios. Thus, for example, it may be the case that no jurisdiction initiates prosecutorial action on the wrong premise that this would be done by foreign authorities; or that prosecution takes place in the “wrong” (non-convenient) forum; or that two or more States raise conflicting jurisdictional claims.

It would therefore be critical to decide which is the most appropriate jurisdiction to institute criminal proceedings. In this vein, States Parties may wish to consider article 47 jointly with article 42 on jurisdiction and take into account the traditional criteria upon which decisions on jurisdiction are made with a view to determining the most convenient jurisdiction for the criminal process.

In doing so, a list of priorities may need to be established. The starting point in that recommendation was that the State in which the act was committed should have priority to prosecute the offender. Other criteria should be subordinate to this principle. Hence prosecution in the State in which the offender is ordinarily resident would depend on the State where the offence has been committed renouncing prosecution.

The assumption that it is normally most appropriate to prosecute an offence where it has been committed is not justified. Rehabilitation of the offender which is increasingly given weight in modern penal law requires that the sanction be imposed and enforced where the reformatory aim can be most successfully pursued, that is normally in the State in which the offender has family or social ties or will take up residence after the enforcement of the sanction.

On the other hand, it is clear that difficulties in securing evidence will often be a consideration militating against the transmission of proceedings from the State where the offence has been committed to another State. The weight to be given in each case to conflicting considerations cannot be decided by completely general rifles. The decision must be taken in the light of the particular facts of each case. By attempting in this way to arrive at an agreement between the various States concerned it will be possible to avoid the difficulties which they would encounter by a prior acceptance of a system restricting their power to impose sanctions.

States Parties may further need to make decisions at an early stage and may wish to ask when and how the issue of jurisdiction should be considered, as well as which authorities will be responsible for consultations and agreement. The issue of timing may also be relevant, as the question is raised whether the decision should be made at the beginning of investigation or after the nature of the case has been shaped and possible admissibility issues have been dealt with.

## *II.2. Practical criteria for decisions on transfer*

To facilitate decisions on transfer, States Parties should therefore formulate a practical set of criteria which may assist in resolving such complex jurisdictional issues. For instance, the types of questions that States Parties should be asking may include the following:

- Where was the offence committed and where was the offender arrested?
- Where are the most witnesses or most important evidence or victims of the crime concerned located?
- Which jurisdiction has the best/most effective laws?
- Which jurisdiction has the best confiscation laws?
- In which jurisdiction will there be less delay?
- Which jurisdiction provides the best security and custody assurances?
- Which jurisdiction can best deal with sensitive disclosure issues?
- Which jurisdiction can bear the costs of the proceedings?
- In which jurisdiction had the crime substantial effects?
- Where are most of any potentially recoverable assets located?
- Which State Party has the most developed asset-recovery mechanisms?

## **III. Checklist**

- Has the State Party concluded agreements or arrangements on transfer of criminal proceedings?

- Has the State Party developed policy and practical criteria for decisions on transferring or accepting criminal proceedings?
- Does that policy paper lay out the judicial, operational and sentencing implications of decision-making on these issues?
- Does the policy paper address the implications of decision-making in relation to the proceeds of crime?
- Has the State Party identified and mandated an authority to take lead responsibility for consultations and decision-making on related issues?

## **Article 48: Law enforcement cooperation**

*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;*

*(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.*

## **I. Overview**

Because law enforcement is one of the most visible and intrusive forms of the exercise of political sovereignty, States have traditionally been reluctant to cooperate with foreign law enforcement agencies. That attitude has slowly changed with the growing understanding both of the shared interest in combating serious crimes and of the importance of cooperation as a response to transnational crime.

Articles 48-50 of the Convention, in particular, intend to promote the close cooperation between law enforcement authorities of the States Parties as an important tool for the successful investigation of transnational corruption. More specifically, article 48 seeks to enhance the effectiveness of law enforcement cooperation and requires States Parties to, inter alia, enhance and, where necessary, establish channels of communication with a view to facilitating the secure and rapid exchange of information relating to all aspects of Convention offences, including their links with other criminal activities.

Paragraph 1 of the article establishes the scope of the obligation to cooperate and identifies those measures that should form the basis of cooperation.

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. It further enables the use of the Convention as the legal basis for such law enforcement cooperation in the absence of specific agreements or arrangements.

Paragraph 3 recognizes the increasing use of computer technology to commit many of the offences covered by the Convention and calls upon States

Parties to endeavour to cooperate more closely in order to respond to corruption-related offences committed through the use of modern technology.

## **II. Challenges and solutions**

### *II.1. Issues to be addressed*

Both informal and formal law enforcement cooperation, has been hampered by a number of problems. As a result, for example, of the diversity in approaches and priorities in different jurisdictions, law enforcement agencies from different States may fail to agree on how to deal with a specific cross-border form of crime. Thus, some States Parties may have a requirement that their law enforcement or judicial officials interview the witnesses in their own language or that questions be provided to them in advance. Other States Parties may require that their officials are present at all interviews conducted by officials from a requesting State Party. Other States Parties may refuse to send their law enforcement officers to testify in foreign courts. Finally, the need for operational secrecy in electronic surveillance and undercover operations, especially when combined with a lack of confidence and trust, may lead to a lack of willingness to share criminal intelligence, both domestically and internationally.

The diversity of law enforcement structures in States Parties may further result in confusion over which foreign law enforcement agency to contact, the duplication of efforts and, in some cases, competition between agencies, thus causing inefficiencies in the use of limited resources.

### *II.2. Areas for cooperation*

In an effort to address the above-mentioned challenges, States Parties may wish to consider the following as potential areas of mutual benefit and cooperation:

(a) *The exchange of strategic and technical information.* This should be done within the limits of respective national competencies and in conformity with relevant rules on, for example, confidentiality. The exchanges should be either spontaneous or on request. The information may be stored on a shared database and may be used to support operational analysis carried out by the various agencies involved. The strategic information may include information on trends in criminality, the operational structures of the criminal organizations and individuals under suspicion, and the strategies, modus operandi and criminal techniques involved. It may also extend to information on the financing of the corrupt behaviour and favoured routes to disperse the proceeds of crime. It may further cover the techniques and approaches outlined in article 50 of the Convention.

(b) *Cooperation in the field of intelligence and technical support.* Again such cooperation should be done within limits of national competencies with a view to ensuring effective coordination of respective national activities, in

particular in the field of threat assessment and risk analysis. This may extend in some circumstances to the sharing of specific technical tools and materials, and in developing patterns and trends relating to corruption such as the use of falsified documentation and the abuse of corporate and personal identities.

(c) *Cooperation in the field of professional training and working groups.* The States Parties may wish to further promote cooperation on joint training. In this vein, the organization of working groups, seminars and workshops would provide the opportunity for broader dissemination of good practices and developing trends and techniques, as well as for the development of networks of anti-corruption law enforcement agencies. Expertise and information should be shared through secondments of personnel and staff exchange. States Parties should also ensure that resources are not wasted or that efforts are not fragmented.

(d) *The use of contact points and networks.* A system of respective contact points for cooperation between States Parties on a regional basis has proved to be beneficial for effective cooperation. Representatives should meet when necessary to foster mutual trust and confidence, as well as develop common strategies, address new trends, and resolve practical problems encountered in practice.

(e) *Participation in joint investigation teams.* There are of course many examples of effective law enforcement cooperation between agencies within States Parties, inter-State Party cooperation through, for example, the intelligence-sharing roles of Europol and INTERPOL, numerous regional instruments that seek to facilitate effective law enforcement cooperation and operational agencies such as OLAF or Europol (see article 49).

### *II.3. Means of cooperation*

In investigations where evidence or intelligence lies overseas, information or intelligence could initially be sought through informal law enforcement channels, which can be faster, cheaper and more flexible than the more formal route of mutual legal assistance. The necessary arrangements for such informal contacts should, however, be subject to appropriate protocols and safeguards. These could range from the use of local crime liaison officers, where memorandums of understanding or similar protocols have been established, to the conclusion of regional arrangements.

Paragraph 1 (e) of article 48 also makes reference to the posting of liaison officers in terms of exchanging personnel. Because of the costs involved in posting a liaison officer to another State, liaison officers tend to be sent only to those States with which the sending State has already had a considerable amount of cooperation. In order to reduce costs, a liaison officer can be made responsible for contacts not only with the host State but also with one or more other States in the region. Another possibility is to have one liaison officer representing several States.

Cooperation within the framework of international structures may further be envisaged. Relevant examples include the work of INTERPOL, Europol, States of the Schengen Agreement and the Southern African Regional Police Chiefs' Cooperation Organization. In order to enhance cooperation within the framework of such international structures, efforts need to be made to develop more effective systems of information-sharing at the regional and international levels.

The effectiveness of any information system, such as the INTERPOL system of notices and the Schengen databases, depends on the accuracy and timeliness of the information provided. At the same time, the acquisition, storage, use and international transfer of operational data give rise to questions of the legitimacy, transparency and accountability of law enforcement actions. If there is an absence of legal controls and judicial supervision, this may lead to a potential for abuse. Mechanisms for the effective gathering, analysis and use of operational data must take into consideration the need for full respect of fundamental rights. Wherever databases are created to assist law enforcement, attention needs to be paid to ensuring that national data protection legislation is adequate and extends to the operation of such databases not only nationally, but also internationally.

### **III. Checklist**

- Has the State Party concluded any bilateral or agreements or arrangements to facilitate effective coordination among law enforcement authorities?
- Has the State Party designated a specific agency or agencies to deal with requests relating to law enforcement cooperation?
- Is this agency authorized to undertake investigative activities on behalf of a foreign State Party in relation to offences under the Convention?
- Is this agency authorized to share information, take lead responsibility in coordination and cooperation arrangements with other agencies in foreign States Parties?

### **Article 49: Joint investigations**

*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.*

## **I. Overview**

The article is non-mandatory but builds upon the requirements set forth in article 48 and further intends to promote closer working relations between States Parties. The article encourages States Parties to consider entering into arrangements that allow for the use of joint investigative bodies, where a number of States Parties may have jurisdiction over the offences involved. Article 49 further enables States Parties to undertake joint investigations on a case-by-case basis when relevant agreements or arrangements do not exist.

## **II. Challenges and solutions**

### *II.1. Operational issues*

Joint investigations have been used as a form of international cooperation for many years in cross-border crime, particularly in relation to organized crime. However, this practice appears to have developed almost on the basis of ad hoc arrangements.

Practical experience has shown that such operations raise issues related to the legal standing and powers of officials operating in another jurisdiction, the admissibility of evidence in a State Party obtained in that jurisdiction by an official from another State Party, the giving of evidence in court by officials from another jurisdiction, and the sharing of information between States Parties before and during an investigation.

It was further acknowledged that these practical issues could be addressed through the use of investigative planning approaches that recognize and deal with them in advance. However, in cases of transnational crime and particularly transnational corruption, there is a need for clarity and consistency in the way investigations are conducted and information is exchanged. This would undoubtedly assist in ensuring, for example, that evidence is admissible in the courts, that the rights and duties of foreign members of teams are secured and that the sovereignty of the State in whose territory such investigation is to take place is fully respected, as article 49 expressly requires.

### *II.2. Developing a framework*

Until recently, there has been no internationally agreed framework for establishing and operating joint investigations and the teams required to undertake the work. The Member States of the European Union put such a framework in place in July 2002 through the adoption by the European Council of the Framework Decision on Joint Investigation Teams. This decision gave support to the implementation of articles 13, 15 and 16 of the 2000 European Union Convention on Mutual Assistance in Criminal Matters (article 13 is dealing with the setting up and operation of a joint investigative team and articles 15 and 16 relate to the criminal and civil liability of those involved).



There are similar provisions on joint investigation teams in articles 20, 21 and 22 of the Second Additional Protocol to the Council of Europe Convention on Mutual Assistance in Criminal Matters, and articles 3, 19 and 24 of the Naples II Convention on Mutual Assistance and Co-operation between Customs Administrations of the Member States.

The European Union approach to joint investigations primarily focuses on the establishment of joint teams for the investigation of serious criminal offences with transnational dimensions. It also requires that a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated and concerted action.

The EU Framework Decision on joint investigation teams serves as a useful guide to address the practical and procedural issues that emerge in the context of a joint investigation.

It was always anticipated by the EU Member States that prosecutors would be consulted by the police at a very early stage in the investigative process and be responsible for providing advice on a wide range of issues such as jurisdiction, disclosure and liaison with other European counterparts. Indeed the team leaders of the participating States Parties are likely to be prosecutors or magistrates.

### *II.3. Planning for joint operations*

In planning joint investigations, and identifying those issues to be addressed prior to undertaking any work, the issues that may need to be considered include the following:

- The criteria for deciding on a joint investigation, with priority being given to a strong and clearly defined case of serious transnational corruption. The issue here is to ensure that such investigations are handled in a proportionate manner and with due respect to the suspect's human rights;
- The criteria for choosing the location of a joint investigation (near the border, near the main suspects etc.);
- The use of a coordination body to steer the investigation if a number of different jurisdictions are involved;
- The designation of a lead investigator to direct and monitor the investigation;
- Agreements on the collective aims and outcomes of joint working, the intended contribution of each participating agency, and the relationship between each participating agency and other agencies from the same State Party;
- Addressing any cultural differences between jurisdictions;
- Assessing the pre-conditions of the investigation as the host State Party should be responsible for organizing the infrastructure of the team;

- The liability of officers from a foreign agency who work under the auspices of a joint investigation;
- The level of control exerted by judges or investigators;
- Financing and resourcing of joint investigations. In this vein, an agreement may be necessary to provide for the costs directly to be charged to the participating States Parties. For each State Party it should be specified whether the costs are directly charged to the agency allocating the staff, or whether there will be some form of national or international financing;
- Identifying the legal rules, regulations and procedures to determine the emerging legal and practical matters, including pooling, storage and sharing information, confidentiality of the activities, the integrity and admissibility of evidence, disclosure issues (a particular concern in the common law jurisdictions), implications of the use of covert operations, appropriate charges and the issue of retention of traffic data for law enforcement purposes;
- Ensuring the upgrading of capacity, expertise and experience of developing States Parties in participating in joint investigations.

Flexible and effective agreements or arrangements in this field are mostly based on the political will and determination of the States involved, as the adoption of the EU Framework Decision indicates. However, the implementation of such agreements or arrangements is often subject to the limitations and requirements foreseen in national legislation. Article 49 is intended to provide a legal regime which may overcome such limitations.

### **III. Checklist**

- Have the authorities of the State Party been involved in joint investigations or joint investigative task forces to deal with multijurisdictional cases?
- Is such involvement based on ad hoc arrangements or is there any established framework to authorize it?
- What kind of legal, operational and evidentiary issues are experienced in carrying out joint investigations?

## **Article 50: Special investigative techniques**

*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.*

## **I. Overview**

Article 50 requires States Parties to take measures to allow for the appropriate use of special investigative techniques for the investigation of corruption.

Paragraph 1 advocates the use of controlled delivery and, where appropriate, electronic or other forms of surveillance and undercover operations on the understanding that such techniques may be an effective weapon in hands of law enforcement authorities to combat sophisticated criminal activities related to corruption. However, the deployment of such techniques must always be done to the extent permitted by the basic principles of domestic legal systems and in accordance with the conditions prescribed by domestic laws. Paragraph 1 also obliges States Parties to take measures allowing for the admissibility in court of evidence derived from such techniques.

Paragraph 2 accords priority to the existence of the appropriate legal framework that authorizes the use of special investigative techniques and therefore encourages States Parties to conclude bilateral or multilateral agreements or arrangements to foster cooperation in this field, with due respect to national sovereignty concerns.

Paragraph 3 provides a pragmatic approach in that it offers the legal basis for the use of special investigative techniques on a case-by-case basis where relevant agreements or arrangements do not exist.

Paragraph 4 clarifies the methods of controlled delivery that may be applied at the international level and may include methods such as intercepting and

allowing goods or funds to continue intact or be removed or replaced in whole or in part. The method to be used may depend on the circumstances of the particular case and may also be affected by the national laws on evidence and its admissibility.

## **II. Challenges and solutions**

In recent years there has been a significant shift in the use of methods to detect and investigate crime and in the nature of investigations with a greater emphasis on intelligence-driven, proactive investigations. In addition, the technological means whereby investigators can gather information covertly have also advanced rapidly. However, States Parties may wish to take into account that the expanded use of special investigative techniques has to be carefully assessed in the light of human rights protection and the evidentiary requirements of any subsequent legal proceedings.

### *II.1. Safeguards*

States Parties may wish to give serious consideration to the legal and policy implications of the deployment of special investigative techniques and therefore a careful assessment of the appropriate and proportionate checks and balances to secure human rights protection may be needed. Careful thought should also be given to the question whether oversight of the use of special investigative techniques shall rest with the judiciary or the executive.

### *II.2. Resources/technological competence*

The professionalism and competence of the law enforcement agencies involved in special investigative techniques and the level of their training are among the practical aspects that require careful consideration. In addition, in seeking the best methods to enhance international cooperation in this field, it may be appropriate for trained law enforcement agents from overseas to work in other States Parties with a view to improving capacity and also ensuring admissibility of the evidence derived from the use of the investigative techniques.

### *II.3. Admissibility of evidence*

Concerns may also be raised with regard to the legality of the use and extent of deployment of special investigative techniques and the resulting admissibility of their results. This will be particularly an issue where a joint operation is involved and therefore the sharing of intelligence, information and resources is likely to require careful handling. In some jurisdictions, the use of special investigative techniques may cause difficulties in that the judges may not be in a position to fully understand the process and the technology involved. This may be resolved through appropriate training and even the use of specialist judges.

## *II.4. Techniques*

There are a number of other special investigative techniques that States Parties may wish to consider, but II.4.1-II.4.7 summarize a number of widely used techniques. It is also important to ensure the integrity of the evidence obtained through such techniques when used before the courts of States Parties.

### *II.4.1. Technical surveillance – telephone intercept, bugging*

Also known as intrusive electronic surveillance, this is a formidable tool in the hands of the investigative authorities. However, given that such devices are generally intended to capture the conversations of individuals – some of whom may not be involved in the investigation – particular attention should be paid to requisite safeguards which authorize, and provide detailed conditions for, their use. Electronic surveillance is likely to extend to the use of listening devices, phone or e-mail intercept, and the use of tracking devices.

### *II.4.2. Physical surveillance and observation*

This technique is likely to be less intrusive than technical surveillance and extend to placing the suspect under physical surveillance, or following and filming the suspect. However, it may also extend to monitoring bank accounts or even sophisticated methods of monitoring transactions.

### *II.4.3. Undercover operations and the use of sting operations*

The use of undercover operations, which may or may not extend to the use of a “sting operation”, are extremely valuable in cases where it is very difficult to gain access by conventional means to a corruption conspiracy. The aim of such operations is to engage in contact with the corrupt parties, so that the undercover operatives can witness and expose the corrupt practices. The evidence of an “insider”, whether an undercover police officer or even a co-conspirator, is likely to be critical to a successful prosecution. Furthermore, the effect of such conclusive evidence often brings offers of cooperation and pleas of guilt from defendants, thereby eliminating the need for long and expensive trial processes (see also article 37).

Undercover operations may range from routine practices, such as the undercover officer offering bribes to traffic police or low-level officials, to much more complex and long-term plans which are more sophisticated in both the use of special investigative techniques and the creativity of the investigation itself (such as “creating” a working import/export). However, there are likely to be problems in some States Parties as to the legality of the use of undercover officers and sting operations, particularly associated with concerns about entrapment, or officers committing a criminal act (such as offering a bribe), as well as concerns about resources, longevity and the cost of such operations.

#### *II.4.4. Informants*

Many States Parties use or recruit informants inside public institutions as sources of information. These are not law enforcement officers but public officials. As sources of information and intelligence within offices not amenable to undercover work or surveillance, such informants may provide effective services. On the other hand, their use may raise issues about payment, dissemination of information, safety and informant-handler relations. Another practical issue that may emerge where the information is sufficient enough to lead the case before a court is the availability of such informants as witnesses.

#### *II.4.5. Integrity testing*

Integrity testing is a method that enhances both the prevention and prosecution of corruption and has proved to be an extremely effective and efficient deterrent to corruption. Integrity testing is usually utilized in circumstances where intelligence exists providing indications that an individual or a number of individuals, usually public officials, are corrupt.

A scenario is created in which, for example, a public civil servant is placed in a typical everyday situation where he or she has the opportunity to use personal discretion in deciding whether or not to engage in criminal or other inappropriate behaviour. The employee may be offered the opportunity to take a bribe by an undercover officer or be presented with an opportunity to solicit a bribe through, for example, an abuse of public functions (see article 19). However, such testing cannot be simply used on an indiscriminate basis but must be based on some level of intelligence to suggest that the employee may be corrupt. Moreover, consideration should be given to existing restrictions intended to prevent “entrapment”, whereby undercover agents are permitted to create opportunities for a suspect to commit an offence, but are not allowed to offer any actual encouragement to do so.

#### *II.4.6. Financial transaction monitoring*

The movement of illicit funds through financial institutions and the level of reporting to FIUs of States Parties provide investigators with information about not only the movement of the funds, but also the relationships of those involved. For the purposes of article 50, States Parties should ensure that the reporting regime of the financial transaction allows, subject to appropriate controls, authority and supervision, for the monitoring of account by investigators to track the location, movement and dispersal of the financial benefits of corruption.

#### *II.5. Relevant Conventions*

A number of States Parties may already have in place the mechanisms provided for in article 50, particularly in relation to offences such as trafficking in drugs or organized crime, as a result of being Parties to Conventions such as

the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (see article 11 on controlled delivery) and the United Nations Convention against Transnational Organized Crime (see article 20). However, the decisions on whether to use these techniques will depend on the requirements of the domestic legislation, as well as the discretion and resources of the States Parties concerned.

### **III. Checklist**

- Do the competent authorities of the State have the power to undertake technical forms of surveillance and other special investigative techniques?
- Are there clear guidelines on the use of such techniques?
- Is evidence derived from the use of special investigative techniques admissible in national courts?
- Has the State Party concluded any bilateral, or acceded to multilateral, agreements or arrangements for promoting international cooperation in using special investigative techniques?





**ASSET RECOVERY**  
**(Chapter V, articles 51-59)**



## **Article 51: General**

*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.*

### **The return of assets as a fundamental principle**

The return of proceeds from corruption to its country of origin is one of the core objectives of the Convention (article 1 (b)). Article 51 further establishes the return of the proceeds of corruption as a “fundamental principle” of the Convention.

The chapter specifies how cooperation and assistance will be provided, how proceeds of corruption are to be returned to a requesting State Party, and how the interests of other victims or legitimate owners are to be considered. In spite of the fact that an interpretative note to the Convention indicating that the expression “fundamental principle” would not have legal consequences on the other provisions of chapter V of the Convention (A/58/422/Add.1, para. 48), article 51 is a statement of intent indicating that any doubt concerning the interpretation of provisions related to asset recovery should be resolved in favour of recovery as a core international cooperation objective of the Convention.

Chapter V on asset recovery must be read in conjunction with a number of provisions contained in chapters II to IV of the Convention, particularly article 14 on the prevention of money-laundering, article 31 on the establishment of a regime for domestic freezing and confiscation of the proceeds of corruption as a prerequisite for international cooperation and the return of assets, article 39 on cooperation between national authorities and the private sector and articles 43 and 46 on international cooperation and mutual legal assistance. Article 52 also has significance insofar as it requires States Parties to take reasonable steps to determine the identity of the beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates.

### **Article 52: Prevention and detection of transfers of proceeds of crime**

*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.*

## **I. Overview**

While article 14 establishes the basic operational principles of an anti-money-laundering prevention system, article 52 requires States Parties to compel their financial institutions to verify the identity of their customers, to maintain adequate records and accounting systems, to take reasonable steps to determine the beneficial owner of highly valued accounts and to conduct enhanced scrutiny of accounts maintained by so-called politically exposed persons (PEP – defined in paragraph 1 (b) as individuals who are, or have been, entrusted with prominent public functions and their family members and close associates). In implementing these requirements, States Parties shall issue advisories to financial institutions on how to carry out these obligations. Advisories are normally formal and binding in terms of guidance, although the detail of implementation may be left to the advised institution, and may be issued by banking or financial services regulators, finance ministries, FIUs or other designated agencies. Additionally, article 52 recommends avoiding corresponding relationships with shell banks to discourage their use for the transfer, diversion or conversion of illicitly obtained funds.

States Parties may wish first to decide the competent authority to issue such advisories. Given the fact that the laundering methods are constantly evolving, advisories may be issued based on identified patterns constructed from suspicious transaction reports as well as from the expert views of the gatekeepers. That taken into account, and reflecting the recommendations of the Convention, the FIU or the agency charged with the prevention of money-laundering should issue the advisories which should address a range of themes regarding the three mandatory requirements of paragraph 1, as well as the requirements of paragraphs 2 (b) and 3. Article 58 describes the structure and roles of FIUs.

The article requires financial institutions to apply higher scrutiny concerning the position of their clients, especially those having prominent public functions and those connected to such individuals, and by complementing the requirements of article 8 in requiring the establishment of financial disclosure systems for appropriate public officials, including ownership of foreign accounts. Ideally, article 52 will prevent the proceeds of corruption from leaving the State Party of origin or at least will alert the authorities of the relevant transactions. When the institutions of the State Party of origin are not able to prevent the transfer, institutions of the receiving State Party will be able either to refuse it or to report it.

## **II. Practical challenges and solutions**

### *II.1. Verification of customer identity*

The first requirement of the relevant institutions – verifying the identity of their customers – goes further than a mere formal identification principle. It is not infrequent that “know-your-customer” rules are designed or interpreted in a strictly formal way and thus limited to obtaining a copy of a customer’s identity card or other identity document. To prevent the use of fake documentation in the establishment of a client relationship with financial institutions, paragraph 1 not only requires that financial institutions “identify” their clients but also “verify” the identity provided. Different identification procedures will be required for addressing different types of customers.

When dealing with face-to-face relationships with an individual, examining and making a photocopy of one or two official identification documents with a photograph (passport, identity card, driver’s licence or some similar document) will suffice so long as the institution takes reasonable steps to verify the authenticity of the documentation. In case of non-face-to-face individuals (correspondence or Internet) financial institutions may verify the identity of the potential account holder by obtaining a certified copy of an official identification document – usually provided by a public notary or another financial institution – as well as a confirmation of the address indicated, which is usually done through an exchange of correspondence using in-house, third-party or independent means of verification.

In the case of legal entities, both domestic or based abroad, financial institutions may be required to verify their “identity” either by obtaining an updated copy of the documents of incorporation in the companies’ registry or, when they are publicly listed in official publications or websites, by checking and getting copies of the data of incorporation from public registries, official bulletin registers, bulletins or gazettes.

As these procedures might take some time, and in order not to obstruct business relationships, States Parties may consider if financial institutions may be permitted to open accounts on a provisional basis while the procedure is being completed. However, all the necessary documents and verifications must be completed before allowing transactions above a reasonable level, or forbidding significant transactions, or transfers to and from foreign jurisdictions. In addition, the procedure may also establish the termination of the relationship if the procedure is not completed before a stipulated deadline.

### *II.2. Identification of beneficial owners of high-value accounts*

The second requirement – taking reasonable steps to determine the beneficial owner of funds deposited in highly valued accounts – aims at impeding the use of third persons holding the proceeds of crime on behalf of corrupt individuals. It requires the establishment of specific procedures,

applicable whenever there is any doubt as to whether the account holder is himself the beneficial owner. There are four main elements of such procedures.

First, in defining “beneficial owner,” States Parties may consider prohibiting financial institutions from accepting a corporate vehicle or a legal entity the identity of which cannot be established as a beneficial owner.

Second, it should be determined what kind of financial products will be considered a “highly valued account” (para. 2 (a)). Despite the reference to *de minimis* amounts, States Parties issuing regulations on this matter may consider applying the requirement not only to bank accounts but also to, for example, securities accounts, management agreements for deposits made by third parties, transactions with currencies or precious metals, and other transactions of risk. Here special attention should be paid to four areas: financial products, offshore vehicles, discretionary trusts and professional persons.

Those financial products which may require attention are those where, by their nature, the client does not coincide with the beneficial owner, such as joint accounts, joint securities accounts, investment companies and other collective investments. In these cases, holders of such products may be required to provide financial institutions with, and periodically update, a full list of beneficial owners with all the information required for clients. Exceptions for publicly traded companies are made in several jurisdictions.

Offshore companies are those institutions, corporations, foundations, trusts, or other vehicles that either do not conduct any commercial operation in the State Party where their registered office is located or do not have their own premises or their own staff, or when they have their own staff, those employees engage solely in administrative tasks. For assets held by these corporate vehicles, States Parties must compel their financial institutions to require, in addition to a certified copy of the incorporation documents to verify their identity, a written declaration indicating the beneficial owner(s) of the assets concerned. Again, States Parties may not permit financial institutions to accept corporate vehicles as beneficial owners of other corporate vehicles.

For clients holding assets without specific beneficial owners (e.g., discretionary trusts), financial institutions may require clients to provide a written declaration containing information about those with control over the assets (the actual settler, all persons authorized to instruct the account holder or other authorized agents, persons who are likely to become beneficiaries, curators, protectors etc.).

In issuing advisories, States Parties need to identify in which situations clients bound by professional confidentiality, such as attorney or notaries, might be required to disclose the beneficiary owner of accounts held by them. Common examples to be addressed are: advances on legal costs, payments to or from parties of a dispute, a pending distribution of inheritance or execution of a will and pending separation of assets in a divorce.

Third, though States Parties may recognize that financial institutions are in the best position to exercise discretion in applying the requirements on beneficial ownership, States Parties may set up a list of situations, cases and examples in which financial institutions are required to apply the procedures. Even though financial institutions are in the best position to decide whether the client and the beneficial owner are the same person, a list of non-exhaustive situations that may be used as a baseline will help. Examples of these situations include circumstances when the assets involved in the transaction are disproportionate to the financial standing of the person wishing to carry out the transaction or when the power of attorney is conferred on someone who evidently does not have sufficiently close links to the account holder.

Fourth, States Parties may advise financial institutions on the situations in which they should terminate a commercial relationship, if the verification criteria are not met, on the grounds of doubts or distrust regarding the true ownership of assets. The grounds may respond to the following situations:

- The bank has cause to doubt the accuracy of the information regarding the identity of the account holder.
- The accuracy of the declaration of beneficial ownership is in doubt.
- There are signs of important unreported changes.
- There is reason to believe that the bank has been deceived when verifying the identity of the account holder.
- The bank was wilfully given false information about the beneficial owner.
- Doubts persist with regard to the account holder's declaration upon implementation of the procedure.

### *II.3. Enhanced scrutiny over accounts held by politically exposed persons (PEPs)*

In addition to the actions under II.1 and II.2 above, States Parties are required to conduct enhanced scrutiny, designed to detect suspicious transactions over accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions, and their family members and close associates (collectively termed PEPs). In issuing the advisories on PEPs required by the article, States Parties should consider a number of issues.

First, States Parties must precisely define a PEP. Given the requirements of paragraphs 5 and 6, and the expectation that States Parties should be both proactive and offer the widest support to other States Parties, States Parties may consider including not only domestic but also foreign political figures, family members and close associates. While including family members does not usually represent a problem – a decision may be based on the degree of family, kin and marriage relationships – a more difficult question usually arises on how to define “close associates”. The answer usually depends on the degree of information available to gatekeepers in the jurisdictions in question. For example, if



regulators may easily access to the registry on real estate, vehicles, companies, the advisory may require them to consider associates as those appearing to share registered assets or forming partnerships and other types of commercial associations. In other jurisdictions, the advisory may resort to “public information”, obligating them to check regularly in the media for possible “close associates”.

Second, States Parties must adopt a concept of “enhanced scrutiny”. In recent years, many jurisdictions have moved to require their financial institutions to establish a “client profile” in order to determine when a transaction does not match with the established profile which may then raise suspicion to be reported to the authorities. The use of a client profile approach requires financial institutions to understand the source of wealth, the financial products expected to be used, the pattern and amounts of the expected funds incoming and outgoing the accounts and the performance of the business in the context of a given market. Other jurisdictions have requested their financial institutions to establish reasonable steps to be followed when setting up a relationship with PEPs, including the following minimum requirements:

- A standard application process that identifies potential PEPs from other overseas applicants;
- If the client or the beneficial owner is a PEP, identifying the source of the wealth by checking verifiable sources of income and the plausible reasons for opening an account in that jurisdiction and monitoring receipts of sums from, for example governmental bodies or commercial concerns based in other jurisdictions;
- If no concern arises by this investigation and a relationship is established, the bank may in any case establish regular due diligence procedures over that client and their transactions;
- When the monitoring process gives rise to any concern, it may be immediately reported to the authorities;
- All customer relationships with PEPs should be reviewed regularly by the financial institution’s senior management;
- Periodic reviews of both existent accounts and the possibility that an older client has become a PEP after starting the relationship with the bank should be made.

#### *II.4. Advisories on enhanced scrutiny to domestic financial institutions*

Taking into account the difficulties in identifying PEPs – especially because the concept includes their families and close associates – article 52 establishes an innovative provision by which any State Party may notify another State Party of the identity of PEPs so as to require its own financial institutions to enhance due diligence over specific clients. In implementing this provision, States Parties

may ascertain that such cooperation and assistance may merit a regular procedure in order to collect relevant information to transmit to recognized foreign authorities, subject to appropriate safeguards as to the integrity and confidentiality and potential use of the information (see also II.8 below). For those jurisdictions where the proceeds of corruption are believed to be regularly diverted, this will be an invaluable tool. Article 56 also encourages States Parties to be proactive in alerting other States Parties about the latter's PEPs where there may be cause for concern.

### *II.5. Record-keeping*

Article 52 (3) requires the advisories issued in accordance to 2 (a) to specify a special record-keeping obligation for high-risk customers and PEPs. While article 14 (1) compels States Parties to hold their financial institutions to a general record-keeping obligation, article 52 (3) requires a specific additional or enhanced policy for PEPs.

In implementing this provision, States Parties may consider different variables to determine a realistic timescale for the retention of records for a number of reasons. These may include delays between the offence and the initiation of any investigation, the difficulties of tracing the proceeds of an official who was in a position of power or remains in office (where they have immunities or where they can influence investigations), the complexities of the procedures involved in international asset-tracing, and policy decisions adopted when implementing article 29 regarding statute of limitations for offences established in accordance with the Convention. Many jurisdictions require their regulators to establish an agreed timescale for retention, such as 5 years from the start of each transaction. In a number of cases, the retention should include the originals of all documents. States Parties may wish to consider whether enhanced scrutiny of PEPs should also extend to a prolonged retention of records given that there may be cases when asset recovery can only be initiated when concerned PEPs have left office.

### *II.6. Preventing the establishment of, and correspondent relationship with, shell banks*

One of the most used financial vehicles to hide assets in the international financial system is the so-called "shell bank." An internationally accepted definition of shell banks is that they are "*banks that have no physical presence (i.e. meaningful mind and management) in the country where they are incorporated and licensed and are not affiliated to any financial services group that is subject to effective consolidated supervision*" (Basel Committee, 2003; see also Wolfsberg AML Principles for Correspondent Banking).

Shell banks have frequently been used to channel proceeds of crime out of a jurisdiction, and have particularly been used in significant corruption schemes. For that reason, paragraph 4 requires States Parties to adopt measures to prevent the establishment of shell banks in their jurisdictions.

For a financial institution, not having physical presence is not just the absence of an office. Usually shell banks do maintain an office run by a local agent or by very low-level staff which provides an address for legal purposes in the jurisdiction of incorporation. For a financial institution, physical presence is usually understood as the place where “the mind and management” of the institution is, so the regulator can exercise its controls. In the case of shell banks, the mind and management are located in a different jurisdiction, either in the offices of an associated entity or even in a private residence. Having the management in a different jurisdiction prevents the regulator at the jurisdiction of incorporation from exercising proper supervision.

The other element of the definition of a shell bank is that they are not affiliated with a supervised financial services group.

Clients of shell banks use them primarily for the anonymity and facilities to disguise the origin of funds and funnel them to other financial institutions. In other words, rarely does money remain deposited in a shell bank for long. For that reason, a further action by States Parties is to adopt measures to prohibit their financial institutions from entering in correspondent banking relationships with shell banks.

Correspondent banking is the provision of banking services from one bank to another. It is an important segment of the banking industry because it enables banks located in one State to conduct business and provide services for their customers in other jurisdictions where the banks have no physical presence. By opening a correspondent account, the foreign bank, called a respondent, can receive many or all of the services offered by the correspondent bank, without the cost associated with being licensed or establishing a physical presence in the correspondent jurisdiction. Today, many of the large international banks located in the major financial centres of the world serve as correspondents for thousands of other banks.

Correspondent banking entails inherent vulnerabilities because a correspondent bank may not be in a position to regularly ask either the extent to which their foreign bank clients allow other foreign banks to use their accounts, or the identity of the owners of the assets (see II.1 and II.2 above) that flow through the correspondent account. Given the fact that their clients are also banks, correspondent banks rely on their compliance with anti-money-laundering regulations practices, the underlying rationale being that enforcing compliance over foreign clients is costly and often not feasible. Moreover, since the correspondent account holder is the foreign bank, the monies flowing through that account may belong to a large number of the foreign bank’s clients.

States Parties implementing the recommended measures may consider that they:

- Require their financial institutions to conduct risk assessments or due diligence over the respondent bank’s management, finances, business activities, reputation, regulatory environment and operating procedures;

- Prohibit their financial institutions from entering into correspondent relationships with foreign banks if, as a result of the due diligence procedures, there is doubt as to whether shell banks may have access to them;
- Require their financial institutions to obtain and keep a copy of the anti-money-laundering regulations, policies and procedures of respondents' banks;
- Require their financial institutions to report all the correspondent relationships to licensing authorities;
- Open channels for information exchange with foreign supervisors and FIUs to help their financial institutions check on specific institutions or cases.

### *II.7. Financial disclosure systems for appropriate public officials*

Paragraphs 5 and 6 recommend States Parties to establish financial disclosure systems for appropriate public officials, including ownership of foreign accounts. This is also discussed in article 8.

States Parties willing to implement this recommendation are encouraged to bear in mind a number of issues raised in article 8. These include, firstly, which agency has the authority to administer and manage the disclosure and verification system (as well as investigate breaches and pursue sanctions). Some States Parties have resorted to the bodies mentioned in articles 6 and 36 of the Convention; in others the relevant systems are managed and administered either by taxation authorities or by designated bodies (such as, a committee in the legislature). Some are advisory, while others have legal powers. Given the range of approaches, the number of public officials involved, the information to be disclosed, the verification and other procedures, and the application of sanctions, States Parties may wish to give careful consideration to the need for an inclusive institutional approach with effective access to relevant information, robust procedures for verification, and the means to ensure effective compliance.

Secondly, in considering whom to include in the concept of “appropriate public officials”, States Parties may not only consider selecting “by rank” but also by “areas of sensitivity” or “vulnerability” (see article 7). Thus, while most States Parties include elected officials, political appointees (like ministers, secretaries and undersecretaries of State), senior career public officials, members of the judiciary, and sometimes high-ranking military officials. States Parties may also consider including any officials in the position of buying and spending on behalf of the State, like public procurement departments or managers of State-owned enterprises and sensitive areas such as arms manufacturing, financial services etc. Moreover, many States Parties also require their public officials to disclose their family’s interests in order to prevent the use of family members as holders of or conduits for the proceeds of corruption.

Third, States Parties may wish to consider what information (and level of detail) should be required in the declaration, and how often such information

should be submitted. It is not only highly advisable that the system requires as wide a disclosure as possible but also allows disclosure of any information not requested (public officials should not be able to hold an interest where there is a definable conflict of interest but then claim that the failure to require a disclosure has obviated the need to identify it).

Fourth, States Parties are requested to consider taking such measures as may be necessary to permit its competent authorities to share the information obtained through the disclosure system with the competent authorities in other States Parties to facilitate the identification, investigation, restraint, claim, and recovery of proceeds of offences established in accordance with this Convention.

Though sharing sensitive information with foreign authorities depends upon more general considerations of international law and foreign policy, the global administrative exchange of information, such as the system among FIUs, has proved to be expeditious and effective. The key is balancing sound rules for preserving confidentiality when required and for enforcing sanctions for non-compliance when violated. Bilateral agreements or memorandums of understanding for the exchange of information between anti-corruption bodies (or FIUs or any body designated under articles 6 and 36) will need to be reconciled with legislation relating to privacy or, if involving disclosure of bank or tax details, bank secrecy and tax confidentiality legislation. When drafting such agreements it is advisable including formal channels for transmitting information not only upon request but also spontaneously (see article 56), a measure that will considerably improve the exchange of information. States Parties should consider how this may be coordinated if there a number of domestic agencies involved.

### *II.8. Public officials and overseas accounts*

A further, specified, disclosure proposal covers, first, the situation in which a public official has a private interest in a foreign account and, second, the situation in which a public official has a power of attorney, authorized signature, or any other authority to represent the State over its financial interests in another State Party, such as foreign accounts of State-owned public enterprises, trading or training accounts, accounts of embassies, diplomatic representations etc.

In the first situation, the same rules apply as those established when implementing the system envisaged by paragraph 5. Special attention would be appropriate regarding the exchange of financial information with foreign authorities. In the second situation, paragraph 6 provides a powerful tool for preventing embezzlement and fraud of public funds, as well as the abuse of trust and discretionary authority. In implementing this provision, States Parties may consider the role of their State audit in reviewing such accounts and whether the agency administering the disclosure system adopted in paragraph 5 will be the appropriate authority for reviewing the disclosed information, and once again, the specific purposes and uses to be given to that information.

As with all aspects of sanctions for non-compliance with disclosure, States Parties may wish to consider providing sanctions for non-compliance in relation to the requirements of paragraph 6. Sanctions should be proportionate to the violation. Thus a range of such sanctions, such as the imposition of a fine, can be dissuasive enough for some officials and for some situations.

Finally, although the system may include criminal offences relating to conflict-of-interest or disclosure systems, States Parties may also wish to take into account that some “appropriate public officials” are likely to enjoy immunity from arrest. In these cases, criminal offences may be reserved upon discovering that the public official lied intentionally, introduced a false statement in the disclosure form, or over-declared with the intention of avoiding having to explain subsequent increases of assets (see articles 15 and 30 on the issue of immunities).

## **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.*

### **I. Overview**

Article 53 requires States Parties to ensure in their jurisdictions that other States Parties have legal standing for claiming misappropriated assets, to initiate civil actions and other direct means to recover illegally obtained and diverted assets. Prior ownership, damage recovery and compensation are different legal grounds for the victim State Party to claim in the courts of the State Party to where the asset in question was diverted and victim States Parties should be granted appropriate legal standing to act as a plaintiff in a civil action on property, as a party recovering damages caused by criminal offences, or as a third party claiming ownership rights in any civil or criminal confiscation procedure.

## **II. Practical challenges and solutions**

### *II.1. Ensuring legal standing*

States Parties are required to permit another State Party to initiate civil action in its courts to establish title to or ownership of any asset acquired directly or indirectly through the commission of an offence established in accordance with the Convention. In implementing this provision, States Parties may consider two actions.

First, States Parties may wish to balance their current provisions on what constitutes legal standing in their civil and criminal jurisdictions against the objective of article 53 (a) in order to assess whether any review or revision is needed. Some jurisdictions will need to ensure that States Parties and their legal representatives are recognized in the same way as other foreign legal entities and persons. In those jurisdictions in which legal standing and access to courts is based on restrictive requirements – such as requiring evidence of damage or loss and a close causal connection between these and the conduct complained of – an evaluation of the consequences of these restrictions is advisable for the purposes of implementing the article. When loss or damage over an indirect interest and indirect causation is accepted as a basis for legal standing, States Parties will be in a position of giving access to their courts to another State Party to claim ownership or title of asset acquired not only through embezzlement where there is a direct relationship but also through bribery (where the victim State Party has a less direct relationship) or any other mandatory offence prescribed by the Convention.

Second, States Parties should review the criteria for accessing the courts when the plaintiff is another State Party. In many jurisdictions having a State Party as a plaintiff in a civil action may trigger jurisdictional and procedural issues. Regarding the jurisdictional issues, some jurisdictions consider foreign States Parties a “special category” of plaintiff and grant them original jurisdiction to a higher court than the court of first instance. States Parties may check whether these conditions do not curtail procedural rights, such as the right to appeal. Regarding procedural issues related to legal standing and access to courts, the necessity of retaining domestic legal counsel may be an issue, especially for least developed and many developing countries, as legal services in these specialized areas tend to be very expensive and may be prolonged.

### *II.2. Compensation or damages for corruption offences*

States Parties are required to adopt such necessary measures to permit their courts to order those who have committed offences established in accordance with the Convention to pay compensation or damages to another State Party that has been harmed by such offences (see also articles 34 and 35). This innovative provision departs from the notion that proceeds from corruption should be recovered only on confiscation grounds and obligates States Parties to enable its

Courts to recognize the right of victim States Parties to seek to recover compensation or damages.

States Parties implementing this provision may take into account a number of issues. The first concerns the need to decide the applicable procedure. Two broad options are available:

(a) States Parties may require the victim State Party to file a claim for damages or compensation, following tort law or other civil doctrines.

(b) States Parties may permit the criminal court sentencing the offender to establish compensation as an ancillary punishment along with the principal punishment. For States Parties applying “value-based” confiscation systems, this option may be more attractive.

Several States Parties – for instance, parties to the Council of Europe Civil Law Convention on Corruption – have already established the right of individuals and legal persons to compensation for damage resulting from acts of corruption. These might just need to add the standing of another State Party to such procedure. In States Parties where claiming damages originating from acts of corruption is not an established procedure, however, a specific procedure contemplating rights of the victim State Party, the applicable standard of evidence and the rights of the defence may need to be established.

From the procedural point of view, civil claims may be either asset-based or tort-based depending on the origin of the claimed assets. In cases of fraud and embezzlement of public funds, the plaintiff State claims the rightful ownership of asset on behalf of its population or the Treasury. In cases of bribery, trading in influence and other offences where the claimed assets have a private origin, the claim may be based on the harm caused by the defendants or the right of the State Party to seek the return of any illicit advantage gained from misuse or misrepresentation of public office or any authority vested in it.

In relation to the issue of types of damages to be covered, States Parties need to decide whether requesting States Parties may claim only material damages or also loss of profits and non-pecuniary loss. Loss of profits may be recognized when it is demonstrated that the revenues or profits of the State were diminished as a result of the corrupt deal. Non-material damages or non-pecuniary loss are related to institutional damages produced by corruption. One of the main consequences of corruption is that it severely undermines the legitimacy of the institutional system. As those damages, however, are difficult to quantify, compensation may also consist of contributing to institutional programmes, building anti-corruption capacities and so forth. Moreover, the consequences of corruption may also consist in including indirect damages caused by the act of corruption, such as environmental damages when allowing infrastructure works without proper environmental impact studies, contamination of natural resources, damages to the health of the population when allowing disposal of toxic waste and the like.



### *II.3. Recognition of ownership in a foreign confiscation procedure*

The article requires States Parties to provide legal standing to other States Parties to claim, as a third party in a confiscation procedure, ownership over assets acquired through the commission of an offence established in accordance with the Convention. Of course it is possible that the concerned State Party may not be aware of the existence of any proceedings, such as a company charged with bribery of a foreign public official in the jurisdiction of the former. States Parties should always be alert to ensuring that other States Parties are notified at an early stage as any other victim should be. States Parties should therefore consider notifying the concerned State Party of its right to stand and prove its claim, also in line with article 56.

## **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.*

## **I. Overview**

Article 54 is yet another advanced approach towards the overall effort of the Convention to help States put in place a robust asset recovery system. Aiming at overcoming obstacles for recovering proceeds of corruption, it requires States Parties to establish procedures to secure the confiscation of the proceeds of corruption originating from another State Party as well as adopting provisional measures with a view to facilitating confiscation procedures or taking proactive measures in anticipation of such requests. As the requesting State Party or States Parties may belong to a range of different legal traditions, article 54 requires States Parties to be able to cooperate across legal systems.

## **II. Practical challenges and solutions**

### *II.1. Enforceability of a foreign confiscation order*

Under article 54 (1) (a) States Parties are required to adopt procedures for allowing its competent authorities to enforce an order of confiscation issued by a foreign court. Traditionally, these procedures may take two forms. The competent authorities of the requested State Party may either recognize and enforce the foreign confiscation order or institute new proceedings according to domestic law and issue a freezing and/or confiscation order in accordance with that law on behalf of another State Party.

In implementing article 54 (1), States Parties may consider that it also includes property involved in the commission of an offence established in accordance with the Convention and not only acquired through such commission, thus broadening the scope of cooperation. Further, article 54 (1) (a), recognizing that most States Parties will require a judicial decision for enforcing a foreign confiscation order, refers to “competent authorities”, thus leaving States Parties free to establish appropriate administrative procedures for enforcing a foreign judicial decision.

In this connection, it should be borne in mind that it is very likely that the requested State Party would require the judicial decision issued in the requesting State Party to be definite. Both legal security and the rights of defence require a completed decision, with status of *res judicata*, not subject to appeal.

While the enforcement of foreign judgments is usually preferable to the institution of new confiscation proceedings – a form of transferring criminal proceedings – there are situations in which the institution of new proceedings may be necessary to accommodate the request to the domestic law of the requested State Party. A common situation arises when a State Party requests the enforcement of an order of confiscation against a legal person in a State Party where criminal liability of legal persons is not recognized. A new proceeding for determining against which individuals to enforce the order will be required.

Several States have established confiscation procedures that take place independently of the procedures established for assessing guilt in the predicate offence. The purpose of such separate confiscation procedures varies from allowing prosecutorial authorities more time to investigate the origin of proceeds of crime to allowing a lower standard of proof with respect to the origins of the asset subject to confiscation.

### *II.2. Confiscation of proceeds of foreign corruption based on money-laundering or related offences*

In the last decade, the proceeds of several significant corruption offences have been recovered by bringing money-laundering charges in the jurisdiction in which the illicit proceeds had been diverted.

The Convention emphasizes the application of anti-money-laundering mechanisms to prevent, trace, restrain, seize and confiscate proceeds of corruption offences (see articles 14, 23 and 52). Articles 14 and 52 require that financial institutions report transactions suspected of involving proceeds of crime. In addition, article 23 (2) (c) requires States Parties to allow domestic legal proceedings involving a money-laundering offence irrespective of the place in which the predicate offence had taken place. Here article 54 (1) (b) closes the circle by requiring States Parties to ensure the ability to confiscate the proceeds of foreign predicate offences through legal proceedings involving money-laundering.

### *II.3. Confiscation without criminal conviction*

Article 54 (1) (c) recommends that States Parties adopt measures to allow the confiscation of proceeds of corruption offences committed abroad and diverted to its jurisdiction even when neither the State Party where the alleged or actual offence was committed nor the State Party where the assets are located, have obtained a criminal conviction against the offender(s).

The implementation of this recommendation depends on the punitive or restorative character that each State Party assigns to the concept of confiscation. While several States consider confiscation of proceeds of crime to be exclusively a punitive sanction, many others have also approached confiscation as a remedial, restorative sanction which under some circumstances applies as a non-criminal remedy.

The Convention recommends, *de minimis*, ensuring remedial action for those cases in which a criminal conviction cannot be obtained by reason of death, flight or absence. In case of death, as it is an established principle that criminal sanctions cannot be passed to heirs, States Parties may portray confiscation as remedial or reparative action on the premise that transfer or conversion cannot alter the illegality of the assets, nor the right of the victim State Party to reclaim them.

The European Court of Human Rights, for example, has delineated the criteria that portray a confiscation either as a penalty or as a civil remedy (European Human Rights Commission, No. 12386/1986 and European Court of Human Rights, Case of Phillips v. the UK, No. 41087/1998). Unlike confiscation in criminal proceedings, civil forfeiture laws do not require proof of illicit origin “beyond reasonable doubt”. Instead, they consider proof on a balance of probabilities or demand a high probability of illicit origin combined with the inability of the owner to prove the contrary.

#### *II.4. Provisional measures for the eventual confiscation of assets*

Paragraph 2 of article 54 requires States Parties to allow their competent authorities to adopt provisional (or interim) measures to be taken at the request of another State Party with a view to the enforcement of freezing or confiscation orders. Article 54 (2) (a) recognizes that foreign freezing or seizure orders may be issued by competent authorities other than the courts. However, States Parties are not required to enforce or recognize a freezing or seizure order issued by an authority that does not have criminal jurisdiction (see, for comparison, Interpretative Note on article 54.2 (a), A/58/422/Add.1, para. 61).

While article 54 (2) (a) and (b) focus on freezing and seizing as required provisional measures, article 54 (2) (c) strongly recommends that States Parties take other measures to permit their competent authorities to preserve assets for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such assets and which may lead to confiscation proceedings. All criminal procedures, for example, provide for measures other than freezing and seizing, such as sequestering, injunctions, restriction orders, monitoring of enterprises or accounts, that allow for temporary restrictions on the disposition, use and enjoyment of assets. States Parties willing to implement this recommendation may consider extending the use of those measures to the early stage in which States Parties get information about a foreign arrest or criminal charge related to the acquisition of such assets (see article 56).

For more information and analysis on the content and structure of, and the requirements set forth in, article 55 of the Convention, see the relevant chapter of the Legislative Guide for the Implementation of the United Nations Convention against Corruption

## **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.*

### **I. Overview**

Article 56 constitutes a step forward in the area of international cooperation that has been based traditionally on the principle of providing information or assistance only at the request of another State Party. The Convention introduces the concept of spontaneous cooperation, thus supporting a proactive approach which has significant potential especially in the context of contemporary financial transactions which move at very high speeds. According to article 56, States Parties are encouraged to proactively inform other concerned States Parties, when they believe that such information may be useful in initiating or conducting investigations, prosecutions or judicial proceedings.

### **II. Practical challenges and solutions**

To implement article 56, States Parties may consider including in their domestic legislation proactive cooperation provisions allowing their competent authorities to forward information considered of interest for the authorities of other States Parties. It is, however, left to the discretion of States to determine how such information may be exchanged. Yet in view of the practicability of the provisions it would appear useful to opt for direct channels of communication allowing relevant authorities to provide such information directly to their respective counterpart agencies. Such information may in particular include suspicious transactions, activities of PEPs or where a public official has a power of attorney, authorized signature, or any other authority to represent the State over its financial interests in another State Party and unusual payments by legal entities.

States Parties may wish to utilize already existing frameworks for information exchange. An example of such a forum for communication can be the Egmont Group. The Egmont Group works to foster the development of financial intelligence units (“FIUs”) and information exchange. FIUs exchange information with other FIUs on the basis of reciprocity or mutual agreement and consistent with established procedures. Such exchange, either upon request or spontaneously, produces any available information that may be relevant to an analysis or investigation of financial transactions and other relevant information

and the persons or companies involved. The exchange of information between FIUs takes place as informally and as rapidly as possible and with no excessive formal prerequisites, while guaranteeing protection of privacy and confidentiality of the shared data. The exchange of information between Egmont FIUs should take place in a secure way. To this end, the Egmont FIUs uses the Egmont Secure Web (ESW) where appropriate.

For more information and analysis on the content and structure of, and the requirements set forth in, article 57 of the Convention, see the relevant chapter of the Legislative Guide for the Implementation of the United Nations Convention against Corruption



## **Article 58: Financial intelligence unit (FIU)**

*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, analysing and disseminating to the competent authorities reports of suspicious financial transactions.*

### **I. Overview**

Article 58 encourages States Parties to establish financial intelligence units (FIUs) in order to increase the effectiveness of cooperation for asset recovery.

FIUs have been created in more than 110 countries since the 1990s in order to prevent and fight against money-laundering as central, national agencies responsible for receiving (and, as permitted, requesting), sharing, analysing and disseminating to competent authorities disclosures of financial information concerning suspected proceeds of crime and potential financing of terrorism, or required by national legislation or regulation, in order to counter money-laundering and terrorist financing. The Egmont Group is an informal organization to facilitate the work of FIUs. Among its priorities are the stimulation of information exchanges, and the overcoming of obstacles preventing cross-border information-sharing.

### **II. Practical challenges and solutions**

#### *II.1. Roles of FIUs*

FIUs normally have three basic functions. First, they operate as a repository to centralize the information on money-laundering coming mostly from financial institutions and other intermediaries and exercising a significant operational degree of control over the use and dissemination of this information. Second, they perform an “analysis function” consisting of processing the information they receive and adding related valuable data on the reported transaction. Such information usually comes from FIUs’ own data, other governmental databases to which FIUs have access, publicly available sources, additional information from reporting entities, and from foreign FIUs. Part of the analysis function can include the performance of research activities with strategic and/or statistical analysis that would be shared with other enforcement authorities, like for example, concerning the development of new trends or typologies in money-laundering, mapping criminal financial activity over large geographic areas, and establishing international linkages that are not apparent in initial investigative activity. Third, FIUs serve as a conduit for facilitating – proactively and reactively – the exchange of information on unusual or suspicious financial

transactions between foreign FIUs or domestic law enforcement, regulatory or judicial agencies.

In certain cases, FIUs may be empowered with some additional supervisory responsibilities either over financial institutions or non-financial businesses and professions, or both. In such cases, these units could also be authorized to impose sanctions against entities or persons for failing to comply with their reporting or record-keeping obligations (e.g., fines, or licence suspensions or cancellations). Some FIUs may also be authorized to enact regulations for the implementation of laws against money-laundering and terrorist financing.

Depending on the model of FIU chosen by States Parties (see below), they can be in charge of some preliminary investigations on money-laundering, or cooperating with judicial authorities in identifying potential assets to be frozen, seized or confiscated, or with respect to the financial activities of the suspected criminal or his/her accomplices. In some cases, FIUs can undertake the restraining of assets as provisional measures while investigations take place.

They can also provide advice and training to the personnel of financial institutions and non-financial businesses or professions in money-laundering regulations or terrorist financing, domestically, regionally and internationally.

In setting up FIUs, States Parties may consider different models, according to their legal frameworks and economic characteristics, for example:

- The administrative model, which is either attached to a regulatory/supervisory authority, such as the central bank or the ministry of finance, or as an independent administrative authority;
- The law enforcement model;
- The judicial or prosecutorial model, where the agency is affiliated with a judicial authority or the prosecutor's office; or
- The hybrid model, which is some combination of the above.

In all cases, however, a core component is agency independence which could be guaranteed in several ways. In certain instances it could be accomplished by creating the FIU as a separate agency with a protected budget and qualified and sufficient staff or ensuring that its resources and activities are not directed by another agency which could influence its effectiveness or exploit its functions and information inappropriately. This independence should, however, be accompanied by proper supervisory and accountability mechanisms, such as oversight of intrusive powers or data use, parliamentary reporting, audits, and/or judicial oversight.

## *II.2. FIU models: administrative*

Administrative-type FIUs may be either public bodies or private bodies (with legislatively defined functions) operating as a separate agency, placed under the supervision of a ministry or administrative agency or not placed under

such supervision (independent). By making an administrative authority a “buffer” between the financial institution and other reporting sectors and the law enforcement sectors, authorities can more easily enlist the cooperation of reporting institutions, which are often conscious of the drawbacks vis-à-vis their clients of having direct institutionalized links with law enforcement agencies. The advantages of an administrative-type FIU are that the FIU often acts as an interface between the financial and other sectors subject to reporting obligations, on the one hand, and law enforcement authorities, on the other. This avoids the creation of direct institutional links between reporting parties and law enforcement agencies, while bringing disclosures to the attention of law enforcement agencies. This makes financial institutions and others more confident about disclosing information if they know that dissemination will be limited to cases of money-laundering or corruption or terrorist financing and will be based on the FIU’s own analysis, rather than the reporting institution’s limited information. The administrative-type FIU is usually seen as a “neutral,” technical, and specialized interlocutor for the reporting parties; if placed in a regulatory agency, it is the natural interlocutor of the financial institutions. Such FIUs can easily exchange information with all types of FIUs.

On the other hand, because the FIU is not part of the law enforcement administration, there may be a delay in applying law enforcement measures, such as freezing a suspicious transaction or arresting a suspect, on the basis of financial disclosures. The FIU usually does not have the range of legal powers that law enforcement agencies and judicial authorities have to obtain evidence, such as issuing search warrants, intercepting communications or to subpoena witnesses. Some, however, do have regulatory and other sanctions and some may have the authority to request other public or private entities the submission of documentary evidence. The administrative-type FIUs may be more subject to the direct supervision of political authorities.

### *II.3. FIU models: law enforcement*

In some States Parties, the emphasis on the law enforcement aspects of the FIU has led to the creation of the FIU as an independent public agency or as part of a law enforcement agency. This has been seen as the easiest way to establish a body with appropriate law enforcement powers without having to design a new entity within a new legal and administrative framework. Operationally, under this arrangement, the FIU will be close to other law enforcement units, such as financial crimes units in other agencies, and will benefit from their expertise and sources of information. In return, information received by the FIU can be accessed more easily by law enforcement agencies and can be used in any investigation, thus increasing its usefulness. Exchanges of information may also be expedited through the use of existing national and international criminal information exchange networks.

The advantages of a law enforcement type of FIU are:

- It is built on an existing infrastructure, so there is no need to set up a new agency.
- Maximum law enforcement use can be made of financial disclosure information.
- There is quick law enforcement reaction to indicators of money-laundering and other crimes.
- Information can be exchanged using the extensive network of domestic, regional and international criminal information exchange networks.
- With shared law enforcement backgrounds and expertise, staff may be seconded, exchanged or joined into teams or task force work.
- There is relatively easy access to criminal intelligence and to the intelligence community at large.

A law enforcement-type FIU will normally have all the powers of the law enforcement agency itself, without the need for separate, specific legislative authority. These powers include the power to access accounts, monitor transactions and seize assets (with the same degree of judicial supervision as applies to other law enforcement powers in the State Party).

The disadvantages are:

- This type of FIU tends to be more focused on investigations than on analytical or prevention measures.
- Law enforcement agencies are not a natural interlocutor for financial institutions; mutual trust must be established, which may take some time, and law enforcement agencies may lack the financial expertise required to carry out such a dialogue, or fail to appreciate the value of relevant and regular feedback to financial institutions.
- Gaining access to a financial institution's data (other than the reported transactions) usually requires the launching of a formal investigation or securing judicial authority.
- Reporting institutions may be reluctant to disclose information to law enforcement if they know the information could be used in the investigation of any crime (not just money-laundering and corruption offences).
- Reporting institutions may be reluctant to disclose information to law enforcement on transactions that are no more than "suspicious".

#### *II.4. FIU models: judicial or prosecutorial*

This type of FIU is generally established within the judicial branch and most frequently under the prosecutor's jurisdiction. Such an arrangement is typically found in those States Parties with a continental law tradition, where

public prosecutors are members of the judiciary and have authority over the investigative bodies.

Judicial or prosecutorial-type FIUs can work well in States Parties where banking secrecy laws are so strong that a direct link with the judicial or prosecutorial authorities is needed to ensure the cooperation of financial institutions.

The advantages of a judicial or prosecutorial-type FIU are:

- They usually possess a high degree of independence.
- The disclosure of information is provided directly to the agency authorized to investigate or prosecute the crime.
- The judiciary's or prosecutors' powers and expertise (for example, seizing funds, freezing accounts, conducting interrogations, detaining people, conducting searches) are immediately brought into play.

The disadvantages are, generally, the ones mentioned above with regard to law enforcement-type FIUs and apply to judicial or prosecutorial-type FIUs except for the reluctance to disclose information upon "suspicion".

### *II.5. FIU models: hybrid*

This last category encompasses FIUs that contain different combinations of the arrangements described in the other three categories. This hybrid type is an attempt to obtain the advantages of the different types of FIUs put together in one organization. Some FIUs combine the features of administrative-type and law enforcement-type FIUs, while others combine the powers of a customs agency with those of the police. It may be noted that in some FIUs, staff from various regulatory and law enforcement agencies work in the FIU, while continuing to exercise the powers of their own agency, to facilitate information-sharing and synergies.

## **Article 59: Bilateral and multilateral agreements and arrangements**

*States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.*

### **I. Overview**

Article 59 contains a strong proposal to States Parties to enter into bilateral or multilateral treaties, having in mind the general principle established in article 51 to strengthen the recovery of assets originated by offences established in accordance with the Convention.

## II. Practical challenges and solutions

States Parties that already have enacted domestic legislation to implement multilateral or other regional agreements containing asset recovery provisions may review those provisions in order to introduce amendments according to chapter V of the Convention. A similar exercise may be done with respect to bilateral agreements, to which signatory States Parties may consider introducing an additional protocol. The review should be undertaken on a priority basis covering first those States Parties with whom mutual legal assistance relations in the context of asset recovery is likely and those whose comparative legal systems are likely to present technical difficulties for cooperation that may be overcome by a bilateral treaty.

Agreements may specify commitments of States Parties on how to implement the provision of chapter V or to go further than its obligations under chapter V and implement recommendations under conditions of reciprocity. They may also establish certain limits concerning the use of the information such as the confidentiality and speciality principles within the implementation of article 56 on special cooperation, or article 58 concerning the cooperation between FIUs. In cases in which the use of the information is restricted with the specialty principle, States Parties providing the information may consider the possibility of authorizing its use for other purposes upon request of the recipient State Party.

Other clauses that States Parties may consider to include in bilateral or multilateral treaties according to their domestic legal principles are those establishing formal and informal procedures to exchange information or to handle mutual legal assistance (MLA) requests, implementing modern means of communication with adequate safeguards concerning the origin and the content of the information, and the identification of simultaneous pre-notification to judicial or other authorized agencies with specific responsibilities on the subject matter of the MLA request, notwithstanding formal communications to a central authority through diplomatic channels.

For a wider knowledge of the specific bilateral and multilateral agreements, and the implementing domestic legislations, regional or international organizations and States Parties may consider publishing these legal provisions in a user-friendly website for citizens in general. In any case, article 55 requires all States Parties to send to the United Nations a copy of all relevant treaties and agreements.





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