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**State of Implementation of the United Nations Convention
against Corruption: Criminalization, Law Enforcement and
International Cooperation****Introduction**

In its resolution 3/1, the Conference of the States parties to the United Nations Convention against Corruption (UNCAC) adopted the Terms of Reference of the Review Mechanism (contained in the annex to that resolution), as well as the draft Guidelines for governmental experts and the secretariat in the conduct of country reviews and the draft Blueprint for country review reports (contained in the appendix to the annex to resolution 3/1), which were finalized by the Implementation Review Group at its first session, held in Vienna from 28 June to 2 July 2010.

In accordance with pars. 35 and 44 of the terms of reference of the Review Mechanism, the Secretariat has prepared Thematic Implementation Reports and Regional Supplementary Addenda, in order to compile the most common and relevant information on successes, good practices, challenges and observations contained in the country review reports, organized by theme. These reports were submitted to the Implementation Review Group to serve as the basis for its analytical work.

The present study¹ builds on the Thematic Reports prepared pursuant to the described mandate, and offers a comprehensive analysis on the implementation of Chapters III (Criminalization and law enforcement) and IV (International cooperation) of the United Nations Convention against Corruption by States parties under review in the first cycle of the Review Mechanism. It is based on information included in the review reports of 44 States parties that had been completed, or were

¹ The full document can be accessed at page <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session5.html>.



close to completion, at the time of drafting. More specifically, the present study has been prepared in order to:

a) identify and describe trends and patterns in the implementation of the different provisions of the above Chapters, focusing on systematic or, where possible, regional commonalities and variations.

b) highlight successes and good practices on the one hand, and problems and challenges on the other, as a means of facilitating and streamlining the implementation efforts of the States parties. The study also aims to identify problems and challenges, particularly in relation to any existing legislative and implementation gaps and to a lesser extent on capacity, resources, training and similar practical challenges. For reasons of convenience, the most noteworthy good practices and/or prevalent current challenges relating to each UNCAC provision are highlighted separately in each chapter. Issues of technical assistance are not included in the study.

c) provide – to the extent possible and taking into full account the United Nations Convention against Corruption Legislative Guide² and the *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC³ – an overview of explanatory observations on the implementation of the UNCAC provisions, based on the significant input and findings of the States parties under review and the governmental experts, included in the country review reports. For this purpose, the study may include some remarks on the emerging understanding by governmental experts of the concepts contained therein, as well as on the legislative intention of each provision.

The study is structured in two parts, one for each Chapter of the Convention under review: The first, covering Chapter III, will be subdivided as follows: I. Criminalization; II. Measures to enhance criminal justice; and III. Law enforcement. The second part of the study, covering Chapter IV, will be subdivided as follows: I. Extradition and transfer of sentenced persons; II. Mutual legal assistance and transfer of criminal proceedings; and III. Law enforcement cooperation.

² Legislative guide for the implementation of the United Nations Convention against Corruption. Second Revised Edition 2012.

³ *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Corruption, 2010.

PART ONE: CRIMINALIZATION AND LAW ENFORCEMENT

Chapter I. Criminalization

A. General Observations

1. Criminalization effects

In ratifying the Convention many States parties have made a significant commitment towards fighting corruption and implementing the criminalization requirements in their domestic legal and institutional frameworks, even if progress was sometimes observed to be slow. Several States parties have drafted or introduced new legislation for this purpose (e.g. widening the range of and raising penalties for corruption offences; aligning national provisions regarding the definition of public officials with Article 2 of the Convention and in particular equating the treatment of members of Parliament and “normal” public officials; expanding the protection of witnesses and victims; and introducing a regime governing the criminal liability of legal persons, etc.). In this context, concepts which were new in some jurisdictions, such as “illicit enrichment”, were further researched in order for States parties to gain an understanding of their content and enable the implementation of the relevant Convention provisions.

In addition to the above-mentioned concrete implementation measures, the Convention has triggered concerted and wide-ranging efforts to assess the anti-corruption regimes of States parties, identify areas where national capacities are lacking and plan for future action. In at least three cases comprehensive action plans on UNCAC implementation have been approved by national Governments; these include actions such as setting up implementation roadmaps and establishing ad hoc working groups and review teams on UNCAC implementation, with the participation of various branches of Government, academia and civil society. In another State the authorities indicated that they had initiated a “governance and anti-corruption project”, aimed at equipping it with the laws and institutions necessary to ensure conformity with UNCAC. This project was based on a set of working parties, which included an UNCAC review team that was tasked, among others, with assessing the current state of implementation of the Convention provisions; highlighting shortcomings and achievements; and identifying the issues where rapid progress could be made to facilitate future assessments and foster national capacities.

Naturally, these developments did not take place in a vacuum, but came to reinforce pre-existing criminal systems and anti-corruption mechanisms. Many countries have already made considerable efforts to reform their legal systems to address issues of corruption, partly due to their participation in other international and regional initiatives focusing on corruption-related matters (e.g. in the framework of the Council of Europe, the Organization of American States (OAS), the European Union (EU), the Organisation for Economic Cooperation and Development (OECD), the Financial Action Task Force (FATF) and the FATF-style regional bodies, the African Union (AU), the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC), etc.). As the most comprehensive international criminalization instrument in this field, the Convention complemented the legal frameworks at the disposal of States parties and provided a strong incentive for progress to be made towards, and finalization of, anti-corruption reforms. Hence, as the result of this evolving process of countries’ accession to major international treaties against corruption and their membership in international anti-corruption monitoring mechanisms, culminating in their ratification of the Convention and participation in the UNCAC Implementation Review Group, the country reviews of some States parties were able to identify the criminalization of a wide array of corruption-related conduct as a significant strength of national legislation.

In general, the review teams welcomed national efforts to strengthen criminal legislation against corruption and urged national authorities to continue such efforts with a view to further improving their existing anti-corruption standards. National authorities were invited, in particular, not to rely solely on external evaluations in the context

of the various anti-corruption mechanisms, but also to conduct formal internal assessments of the effectiveness of implementation measures for UNCAC provisions. Furthermore, due emphasis was placed on the need to ensure that all legislative changes and updates are sufficiently linked and cross-referenced to existing pieces of legislation, in order to ensure “complementarity, coherence, robustness and consistency” of the overall anti-corruption legal framework. As emerges from the reviews, hurried and overstretched legislative changes may result in discrepancies and legal uncertainties and may have an adverse effect to the one meant to be achieved by the criminalization provisions of the Convention.

2. The definition of a “public official”

The main cross-cutting topic related to the implementation of Chapter III concerns the scope of coverage of the term “public official”. The issue to be determined is how States parties define “public officials” for the purposes of corruption offences, and whether national definitions are in compliance with Article 2(a) of the Convention.

Definitional concepts: There are a number of (barely) distinguishable methods used by States parties to define the concept of a public official. Most of them have incorporated an explicit definition of the relevant term in their legislation (usually in their Penal Code), typically used for the purposes not only of corruption offences, but of all offences related to the exercise of official duties. This definition covers in most cases any person “performing a public function”, “entrusted with a public task”, “holding a responsible official position”, or to whom public functions “have been assigned”, regardless of whether this person has been elected or appointed, is paid or unpaid, and appointed on a permanent or a temporary basis. As noted in one country review, it is immaterial under which legal status a person performs tasks in the public service. What is decisive is that he or she accomplishes the tasks of the State, irrespective of the nature of the contractual relation between the public sector and the individual concerned.

A second group of States parties has dispensed with the more or less “functional” definition given above, and has opted for a more comprehensive enumeration of either the various types of office-holders that fall under the notion of a “civil servant” or a “public official”, or of the “public bodies” for which a person has to work in order to be considered a “public official”. Interestingly, some countries in the first group also use exhaustive lists of persons who may be liable for corruption offences; these lists have been designed to complement the functional definition employed in relation to offences committed during the exercise of official duties. This method appears to offer more guarantees that all the possible categories of persons are included, as envisaged by the Convention. As implied in one review, States parties should examine the possibility of defining the term “public official” by mentioning at least some general criteria (e.g. the character of his/her duties; the applicable appointment procedure; etc.), without relying exclusively on an exhaustive enumeration as this presents the danger that some categories would not fall under such a definition.

Example

Two States parties do not use a definition of “public official”, but instead stipulate in their bribery offences that the advantages should be directed at a “person bestowed with public authority, discharging a public service mission, or vested with a public electoral mandate”.

Finally, a few States parties make no distinction between “public officials” and private employees. In two cases the law uses the term “official” – encompassing public officials as well as private sector managers and employees or representatives – for the purposes of corruption offences, while in three further States parties the law, following a traditional concept of common law jurisdictions, uses the term “agent” to designate all persons “employed or acting for another”. Nevertheless, in some of those cases it seems that other terms, such as “public servant”, “public officer” and “officer of a public body”, are also employed for the purposes of bribery and other corruption-related offences, a situation which raises concerns of a potentially inconsistent use of terminology and led to recommendations to address this problem. In a more advanced version of the above-mentioned uniform concept, another State party dispenses with the need for a definition of a “public official” by capturing any person

receiving an unlawful advantage, regardless of whether they occupy a position in the public or private sector, on the basis of the “function or activity” to which the bribe relates. The functions or activities relevant for the application of the offences include those which are “of a public nature”, “connected with a business”, “performed in the course of a person’s employment” or “by or on behalf of a body of persons”, insofar as the person performing the function or activity “is expected to perform it in good faith”, “is expected to perform it impartially”, or “is in a position of trust by virtue of performing it”. Although unusual, these generic descriptions of the criteria to be fulfilled to meet the functional standard for the “prohibited” recipient of the bribe were found to cover all cases required by the Convention.

In eight jurisdictions, the relevant laws were found not to cover all categories of persons enumerated in the Convention or to use inconsistent terms to define the class of covered officials. In another case it was stated that the term “public officer” used in the bribery offences related to “a person who works for the State”, without further clarification. With respect to the offence of abuse of functions, in particular, it was noted in one jurisdiction that prosecutions often resulted in acquittals. This was due to an established court practice of excluding liability for a wide range of persons that were not considered as “officials”, leading to the identification of the need for a new criminal law approach.

Members of the judiciary: Not all States parties view members of the judiciary as occupying a position equal or equivalent to that of a regular “public official”. Accordingly, in some cases separate corruption offences apply only to judges, public prosecutors, jurors, arbitrators, etc., and these usually (but not in all circumstances) carry higher penalties in comparison to the general corruption offences. While this practice in principle reflects the predominant position historically occupied by the bribery of judges (especially its passive version) as the subject of criminal legislation in this field, it does not run contrary to the requirements of the Convention. However, caution should be taken: Given that Article 2(a) specifically addresses “judicial officers”, any special offences of this kind should include all elements of the UNCAC offences, as in the case of offences involving “normal” public officials. Thus, the offence of bribery should not be limited to particular acts or omissions in the exercise of judicial duties (e.g. deciding a case one way or another, pronouncing, delaying or omitting a ruling or sentence relating to a case under adjudication, etc.), and leaving other official duties unaddressed.

Equally, one should consider as acceptable the similar practice of some States parties to include members of the judiciary (or other equivalent categories of public servants, such as the members of the national anti-corruption agency) in the general definition of a “public official” and apply the basic corruption offences to them, but also have separate offences, e.g. for the aggravated case of a judge receiving a bribe “regarding a ruling pronounced by him/her”, or in relation to a case “which has been submitted to his judgement”.

Parliamentarians: One of the features of the Convention that sets it apart from all other international anti-corruption instruments, and has even delayed its ratification by some countries, is the fact that it sets members of Parliament (MPs) at the same level as “normal” public officials for the purposes of criminalization. Under Article 2(a), the term “public official” includes, inter alia, any person holding a legislative office of a State party, whether appointed or elected. This obligation is not fulfilled in all States parties. While in some cases the extent to which this category of persons is covered remains unclear, in the case of two particular States parties it was more or less acknowledged that members of the legislative branch are not considered public officials, or do not immediately fall under the relevant definition, thus limiting the application of several corruption offences, including domestic and foreign bribery and abuse of functions. Recommendations were made by the reviewing States parties to extend the scope of the relevant definitions and provide for appropriate sanctions for offences involving parliamentarians.

Similarly to the situation with members of the judiciary, in some jurisdictions the bribery of MPs *is* regulated, albeit separately from the one involving “public officials”. This was the case in one of the States parties where MPs are not considered as public officials. Again, as with members of the judiciary, the relevant practice can be considered as being in accordance with the Convention, as long as all elements of the corresponding UNCAC provision are covered and the scope of the special offence involving MPs is not restricted to particular acts. For

example, in the above-mentioned reviewed State party, the relevant provisions apply only in cases where the benefit is intended to induce the MP to act in his parliamentary mandate in such a manner “that a matter being considered or to be considered by Parliament would be decided in a certain way”. This does not appear to cover cases where the bribe is intended to cause the MP to act or refrain from acting in other ways that might breach the duties of his/her mandate, and that do not involve a parliamentary vote, e.g. during considerations of whether to raise an issue in Parliament or during parliamentary committees, etc. Therefore, the offences were found to fall short of the requirements of the Convention.

Military personnel: In rare cases separate bribery offences are also applicable to members of the military, without this seemingly having caused any additional problems.

Persons performing public functions for public enterprises: In some cases the extent to which persons performing public functions for public enterprises can be held liable for bribery offences remains unclear and in one State party this category was not included in the definition of a “public official”. However, this was not a point that was dwelled upon in the majority of reviews.

B. Bribery in the public sector

1. Bribery of national public officials

Bribery offences relating to the domestic public sector traditionally belong to the core features of national criminal law. Accordingly, all States parties have adopted measures to criminalize both active and passive bribery of domestic public officials, in most cases long before the Convention came into force. Most States parties have different offences for active and passive bribery. Uniquely, in one case active bribery is punished only as a participatory act (“abetment”) to the offence of passive bribery. Such subsidiary treatment of active bribery, which reflects the traditional view (in both civil and common law systems) that corruption primarily constitutes a misuse of power or an offence linked to the extortion of money during the administration of public authority (“*crimen repetundarum*” or “*crimen extraordinarium concussionis*” in Roman law), was largely abandoned in the course of the 19th century, even if – as noted below under Article 30 par. 1 – there are still many States applying milder penalties to the persons offering a bribe, as compared to those accepting it.

The offence of active bribery does not constitute a “*delictum proprium*” as the Convention makes no reference to any specific capacities of the possible perpetrators. Accordingly, in one jurisdiction where the law stipulates that active bribery can only be committed by “private” persons, the reviewers remarked that acts committed by public officials (*vis-à-vis other* public officials) were not adequately covered. Taking into account that other offences (such as trading in influence or abuse of authority) did not provide a satisfactory solution, the reviewers issued a recommendation for the State party concerned to consider amending its legislation in order to regulate all cases of active bribery by public officials.

Basic criminal behaviour: The structures and terminology used to establish and describe the basic unlawful behaviour in bribery offences vary widely among States parties. As to the methods adopted, two major groupings transcending geographical and regional boundaries can be identified. On the one hand, countries steeped in, or with an (even loose) affiliation to, the civil law system tend to follow a pattern similar to the one adopted in Article 15 of the Convention, and provide descriptions of the offensive behaviour that are intended to be restrictive and concise. For example, in one case the referred legislation and Article 15 are almost identical, which reviewers considered a good practice.

Example

The law of one State party contains the following offences of passive and active bribery:

“Any public official who asks or accepts for himself or for a third party a promise or a gift to perform or to abstain from any of the activities of his office, shall be penalized by incarceration for a period not exceeding ten years and a fine equivalent to double the value of what he is given or promised, provided that it shall not be less than (...). The provision of this Article shall apply even if the activity provided in the preceding paragraph is not

included within the activities of the office of the receiver, yet he assumes or thinks same by fault. Likewise, the provision of this Article shall apply even if the receiver intends not to perform the activity or to abstain therefrom.

(...)

Any person who offers a public official – without acceptance of his offer by the latter – a promise or a donation to perform or abstain from an act in violation of the duties of his office, shall be penalized by incarceration for a period not more than five years and a fine not more than (...) or either of both penalties. Should the performance of, or abstention from, such act be rightful, the penalty shall be incarceration for a period not more than three years and a fine not more than (...) or either of both penalties.”

On the other hand, countries that lean toward a common law legal tradition tend to apply definitions that are more analytical and all encompassing.

Example

The law of one State party contains the following basic provisions on active and passive bribery:

“(1) A person is guilty of an offence if:

- (a) the person dishonestly: (i) provides a benefit to another person; or (ii) causes a benefit to be provided to another person; or (iii) offers to provide, or promises to provide, a benefit to another person; or iv. causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
- (b) the person does so with the intention of influencing a public official (who may be the other person) in the exercise of the official's duties as a public official; and
- (c) the public official is a (...) public official; and
- (d) the duties are duties as a (...) public official.

Penalty:

- Individual - Imprisonment for 10 years and/or 10,000 penalty units.
- Body Corporate - 100,000 penalty units, or 3 times the value of the benefit obtained from the conduct; or 10 per cent of the annual turnover of the body corporate during the 12 month period in which the offence occurred if the court cannot determine the value of the benefit obtained.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew:

- (a) that the official was a (...) public official; or
- (b) that the duties were duties as a (...) public official

(3) A (...) public official is guilty of an offence if:

- (a) the official dishonestly: (i) asks for a benefit for himself, herself or another person; or (ii) receives or obtains a benefit for himself, herself or another person; or (iii) agrees to receive or obtain a benefit for himself, herself or another person; and
- (b) the official does so with the intention: (i) that the exercise of the official's duties as a (...) public official will be influenced; or (ii) of inducing, fostering or sustaining a belief that the exercise of the official's duties as a (...) public official will be influenced.

Penalty:

Individual -Imprisonment for 10 years and/or 10,000 penalty units.

Body Corporate- 100,000 penalty units; or 3 times the value of the benefit obtained from the conduct; or 10 per cent of the annual turnover of the body corporate during the 12 month period in which the offence occurred if the court cannot determine the value of the benefit obtained.”

However, it should be noted that this classification is rudimentary and in no way absolute. For example at least five countries with a common law system appear, in principle, to follow the first model, while another State party appears to have overlapping offences, each one adhering to a different model.

Interestingly, in one of these common law countries the relevant articles of the Penal Code (and in general, all offences contained therein) are complemented by so-called “Explanations” and “Illustrations” of the way they are applied in practice – an unusual feature which could be adopted, for example, in the explanatory report of a law; this was considered by the governmental experts as a good practice as it was seen as a useful means to clarify the

scope of the offences. A similar practice is followed in some countries of the Eastern European Group which use “Notes” as an integral commentary accompanying the text of certain provisions of their Criminal Codes.

Example of implementation

In one State party the passive bribery offence is complemented by “Explanations” of its constituent elements, such as the following:

“A motive or reward for doing: A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.”

More importantly, the offence is also accompanied by “Illustrations” which further clarify its scope of application, such as the following:

“(a) A, an official, obtains from Z, a banker, a position in Z's bank for A's brother as a reward to A for deciding a cause in favour of Z. In this case, A has committed the offence defined in this section. (...)

(c) A, a public servant, induces Z erroneously to believe that A's influence with Government has obtained a title for Z and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section.”

Both methods of describing the above-mentioned criminal conduct can be equally effective in satisfying the obligations derived by the Convention. However, in a significant number of cases some of the basic elements of the offensive behaviour contained therein (promise, offering or giving on the active side, solicitation or acceptance on the passive side) seem to be altogether missing. In particular, while the elements of “giving” and “acceptance” rarely pose a problem, in several States parties the “promise” of an undue advantage is not explicitly covered or is indirectly covered – through doctrinal and case law interpretations – as “preparation” or attempt to commit a crime, or under related (or from a linguistic point of view interchangeable) concepts, such as the “offer” of a bribe. Additionally, several States have adopted a “conduct-based” approach whereby only the actual exchange is the subject of the offence, while an “offer” of bribery is not explicitly covered, although in some cases the act of offering could eventually be prosecuted as an attempted or “incomplete” crime or a “preparation” thereof. Finally, there are jurisdictions where the element of “solicitation” is (also) missing from the description of the offence.

In view of the above, numerous recommendations were issued to proceed with the necessary legislative amendments or the development of guidelines in judicial practice, or to monitor the way courts interpret the relevant provisions in the future. As acknowledged in one country report, the evaluation of national legislation with regard to the wording of the applicable provisions should take into account Article 30 par. 9 of the Convention, which contains the principle that the description of the offences established according to the Convention is reserved to the domestic law of the States parties. Thus – even if some reviewers view the autonomous incrimination of the different forms of basic corrupt behaviour as a better practice – it is certainly possible to capture some of the basic elements of the bribery offences, such as “promise”, “offering” or “solicitation” through the provisions of the general part of the national Penal Code, e.g. regarding “preparation for or attempt to commit a crime”;⁴ however, this only applies if these general provisions are clearly delineated and do not contain limitations (e.g. “subject to the condition that public danger results from the act”), or make exceptions (e.g. for “crimes of lesser gravity”) that restrict criminal liability as foreseen by the Convention.

States parties should ensure above all that there is no need to prove the existence of an agreement between the bribe-giver and the unlawful recipient. The active offence should be considered as autonomous and not reliant on the agreement of the passive party, so that the simple offer or giving of the undue benefit suffices for holding the bribe-giver criminally liable. This autonomy would appear not to exist, for example, in cases such as the one mentioned above, namely that of a State party punishing active bribery only as a participatory act (“abetment”) to

⁴ See also UNCAC Legislative Guide, par. 197.

the offence of passive bribery. Insofar as the punishment of abetting passive bribery would be dependent on the actual commission of the passive bribery offence, i.e. on the public official “accepting, obtaining, agreeing to accept or attempting to obtain” an undue advantage, the simple offer of a bribe, without the official agreeing to it, would remain outside the scope of the criminal law. In this respect, the State party concerned would fall short of satisfying the requirements of the Convention.

It should, however, be noted that in the particular jurisdiction that gave occasion to the present discussion, the law appears to exceptionally allow a different viewpoint. The governmental experts conducting the review made no comment on the practice in question. Nevertheless, the national definition of abetment includes an explanation according to which “to constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused”. In other words, as it turns out, the law punishes not only the “usual” participatory acts, but also the mere *incitement* (attempted instigation) of an offence, a practice that has been observed in other jurisdictions as well.⁵ If this interpretation is correct, then ultimately no agreement between bribe-givers and unlawful recipients is necessary and the national provisions suffice for the purposes of the Convention.

Indirect bribery: In several cases gaps were identified as to the coverage of indirect bribery involving intermediaries. As to the methods used to fulfil this requirement, some countries explicitly provide for the execution of the prohibited conduct through an intermediary, while others argue that they cover indirect bribery through the provisions on participation and/or the definition of “principals” (those who carry out the act by themselves or by means of another person whom they use as an instrument) in the general part of their Criminal Code. In one State with no explicit provisions, reference was also made to a resolution of the Supreme Court providing guidance on this issue and indicating that bribery may also be committed indirectly through an intermediary. These arguments were accepted as valid by evaluators, who considered that these general provisions remove any obstacles in prosecuting bribery offences involving intermediaries, and that accordingly the countries in question complied with the provision under review.

Unusually, in one State party the Penal Code contains a stand-alone offence that specifically incriminates the conduct of an intermediary in cases where a bribe is given to the intermediary and he/she fails to deliver it. Although such a legislative practice cannot be rejected outright, in this particular case reviewers considered it as outdated and redundant, and recommended that the State party reconsider the usefulness of maintaining it and consider the possibility of including in the bribery provisions, *expressis verbis*, the phrase “directly or indirectly”.

Scope of the undue advantage: In the Convention, the term “advantage” is intended to apply as broadly as possible and also cover instances where intangible items or non-pecuniary benefits are offered, insofar as they create or may create a sense of obligation on the side of the recipient towards the giver. In many cases States parties use analogous or similar terms coupled with expansive definitions or allowing broad interpretations (such as “any gratification” or “gift or some other gain”), which reflect the spirit of the Convention and have even been identified as good practice by governmental experts.

Examples

In one State party, the bribery law contained a very broad definition of the concept of an “undue advantage”, which was defined as “gift or other gain” and understood to comprise money, any item (regardless of its value), and a right or service provided without recompense or other *quid pro quo*, which creates or may create a sense of obligation by the recipient towards the giver. It was noted that even the smallest amount of money or other objects could be considered as gifts and would suffice to be considered as constituent elements of the criminal offence.

⁵ See below, under Article 27.

The following definition was provided by another State party: Any advantage – obtained by the receiver or the person nominated by him for this aim or known and accepted by him – whatever the name or kind thereof may be and whether pecuniary or not, shall be deemed as a promise or a donation.

This requirement has, however, proven to pose a problem in a number of States parties. In two cases, the domestic bribery provision requires an element of “economic” or “material” benefit, which was interpreted to cover only money and benefits subject to some form of pecuniary valuation and not any other undue advantage. A similar issue was noted in two cases where a “value-based” approach is followed in national jurisprudence; in this instance, bribery is only punished when it involves material advantages. In another case, it was unclear whether the phrase “any valuable thing” in the national law includes intangible items and thus adequately covers undue advantages. Other examples of ambiguities include a State party where the meaning of “bribe” used in the public bribery offence is unclear and there is uncertainty if this notion corresponds to the term “illegal benefit” used in the private bribery offence. Doubts also remain in another State party as to whether the jurisprudence might interpret the term “gift” as excluding non-quantifiable benefits. In all of the above cases, recommendations were made to broaden the scope of the applicable provisions or ensure that the domestic legislation is interpreted in a way that addresses benefits of a non-material nature. Ambivalent and fluctuating jurisprudence was not deemed satisfactory. As emerges from the reviews, State parties should strive to provide for certainty, clarity and uniformity in the definitions contained in the bribery offences and address issues of potential inconsistencies in the manner that such definitions are interpreted domestically, both at the levels of legislation and application of criminal laws.

In one State party the legislation contains a specific limitation for all acts of bribery falling below a certain threshold amount; in this case the perpetrator is only punished if the act causes “serious consequences” or is the subject of repeated violations. Although this provision is possibly aimed at the exclusion of socially “adequate” advantages, as discussed below, it should be treated with caution as it leaves room for considering all offerings of small advantages as justified and acceptable, regardless of their motivation. It is one thing to *prohibit* all benefits above a certain threshold, allowing some flexibility for gifts not exceeding it, and quite another to *allow* all benefits below a certain threshold, demanding the fulfilment of further conditions to render them punishable.

Socially “adequate” advantages: Few jurisdictions make explicit reference to the “undue” character of the advantages offered, or use similar expressions to describe them (“unjustified”, “unlawful”, “with no right”, etc.). Most States parties use no such attribute at all. In some cases, however, it was confirmed during the review that, regardless of the lack of the term “undue” in the law, genuine gifts of a minor value are exempted from criminal liability.

Examples

In one State party public officials can receive a minor gift from a person who is grateful for the treatment he has received or expects to receive. There are no general provisions regulating the reception of gifts, although the prohibition of all gifts of a value of above a certain threshold (approximately 200 USD) has been recommended.

In another State party the law uses the term “undue” and expands on its meaning, making clear that this notion does not refer to advantages that are permitted under the regulations on the conduct of official duties, as well as negligible advantages that are common social practice and present no risk of dependence or unacceptable influence on the public official concerned. Examples include Christmas gifts, such as calendars or pens, or an invitation to go to the circus. However, the “tolerance threshold” in this particular jurisdiction is low: Five invitations to a meal and the offer of several drinks are considered advantages that are not socially acceptable. Equally, the offering by a driver of a negligible sum of money to a police officer so that the latter will refrain from recording a traffic offence committed by the driver is considered unacceptable as this is intended to encourage the public official to engage in conduct that is in breach of his or her duties.

Finally, a State party gives the definition of a “casual gift” as follows: “Any conventional hospitality of a modest scale or unsolicited gift of modest value offered to a person in recognition or appreciation of that person’s

services, or as a gesture of goodwill towards that person and includes any inexpensive seasonal gift offered to staff or associates by public and private bodies or private individuals on festive or other special occasions, which is not in any way connected with the performance of a person's official duty so as to constitute an offence".

Third-party benefits: In several cases there were gaps as to the accrual of benefits to third parties. Article 15 prohibits the giving of a gift, concession or other advantage to, or for the benefit of, some person other than the public official, such as a relative or political organization. Nevertheless, in one jurisdiction, provisions criminalizing bribery aimed specifically at obtaining the performance of acts not contrary to the duties of national public officials do not cover all instances of undue advantages for third parties. In another case, it was not clear whether the phrase "for himself or for any other person" also included other "entities" (such as a political organization), as stipulated in the Convention. Finally, and most importantly, in several States parties the conduct of bribery is described without any further specification of whether the gratification is for the agent himself or herself, or a third party or entity. However, in some of these cases, particularly where this is supported by the pertinent domestic jurisprudence, it could be argued that third-party benefits are automatically included or perform the same function as undue advantages for personal gain, since no mention of the purpose of the bribe is made. The reviewing experts recommended removing any grounds for ambiguity and aligning all relevant provisions in order to ensure consistency in their application. Such a need was detected, for example, where the element of a third-party beneficiary is absent from the bribery offence but is foreseen in other parts of the legislation (e.g. the trading in influence offence), as well as where there is specific reference to a third-party beneficiary in the passive bribery provision, but not in its active bribery pendant. In respect of this last case, the national authorities of one State argued, by virtue of a theory of mirroring provisions, that the offence of active bribery should be considered to implicitly contain the element of third-party beneficiaries. However, besides the important fact that the jurisprudence provided was not entirely clear on this point, governmental experts further argued that the reasoning of the authorities seemed to allow, by analogy, the implementation in an active bribery case of another provision dealing with the passive form of such bribery, and this appeared to be problematic from a dogmatic point of view. Moreover, such an interpretation might not suffice in cases of parallel proceedings on both active and passive bribery, whereby the criminal proceeding on passive bribery is closed (for any reason, such as death) while the criminal proceeding on active bribery continues.

Caution is advised regarding the difference between indirect bribery (involving bribery performed through intermediaries) and third-party benefits (involving undue advantages offered for the benefit of a third person or entity). The difference is sometimes not clear to evaluators, leading to confusion and uncertainty about the applicable standards.

Action or omission of the recipient: The Convention requires that the prohibited conduct includes acts intended not only for positive actions, but also for omissions of the relevant public official. Most States parties have followed this rule by explicitly including cases where the official refrains from acting or by adopting language (e.g. "how the public official conducts himself/herself in office", "with the intention of influencing a public official") that can clearly be interpreted to the same effect.

According to the Convention the commission of the crime of bribery should not be dependent on whether the action or omission of the public official was realized as planned. The mere offer, promise, acceptance of the promise, reception, etc., of the benefits should suffice. Indeed, most if not all States parties have adhered to this principle. Interestingly, in one State party the law foresees a higher penalty for the public official if he/she proceeds with the performance of the envisioned act.

In one case the active bribery offence makes no general reference to an act or omission of the unlawful recipient, but is limited only to instances where a person offers a bribe "demanding an injustice, buying a vote, or seeking to achieve or assure by corruption the result of any pretension".

Ex post facto payments: In some jurisdictions it is a criminal offence to give or accept an undue advantage, even if this happens *after* the public official has carried out (or omitted) an act, as a reward or a token of gratitude.

This goes further than the requirements of Article 15, which refers to bribes offered as an inducement to future acts or omissions of the recipient.

In the exercise of official duties: The Convention refers to acts or omissions of the recipient “in the exercise of his or her official duties”. Most States parties use the same terms, or terms which were deemed equivalent, such as “in relation to the principal’s affairs or business”.

The Convention does not oblige States parties to include in their bribery provisions benefits designed to induce an official to perform an act *other* than those that fall within the scope of his/her official duties, but which he/she nonetheless has an opportunity to perform as a result of his/her official function. Nevertheless, as pointed out in one review it is helpful for the purpose of enabling successful and effective prosecution to develop consistent case-law regarding whether it is necessary for the actions of the public official to fall within the scope of his/her functions or it suffices that he/she has only a connection to them. Furthermore, in cases where national law appeared to cover this last scenario or measures had been proposed to this effect, the governmental experts involved often pointed out that this can be considered as a “success” or good practice for the purposes of the Convention. This view is corroborated by the fact that part of the questionable behaviour can be considered as falling under the optional requirements of Article 18 of the Convention.

Example of implementation

The bribery offences in the Criminal Code of one State criminalize active and passive bribery for the legal or illegal performance or omission of a public official “within the scope of his/her authority”. However, the national authorities reported that the new Criminal Code explicitly criminalizes acts and omissions within, but also *outside* the scope of the public official’s authority. The latter confirmation was found by the review team to be conducive to ensuring compliance with Article 15 of the Convention.

It should be clear that legislation that *only* addresses payments to induce acts outside an official’s duties does not suffice for the purposes of the Convention. In the atypical example of one State party, the granting of a benefit or the payment of money to a public official for performing acts that fall *within* his or her official duties is not considered bribery; such cases are currently dismissed by prosecuting authorities. This practice bypasses the behaviour covered by Article 15 of the Convention and addresses a completely different group of cases, missing entirely the point of the bribery offences. Governmental experts recommended accordingly that acts of paying or receiving a bribe in order to induce the exercise of an official duty should be added to the relevant legislation.

In at least eleven States parties, a (more or less explicit) distinction was drawn between a “gratuity” (expediting or facilitating an otherwise lawful administrative procedure – hence also the commonly used term “facilitation payments”, which is not included in the Convention) and a “bribe” *stricto sensu*, with the acceptance or giving of the latter punishable by a more severe penalty in cases where the intended purpose was to induce the official to act in breach of his/her duty or obligation. Certain governmental experts expressed reservations on this and even issued recommendations to abolish it, or to harmonize the applicable sanctions, since the Convention does not foresee such a distinction. On the other hand, the consideration of a bribe intended to induce a breach of duty as an aggravating circumstance is a relatively common feature of the criminal law system of civil law countries, and can be seen as not being in breach of UNCAC requirements, as long as it does not in any way involve acceptance of so-called facilitation payments.

It is a different matter if the national law extends *only* to “bribes”, leaving facilitating payments outside the scope of criminal liability, or if the provisions on bribery aiming at obtaining the performance of acts that would not be contrary to the duties of the public official are lacking in scope (e.g. do not include advantages given in favour of third parties). In such cases the State party clearly falls short of fulfilling Convention requirements.

Investive corruption: Some States parties go further than the minimum requirements of the Convention by also covering (often with lower penalties) so-called “investive” corruption practices that involve the offer/acceptance of benefits given by virtue of the public official’s position, *without* a direct link to a concrete act or omission in

the exercise of the unlawful recipient's official duties. Such benefits – while exceeding simple courtesy gifts and other “socially adequate” benefits – are not directed at any particular favour at that particular time, but are offered in anticipation of future situations when a favour may be required. The criminalization of such behaviour has been identified as a good practice by a number of evaluators.

Example of implementation

In one case the law goes beyond what is required by the Convention, even covering the solicitation or acceptance of a benefit that does not involve the official acting or refraining from acting in the exercise of his or her official duties. It is sufficient if the official's behaviour might weaken public confidence in the impartiality of the actions of the authorities.

Immunities and mitigating factors for reporting persons: In several States parties the possibility is foreseen of granting immunity from prosecution to persons engaged in bribery, who voluntarily report the presentation of the bribe before the authorities receive information about it from other sources, or who confess to the offence before a criminal action is brought against them (including in one case the possibility of having all or part of the property returned). In a number of States parties it is further explicitly stipulated that such notification or confession of an act of bribery is a mitigating factor, if it occurs after a criminal action has been brought against the reporting person and until the end of the proceedings. Finally, in other States the law specifically provides for mitigated punishment, whenever the perpetrator of a corruption offence assists in the collection of decisive evidence for the identification and capture of other persons responsible, not to mention the general sentencing rules mitigating the criminal liability of cooperating persons, common in the legislation of most States parties.

Although the Convention does not exclude giving such incentives to enable cooperation with law enforcement authorities – on the contrary, it outright encourages them, given the contents of Article 37 pars. 2 and 3 – some evaluators have expressed reservations regarding *total* immunity practices and have issued recommendations to ensure that appropriate sanctions are imposed in all cases of bribery. For example, in one case the leniency measure under discussion was perceived to incentivize persons to engage in active bribery, despite the fact that: (a) its application was non-mandatory but had to follow a specific process in each case, was subject to close scrutiny by supervising prosecutors and could be challenged in court; and (b) it had significantly contributed to the number of passive bribery cases.

On the other hand, other reviewers expressed a fundamentally different opinion. They expressly identified the possibility of relieving the reporting person from criminal liability as a good practice, and noted that thanks to the relevant provisions, bribery investigations had been simplified and significant results had been achieved. As pointed out, in most cases defendants cooperate with investigation authorities and help them to detect the crime because it is in their interest to be released from criminal liability.

In view of the above disparate opinions, the subject merits further examination and cannot yet be identified in general as either a “challenge” or a “success” for the implementation of Article 15. It should be noted, however, that Article 37 pars. 2 and 3 definitely point in the direction of a positive appraisal of the practices under discussion. The legislator should consider allowing, in principle, competent national authorities to provide some form of incentive, in appropriate cases, to cooperating persons. It may then fall within their discretion to decide, on a case-by-case basis and by weighing all relevant factors, whether the nature, significance, effectiveness and impact of the contribution offered by someone to the investigation of a corruption case justify his/her exemption from prosecution or the recognition of mitigating circumstances in his/her favour.

Immunities for victims of extortion: A few States parties grant immunity from prosecution to persons who engage in active bribery under threat, inducement, compulsion, coercion or intimidation by a public official, in order to prevent harmful consequences with respect to their rights and lawful interests. The evaluators have not commented on this practice, which also merits further consideration.

Mens rea: The matter of mens rea was the subject of limited analysis and was only raised in a small number of reviews. This is an indication that in the vast majority of cases the subjective requirements of the Convention seem to be met. Acts committed intentionally are punishable as criminal offences, whereby a clear subjective link must be established between the promise, offering, giving, etc., of the advantage and influencing the conduct of the recipient.⁶ The mental element of the offence is often not explicitly mentioned in the bribery provisions, but can be gathered from the provisions in the general part of the applicable Penal Code. Interestingly, in two cases the passive bribery provisions of the States under review explicitly mentioned that they applied regardless of the intention of the public official to actually carry out or refrain from performing the act in the exercise of his/her duties. In another State party the subjective requirements for acts of passive bribery seem to be even lower than the ones indicated in the Convention, since it does not matter if the perpetrator knows or believes that the request, agreement or acceptance of the unlawful benefit is improper. The State party in question takes the strict view that a civil servant should know what is expected from him/her.

At least five States parties, following an old tradition in common law jurisdictions, require in the description of the bribery offences that the perpetrator should act “corruptly”. This term functions as a kind of subjective element of wrong-doing (“corrupt intent”) and is supposed to play a qualifying role to restrict the combinations of facts liable to bring about a conviction. The meaning of the term, and even its necessity, however, is contentious and its interpretation is inconsistent. Therefore, the majority of governmental reviewers have raised concerns about the manner it is interpreted when implementing the relevant legislation.

Effectiveness: Although only one review found that the national provisions corresponding to Article 15 have been successfully implemented in practice, and some countries stated outright that they had not assessed the effectiveness of the provisions establishing the bribery of domestic public officials as a criminal offence, the great majority of States parties presented statistical data or even concrete examples of the implementation of domestic bribery offences. This shows a consistent application of the relevant provisions and reflects their traditional role and established position in national criminal law.

Challenges: The most common challenges in the implementation of Article 15 related to the scope of public officials covered by the bribery offence, in particular its application to members of Parliament, to the coverage of the promise, in addition to the offer or exchange, of an undue advantage, to the coverage of indirect bribery, the scope of the undue advantage, in particular as regards non-material benefits, the application of the bribery offence to benefits extended to third persons and entities, applicable distinctions between acts within and outside the scope of official duties of public officials, and the coverage of “facilitation payments”.

As to the practical application of the bribery offence, in some jurisdictions problems arose on the collection, consolidation and accessibility of statistical data related to the investigation and prosecution of corruption offences, including the sentences and fines imposed. Apart from that, the main challenges identified by some countries consist in the lack of specialized practitioners (investigators, prosecutors and magistrates) and the limited resources available for implementation of the bribery provisions.

2. Bribery of foreign public officials and officials of public international organizations

Contrary to the situation regarding bribery of national public officials, comparatively few States parties have introduced or taken steps towards establishing as criminal offences the bribery of foreign public officials and officials of public international organizations. This relates mostly to the novelty of these particular offences, which appeared for the first time in national criminal laws in 1977 and have only applied at an international level since 1996. In those countries that have adopted specific measures to criminalize the bribery of foreign public officials, there is a clear distinction between States parties that were already bound by previous international instruments containing the relevant obligation (above all the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions), and that had previously already undergone mutual

⁶ See UNCAC Legislative Guide, par. 198.

evaluation reviews on the implementation of these instruments (e.g. by the OECD Working Group on Bribery in International Business Transactions), and States parties that were for the first time obliged under UNCAC to proceed with criminalization but had not yet made the necessary adjustments.

In particular, at the time of the reviews the relevant conduct had not been criminalized in 15 cases, all of them from the Asia-Pacific and African Groups, although legislation to this effect was pending in six of these States. Another State had provisions in place that could eventually be applied in such cases, but were considered by the reviewing experts as lacking in clarity and not including a clear link to the functions of foreign public officials – a recommendation was therefore issued to ensure more focused and specific legislation in this regard.

A number of States parties have established separate, autonomous offences that only address the bribery of foreign public officials and functionaries, while others have opted to apply the principle of assimilation, i.e. equating domestic public officials with foreign public officials, and dealing with such cases under a common bribery offence. As a general rule, the legislation of countries that have criminalized international bribery as separate offences is of a high standard and conforms to the requirements of the Convention. In States parties that have chosen the method of assimilation, criminalization of foreign bribery usually incorporates the same problems and implications of domestic bribery offences with respect, for example, to third-party beneficiaries or immunities and mitigating factors for reporting persons or victims of extortion. On the other hand, in this group of countries criminalization tends to go further than the requirements of Article 16.

Apart from the above, a number of special issues were raised concerning the scope of foreign bribery offences:

Criminalization of passive bribery: In those countries that have criminalized the bribery of foreign public officials, seven have done so only with respect to active bribery, while in another country the reviewers suggested that the State party concerned should introduce an explicit and more direct statute covering the relevant conduct. In one of the cases without a similar offence, governmental experts considered that the requirement to criminalize the passive bribery of foreign public officials was satisfied by the “normal” passive bribery provisions in conjunction with the internal rules of the country that punish the bribery of its own officials. This consideration cannot, however, be accepted as a rule as the Convention clearly implies a widening of the interests protected by national criminal law that would go beyond existing internal provisions and which are not automatically covered by the internal provisions of the official’s own jurisdiction.

Some countries have argued that, given the non-mandatory nature of Article 16 par. 2, they have considered and *opted* not to introduce the offence in question because of policy and jurisdictional concerns as they believe that there is limited nexus to their own territory and that the country of the official concerned would be better suited to prosecute such an official (under the offence of active bribery of national officials). In other words, they consider it appropriate for States parties to pursue the conduct of their officials in their *own* jurisdictions, which is likely to be where the majority of the evidence is located. As an alternative, one of these countries has stated that it readily shares evidence and information of bribery cases with the country of citizenship of the foreign public official for possible domestic investigation and prosecution, while another has made it clear that it has repeatedly prosecuted corrupt foreign officials for other offences, such as money-laundering based on bribery as a predicate offence. In all of the above cases, the reviewers were satisfied with the answers provided.

Scope of officials covered: One of the main issues that came under scrutiny in the country reviews was whether the terms “foreign public official” and “official of a public international organization” are defined by States parties in accordance with Article 2(b) and (c) of the Convention, including, among others, officials of countries that are not States parties, members of foreign parliaments and individuals exercising a public function for a public agency or public enterprise of a foreign country. In some countries there was apparently no need for an explicit definition of the term “foreign public official”, without this proving to be a detriment for the purposes of UNCAC. Thus, in one case a definition is absent from national law, while another State party provides no definition but instead states in the bribery offences that the advantages should be directed at a “person holding public authority or discharging a public service mission, or an electoral mandate, in a foreign State, or within a public international organization”.

Example

One State's law stipulates simply that persons holding "appropriate powers" in foreign State institutions, international public organizations or international judicial institutions, including official candidates for such positions, shall be held as equivalent to civil servants within the meaning of the Criminal Code. This broad wording is used to expand the circle of persons falling within the list of public officials under the different laws of foreign States so as not to restrict the scope of the applicable offence. Accordingly, any powers held by a person at a foreign State institution, an international public organization or an international judicial institution, would be evaluated on an ad hoc basis (taking into account the differences of laws of foreign States on the relationships of civil service, etc.), seeking to establish whether he or she holds *appropriate* powers that allow the conclusion that the person is a foreign public official or an official of a public international organization within the meaning of the Convention. The reviewing experts, despite their initial concerns, were satisfied that this approach does not create any obstacles to the effective implementation of the foreign bribery offence.

In several cases, however, gaps were discovered in the pertinent legislation: In some States parties, the legislation did not extend to officials of public international organizations or extended only to persons who were gainfully employed, while in another the scope of the definition of covered officials was considered by the reviewers to be narrower than the UNCAC definition in Article 2(c), being limited to foreign officials of international organizations or assemblies of which the State party *was a member*.

Furthermore, in one State party, the definition of "foreign official" did not explicitly include persons exercising public functions for a public enterprise, leaving room for uncertainty. In the same jurisdiction, members of foreign parliaments and members of international assemblies are covered only insofar as the bribe is intended to induce an act in connection with a parliamentary vote and not for other acts in the exercise of the duties of their mandate. This falls short of the requirements of the Convention, which does not differentiate between members of foreign parliaments and other foreign public officials. According to Article 2(b) the term "foreign public official" includes, inter alia, any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected.

On the other hand, the governmental reviewers considered the very broad definition of a "foreign public official" as positive.

Example of implementation

In one case, the definition of "foreign public official" extended to officials designated by both foreign law and custom, in particular to any individual who held or performed the duties of an appointment, office or position created by custom or convention of a foreign country or part of a foreign country.

Facilitation payments: A matter of particular interest regarding foreign bribery is the extent of the obligation to cover so-called facilitation payments, i.e. undue advantages offered to expedite or secure the performance of routine governmental action by foreign officials, political parties or party officials. While most countries include such payments in the relevant offences, insofar as they involve (one way or another) influencing the official conduct of the recipient, in three cases the foreign bribery statutes contain an *exception* for facilitation payments/advantages inducing actions that do not run contrary to the officials' duties and are not discretionary. In contrast, the principal domestic bribery statutes of the countries involved contain no such exception.

The basis for this exception seems to be the reference made in Article 16 (and in corresponding provisions of other international instruments) to the bribe being offered in order to obtain or retain business or other "*undue*" advantage. Following this example, in two of the three above-mentioned States parties the law excludes bribes made to obtain or retain business advantages that are "legitimately due to the recipient" of this advantage. In one case it is further stipulated that in working out if a business advantage is not legitimately due, one should disregard: "(a) the fact that the business advantage may be customary, or perceived to be customary, in the situation; (b) the value of the business advantage; and c) any official tolerance of the business advantage."

The governmental experts conducting the reviews unanimously agreed that such practices should not be tolerated. They considered that the Convention contains no enumerated exception for facilitation payments and, while not always directly questioning the consistency of national legislation with the requirements of the Convention, issued recommendations for States parties to review their policies and approach on such payments, in order to discourage their use and effectively combat the phenomenon.

Nonetheless, it should be stressed that an interpretative note to Article 16 par. 1 of the Convention stipulates that “a statute that defined the offence in terms of payments ‘to induce a breach of the official’s duty’ could meet the standard set forth in each of these paragraphs, provided that it was understood that every public official had a duty to exercise judgement or discretion in an impartial manner and that this was an ‘autonomous’ definition not requiring proof of the law or regulations of the particular official’s country or international organization”.⁷ Taking this into account, and to the extent that national legislation and its interpretation by the Courts meet the conditions set forth in this interpretative note, States parties should be considered to be in compliance with the Convention. The matter merits further consideration in order to fully clarify the role of the term “undue” in the text of Article 16.

Relation to the conduct of international business: The offence of international bribery, as foreseen in the Convention, is linked to the conduct of international business, which includes, according to an interpretative note, the provision of international aid.⁸ While the matter of facilitation payments remains controversial, governmental experts – insofar as they touch upon the matter – appear to unanimously approve in principle and even to consider as a “success” and good practice the decision of some States parties *not* to limit the foreign bribery offence to activities “in relation to the conduct of international business”, thus exceeding the minimum requirements of the Convention.

Example of implementation

In nine States parties, the foreign bribery law goes beyond the minimum requirements of the Convention and also covers cases where the bribe is not intended to “obtain or retain business or other undue advantage in relation to the conduct of international business”.

Effectiveness: In most reviews of States parties that have the requisite legislation in place, it was noted that there were few, if any, reports of foreign bribery and that only a small number of relevant cases reached the criminal justice system. Although some States parties have confirmed the existence and partly furnished statistics and/or concrete examples of investigations and prosecutions for foreign bribery, only a handful of final decisions and convictions were reported. Apart from three definite convictions in one State party, three more in another, and a single conviction in a third, in only one case was a significant level of enforcement demonstrated, and commended by the governmental experts conducting the review. Significantly, this particular State party, as well as another, have emphasized that the crime of foreign bribery is taken very seriously and constitutes an enforcement priority for the competent authorities.

Challenges: The major challenge in the implementation of Article 16 is the complete absence in many States of a criminal offence addressing the bribery of foreign public officials and officials of public international organizations. This concerns above all countries from the Asia-Pacific and African Groups, where the introduction of a corresponding offence was not considered up until now to be of particular priority.

The comparatively low interest towards the criminalization of foreign bribery has been exacerbated by the general reluctance of States parties to extend the reach of their criminal law to foreign public officials, as demonstrated by the even lower number of jurisdictions having adopted the non-mandatory offence of passive bribery of foreign public officials and officials of public international organizations. This situation is best illustrated by the example of one State party which gave as a reason for not implementing Article 16 in the

⁷ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 176.

⁸ *Ibid.*

domestic legal system the possible contradiction of the criminalization of foreign public officials and officials of public international organizations with the immunities offered to international public officials mentioned in the Convention on the Privileges and Immunities of the United Nations of 1946. It should be clear that no such contradiction exists as the provisions of Article 16 do not affect, nor are they meant to affect, such immunities.⁹ As indicated in the interpretative notes to UNCAC, the States parties have noted the possible relevance of immunities in this context and have simply encouraged public international organizations to waive such immunities in appropriate cases.¹⁰

Apart from the non-existence of normative measures, common challenges relate to the scope of foreign public officials and officials of public international organizations covered by the offence, and especially to the apparent ineffectiveness of the existing legislation, which runs the risk of being downgraded to the level of fulfilling a merely symbolic function.

C. Diversion of property, trading in influence, abuse of functions and illicit enrichment

1. Embezzlement, misappropriation or other diversion of property by a public official

All of the States parties have established measures to criminalize the embezzlement and misappropriation of public funds. Even if there is no single approach in the various jurisdictions, but rather a wide array of terms and concepts under which the relevant conduct is subsumed (for example, “theft”, “embezzlement”, “peculation”, “conversion”, “misappropriation”, “mismanagement”, “criminal breach of trust”, “unauthorized use of things”, “squandering of property”, “spending budgetary funds for the wrong purposes”, etc.), national legislations cover in principle the stealing of funds entrusted to a public official by virtue of his/her position, as well as more generally the misuse and maladministration of public funds and resources for purposes other than the ones for which they were intended, or for the benefit of the official himself or herself, or for the benefit of another person or entity. Accordingly, governmental experts were mostly satisfied with the results of the reviews, despite the terminological variety and even numerous inconsistencies observed among the factual elements of the applicable offences.

A notable exception relates to the case of a State party that only uses the terms “misappropriation” and “conversion”, leaving aside “embezzlement” and “diversion”. The reviewers expressed the view that “diversion” is a general term that encompasses something more than “conversion”, creating the impression that the conduct in question is not sufficiently covered. Nevertheless, in another State party with identical provisions, the reviewers made no such comment. Further, it should be pointed out that according to one interpretative note to the Convention, the term “diversion”, as used in Article 17, could be understood as covered by or synonymous with the terms “embezzlement and misappropriation”.¹¹

In several jurisdictions, the relevant legislation does not differentiate between acts committed in the public sector and acts committed in the private sector. It contains broad offences, which apply not only to public officials but to all persons who are entrusted with another’s property, including company directors, officers, members and agents. All the same, in many of these cases the embezzlement or misappropriation of public funds can constitute an aggravating circumstance, while in other jurisdictions if the relevant offences are committed by public officials it is possible to concurrently apply additional offences such as “abuse of public office”, resulting in higher punishments than for ordinary citizens. The reviewers were generally not opposed to such practices, with the exception of one case, where they argued in favour of putting in place ad hoc criminalization provisions to cover acts of embezzlement, misappropriation or diversion of property by a public official. This did not have to

⁹ See also UNCAC Legislative Guide, pars. 211 and 275.

¹⁰ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 176.

¹¹ *Id.* at 181.

do, however, with a fundamental objection to subsuming the public and the private sectors under a common offence, but rather with the fact that some forms of behaviour falling under Article 17 (namely the unlawful use of property entrusted to or held at the disposal of a public official) were not covered by the national provisions because the only applicable offence (abuse of office) required “major damage” as a consequence of the act.

Subject matter of the offence: A common issue encountered relates to the scope of the property that constitutes the “material object” of the offence. Article 17 extends to “any property, public or private funds or securities or any other thing of value”, whereby according to Article 2(d) “property” covers “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.” Moreover, the term “assets of every kind” is understood to include funds and legal rights to assets.¹² In the same spirit, many States parties rely on wide definitions of “property” or on jurisprudence that has the same effect.

Example

The criminal law of one State party does not provide a specific definition of the term “property”. However, according to old legal precedent the term is interpreted in a very wide sense to include “any valuable interests owned by a person, other than himself or herself, his or her life and his or her freedom”, including money and any right protected by the law and that may be measured by money, so long as the law provides the owner with legal instruments against any person who tries to prevent him or her from using his or her property.

In at least six States parties, immovable assets are outside the scope of the relevant criminal provisions as a person could only embezzle property if it is in his or her possession. Similarly, in one jurisdiction the law criminalized the embezzlement of “money or securities” and “goods, official documents, letters or registers”, but did not appear to cover all forms of “property” or “any other thing of value” within the meaning of Articles 2(d) and 17 of the Convention. In most (though not all) of the above cases recommendations were issued to amend the law to include immovable assets in the embezzlement offence, in accordance with the definitions of the Convention. One State party, however, argued that the public official would normally try to misappropriate or otherwise divert immovable assets by forging a deed of ownership or by making a false entry into a public register. Such conduct would be sufficiently covered by the offences relating to forgery or, most likely, fraud – a point that was accepted as valid by the governmental experts conducting the review.

Article 17 includes as material objects of the offence any property, funds, securities or other things of value which have been entrusted to a public official, while owned by either the State or a private person or entity. In view of this, shortcomings were identified in one State party where only public assets are covered, and in another where national legislation covers only property, monies or securities belonging specifically to the State, to an independent agency or to an individual, thus excluding funds belonging to a private organization, such as a foundation. The authorities stated that according to national law, such funds are usually not entrusted to the custody of public officials anyway, but usually transferred directly into the property of the State or a public entity. Nevertheless, it was felt that a clarification of the relevant legislation was needed to ensure that it covers all kinds of private funds entrusted to a public official, as this would help to cover any similar cases that may occur in the future.

The commission of the offence entails a breach of trust on the part of the public official to whom the property or other thing of value had been entrusted. It is worth noting, however, that there are countries where the embezzlement or misappropriation offence is not limited to situations where property has been “entrusted” to an official “by virtue of his or her position”, but encompasses more generally the appropriation of any property, assets or other things of value, which are or have come in any way into the possession of the offender.

Finally, as with the bribery provisions, jurisdictions exist where, in respect of property valued below a certain threshold, the offence of embezzlement either applies only if the act causes “serious consequences” or does not apply *at all* and the act is dealt with administratively. Conditions and limitations of this kind are not foreseen in the Convention. However, it is true that according to an interpretative note, Article 17 does not “require the

¹² Id. at 53.

prosecution of de minimis offences”.¹³ Hence, such limitations should be evaluated on an ad hoc-basis, taking into account the values and general circumstances involved.

Third-party benefits: In seven cases there were limitations or discrepancies concerning the accrual of benefits to third parties, and appropriate recommendations were made. In one of the States parties concerned, the authorities argued that the absence of an explicit reference to conduct carried out for the benefit of third parties was due to the irrelevance of what the principal does with the funds as the offences mentioned were considered consummated at the earlier point of time when the funds are diverted. This explanation was accepted for purposes of the implementation of the Article under review, although it was noted that the requirement of benefit for third parties is explicitly mentioned in other parts of the national legislation; this would suggest that its absence from other provisions is not irrelevant.

Mens rea: Intentional misconduct is covered in all countries with embezzlement offences. In addition, in one State party the law also specifically addresses cases **where the offence results from acts of negligence by the concerned official, while in another the offence of embezzlement** itself could be committed negligently or with gross negligence. The reviewing experts observed this last possibility to be a good practice.

Effectiveness: As noted in one review, embezzlement is one of the most common crimes against property. Many countries have provided statistics or case law, often without differentiating between the public and the private sector, given the uniform approach many of them have adopted.

2. Trading in influence

Trading in influence, a non-mandatory provision, has been established to some extent as a criminal offence in more than two-thirds of States parties, and legislation has further been drafted or introduced to criminalize trading in influence in several jurisdictions. In four cases, only the passive version of the offence has been fully or partially established, with legislation pending to fully implement the offence in one of them.

In two cases, both from the Western European and Others Group, the adoption of implementing legislation was considered but eventually rejected. This rejection came because the concept of trading in influence was considered overly vague and not in keeping with the level of clarity and predictability required in criminal law or because the legislator, taking also into account the difficulty of distinguishing trading in influence from socially acceptable forms of pressure (e.g. lobbying) decided to focus on the most dangerous acts, especially those that undermine confidence in public administration, justice and the authorities in general, preferring the path of prevention and establishing rules of professional ethics for the conduct in question. Recommendations were issued to reconsider the possibility of introducing appropriate criminal legislation.

In some States parties, the offence seemed to be (at least partially) addressed through the wide general provisions against bribery or through their combination with another set of special provisions against practices involving trading in influence. However, reviewers were sceptical about such legislative methods. In one case it was argued that Article 18 is intended to encourage the creation of a “separate and distinct” offence and that its emphasis is not so much on actual bribery, be it direct or indirect, but rather on the personal *influence* which a public official or any other person has by virtue of his position or status. In another State party, due to the lack of more information and jurisprudence, considerable uncertainty remained about the scope of criminal liability, leading the reviewers to recommend that the State explore the possibility of including ad hoc provisions to criminalize trading in influence in its domestic legislation. The matter warrants closer scrutiny in order to determine whether States parties should be encouraged to amend their criminalization methods to bring them in line with the stand-alone concept of Article 18, even where the conduct in question is sufficiently addressed in general domestic bribery provisions.

Some reviewers have accepted that trading in influence could be adequately covered by jointly applying the “basic” provisions on bribery and the provisions on participation of the general part of the Penal Code. According to this theory, if a private person promises or offers a benefit to another private person (or public official) to

¹³ Id. at 181.

exercise influence over a public official, the first private person would be qualified as an instigator of active bribery and the second private person (or public official) would be considered the bribe-giver in the bribery offence. Nonetheless, the accuracy of this reading of the national legislation is doubtful, since it presupposes that the public official responsible for the intended administrative action did somehow get involved in the corrupt scheme, and overlooks the requirement that criminal liability should be established even if the public official has not been approached with the aim to influence him/her. To make things clearer, as in another country with similar legal principles, the offence of bribery and the provisions on participation are jointly applicable in certain cases where the public official to be influenced takes part in and accepts the “deal”. For instance, depending on the content of the agreement among the various parties, the third party could be guilty of active bribery (or instigating active bribery), the public official of passive bribery and the intermediary of active bribery (or incitement or complicity). Furthermore, where the person promising the advantage agrees with the intermediary that the latter will bribe an official directly, but the intermediary does not do so, this could constitute an attempted instigation of active bribery. Cases remain uncovered where no official decision maker is involved, even if only indirectly as the ultimate recipient of the undue advantage.

On another note, where legislation against trading in influence is in place, there are certain deviations from the scope of the Convention. Most basic constitutive elements of the offence are identical to the ones contained in Article 15 (promise, offering or giving/solicitation or acceptance, directly or indirectly, of an undue advantage, for the recipient or another). Accordingly, in some cases the reviews focused on similar problems to the ones observed with regard to bribery offences, e.g. those relating to solicitation, indirect conduct, third-party beneficiaries, etc., or on analogous successes such as immunities for reporting persons.

“Influence peddling” by public officials: A more serious deviation concerns the fact that some States parties criminalize only acts by or vis-à-vis public officials, i.e. the offer or acceptance of advantages in order that a public official abuses his/her influence over *another* public official.

This behaviour constitutes undoubtedly the most serious form of trading in influence falling under the scope of the Convention. It is no accident that some countries explicitly provide for its punishment in the context of the main corruption offences, or that, as mentioned above in the context of Article 15, some States parties partially address the relevant conduct by including in their bribery provisions benefits designed to induce an official to perform any act in connection with his/her official activity, other than those that fall within the scope of his/her official duties.

Article 18, however, further addresses the conduct of *private* individuals abusing their real or supposed influence over the exercise of public administration, something that the governmental experts conducting the reviews have sometimes overseen in cases where either the active or both versions of the offence seem to exclude the scenario of a private-to-private transaction.

International trading in influence: The Convention encourages the criminalization by States parties of trading in influence with a view to obtaining an undue advantage from their own administrations or public authorities. In some States parties the law exceeds this requirement by also covering (to a lesser or greater extent) trading in influence with respect to foreign and international public officials, elected members of international organizations and members of the international judiciary.

Although in the vast majority of cases the governmental experts did not comment on the matter of international trading in influence they did observe, in one case concerning a country where the law already partly addressed the problem by covering officials of international organizations and courts, that making trading in influence an offence in every country was an important means of improving the transparency and impartiality of public decision-making and eliminating the risk of corruption therefrom. Moreover, they noted that, generally, persons seeking to corrupt foreign public officials use subtle methods and employ intermediaries which make it very difficult to prove the intention by the foreign public official to accept bribes as payments of money cannot be traced in many situations. Therefore, the reviewers drew the attention of the national authorities to the importance

of being able to use the trading in influence offence in such situations and encouraged them to consider expanding it to include foreign public officials and members of foreign public assemblies.

Abuse of influence: Article 18 refers to the offer/solicitation, etc., of benefits that intend to induce the abuse of influence by the recipient/influence peddler. The offence clearly includes situations where the capacity of the recipient to exert influence is not real, thus covering cases where fraudulent claims are used to induce the offer of the undue advantage. In two States parties the abuse of “supposed” influence did not appear to be covered, and was therefore not fully in line with the Convention. The national authorities in one of those States argued that the matters pertaining to “supposed influence” could fall under the fraud provisions in the Criminal Code. Indeed, even countries that include fraudulent claims in the trading in influence offence sometimes concurrently apply the fraud offence, based on the different legal interests protected by the respective provisions. As an offence of an economic nature, fraud requires, however, as a rule the act causing or having the clear potential to cause direct *economic loss* – a restrictive condition that is bound to leave a range of situations falling under Article 18 uncovered.

Whilst there needs to be a nexus between the giving, offering or promising and inducing the official or person to use his/her influence, the active offence is autonomous and does not rely on the agreement of the passive party and vice versa. Moreover, the offence does not focus on the abuse of influence *per se*, but stretches to situations where influence is only alleged and has not been exerted. Therefore, in States parties that solely criminalize the exercise of influence by one civil servant over another in order to obtain a favourable decision, the reviewers considered the relevant legislative measure as inadequate.

Other reviewers have, however, expressed a fundamentally different opinion: In one jurisdiction where the “active” offence was equally geared towards the exertion of influence, rather than the trading in influence itself – making no mention of the promising, giving or offering of an undue advantage to the “influence peddler” – the review team submitted that the national legislation is broader than the offence recommended in UNCAC, accepting the claim of the authorities that the conduct in question is covered by the general rules on participation (“abetting”, “necessary cooperation”, and especially the civil law concept of “mediate authorship” or “indirect perpetration”, which establishes as principals of a crime not only those who carry out the act by themselves (“direct perpetrator”), but also those who carry out the act “by means of another who they use as a tool”). According to this (dubious) view, the case foreseen in Article 18(a) of the Convention is actually in itself “an assumption of mediate authorship”, criminalizing in essence, as it seems, the indirect exertion of illicit influence on an authority or on a public official, via the promise, offering or giving to another person (the “direct” perpetrator), who uses his/her influence on the said authority or on the said public official. This, however, does not answer the question of how to deal with cases where there is no direct perpetrator of illicit influence in the above sense, i.e. where the trader in influence (the person who has or is presumed to have some influence) is not himself a public official and does not effectively exert his/her influence over one, or rejects the offer to do so. As in other cases where there is a difference of opinion between reviewers, the matter should form the subject of further analysis, in order to determine whether the national system, as appears likely, would benefit, in terms at least of legal certainty, if active trading in influence were to be criminalized as a principal offence.

Less controversy surrounds the characterization by reviewers as a good practice of the establishment of the offence of trading in influence in cases where the recipient is “using his/her supposed official or social position”, in addition to the standard cases where he/she “uses his/her actual or assumed influence”. This wording was considered to broaden the scope of the offence in comparison to Article 18, although there were no cases to demonstrate the practical significance of this interpretation.

Obtaining an undue advantage: As already mentioned, the offence of trading in influence does not require that influence is actually exerted. Nor does it require that the desired results, i.e. “obtaining from an administration or public authority of the State party an undue advantage”, are achieved.

<u>Example</u>

In one State party, the applicable legislation on trading in influence was observed to cover all material elements of the offence and additionally, neither the “influence peddler”/intermediary, nor the person whose influence was sought had to be public officials. It was understood that the influence could be real or merely supposed, and the undue advantage could be for the perpetrator him/herself or for another person. The offence appeared to be completed whether or not the intended result was achieved, and additionally a separate offence was fulfilled if the person whose influencing was sought actually carried out the requested act as a result of the improper influence.

Equally, it is not required that the intended advantage is of a specific nature. Accordingly, it was found that legislations that require that trading in influence be related to “the promotion, execution or procuring of a contract with a public body” or to trying a specific “legal or administrative case”, or that it is carried out in order to create, directly or indirectly, “an economic benefit”, are not fully in line with the Convention.

On the other hand, and provided that the law relates in principle to any possible “undue advantage”, specific circumstances may well function as aggravating factors. For example, in one State party if the person abuses his or her influence over a judge or a public prosecutor in order to ensure that the judge or public prosecutor issues, pronounces, delays or omits a ruling or sentence relating to a case under his or her jurisdiction, the penalty increases and includes disqualification from holding office for life. Likewise, another State party has established higher penalties for trading in influence to obtain an unlawful than a lawful decision.

Effectiveness: Relatively few States provided statistical data or examples of cases and convictions for trading in influence. This possibly reflects the fact that the relevant offences are in many cases new and untested, hampering for now any attempt to conclusively assess their effectiveness.

Challenges: The main challenge regarding this Article seems to be its inherent complexity and the ensuing technical and methodological difficulties encountered by States parties in transposing it in their national legislation. This may explain the lack of provisions criminalizing the relevant conduct – especially in its active form – in several countries, including the cases where the establishment of the offence of trading in influence has been considered but ultimately rejected. This also accounts for the serious interpretational issues that surfaced during the reviews and led partially the reviewers to contradicting readings of the national texts, e.g. regarding the possible application of the general provisions on participation or the adequacy of laws criminalizing solely the abuse of influence in order to obtain a favourable decision. Other challenges relate to the criminalization of influence peddling by private persons – not only by public officials claiming to have influence over their colleagues, and of situations where the proclaimed capacity to exert influence is not real.

3. Abuse of functions

The offence of abuse of functions – as foreseen in the non-mandatory provision of Article 19 – is designed to cover a wide range of official misconduct and has an auxiliary role in relation to other narrower corruption offences. This was confirmed in a State party where the authorities stated that the corresponding statute is used in some cases as an alternative to a prosecution for bribery, if there is not sufficient evidence to cover all of the necessary elements of this particular offence. As indicated in the interpretative note under Article 19, abuse of functions “may encompass various types of conduct such as improper disclosure by a public official of classified or privileged information”.¹⁴

A large majority of States parties has adopted measures to criminalize the abuse of functions by public officials. In one State only disciplinary sanctions are available, given that the conduct in question is prohibited under public service regulations. In three other cases, legislation has been drafted to introduce a corresponding offence or to ensure the full implementation of the provision under review.

In most States parties national legislation (or in rare cases common law) contains a general offence that includes the main constituent elements of Article 19 – under similar titles such as “abuse of authority and failure to

¹⁴ See *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, p. 194.

discharge official duties”, “abuse of public office”, “criminal breach of trust”, “abuse of official position” or “misconduct in public office” – focusing on the violation of laws by a public official in the discharge of his/her functions, through the wilful performance of an act or the failure to perform his/her duty.

Apart from these general offences, States parties referred to a wide variety of special offences in their legislation, which they deemed as relevant for the implementation of the present Article, such as refusing or delaying beyond the legal time limits the granting of a special permission, having a personal interest in contracts or transactions in which the official participates by virtue of his/her duties or alteration, damage or destruction of computer data or software.

Example

The Penal Code of one State party provides for the special offence of “incompatible transactions” according to which: “Any public official who, directly or indirectly, becomes interested in any contract or transaction in which he or she participates by virtue of his or her duties, for the purpose of obtaining a benefit for himself or herself or for another person or entity, shall be punished by one to six years in prison and special disqualification from holding a public office for life. This provision applies to arbitrators, conciliators, experts, accountants, guardians, executors, official receivers and liquidators”.

The criminalization of this special form of abuse of functions is deemed to protect the interests of the community, the prestige of public officials and, especially, the transparency of administrative work, guaranteeing the impartiality of the public service. The action of “becoming interested” means “seeking a benefit different to the one established by the public service, that is to say, a benefit contrary to the proper performance of official duties”. The provision in question does not require demonstrating the damage to the State nor the perpetrator’s personal gain. The perpetrator’s interest is enough to charge him or her with abuse of functions.

There are, however, jurisdictions where no general offence, encompassing the basic forms of conduct envisaged under the Convention, exists. In at least four States parties only certain very specific instances of abuse of functions were cited as applicable; these related for example to acts of bribery, the improper use of confidential information, the embezzlement of public funds or intimidation and assault – all prohibited under the criminal law. Recommendations were issued accordingly – with one exception – for the States parties to consider reproducing more precisely the criminal offence described in Article 19 and enacting legislation addressing more broadly the abuse of functions by public officials. In one further State, with a larger and seemingly more complete catalogue of special offences falling under the category of “abuse of functions” (obstructing the implementation of a law, misappropriation, unlawful taking of interests, favouritism etc.), the reviewers were reasonably satisfied that the national law was in line with the Convention, despite the lack of a general offence following the concept of Article 19.

Mens rea: The abuse of official authority by public officials to the detriment of the public interest is only normally classified as a criminal offence when it is committed intentionally. This is also the model promoted by Article 19. Still, in some cases criminal liability is extended to reckless or negligent conduct, thereby going beyond the minimum standards set forth in the Convention, as was considered a success by some review teams.

Obtaining an undue advantage: In most jurisdictions criminal liability for abuse of functions presupposes that the public official acts with the special purpose of obtaining a benefit for himself/herself or another person – as foreseen by the Convention – or (alternatively) with the purpose of causing harm to another person. Thus, there are many jurisdictions where the official could be held liable even if he/she did not seek to secure an “undue” advantage or any advantage at all.

Example

In one State party, the Criminal Code prohibits a wide array of activity, including where an official acts unlawfully with the intention of dishonestly obtaining a benefit for himself or another person or dishonestly causing a detriment to another person.

In some cases the law goes even further, and the perpetrator is considered criminally liable independently of whether he acted for one of the above purposes, as long as he/she violated his/her official duties.

The meaning of “undue advantage” corresponds to the meaning of the term, as accepted in other corruption offences under the Convention, and includes intangible and non-pecuniary benefits. In some cases national legislations use terms such as “income or gains”, which do not appear to cover non-material advantages.

The most important deviation from the text of the Convention is observed in a considerable number of States where some degree of damage (often “major” or “substantial”) has to accrue to the rights or legal interests of a (natural or legal) person, society or the State, for abuse of functions to be considered as a criminal offence. Additionally, in one of these States the application of the relevant offences is subject to a threshold, such that abuses involving amounts below a certain sum of money are not criminalized but are dealt with administratively. With regard to this precondition of causing damage or loss to someone, caution is advised. Most – though not all – review teams issued recommendations for the elimination of such restrictive requirements. In one example, however, the reviewers considered that the absence of the qualification of a “purpose of obtaining an undue advantage” widened the scope of application and covered all cases addressed by Article 19, disregarding the prerequisite of the national law that the act should be “prejudicial” to the interests of a person to constitute an offence.

Third-party benefits: In a number of cases, acts intended to obtain an undue advantage for third parties or especially for legal entities are left outside the scope of the law. In one State, for example, the term “for self-serving purposes” was judged to be too narrow in comparison with the meaning of terms employed by Article 19.

Effectiveness: As noted in one review, the provisions on abuse of functions relate to one of the most common crimes in the exercise of official service. Significantly, in one country of the Western European and Others Group, the offences in question appear regularly in practice, with around 30 cases and 40-50 offences reported each year. Despite this, however, relatively few States provided statistics and/or information on relevant jurisprudence.

Challenges: The main challenge seems to be recognizing the importance of introducing a general offence that is sufficiently broad to cover all conduct envisaged by the Convention. There is also a need to address the widespread restriction of linking the application of the offence to the objective requirement that it has caused damage to a person or the State.

4. Illicit enrichment

Illicit enrichment, a non-mandatory provision, had not been established as a criminal offence in the majority of States parties, although legislation was pending in several cases. Countries from the Group of Asian and Pacific States seemed more willing to adopt such an offence, while on the other hand States parties from the Group of Western European and Others States are most likely to reject it and none has yet recognized the concept of illicit enrichment. Significantly, in one out of two States from the Eastern European Group that have criminalized the conduct in question, the reviewers considered this “noteworthy” and classified it under “successes and good practices”. In some cases where such an offence has been introduced in national legislation, this resulted from the implementation of regional anti-corruption instruments, such as the Inter-American Convention against Corruption.

It should be noted that many States parties have considered the possibility of adopting an illicit enrichment offence and made a genuine effort to assess whether its introduction would be compatible with their national legal system, but concluded that this would not be appropriate or had serious doubts about the perceived breach of fundamental principles of justice that it entails, as well as the constitutional limitations pertaining above all to the right to be presumed innocent until proven guilty under the law. The presumption of innocence is invoked because the crime of illicit enrichment hinges on the presumption that the accumulated wealth is corruptly acquired, unless the contrary is proved. This reversal of the burden of proof in a criminal case is not regarded as

compatible with fundamental principles of the domestic legal system in many jurisdictions, as it is believed that it could lead to a significant risk of convicting innocent individuals where their explanation is simply not believed. This is why the authorities in some of these countries have made it absolutely clear that no plans exist to include such an offence in a future revised text of the Criminal Code.

Given the optional character of the criminalization requirement and the broad discretion that States parties enjoy regarding its application, reviewers have generally accepted such arguments and considered that the countries involved have fulfilled the obligation under Article 20 to consider establishing an illicit enrichment offence.¹⁵ In only two cases did they insist that the States parties should give further consideration to the criminalization of illicit enrichment: in one of them, reviewers sought to invalidate the arguments of the authorities regarding the presumption of innocence and even going so far as to express the view that if there are constitutional impediments to the criminalization of illicit enrichment, the Constitution should be amended or, at a minimum, asset forfeiture provisions should be adopted. Equally, in cases where no compelling reason for not implementing the measures was given, despite inadequacies in the national legal framework, the governmental experts invited the States parties under review to explore the possibility of re-assessing the appropriateness of establishing this particular offence.

Where illicit enrichment has not been criminalized, a similar effect is pursued to some degree by criminal provisions on money-laundering and concealment, as foreseen by Articles 23 and 24 of the Convention, by the partial reversal of the burden of proof in the context of assets belonging to persons who participated in or supported a criminal organization, or to foreign “politically exposed persons” coming from countries with high levels of corruption, as well as by special provisions on the non-justification of resources by persons associated with criminals or victims of crime. Moreover, evidence of unexplained wealth can, and often is, introduced at trial as circumstantial evidence supporting other charges of public corruption. Most importantly (and more effectively), several States target illicit enrichment by way of asset and income declaration requirements, as well as extended criminal confiscation and civil forfeiture procedures. While all these solutions do not directly satisfy the purposes for which Article 20 was established, the extended criminal confiscation and civil forfeiture procedures seem to present viable alternatives which are worth a closer look and are discussed briefly below.

Increase in assets: The main element of the offence is none other than the “significant increase in the assets of a public official” in comparison to his/her lawful income which he/she can reasonably account for, i.e. the fact that he/she is found to have financial resources or property disproportionate to his or her present or past sources of income or assets, or – as more generally put by a number of national laws – that he/she maintains a standard of living above that which is commensurate with his or her present or past known earnings. As noted in some reviews, it is the task of the Prosecutor to prove the unjustified enrichment, i.e. the possession of the questionable property. Once the prosecutor presents evidence that the defendant has greater assets than can be accounted for by his/her salary and other legal income, it is then up to the defendant to prove that these assets were acquired legally. The above supports the theory proposed in one review that the offence of illicit enrichment should not be considered as a crime of omission, but an “active” offence, cantering on the significant increase in the assets of a public official in a way that he or she cannot reasonably explain in relation to his or her lawful income.

Regarding the time period in which an increase in the assets is relevant, in most cases the law places under scrutiny the whole period of time after a person becomes a public official. Nevertheless, in one case it is specified that the period during which a person’s financial situation is considered to be liable to be checked ends two years after leaving office, and in another it seems that only increases in wealth during the tenure of the public official fall under the scope of the offence.

Scope of persons covered: Article 20 intends to cover the significant increase in the assets “of a public official”, without any further personal specifications. National legislations with corresponding offences tend to be more precise regarding the scope of persons whose assets are subject to scrutiny.

¹⁵ See also UNCAC Legislative Guide, par. 297.

It should first be noted that not all countries limit the application of the relevant offences to the possession of disproportionate assets by public officials. In at least three States parties, the applicable provisions appear to extend also to *private* persons when there are sufficient and reasonable grounds to believe that they have obtained ownership of moveable or immoveable property through dishonest means and the property is not consistent with their known sources of income.

Regarding public officials, the offence of illicit enrichment is not limited, as a rule, to persons still carrying out official duties, but also includes those persons who *previously* served as public officials. Furthermore, one State party has made it clear that any person who helps a public official evade accountability by pretending to be the lawful owner of the questionable assets is also liable to explain the origin of a significant increase in his or her assets. Thus, this provision punishes both the ‘front men’ and others trying to assist the corrupt public official.

Example

The criminal law of one State party provides that: “Any person who fails to demonstrate the lawful origin of a significant increase in his or her assets, in his name or in the name of a third party for concealment, obtained after taking office up to two years after leaving office, shall be punished by two to six years in prison, by a fine equal to 50-100% of the illicit enrichment and by absolute disqualification from holding office for life. Illicit enrichment includes debt cancellation and extinction of obligations. The third party that conceals the illicit enrichment shall be penalized by the same punishment imposed on the offender”.

Reversal of the burden of proof: As most national laws establishing an offence of illicit enrichment make clear, the onus on proving the legitimate provenance of the funds or property in question lies with the investigated person. Unless he/she gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such financial resources or property came under his control, this person will be guilty of the offence. Thus, it seems that a rebuttable presumption of guilt is established: Once the case on the disproportionate increase in assets is made, the defendant can then offer a reasonable or credible explanation to avoid punishment.¹⁶ This presumption is explicitly affirmed in some jurisdictions.

Example

In one State party, the law clearly states that “if it is proved during the trial (...) that the accused person in his own name or any other person on his/her behalf has obtained ownership or is in possession of moveable or immoveable property not consistent with the known sources of his/her income then the court shall presume that the accused person is guilty of the charges and unless the person rebuts that presumption in court the punishment meted out on the basis of this presumption shall not be unlawful”.

With regard to the presumption of innocence, it is worth mentioning that the authorities in one State party defend the legitimacy of the reversal of the burden of proof, as described above, by arguing that at the end of the day no one is punished on the basis of a presumption, “but based on the true and proven fact that the public official increased his or her assets during his or her term in office, in a way that he or she cannot reasonably explain in relation to his or her lawful income.” The particularities of the offence of illicit enrichment are justified by the fact that, although equal treatment for all citizens is guaranteed, “public officials have greater liabilities because of their duties”.

Some States parties specify that the reversal of the burden of proof relates not only to assets being strictly in the possession of the public official, but also to the assets of persons closely related to him/her, which may be presumed to be under the control of the accused. Furthermore, in some cases the existing offences extend explicitly to the assets of relatives or “dependents” of a public official.

¹⁶ See also UNCAC Legislative Guide, par. 297.

Example

In one State party, possession of property disproportionate to known sources of income by a public servant or any of his dependents, for which no reasonable explanation is offered by the public servant, amounts to the offence of “criminal misconduct”. The relevant provision includes an “explanation” of the term “dependent”, which means the wife, children and step-children, parents, minor sisters and brothers who reside with the official and are wholly dependent on him/her.

Using asset and income declarations in lieu of illicit enrichment: In some jurisdictions where illicit enrichment has not been criminalized, it was argued and partly accepted by reviewers, that a similar effect could be achieved by way of having in place a stringent and functioning control system on the income and assets of public officials (e.g. keeping the salary and taxation of public officials a matter of public record); this facilitates the gathering of information and supports monitoring and investigation, and especially by way of a binding legal requirement that public officials submit *asset and income declarations* for themselves, as well as their spouses and dependent children (usually prior to assuming their office and after that on an annual basis). Persons required to file a declaration are liable to be asked to explain any asset increases described in their disclosures. Failing to submit the declaration and declaring false information constitutes, depending on the jurisdiction, a disciplinary, administrative or even criminal offence.

The introduction of this system has also proven useful in facilitating the implementation of the illicit enrichment offence itself in those countries that have established it. The offence under Article 20 of the Convention may function in tandem with the offences of failing to file an asset declaration or submitting a false declaration. A case of illicit enrichment can be initiated based on data compiled after verification of the obligated persons’ declarations of assets and liabilities. It is no accident that in many legal systems all of these issues are dealt with in the context of the same special criminal law on asset disclosure, whereby those who may be held criminally accountable for illicit enrichment are also required to submit a financial disclosure report.

The governmental experts, taking into account the non-mandatory nature of Article 20, recognized the value of this alternative solution and issued recommendations for States parties to consider establishing asset declaration (and not only interest declaration) systems, at least for high-ranking officials and members of Parliament, and in general take measures to improve the effectiveness of existing systems. For example, in one State party, the reviewers noted that in practice, asset and income declaration forms are completed and submitted, but not verified, because no verification process exists. Therefore, they recommended that the country under review consider unifying and streamlining the process of income and asset declarations, whereby one institution would be responsible for this task and support would be provided by a working group that would be responsible for verifying the information received. In another case, a recommendation was issued to introduce stricter sanctions for deliberately falsifying or providing wrong information on an asset and income declaration, such as the forfeiture of undeclared property. Finally, in a third State party, the reviewing experts recommended that the regulations on asset declarations be extended to cover all public officials, not only Ministers and their Deputy Ministers, as is currently the case.

Using extended powers of confiscation or civil forfeiture in lieu of illicit enrichment: Some countries have used other ways to achieve a similar effect to the one envisaged by Article 20, which are linked to the confiscation regime foreseen by Article 31. First of all, in a more general context, the acquisition of illegal gains following criminal acts related to corruption may lead to property sanctions, including seizure and confiscation of proceeds of crime or property derived from, or used in the commission of such criminal acts. Some States parties have further developed this concept and introduced legislation, according to which unexplained wealth can be restrained and confiscated: (a) without the criminal court having to prove that it derived from the particular offence for which the owner was convicted (extended powers of confiscation); or (b) in civil proceedings (non-conviction based civil forfeiture). More specifically:

a) According to the first alternative, if a court convicts a person of a (serious) criminal offence, it (or in some cases a civil court acting on a suit by the Public Prosecutor) may, in the cases provided by law, confiscate a part or all of the criminal offender's assets if these belonged to the offender at the time of the making of the judgment, and if the nature of the criminal offence, the legal income, or the difference between the financial situation and the standard of living of the person, or another fact gave reason to presume that the person had acquired the assets through (other) criminal activities. The decision to apply extended confiscation is made on the basis of proof that the property originated from criminal activity, in the absence of contrary proof. In other words, confiscation is not applied to assets proven to have been acquired out of lawfully received funds.

b) The second alternative, civil forfeiture, originally comes from the common law tradition, but has also been adopted in a number of civil law countries in recent years. Whereas in the case of extended confiscation a criminal conviction for at least one offence has to be attained, according to this method no one is charged with a crime. Where there are reasonable grounds to suspect that a person's total wealth exceeds the value of wealth that was lawfully acquired, a civil court can compel the person to prove that his or her wealth was not derived from an offence. Civil proceedings involve a lower standard of proof than "beyond a reasonable doubt". If the authorities establish – based on a balance of probabilities and the preponderance of the evidence – that the assets derived from criminal activities and the person involved cannot demonstrate their legal origin, the court may forfeit the assets or order him/her to pay a proportion of wealth that corresponds to their value. This innovative approach to addressing concerns of unexplained wealth and illicit enrichment outside the scope of the criminal justice system was well received; some governmental experts remarked that as these provisions are implemented in the context of the considerable protections afforded to the defendant under the legal system of the State party in question, the effectiveness of these measures will be of interest in future reviews to address the problem of illicit enrichment.

Procedural measures: Even in cases where no general criminal statutes or equivalent punitive measures have been adopted to address illicit enrichment by public officials, there are practical procedural measures that can be taken to effectively deal with this conduct. For example, a detailed mechanism facilitating the investigation of suspected illicit wealth cases was highlighted in one case as a good practice and, in the opinion of the reviewing experts, furthered the goals of the Convention.

Example of implementation

In one State party, the Director of Public Prosecutions can apply to a Judge for an investigation direction based on evidence that a person: (a) maintains a standard of living above that which is commensurate with his or her present or past known sources of income or assets; or (b) is in control or possession of financial resources or property disproportionate to his or her present or past known sources of income or assets; and (c) maintains such a standard of living through the commission of corrupt activities or unlawful activities; and (d) such investigation is likely to reveal relevant information of unlawful activity. The Director can thereafter summon the suspect or any other person specified in the investigation direction to answer questions and/or produce evidence. This information can then be used to seize and confiscate property or lead to further criminal investigation. Although this procedure has not yet been applied in practice, guidelines were under development to facilitate its proper application.

Effectiveness: Even in those States that recognize the concept of illicit enrichment, the relevant provisions remain sometimes a matter of debate in academic and judicial circles. For example, in one State party the Supreme Court was recently called to pronounce on the constitutionality of the offence of illicit enrichment, while the authorities stated that they have attempted to direct its application and to interpret its terms "in a manner that is respectful of the rights of the people" and in accordance with the fundamental principles of the national legal system. This ongoing controversy may explain to a certain extent the limited application of the offence. Some States parties admitted that the relevant provisions have never been applied in practice. Only one State party provided statistics and reported some successes, while two cases were pending in court at the time of the review in another State party. This same State party reported difficulties in bringing cases due to challenges in pursuing financial profiling, net worth analysis, as well as asset tracing and seizure.

Challenges: Apart from the very few instances of implementation, the most important challenges in the implementation of Article 20 relate to the above-mentioned reasons for the non-criminalization of illicit enrichment at the national level, in particular constitutional and equivalent limitations related to the principle of the presumption of innocence and the criminal burden of proof. Other identified issues relate to inadequacies of asset and income disclosure systems, and the application and potential overlap of existing laws, such as tax and anti money-laundering legislation, to cases of illicit enrichment.

D. Private sector offences

1. Bribery in the private sector

Article 21 of the UNCAC is a non-mandatory provision that highlights the importance of requiring integrity and honesty in economic, financial or commercial activities.¹⁷ At the time of the reviews, less than half of the States parties had adopted measures to fully criminalize bribery in the private sector, partly on account of earlier regional instruments, such as the Council of Europe Criminal Law Convention on Corruption and the EU Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector. In one State party with a federal structure, notwithstanding the lack of a federal commercial bribery law, private sector bribery has been effectively prosecuted under related laws and has been further criminalized to a considerable degree at the state level. Furthermore, in one case acts of passive bribery of directors and officers of corporations could potentially meet the requirements of general breach-of-faith offences. In eight cases legislation for the criminalization of bribery in the private sector has been introduced, and the need to enact similar legislation in another State party was noted as a priority.

In some civil law jurisdictions from the Latin American and Caribbean Group, the countries under review argued (or examined the possibility) that the conduct in question could be pursued as a type of fraud under the relevant provisions of their respective Penal Codes. However, reviewing experts expressed reservations on this possibility as it is unlikely that the applicable fraud offences, which include as a rule the restrictive elements of deception and economic loss, could cover the situations envisaged by Article 21.

As to the method of criminalization, some countries have opted for using the same provisions as applied to the bribery of public officials, making no essential distinction between bribery in the public sector or in the private sector. This approach was noted as “an asset in the fight against corruption” by some reviewers, its strength lying in the decreased possibility of loopholes when determining applicable provisions, e.g. to private sector entities providing a public service or to public-private partnerships.

The basic elements of the optional offences of active and passive bribery are again identical to the ones contained in Article 15 (promise, offering or giving/solicitation or acceptance, directly or indirectly, of an undue advantage, for the recipient or another). The offences cover tangible and intangible advantages, whether pecuniary or non-pecuniary, as well as instances where no gift or other benefit is actually offered. Similar problems as the ones observed under Article 15, e.g. regarding indirect bribery, third-party benefits or the scope of undue advantages, sometimes exist in national laws; however, these appear to be fewer in quantity and less pronounced in quality.

Scope of private individuals covered: At least four States parties with criminal provisions against bribery in the private sector faced issues on the scope of private individuals covered. Article 21 considers as a potential unlawful recipient “any person who directs or works, in any capacity, for a private sector entity”, independently of his/her position. It therefore applies to managers and employees at all hierarchical levels of private sector entities, as well as agents and consultants of companies, professionals/sole entrepreneurs, and even non-profit legal entities or foundations (to the extent of course that they are engaged in economic, financial or commercial activities). In the above jurisdictions national law potentially covers an incomplete list of legal entities or uses

¹⁷ UNCAC Legislative Guide, par. 298.

narrower definitions of the concerned persons (e.g. those who “direct a legal person of private law, act on behalf of such person, or act on behalf of another natural person, and who perform administrative, supervisory or managerial functions or functions relating to the organization of movements of assets”), capturing mostly individuals in senior management positions. Accordingly, amendments were deemed necessary in order to fully comply with the requirements of the Convention.

An opposite approach is taken in another jurisdiction, where it is clear that the bribery offence applies to any person who directs or works, in any capacity, for a private sector entity, even if the person’s function or activity has no connection with, or is performed outside the country.

Breach of duties: With regard to the intended behaviour of the bribe-taker, Article 21 is construed in principle as a breach-of-faith offence, addressing cases where the unlawful recipients are induced to “act or refrain from acting in breach of their duties”, and primarily safeguarding the relation of trust between employer and employee.

Example

The Criminal Codes of two States parties contain special, identical provisions on bribery in the private sector, covering all acts involving persons who, without being public officials, hold or occupy, within the scope of their professional or social activities, a management position or any occupation for any person, whether natural or legal, or any other body, and intended to obtain the performance or non-performance of any act within their occupation or position or facilitated by their occupation or position, in violation of their legal, contractual or professional obligations.

Wherever national law does not require a breach of duty as a constituent element of the offence, as is often the case, for example when States parties use a common definition of bribery in the public and in the private sector, this goes beyond the requirements of the Convention and accords in effect equal weight to the protection of free competition.

On the contrary, national legislation which requires that the act of the bribe-taker causes “damage” or a “detriment” to whom he/she represents, adds a further constituent element in the description of the offence, which narrows its scope in variation from the provisions of the Convention.

In the course of economic, financial or commercial activities: In some countries the law stipulates that bribery in the private sector occurs only insofar as the act has been committed in the course of “economic” or “business” activities. In most cases, however, offences are more general, making no reference to the nature of the relevant activities.

On the other hand, in one case the law limits bribery in the private sector to a breach of obligations “in the purchase or sale of goods or contracting of professional services”. This can prove overly restrictive, as can the requirement in another State party – where the offence is contained in the law against unfair competition – of a prior complaint from those entitled to institute civil proceedings, including competitors and State authorities, for proceedings to be initiated (though this element was under consideration).

Effectiveness: Only a few countries have provided examples of implementation or statistics on prosecutions and convictions. Two States parties reported that there have been no convictions or prosecutions, respectively, related to the above-mentioned offence, and two others reported that in practice very few cases involving the application of the relevant provisions are reported and investigated. In only one case did the reviewing experts note an increased enforcement of laws over the past 14 years as a result of the prohibition of *foreign* commercial bribery. In contrast, domestic bribery in the private sector seemed not to attract equal attention as official bribery.

Challenges: An important challenge in many countries regarding the implementation of Article 21 appears to be overcoming the preoccupation with protecting the public sector. In a number of cases bribery in the private sector is covered only insofar as the business or company is owned in part by the State. A criminalization of private bribery would require a fundamental change of attitudes, especially in countries from the Asia-Pacific Group, which seem to have the most reservations regarding this particular offence.

2. Embezzlement of property in the private sector

All States parties have adopted measures to criminalize embezzlement in the private sector, a non-mandatory offence. In three cases doubts remain as to the relevance of the cited legislation and the extent to which the conduct in question is covered, while in other cases measures to more fully implement the article were still under study and under discussion at the time of the country reviews. Furthermore, a State party with a federal structure lacked a federal statute that prohibited embezzlement in the private sector in all circumstances. All the same, the review team was satisfied that various federal laws could be used instead to cover many related situations, and also that embezzlement from a private entity is primarily criminalized under state legislation.

As with embezzlement in the public sector there is a wide array of different terms and concepts used to hold people criminally responsible for the relevant conduct, including for example “fraud by officers of a company”, “unlawful appropriation”, “breach of trust”, “abuse of position” or “authorizations”, etc. In one case a recommendation was issued for the State party to consider adopting a provision that reproduces more precisely the criminal type described in Article 22.

Subject-matter of the offence: As noted with regard to Article 17, many countries do not distinguish between the private and public sector, but apply the same embezzlement/misappropriation offences to both. Accordingly, some of the problems discussed under Article 17 also surface here, e.g. regarding immovable property. This latter issue constitutes a challenge even in States with separate private bribery offences, leading reviewers to recommend that these countries consider amending their legislation and in particular adopting the necessary measures to extend existing definitions that currently cover “moveable property” to “any property, private funds or securities or any other thing of value”. Similarly an issue of more closely aligning national law with the spirit of the Convention was raised in one State which covers only property received by loan, borrowing, hiring or contract.

Breach of trust: Article 22 refers to property, private funds or securities or any other thing of value entrusted to a private person by virtue of his or her position, thus encompassing a concept of breach of fiduciary duties of trust and care. The governmental experts noted as a success the practice in one State to take into account the exact capacity in which the offender received the embezzled assets, in order to determine whether to apply an aggravated version of the offence.

Example of implementation

In one State the penalties for embezzlement would be aggravated according to the value of the embezzled asset and would be *further* aggravated if the offender “received the asset upon deposit imposed by law, by reasons of occupation, employment or profession, or as a tutor, trustee or court custodian”.

In the course of economic, financial or commercial activities: A further point worth mentioning with respect to Article 22 is the fact that many national provisions that criminalize embezzlement in the private sector have a broader scope than the Convention as they are not confined to acts committed in the course of economic, financial or commercial activities.

Effectiveness: Finally, as regards the practical application of the offence, only a few countries have provided any statistical data. This should not be taken, however, necessarily as a sign of ineffectiveness, given that, for example, the reviewing experts in one State observed that the majority of embezzlement prosecutions have involved embezzlement in the private sector.

E. Money-laundering and related conduct

1. Laundering of proceeds of crime

There is remarkable uniformity among States parties with regard to the criminalization of money-laundering, despite the wide scope of this particular offence, its complex nature and the many controversies it has generated since it has come to international public attention. As becomes evident from the country reviews, national anti money-laundering provisions have been largely drawn up on the basis of the principles set out in a series of international conventions and instruments, including – apart from the present Convention that builds on and advances earlier initiatives – the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (concluded in Vienna in 1988) and the United Nations Convention against Transnational Organized Crime (concluded in Palermo in 2000). An important role in determining and harmonizing the contents of the relevant legislation is apparently also played by the focused periodical evaluations conducted by mechanisms such as the Financial Action Task Force (FATF) and the FATF-style regional bodies, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism, (MONEYVAL), or the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption (MESICIC). Finally, some countries have benefited from technical assistance and recommendations from other specialized groups such as the Asia-Pacific Group on Money Laundering (APG), the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG), and the Financial Action Task Force of South America (GAFISUD).

Almost all States parties have taken measures to establish money-laundering as a criminal offence, in most cases, including almost all countries from the Eastern European Group and the Group of Western Europe and Others States, in their Penal Codes and in others, including all countries from the African Group, in special anti money-laundering laws. The governmental reviewers occasionally found “strong”, “solid” and “robust” regimes designed to deter and detect money-laundering, despite that technical deficiencies or even significant gaps could be found in several cases in the implementing laws, especially with regard to the conduct described in subparagraphs (1)(a)(ii) and (1)(b)(i) of Article 23, as well as parts of subparagraphs (2)(a) through (c). Furthermore, in one State party the scope of the money-laundering offence is limited to banking, financial and other economic operations which, though widely interpreted, were observed not to cover all potential areas of laundering of proceeds. As a result of the above shortcomings, and while noting, in some cases, that legislation to fully implement the Article had been introduced, appropriate and, in at least one case “urgent”, recommendations were issued for the countries involved to enact the necessary legislation. More specifically:

Conversion or transfer: First, Article 23 par. 1(a)(i) requires the conversion or transfer of property to be an offence where the defendant knows that the property involved is the proceeds of crime and does so for one of the following two purposes: (a) concealing or disguising its illicit origin (e.g. by helping to prevent their discovery); or (b) helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action. The term “conversion or transfer” includes instances in which financial assets are converted from one form or type to another, “for example, by using illicitly generated cash to purchase precious metals or real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.”¹⁸ States parties are generally in compliance with this basic requirement, with two notable exceptions, using various versions of provisions designed to address the relevant conduct.

Example

In one State party, money-laundering is defined broadly to include giving “a legal form” (e.g. through the use, acquisition, possession, conversion, transfer or any other action) to illegal or simply undocumented property to conceal its illegal and/or undocumented origin, or to help any person to evade the legal consequences of its

¹⁸ UNCAC Legislative Guide, par. 231.

actions. The inclusion of “undocumented” property extends liability to property suspected of being derived from criminal activity.

A very interesting debate, with repercussions for the application of the Convention in its entirety, developed during the review of one State party regarding the degree to which States parties are obliged to faithfully espouse the exact wording of the Convention. The domestic legislation of the country involved only took up one of the two above-mentioned purposes among the subjective elements of the offence, namely to make the asset “acquire the appearance of being from a legitimate source”, i.e. to only conceal its illicit source, instead of both alternatives enumerated in Article 23 par. 1(a)(i).

National authorities argued that this legislation is sufficient to cover the conduct described in the “conversion or transfer” limb, without literally following the wording used in the Convention. In this regard they referred first to the principle of functional equivalence, which enables a State to cover the conduct which should be criminalized, but using terms that are better adapted to its traditions and the domestic legal system. This approach is consistent with par. 16 of the Legislative Guide for the implementation of the Convention which advises those drafting legal reforms to give effect to the spirit and meaning of the provisions of the Convention. Bearing in mind the above, the authorities pointed out, as regards the substance of the money-laundering offence in question, that this is drafted in such a way that the purpose for which the “conversion” or “transfer” is made is irrelevant, it being sufficient that the act is carried out “with the possible consequence” that the property will acquire the appearance of legality. Therefore, whenever the conversion or transfer may imply that the property acquired the appearance of legality, the criminal conduct has occurred, regardless of the purpose for which the action took place. Consequently the authorities considered that the law not only satisfies the requirements of Article 23 par. 1(a)(i), but in fact criminalizes money-laundering even more comprehensively than the standards established by the Convention.

Additionally, the State under review pointed out that in any event, the second purpose in the “conceal or transfer” limb is expressly laid out in the part of its legislation penalizing “concealment”, and specifically covers the conduct of a person who helps another person to evade the inquiries of the authorities or helps the principal or accomplice to secure the product or proceeds of a crime.

On the other hand, the reviewing experts, while accepting that the national authorities had made a valid point with regard to the dual purposes under the “conversion or transfer” limb, noted that in other international mechanisms evaluating the same article, namely the FATF and the FATF-style regional bodies, a stricter interpretation requiring national legislation to include both (or none of) the purposes in the “conversion or transfer” limb had been adopted. Moreover, they pointed out that par. 233 of the Legislative Guide for the implementation of the Convention also makes specific reference to the fact that the conversion or transfer must be for either purposes. Finally, with regard to the possibility to apply the domestic provisions on “concealment”, which include the second purpose of the “conversion or transfer” offence, they noted that these provisions correspond to the offence of “concealment or disguise” established under Article 23 par. 1 (a)(ii), i.e. a technically different offence from that of “conversion or transfer” of Article 23 par. (a)(i).

Taking the above into account, the reviewing experts concluded that the legislation of the State under review was fraught with a “technical deficiency” relating to the missing alternative purpose of the “convert or transfer” limb of the offence. Independently of this conclusion, however, the subject raises a number of important interpretative and methodological issues, already encountered in part under previous articles, which may merit further analysis: The degree to which a country is bound to adopt the Convention text and structure; the application of the concept of functional equivalence; the role of Article 30 par. 9; and also the extent to which an authoritative value should be accorded to evaluations and interpretations adopted by other review mechanisms. It is worth noting in this regard that par. 3(j) of the Guiding Principles and Characteristics of the UNCAC Implementation Review Mechanism specifies that the present process is intended to “complement existing international and regional review mechanisms in order that the Conference may, as appropriate, cooperate with those mechanisms and avoid duplication of effort”. This does not necessarily exclude, however, the adoption of diverging standards and

interpretation techniques than the ones adhered to by other evaluation mechanisms (e.g. in respect of the margin of appreciation of States parties, or with regard to the possibility of using equivalent terms instead of the exact wording of the Convention text, or the necessity of introducing ad hoc provisions instead of general catch-all offences) where this is deemed appropriate and more consistent with the nature of the Convention and the priorities of the States parties.

Concealment or disguise: A number of comparatively more substantial problems were observed with regard to the application of subparagraph 1(a)(ii) of Article 23, relating to the broader offence of concealment or disguise of property. For example, in one case this particular component of the money-laundering offence was found to refer only to proceeds from the previous criminal conduct of the perpetrator himself, and appeared (somewhat peculiarly) to be confined solely to cases of self-laundering. For this reason, the reviewing experts recommended amending the provision to widen the scope of this money-laundering conduct to the proceeds of crimes committed by other people as well.

In another case the national law was judged not specific enough, since it referred only to the concealment of the property itself, and not to the concealment of the “true nature, source, location, disposition, movement or ownership of or rights with respect to property”.

Finally, in one State party there is an exemption from criminal liability where the offence of concealment is committed to benefit a “spouse, a relative whose tie does not exceed the fourth degree of consanguinity or second degree of affinity, an innermost friend or a person to whom a special gratitude is owed”. The exemption shall not apply where the offence is committed to assure the benefits of the crime, as is usually the case, or where the act was done for a profitable purpose. The authorities of the country under review explained that in practice this concerns only a small category of persons. Nonetheless, the governmental experts considered it a deficiency that may erode the overall efficacy of the anti money-laundering regime. In any event, as they pointed out, the footnote to par. 237 of the Legislative Guide to the Convention refers to the understanding that national drafters should also consider concealment for other purposes, or in cases where no purpose has been established, to be included **in the scope of the offence**.

Acquisition, possession and use: Article 23 par. 1 (b)(i) contains as a mandatory offence the acquisition, possession or use of proceeds of crime, while knowing at the time of receipt that such property represents the proceeds of a crime. In several jurisdictions one or more types of this behaviour (especially the mere “possession”, but also the “acquisition” or “use” of proceeds of crime) are altogether missing from the applicable provisions or are only partly (under certain restrictive conditions) or at best implicitly covered (through related concepts, such as “receiving” or “applying”).

It is worth noting, however, that not all restrictive conditions to the way the above forms of illicit behaviour are addressed have been treated by the reviewers as equivalent to a breach of the Convention. It should not be forgotten that the criminalization requirement under discussion is subject to the basic concepts of the legal system of the State party in question.

Example

In one State party the law provides, as a rule, that a person living in a joint household with the offender, and who only used or consumed property obtained by the offender for ordinary needs in the joint household cannot be sentenced for money-laundering. This exemption is not foreseen in the Convention. However, the national authorities explained, to the satisfaction of the review team, that this provision was inserted into the law to allow for considerations of equity, and thus complies with fundamental principles of justice. If a person commits an offence, e.g. sells drugs, steals property and so on, and he or she uses the proceeds to pay for the rent or buy food, it is regarded as inequitable to punish anyone living in his or her household for continuing to use the residence, or for eating the food put on the table. Moreover, in such minor cases it would often be difficult to prove that this other person knew that the money was the proceeds of crime. The above exemption was reported to be used restrictively, in cases where the sums were indeed small. In practice, a person may continue to live in the

apartment and eat food without committing an offence, but if one goes, for example, on an expensive trip to an exotic destination, this person will be deemed to have committed the offence in question.

Participation and attempt: Article 23 par. 1 (b)(ii) requires the criminalization, subject to the basic concepts of the legal system of the State party, of participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences mandated by the Article. Participation and related conduct, as well as attempt, are usually covered by the general provisions of the respective national Criminal Codes, which are also relevant for the application of Article 27 of the Convention, and more rarely in additional provisions related specifically to money-laundering. In one case no information was provided on the existence of provisions covering participation, aiding and abetting or conspiracy, while in another case, uniquely, attempted money-laundering was not punishable, though this would have been covered in a pending amendment of the law.

A more important issue has arisen in some countries with regard to the punishment of “conspiracy” – a concept that is not part of the civil law tradition of many countries and captures a preparatory stage more distant to the full offence than attempt, involving the agreement between two or more persons to commit a crime, and in many cases (but not always), additionally, at least one of the conspirators taking some concrete action in furtherance of the criminal plan. States parties are obliged to criminalize the various participatory acts and attempt, including conspiracies, “subject to the basic concepts of their legal system”. However, in one case it was noted that the concept of conspiracy is not applicable for money-laundering offences, despite the fact that it is recognized and applied for another category of crimes (related to the security of the State). Similarly, in another jurisdiction, the reviewers issued a recommendation for the criminalization of conspiracy to carry out money-laundering, and the authorities stated that they were preparing an amendment to address this matter – even though it was not immediately clear if conspiracy was a familiar concept in their domestic legal system. In contrast, two States have introduced and apply the concept of conspiracy specifically with regard to (some) money-laundering offences, despite the fact that in these particular legal systems the use of this concept is considered highly unusual and that such behaviour, as a general rule, goes unpunished.

Proceeds of crime: Article 23 concerns the conversion, transfer, etc. of the proceeds of crime, regardless of whether the property is tangible or intangible. As regards the term “property”, this gives rise in a few cases to similar issues as the ones encountered with regard to Articles 17 and 22. For example, in one case the law appeared to be limited to certain objects of laundering, though it was explained that all types of property were covered; and in another case the Penal Code did not contain a definition of property, though legislation was pending to address the issue. All in all, however, the anti money-laundering legislation seems to contain more comprehensive definitions than the ones applicable to other offences.

The meaning of the term “proceeds of crime” is defined in Article 2(e) as “any property derived from or obtained, directly or indirectly, through the commission of an offence”. Most States have adopted similar or equivalent definitions.

Examples

According to one national anti money-laundering law, proceeds of crime means any money or other property that is wholly or partly derived or realized, directly or indirectly, by any person from the commission of an offence against a law of the State, its territories or a foreign country that may be dealt with as an indictable offence.

In another State party, “proceeds of unlawful activities” means any property or any service advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the State or elsewhere, “in connection with or as a result of any unlawful activity carried on by any person” and includes any property representing property so derived.

Finally, according to the even simpler definition of a third anti money-laundering law, “proceeds of crime” means “any property, benefit or advantage, within or outside the State, realized or derived, directly or indirectly, from illegal activity”.

In one State party an issue arose regarding the coverage of indirect proceeds of crime, due to the fact that the national legislation does not contain explicitly the word “indirectly”. The authorities argued that the general wording of the law under review (“things or property derived from a crime...” and “products or benefits of the crime”) is sufficient to cover indirect proceeds and referred to the relevant jurisprudence. However, the reviewers again advised the concerned State party to adhere to the stricter interpretation of other mechanisms such as the FATF and to adopt language that is more clearly consistent with Article 2(e).

Predicate offences: There are four distinct methods of determining the predicate offences of money-laundering. The majority of States parties have adopted an “all-crimes approach” that does not restrict application of the money-laundering offence to specific predicate offences or categories of predicate offences. In other words, the offence of money-laundering is applicable to all offences criminalized under the respective national law and generating some sort of proceeds, including corruption offences established in accordance with the Convention. This method is understandably the one which best serves the purposes of Article 23 pars. 2(a) and (b), i.e. applying the money-laundering provisions to the widest range of predicate offences, and including at a minimum a comprehensive range of criminal offences established in accordance with UNCAC – provided that States parties have fully complied with their criminalization obligations (which is not always the case, e.g. regarding the bribery of foreign public officials, bribery in the private sector or embezzlement). Interestingly, the legislation of two States parties seems to go even further and addresses all types of offences, not only criminal but also of an *administrative* nature, regardless of their gravity.

Other countries apply the law only to “serious offences”, “socially dangerous unlawful actions” or “felonies”, defined as such when subject to penalties above a particular threshold, whereby the applicable thresholds differ depending on the features of the legal system in question. Here, although there are cases where the selected threshold (e.g. at least 6 or 12 months or even 3 years imprisonment) appears enough to cover Convention offences, in some jurisdictions it is too high (e.g. 5 years imprisonment), resulting in the review teams recommending to proceed with the enactment of new law, with a view to expanding the scope of predicate offences by reducing the applicable threshold (e.g. from 5 years to 1 year).

A third group of States parties does not establish the predicate offences of money-laundering depending on the severity of the applicable penalty, but uses an exhaustive list enumerating the offences deemed essential. Here again the national laws were sometimes found to be lacking, leading for example the reviewers to issue a recommendation for one State party to extend the list to include all offences established under the Convention, and in particular to consider the possibility of including those relating to bribery and embezzlement in the private sector, all the time recognizing the optional nature of those provisions.

Finally, a number of countries adopt a mixed approach, combining a more or less comprehensive list of specific offences with a threshold (imprisonment of 4 years and above) applying to all crimes other than those included in the list. Again in one of these cases, the threshold was considered too high, leaving some corruption-related offences, such as trafficking in influence, outside the scope of the offence and leading the reviewers to recommend legal reform to lower the threshold to 1 year of imprisonment.

As regards the handling of the predicate offences themselves, an interpretative note to the Convention clarifies that “money-laundering offences established in accordance with this article are understood to be independent and autonomous offences and that a prior conviction for the predicate offence is not necessary to establish the illicit nature or origin of the assets laundered. The illicit nature or origin of the assets and any knowledge, intent or purpose may be established during the course of the money-laundering prosecution and may be inferred from objective factual circumstances”, in accordance with Article 28.¹⁹ Most States under review have confirmed that this is indeed the case in their jurisdictions and that this is the practice followed by their courts.

Foreign predicate offences: Regarding predicate offences committed outside the jurisdiction of a State party, in most cases national legislation contained standards similar to those listed in Article 23 par. 2(c), providing for the application of the money-laundering offences, under the condition that the relevant conduct is also punishable

¹⁹ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 223.

under the domestic law of the State where it was committed (dual criminality). In other words, it is sufficient that the offence is punishable in the place of commission and constitutes a predicate offence for the laundering of assets originating from that conduct to be sanctioned. As a matter of fact, one State reported that in practice, it helps if there is a foreign indictment in order to count the foreign indictable offence as a predicate offence. Furthermore, in some cases national laws seem to go one step further, dispensing with dual criminality and making no distinction regarding predicate offences that do not come under their jurisdiction.

Nevertheless, in several cases, issues were encountered with respect to the coverage of foreign predicate offences. For example, in five cases, the extension to these acts was at best implicit as the law did not address the question of whether a predicate offence could be committed in a foreign country where proceeds are laundered domestically. Moreover, in at least three cases offences committed outside the State party were not considered predicate offences, or were considered as such only in certain limited cases, even if legislation was pending to address the matter.

Self-laundering: Most States parties reported that the exception contained in Article 23 par. 2(e) does not apply in their legislation and that a person can be convicted of both a money-laundering offence and the underlying predicate offence or offences (so-called “self-laundering”), with one review team considering this as a good practice. Significantly one State from the Eastern European Group provided statistical data showing that about half of those convicted of money-laundering offences between 2004 and 2011 were accused of self-laundering.

Other countries have opted to make use of the possibility afforded by the above provision and exclude cases of self-laundering. Nevertheless, implementation gaps were identified: some States under review did not indicate or provide any material evidencing a fundamental principle of domestic law which prohibits the criminalization of self-laundering, while other authorities reported that such a principle exists, and even stressed that the criminalization of self-laundering seems to run against common sense, despite conflicting opinions expressed during on-site visits. Legislation is pending or being discussed in about half of these States.

Mens rea: With regard to the subjective element of the offence of money-laundering, some States establish that the offence (or sections thereof) is punishable both when committed with criminal intent and when committed through recklessness or gross negligence. This goes beyond the minimum requirements of Article 23 and has been identified as a success by some governmental experts.

Case example

One State party provided a case example of a syndicate that laundered cash derived from narcotics trafficking by using a method called “cuckoo smurfing”. This involved depositing cash into innocent third party bank accounts and releasing the equivalent legitimate funds from overseas money remitters, which could then be forwarded as payment for the drugs. The defendant, a low- to middle-level operator of the syndicate, was sentenced to 7 years imprisonment with a non-parole period of 4½ years for recklessly dealing in the proceeds of crime.

Similarly, another review team noted as a good practice the fact that the laundering of proceeds of crime was criminalized not only when the alleged offender knew but also when he or she ought to have known that the assets laundered resulted from a crime.

Providing copies of anti money-laundering laws: Despite the fact that the obligation stemming from Article 23 par. 2(d) is relatively straightforward and creates relatively minor burden, the vast majority of States parties had not provided copies of their anti money-laundering laws to the Secretary-General of the United Nations at the time of the reviews. Accordingly, the reviewing experts signified that they anticipated that official versions of the relevant legislation would soon be provided, or issued direct recommendations for States parties to comply with this requirement, and also ensure that future amendments are sent to the Secretary-General of the United Nations.

Effectiveness: Although there were cases where the lack of statistics on money-laundering cases was noted, and some countries with recent anti money-laundering legislation confirmed that no prosecutions have yet been raised, a large number of countries provided (sometimes extensive) statistical data and detailed examples of cases of

money-laundering prosecutions, alluding to a fairly widespread application of the relative provisions. In one State party the practical effectiveness of the criminal legislation on the matter, demonstrated by the unusually large number of prosecutions and convictions for laundering of proceeds of crime (over 1,000 convictions from 2003 to 2009), was even declared a “good practice” by the reviewing experts. As to the lessons learned from this practical experience, one State outlined for the benefit of the review the most common ways in which money-laundering occurs, according to the knowledge gathered by its investigation and prosecution authorities; it involved the use of false documents to conceal and disguise illicit origin of proceeds; intermingling of proceeds of crime with legal businesses; use of fictitious and offshore companies, fictitious directors and representatives; and providing the competent anti money-laundering bodies with false information regarding trading with goods and having particular business to justify the movement of illicit money.

Challenges: Even in countries where the effectiveness of anti money-laundering legislation has been demonstrated in practice, as described above, prioritizing the investigation and prosecution of money-laundering and financial aspects of criminal activity, particularly in corruption cases, remained challenging. Furthermore, in several countries the practical capabilities of competent authorities need to be enhanced and enforcement levels of the relevant provisions improved. For instance, in one case it was confirmed that the number of prosecutions for money-laundering was relatively low, that law enforcement agencies were not very aware of this offence, and that investigators and prosecutors needed to have greater information-gathering discretionary powers and better training in the “follow-the-money” approach; the use of the anti money-laundering legislation also needed to be promoted. In another case, the State under review was encouraged to obtain further clarity on the interpretation and scope of application of the different sections in the money-laundering provision, especially with regard to the criteria of imposing differing sanctions.

2. Concealment

As indicated in the text of Article 24 itself, concealment or continued retention of property without having participated in the offence, when the person involved knows that such property is the result of an offence, is a non-mandatory provision complementing the money-laundering offences of Article 23. In most legal systems, no particular implementation problems were observed. Conduct of this nature is criminalized either in separate offences, often in the form of more traditional Penal Code provisions targeting “receiving stolen property” or the “handling of stolen goods”, or in the context of novel and broadly formulated anti money-laundering legislation.

Example

One country under review includes in its domestic legislation a provision which criminalizes the act/s of a person that “acquires, stores or sells properties of another, whereby he/she acknowledges the origin of the goods as obtained as a result of a criminal offence”.

One State party’s law also covers the mere suspicion that property constitutes or represents a person’s benefit from criminal conduct, thus extending beyond the requirements of the Convention. It should be noted, however, that the offence is not recognized by all States parties. Furthermore, in a few States parties that have established concealment as a criminal offence, there are issues with respect to the “continued retention” of property resulting from an offence established in accordance with the Convention. Legislation has been drafted or introduced in some jurisdictions to fully implement this article.

F. Obstruction of justice

Obstruction of justice is established as a criminal offence in all States parties, albeit with varying degrees of success. In about one-third of cases serious limitations have been observed. The tendency among States parties is not to have an overarching offence encompassing all forms of illicit behaviour, as contained in Article 25 of the

Convention, but to seek to achieve the intended (mandatory) result through a combination of multiple, partly overlapping provisions.

Example

The criminal law of one State includes no less than 13 separate offences addressing the various forms of criminal obstruction of justice, in particular “intimidation of witnesses etc.”, “corruption of witnesses”, “inducing false testimony”, “deceiving witnesses”, “destroying evidence”, “preventing witnesses from attending court”, “conspiracy to bring false accusation”, “conspiracy to defeat justice”, “attempting to pervert justice”, “unwarranted demands of a public official”, “causing harm to a public official etc.”, “threatening to cause harm to a public official etc.”, and “obstruction of public officials”.

Three sets of acts can be distinguished as falling under the term “obstruction of justice” in relation to the commission of offences established in accordance with the Convention, namely: the use of coercive means to interfere in the giving of testimony the production of evidence in a relevant proceeding; the use of corrupt means for the same purposes; and the use of coercive means to interfere with the exercise of official duties by justice or law enforcement officials.

Use of coercive means to interfere in the giving of testimony or the production of evidence: Article 25 (a) requires first of all the criminalization of the use of coercive means (i.e. physical force, threats or intimidation) in order to influence potential witnesses and others in a position to provide the authorities with relevant evidence, in proceedings (including pre-trial processes)²⁰ in relation to the commission of offences established in accordance with the Convention. It is irrelevant whether the act of intimidation is carried out in the presence of the victim, or whether the victim has been directly intimidated, or through a third party. It is also irrelevant if the perpetrator achieved the intended result (i.e. the inducement of false testimony or interference in the giving of testimony or the production of evidence). Therefore, it is not enough if the national legislation criminalizes only the act of the “principal” offender who gives false testimony, causes the disappearance of evidence, destroys documents to prevent them from being used as evidence, etc. In two countries where this was more or less the case, the review teams issued (at least partially) an appropriate recommendation. In the same line of thought, the reviewers, in their majority, have viewed with obvious reservation the claims of some national authorities that cases of inducement to give false testimony could be punished as abetting or instigating the principal offence of perjury even in cases where the inducement was unsuccessful and no perjury was actually committed. Although this is a matter of contention, about half the reviewers seem to follow a different view; only in the event that the inducement succeeds would the perpetrator most likely be punished as an instigator to the false statement made by the witness.

In fact, several States seem to rely solely on general provisions on “criminal intimidation” or “attempted coercion” to cover the conduct in question, punishing the use of threats to alarm or intimidate one or more persons, regardless of a link to giving of testimony, the production of evidence, or the carrying out of judicial proceedings.

Example

According to the Penal Code of one State, “whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.”

²⁰ See UNCAC Legislative Guide, par. 257.

Even if some reviewers have expressed their preference for “more focused and specific legislative provisions”, the above practice can be considered in principle as being in accordance with the Convention, as long as it is ensured that all coercive means listed in Article 25 are included within the scope of the applicable provisions. Furthermore, criminal intimidation should not be confined, as in the example above, to threatening someone “with any injury to his person, reputation or property, or to the person or reputation of anyone in whom that person is interested”. The Convention does not condition the application of the offence on whether the threatened harm was directed against specific interests or individuals. This was pointed out in the review of one State, but not in another concerning identical provisions.

A far larger group of States makes use of a range of special offences that specifically target separate aspects of the behaviour foreseen by the Convention, with a particular focus on the envisaged impact of the act on the conduct of judicial proceedings. Such offences include for example “intimidating witnesses”, “attempts to induce false testimony”, “subornation of perjury”, “attempts to destroy evidence”, “preventing witnesses from attending court”, “conspiracy to defeat justice and interference with witnesses”, as well as the broader offence of “attempting to pervert the course of justice”. Usually, no aggravated provisions apply when the witnesses are justice or law enforcement officials, but then again the establishment of particular criminal offences in this respect is not required by the Convention, insofar as any interference with the exercise of official duties in accordance with the general provision of Article 25 (b) is otherwise covered.

Example

The law of one State subsumes under the offence of “conspiracy to defeat justice and interference with witnesses” the conduct of “any person who” (...) “in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so”, or “obstructs or in any way interferes with or knowingly prevents the execution of any legal process, civil or criminal”.

It should be noted that in at least four cases, including the example above, issues arose relating to the scope of coverage of the offence, and particularly on the use not just of threats and intimidation but also of physical force, especially regarding conduct intended to interfere not just with the giving of testimony but with the production of non-oral evidence (such as a document or expert opinion) by persons involved in criminal proceedings. Even if such conduct might sometimes fall under the general offence of criminal intimidation, the latter usually carries a lower sanction, creating a discrepancy regarding the applicable penalties in similar situations.

Use of corrupt means to interfere in the giving of testimony or the production of evidence: States parties are required to not only criminalize the use of coercive means but also the use of corrupt means (i.e. the promise, offering or giving of an undue advantage) for this purpose. Again, it is irrelevant if the perpetrator achieved the intended result (i.e. the interference in the giving of testimony or the production of evidence), and the observations made above also apply here.

Most countries fulfil this requirement through special provisions covering “bribery of a witness or expert”, “attempting to induce false testimony or the giving of false expert evidence”, “attempted incitement to a false statement”, “attempted subornation of perjury” or “attempted corruption of witnesses”, but also through the more general offence of “attempting to pervert justice”. Frequently these provisions coincide with the ones referring to the use of coercive means.

Examples

The Penal Code of one State includes the offence of “subornation to perjury”, according to which “the use of promises, offers, presents, pressures, threats, acts of violence, manoeuvres or tricks in the course of proceedings or in respect of a claim or defence in court to persuade another to make or deliver a statement, declaration or false affidavit, or to abstain from making a statement, declaration or affidavit, is punished by three years’ imprisonment and a fine, even where the subornation of perjury was ineffective.”

The new Criminal Code of another State party goes beyond the provisions of subparagraph (a) of Article 25 and includes as separate offences both the active and passive forms of interference in the giving of testimony through the use of corrupt means. A distinct provision specifically covers any person who requests, or accepts an unlawful advantage, or a promise thereof in return for refraining from exercising his or her lawful rights, or neglecting his or her duties in court proceedings.

In the case of at least three States parties the law does not extend to corrupt means, as stipulated by subparagraph (a) of Article 25, but only to the use of threats, coercion or criminal intimidation. Some issues arose also with regard to the failure of some laws to explicitly refer to the “promise” and “offering”, as done with the “giving” of an undue advantage as an inducement, although such behaviour would most likely be treated as attempt to give the advantage in question. Finally, in one State the law was found not to be in full compliance with the Convention, because it did not ensure that the domestic provisions on obstruction of justice applied even if persons other than the witness/expert witness/trial participant himself (such as his/her close relatives) were the recipients of an undue advantage.

Use of coercive means to interfere with the exercise of official duties by justice or law enforcement officials: As regards acts directed against justice or law enforcement officials, most countries adhere to the spirit of the last sentence of subparagraph (b), and have general offences classified as “crimes against the public order” or “the State authority” that are designed to punish the use of threats, intimidation or physical force to interfere with the exercise of official duties by *all* categories of public officials and not just the ones performing justice or law enforcement duties. Equally, these general provisions – which are uniformly viewed as adequate for the purposes of Article 25 – are rarely related specifically to corruption offences, as established in accordance with the Convention. Sometimes offences of a more specific nature (e.g. attempting to pervert the course of justice), protecting law enforcement officials, are also applied, usually accompanied by aggravated penalties.

Examples

The law of one State provides that anyone who uses intimidation or physical force to interfere with the exercise of official duties by a public official and to force him or her to act or refrain from acting in the exercise of his or her official duties, shall be punished with imprisonment of one month to one year. Additionally, other provisions foresee the imposition of life imprisonment to “anyone who killed a member of the police force or prison guard by virtue of his or her duties or position, in order to prepare, facilitate, commit or conceal another crime or to evade justice, for himself or herself or for the benefit of another person or entity, or for failing to achieve the intended purpose”.

There are also States – interestingly, this is the dominant tendency in the Eastern European Group – that have aligned their legislation to the narrower mandatory part of subparagraph (b) and have only established special offences classified as “crimes against justice”, such as “impeding the implementation of justice”, “coercion against a magistrate”, “threatening or application of violence in connection with administration of justice or preliminary investigation,” etc.

Example

Legal provisions in one State party that prohibit the use of physical force, threats or intimidation to interfere with the official duties of judicial officers and law enforcement officials also expressly extend to jurors and defence attorneys. Enhanced penalties apply if the offence was committed by public officials in the exercise of their official duties.

As to the problems and shortcomings encountered, in at least one case the domestic provisions covered intentional insult, assault or the use of criminal force but not threats or intimidation, while only one kind of physical force was covered in another case. Furthermore, reviewers located an isolated case where criminal liability for interference with the exercise of judicial duties was limited to acts committed by persons who are

public officials themselves, excluding all other perpetrators. Finally, in one State party, even though the applicable provisions on assault, intimidation, contempt and defeating or obstructing the course of justice appeared to satisfy the requirements of the Convention, the reviewing experts recommended that the authorities consider a special statutory prohibition for the obstruction of judicial officers consistent with a similar special prohibition already in existence with regard to law enforcement officials and police.

Challenges: No particular challenges were identified other than the numerous limitations in the establishment of domestic offences mentioned above. Few States parties have provided statistical data or case examples, making it difficult for the time being to assess the effectiveness of provisions regulating obstruction of justice.

G. Provisions supporting criminalization

1. Liability of legal persons

All but four of the States parties have adopted measures to establish the liability of legal persons for participation in the offences covered by the Convention, although some of these countries have no general liability provision and there is considerable variation with regard to the type and scope of such liability. One State appears to have established some form of liability but only in relation to money-laundering. In almost all cases – with the exception of one State whose applicable provisions need to be clarified – it appears clear that the liability of the legal entity, be it criminal, civil or administrative, is without prejudice to the criminal liability of the natural persons who have committed the offences, and is therefore in compliance with Article 26 par. 3 of the Convention. In practical terms this means that the legal person can be held accountable despite an inquiry failing to identify the individual offender or establish his/her liability; at the same time the procedural decisions taken in relation to the legal person will not influence decisions affecting the natural person.

Example

The law of one State party specifies that the liability of legal persons shall be without prejudice to the individual criminal procedures against their representatives or accomplices. The legal representatives of a legal person shall represent it during the investigations and proceedings instituted against it for corruption or corruption-related offences. Nevertheless, they shall not be convicted for the offences committed by the legal persons they represent, unless such legal representatives are individually responsible.

Nature of liability/civil liability: As to the type of liability involved, in most cases there seems to be no question that the possibility exists to hold a legal person accountable through the general rules of civil responsibility or some administrative rule, although often inadequate or confused information on this possibility was provided during the reviews. In several jurisdictions, multiple forms of liability apply. The main issue related to the application of Article 26 is whether States parties have confined themselves to the application of administrative penalties, or have gone a step further and made legal persons subject to criminal sanctions.

Criminal liability: The second alternative clearly prevails. More than two-thirds of States parties have established some form of criminal liability of legal persons for corruption offences. Whereas this was a distinctive feature of a number of common law systems in the past, at the time of the reviews there were at least as many civil law countries with corresponding rules. More States parties around the world are now increasingly following this trend, as reflected in the example of three countries from different regions with civil and/or administrative regimes in force, where either a law introducing criminal liability had already been signed and was expected to become effective within weeks, or a commitment had been made – in one case, apparently, under the influence of the OECD Working Group on Bribery – to introduce such liability and legislation to this effect was pending. It is equally telling that in two of the four States with no or with limited legislation enacting the liability of legal persons for corruption offences, national authorities indicated that their respective Governments intended to prioritize the enactment of *criminal* liability measures; reviewing experts, however, noted in one case that alternative forms of civil and administrative liability would also satisfy the requirements of the Convention.

Much of the relevant legislation is recent and untested, and this partly explains its limited or non-existent practical impact in some countries and the still existing uncertainty as to the way in which the courts will assess some of its aspects, such as the applicable evidentiary rules or the criteria of choosing between different types of sanctions against legal persons.

The more traditional way to regulate the criminal liability of legal persons – and the one prevalent in common law jurisdictions – is to deem all applicable offences (or at least the ones punishable with a fine) as referring to both natural persons and bodies corporate and apply them in the same way, with only the necessary adaptations.

Example

In one State, a general provision stipulates that criminal legislation “applies to bodies corporate in the same way as it applies to individuals”, with such modifications as are set out therein, “and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.” “A body corporate may be found guilty of any offence, including one punishable by imprisonment.”

Many countries follow a narrower approach, whereby legal persons are amenable to criminal punishment only for specific offences, usually those considered more “serious” or falling under the category of “economic” offences. In terms of compliance with the Convention, this may lead to deficiencies insofar as no complementing administrative provisions are in place. For example, in five cases, liability is limited to offences such as money-laundering and the bribery of national and foreign officials, or to crimes that involve a person enriching himself or a corporation “in such a way as to be detrimental to the finances of the State”. It was therefore recommended to consider extending the scope of the law to include all offences established under the Convention. Equally, in other cases with somewhat broader provisions, certain offences were excluded from the scope of coverage, such as embezzlement in the public and private sectors, abuse of functions and obstruction of justice. There are also certain limitations with regard to the possible perpetrator of an offence. For example, in one jurisdiction the scope of the criminal liability of legal persons was overly narrowed by an exception covering the State, local Governments or public-law legal persons; this is also the case in other countries and for State-owned enterprises.

There are no clearly consolidated principles for the attribution of criminal liability to legal persons. In broad terms corporate liability usually arises when a culpable act is committed on behalf and/or for the benefit of the corporation by either: (a) a member of its statutory organ, senior manager, official with actual decision-making authority or competent representative; or (b) a subordinate of one of the above persons, in cases where the care and diligence necessary for the prevention of the offence were not observed in the operations of the corporation, allowing for its commission.

Examples

In one State the attribution of liability requires the offence to have been committed in the interest and for the benefit of the legal person concerned by a natural person with managerial, administrative or supervisory powers or by someone under the direct supervision or management of such a person; failure on the part of the legal person to comply with managerial or supervisory duties must also be proven. The law defines such non-compliance on the part of the legal person concerned as the failure to implement organizational, administrative and supervisory mechanisms to prevent the commission of an offence.

In another country an offence can only be attributed to the legal person if: (a) a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority; and (b) a fault element is attributed to a body corporate that expressly, i.e. tacitly or impliedly authorized or permitted the commission of the offence, including when a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

One of the objectives of the establishment of corporate liability is clearly to encourage legal persons to adopt adequate corruption prevention mechanisms, such as the appointment of a prevention manager; the definition of his/her prerogatives and powers; and the establishment, supervision and certification of an internal control system, etc.). Therefore, in some cases the corporation may not be found liable if it proves that it exercised due diligence to prevent the criminal conduct or its authorization. On the other hand, in some States a corporation is generally liable for the acts of its employees, even if the corporate management condemned the employee's conduct and even if an "effective" compliance programme was in place; these factors can play a role only in mitigating the applicable penalties. Thus, if a company has in place comprehensive due diligence rules that are supported by management, and an employee still violates the law, the court can recognize the corporation's efforts as a mitigating factor in determining the level of the sanction.

Example of implementation

One State party has introduced the strict liability of commercial organizations that fail to prevent associated persons from engaging in bribery in order to obtain or retain a business advantage. Covered organizations are domestic and foreign entities that operate a business or conduct any trade or profession domestically, including companies that are partially or wholly State-owned. In creating an obligation for these entities to prevent bribery, the law was considered to be an effective deterrent that led many companies to adopt comprehensive preventive measures. Given this consequence, and the general positive response of prosecuting authorities and the business sector, the measure was considered a good practice and, importantly, could also be applied in States not following a criminal liability regime.

Administrative liability: Article 26 par. 1 of the Convention requires States parties to take the necessary steps, *consistent with their fundamental principles*, to provide for corporate liability for the offences established in accordance with the Convention. There is no obligation to establish criminal liability, consistent with other international initiatives that acknowledge and accommodate the diversity of approaches adopted by different legal systems.²¹ Several States parties have indeed opted to rely on administrative sanctions, citing fundamental principles of their legal system and permanently settled doctrine. According to these, only a natural person could be considered criminally responsible and thus subject to criminal liability; corporations, however, do not have a blame-worthy state of mind, and neither can they be at the receiving end of a genuine criminal penalty (*societas delinquere non potest*).

In most cases, the reviewing experts accepted the national choice on the preferred form of liability and noted that systems with administrative sanctions are in full compliance with the requirements, as set forth in Article 26. It should be noted, however, that a number of reviewing experts, despite the extended margin of appreciation of States parties in this matter, have recommended pursuing the establishment of criminal liability. In the same spirit, some review teams have highlighted the establishment of criminal liability of legal persons involved in the commission of UNCAC-based offences as good practice, taking into account the innovative nature of such a measure in civil law legal systems.

Concerning the principles governing the attribution of administrative liability, only scant information was provided, although the threshold is certainly lower than the one required for the application of criminal penalties.

Example

In one country, the law regulating corruption offences stipulates that "in the event that organization, preparation and commitment of corruption offences or offences providing conditions for corruption offences are carried out on behalf of or in the interests of a legal entity, responsibility measures can be applied to this legal entity" in accordance with the national legislation. In certain cases foreign legal persons may also be recognized as perpetrators of corruption-related offences. Moreover, legal persons may be held legally liable for failing to abide

²¹ See the examples in the UNCAC Legislative Guide, pars. 323-327.

by the requirements of legislation on countering the legalization (laundering) of proceeds of crime and financing of terrorism.

Sanctions: Sanctions generally vary, ranging from the most common variants of pecuniary penalties (e.g. up to “five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence” or “equal to twice to ten times the value of the illicit values received, accepted, solicited, agreed or promised”), forfeiture and publication of an extract of the judgment, to penalties of an administrative nature, including partial or total loss of tax incentives and benefits or absolute prohibitions from receiving them for a specified period, temporary or perpetual prohibition (“blacklisting”) from entering public tenders or concluding acts and contracts with State agencies, deprivation of business licence and temporary prohibitions from engaging in a commercial or other activity, and even, as a most drastic tool (especially if the legal person was created specifically to perform criminal activities such as money-laundering), dissolution of the corporate body or cancelation of the legal personality, as well as different combinations of the above.

Monetary sanctions for legal persons are generally harsher than the ones foreseen for natural persons. However, the review teams frequently felt that the maximum fines for corporations could be higher, taking into account the seriousness of the offences, the often significant illicit profits involved and the economic strength of the entities in question. Accordingly, specific recommendations were issued in six cases to consider increasing the level of fines available for corruption-related offences, or to extend the types of sanctions applicable to legal persons beyond pecuniary sanctions, with legislation to address the issue pending in one case. In two cases the absence of a blacklisting system for companies and their principals was considered to be a deficiency. Finally, in one case a recommendation was made to seek clarity in jurisprudence with respect to the imposition of sanctions on legal persons for specific offences; this entailed identifying penalty thresholds and specifying appropriate indicators for application of a certain type of penalty, taking into consideration the size or the financial situation of the legal person.

Effectiveness: As already mentioned above, rules on corporate liability are often recent and untested. It was reported that penalties for legal persons are not being applied widely, or that national prosecutors rarely demand that a legal person is declared criminally responsible for the commission of economic crimes. Equally, statistics and case analyses were seldom provided. In only two cases were the reviewing teams satisfied with the effectiveness of national regimes: In the first case the system of criminal liability was declared a success due to the prosecutions and sanctions imposed on major corporations for corruption; and in the second the standard of liability was found to be direct and effective, resulting in an impressive number of law enforcement actions in the past five years.

Challenges: Common challenges related to the inadequacy of existing normative measures, specificities in national legal systems and the establishment of appropriate penalties in accordance with par. 4 of Article 26. Apart from that, the main challenge was the limited practical enforcement of existing regulations, the reasons for which lay partly in systemic deficiencies or rooted negative preconceptions on the usefulness of such measures. Two examples illustrate this situation: In one State the minimal use of corporate liability laws was partly attributed to the limited capacity of law enforcement agencies, i.e. to a lack of knowledge among investigators and prosecutors on how to investigate and prosecute the offence; and in another State where no case had yet been brought to court against a legal person, the authorities stated that there was a general perception that bribery was not a problem associated with the private sector, but rather concerned public officials receiving or soliciting bribes.

Last but not least, more information is needed, especially on the administrative option preferred by many countries. The governmental experts in one review therefore recommended keeping statistics on administrative penalties and proceedings against legal persons, as well as on criminal cases and sanctions under the (new) criminal regimes.

2. Participation and attempt

All of the States parties had adopted measures to criminalize the joint commission, participation and (barring one country) attempt to commit the offences established in the Convention, usually not through special provisions referring to each of them separately, but through provisions set in the general part of their respective Penal Codes. The same is not the case with respect to the preparation of a corruption offence, a non-mandatory provision which is criminalized only in about two-thirds of States parties.

Participation: The scope and coverage, as well as terminological classifications of participatory acts vary, although it is possible to discern (in a broad manner) some common patterns among the different jurisdictions. The clearest one concerns persons who have jointly committed an intentional offence (co-perpetrators). In almost all cases, when a criminal act is jointly carried out by several persons, in furtherance of the common intention of all, each of these persons is liable for that act in the same manner as if it had been carried out individually.

As regards participation *stricto sensu*, national laws commonly cover anyone who intentionally “cooperated”, “collaborated” “aided” or “provided assistance” in any way (through advice, action or otherwise) before or during the commission of an intentional act or a punishable attempt (and occasionally even after that, e.g. if this was done to keep a promise made before the commission of the offence). Accomplices, aiders and abettors are frequently (though not always) punished with the same penalty applicable for the principal offenders, with the courts taking into account their level of involvement when assessing the level of penalty imposed. Often special reference is made to “instigators” (i.e. persons who intentionally persuade another person to commit an intentional offence or to make a punishable attempt at such an act), and persons who provided “essential”, “significant” or “direct” aid in the commission of the crime but also, as is the case primarily in countries of the Eastern European Group, to “organizers” (i.e. persons who staged the crime or supervised its perpetration, as well as persons who established or supervised an organized group or criminal organization). These three categories (instigators, “direct” participants and organizers) are more likely to be treated as principals and to be considered liable to the same punishment, as if they were the actual perpetrators.

Further, there are isolated cases where the law also treats as accomplices the “contractor” (i.e. the person who hires others to commit a crime) or even the “concealer”, i.e. the person who witnesses the offence without taking immediate part in it but does not prevent its commission – in the latter case probably going beyond what is required by the Convention.

Attempt: An attempt is usually defined as the conduct of a person who initiates the commission of a crime (i.e. proceeds with an act that is more than merely preparatory and enables the realization of the offence) but who ultimately fails due to circumstances beyond his or her control. The perpetrator of an attempt is mostly punished with the sanctions provided for the completed crime, although there are several countries where the sentence is reduced. In many States it is explicitly stated that no punishment is imposed if the crime is not completed due to voluntary action or inaction of the offender (not due to external conditions or objective circumstances, such as an unforeseen risk of being exposed).

There are cases where the law punishes attempts only regarding criminal offences carrying a penalty above a certain threshold, or elsewhere when the punishment of attempt is specifically prescribed. This appears, however, not to have created significant problems with respect to the coverage of corruption offences. Only one State was identified with a definite weakness. Although attempts to commit the offence of passive bribery are specifically criminalized, there is no general provision on “attempt” covering all offences established in the Convention.

As already mentioned under Article 15, many countries have limited room to apply measures on the attempted commission of Convention offences, in particular with respect to bribery and trading in influence. Although several States parties consider the acts of “promising” and “offering” an undue advantage as attempts to commit the crime of bribery, many more States directly cover the promise and offer, as well as the acceptance of a promise or an offer, as complete bribery offences. In such cases, as pointed out in a number of reviews, no nexus of any kind is required between the active and passive actors; the subsequent behaviour of the opposite party is irrelevant and it does not matter if the illicit advantage is actually given and received or not. On the other hand it is also not entirely accurate that there is no room *at all* for an attempt, as argued in one review. One could

conceive, for example, the scenario of an envelope containing a bribe offer, sent through the post, but intercepted in the way without ever reaching its intended recipient. This would amount to attempted active bribery.

Preparation of an offence: Contrary to the situation with attempt, preparatory acts are not normally viewed as a matter that always calls for penal measures and can accordingly be regulated collectively, e.g. in the general part of a Criminal Code. In eleven States parties, the mere preparation of an offence (par. 3 of Article 27) does not appear to be criminalized in any of its forms (including conspiracy, which, as observed with regard to Article 23 par. 1 (b)(ii), is in principle considered to fall under the concept of preparation). In one of these cases, the State under review argued that the criminalization of preparation does not easily fit in with its legal system and its basic principles, which require clear identification of the reproachable conduct that constitutes the offence. Given the optional character of the obligation in question, this explanation was deemed satisfactory by the team conducting the review.

Similarly, in some jurisdictions the preparation of a crime (especially in the form of a conspiracy or an attempt to arrange a conspiracy) is punishable only in specific cases provided for by the law; this sometimes includes money-laundering, but not other corruption offences and in any case not all offences established in accordance with the Convention. The criterion is usually the “seriousness” of an offence and more generally its characteristics and the way it is committed that determines whether or not it is necessary to incriminate the preparatory activities of possible perpetrators. The stipulation of criminal liability for the preparation of the commission of less dangerous crimes is considered disproportionate and incompatible with the purposes of criminal law as an ultima ratio measure. In several States parties, legislation was pending or had been drafted to more fully implement the Article.

The concept of “preparation” is closely defined in only a few jurisdictions – interestingly most of them steeped in a legal tradition with roots in the Eastern European Group – e.g. as “the intentional creation of conditions for the perpetration of the crime”, or “the taking, according to a plan, of concrete technical or organizational precautions, the type and scope of which show that one is preparing to carry out a criminal act”.

Example

In five States parties with almost identical provisions, the preparation of a crime is deemed to consist in the looking for, purchasing or manufacturing by a person of means or instruments for committing a crime, looking for accomplices to a crime, conspiracy to commit a crime or any other deliberate creation of conditions for the commitment of a crime, unless the crime has been carried out owing to circumstances beyond the control of this person. In these countries criminal liability arises only for preparations to commit a grave or especially grave crime.

Many more States, primarily the ones with a common law background, confine preparatory conduct to a special offence of conspiracy, which, as explained under Article 23 par. 1 (b)(ii), usually involves a person entering an agreement with one or more other persons to commit a (serious) offence, so long as at least one overt act (which can be an act in preparation to commit the offence) has occurred.

Additionally, some jurisdictions include inchoate offences of “encouraging an offence” or “incitement”, i.e. intentionally urging the commission of an offence, even if it is impossible to commit the offence or it has not been attempted at all (attempted instigation).

3. Knowledge, intent and purpose as elements of an offence

Article 28 appears to be one of the least problematic provisions of the Convention in terms of implementation. All but two of the States parties have adopted the evidentiary standard contained therein with regard to the establishment of knowledge, intent and purpose, as elements of the offences enumerated in the Convention – although in a few cases, the information provided was insufficient and/or clarifications were sought by the reviewing experts.

The point of Article 28 is that the evidentiary provisions of each State party should allow inferences with respect to the mental state of an offender, based on objective, factual circumstances, rather than direct evidence, such as a confession, before the mental state is deemed proven.²² Indeed, in most States parties, given that the mental situation of the accused is not directly accessible to the perception of the court and there is rarely direct evidence on the state of his or her mind, proof of the subjective element of the offence may be achieved through so-called circumstantial evidence, i.e. by means of a logical reasoning process of inferring valid conclusions on the missing element from known and proven facts through direct pieces of evidence (for example documents, witnesses and expert reports), taking into account the personal circumstances of the accused, the general context of the case, as well as the maxims of experience and matters of common knowledge. As explained in one review, “in short, with the exception of spontaneous confession, the intent must be induced, legally and rationally, from many circumstances revolving around – before, during and after – the behaviour being prosecuted, the analysis of which cannot lack the study of the personality of the author, his knowledge, his training, his professionalism, social situation and his interests (whether economic, professional, altruistic or otherwise)...”. All this information is used to shape the intimate conviction of the judges and prove beyond a reasonable doubt the subjective element of the offence.

The matter is closely linked to the principle of free (“moral”) evaluation of evidence, which is frequently enshrined in national Codes of Criminal Procedure and allows courts to assess freely any evidence before them, so long as: (a) they do not contradict the principles of logic, experience and entrenched scientific knowledge; and (b) they issue reasoned decisions indicating the means of evidence which were used to prove each of the facts and circumstances assumed.

The evidentiary standard of Article 28 itself appears more often than not as a general principle of national criminal law and procedure; compliance is rarely assured through provisions laid out in legal texts. There are, however, a few such characteristic examples.

Example

The law of one State provides that “a court or jury, in determining whether a person has committed an offence: (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable result of those actions; and (b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inferences from the evidence as appear proper in the circumstances.”

It is worth mentioning that, as acknowledged by one State Party, trial judges sometimes resort to indirect methods of proof such as *presumptions of fact* to infer from acts carried out the intention of their author. It is also common for judges in the criminal courts to take into account the fact that the perpetrator had a certain quality that ought to have led him or her to be fully aware of committing the offence.

Example of implementation

In two States parties with similar systems, the criteria to infer “knowledge”, “intent” or “purpose” are not regulated by any statute, but are left to the courts’ objective judgment. Nevertheless, domestic standards enable the courts to *presume* a certain mental state of a person accused of corruption. In other words the courts may presume mens rea (e.g. the intention of obtaining a special favour from the corrupt official) on proof of actus rea (e.g. the giving or offering of a gratification to the public official). It is thereafter for the accused to show the contrary on a balance of probabilities. However, the legal burden of proof, as a whole, still remains with the Prosecution to prove the charge beyond reasonable doubt. The governmental experts deemed the above as “a powerful tool for the prosecution”, facilitating proof of the offence and described it partly as good practice. It is also worth mentioning that the law of one of the above States parties provides that when a person who is charged with corruption is in possession of pecuniary resources for which he/she is unable to satisfactorily account for, the courts may take this into consideration in deciding his/her culpability.

²² UNCAC Legislative Guide, par. 368.

4. Statute of limitations

There was considerable variation among the States parties with regard to the length and application of the statute of limitations for the commencement of criminal proceedings regarding offences established in accordance with the Convention.

Statute of limitations period: Compliance with Article 29 was assured in nine States parties where no statute of limitations was in place for corruption offences, either because a statute prescribing a time limit for the beginning of criminal proceedings did not exist for any domestic offence, or because it existed only for crimes subject to low penalties (e.g. a maximum term of imprisonment below six months or a small fine), which did not include the ones established in accordance with the Convention. This practice, most widespread among common law countries, was generally welcomed by governmental experts and described in one country as “prosecution-friendly, even if it did not specifically target corruption offences”.

The majority of States parties have established a statute of limitations period for UNCAC offences, calculated from the date of commission of the crime, and ranging from a minimum of one year in one case to a maximum of as 25 years in another, depending usually on the classification of the offence (e.g. as a misdemeanour or felony, or as a “less serious” or “serious” crime) and the gravity of their punishment. In many cases the prescription is interrupted or suspended by an action of the relevant prosecution bodies, especially when the procedure is formally directed against the accused, or for other reasons specified in the law (such as the submission of a mutual legal assistance request), resulting in a possible extension of the prescription period (e.g. up to a maximum of 15 years from the commission of the act, or even, as it appears in one case for lack of information to the contrary, indefinitely). Moreover, there are jurisdictions where case law has come to *further* lengthen the statute of limitations, e.g. by holding that each successive act of bribery in the context of the same corrupt relationship renews the limitation period for the preceding acts, or by considering as the starting point for the limitation period of many offences (embezzlement, misuse of company assets, trading in influence, misappropriation of public funds, etc.) the date of *discovery* of the offence and not the date of its commission. Interestingly, the Legislative Guide for the implementation of the Convention also recommends the use of this last possibility.²³

In a number of reviews the governmental experts felt that the statute of limitations periods are not long enough for the purposes of the Convention and issued recommendations to prolong them. For example, in one State party they urged the authorities to reconsider the periods of three years and two years, respectively, for offences punishable by more than one year and by up to one year or a fine (noting that a legislative amendment to this effect was pending). It should be emphasized, however, that the concept of “long” periods, as used in Article 29 is not fixed, and there is no definite threshold under which the statute of limitations period must be considered insufficient. Thus, although the reviewers were initially concerned about one country’s two-year limitations period for certain enumerated offences and an even shorter one-year period for others, they received (and eventually accepted) the assurances of all relevant authorities that the statute of limitations does not present impediments to effective and timely prosecutions.

Another factor to be taken into account is whether or not, in cases of short statute of limitations periods, there are sufficient guarantees that the proper administration of justice is not affected (e.g. prolongation/suspension/interruption). The time limits and these guarantees should be considered jointly in each case. In any case, reviewers should take into account the number of criminal cases and law enforcement capacities of each individual State and ensure that the national time limits strike a fair balance between the interests of swift justice, closure and fairness to victims and defendants on the one hand and the recognition that corruption offences are often complex, and take a long time to be discovered and established, and may also involve multiple jurisdictions on the other.²⁴

²³ UNCAC Legislative Guide, pars. 370 and 373.

²⁴ See also UNCAC Legislative Guide, pars. 370-371.

Suspension in cases of evasion of justice: In numerous States parties, the statute of limitations is suspended (and the basic prosecution time limit, as defined above, extended) if the alleged offender evades the administration of justice, as required by Article 29. Again, the suspension can be indefinite (the limitation period resumes from the moment of detention of the said person, or from the time that he/she gives himself up), or temporary (e.g. lasting for up to a maximum of 3 years or until 15 years from the commission of the criminal offence have passed).

Example

One State party has established a general statute of limitations period of five years, which is suspended by the formalization of the inquiry. If the defendant eludes the action of justice, he shall be declared “in rebellion”, which in turn implies decreeing a temporary stay of proceedings. A period of three years must pass after that date, before the suspended prescription is resumed. Consequently, in the country involved the possibility of evading justice gives rise to a three-year extension of the prescription period in accordance with Article 29 of the Convention.

The question of whether the suspension provided for is sufficient will be answered with much the same criteria in mind as regarding the length of the basic statute of limitations period. For example, in one case where there was concern that the possibility of only a one-year extension was too restrictive and could prove to be an obstacle to the effective prosecution of some of the offences contained in the Convention, the State under review explained to the satisfaction of the review team that, although a longer statute of limitations could conceivably help to ensure that a few offenders do not evade justice, there had been no particular practical problems or implications with the existing provision. A further extension was thus not considered as necessary or appropriate.

In contrast, it was noted that several States parties did not provide for a suspension or interruption of the statute of limitations where the alleged offender had evaded the administration of justice. In two further cases not entirely comprehensive information (or no information at all) was provided on this issue, creating doubts about the compliance of the States parties involved. The lack of a suspension possibility was described by some reviewers as “a major gap in the legal system” as absconding to another country is a frequent practice in corruption cases. Accordingly, appropriate recommendations were made, including in one case to provide for the limitation period to start only when the crime comes to the notice of the authorities.

Example of implementation

In one State party, if a corruption case involves more than one person and one of them is a public official, the statute of limitations period does not commence while the public official remains in office. Account starts *after* the public official’s removal from office. Furthermore, the statute of limitations period is stopped for all other persons involved in the commission of the crime, no matter whether they are public officials or not. This provides the examining magistrates with a longer term to conduct investigations, which is very useful in the event of complex inquiries and was considered good practice by the governmental experts conducting the review.

Chapter II. Measures to enhance criminal justice

A. Prosecution, adjudication and sanctions

Article 30 contains extensive and multi-faceted rules for adjudicating corruption offences. Its scope and density of context account for a significant number of challenges with regard to its implementation, reflecting the specificities and different priorities of national legal systems, and making it one of the key provisions for putting into effect the criminalization measures of the Convention, and to some extent for the overall success of the Convention itself.

Sanctions: Par. 1 of Article 30 is a provision complementing the more special provision of Article 26 par. 4, and requires that States parties give serious consideration to the gravity of the offences when they decide on the appropriate punishment. First and foremost, this reflects a determination of the range of penalties at the disposal of the national courts. As confirmed by the country review reports, corruption offences are universally punished with custodial sentences, and frequently accompanied by pecuniary or other penalties, such as confiscation of property or deprivation of certain rights. Additionally, the criminal law of each country normally establishes specific criteria that courts are obliged to take into account in order to determine an appropriate sentence, which include the nature and gravity of the offence and any circumstances mitigating or aggravating punishment.

The range of applicable sanctions depends on the nature of the offence and the overall characteristics of the criminal justice system of each State party. In one State they include “hard labour” (for embezzlement), and in at least two other cases they can reach up to life imprisonment for the most serious cases of embezzlement, misappropriation or abuse of functions by public servants; offenders can even face the death penalty (for embezzlement and passive bribery) in one country. States parties were found generally to have “strong” sanctioning regimes in place to address acts of corruption, with penalties which were commended by reviewers as adequate and “sufficiently dissuasive”.

Example of implementation

An innovative approach followed by some States involves the imposition of a fine calculated as a multiple of either the value of the gratification offered/received or of the proceeds of the offence as a sanction for bribery and commercial corruption. The review team of one country highlighted emphatically this approach as a good practice. Nevertheless, as noted in other reviews, the quantification and calculation of the multiple may prove difficult in cases where it is not possible to attach an exact monetary value to the benefits involved or to the illicit advantages acquired by the corrupt act. Accordingly, a recommendation was made for one of these States to consider drafting the relevant provision in a way that determines more specifically the method for calculating the applicable fines.

In some cases recommendations were made on account of penalties which were considered too lenient. It should be stressed, however, that as with the length of the statute of limitations, there is no definite standard on which the appropriateness of each State’s levels of sanctions can be measured. Effectiveness and proportionality are matters that should be considered in the light of the prevalent legal culture, as well as the overall system of sanctions and the functionality of the criminal justice system in a country – taking into account par. 9 of Article 30, which affirms the primacy of national law in respect of the determination of the nature and severity of punishments.²⁵

Example

A common feature of the criminal justice system of one State is the use of relatively mild sanctions compared with other countries, with an emphasis on fines. The penalties for corruption-related offences are no exception to this general trend. Imprisonment is rarely used and judges have a tendency to apply sentences at the latter end of the penal scales established in statutes. All the same, statistics and criminological studies provide strong evidence that the low level of punitive sanctions of the criminal justice system has not led to an increase in the commission of offences. It was pointed out that this may be the positive effect of the efficient functioning of a criminal justice system, whereby individuals have little incentives to commit crimes due to the high risk of being prosecuted and of losing profits stemming from criminal behaviours. In light of the above and despite their initial doubts, the reviewers stated that they were satisfied with the foreseen level of sanctions.

A relevant point has to do with the internal consistency and coherence of the national sanctions system. The obligation to make corruption offences liable to penalties that take into account the gravity of the offence also

²⁵ See also UNCAC Legislative Guide, par. 383.

means that States parties should differentiate appropriately between the relevant offences themselves and eliminate possible discrepancies. Thus, in one case the governmental experts recommended that the State under review provide for an aggravated form of bribery in respect of parliamentarians, taking note that this conduct carried at the time a lower minimum sentence than the offence of aggravated bribery. Equally, in another State, the reviewers noted that abuse of functions is punishable with life imprisonment, while the active bribery offence is only punishable with between one to five years of imprisonment, and recommended a re-assessment of these penalties. A third country was advised to address disparities in the sanctioning measures applied against basic forms of bribery as the “offering” of a bribe in the public sector was subject to less severe sanctions than the “giving” of the same. Finally, in two cases, it was suggested to consider differentiating sanctions between persons carrying out public and non-public functions, in light of the heightened obligation of trust of public officials, e.g. by providing for aggravated forms of the relevant offences, although a universal regime applicable to both categories of persons was deemed to be compatible with the principles of the Convention and in keeping with the existence of different legislative traditions. In one of these countries the reviewing experts suggested as a possible alternative of issuing of sentencing guidelines for corruption offences which would reduce the uncertainty surrounding the range of applicable penalties.

Such recommendations are understandably not standardized, nor always aligned with one another, given the different needs of each State party and the different conditions prevailing therein. This is illustrated by the positions adopted by governmental experts with regard to the eventual differentiation of penalties applicable to active bribery on the one hand and passive bribery on the other. In most countries that apply higher penalties to passive bribery, the reviewers did not comment on or discourage this practice, nor did they suggest enhancing the overall sanctions framework related to bribery without necessarily altering the existing differentiation. Having more severe penalties in place for the act of receiving a bribe than for giving a bribe was felt to be appropriate in principle, in order to discourage the solicitation of bribes by public officials and encourage the reporting of bribery incidents. In contrast, in one State the experts were, exceptionally, firmly of the view that sanctions for active and passive bribery should be harmonized – despite the historic reasons apparently noted for the existing disparity.²⁶ The different treatment of the two parties of the bribery offence was not considered justified and it was pointed out that harmonization would also have the effect of removing the potential for difficulties arising from a shorter statute of limitation period for active bribery.

Most countries confirm in their reviews that par. 1 of Article 30 is without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants, as required by par. 8 of Article 30. There were, however, instances where this principle was not followed. In one State party, for example, the reviewers were informed about an internal ethics committee that is exclusively responsible for minor cases of bribery of policemen and observed in this regard that the use of internal procedures is a cause of public distrust. Any case of corruption in the police, no matter how trivial, is damaging to the credibility of the law enforcement process and should be regarded in principle as a matter for the courts.

Independently of the above, some reviewers highlighted the need for national authorities to ensure that the administrative sanctions imposed as a result of the exercise of disciplinary powers against civil servants take into account the gravity of the act and the related infringement.

Example of implementation

The reviewers noted with appreciation one State party’s positive efforts to ensure severe consequences for public officials who engage in corruption, including the possible forfeiture of the public sector contribution to the convicted official’s pension fund.

Immunities and jurisdictional privileges: Immunities and jurisdictional privileges are a common element in the criminal justice systems of States parties, creating potentially serious challenges regarding the investigation,

²⁶ Some mention of these historic reasons is made above under Article 15.

prosecution and adjudication of offences established in accordance with the Convention. In most cases, they are granted at the constitutional level (and more rarely in ordinary laws) to certain categories of domestic public officials. These include regularly members of Parliament or the Constitutional Assembly, the leaders or Government ministers and members of the judiciary, and apply to conduct that took place either with respect to the performance of their functions (functional immunity), or more generally while they were in office (absolute immunity).

In most cases – normally with the exception of serious crimes caught *in flagrante* – the immunity has to be lifted first for the prosecution to be raised and the criminal process to take its course. Preliminary inquiries and investigations are sometimes possible, but with significant restrictions, limiting for example the possibility of applying special investigation techniques, arresting the protected person or taking other measures of judicial restraint. Such investigative restrictions are especially problematic in corruption cases, which are by their nature difficult to detect given that they often take place in secret and come to light based on the reports of informants. The initiation of criminal proceedings (either an investigation or a prosecution, depending on the system) in most cases requires the permission or approval of the Head of State or an overseeing body, e.g. Parliament in case of a member of Parliament and the Supreme Court or Parliament in case of a member of Government or a judge.

A somewhat divergent (at first glance, significantly more balanced) practice was observed in two States from the Latin American and Caribbean Group, where according to relatively recent laws the persons in question (legislators, members of Government and judges alike) enjoy more of a procedural privilege than a clear immunity. Their capacity does not constitute an obstacle for initial enquiries and preliminary investigations to be carried out. In the first State a criminal prosecution may start and continue until it is completed, right until the end of the trial, without the need of previously decreeing the removal of the privileges of the legislator, magistrate or official under investigation. This is recompensed by the fact that some privileges continue to be respected during the proceedings as the Court cannot order measures such as house searches, arrest or preventive arrest against the accused. In the second jurisdiction, a decision on the lifting of immunity is taken by the supervising Court itself – not by another body – and only at the end of the investigative stage, thus constituting a form of procedural guarantee aimed at ensuring the seriousness of the criminal charges.

The critical question regarding the application of Article 30 par. 2 is whether there is an appropriate balance between such immunities and privileges and the need to be able to effectively investigate, prosecute and adjudicate corruption offences. In answering this question the governmental experts have relied on a number of criteria which are summarized below:

- a) The percentage of immunities which have been lifted in recent years – insofar as such data is provided
- b) The circle of persons enjoying immunity should not be too broad, reasonably compact and clearly defined. This was not the case, for example, in a State party where a broad constitutional provision provided immunity to “any person acting on behalf or under the authority” of the Head of State. The reviewers expressed doubts on whether criminal proceedings could be initiated in cases where it was not certain whether the perpetrator had acted under or on behalf of the Head of State, or the latter was not informed correctly about the factual circumstances of the matter.
- c) The scope of immunities afforded (whether immunity is functional or absolute, whether it is restricted to the raising of criminal charges or extends to the preliminary and investigative stage, etc.).
- d) The procedure for lifting immunities, which should not be too cumbersome or unwieldy, being the cause of excessive delays and the loss of evidence or otherwise impairing the application of the offences established in accordance with the Convention. For example, in one State party, where the lifting of immunities of members of Parliament and judges required the filing of a petition by the Prosecutor General to Parliament or a Judicial Council, the reviewers recommended a relaxation of the relevant standards and procedures. Similarly, in another case where a suspension of immunities by Parliament was needed to investigate certain categories of public officials, there were doubts about the independence of the persons responsible for the relevant decisions and, above all, there was no legal procedure to resolve

cases where requests to suspend immunities remained unanswered (an apparently common phenomenon) leading the reviewing experts to issue appropriate recommendations. In contrast, reviewers commended as a success the fact that in one State party the immunity of members of the Government and of the Parliament has been lifted on several occasions and high-ranking officials have undergone prosecutions and trials.

e) The nature of the decision denying the lifting of immunities, which should leave reasonable room for a possible reassessment of the case. In one State party, a recommendation was issued that decisions rejecting a request for the deprivation of privileges and immunities at the end of the investigation stage should not prevent subsequent investigations once the officials in question are no longer in service.

Independently of the above, there is a noticeable trend among States parties to minimize the use of immunities or do away with them altogether. For example, apart from the replacement of clear immunities in some countries with a more lax system of procedural privileges mentioned above, reviewers favourably noted the steps recently undertaken in one State party to reduce the categories of officials enjoying immunity, as well as the scope of its application. In another State party, the experts were informed that since the adoption of a new Constitution parliamentarians and magistrates no longer have immunity – even if it was not clear how the new rules are implemented in practice.

These examples come in addition to the growing number of States parties – about one third of the total – where public officials do not benefit from immunities nor procedural or jurisdictional privileges – other than sometimes being tried by special courts for acts committed in the exercise of their duties. Limited exceptions are usually only made for the Head of State, or in some cases for members of Parliament, who may be afforded some form of immunity or protection regarding their opinions expressed in Parliament or their conduct in the consideration of a parliamentary matter (parliamentary privilege). Additionally, the detention or arrest of members of Parliament may also be conditioned on parliamentary consent.

Example

In the case of one State party, the Head of State incurs no liability by reason of acts carried out in his official capacity, and cannot during his/her term of offices be prosecuted or investigated. However, actions and proceedings thus stayed may be re-activated one month after the end of his/her term of office. Government members enjoy a jurisdictional privilege and are tried in special courts for offences committed during their tenure. Further, while members of Parliament do not enjoy immunity (with the exception of opinions expressed or votes cast in the performance of official duties), and their arrest or other deprivation of liberty in a criminal or disciplinary matter (with the exception of felonies or cases *in flagrante delicto* and when a conviction has become final) require the authorization of the relevant Bureau of the House.

The reviewers have noted favourably such practices, and have encouraged that they be further expanded to abolish, in one case, the absolute immunity of former Heads of State for acts carried out while in office, and have highlighted these developments as a success and good practice. Indeed, the purpose of Article 30 par. 2 is to eliminate and prevent, where possible, cases where corrupt public officials manage to shield themselves from accountability and investigation or prosecution.²⁷

Example of implementation

The position of one State party is that no individual is immune from prosecution for corruption cases, including parliamentarians, with the exception of the Head of State, in respect of whom there is a strong presumption that he/she is not criminally liable. The review team considered that this position deserves favourable mention, although certain evidentiary restrictions protect statements made on the floor of the Parliament from being presented in a subsequent criminal prosecution.

²⁷ See also UNCAC Legislative Guide, par. 387.

The one case where the reviewers have encouraged the expansion of *immunities* (instead of measures to restrict them) concerns persons who are themselves responsible for the investigation and prosecution of corruption cases. In the State involved, it was observed that there may be some benefit in the further consideration of introducing limited immunities for members of the national anti-corruption commission, who carry out significant investigations with no immunity protection, or even to judges and prosecutors, providing a measure of protection in the performance of their duties.

Discretionary legal powers: Some implementation issues were also encountered with regard to par. 3 of Article 30 on discretionary legal powers relating to the prosecution of persons for offences under the Convention. This provision does not necessarily compel States parties to “use discretionary powers in order to enhance the effectiveness of law enforcement measures”, as urged in one review. What is important, as observed in another review, is rather to ensure, especially in corruption-related cases, that investigation and prosecution are the norm, while the dismissal of proceedings in application of discretionary powers should remain an exception and would need to be justified (for instance, in case that the conditions of Article 37 par. 3 are fulfilled), taking of course into consideration the rule-of-law principles and with due regard to the rights of the defence.

Several States – mostly (but not exclusively) the ones with a common law tradition – follow a discretionary prosecutorial model, according to which a public prosecutor is allowed under certain conditions not to initiate a criminal prosecution or halt a process that has already been initiated (the so-called “principle of opportunity”). The main criterion for exercising this discretionary power is normally the extent to which the “public interest” calls for a prosecution, taking into account factors, such as the seriousness of the alleged offence, the effect on public order, the availability and efficacy of any available alternatives, the need for deterrence, the consequences of any resulting conviction, the attitude of the victim, the likely length and expense of a trial etc. Many variations of this model were observed, including cases where immunity from prosecution is granted in exchange for the cooperation of a participant in criminal activities, as described below under Article 37, par. 3.

Examples

In one federal State prosecutors are entrusted with discretion to decide if and when to bring a criminal prosecution. Pursuant to the applicable principles, a “determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances.” Accordingly, a prosecutor may decline prosecution, even when there is sufficient evidence to proceed, if “(1) no substantial federal interest would be served by prosecution; (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution.” The presence or otherwise of a “substantial federal interest” is contingent on federal law enforcement priorities and resources; the nature and seriousness of the offence, including the impact of the offence upon the community; the deterrent effect of prosecution; the person’s culpability; the person’s criminal history; the person’s willingness to cooperate; and the probable sentence resulting from a conviction. A prosecutor may not, in considering whether to bring charges, consider a person’s race, religion, sex, national origin, or political association, activities, or beliefs.

In another State with discretionary prosecution, when the identity and domicile of the perpetrator are known and there is no legal obstacle to commencing a public prosecution, the prosecutor can only decline the case when “the particular circumstances linked to the commission of the offence” justify this. Furthermore, the authorities indicated that the principle of discretionary prosecution exists only in paper. In practice, all offences are prosecuted as soon as they are detected.

In contrast to the above, a number of States parties – all of them civil law jurisdictions – apply the principle of legality, according to which prosecution is mandatory in principle and no substantial discretionary powers are conferred to the competent authorities – provided of course that there is some minimum legal and factual basis for raising criminal charges. There may be limited exceptions, strictly defined by law, regarding for example petty criminality, acts which entail minimal public hazard, or cases where it would be “unreasonable” to charge the offender; however, given the seriousness of allegations of corruption and the important public interests involved, it is unlikely that prosecution in such a case would be waived. There are also cases where the principle

of legality is applied specifically with regard to corruption-related offences. Most (though not all) of the civil law jurisdictions that apply the principle in question do not have provisions granting immunity from prosecution to cooperating offenders, in contrast to the above-mentioned civil law countries.

Example

One State applies the principle of prosecutorial discretion. Nevertheless, prosecution is mandatory if the offence was committed by a public official in the discharge of his or her functions; additionally, as regards corruption and the offence of transnational bribery, a general instruction has been issued to public prosecutors to restrict the application of alternative solutions, given the legally protected interests at stake. Equally, no immunity is granted to cooperating offenders.

Even though the information provided in some reviews is insufficient and does not always allow definitive conclusions on the national option, both systems described above (discretionary/mandatory prosecution) were found in principle to be in line with the spirit of the Convention. In order to confirm this, the reviewing experts accorded importance to three basic guarantees for the proper exercise of any discretionary powers of the prosecution authorities:

a) The first guarantee concerns the independence of the public prosecutor in the criminal process, as ensured, among others, by the national recruitment, appointment, evaluation and oversight process. No member of the executive, including the Head of State, should be able to intervene, influence or override a decision to prosecute a corruption-related offence. The prosecutor should be able to take his/her decisions on inner conviction alone and base them on an objective, thorough and complete assessment of the circumstances of the case. In many reviews the experts noted and welcomed the apparent independence and impartiality of the prosecution service and considered this an important contribution to the effectiveness of law enforcement measures. In contrast, in one case the reviewers expressed the concern that the application of the principle of discretionary prosecution in a context where the judiciary depends on the executive (Ministry of Justice) may affect the effective criminalization of certain acts of corruption, and recommended an in-depth analysis of this issue to be carried out to avoid, at least as regards acts of corruption, any risk of political interference in decisions made by public prosecutors. Finally, in two States parties clear risks were identified: Either because the Attorney-General could instruct prosecutors to set aside (even technically sound) cases to protect the public interest which, although rarely applied, was considered to present a potential for abuse, especially in corruption cases, or because the system was generally prone to interference by third parties and the independence and objectiveness of prosecutors was not assured.

b) The second guarantee consists in the possibility provided by the law of some States to review the decision of the public prosecutor not to prosecute. The review is usually conducted by a higher-ranking prosecutor, either on his/her own initiative or following a complaint by the victim, the person who has reported the crime or even any interested party or person aggrieved by the decision not to prosecute. Equivalent measures should be taken in all cases where discretionary considerations influence the raising of criminal charges, including the various plea arrangements discussed under Article 37. In one State which operates a scheme allowing self-reporting companies to reach out-of-court civil settlements with the main investigating authority, which is partly funded by monies recovered in such settlements, the governmental experts suggested that all settlements should be subjected to judicial scrutiny independent from the prosecutor's office and that an independent body could be considered to review sensitive cases. Moreover, companies that reach settlements could be asked to commit to compliance programmes and the appointment of an independent experts to monitor where remedial action is warranted. In general, adequate transparency and predictability should be ensured in such procedures.

Example

The Constitution of one country provides for a review system at the request of an accused, a complainant or any other person. The decision to hold such a review is the responsibility of national Director of Public Prosecutions and is aimed at reviewing a prosecutor's decision to institute a prosecution or not.

c) The third guarantee is mostly relevant for countries with a discretionary prosecutorial model and takes the form of official, written guidelines or directives on the exercise of discretionary rights and the preparation and content of a decision on non-prosecution, setting out rules, standards and priorities. A similar effect may be achieved through circulars sent periodically to the prosecutors, stressing the importance of a firm and appropriate response to certain types of acts, such as international corruption.

Example

In one State, specific standards and guidelines governing prosecution initiative are in place, and the Chief Prosecutor and Ministry of Justice are responsible for monitoring their application. The monitoring of prosecutions is facilitated by an electronic document management system and oversight by the Inspector General's office in the Ministry of Justice. Failure to follow these guidelines can be grounds for a breach of the professional code of conduct or even for the crime of abuse of power.

Release pending trial or appeal: Par. 4 of Article 30 requires that States parties take measures to ensure that those charged with offences established in accordance with the Convention appear at subsequent criminal proceedings, consistent with their law and the rights of the defence. This relates to decisions on the defendant's release pending trial or appeal and the conditions imposed in connection with such decisions. States parties should be aware of the risk of the imprudent use of pretrial and pre-appeal releases and impose conditions capable of ensuring, to the extent possible, that the defendants do not abscond.²⁸ In this context, an interpretative note to the Convention makes clear that the expression "pending trial" is considered to include the investigation phase.²⁹

The reviews have brought to light a few problems with regard to the implementation of this provision, notably because of the wide margin of appreciation enjoyed by States parties in the determination of the relevant rules, as well as to the fact that most countries do not normally have provisions on release pending trial or appeal applied specifically to corruption-related offences. Furthermore, the reviews contain only moderate information on the national regimes governing pretrial release and conditions imposed pending trial. Pre-appeal release and conditions imposed pending the appeal trial are rarely brought up, much less scrutinized, often because such data was not made available for the reviews.

As regards the pretrial regime, all countries appear to apply preventive detention as a precautionary measure designed to ensure the presence of the defendant at subsequent criminal proceedings. As an alternative, most States parties foresee the possibility of release on bail, while some provide for a range of other coercive measures which, if violated, leads to the detention of the defendant, such as house arrest, electronic supervision, prohibition to travel abroad, police supervision, prohibition to leave place of residence, establishing residence near the court, or a restraining order.

In two States parties, corruption offences (including, in one case, money-laundering), are deemed to be non-bailable, except in exceptional circumstances. In contrast, some countries apply preventive detention only in respect of offences punishable with imprisonment above a certain threshold. As a consequence, in at least one State party where crimes against public service, including corruption, are punished with lower penalties, preventive detention is unlikely to be ordered; thus, persons under investigation can remain free, albeit with some limitations depending on the conditions imposed. The reviewing experts have not objected to this practice, recognizing evidently the wide discretion a country enjoys in determining the appropriate measures for compliance with the provision under discussion. Independently of this, however, it is worth bearing in mind that, especially in corruption-related cases, some alternative coercive measures may have a diminished dissuasive effect. This is true, for example, with respect to bail, given the substantial profits potentially generated by corrupt transactions and the significant resources available accordingly to the accused for such acts.³⁰ States parties,

²⁸ UNCAC Legislative Guide, par. 390.

²⁹ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 261.

³⁰ See UNCAC Legislative Guide, par. 390.

therefore, may wish to consider keeping their options open and aiming for a more individualized approach, in order to lower the risk that law enforcement is undermined.

Regarding the selection of the appropriate coercive measure by the competent authorities, most reviews attach importance to the existence of provisions in national legislations stipulating that decisions granting bail or imposing other conditions for the release of the defendant before trial first and foremost take into account the likelihood of the alleged offender absconding from the criminal proceedings based on an objective provisional assessment of the facts and with an eye on the presumption of innocence and the rights of the defence. Other factors playing a role are usually the likelihood of the defendant re-offending or obstructing the course of the investigation (e.g. through the destruction of evidence or interference with witnesses), the seriousness and nature of the offence, the personal circumstances of the accused person and previous convictions. Normally, the selection of the appropriate measure is supposed to follow the principle of necessity, according to which a measure is not selected if the same effect may be achieved by a less severe measure.

Example

In one State party, it was considered that the provision under review is adequately implemented through provisions stipulating essentially that: (a) “Every accused person has a right to be released on bail unless it is not in the interest of justice that bail should be granted (...)”; (b) “When deciding whether to grant bail to an accused person, a police officer or court, as the case may be, must take into account the time the person may have to spend in custody before trial if bail is not granted”; and (c) “The primary consideration if deciding whether to grant bail is the likelihood of the accused person appearing in court to answer the charges laid against him or her.”

A further criterion for the adequacy of domestic rules governing pre-trial release concerns the institutional nature/type of the authority which is awarded the competence for the relevant decision. The reviewers noted the need for judicial control of actions, such as the decision on detention during pre-trial proceedings, both because of their impact on the protection of human rights, and of the fact that members of the judiciary offer more guarantees for a prudent use of releases and the selection of the associated conditions. Thus, in one State party where the law allows an investigator to change the type of coercive measure imposed, for example from imprisonment to “city arrest” (or vice versa), without judicial supervision, the reviewing experts expressed their concern that this discretion could be abused in a corruption case, under financial or other pressure, resulting in the alleged offender being able to flee justice, and recommended that either this power be repealed or exercised under strict judicial control. The State concerned concurred with this observation.

As to conditions imposed pending appeal, it appears based on the very limited information provided that the main measure used is the granting of bail, on the discretion of the courts.

Early release or parole: Article 30 par. 5 encourages a strict but fair post-conviction regime, requiring States parties to take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of corruption offences. Some jurisdictions stipulate that, in principle, individuals incarcerated for corruption-related offences cannot be released before their sentence has been served in its entirety and only limited exceptions may apply. Similarly, one State has provided statistics according to which persons who have benefitted from conditional release during the last few years do not include persons convicted for corruption offences. Clearly, the Convention does not require from these States parties to introduce a programme of early release or parole if their system does not provide for it. It does, however, urge those States which provide for early release or parole to consider adapting the eligibility criteria to the gravity of the offence.³¹

As with the previous provision most reviews offer a rather brief discussion of the relevant legislation. Equally, comparatively few implementation problems have emerged, although the criteria used by reviewers to determine compliance are not always uniform and sometimes seem to follow a diverging logic. The majority of States parties do not distinguish specifically between corruption-related and other offences in the way they regulate the

³¹ See UNCAC Legislative Guide, par. 385 Footnote 49.

possibility of early release or parole. Nevertheless, many apply different policies depending on the length of the sentence imposed or the general classification of the crime, or make exceptions for certain crimes considered “extremely serious”. Thus, for example, a defendant who is convicted of an offence classified as “of no big public danger” shall serve a lesser portion of the sentence in order to qualify for early release or parole than a defendant convicted of a “serious” crime. One State party follows a similar, more individualized approach, providing that if a court sentences a person to imprisonment for a period of two years or longer, the court may, as part of the sentence, fix a period during which the person shall not be placed on parole. Thus, courts must account for the gravity of the offence already at the time of sentencing. Finally, some countries have moved completely away from the classic parole system, preferring a “true sentence” that includes a period of supervised release following imprisonment, the length of which is linked to the seriousness of the crime. Provisions falling under any of the above categories can be considered as making up a first, basic way in which States take into account the seriousness of the crime in parole matters and may be considered sufficient for the purposes of the Convention.

Example of implementation

One Federal State has abolished the parole system for federal offences and introduced a system according to which “the court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanour, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment”. Supervised release as part of the sentence is obligatory, if such a term is required by statute. “The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release”, shall give consideration to the type and the gravity of the crime.

Additionally, there is regular follow-up and reporting conducted by the national bureau of justice statistics on the effectiveness of early release and parole procedures at the non-federal level; this was found to constitute good practice and could serve as an example for other States parties.

Apart from such “ex ante” differentiations regarding the early release programmes available to offenders of more serious crimes, many reviews follow a second path, attaching importance to the possibility, provided by many national laws, of taking into account – even if only indirectly – the gravity of the offence (usually together with other factors, such as the behaviour exhibited by the convict while in prison), on an ad-hoc basis, at a later stage, i.e. at the exact time when the decision on releasing corruption offenders is taken.

Example

In one State party the following provision applies: “In deciding release on parole, the court shall take into consideration the circumstances relating to the commission of the criminal offence, the personality of the convicted offender, his or her previous personal history and conduct during the service of the sentence, his or her living conditions and the consequences which release on parole may bring about for the convicted offender.” The reviewing experts observed that although the “gravity” of offences committed is not explicitly mentioned as a factor to be taken into account, the “circumstances” of the offence, regardless of whether these are aggravating or mitigating circumstances, have the same effect.

The importance attached to the factors governing the decision granting parole is illustrated by the example of one State party where the reviewers recommended considering the adoption of a *written* policy setting forth the factors for consideration, despite the fact that as a matter of practice the nature and circumstances of the offence are taken into account in parole decisions. In two further cases, the reviewing experts stressed the need to ensure that the competent national authorities take into account the gravity of corruption-related offences when considering the eventuality of early release or parole of persons convicted of such offences.

Several reviews also considered the fact that the State party had determined a mandatory portion of the sentence that must be served before the offender becomes eligible for release as having appropriately taken into account the gravity of the offence. Similarly, some appear to focus on the length of the minimum eligibility period, or on the percentage of the sentence remitted, and accept that the gravity of the offences is sufficiently taken into account when the corresponding levels are considered high enough. A possible explanation for this could be that the reviewers involved adhere to the view that par. 5 of Article 30 implies that *all* offences established in accordance with the Convention are of exceptional gravity, justifying special consideration or long common

minimum eligibility periods – an important interpretational issue which merits further examination.

Removal, suspension and re-assignment: Several States parties have taken measures to implement par. 6 of Article 30 – a non-mandatory provision – on the suspension, removal from office or re-assignment of public officials accused of corruption offences. In some cases where gaps were identified (especially regarding re-assignment and removal), recommendations were issued encouraging States parties to consider adopting clearer and more specific measures.

Suspension of public officials is possible in the majority of jurisdictions, and is applied as a rule when the official finds him/herself under criminal investigation, either for a specific period of time or indefinitely pending resolution of said investigation or an eventual court procedure. The same usually applies for the transfer or re-assignment of an employee allegedly involved in an offence – although not as many States have provided information in this regard, and in one case the reviewers noted that the effectiveness of provisions on re-assignment depends on ensuring that they fulfil the purpose of disciplinary action.

The measures on suspension and re-assignment are normally based on the disciplinary regulations governing breaches of duty by civil servants, as contained for example in Public Service Codes of Conduct, Public Ethics Acts and Rules on Administrative Inquiries. In general, the existence of such disciplinary procedures meets the requirements of the Convention, although it should be noted that few reviews made any reference to the guarantees related to the due process rights of the person affected, to evidentiary standards, remedies, or the possible impact on the presumption of innocence.

Example of implementation

In one State party, the Public Service Commission's rules and practice for recording disciplinary and ethics proceedings and timely producing transcripts were observed to promote transparency, accountability and consistency, as well as significantly enhance public confidence in its decision-making processes. The period in which disciplinary and ethics cases were disposed of by the relevant tribunal has been reduced in recent years from an average of several years to an average of three to six months. Moreover, training of civil servants on matters related to ethics, discipline and good governance, among others, involved the participation of a wide range of government ministries, departments and agencies, including the anti-corruption agency, the police and prosecutor's office, the office of the Auditor General and the Ministry of Finance. Regular surveys and studies to gauge the impact of these training sessions were carried out by the Public Service Commission.

Interestingly, in some States parties with a common legal tradition stemming from the Eastern European Group, temporary suspension (also referred as "removal" or "exclusion") from office is (also) regulated in the Code of Criminal Procedure as a type of *coercive measure* available during an investigation: If the prosecuting and investigating authorities consider it necessary to suspend a person from their position in order to suppress his/her illicit influence, protect victims and witnesses and prevent the commission of new crimes, the prosecutor in charge refers the matter to a court authority, which decides on the application of the measure. The affected persons can be reinstated if the charges are not substantiated. Furthermore, in some cases, temporary suspension from public office appears as a form of criminal sanction imposed upon conviction by the court.

While in most States parties suspension is discretionary, in some States parties the start of a criminal proceeding, i.e. the point where it is clear that the breach of official duties is considered to represent criminal misconduct, triggers an automatic suspension of the public official from service. In some States parties it is only the arrest of the official that triggers an automatic suspension – a practice not deemed sufficient by reviewers in one case, who recommended establishing procedures through which the official would be suspended at the point of investigation. The above possibilities do not normally apply to members of Parliament, suggesting that their treatment should form the subject of a separate review. Few countries have provided information about equivalent procedures leading to the suspension or removal of elected officials under criminal investigation for corruption. In one State party suspension is possible at the discretion of Parliament, which may pass a suspension motion upon an individual member, if it receives a majority vote.

Disqualification: Disqualification from holding public office due to conviction on corruption offences, as envisaged in the non-mandatory provision of Article 30 par. 7(a), appears possible in the majority of States parties. First of all, in most States parties, the conviction of a public official opens the door for his/her *permanent*

removal. Insofar as the conviction concerns (depending on the national system) a crime committed “against public service”, punishable beyond a certain threshold and/or “seriously violating the principle of administrative probity”, it triggers an administrative procedure which can lead to the dismissal of the offender. Corruption offences are usually offences that can result in this outcome. In some States removal appears to be an automatic consequence of the conviction, while in others such a decision is at the discretion of the competent authority.

Example

In one State, apart from the regular procedures which lead to the dismissal of an official convicted for a serious offence, a special decree provides that a sentence for the offences of bribery, embezzlement or theft leads to the dismissal of an official from service.

Furthermore, as with suspension, some States provide in parallel to the administrative procedures the possibility for a settlement of the matter of removal from office by a court authority, namely the court convicting the public official for corruption. The Criminal Codes of these countries include additional criminal sanctions, such as “dismissal from office”, “cessation of exercising a public function”, “deprivation of the right to hold a certain state or public office” or “deprivation of the right to exercise a certain vocation or activity”. The courts do not always have discretion in respect of imposing dismissal or deprivation of rights for corruption offences. Thus, for example, in at least two cases the relevant effect appears mandatory, while in another only aggravated bribery leads to an automatic dismissal from office upon conviction.

Again, different rules may govern the removal from office of members of Parliament, the Government or the judiciary, who are under sentence for bribery or other indictable offences.

Example

In one State party, contrary to what happens with public officials or even members of municipal councils, the law does not provide for the forfeiture of parliamentary seats in case of conviction for a corruption-related offence, either automatically or following court order, because this is an elective office and it is considered that it is primarily a matter for the electorate to decide who it chooses as a representative. A special procedure under the Constitution exists, however, whereby parliamentarians may be dismissed in the event that they have been sentenced to imprisonment for a deliberate crime and the offence is such that the accused does not command the trust and respect necessary for his or her office. The governmental experts recommended exploring the possibility of introducing a system for the *automatic* dismissal of members of Parliament, e.g. when they are convicted for aggravated bribery.

Many of the above-mentioned criminal sanctions (that lead to the cessation of current functions and immediate removal of persons already having an official capacity) also entail the *disqualification* of the convicted persons from holding public office for a specific period of time or sometimes even for life (temporary or perpetual disqualification). In several cases, disqualification is not mandatory but is left to the discretion of the court. The Convention also leaves the duration of the disqualification to the discretion of the States parties, consistent with their domestic law, although in one case the period of disqualification was deemed to be too short, resulting in instances of persons being transferred to other public offices.

Example

The law of one State party includes as criminal penalties the deprivation of the right to hold a certain State or public office and the deprivation of the right to exercise a certain vocation or activity. If these punishments are imposed separately or in addition to a penalty not entailing the deprivation of liberty, they are pronounced for a specified term of up to three years within the limits established in the special part of the Criminal Code. If the deprivation of such rights is imposed together with deprivation of liberty, its term may exceed the term of the latter by at most three years, unless otherwise provided. The term shall commence as from the entry of the sentence into force, but the convict may not avail himself of the rights of which he has been deprived prior to completion of the punishment by deprivation of liberty. The term of deprivation of rights shall be reduced in accordance with the portion of the term of deprivation of liberty reduced due to remission, work or the deduction of the period of preliminary detention. A person sentenced to life without substitution shall be deprived of the

rights set forth in the sentence for good. After the expiry of the term, the convict shall be able again to exercise the rights of which he was deprived by the sentence.

In a number of countries there are no specific provisions in place that completely exclude persons who are convicted of a criminal offence from (re)employment in the public sector. However, some alternative measures were cited, which, while not equivalent to full implementation, indirectly promote the purposes of the Convention or ensure, at least partially, some form of compliance. As pointed out in two States, if the criminal conviction is relevant to the specific requirements of a particular vacancy, it can be taken into account in making a decision whether to employ a person with such a record. Similarly, dismissal from office on ground of criminal conduct would be recorded in the personnel file of a public official, and thus would be known to an official or authority who is considering possible appointment of this person to a new public office. According to regulation in a further country, “re-employment after dismissal on grounds of unsatisfactory work or conduct is only possible in special and exceptional cases”. Finally, in one State the defendants who plead guilty to corruption offences are routinely required by the prosecution authorities to agree not to accept or compete for public office or positions in the future.

In addition to the above, several States – even some without general disqualification rules – have special provisions for the suspension of political rights or disqualification of persons who have been convicted of corruption-related offences from being elected as members of Parliament or elected or appointed as a member of Government for a certain period, although sometimes this period appears too short, or the persons involved are allowed to be nominated as soon as they have completed their sentence.

The disqualification of corruption offenders from “holding office in an enterprise owned in whole or in part by the State”, as urged by Article 30 par. 7(b), has led some countries to provide excerpts from their company laws regulating the non-eligibility of convicted persons for appointment in positions within State-owned enterprises, ensuring at least partial implementation. Others subsume employees and managers of state-owned or semi-public companies under the concept of “public official”, regardless of whether there is a majority or minority State interest. Accordingly, the relevant posts are covered by disqualifications from holding public office in the same way as other positions in the public sector. In a third (and the largest) group of States the criminal sanctions applied for corruption offences include not only the disqualification from holding public office, but also the deprivation of the right to hold posts in State bodies, practice a certain profession or engage in business or specific professional or other activities, thus covering all types of officials and offices in the public and private sectors. In this context, it was noted by some reviewers that the delineation of the concept of an “enterprise owned in whole or in part by the State” might be useful.

Despite these measures, implementation of subparagraph 7(b) of Article 30 is somewhat lower in comparison to subparagraph 7(a). Many countries appear not to have taken any relevant action, or not to cover all commercial enterprises owned in whole or in part by the State, while in one country it was made clear that persons holding office in State-owned enterprises cannot be dismissed on the basis of a conviction, despite the fact that there are regulations prohibiting a person convicted of offences connected with commercial activities from engaging directly or indirectly in business for a certain period of years. Accordingly, the reviewing experts issued recommendations to consider the establishment of disqualification procedures for such persons, when convicted of offences established in accordance with the Convention.

Finally, it should be clear that, as with other provisions of the Convention, implementation is not ensured if the measures taken are not proven to be legally binding and effective. This seems not to be the case for example in one State party where the authorities offered contradictory information on the existence of appropriate measures, and stated that it is common for a person who has been accused of a crime to hold public office again in a different organization shortly after his or her removal from previous office. In another State party, despite the theoretical possibility to apply complementary penalties disqualifying persons from holding public office, the review team was informed that such penalties have almost never been applied in practice (at least, as it seems, regarding elected officials). An example was mentioned where a mayor convicted of bribery in the exercise of his

duties was re-elected as a mayor in the municipality where he lived following his release from prison. The reviewers expressed the opinion (issuing a corresponding recommendation) that it should be mandatory to declare someone elected to a public position ineligible to be re-elected after committing a corruption offence, thereby sending a signal about the seriousness of corruption offences. The length of the non-eligibility period should depend on the gravity of the offence.

Reintegration: Article 30 par. 10 encourages efforts by States parties to promote the reintegration into society of persons convicted of offences established in accordance with the Convention, recognizing reintegration as an important goal of criminal justice systems.³² Indeed, many States parties referred to correction, re-education and reintegration as important objectives of their criminal justice systems, and cited collectively a wide array of measures aiming in this direction, including the maximum possible individualization of sentences, the suspension of custodial sentences, probation coupled with psychological intervention as a substitute to deprivation of liberty, the introduction of social activities, educational, qualification and rehabilitation programmes, work regimes, cultural and sports activities and religious support for convicts, exit permits from prison, release on parole, supervised release, community service, assistance in finding employment, health care and other forms of social aid after release, legal and judicial rehabilitation and cessation of legal consequences of conviction.

Examples

In one State party, released convicts are guaranteed certain types of benefits and rights to prevent their return to criminal activities. The penitentiary institution informs the appropriate correctional institution under the Ministry of Justice and local executive power on the pending release of a convict in order that necessary preparations be made by the latter authority. Through concerted efforts, the penitentiary institution, the Ministry of Justice and the local executive supply the ex-convict with food, clothing and transport fees needed to get to his/her place of dwelling. If available, the person is provided with a dwelling premise or given a one-time payment. In addition, the local executive endeavours to provide the ex-convict with employment through the local job centre.

In another State the Prisons Department has launched a community-based initiative known as the “Yellow Ribbon Project”. The goals of the project are threefold and consist of: creating awareness among the community of the need to give a second chance to ex-offenders; generating acceptance of the ex-offenders and their families into the community; and inspiring community action to support the rehabilitation and reintegration of ex-offenders back into their midst.

Given the broad content of the provision in question and the wide margin of appreciation of States parties in the way they should implement it, the reviewers were for the most part satisfied with the information provided and considered the legislative efforts and measures cited, even if only limited or declaratory, as in line with the spirit of the Convention. Only a few cases from the African and Asia-Pacific Groups indicated they had no legal provisions promoting reintegration and their existing policies were described as vague and unspecific, especially regarding the mechanisms for their implementation and the responsibilities of agencies, organizations and individuals involved, or where the legal environment for the reintegration of former convicts was described as inadequate, resulting in people experiencing enormous difficulties after release, particularly in finding employment. It is worth mentioning that in one of the above countries the authorities referred to the “surrogate” contribution of non-governmental organizations (NGOs) and faith-based organizations in trying to help former convicts reintegrate into society. The reviewing experts, while taking duly note of the role of NGOs and faith-based organizations, recommended that the State attempt to promote the reintegration of persons convicted of UNCAC-related offences, as required by the Convention.

Challenges: The most common challenges in the implementation of Article 30 related to: (a) the levels of monetary and other sanctions, especially the internal consistency and coherence of national systems regarding the sanctioning of corruption-related offences; (b) the balance between privileges and jurisdictional immunities

³² UNCAC Legislative Review, par. 395.

afforded to public officials and the possibility of effectively investigating, prosecuting and adjudicating offences under the Convention; (c) considering the adoption of measures for the disqualification of convicted persons from holding office in enterprises owned in whole or in part by the State; (d) the exercise of discretionary prosecutorial powers; (e) the removal, suspension or reassignment of accused persons; and (f) early release or parole.

B. Freezing, seizure and confiscation

Article 31 of the Convention contains an important provision (designed in tandem with Articles 23, 40 and the provisions of Chapter V) to prevent offenders from profiting from their crimes and to remove the incentive for corrupt practices. While a number of common implementation issues were observed during the reviews and more efforts need to be made to achieve a degree of uniformity equivalent to the one regarding the relevant issue of national anti money-laundering legislation, there is an obvious trend towards legislative convergence and enhancement of the applicable measures in accordance with the standards of the Convention. In this context, many countries have profited from the continuous monitoring of international evaluation mechanisms, such as those frameworks elaborated by the EU, the OECD, the Council of Europe, FATF and ESAAMLG. Although, as confirmed in par. 10 of Article 31, it is a matter for States parties to determine the form of legislative compliance with the Convention and its reliance on several laws is not in itself objectionable, reviewers have pointed out the need for clear and consistent legislative frameworks on the confiscation, seizure and freezing of criminal proceeds and instrumentalities, and noted that complex and fragmented legislation may hinder the effective implementation of the domestic anti-corruption measures.

Confiscation of proceeds of crime: Almost all States parties provide in principle for the confiscation of proceeds (or an estimate of the proceeds) of crime derived from offences, as established in the Convention. In this case, the meaning of the term “confiscation” is in accordance with Article 2(g), the permanent deprivation of property by order of a court or other competent authority”. Two jurisdictions depart considerably from this rule: In the first case, apart from offences related to money-laundering, only instrumentalities are covered, and a complete revision of the relevant legislative framework was recommended; in the second case, confiscation does not directly refer to proceeds but is conceived as a penalty covering “all or part of the total property making up the assets of the convicted person, after satisfaction of any potential rights of his spouse, his co-owners or co-inheritors”. In other words, the State party in question appears to apply a penalty of “total confiscation” of the convicted person’s property and this does not require a direct link between the confiscated assets and a crime – a practice which has created issues of compatibility with fundamental legal principles (on the precision and predictability of criminal provisions) in other countries where it has been applied. With the exception of these two countries, States parties have usually established general confiscation provisions (e.g. in the Criminal Code) applying to most offences in the domestic legislation, and often special provisions as well, for particular offences (e.g. bribery, regarding the undue advantage or the value thereof, or money-laundering). While as a rule, confiscation is ordered as an (additional) criminal sanction – or a security measure – in the context of criminal proceedings, a number of States have opted for a primarily *civil* scheme (even if operating during the criminal trial), taking advantage of the lower evidentiary standards that are needed in such cases.

States parties should ensure that all UNCAC offences are covered by national provisions. This is usually the case, including when countries have general regulations referring to serious or “indictable” offences. In one jurisdiction most corruption-related offences fall within the scope of the forfeiture law, with the exception of bribery in the private sector, although legislation was being prepared to more fully implement the Article. In a further case, concern was raised as to the wording of the law, which appears to exclude property obtained by criminal means but transferred to third parties, leading to the observation that confiscation measures needed to be applied more consistently in criminal cases.

Value-based confiscation: There are two basic systems used to cover proceeds of crime, one property-based and one value-based.³³ In most States the law provides for a value-based or combined approach, allowing

³³ See UNCAC Legislative Guide, pars. 398-399.

confiscation of property of a corresponding value to that of proceeds of crime, frequently in the form of pecuniary orders or fines imposed by the court and requiring a person to pay an amount equal to his/her criminal profits. In some cases, the law specifies that value confiscation is incurred only if the forfeiture of the actual proceeds of a crime in favour of the State is impossible or unreasonable due to some reason that was valid at the time the decision was taken, e.g. when the bribe was used or left the country or when the property went missing or expropriated.

Example

The law of one State party provides that value confiscation is possible in relation to both an instrument of a crime or the property produced during a crime. If such an instrument or the property has been hidden or is otherwise inaccessible, a full or partial confiscation of the value may be ordered on the offender, or participant or person on whose behalf or with whose consent the offence has been committed. In addition, value confiscation may be ordered on a person to whom an instrument or the property has been conveyed. However, value confiscation is not allowed if it is shown that the instrument or property has probably been destroyed or consumed.

In at least seven countries the confiscation of property corresponding to the value of the proceeds of corruption-related crime is not covered, as the national laws are based on the principle of object (in natura) confiscation and do not recognize value confiscation. As a consequence, recommendations to address this issue were made. In two of these cases the situation was being reviewed and draft laws would have provided for the option of freezing, seizure and confiscation of property of an equivalent value.

Confiscation of instrumentalities: Measures to enable the confiscation of instrumentalities of corruption offences are in place in the majority of States parties; however, some States did not provide for such a possibility, leading to corresponding recommendations. In at least one State only instruments and means “used by the convict to commit a criminal offence” and not instrumentalities “destined for use” in corruption offences are covered. Although current legislation does not prohibit the application to instrumentalities destined for use in corruption offences, it has not previously been applied in this particular circumstance. Therefore, it was recommended that, should the judiciary not interpret the law accordingly in future cases, legislative clarification be considered.

Extended and non-conviction based confiscation: The classic paradigm of confiscation is one of a criminal penalty imposed after the conviction of a person for an offence and targeting the property acquired directly or indirectly from that particular offence. While this remains the dominant legal formula leading to confiscation, some States, especially from the Eastern European Group, provide additionally the criminal courts, as already seen under Article 20, with the power to confiscate all or part of the wealth belonging to the offender at the time of the making of the judgment and presumed with good reason to derive from his/her (not considered as insignificant) criminal activity. In those cases of extended confiscation, the offender is obliged to prove the lawfulness of the acquisition of the property. Such confiscation may also be ordered on a family member, close relative or other natural or legal person linked to the offender, if there is reason to believe that the property has been conveyed to that person to avoid confiscation or liability. In some States parties the relevant power is exercised in a civil process, raised after an application or lawsuit has been filed by the Public Prosecutor. The use of such extended powers of confiscation, independently of whether they are formally exercised in the context of a criminal or a civil procedure is considered as a good practice by governmental experts.

Examples of implementation

In one State if a court convicts a person of a criminal offence and imposes a sentence of more than three years, the court can extend confiscation to all unexplained assets belonging to the perpetrator, unless the perpetrator proves the legal origin of the property.

Another jurisdiction has established comprehensive forfeiture mechanisms, including the potential invocation, at the discretion of the prosecutor, of a legal presumption against so-called “lifestyle criminals” with unexplained wealth, where it is impossible to prove all the crimes they committed over many years. According to this

presumption, upon conviction of a particularly serious offence all assets and property acquired during the previous 7 years are considered as criminal proceeds and subject to (civil) forfeiture unless their lawful origin can be established by the defendant.

Moreover, many States parties provide (in parallel) for *non-conviction* based processes provided that a Court is satisfied that a (serious) offence has been committed in the past and that the property in question are proceeds or the instrument of such activity. This issue has already been discussed under Article 20, where the expanding appearance in countries from all regions of civil forfeiture regimes (also called “in rem forfeiture”, in contrast to the conviction-based “in personam” forfeiture) was noted, with particular reference to provisions targeting persons unable to demonstrate the legal provenance of their assets and enabling the countries involved to achieve an effect similar to the one envisaged by the criminalization of illicit enrichment, independently from prosecution. As with extended powers of confiscation, the development and expansion of such non-conviction based civil forfeiture regimes – also in civil law jurisdictions – have been highlighted as a good practice and recommended by many reviewers. Indeed, this mechanism is particularly useful in corruption cases as it is often difficult to gather sufficient evidence to secure a conviction. Significantly, legislation on unexplained wealth or introducing in rem forfeiture was reported pending in two further jurisdictions, illustrating the substantial dynamic of this mechanism.

Example of implementation

In one State party the Parliament recently passed legislation introducing unexplained wealth provisions which target wealth that a person cannot demonstrate that he or she has lawfully acquired. Under these provisions, once a court is satisfied that an authorized officer has reasonable grounds to suspect that a person’s total wealth exceeds the value of a person’s wealth that was lawfully acquired, the court can compel the person to attend court and prove, on the balance of probabilities, that his/her wealth was not derived from certain offences. If a person cannot demonstrate this, the court may order him/her to pay the difference between his/her wealth and his/her “legitimate” wealth.

In a related, more limited version of a non-conviction based process, confiscation is allowed when the penal procedure could not proceed (or started but was suspended during its course) due to a number of reasons specified in law, e.g. because the perpetrator lacked criminal capacity or was exempt from criminal liability because he/she died, absconded, fell into a durable mental disorder, or suffering from another serious ailment, or because an amnesty was given, or because the penal procedure was discontinued due to the statute of limitations, etc. Similarly, a corporation may be subject to a forfeiture order, even if the individual committing the offence cannot be identified or cannot be convicted for some other reason. Under the above scenarios, non-conviction based confiscation may be imposed by the criminal court or a judicial council involved in the criminal investigation at the time the reason for suspending the procedure became apparent. Nonetheless, some States handle all the eventualities above under the same civil forfeiture scheme. Both of these methods are in line with Convention requirements that call on States parties to consider as an option, in the context of mutual legal assistance, the confiscation of 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 (Article 54 par. 1(c)).

Identification, tracing, freezing and seizure: Article 31 requires the establishment of a strong confiscation regime, which includes, as specified in par. 2 such measures as may be necessary to enable the identification, tracing, freezing or seizure of proceeds and instrumentalities for the purpose of eventual confiscation. First, as regards measures to identify and trace property, while some States parties stated that no detailed rules exist or failed to provide any relevant information – partly drawing appropriate recommendations from governmental experts – others have pointed to a wide array of information gathering tools, including in some cases special powers of investigation for corruption offences; these include: (a) orders requiring any person to furnish a statutory declaration listing all movable or immovable property belonging to or possessed by such person and his family; (b) orders requiring any person to attend an examination and answer questions about the nature and location of certain property, and any activities that may demonstrate that they (or another person) have engaged

in unlawful activity; (c) orders requiring a person, company or institution to produce documents of any kind that are relevant to identifying, locating or quantifying certain property or necessary for the transfer of that property; (d) notices to financial institutions requiring them to confirm the existence of an account of any kind, a stored value card or a safe-deposit box, and the balance, signatories, and any recent transactions; (e) monitoring orders, requiring a financial institution to provide information on transactions conducted during a particular period through an account held by a particular person with the institution or made using a stored value card issued to a particular person by a financial institution; (f) warrants for the search of premises or vehicles and seizure of tainted property; (g) other “traditional” investigation techniques, such as the use of covert surveillance methods.

Examples of implementation

One State party encouraged the use of special investigative techniques in the identification and tracing of property suspected of being proceeds of crime.

Another State recently introduced the possibility of conducting special “financial investigations” to check the legality of the origin of the property of persons involved in criminal offences to which extended powers confiscation apply. A Public Prosecutor is in charge of conducting the financial investigation and he/she collects evidence on the incomes and property of the defendant, his/her legal successor and any person the defendant transferred his/her property to.

Normally, the national Financial Intelligence Units (FIUs) also dispose of broad authority to access financial accounts and banking records under the AML/CFT legislation and framework. Furthermore, the above possibilities are sometimes carried out through the usual prosecutorial and law enforcement channels and also by specialized authorities (such as “Asset Recovery Offices”), adding considerably to their practical effectiveness.

Example

In one State party, a Commission has been set up to identify property acquired from criminal activity. The Commission is a specialized State authority in charge of inspecting the property of significant value of persons against whom criminal prosecution has been undertaken in connection with certain criminal offences. Upon receiving information from the pretrial authorities and the courts, the territorial bodies of the Commission approach its members and, subject to the evidence presented, a decision is made to start a legal procedure to establish whether property of significant value was acquired from criminal activities. The rules of the Commission apply for the purpose of identifying criminal assets both in the country itself and overseas. If enough evidence is available, the Commission decides to take into court a motivated application to impose injunction orders. After the entry into force of the indictment and on the basis of the evidence gathered, the Commission may come up with a decision to take into court a motivated application for the forfeiture in favour of the State of the property acquired from criminal activity. The procedure for both the injunction orders and the forfeiture of proceeds of crime is carried out under the provisions of the Civil Procedure Code. Concrete instructions stipulating the order and manner of cooperation have been issued for the correct application of the law and to achieve the highest possible level of cooperation between the Commission and other competent authorities (Prosecutor’s Office, Ministry of Interior and Ministry of Finance).

Many more States have reported the existence of mechanisms to provisionally freeze, restrain and seize property liable to confiscation, prior to a final order being made. In most cases, this refers to the direct seizure by investigating officers of objects that may be subject to confiscation or can serve as evidence for the conviction or acquittal of the investigated person. It also refers to interim freezing and restraining orders, or orders for the attachment of property, issued without prior knowledge of the affected party by a court exercising judicial control of the preliminary investigation according to the request of the investigating authority (including the FIU), that prevent, in accordance with the definition of Article 2(f), property from being disposed of or dealt with (except in a specified manner or circumstance) prior to a confiscation order being made. The court may order, among others, a ban on executing certain acts and contracts and their registration in various records; withhold deposits of any nature in banks or financial institutions; prevent transactions of shares and bonds; etc. Normally, such measures

can be lifted under certain conditions at the request of the prosecutor or the affected persons before the completion of the criminal proceedings.

Despite the importance of such measures, in at least two cases, measures to enable the freezing or seizure of proceeds or instrumentalities of crime for purposes of eventual confiscation were lacking. In a third case, the reviewers expressed reservations that the regulation of seizures and freezing of property could be achieved (with the exception of money-laundering) only by reference to the Civil Procedure Code, and recommended addressing this matter in a uniform manner to avoid its fragmentation in different legislative pillars and to limit possible questions of interpretation.

Furthermore, the reviews attached particular importance to the effectiveness and expediency of the applicable procedures. For example, in one case, in light of possible delays that may occur with respect to obtaining court orders, the reviewers recommended that the State party under review consider easing the formal requirements for obtaining authorization to freeze financial accounts in the context of domestic investigations of corruption cases, taking into account the overall approach of national legislation relating to the authority that is competent to provide authorization. In another jurisdiction it was reported that the seizure of goods other than bank accounts is difficult in practice due to the high standard of proof required (resembling the presentation of a prima facie case, which is difficult to reach at the initial stage of investigations).

Apart from these “regular” freezing or restraining procedures, in several cases further precautionary measures are possible, these can take the form of “urgent” short-term freezing orders, issued ex parte without a court order preventing a financial institution from processing withdrawals from a specified account or restricting the transfer or disposal of other property constituting the object of a suspicious transaction for a certain period (from 24 hours up to 60 days under certain conditions) in order to avoid frustration of restraining orders by offenders dissipating funds. These “urgent” short-term freezing orders can be taken by the public prosecutor, by individual magistrates following the application of certain law enforcement officials, or by the national FIU in money-laundering cases (administrative freezing order). In one case the Central Bank is also able to freeze an account without warning for 30 days, which can be extended for a further 30 days and beyond that subject to a court order. Finally, in one State the domestic financial institutions detecting a suspicious transaction and reporting it to the FIU have to freeze the funds involved on their own initiative for a maximum of five days. The criminal authorities, and not the FIU, decide on the extension of the freezing.

Administration of property: Several States parties faced issues with regard to the administration of frozen, seized and confiscated property. In two cases no efforts have been made to implement par. 3 of Article 31, and a number of States parties provided no information on the subject under review. A wide variety of policies were addressed; these range from the most basic (e.g. regulations for the disposal of seized items usually consisting of hazardous, perishable material or subject to rapid devaluation or high maintenance, mostly by police officials), to tailored solutions according to the nature of the property in question.

Example

In one State party the law provides the competent judge with the discretion to make orders with respect to the administration of attached property. This includes providing from the attached property such sums as may be reasonably necessary for the maintenance of the owner and his family, and for the expenses connected with the defence of the applicant where criminal proceedings have been instituted against him; safeguarding so far as may be practicable the interests of any business affected by the attachment, and in particular, the interests of any partners in such business; and appointing a receiver to manage any property in accordance with the instructions of the competent Judge. Furthermore, the anti money-laundering law gives authority to the Court to appoint any law enforcement agency as a manager or caretaker of the frozen, attached or forfeited property.

Most reviews focus on the administration of seized and frozen assets, the latter presenting the greatest challenges for implementing States parties, and attach particular importance to the development of clear and comprehensive rules to ensure the safety and cost-effective conservation of the property involved and address all kinds of situation and assets, no matter how substantial. In this context many recommendations aimed at improving the

management capacities of the States parties concerned. For example, a recommendation was made in the case of one State party to build the capacity of different public institutions assigned to receive the seized property and to handle complex assets requiring extensive administrative measures, e.g. businesses, once such assets have been seized. Similarly in one State it was reported that the seizure of any substantial asset, such as a house, would present a serious challenge to the management capacity of the law enforcement authorities; as a consequence, major seizures are rarely undertaken. In other reviews, recommendations were issued to consider strengthening measures for the management of seized, frozen and confiscated property in order to regulate the process more methodically and not limit it, for example, to seized items or cases where the property is perishable or its value may rapidly depreciate.

On the question of which of the reported asset management was the most adequate, the governmental experts were generally in favour of systems that provide for the possibility of entrusting property on a case-by-case basis, e.g. when in risk of depreciation or deterioration, to a person (e.g. a “curator bonis”, a “receiver”, or an “administrator”) or agency authorized to take care and administer this property and perform any necessary act for this purpose. Other than that, they appear sometimes to favour centralized services, capable of handling all relevant situations. In one case where the establishment of a central agency to administer seized assets was under consideration, replacing local authorities entrusted with this responsibility. This development was welcomed by the reviewing experts, and they encouraged the State party under review to continue to pursue the creation of such a specialized body.

Example of implementation

In one State party, a separate institution had been recently established to manage both seized and confiscated assets, and especially of “complex” assets requiring effective management (companies, businesses, boats, buildings, animals, etc.). Interestingly, its operations are self-financed from the sale of confiscated property. The reviewers considered the establishment of this institution a “key step” in the efforts of the State involved to confiscate property resulting from an act of corruption, and observed that States parties that plan to modify their legislation in order to ensure or enhance coherent and efficient asset management should be informed about its *modus operandi*, as well as any other innovative measures that it may eventually adopt.

Another model worth mentioning provides that seized assets are to be invested so that the investment is safe, does not depreciate and produces a return. The authorities in the country involved did not consider it necessary to set up a special agency for the management of seized assets. Responsibility rests with the prosecution service, which allows the bank where the assets are held to pursue its investment policy, in agreement with the account holder, provided that approach taken is conservative and, if possible, yields a return. The interest yielded by the seized amounts must also be seized and the return of seized assets that are the proceeds of a crime will form part of the amounts that are eventually confiscated, if this takes place.

The situation in relation to the use of *confiscated* assets again appears fragmented as States parties pursue different goals and priorities. Confiscated values are often deposited in a State account, and confiscated property (other than that which is required to be destroyed by law) is sold by public auction, or by other commercially profitable means, and the proceeds of the sale are then deposited into the State treasury.

Example of implementation

In one State party, reviewers highlighted as a good practice the use of an e-Procurement system, which allows citizens to bid on and purchase confiscated property, providing for transparency and aiding in curbing corrupt practices.

No clear policies on the re-use of confiscated assets are commonly found. In some cases the States parties have special agencies in place to handle the management of confiscated property, and pursue specific objectives centered on further enhancing their law enforcement capabilities or diminishing the consequences of crime. Therefore, the observation of the authorities in one State party that “once assets are confiscated, the issue of asset administration does not arise, as they become property of the State” is not quite accurate. For example, in one case, funds obtained from the sale of confiscated assets, after deducting the costs for value assessment, storage,

preservation and the sale of seized property, are paid into the State budget and used to finance projects aimed at strengthening the capacity of judicial, prosecutorial and authorities responsible for internal affairs. In another State the proceeds of public auctions of confiscated assets are given to the victims (including State entities or agencies affected) as redress. In the event that no victim can be determined, the law provides that “goods seized under criminal proceedings, confiscated property and any other revenue from judicial proceedings” belong to the judicial branch. And in a third case, the proceeds of the disposal of the property and securities, as well as the confiscated money, are allocated to a special fund of the Ministry of Interior, in order to be used in programs for drug prevention, treatment and rehabilitation of drug addicts.

Scope of property subject to freezing, seizure and confiscation: States parties must make sure that their notion of “proceeds of crime” corresponds to the definition contained in Article 2(e) of the Convention, and includes “any property derived from or obtained, directly or indirectly, through the commission of an offence”. Furthermore, they must ensure that domestic measures on freezing, seizure and confiscation also extend to situations in which the source of proceeds may not be immediately apparent, i.e. to proceeds of crime that have been transformed or converted into other property (Article 31 par. 4), or have been intermingled with property acquired from legitimate sources (Article 31 par. 5), as well as to income or other benefits derived therefrom, in the same manner and to the same extent as proceeds of crime (Article 31 par. 6).

Indeed, most jurisdictions have taken measures to this effect, at least regarding confiscation, either by using appropriate statutory definitions of “proceeds”, or through jurisprudence applying expansive interpretations, or making use of the value-based approach according to the merits of each case. Thus, for example, where proceeds of crime have been intermingled with property from legitimate sources, the investigating and prosecuting authorities are usually in a position to confiscate the assessed value of the illicit proportion of the co-mingled assets or auction off the portion representing criminal proceeds, returning the legitimate property to its lawful owner. Equally, income or other benefits derived from investing proceeds of crime are usually also liable to confiscation.

Example

A State party uses the following definition of proceeds:

1. “Property is proceeds of an offence if: (a) it is wholly derived or realized, whether directly or indirectly, from the commission of the offence; or (b) it is partly derived or realized, whether directly or indirectly, from the commission of the offence; whether the property is situated within or outside” the country.
2. “Property becomes proceeds of an offence if it is: (a) wholly or partly derived or realized from a disposal or other dealing with proceeds of the offence; or (b) wholly or partly acquired using proceeds of the offence; (...)”

Gaps were found in the legislation of a significant number of countries with regard to one or more of the above types of property and numerous recommendations were issued to pursue a clear delineation of the concept of property as a subject of confiscation proceedings, and to ensure that proceeds of corruption offences transformed into other property, intermingled proceeds and income or other benefits derived from such proceeds (i.e. secondary profits) shall be liable to the measures of Article 31 par. 1.

Equally, a lack of clarity was observed in numerous cases regarding the *seizure or freezing* of transformed, converted and above all intermingled property, in which regard clear and thorough rules are needed. Apart from the fact that some States provided inadequate information for the purposes of the review, in two cases recommendations were deemed necessary to establish that the seizure of intermingled property is possible, but also to indicate precisely the measures taken in order to avoid the freezing or seizure of the section of the property acquired from a legitimate source.

Production of bank, financial or commercial records: Article 31 par. 7, sets forth procedural law requirements to facilitate the operation of the other provisions of Article 31 (and also of Article 55 on international cooperation for purposes of confiscation). It requires States parties to ensure that bank records, financial records (such as

those of other financial services companies) and commercial records (such as those of real estate transactions, shipping lines, freight forwarders and insurers) are subject to compulsory production, for example through production orders, search and seizure or similar means that ensure their availability to law enforcement officials. The same paragraph establishes the principle of bank secrecy cannot be raised by States as grounds for not implementing its provisions.³⁴

Indeed, almost all States parties have procedures in place empowering their courts or other competent authorities to order that bank, financial or commercial records be made available or seized. Courts, judicial officers, prosecuting authorities and sometimes also other specified persons may order the disclosure or seizure of documents (such as files with information concerning financial transactions, bank account statements, computerized data etc.) in the context of criminal proceedings for corruption offences or as an administrative measure during the investigative stage, be it against individuals or legal persons; bank secrecy may not be invoked. On the contrary, if the order of a judge is not complied with, any person involved could themselves be charged with a criminal offence (e.g. “disobedience” or “refusal of assistance”). Furthermore, the national FIUs were also found to enjoy broad authority to access financial accounts and banking records in the context of money-laundering investigations, whereby banking or other legally protected secrecy regimes cannot be invoked as a ground to reject submitting information.

Example

According to the law of one State, “at the request of a commanding police officer, the police have the right to obtain any information necessary to prevent or investigate an offence, notwithstanding business, banking or insurance secrecy binding members, auditors, managing directors, board members or employees of an organisation (...)”. In particular, the lifting of bank secrecy does not require court authorization.

In view of the above the governmental experts were generally satisfied with the levels of implementation and only sporadically issued recommendations for States parties to consider a relaxation of the relevant standards and formal procedural requirements, most of all in light of possible delays that may occur with respect to the obtaining of court orders for the lifting of bank secrecy. In one case they also expressed doubts on whether the cited legislation has been applied in practice.

Reversal of the burden of proof: A reversal of the burden of proof for demonstrating the lawful origin of alleged proceeds of crime or other property liable to confiscation (as the relevant provision of the Convention was interpreted by several States parties) had not been introduced in the slight majority of jurisdictions, at least with respect to corruption offences. States parties rejecting the relevant (optional) measure viewed it as a violation of the principle of the presumption of innocence, established at the constitutional level in many countries, and as inconsistent with the restrictive view taken by national criminal justice systems towards any reversal of the burden of proof in criminal cases. The reviewers accepted these arguments, given the wide discretion of States parties as to whether to implement the provision in question. In one case, however, as well as in countries where no such justification was offered, the experts recommended that the States may wish to consider such adopting legislative amendments.

On the other hand, there are examples of States with criminal confiscation regimes using lower evidentiary standards in confiscation proceedings than in the level of proof required for the conviction of the offender, including the cases mentioned above where extended powers of confiscation apply and the offender is called to reverse the doubts about the provenance of his/her assets. In one case, this concerns only assets belonging to a person involved with or having supported a criminal organization. The governmental experts considered the lowering of evidentiary requirements as a success.

Example of implementation

³⁴ UNCAC Legislative Guide, par. 421.

According to the Recovery of Proceeds law in one State party, the standard of proof required to determine any question arising under that law as to: (a) whether a person has benefited from an offence; or (b) the amount to be recovered by confiscation order, shall be that applicable in civil proceedings.

Additionally, the reversal of the burden of proof is also standard practice in non-conviction based or civil forfeiture proceedings, as indicated above and under Article 20. In one of these cases, the accused has to make a declaration in writing in order to prove the legal nature of the property and, if he/she fails to make such declaration or the declaration is incomplete, the property is presumed to have been derived from criminal activity. Similarly, in another State a person whose property has been restrained or forfeited may apply for the property to be excluded from restraint or forfeitures. The applicant bears the burden of proof in demonstrating that the property was lawfully acquired.

Rights of bona fide third parties: Few issues have arisen with regard to par. 9 of Article 31 and few, if any, observations were made by reviewers. In the context of the in-depth review, the question of the rights of bona fide third parties appears to have been one of the “hardest” provisions of the UNCAC to examine as external experts seek to establish whether a body of legislation prejudices or not the rights of third parties. It is telling that in two cases, the reviewing experts observed that the information provided by the authorities (on the national provisions on confiscation) did not demonstrate any *positive* disposition with regard to the principle of protection of the rights of bona fide third parties, and at the end had to employ an *a contrario* reasoning, to conclude that they cannot (or only as a matter of exception can) be subject to measures such as confiscation, seizure or freezing of assets.

As to positive national measures indicating compliance with this provision, there are cases where national legislation includes a general declaration that any decision on forfeiture should not infringe on the rights of bona fide third parties. Apart from that, a comparative overview of the reviews with information on the subject points to the following examples of implementation, adopted in varying degrees by States parties: (a) Providing that an instrument of a crime or other property belongs to a third party, it may only be confiscated if it has been conveyed to him/her after the commission of the offence, and if he/she knew or had justifiable reason to believe that the object or property was linked to an offence, or if he/she has received it as a gift or otherwise free of charge; (b) Notifying interested third parties of proceedings that may affect their property rights; (c) Providing the possibility to third parties to apply for their legitimately acquired property to be excluded from restraint or forfeiture, to appeal a freezing or confiscation order, as well as to file a civil claim challenging a confiscation order; (d) If legitimately obtained property has been forfeited, providing the possibility to the relevant party to apply for compensation to the value of the legitimately acquired property; (e) Taking into account possible claims of the victims/civil claimants in determining the disposition of confiscated assets.

Example

In one State an Ordinance “to prevent the disposal or concealment of property procured by means of certain offences” provides that a bona fide third party cannot be sued, prosecuted or have other legal proceedings filed against him or her “for anything in good faith done or intended to be done in pursuant of this Ordinance”. The reviewing experts invited the authorities to consider the inclusion of a provision in the national legislation that would define the concept of good will of third parties in confiscation proceedings.

Effectiveness: A relatively small number of States provided information, examples of cases and statistical data on the implementation of relevant legislation, and in one case it was specifically recommended that statistics on confiscation be made publicly available and regularly updated. Despite this, however, some notable successes were observed, including cases where the domestic provisions have facilitated the confiscation of assets in matters involving foreign corruption offences, and the repatriation of those assets to the countries in which the corrupt conduct was perpetrated. One example of this is the system that one State set up for the seizure of funds misappropriated by politically exposed persons and which led to the confiscation and restitution of very large amounts of money over the past 15 years; this was identified both as a success and a good practice in the

implementation of the provisions of Article 31, but also in the area of mutual legal assistance in view of asset recovery.

Challenges: The most common challenges in the implementation of Article 31 related to: (a) the absence or inadequacy of measures to facilitate confiscation, in particular for identifying, tracing and freezing assets, including in some cases, the excessively burdensome formal requirements for freezing financial accounts; (b) the reluctance of close to half of the States parties to adopt the non-mandatory measure providing that an offender should demonstrate the lawful origin of alleged proceeds of crime; (c) challenges in the administration of frozen, seized or confiscated property; and (d) the scope of criminal proceeds, property and instrumentalities that are subject to the measures in Article 31, especially in the coverage of transformed, converted and intermingled criminal proceeds, as well as income and benefits derived therefrom. In some cases a complete overhaul is needed to enhance and ensure greater coherence of existing measures, frameworks and capacity to conduct asset confiscation, freezing and seizure. Finally, the reluctance of some judicial authorities to make full use of confiscation instruments needs to be resolved: In one State party, the national courts, possibly governed by human rights considerations – one of which is the possibility of violation of the provisions of the European Convention on Human Rights and its protocols – tended to reduce the scope of the confiscation considering it an extremely restrictive measure. A reasonably cautious implementation of the UNCAC provisions would entail no such implications.

C. Protection of witnesses, experts and victims

There was wide variation among the States parties with regard to the protection of witnesses, experts and victims against potential retaliation or intimidation. The end balance of a comparative overview of national legislations can be considered positive, although it was noted that no measures had been taken in several jurisdictions for the effective implementation of Article 32. Equally, a number of States parties pointed to limited and fragmented efforts to structure a comprehensive witness protection system, including fairly standard provisions criminalizing the obstruction of justice (as foreseen by Article 25), informal practical steps taken by the police, or provisions on the non-disclosure of the identity or whereabouts of witnesses or informers, or of matters which might lead to their discovery. Most of these States parties lack more enhanced procedures for the physical protection of witnesses, experts and their families, and for providing them with new identities or for their relocation. There are also cases where existing laws providing some forms of legal and physical protection of witnesses have yet to be implemented, or are only applied in very restricted circumstances.

The absence of a comprehensive witness protection or relocation programme did (and should) not automatically lead governmental experts to consider all of the above States as being in breach of the Convention provisions. In this context, one should not forget that the requirements of Article 32 par. 1 are mandatory, but only where considered appropriate, necessary, feasible and “within the means” of the State party concerned. This implies, as noted in the Legislative Guide for the implementation of the Convention, that “the obligation to provide effective protection for witnesses is limited to specific cases or prescribed conditions where, *in the view of the implementing State party*, such means are appropriate. For instance, officials might be given discretion to assess the threat or risks in each case and to extend protection accordingly”.³⁵ Equally, the obligation to provide protection arises only insofar as the State party concerned has the available resources and technical capabilities to offer such protection. In view of the above principles and the wide discretionary powers accorded to States parties regarding the implementation of Article 32, the reviewers are called to adapt their findings to the special conditions they encounter in each country and ask the national authorities whether any technical assistance is needed. Hence, in one State with no comprehensive witness protection programme, the review team took into account that it was dealing with a relatively small and homogenous country, with an extensive degree of transparency and high technology – rendering very difficult, for example, the successful relocation of a person

³⁵ UNCAC Legislative Guide, par. 438.

from one part of the country to another, and there was as yet no pressing need for a relocation programme. The experts therefore came to the conclusion that the State in question should be deemed to be in compliance with the Convention requirements, and confined themselves to urging the authorities to strengthen measures to protect the identity of informants in order to alleviate concerns that the names of witnesses can be traced.

Nevertheless, such conclusions were not possible in the majority of countries, especially countries in the African and Asia-Pacific Groups. National authorities repeatedly pointed out the absence of comprehensive witness protection systems as a major weakness in the fight against corruption: Witnesses lack the necessary assurances for their safety and security in order to testify in courts and, in cases where they appear, they are hesitant to speak the truth, especially when they feel that the accused persons are politically, financially or otherwise influential. In practice, this has prevented cases from being prosecuted as witnesses were not prepared to testify. Accordingly, several recommendations were issued by the reviewing experts, including to enact comprehensive legislation and systems for the protection of experts, witnesses, victims and their relatives, where these were absent, and also to give adequate attention to such measures on the ground, for example by sensitizing the police and other law enforcement agencies.

The downbeat impression created by this situation is counterbalanced by a considerable number of countries with adequate and sometimes broad and progressive witness protection programmes – all based on solid bodies of legal standards. In several cases, the manner in which the relevant issues are regulated was highlighted as a good practice in advancing the goals of the Convention. In one State party, the right of victims and witnesses to receive adequate protection in the course of criminal proceedings is even recognized at the constitutional level. Furthermore, in some cases the indicated legal acts were elaborated with the participation of UNODC experts and the contribution of partner countries, or are the result of efforts to comply with the requirements of regional instruments, such as the Resolution of the Council of the EU of 23 November 1995 on the protection of the witnesses in the fight against international organized crime, and the EU Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.

Apart from general provisions (e.g. in the national Criminal Codes or Codes of Criminal Procedure) providing protection to witnesses identified as being at a real risk because of the assistance they have provided to police and other law enforcement agencies in significant criminal prosecutions, many States have special “national witness protection programmes”, “witness protection acts” and similar laws that specify the types of protection afforded, the persons enjoying it, the scope and duration of protection, and the duties of the competent bodies and authorities. As a rule, such protection covers both witnesses and experts giving testimony – with some notable exceptions – is provided irrespective of the nationality of the witness, and may be extended to their relatives or individuals with whom the protected person is in a particularly close relationship, as required and when appropriate, by Article 32 par. 1. Equally, national mechanisms to protect persons giving evidence in judicial proceedings usually make no distinction between victims who act as witnesses and third parties or experts who testify at trial, and is thus in line with the spirit of Article 32 par. 4. Finally, it appears that the applicable national provisions extend in most cases to the protection of persons who participate or have participated in the offences established in accordance with the Convention and who then cooperate with or assist law enforcement, as required by Article 37 par. 4.

As with States parties with more constrained legislative efforts, the exact contents of national witness protection programmes are to be evaluated based on the actual needs of the criminal justice system of each country and the limits posed by existing structures, resources and capacities. Comparatively inexpensive measures may be sufficient and preferable over other alternatives, and countries may wish to differentiate the types and level of protection granted, depending on the seriousness of the crime, the contribution of the witness or victim involved and other contextual factors.³⁶ For example, in one jurisdiction the law on witness protection only applies to offences carrying a maximum penalty of 10 years imprisonment or more, thus excluding a series of offences established in accordance with the Convention. The national authorities explained that this reflects the balance of

³⁶ See UNCAC Legislative Guide, par. 439.

resources in the domestic criminal justice system and noted that they might consider changing the threshold once they are in the process of reforming the law – an explanation which was apparently accepted by the governmental experts, given the margin of appreciation of States parties noted above. On the other hand, in another State party, the legal system provides protection for witnesses, experts and victims, but the inclusion of corruption offences is not automatic. In this particular case a recommendation was issued to extend such protection in a direct and explicit fashion to witnesses and victims of corruption offences.

The following measures are indicative of the way States parties have built up their witness protection programmes, in accordance with the classification suggested in par. 2 of Article 32:

Physical protection: First of all, States parties deemed to be in compliance with the Convention employ operating methodologies designed to ensure the physical protection of vulnerable witnesses, their families and other persons close to them. The most substantial part of this job is usually conducted by regular police units, although in some cases specialized bodies have been established, either at the national or regional level. There is an extensive range of measures used, which are often conditioned on the consent of protected persons, and may include:

a) Measures for the immediate physical protection of the safety and welfare of witnesses who may be subject to intimidation or harassment as a result of giving evidence, such as guarding the protected person and his/her apartment and property; equipping their place of residence with fire safety and security devices, such as alarm systems; changing their phone numbers and state registration numbers of their vehicles; installing facilities and procedures for emergency police communications, such as telephone hotline numbers; providing security during travel; issuing the protected person with special personal protection equipment, and warning him/her of existing danger; temporary billeting of the protected person in a secure place; and (if the protected persons are kept in an investigation jail or prison facility) transferring them from one investigation jail or prison facility to another, or keeping them separated from other inmates or in solitary confinement.

b) Identity protection and relocation measures, as suggested in subparagraph 2(a) of Article 32, ranging from the minimal protection of non-disclosure of identity and whereabouts of protected persons to the changing of their identity documents, biographical data and appearance; finding other employment opportunities, changing their place of work/study and permanently moving them to another place of residence; and prohibition of all referral services (such as local population registration authorities, directory enquiries and passport registration services) to provide information on place of residence or other data on the protected persons.

Example

In one State party, police and law enforcement agencies had access to an extensive range of measures to protect witnesses and experts based on the provisions of tailored legislation, including full witness protection programmes involving permanent relocation, change of identity, personal and home security measures, and a high degree of confidentiality. Protection arrangements were transposed in writing and taken in full consultation with victims, who were assisted by a specialized witness protection service.

c) Ensuring the safe integration of witnesses, and their families participating in the programme back into the community; ancillary measures related to social, medical, psychological, legal or financial assistance; access to information and help to resolve organizational issues; and compensation for the total of the transfer and relocation costs.

d) Indirect protection methods that target the threat itself and regulate the conduct of the accused who may present a danger to the witness. These measures, which include the provisions criminalizing obstruction of justice (as foreseen in Article 25(a)), may prove at least as effective as direct physical protection and are certainly less expensive.

Examples

One State party (among many others) grants additional protection for witnesses through the setting of bail conditions for accused persons. The Court can take into account, in granting bail to a person, the likelihood of

that person harassing or endangering the safety or welfare of a person, or interfering with evidence, intimidating a witness or obstructing the course of justice.

In another State (again, among many others), the law provides as a measure of procedural compulsion the “prohibition to approach the victim”. This measure is applied against the accused by the competent first instance Court, upon proposal of the prosecutor and with the consent of the victim, or upon request of the victim itself. The Court provides an immediate decision on the proposal or the request in a public session, after hearing the prosecutor, the defendant and the victim. The determination of the Court is final. The prohibition is cancelled after an effective verdict is pronounced, or where the procedure is discontinued on other grounds. The victim may at any time require the Court to cancel the prohibition.

Evidentiary rules: In addition to physical protection, comprehensive witness protection programmes include evidentiary rules which tend to ensure the safety of witnesses and victims, in particular:

a) Measures specifically aimed at keeping the identity of protected witnesses secret during pre-trial and trial proceedings, including hearing of witnesses under pseudonyms; placing testifying persons behind a screen; voice alteration methods; and suppressing the publication of evidence.

Examples

In one State party, the testimony of protected persons during interrogation is reflected in a record, drawn up in two copies. Only the identification code of the witness is entered in the record instead of his/her identity data. The witness only signs the original copy of the record which is then given in a sealed envelope to the judge. The other copy is attached to the case file and submitted to the accused party and his/her defence counsel. The accused party and his/her counsel may put questions to the witness in writing. The interrogation is conducted by altering the witness’ voice as well as image if videoconferencing facilities are used. Before starting the interrogation a judge from the Court of first instance at the location of the witness verifies that the interrogated person is the same as the one that has been given an identification code.

In another State party, a preliminary investigation judge, taking into account the gravity of a criminal offence or the exceptional circumstances relating thereto, may, at the request of the Prosecutor’s Office, declare a witness “anonymous”, in order to ensure his/her safety. On the basis of the judge’s ruling, a fictitious name is assigned to the witness and used in procedural acts. Information concerning the real name, personal identification code or, in the absence thereof, date of birth, citizenship, education, residence and place of employment or the educational institution of a witness declared anonymous, is enclosed in an envelope bearing the number of the criminal matter and the signature of the person conducting the proceedings. The envelope is sealed and kept separately from the criminal file. The information contained in the envelope can only be examined by the person conducting the proceedings, and then who seals and signs the envelope again after examining the information. In a court proceeding, the anonymous witness is heard by telephone using voice distortion equipment, if necessary. Questions may also be submitted to the witness in writing.

In a third State party, there exists the possibility not only of full anonymity (in cases where, with respect to a grave crime, there is an imminent threat to the life, health, freedom or property of an important witness, victim, his or her family members or close relatives), but also of *partial* anonymity. Thus, only partial data of the witness or victim, such as date of birth, personal identification number, residential address, occupation, place of work and education or personal relationships may be kept as classified material, depending on what is sufficient to ensure the protection of their rights and interests.

b) Further measures to provide protection of vulnerable witnesses when giving testimony, include: holding proceedings in private or conducting closed/in camera court sessions in order to avoid direct contact with persons posing a possible threat for the witness; questioning protected persons without participation of the accused; using pre-recorded testimony; and having procedures in place allowing witnesses to give evidence through video links, closed circuit television or other communications technology, as suggested in subparagraph 2(b) of Article 32.

Examples

The laws of one State party allow a judge or magistrate at any time before or during a hearing of an application or

proceedings before a court, under certain conditions, to: (a) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or (b) order that no report of the whole or a specified part of, or relating to the application or proceedings be published; or (c) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court.

Another State party has created a fund specifically for granting protection and providing support to victims and witnesses, used among others for the acquisition of a range of protective tools for trial hearings, such as panel-type screens that prevent visual contact between the victim and the accused, closed circuit television that allows the victim and/or witness to testify in a room adjacent to the courtroom, etc.

Evidentiary rules for the protection of witnesses may be in conflict with fundamental principles of a fair criminal process in States parties, as they are related to the protection of the rights of the accused and enshrined in the criminal procedural law, the Constitution or even texts of international treaties prevailing over contrary national provisions. This is reflected in Article 32, which provides that the measures implemented should be “without prejudice to the rights of the defendant, including the right to due process”. The non-disclosure of the witnesses’ identity or the employment of methods for their private or “long-distance” interrogation may contradict, to give a few examples, the right of the accused to be informed of the charges and the evidence against him/her, the principle of equality of arms, the right to a public hearing, the oral character of the main criminal process, the principles of direct and personal evaluation of evidence, the right of the accused to be present at one’s own trial and examine the witnesses of the prosecution, etc.³⁷ Conflicting interests of this sort should be taken into account and the possibility considered that the absence of certain measures to guarantee the safety of witnesses, experts and victims is due to the impossibility of reconciling them with established rights of the defence. For instance, in one State the authorities explained that the Constitution provides for the right of the accused to be confronted with the witnesses against him, thereby excluding the use of video testimony in a trial. Only exceptionally have some children been permitted to testify via closed circuit television, and in rare cases some victims or witnesses have also been allowed to testify while partially disguised by a wig or glasses, or while screened from the public but not the jury. The reviewing experts accepted this explanation and did not alter their view that the State party under review had taken the appropriate measures to satisfy the requirements of the Convention.

Relocation agreements: Most States parties had not entered into agreements or arrangements with other States for the relocation of persons, or provided no relevant information, leading (in some cases) to recommendations by the reviewing teams to at least consider such an action. Some experts were satisfied that such arrangements or agreements are possible, or that there is nothing in the legislation of States parties that would prohibit them in appropriate circumstances. Therefore they considered the States parties in question to be in compliance with the spirit of the Convention. It should be noted, however, that Article 32 par. 3 creates a positive obligation to consider entering into concrete relocation agreements or arrangements, and not simply to eliminate theoretical obstacles to such agreements taking place.

Some States parties reported that they are parties to regional agreements on witness protection that involve the relocation of the protected person in the territory of another State party, such as the Agreement on the Protection of Participants in Criminal Proceedings among Member States of the Commonwealth of Independent States and the Balkan Agreement on Witness Protection.

Participation of victims: Regarding the obligation of States parties to consider the perspective of victims of corruption, some countries provided insufficient information or did not elaborate on the exact nature of a possible involvement of the victim in the different stages of criminal proceedings, apart from the right to protection which it enjoys. Other States parties, especially from the African and Asia-Pacific Groups, appear to have no provisions whatsoever to facilitate the presentation and consideration of the views and concerns of victims, or do not seem

³⁷ See also UNCAC Legislative Guide, par. 445.

to provide other than a basic opportunity, e.g. if called as witnesses, for victims to voice their views and concerns in relation to how the case has affected them personally or professionally; the authorities sometimes simply stated that nothing in domestic law prevents them from doing so and that it rests on the presiding judge as to whether or not such views and concerns will be heard. These unsatisfactory practices led to recommendations urging the national authorities to clarify the role of victims in trial and enhance their intervention capacities. The authorities in one State party argued that in corruption cases the law does not contain any provisions that allow victims to give testimony because victims are not usually identifiable in such cases. This does not apply, however, to all offences established in accordance with the Convention, nor does it release States parties from the obligation to enable the victims which can be identified to state their position.

Turning to the States parties that provide this opportunity, the largest group among them, composed of countries with civil law systems, enable the victims of corruption offences not only to file private actions before the civil courts or to give testimony when called to act as witnesses, but also to present their views as civil plaintiffs or private prosecution parties in the criminal trial, enjoying a variety of rights at all stages of the criminal proceedings. These rights include, inter alia, the right to contest a refusal to commence or the termination of criminal proceedings; be informed of the nature of the charge; take knowledge of the case file and examine and make copies of the materials contained therein; give consent to the application of temporary restraining orders or request the application of a restraining order; submit evidence to include in the case file for examination in court; file requests and complaints, and summon witnesses; examine the reports on procedural acts and give statements, on record, on the conditions, course, results and minutes of the procedural acts; participate as a full party in the court hearings; give consent to the application of settlement proceedings or refuse to give such consent; present an opinion concerning the charges and (even) the punishment, as well as the damage set out in the charges and the civil action; appeal the decision; etc. In one State party, a recommendation was issued to ensure that the status of victims in criminal proceedings is afforded to both natural and legal persons.

Example

In one State party, the victim has the possibility of bringing a civil action at all stages of the proceedings. He/she then becomes a party to the proceedings or trial and enjoys the rights accorded to this status. Thus, as a party to the investigation, the civil party is entitled, like the accused, to a free copy of the official record stating the infringement, written witnesses statements and expert reports. He/she may also take or copy, at his/her expense, of all documents of the proceedings, make applications or requests for annulment, call witnesses at the trial hearing, put his/her case and assert his/her right to compensation. Moreover, a recent amendment to the criminal procedure code appointed a special judge to intervene on behalf of crime victims who, at their request, can ensure consideration of the victims' rights in the implementation and enforcement phases (e.g. recovering compensation or enforcing a contact ban) of a case.

In a second group of States parties, victims can participate in criminal proceedings and present their views and concerns (e.g. in testifying on the damages incurred during the substantial hearing of a case and at the sentencing hearing, or participating extensively in the investigation process), even if they appear not to enjoy the full rights of a civil party as above.

Finally, a third group of States parties following a common law system consider as one possibility that the victim can appear and present his/her views in order to exclude any possibility that information prejudicial to the rights of the defence will be disclosed after the accused has been convicted. This is achieved by means of oral or written statements (often called "victim impact statements") that provide details to the court of the harm suffered by victims resulting from the offence and that are submitted during sentencing (occasionally also at proceedings involving release, plea or parole). The shape, form and content provided in a victim statement varies according to the governing legislative scheme. In some jurisdictions the defendant or his/her lawyer may call a victim to be cross-examined on the statement. There are also victim support schemes providing advice and counselling services when attending court, part of which entails providing assistance in preparing and presenting a victim statement. The reviewing experts were generally satisfied that the provision under review was adequately

implemented in such post-conviction victim participation measures, even in one (somewhat problematic) case where the authorities clarified that the victim does not have a right per se to address the court, and that the decision to call a victim to make a statement at the time of sentencing lies with the prosecutor.

Effectiveness: Although some statistical data on witness protection operations were provided, information on the degree to which such programmes achieve their goals in States parties is scarce, making it impossible to reach an overall conclusion on the effectiveness of existing regulatory frameworks in corruption-related cases. This becomes all the more clear when one considers that the laws on witness protection are not implemented in certain countries because of lack of resources and competing priorities, or are only applied in very exceptional cases, reportedly because the phenomenon of corruption is not manifestly linked to organized crime in the countries concerned. An important step in resolving this issue is the adoption of the recommendation in one review to consider developing and using statistical information tools for the monitoring of witness protection policies.

Challenges: The major challenge in respect of the implementation of Article 32 is that of addressing inadequate normative frameworks, and sometimes the complete absence of witness protection programmes in many States parties. This is explained by the significant costs of witness protection programmes; limited resources of the countries involved; limited awareness of state-of-the-art programmes and practices for witness and expert protection; specificities in the national legal systems; and weak inter-agency coordination and limited capacities (e.g. human resources, technological and institutional infrastructure, etc.). A further challenge concerns the non-application of existing measures in practice, due to the novelty of witness protection laws and methods, lack of instructions and regulations for their implementation, and lack of experience in running the relevant programmes. Regarding relocation agreements with other States parties, the reviewers noted that one State party had not entered into arrangements of this kind, mostly because of the alleged “high complexity of such an operation”. Finally, many States parties do not have provisions in place to enable the presentation and consideration of the views and concerns of victims.

D. Protection of reporting persons

As with the protection of witnesses, experts and victims, there was considerable variation among States parties with regard to the implementation of Article 33 – a non-mandatory provision – and the incorporation into domestic legal systems of appropriate measures for the protection of reporting persons (the so-called “whistle-blowers”). A considerable number of States parties have not established comprehensive whistle-blower protection programmes or were found to be only partially in compliance with the provision under review, although legislation was pending in several cases. Accordingly, in all of the above cases numerous recommendations were issued either to pursue or even prioritize the adoption of such legislation, or to take further steps towards protecting whistle-blowers in accordance with the spirit of the Convention. It should be noted that such a recommendation was deemed necessary by reviewers, even in three cases where provisions in various laws provided to an adequate extent protection for reporting persons, but where no *ad hoc* legislation on whistle-blower protection was currently in place. It thus appears that – although no such requirement derives from the Convention and not all reviews reached the same conclusion – the existence of piecemeal and fragmented provisions does not contribute to the effectiveness of the afforded protection.

The lack of adequate measures appears particularly manifest in States parties where the law contains a duty of public officials or other citizens to report suspicions of corrupt practices, but does not provide any corresponding protection against unjustified treatment. In some cases where no specific whistle-blower protection framework exists, the authorities made reference to the domestic provisions on witness protection. Nevertheless, it should be clear that such provisions are not always sufficient. While physical safety is often a major preoccupation of informers and the analogous application of witness protection measures in their favour certainly promotes the reporting of corruption offences, Article 33 implies measures of a different nature and scope and covers not only “witnesses”, but also persons who do not participate in any official capacity and may not become directly involved in the criminal process, for instance in cases that do not progress beyond the investigation stage. Hence,

the application of such measures to the employment context and the private sector is considered to be especially important.

In contrast to the above-mentioned group of States parties, a number of countries, especially those with a common law background, have introduced special legislation on “public interest disclosures” and whistle-blower protection, which in some cases was found to be “elaborate” and to represent a good practice. At least one of these States parties received help to this effect from an international institution, in this case the Asian Development Bank. As to the form of protection afforded to persons reporting in good faith and on reasonable grounds on corruption-related activities – apart from the extension of the physical protection provided to witnesses to also cover, if needed, this group of persons –, reviewers considered the following three sets of measures as being of significance:

a) Some types of protection, described by some reviewers as good practices – are of a mainly procedural nature and concern the possibility to accept and investigate information derived from anonymous reports (e.g. submitted via web, e-mail or telephone “hotlines”) and, more importantly, to preserve the *anonymity* of reporting persons against third parties (insofar as those individuals do not consent to the disclosure of their identities), as well as secrecy regarding the information, records and documents delivered or indicated at the time of the reporting. Anonymity, in particular, should be ensured at least at the beginning of the investigations and up to the point where justice cannot be fully served without the disclosure of the informer’s identity, e.g. until he/she is called to testify as a witness.

b) A second set of measures refer to protection against court action, i.e. the explicit prohibition of civil suits, prosecutions (especially for defamation, perjury and false accusation), or any other legal proceedings related to disclosures made in good faith, even if the facts presented by the informant were not sufficient to allow a decision to prosecute or to convict. Some States parties grant this privilege to persons reporting suspicious transactions indicating the commission of money-laundering offences. One should bear in mind, however, that in many criminal systems it may be difficult to reconcile such measures with the rights of the accused, or to determine the point when such *ex ante* immunity ceases to be valid or absolute. In any case, the success of a civil or criminal court action against the reporting person would probably depend on proving the maliciousness of the acts involved, something that in itself constitutes a form of protective guarantee and may be considered to reduce the added value of the measures under discussion.

c) A third (and, as it appears from the weight attributed to them in the reviews, the most important) set of measures for the protection of persons who report misconduct or corruption, concern their employment conditions and are often found, for that reason, in the labour legislation or civil service codes of States parties. As noted by the reviewing experts, bearing in mind the optional nature of Article 33, “the protection of whistle-blowers should include measures to prevent discriminatory treatment or disciplinary sanctions against reporting persons...”. Unless an employee is legally assured of protection from reprisals in the workplace, he/she may never come forward to give information to his or her employer or to the regulatory authorities. In this context, some reviews indicate that general provisions protecting against wrongful termination of an employment contract and establishing a right to take the matter to court may not suffice for the protection of employees reporting corruption practices. A clear delineation of a reporting person’s rights and special measures for the enhancement of his/her protection are needed, including the explicit prohibition of discriminatory transfer, reassignment, demotion, pay cut, suspension from employment, dismissal, forced retirement, or any other professional disadvantage that may follow a whistle-blower report; and eventually shifting the burden of proof in related labour proceedings to the employer. In addition, it may be helpful, as one State party has done, to have a special agency in place to which persons can bring their own actions or complaints of adverse treatment, as well as to explore ways to expedite access to existing protections mechanisms and remove cumbersome processes.

Examples of implementation

In one State party, a draft anti-corruption law that was adopted at the conclusion of the review provides for a reversal of the burden of proof to protect victims of retaliation measures: As things stood before, a reporting person in the public or private sectors who believed he/she was being subjected to retaliation could file a

complaint, thereby initiating a lengthy process. The new law streamlines and amplifies this regime by shifting the burden of proof to the employer, after the reporting person has shown that his or her whistleblowing action was a contributing factor to the alleged retaliation.

Similarly, in another State party, the Labour Code provides that “no person shall be excluded from a recruitment procedure or access to an internship or a training period in a company, no employee may be sanctioned, made redundant or subjected to discrimination, direct or indirect, particularly in terms of pay, training, reassignment, assignment, qualification, classification, professional promotion, transfer or renewal of contract for having reported or testified about, in good faith, either to his employer, or the judicial or administrative authorities acts of corruption he was aware of in the exercise of his functions. Any breach of employment contract that would result from this, any provision or act contrary is null and void. In case of dispute (...) when the concerned employee (...) establishes the facts from which it is assumed that he reported or gave evidence of corruption, it shall be for the defending party, in view of these elements, to prove that its decision is justified by objective factors unrelated to the statements or testimony of the employee...”.

Finally, the law in a third State party provides elaborate protection for whistle-blowers, including prohibiting an employer from subjecting an employee to “occupational detriment” on account of having made a protected disclosure. The overall scope of the law, as well as the broad definition of “occupational detriment” (which includes, inter alia, any disciplinary action; dismissal, suspension, demotion, harassment or intimidation; being transferred against his or her will; being refused a transfer or promotion or being threatened with any of such actions) were highlighted as a good practice by governmental experts. It is also worth mentioning that various companies and government departments implemented specific measures to encourage whistleblowing, and that civil society actively promotes this practice and the establishment of protection mechanisms. A national anti-corruption hotline has been established and statistics of reports are centrally collected and published.

It should be noted that specific legislative mechanisms of this kind exist in some States parties for both public and private sector whistle-blower protection, but that in several cases only public officials and not private persons are afforded such protection; recommendations were accordingly issued to consider extending the rules to encourage persons other than public officials to report offences under the Convention.

A final point has to do with possible reporting restrictions, which, as noted in the review of one State party, may have a serious impact on the margin of protection and the disclosure channels available to would-be whistle-blowers. In the public sector there is usually a range of laws providing for secrecy of particular kinds of information, especially with regard to intelligence and foreign affairs. Equally, private sector whistle-blowers may arrange a privacy and confidentiality agreement with the affected employer. This places restrictions as to whom an informant may disclose information to and may render the informant’s protection dependent on keeping these restrictions. For instance, while nothing directly prevents a private sector whistle-blower from revealing an act of corruption to the media or an authority in the above-mentioned State party, an employer may later take action against this person for taking this liberty. Furthermore, as mentioned in another review, the existence of criminal offences in respect of violations of business secrets could provide a further disincentive to the reporting of corruption offences by employees.

In view of the above, States parties should make every effort to strike a balance between acknowledging the loyalty and confidentiality obligations of civil servants and private employees towards the State and their employer, respectively, and the obligation to provide protection against any “unjustified” treatment of reporting persons. This could be done by providing for different “spheres” of disclosure with corresponding levels of protection.

Examples

This solution is illustrated by the example of one State party’s system of three disclosure spheres: (a) The whistle-blower’s own employer is the safest recipient of concerns concerning corruption. An internal disclosure will be protected if the whistle-blower acts in good faith, and follows the process set out for such disclosures by

the employer; (b) disclosures to specified regulatory bodies (i.e. the office of the Public Protector and the Auditor-General) are also protected, without a need that the concern should first have been raised with the employer, where the whistle-blower makes the disclosure in good faith and the employee reasonably believes that the regulatory body would usually deal with this kind of problem; (c) wider disclosures (e.g. to the police, members of Parliament and the media) can be protected, insofar as the disclosure is reasonable, made in good faith and, crucially, if there was a good cause for going outside the first two spheres.

Similarly, in another State party, the jurisprudence admits an exception to the obligation of confidentiality, where the disclosure meets an “overriding interest”; in such cases, the employee must first report the facts to the employer, then report them to the authorities, and only as a last resort go to the media. Direct disclosure to the authorities is also admissible where justified. Thus, any dismissal action taken in such cases on the grounds of violation of the obligation of confidentiality is deemed to be unjustified and gives rise to a claim for compensation. The country in question also stated that it intended to take measures to strengthen the protection mechanism in force against unfair treatment, and was encouraged by the reviewers to take measures to achieve this.

Challenges: The challenges reported as relevant to the implementation of Article 33 are much the same as those related to witness protection. Additionally, a number of reviews emphasized the need for carrying out ancillary programmes to raise awareness on the importance of disclosing acts of corruption, the reporting mechanisms, and the means of protection available to whistle-blowers. This would facilitate the practical application of whistle-blower protection laws. Further suggested ancillary measures include the provision of financial incentives for whistle-blowers, the creation of institutionalized whistle-blower protection policies within companies, and the establishment of independent bodies specifically responsible for implementing the domestic public interest disclosure and whistle-blower protection policies.

E. Consequences of acts of corruption

Article 34 creates a general obligation for States parties to take measures to address the consequences of corruption and, as noted in one review, is specifically intended to ensure that persons (both natural and legal) do not benefit from contracts or concessions or similar instruments obtained through corrupt means. Although a number of States parties tend to cite the sanctions and penalties imposed on physical and legal persons convicted of corruption offences (from terms of imprisonment, pecuniary penalties and disqualifications to withdrawal of professional and corporate licences and blacklisting), the provision in question seeks to address issues not already covered by more special rules, such as the ones contained in Article 26, Article 30 par. 1 and Article 35.

While the provision allows States parties room for manoeuvre, most reviews focus on concrete measures, namely the annulment or rescindment of contracts and the withdrawal of concession agreements or other similar instruments. At this point, it should be noted that Article 34 creates a positive obligation for States parties to take measures addressing the consequences of corruption and to illustrate the manner in which they have achieved this. The simple statement, as made in one case, that “there is nothing in domestic law to prevent corruption from being 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”, should be considered, as insufficient for the purposes of a country review.

Corruption is a factor for the annulment or rescindment of contracts or the withdrawal of concessions or similar instruments in a large number of countries, although at least four jurisdictions appear to offer no such possibility. The standard method used to achieve this is through the application of general (either common law or Civil Code) principles of contractual law that permit annulment or rescission of a contract on the basis of *mala fides* (lack of good faith or fraudulent misrepresentation) on the part of at least one of the contractual parties.

Example of implementation

In one State party, the reviewing experts observed a growing trend to include standard clauses in government contracts that are designed to allow the Government to rescind contracts, withdraw licenses and take other similar remedies where corruption or criminal conduct has occurred. The experts observed that further consideration could be given to the more widespread use of contract provisions of this type.

It is worth mentioning that in this particular State party “fraudulent activities”, if established, may provide adequate grounds for the withdrawal of instruments, even without having to initiate legal proceedings. An example is the transfer of titles: If the Register of Titles is satisfied that the transfer was a result of fraudulent activity, he or she, having heard both parties to the application, may withdraw or cancel the transfer.

While the above principles refer normally to contracts with a *lawful* content, but achieved through corrupt influence, and render such contracts voidable, some reviews (also) make mention of the general possibility to consider as (ab initio) void a contract whose object is illegal or contradicts public order or good morals. Under the relevant provisions a contract that is drawn up following an act of corruption will be void if the corrupt act has substantially influenced the content of the contract, or if the object of the contract is the corrupt transaction itself, e.g. the agreement of a specific fee for the services of an intermediary who has offered to exert unlawful influence on a public official.

In a second group of countries (apart from the one relying on the above basic elements of basic contractual law), the matter is regulated (additionally) by special provisions of various administrative decrees, public procurement laws or concession acts, stipulating directly or implying the invalidity of contracts and concession agreements concluded through the use of corrupt means. In one of these cases it was found that contracts could be rescinded under the public procurement and disposal of assets law, but that a regulation on concessions was missing; accordingly, a recommendation was made to adopt corresponding provisions.

Examples

In one State party, in addition to general contractual clauses providing consequences of corruption, both the Public Procurement Act and the Concession Act warrant that no contract for public procurement or concession shall be concluded and, if concluded, shall be deemed invalid or void, in case of non-conformity of the candidates (due to a previous conviction for a corruption offence). The same goes for breaches of the procedure, particularly in cases of bribery with intent to win a tender.

In another State party, the administrative laws provide for the possibility to invalidate an administrative act, including contracts and agreements. The Comptroller General of the State, upon carrying out the preventive legal control to which administrative acts are subject, verifies whether these comply with the law and principles of probity, transparency, openness, equality, free competition of bidders, strict adherence to the terms that govern the contest or tender and those aimed at preventing acts of corruption. If these provisions or principles are found to have been violated, the Comptroller General refrains from processing those acts and informs the relevant public body concerned, which then proceeds to invalidate them.

In two States parties with a similar legal tradition, the Penal Code also provides for the possibility to “return things to their previous state”, or “repair” the civil consequences and damages of corruption, based on an order contained in the sentence issued after a criminal conviction. An annulment of the contract, concession or other legal instrument is considered part of such reparation of damages.

Finally, a few States parties make reference to other kinds of remedial action, such as blacklisting or the recovery of employer-funded superannuation contributions, where public sector employees have been convicted of corruption offences. The recovery of these (retirement) funds is based on the notion that an employee convicted of a corruption offence has failed to fulfil his or her contractual duties.

Example of implementation

The reviewers of one State party considered it good practice (in the context of Article 34) that the State institutions affected by the commission of an offence are obliged to file a complaint and become a plaintiff in

order to protect the institution's interests, regardless of the criminal proceedings instituted by the Public Prosecution Service.

F. Compensation for damage

Article 35 on compensation for damage appears to be one of the least problematic provisions of the entire Convention in terms of compliance, and all but one of the reviewed State parties had adopted measures to fully or partly implement the Article. In one case, the matter was addressed in the anti-corruption law, which covered only part of the cases foreseen in the Convention (compensation of damages suffered specifically by the principal whose agent had been convicted of a corruption offence), and had no provisions in place stating the rules and procedure for the court to order the compensation of the victim.

The ratio legis of Article 35 is to urge States parties to provide legal grounds for those who have suffered some type of damage as a result of acts of corruption, which will enable them to pursue compensation from actors involved in such actions. Indeed, as a rule, national legal systems provide procedures allowing persons or entities to seek compensation for damages (material or immaterial), or any detrimental consequence suffered as a result of acts of corruption. An interpretative note to the Convention indicates that that any "entities or persons" suffering damages from corrupt acts should have the right to seek compensation, including States, as well as legal and natural persons.³⁸ Most countries appear to follow this interpretation. As to who may be found liable, one review made the point that a remedy allowing for damages to be claimed should be available even where a public authority is alleged to have been complicit in a corrupt process. The elements of liability, such as causality and the extent of damage inflicted to the claimant because of an act of corruption ("... damage as a result of ..."), will have to be substantiated in accordance with the principles of the domestic law of each State that govern causality and extent of due compensation. In the context of *intent* and in line with the provisions of the Convention, one review noted that the absence of personal interaction between the perpetrator(s) and the claimant(s), or that the perpetrator was not aware of the specific damage on specific claimant's interests will not serve as a defence for the latter, nor as a legal obstacle for those who have suffered damage and will try to pursue compensation. In other words, the means to seek compensation should be available, insofar as the actors of a corrupt transaction intended or were aware that damage was going to be inflicted to a certain group of persons.

There are usually no special legal provisions that provide a cause of action based on damages due to corrupt activities; such cases are dealt with under the general principles of civil (contract or tort) law. The regular path for obtaining compensation is by instituting civil proceedings before a civil court against the offender (and/or the persons who bear civil responsibility for his/her actions). In many cases, however, the victims of the corruption offence can seek redress both through this regular channel and by filing a civil claim in the context of criminal proceedings if the damage was a direct, personal and immediate consequence of the crime. Such mechanisms, permitting persons to bring a civil claim before the criminal court adjudicating the criminal case, regardless of whether the victim was at the origins of the proceedings by filing a complaint, have been described as a good practice in one review as they are operative and efficient in practice and based on comprehensive procedural provisions which ensure restitution of victims' rights and their compensation for the damage they suffered from criminal acts related to corruption.

Case examples and example of implementation

The Court of Cassation of one State party has expressly recognized that it is admissible for an enterprise to be civil party in a criminal procedure when its bids were rejected because of the corruption of a public official by one of its competitors. Similarly, the court recognized that a third party, outside the corruption agreement, can invoke the material and moral damage caused to it by the consequences of this criminal contract. Thus, a public office of the social housing department has been declared admissible to bring a civil action during a prosecution

³⁸ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 299.

for passive bribery of its director and secretary because of the damage to its reputation which had been caused by the actions of its employees.

Finally, the reviewers took note of a Court of Cassation decision to allow a non-governmental organization active in corruption prevention to bring a civil action in criminal proceedings related to a corruption offence. The reviewers stressed that they consider this to be a good practice for other States parties to the Convention planning to increase the role and participation of civil society in their domestic legal processes.

It should be noted, however, that a mechanism of civil action tied to the criminal procedure may not solely be sufficient to ensure compliance with the Convention as Article 35 does not contain (at least not directly) such a restriction. In one case, where there appeared to be no provisions guaranteeing eligible persons the right to initiate legal proceedings *in the absence* of a prior criminal case, a recommendation was issued for the authorities to address this issue.

Chapter III. Law enforcement

A. Institutional provisions

1. Specialized authorities

All but one of the States parties have established one or more bodies or specialized departments to combat corruption through law enforcement. In one further case, legislation has been prepared for the creation of such a body. Most countries have opted for a single, specialized anti-corruption “agency”, “commission”, “bureau”, “department”, “office”, or “task force”, operating (or about to become operational) within the institutional framework of the national Ministry of Justice or Prosecutor General’s Office. These new anti-corruption entities are empowered in various degrees to investigate and/or prosecute corruption-related offences, as well as centralize information relating to operational modes and methods used to commit the relevant infringements. Some of those bodies have exclusive operational competence to conduct enquiries aimed at the detection of instances of corruption and to use special means and techniques in the course of criminal investigations. This is the case in a country that established an anti-corruption department within the prosecutorial authority following the implementation of recommendations of the OECD Anti-Corruption Network for Eastern Europe and Central Asia (can). Others share law enforcement capabilities in corruption matters with judicial authorities and “regular” public prosecution services. The focus of specialized agencies of this kind is on the more serious and complex corruption cases, or cases involving high-ranking public officials, leaving regular law enforcement bodies to deal with lower level cases of corruption. Moreover, some anti-corruption bodies with investigative and law enforcement powers also fulfil preventive functions. This practice is in line with an interpretative note to the Convention, which states that the body or bodies referred to in Article 36 may be the same as those referred to in Article 6.³⁹

³⁹ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 303.

Examples

The anti-corruption agency of one State party was divided into two sections: The first is responsible for investigating offences, and the second is in charge of prevention and development of public programmes and policies to prevent and combat corruption.

In another State party, the anti-corruption bureau, further to its investigative functions, is actively raising awareness and combating corruption through lecture programmes, exhibitions, media publicity and promotions to encourage the public to report cases of corruption.

The mandate of the anti-corruption commission of a third State party involves: (a) to raise anti-corruption public awareness and education; (b) conduct corruption prevention activities; and (c) carry out undercover operations, inquiries and investigations to detect cases of corruption, and review and inspect the assets and income declarations of high-level public officials. Experts observed that this three-pronged approach is conducive to fighting corruption because it embraces the three key strategies of education, prevention and enforcement. Furthermore, it was noted that anti-corruption laws contain a unique provision that prohibits a decrease in the anti-corruption agency's budget from the previous year, and requires the agency's corruption-related recommendations to public sector institutions to be implemented. A three-sided agreement between the agency, Government and civil society is in place to promote collaboration in combating corruption; and representatives of civil society also hold a seat on the advisory council of the agency.

Another group of State parties does not have a specialized anti-corruption agency, but follow a more decentralized or individual approach: These countries have established special departments within the national public prosecution services, designated specialized public prosecutors in the country's regions to investigate corruption-related cases, introduced specialized police units and investigators or adequate economic crimes investigation structures on a regional level, and set up specialized court divisions to hear cases involving corruption. In one of these States parties, public prosecutors may seek the support and assistance of a specialized anti-corruption unit which provides legal support during investigations and employs financial and accounting analysts who evaluate the information gathered in cases relating to economic crime. Similarly, in another State party, a number of prosecutors together form a "centre of expertise" on economic crime and corruption, working closely with accountants and financial analysts. Finally, in a third country, some of the most serious and complex crimes, and some cases with an international connection, would generally be transferred to a special police authority, where investigators specialize in, among others, financial and economic offences, including corruption.

A third group of State parties follow a multi-agency approach, which vests responsibility for combating corruption in numerous independent agencies or law enforcement divisions scattered within various authorities or ministries. This is based on the idea that no single body should be solely responsible for anti-corruption. Instead, a range of different bodies and government initiatives are designed to promote accountability and transparency. The reviewers were satisfied with examples of this approach and concluded that Article 36 was fully implemented. In one case, however, it was noted that much of the focus of the specialized units is on foreign fraud and bribery rather than domestic corruption. Although the reviewing experts found this to be commendable and in many ways unique among other countries, they urged the national authorities to consider focusing additional resources on the domestic sphere and developing a national anti-corruption strategy.

While all of the three above systems have been found to be in line with the requirements of the Convention, the reviewing experts have tended to favour the more centralized approaches. Thus in one State, they expressed their support for a plan to strengthen the Public Prosecution Service through the establishment of a super-regional prosecution office responsible for prosecuting highly complex cases. Equally, in another State, with a multi-agency approach, they urged the authorities to continue progress on the development and implementation of a comprehensive anti-corruption strategy, including through the establishment of a "Commission of Integrity" or similar national anti-corruption body. A further measure favoured by reviewers appears to be the establishment of special anti-corruption courts. As noted in one review, such courts would provide a good opportunity for judicial officers to specialize in the area of corruption and to deal with cases promptly, effectively and efficiently.

Example of implementation

In one State party, the establishment and operation of a dedicated agency was specifically noted as the primary reason for success in addressing corruption in the country. The agency has brought cases against former Ministers, members of Parliament, senior officials, mayors, company directors, and one of its own staff. As a result, the performance of the system against corruption has greatly improved. The agency appears to have the necessary independence and considerable investigative powers. It is also greatly respected and trusted by the public, has attracted positive attention internationally and seems to represent both a success story and a source of lessons which may be useful to other countries.

In the same State party, the creation of a separate anti-corruption court, which has proved an effective partner for the agency, in addition to specialized judges in the Supreme Court, was noted as a further positive measure, and plans for additional courts, one for each region of the country, are currently underway.

The body, bodies or persons envisaged in Article 36 must be granted the necessary independence in accordance with the fundamental principles of the legal system of each State party in order to be able to carry out their functions effectively, free from political interference or other undue influence. In this context, the creation of one country's current anti-corruption agency was the result of a judgment of the domestic Constitutional Court, which found, firstly, that the Constitution and a number of binding international law agreements impose an obligation on the State to set up and maintain an effective and independent body to combat corruption; and, secondly, that the law regulating the police directorate, which had been responsible until then for corruption cases, was inconsistent with the Constitution and invalid to the extent that it failed to secure an adequate degree of independence.

Among the elements examined in the reviews to confirm compliance with this Article are the budget and fiscal autonomy of the bodies concerned; the manner of appointment and removal from office of their members and leadership; the length of term of these persons; the salary, benefits and employment security they enjoy; the extent to which they can authorize special investigative measures (such as the interception of communications) or prioritize investigations without any external supervision; the reporting and accountability obligations they are subjected to; and in general the existence of monitoring mechanisms and checks and balances systems (including through the participation of NGOs) as a guarantee for their effective and fair operation, and the existence of conflict of interest regulations.

Example

The Anti-Corruption Department of one State party is attached to the office of the Prosecutor General without, however, formally being part of it. This implies that other departments of the Prosecutor General's Office cannot interfere in its activities. The Director of the Department is procedurally independent and is entitled to endorse bills of indictment, which are required to submit cases to court. The salary of the employees of the Department is defined separately by the Head of State. The latter also endorses the nomination of the candidate for the post of Department Director. The Department enjoys the power of a prosecutorial agency, which in accordance with the Constitution is a body within the judiciary branch of power.

In several cases, the reviewing experts made observations on the independence of national anti-corruption bodies. For example, in one case corruption investigations or related actions against public officials required the prior authorization of the prosecutor's office. While it was noted that the anti-corruption law prohibited influencing or interfering in the operation of the agency, a recommendation was issued to consider establishing criminal sanctions against persons not keeping this prohibition (and also to widen the agency's mandate to cover the investigation of all offences under the Convention). In another State party, a legislative proposal was pending that would grant the Government similar authorization powers as well as the competence to appoint a high-ranking official of the agency. Additional concerns were raised as to the independence of contractors and staff members of the agency who could hold office outside the agency (including secondments to other Ministries and institutions) and who were not subject to any conflict of interest law. The reviewing experts urged the country

concerned to ensure that officials exercising functions within the agency enjoy the necessary independence to perform their duties effectively and without undue pressures, and that such officials be provided with adequate training and sufficient resources.

Further to the independence of specialized authorities, States parties must ensure that the persons involved have the appropriate training and resources to carry out their (often, considerably challenging) tasks. In order to achieve this, at least with regard to training, some States parties have signed memoranda of understanding with international and regional organizations to train the staff of their oversight and audit agencies in all specialties needed. UNODC has also run training sessions and workshops of this nature.

Example

The anti-corruption department of one State party has law enforcement and prosecutorial powers, with a staff of 145 prosecutors, investigators, detectives and specialists. The national authorities emphasized that this number of staff is sufficient to carry out their function and tasks effectively, given the current case load and complexity of investigations, including financial cases. Regarding selection and training, the State party indicated that staff are appointed by order of the Prosecutor General from among the employees of the Prosecutor's Office and other law enforcement and auditing agencies, based on their professional qualifications and experience. The employees of the Prosecutor's Office are selected on a competitive basis, i.e. through three-stage exams consisting of a written test, essay and interview. Each year, the Department Director approves the training programme, which is followed throughout the year. Training of the officers of the Department is conducted on a weekly basis by means of internal seminars and training sessions, as well as through seminars and conferences organized in cooperation with a number of international organizations. The number of criminal cases instituted and investigated by the Department has increased on a yearly basis since its establishment, including cases of passive bribery.

As newly created bodies, national anti-corruption bodies often face common challenges related to limited capacity and resources for implementation, as well as competing priorities. Recommendations were issued in a number of cases to ensure, preserve or increase manpower and resources for training and provide for capacity-building of the agencies or bodies involved; to strengthen their presence in the regions and provinces; to widen their mandate in law enforcement; to consider ways and means to better use available resources, including creating synergies among investigative and prosecutorial authorities; to ensure more efficient and effective case management; to increase political support; and to continue efforts to combat corruption through independent law enforcement bodies focusing, in particular, on addressing implementation challenges in this field. In one case, a recommendation was made to consider focusing the responsibilities of the various law enforcement authorities as there was a certain overlap in their various functions, as well as to improve their staffing and training. The reviewing experts also noted in several other jurisdictions a need for effective inter-agency coordination to prevent fragmentation of efforts and ensure that an efficient "checks and balances" system was in place to combat corruption, as well as a need to develop statistical indicators to establish benchmarks, develop strategies and measure progress of the anti-corruption body in question.

Challenges: The most common challenges in the implementation of Article 36 relate to enhancing the efficiency, expertise and capabilities of staff, and ensuring the existence of specialized law enforcement capacity for offences under the Convention; enhancing the independence of specialized law enforcement and prosecutorial bodies; increasing inter-agency coordination among relevant institutions; considering reorganizing their functions, and assessing how to make existing systems and operations more effective.

2. Cooperation with law enforcement authorities

Article 37 of the Convention requires that States parties take measures to encourage cooperation with law enforcement authorities of persons who are *themselves* (potentially) subject to prosecution, in view of their direct or indirect participation in corruption offences. First of all, according to par. 4 of the provision in question, States

parties should ensure that this special category of witnesses enjoy, *mutatis mutandis*, the protection provided for in Article 32. This is generally the case among States parties, insofar as national law contains adequate witness protection programmes, with problems arising correspondingly where national provisions fail to reach and uphold the standards of Article 32. In some reviews additional concerns were raised on the absence of specific protection measures for cooperating offenders, or of specific data on concrete cases where such measures have been applied. All but one States parties do not foresee or keep a record of protection measures that are applied separately for collaborators of justice.

State parties are also called to provide concrete motives and inducements to offenders to obtain their cooperation in supplying information that may be useful for investigatory and evidentiary purposes and for recovering the proceeds of crime. The substance of such motives and the possible steps to be taken for the introduction of such motives and inducements are left to the discretion of States parties. Among the conceivable measures capable of furthering the goals of the Convention, States parties are urged in particular to provide for the possibility of mitigating the punishment of persons providing substantial cooperation in the investigation or prosecution of a corruption offence (Article 37 par. 2), or granting immunity from prosecution to the same persons (Article 37 par. 3).

Several States parties were found not to have any explicit policies or adequate legal provisions in place, although in some cases legislation to address the matter or improve the situation was pending. In many of these cases, recommendations were issued to consider providing for the mitigation of punishment of persons who had participated in the commission of corruption offences, expanding the scope of existing provisions, or taking other measures to encourage active and substantial cooperation with law enforcement authorities.

Mitigated punishment: Most States parties have implemented measures in accordance with the spirit of Article 37 par. 1. While there are a few cases where special provisions foresee the imposition of reduced sentences on corruption offenders who cooperate during the proceedings, the provisions that are in place in the majority of States parties are of a *generic* nature (found usually in the Criminal Code), and allow collaboration to be considered as a circumstance mitigating criminal liability and to be taken into account by the court during sentencing, i.e. at the stage of determining the perpetrator's individual punishment. The consideration of the cooperation of the accused only has tangible effects during deliberations and no advance assurances are provided to the interested party. Acts of collaboration which may lead to a mitigated treatment (e.g. imposing a sentence below the minimum provided for or substituting a penalty, such as imprisonment, by a less harsh one, such as a monetary fine normally) include active steps which may have led to the detection and disclosure of an offence, giving oneself up and confessing to a crime, exposing other accomplices, and also rendering assistance in the investigation and detection of criminal proceeds, as a form of repairing the harm caused or preventing further harmful consequences of the offence. The extent to which a lighter sentence is imposed usually depends on the degree of cooperation of the particular defendant and the effect it had in reducing the harm caused by the offence, and is left to the discretion of the court. Since this is a general principle of sentencing, there are normally no guidelines or other criteria in this regard and every case is dealt with on its own merit.

Generic provisions of this kind are not always considered sufficient for the purposes of the Convention. In the case of one State party, the reviewing experts recommended expanding the scope of the domestic legislation on the mitigation of punishment and also providing for the possibility of non-punishment of spontaneous and active collaborators, as the Criminal Code of this country recognizes as grounds for decreasing punishment any attempt by the perpetrator to prevent or remove or clear up the effects of the offence. Similarly, extensive recommendations were made to the authorities of a State party with even more limited provisions, according to which only the "spontaneous confession of a crime", a concept often viewed critically by governmental experts, is considered a circumstance warranting a mitigated punishment.

In some countries, provisions exist to provide special incentives aimed at the recovery of the proceeds of specific offences, e.g. as in the case of embezzlement of public funds. In these cases, the return of the embezzled property can imply the imposition of a substantially lower penalty.

In addition, laws instituting various forms of plea bargaining, pre-judicial cooperation agreements and summary prosecutions are in place or being developed in several States parties. Under the relevant arrangements, the defendant may have to confess to being entirely guilty of an offence, accept possible civil claims and not question the circumstances in the indictment, in exchange for a lesser charge or a reduced penalty. In these cases, the court does not hold a regular hearing but pronounces the verdict based on the evidence collected in the pre-trial proceedings, confirming in effect the agreement between the prosecutor and the cooperating person's defence counsel. A similar regime appears to apply in one State party specifically with regard to corruption offences; in this case, the National Anti-Corruption Commission can reduce or otherwise modify charges on a case-by-case basis in appropriate instances of cooperation. Simplified procedures of this kind are considered an important incentive for white collar offenders who may be eager to avoid the negative impact of a criminal trial on their reputation, and are thus ready to cooperate with the authorities by admitting the charges against them. However, as noted in one review, the possibility of mitigating a sentence may not be only related to cooperation, but also to the seriousness of the crime and the guilt of the accused person. Therefore, mitigation of punishment may be excluded in the case of a major corruption offence and the substantially wrongful behaviour of the cooperating person.

In plea bargaining cases, the court normally retains a measure of discretion with respect to the authorization of the agreement, this in order to ascertain that the accused understands his right to assert his innocence and demand a trial, that he makes his plea voluntarily, and that he understands the terms of any agreement and the consequences of his guilty plea, and that he has not been subject to coercion or improper promises on the part of the prosecutor. Indeed, as noted in the Legislative Guide to the Convention, the possibility that judges would be *required* to impose more lenient sentences should be approached with caution, as it might raise concerns about judicial independence and create potential for the corruption of the prosecutors bearing the relevant responsibility.⁴⁰

Immunity from prosecution: Several States parties have not established any possibility of granting *immunity* from prosecution to accused co-operators. Interestingly, in one country there is apparently no prospect of a law that provides for immunity, or an equivalent measure, because of the fundamental legal principle that forbids granting immunity during prosecution. Similarly, in another State party the authorities also argued that such a practice would be inconsistent with their legal tradition. Although both of these States parties have a civil law system, it should be noted that not all countries with similar legal traditions appear to share their reservations, at least not to the same extent. In any case, as mentioned earlier in the context of Article 15, the provision of Article 37 par. 3 points to the possibility of providing competent national authorities with the *option* of giving such a strong incentive to a cooperating person, should this be judged appropriate.

Among the States parties that do provide for some form of immunity (if not from prosecution itself then from imposing punishment), several countries (especially the ones with a common law system) alluded to the broad discretionary powers of public prosecutors, which allow them under certain conditions and in line with Article 31 par. 3, not to initiate or discontinue a criminal prosecution in exchange for the substantial cooperation of a participant in criminal activities with a law enforcement body. In addition, other States parties cited special statutory provisions regulating the favourable treatment of cooperating persons, either generally in respect of all offences or specifically in respect of corruption-related charges.

Examples

In one State party, a special provision of the Criminal Code empowers the Public Prosecutor's Office to terminate criminal proceedings against a suspected or accused person, with his or her consent, if the suspect or accused has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence which is important from the point of view of the public interest in the proceedings; and if, without this assistance, the detection of the criminal offence and collection of evidence would have been precluded or essentially

⁴⁰ UNCAC Legislative Guide, par. 475(a).

complicated. The Public Prosecutor's Office may, by its order, resume proceedings, if the suspect or accused has stopped providing assistance, or if he or she has intentionally committed a new criminal offence within three years after the proceedings have been terminated.

In another State party, a co-perpetrator or accomplice can become a witness for the prosecution, subject to discharge from prosecution. Under the terms of the relevant law, the prosecutor may inform the court that a person called as a witness on behalf of the prosecution will be required to answer questions which may incriminate such witness with regard to an offence. Thereupon, the court shall inform such witness that, among others, he or she is obliged to give evidence and to answer any question put to him or her; and that if he or she answers frankly and honestly all questions, he or she shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

Finally, a third jurisdiction recognizes two types of immunity: "transactional immunity" and "use immunity". "Transactional immunity" immunizes a defendant from prosecution for all crimes on which he testifies or cooperates. Although rarely granted, this kind of immunity is typically used with minor criminals who can provide significant testimony against more culpable defendants. The second, narrower type of immunity, "use immunity", is designed to overcome a witness' assertion of the privilege against self-incrimination when lodged in response to a particular question. In these cases, the immunity applies only to the response to a specific question, and the individual granted immunity may still be prosecuted as long as evidence provided during the testimony under immunity is not used in that prosecution.

Apart from the above possibilities, in several cases, as already seen under Article 15, *partial* immunity can be granted under certain conditions in cases of active bribery (and more rarely in cases of passive bribery or trading in influence), where the offender voluntarily, "before being recognized as a suspect" and without delay, or within a short period of time (1-2 months), informs the appropriate authorities about the presentation of the bribe. A similar approach, which is more akin to "granting immunity" than to "mitigating punishment" is followed in some cases with regard to money-laundering, whereby the perpetrator is not punished if, before the offence is completed, puts an end to his/her participation and notifies the authorities thereof. Most review teams were satisfied with such provisions in the context of Article 37 and in some cases encouraged national authorities to consider the expansion of the scope of the relevant legislation to cover specific instances of a broader range of offences under the Convention, and not only those of active bribery or money-laundering.

As with Article 15, however, some reviewers also expressed reservations about the compliance of the above provisions with Article 37 of the Convention. These reservations concerned, in particular, a piece of national legislation providing immunity for an official who reported having received a bribe within 30 days of having done so. The review team criticized this provision, arguing in principle that: (a) Article 37 only mentions immunity as a possibility for persons other than those who participate in crime – an incorrect interpretation, as explained below; (b) the national provision goes too far in allowing an official in effect to receive a bribe and consider the risks of detection over a 30-day period; and (c) this amounts to an "effective regret" type of provision which may be open to abuse as there is no discretion for the law enforcement community, and the declaration of the public official has to be accepted, regardless of the seriousness of the offence and the amount involved. Nevertheless, this outright rejection of the immunity provision in question is partly based on false premises. It should be clear that Article 37 does not refer to the possibility of granting immunity only to persons that have not participated in the investigated corruption-related crime but primarily to those who participated in it. Furthermore, and despite the fact that this sort of effective-regret provision for passive bribery offenders is unusual among States parties, and that its establishment may be considered to lie within their margin of appreciation, even if broader national measures could be seen as more effective to the full implementation of the Convention.

It is a different matter whether and to what extent law enforcement authorities should have discretion over any decision to grant immunity to the defendant in question. This is indeed a contested issue: The lack of discretion in the case of the aforementioned State party was viewed by some reviewers as an element undermining the goals of

the Convention, whereas other reviewers considered the fact that the authorities *had* discretionary powers as a factor that discouraged cooperation by persons who had participated in the commission of an offence. For example, in one State party where the law empowers the investigating judge or the court, at any stage of the proceedings, to offer a pardon to a person on condition that he/she makes a full and true disclosure of the circumstances within his/her knowledge relating to the offence and of every other person involved in its commission, the national authorities argued (and the review team appeared to accept) that this arrangement does not ensure sufficient cooperation because, among others, “it does not provide (an accomplice with) “the choice to cooperate of his or her own accord to claim any immunity or exemption”. The problem here seems to be none other than the discretionary character of the decision on granting pardon.

Such conflicting views indicate that the prerogative of the appropriate solution for the procedural implementation of the various forms of immunity should best be left to the States parties themselves. However, it should be noted that some degree of discretion appears in most cases unavoidable, if only regarding the level of cooperation and the sincerity and value of the disclosures made by the cooperating person. Based on such discretion, a more flexible application of the relevant provisions is possible, allowing the public prosecutor to “weigh” on a case-by-case basis the degree of cooperation of the perpetrator of the crime. This is probably the reason why, as evidenced in the majority of reviews, non-discretionary measures are not common. Release from liability or exemption from penalty is normally granted on a discretionary basis by prosecutors or courts. Where this applies, it is important to make an effort to preclude doubts and reservations towards the method used by taking all necessary precautions to curb possible abuses. For example, as is the practice in one State party, law enforcement agencies could seek to corroborate the information provided before granting immunity to a collaborator. If the decision is taken by the prosecution authorities, some form of judicial review may have to be provided for, in order to ratify the terms of any informal arrangements and render the decision binding on all parties.⁴¹ The national laws could foresee the possibility of withdrawing immunity, in the event that the person involved has tried to mislead a law enforcement body. And the State party could issue guidelines, setting out in detail the principles of exercising the available discretion, which could serve to assist the competent authorities in deciding whether the granting of immunity from prosecution may be appropriate in the interests of justice.

Finally, while immunity can be a powerful inducement to a person involved in an offence to cooperate and may serve to bring to court important corruption cases that would otherwise remain unsolved, one should bear in mind, as noted in one review, that the complete exception from punishment of an offender 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, it is necessary to strike a balance between the indisputable advantages of granting immunity to deal with specific cases and the need to enhance public confidence in the administration of justice.

International arrangements: Par. 5 of Article 37 urges States parties to consider entering into agreements or arrangements between them, to potentially provide preferential treatment by the competent authorities of one State party to a cooperating person located in another country. The great majority of States parties have not entered in any such arrangements and have not given any indication that they have considered doing so, leading in most cases to corresponding recommendations. Some States parties expressed the willingness to take compliance measures; in one State party, the reviewers noted the interest expressed by the national authorities in learning about the experience of other countries on this issue, and in receiving model agreements or arrangements.

3. Cooperation between national authorities

The collaboration of public authorities and officials with the agencies and authorities in charge of investigating and prosecuting criminal offences is essential to the overall anti-corruption efforts, and most States parties have taken measures designed to encourage and foster such cooperation. Article 38 urges States parties to ensure that

⁴¹ UNCAC Legislative Guide, par. 475(b).

public officials and institutions notify, on their own initiative, law enforcement authorities where there are reasonable ground for them to believe that an offence of bribery of national public officials, bribery in the private sector or money-laundering has been committed; and also to provide all necessary information for the investigation of such offences to law enforcement authorities.

Indeed, while some States parties appear to regulate solely the manner and procedures of referrals of suspected offences to the national prosecution services, several others have established (in addition to said regulations) a direct and definite obligation of public officials to report to the law enforcement authorities, on their own initiative, any crimes and irregularities they become aware of in the course of performing their duties, including incidents of corruption. One State party was contemplating the introduction of such an obligation and a recommendation was issued for it to proceed and adopt this measure.

Examples

The legislation of one State party specifies the procedures to follow for public officials to report information on any reasonable grounds they may have to believe that a corruption offence took place. In case a public official or public institution receives information from citizens regarding an alleged corruption offence, such information shall be referred to the internal investigation unit of that institution. The internal investigation unit shall conduct a preliminary review and, in case there are sufficient grounds to believe that elements of a corruption offence are detected, it can recommend to the head of that institution to refer the matter to the law enforcement agencies (i.e. the Prosecutor's Office, according to the Criminal Procedure Code).

Similarly, in another State party, reporting administrative errors and violations that create conditions for corruption, fraud or irregularities is a direct obligation of every public official, as specified in existing ethical codes and the law on civil servants. In addition, specialized "inspection" exist in every central public body, which could be charged with collecting, analysing and checking for signs of corruption and informing the prosecuting authorities of evidence concerning criminal activities. A Chief Inspectorate attached to the Council of Ministers coordinates and supports the activities of each of the inspection.

Failure to report concerns or prima facie evidence of criminal activity may lead to disciplinary measures against the official involved. Moreover, in some countries, especially of the Eastern European Group, the non-disclosure of suspicions of "serious" or "very serious" crimes, including some of the offences established under the Convention (such as money-laundering), constitutes per se a criminal offence and is punishable by a fine or imprisonment of up to five years in some cases.

Various measures have also been established by States parties to encourage cooperation and information exchange among national authorities, including, the duty, anchored in law, to cooperate and provide all necessary information to the prosecution or national anti-corruption agencies. Inversely, there are laws granting members of the public prosecution services or anti-corruption bodies the power and authority to demand and collect intelligence and specific reports from national, provincial and local organizations; to request the support of police and security forces, e.g. in order to start proceedings and summon people to testify; and to analyse information produced by other public authorities. In this context, many reviews specifically cited the functions of the national financial intelligence units (FIUs) in receiving, analysing and monitoring suspicious transaction reports (STRs) made by reporting entities, and disseminating evidence of corruption or money-laundering to the appropriate State authorities for further action and investigation. Frequently, inter-agency agreements, memoranda of understanding, joint instructions or networks of cooperation and interaction have been established. Examples of this include various forms of agreements between the prosecution service or the national anti-corruption authority and various ministries, between the FIU and other anti money-laundering stakeholders, or between the different law enforcement agencies themselves, all of which are aimed at sharing intelligence on the fight against crime and corruption, and carrying out other forms of collaboration.

Example

In one State party a constitutional provision requires all spheres of Government to cooperate with one another in mutual trust and good faith by fostering friendly relations, assisting and supporting one another, consulting on matters of mutual interest and adhering to agreed procedures. Established policy requires effective cooperation between the prosecution service, investigative agencies and other public authorities, and non-compliance may lead to disciplinary proceedings.

A number of reviews attached particular importance to the existence of (electronic) registers, databases, automatic update systems, or other ways through which information can be shared in order to promote cooperation between the competent authorities. In one case, the national authorities were encouraged to proceed with plans to allow the national anti-corruption agency to have access to the databases of all State institutions. More importantly, many governmental experts highlighted the value of establishing a *single*, central database or nationwide information system on corruption offences (for example within the national anti-corruption body) as this could facilitate the sharing and reporting of information by State agencies to the investigating and prosecuting authorities and also help to better track cases from the outset of an investigation through to conclusion of the criminal process. Shared databases, however, may not always reflect the needs of a criminal justice system and may even run contrary to other considerations, notably confidentiality requirements. This is illustrated by the fact that the police in one State party reported that maintaining *separate* databases was necessary due to the difference in mandates. In their view, as long as the prosecutors and law enforcement officers are working closely together, this should satisfy the need to share critical, relevant information.

Finally, in one review it was noted that cooperation in general would be enhanced by a comprehensive analysis of the state of corruption, its structure, dynamics and trends, as well as analysis of the activity on detection and prevention of crime as this would make it possible to identify the main future directions for countering corruption. Measures to promote such an outcome include the central collection of statistics, unified reporting on corruption cases and consolidation of the reports by a single body; again, the establishment of centralized databases appears helpful in this context, as well as regularly convened coordination councils of law enforcement and supervising bodies.

Example of implementation

Staff secondments among different Government and law enforcement agencies with an anti-corruption mandate were deemed to foster cooperation and inter-agency coordination and contribute to the efficient functioning of these agencies.

Challenges: The most common challenges in this area relate to ensuring effective inter-agency coordination, especially among agencies with an anti-corruption mandate; enhancing the implementation capacities of anti-corruption bodies and law enforcement agencies, especially regarding communication and data sharing; considering ways and means to better use available resources through the creation of synergies in order to establish comprehensive statistics on anti-corruption and ensure a more efficient management of corruption cases. Several observations and recommendations were made with regard to these problem areas. As noted in one review in the context of both the present Article and Article 36, improved and enhanced inter-agency coordination could prevent fragmentation of efforts and ensure the existence of an efficient “checks and balances” system as an effective response to corruption.

In some cases public officials were reluctant to report, especially where anonymous reporting was not provided for and feared possible retaliation. Furthermore, in one State party public organizations did not regularly report incidents of corruption but instead resolved the incidents by taking administrative measures of their own; this is considered to amount to a compromise in the fight against corruption.

4. Cooperation between national authorities and the private sector

Article 39 requires States parties to foster a cooperative and consensual relationship between their investigating and prosecuting authorities and the private sector in matters pertaining to corruption offences. Indeed, several States parties reported strong regulatory and co-regulatory frameworks governing the relationship between the private sector and law enforcement authorities, with various measures encouraging cooperation, ranging from “Corporate Governance Principles and Recommendations”, Codes of Conduct, memoranda of understanding and official or unofficial partnerships with private sector stakeholders, regulators and practitioners. Other frameworks could include legal provisions empowering members of the public prosecution services or national anti-corruption agency to request reports and evidence from private entities and individuals, as partly described under Article 31 par. 7, and providing for punishment in case of failure to comply.

Examples

In one State party, the anti-corruption agency actively cooperates with civil society and has signed a memorandum of understanding with a network of NGOs to combat corruption. Agency officers participate in events organized by NGOs and civil society representatives contribute to their training, and also receive information on corruption allegations from NGOs. Likewise, they regularly conduct public awareness-raising activities against corruption, appear on television and radio, participate in roundtables and other public discussions and issue press releases.

In another jurisdiction, the Ministry of Justice has established an anti-corruption cooperation network, which brings together the key governmental authorities, as well as stakeholders representing the private sector, civil society and the research community, in order to ensure inter-institutional coordination and awareness-raising. It is hoped that this network will provide the driving force behind future efforts to fine-tune the country’s legal and institutional anti-corruption machinery.

In a third State party, the reviewing States parties acknowledged the national anti-corruption commission outreach activities towards the private sector. Nearly half of the workshops held by the commission were conducted in collaboration with civil society and consisted of lectures to private entities; this serves to highlight, among others, the fact that organizational culture can be an important safeguard in helping to curb corruption.

The measures cited by States parties are most often related to financial institutions – the objective of Article 39 par. 1 – and often focus on money-laundering. They concern to a large extent the activities of national FIUs and especially the obligation of a series of reporting entities from the private sector specified in the anti money-laundering legislation (e.g. banks, credit institutions, financial houses, stock agents, futures and options brokers, exchange bureaus etc.) to take due diligence measures, inform the respective FIU (or in some cases the Public Prosecutor directly) of any suspicious fact or transaction for the purposes of detecting criminal offences, and provide information and documents to authorized officers upon request. Normally, during the investigation of a report of suspicious transactions, the individuals involved may not use the argument of banking, stock or professional secrecy against the FIU, nor any legal or contractual commitments related to confidentiality. Related measures in the area of money-laundering include training courses and workshops for financial intermediaries and initiatives aimed at raising awareness between the competent national authorities and the private sector.

In several cases, recommendations were issued to broaden the scope of cooperation between national law enforcement authorities and private sector entities, and to enhance awareness-raising on anti-corruption among the public, particularly when no collaboration policies existed, where only measures regarding the participation of civil society had been taken, or inversely, where States parties reported only partnerships with financial institutions. In one case, limitations on obtaining information and records from private sector institutions due to bank secrecy and confidentiality restrictions outside the context of STRs were noted as a concern.

Encouraging the reporting of corruption offences: Par. 2 of Article 39 – a non-mandatory provision – urges States parties to encourage their nationals and persons with a habitual residence in their territory to report to the

law enforcement authorities the commission of a corruption offence in the same manner as public officials. Indeed, a number of States parties have established a general obligation to report corruption incidents, valid for all citizens or encompassing specific categories of professionals in the private sector. Furthermore, as with public officials, non-disclosure by citizens may sometimes constitute a crime in itself. Nevertheless, the number of States parties with provisions of this kind is far lower than those States imposing an obligation to report on their public officials. Normally, the private sector has discretion on whether to report cases falling under the Convention to law enforcement agencies. This was generally accepted by the reviewing experts, although in some cases recommendations were issued to adopt equivalent measures, particularly to the extent that the countries involved had introduced or planned to introduce the offence of corruption in the private sector in their legal framework.

Some reviews also referred to further measures encouraging private persons to report corruption offences, including practical procedures facilitating corruption reports, establishing telephone hotlines and internet services to report crime in general and corruption in particular, raising social awareness of these possibilities (e.g. through lectures, exhibitions, media publicity and promotions), and running cooperative programmes to fight and prevent crime, involving all relevant stakeholders (members of the Government, the police, the media and the community). The launch of a special corruption hotline by the anti-corruption department of the prosecutor's office in one State was considered a "significant and positive example in implementing par. 2 of Article 39". In the same context, another review team emphasized the point that a better and more effective implementation of the provision at the domestic level could be achieved through building the capacity to collect and systematize information collected through corruption hotlines (e.g. number of reports received, number of reports that have contributed to the investigation or prosecution of corruption offences, follow-up to these reports, etc.). It should be noted, as done by the reviewing experts in a number of reviews, that some of the above measures coincide with those described under Articles 32 and 33 and raise many of the same issues discussed there, e.g. with regard to the keeping the identity of the reporting person confidential and providing for the possibility of anonymous reports.

A measure of a different nature, aiming likewise to encourage people to report the commission of offences, is the provision of material or immaterial *incentives*. In at least six States parties, persons who provide information that leads to the return of State assets, the disclosure of all or specific offences (including bribery and embezzlement) or in general to the arrest of an offender, may claim a reward, either from the State itself or from private funds gathered in the context of a crime-fighting cooperative programme. In one of these cases the reviewing experts noted the relevant provision as a good practice, despite the fact that it had not yet been applied. In a further State party, the law provides for the possibility of granting commendations to members of the public who have rendered assistance in efforts to prevent and eradicate acts of corruption, although the relevant provision appears not to have been activated.

Finally, one review looked into the aspects of anti-corruption policy covered by Article 39 par. 2 under a broader perspective, bringing to attention the critical importance of instilling public confidence and trust in the institutional framework charged with upholding the rule of law, as a basic precondition of convincing citizens to report corruption offences. This requires ensuring the transparency, accountability and consistency of the judicial system, including the timely resolution of criminal prosecutions. The reviewing experts were pleased to note that in furtherance of these objectives, the State in question had among others recognized the limits of self-regulation with respect to the oversight of the legal profession; had prohibited in camera judicial proceedings and ex parte meetings; had improved the disciplinary system with respect to the possibility of misconduct by judges; and had proceeded with case management reforms eliminating forum shopping for judges and otherwise improving case processing.

B. Other provisions

1. Bank secrecy

As already noted under Article 31 par. 7, in most jurisdictions, bank secrecy did not present significant issues. Even in cases where bank secrecy rules are in place, State parties have appropriate mechanisms available to overcome the obstacles arising out of such rules when investigating offences established under the Convention, and to compel banks and financial institutions to disclose the information they have on their clients, or any operation or business they do with them, upon request by a judge, a public prosecutor or another competent authority (including in most cases the national FIU), usually depending on the stage of the proceedings. This also implies that those persons providing reports or information to the competent authorities are immune from civil, criminal or administrative sanctions and exempted from liability arising from secrecy disclosure, i.e. the disclosure of information they are obliged not to divulge. The reviewing experts made particular reference to the practice of granting law enforcement agencies effective and prompt access to financial information, and applauded legislative provisions according to which orders involving the lifting of banking secrecy in the context of criminal investigations are not subject to rigid evidentiary or procedural requirements.

Examples

In one State party, the reviewers noted as particularly interesting and possibly an example of a good practice worth suggesting to other States parties, a special rule applicable to investigations directed against civil servants for offences committed in the exercise of their functions, which gives the Prosecutor's Office the power to order the *complete* disclosure of their current accounts and respective balances, and not only those records relating to specific transactions that are of direct relevance to the proceedings.

In another State party, a national register of bank accounts has been created to facilitate the work of investigative services. The register is maintained by the General Directorate of Public Finance and is used to identify accounts of all kinds (banking, postal, savings, etc.) and to provide authorized persons (including the judiciary and judicial police officers investigating a criminal offence) with information on accounts held by individuals or companies.

In the few jurisdictions where the lifting of bank secrecy was an area of concern, it was noted that the obstacles were mostly related to possible delays during the process of obtaining judicial authorization for this purpose. Accordingly, a number of recommendations were issued for States to consider a relaxation of the relevant standards and procedures in the context of domestic investigations of corruption cases, taking into account the overall approach of the national legislation as to the authority capable of providing the necessary authorization. For example, in one case where the lifting of bank secrecy is provided through court permission, upon request by a prosecutor when there is evidence of the commission of a criminal offence, it was recommended to ease the formal requirements for obtaining authorization – possibly bearing in mind a simplified procedure already in place in the State party in question with regard to money-laundering, according to which the Prosecutor General is able to require banks *directly* to produce the relevant data.

Most notably, in another case, difficulties for investigators to obtain the lifting of bank secrecy were noted, not only because of the delays in the treatment of requests for the lifting of bank secrecy by judges and in the subsequent provision of information by concerned banks, but also because of the particularly high standards of proof required by the supervising judge to provide his/her authorization. A recommendation was issued to adopt suitable measures to facilitate the practical implementation of the standards on the lifting of bank secrecy.

Finally, in one State party, while law enforcement agencies and judges are able, in practice, to obtain or seize bank, commercial or financial records from banks and other financial institutions, this appears to be conditioned on the written permission of the Chairman of the Central Bank. Accordingly, a recommendation was made to eliminate this requirement.

2. Criminal record

Article 41 – an optional provision – encourages States parties to consider adopting “such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with the Convention.” According to an interpretative note, the term “conviction” should be understood to refer to a conviction no longer subject to appeal.⁴²

This Article has not been implemented in several jurisdictions. In some cases no laws or practice appear to exist with regard to the use of foreign criminal records, whereas in other States parties it is clear that previous convictions in another State party *cannot* be taken into account with regard to corruption offences, or can be taken into account to a limited extent (e.g. when related to money-laundering).

On the other hand, in many cases national courts can take into account similar convictions that have been recorded elsewhere, either in the course of the criminal proceedings against a person charged of a corruption offence (e.g. as evidence of a person’s “bad character” or lack of credibility), or as most often the case at the stage of sentencing a convicted person (e.g. when determining recidivism, the application of mitigating circumstances such as “past irreproachable conduct”, etc.). Often, this is achieved by reference to bilateral mutual legal assistance agreements or other international legal instruments in criminal matters, such as the Riyadh Agreement on Juridical Cooperation, the European Convention on the International Validity of Criminal Judgments, EU Council Framework Decision 2008/675/JHA of 24 July 2008, the Convention on Mutual Assistance in Criminal Matters between the Community of Portuguese Speaking Countries, the CIS Convention on Legal Aid and Legal Relations in Civil, Family and Criminal Cases, and the European Convention on Mutual Assistance in Criminal Matters. These instruments set forth provisions on the exchange of national judgment data with other States and more specifically on the regular exchange of information about criminal convictions or security measures imposed on nationals or residents of the participating States within one another’s territory. Additionally, information on judgments imposed on offenders by foreign countries is regularly exchanged through police channels, as well as through FIU networks (e.g. in relation to predicate offences for money-laundering).

Examples

In one State party, data concerning a citizen or permanent resident, an alien holding a residence permit or with permanent right of residence, or a legal person registered domestically who has been convicted by a foreign court, shall be entered in the punishment register, in the cases and pursuant to the procedure prescribed by international conventions and cooperation agreements between state agencies.

EU countries have a network of judicial records, allowing for the exchange of convictions and extracts of criminal records in an almost fully automated and secure fashion, with automatic translation, and using a table of offences and penalties that are valid for all member states and that allocate a unique code for each family of offence and punishment.

As noted in one review, States parties considering a more thorough application of the present Article may find it convenient to allow other countries to have direct access to their criminal records, both from a legal and technical standpoint. With regard to the former, States parties must evaluate whether their legislation allows for the international transfer of data such as criminal records, and eventually update it to this effect. With regard to the technical aspect, it may prove convenient for States parties to appoint a central authority to be in charge of the international exchange of the relevant information; this duty could be assigned to the national authority in charge of international cooperation in criminal matters.

⁴² *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 325.

3. Jurisdiction

With respect to national jurisdiction over the offences established in accordance with the Convention (international criminal law *stricto sensu*), the mandatory provisions of Article 42 require first of all that States parties adopt the territoriality and flag principles, as well as the principle “aut dedere aut judicare” (extradite or prosecute) for the purposes of Article 44 par. 11, i.e. in cases where they do not extradite a person present in their territory solely on the ground that he or she is one of their nationals.

Territoriality and flag principles: Indeed, all States parties have established jurisdiction over acts committed wholly or partly within (or having effect on) their territory, as required by Article 42 par. 1(a) and the relevant interpretative notes to the Convention.⁴³ This also refers to offences committed through the use of computer technology, whereby there should be a general understanding that the Convention covers the exercise of jurisdiction over offences that were committed using computers, even if the effects of the offence occurred outside the territory of a State party.

The great majority of States parties also extend their “territorial” jurisdiction over offences committed wholly or partly on board aircraft and vessels registered under their respective laws, as required by the provision of Article 42 par. 1(b). Only four States parties, all of them with common law systems, do not appear to apply the flag principle in all possible occasions, and reviewing experts have recommended this approach.

Aut dedere aut judicare: As to the adoption of the principle “aut dedere aut judicare”, which requires above all the possibility of establishing jurisdiction over offences committed abroad by a country’s own nationals, most States parties have (at least to some extent) implemented the relevant requirement, and were sometimes commended by reviewers for this practice. Several States parties have established measures that prohibit the extradition of nationals or allow such extradition only when applying international treaties, and according to the principle of reciprocity, as discussed further under Article 44, in a number of cases there are no constitutional or legal limitations for the surrender in extradition of a country’s own nationals. Indeed, the tendency among many States parties is not to refuse to extradite one’s own nationals on the basis of nationality so that the issue of prosecution in lieu of extradition ends up being of no particular practical significance. In contrast, Article 42 par. 4, which urges States parties to establish their jurisdiction in all cases where an extradition of the alleged offender does not take place, does not seem to apply or applies in limited circumstances (when stipulated in a bilateral or multilateral treaty) in the majority of States.

Examples

In one State party, the extradition of the country’s own nationals is possible. If an international treaty establishes that nationality is irrelevant for the purposes of extradition, the person will not have the option of being prosecuted by domestic courts, but must be extradited. The trend is that requests for the extradition of nationals are being granted. If no extradition treaty exists, the person may have the option of being prosecuted in one’s own country by the same court that would have the power to reject the extradition. In this case, any existing evidence will be requested to be transferred from the State requesting the extradition. Thus, the State in question has fully implemented the requirement of prosecuting its own citizens when an extradition request is rejected solely on the basis of nationality.

Further to the above, another State’s criminal legislation is also applicable to a foreigner who commits abroad, against a foreign country or a foreigner, a criminal offence punishable under the law of the country it was committed in by an imprisonment sentence of five years or more, should he/she be caught in the territory of the State in question but not surrendered to a foreign country. Unless otherwise provided, a court of law may not in such a case impose a sentence more severe than the one provided for under the law of the country in which the criminal offence was committed.

⁴³ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 336.

Apart from the above basic principles, States parties are also encouraged (in Article 42 par. 2) to widen the scope of their jurisdiction extraterritorially, over cases where their nationals are victimized (passive personality), the offence is committed by a national or stateless person residing in their territory (active personality), the offence is linked to money-laundering offences planned to be committed in their territory, or the offence is committed against the State (State protection). Indeed, most countries have expanded the scope of their jurisdiction to include one or more of the above jurisdictional links, with very few continuing to abide to a mostly territorial jurisdictional tradition that does not provide for any form of extraterritorial jurisdiction in corruption matters.

Active personality: Among the alternative extraterritorial jurisdictional bases, the one to which the most importance should be attached appears to be the active personality principle, given also the necessity of covering offences such as international bribery, which will usually be committed by nationals abroad.⁴⁴ Most States parties have introduced this principle, at least with regard to the most pertinent offences of foreign bribery and/or money-laundering. Reviewing experts have commented on the broad jurisdictional provisions of this nature, applying both to conduct within the country and to conduct by citizens, residents and companies overseas, and highlighted as good practice extended versions of the active personality principle, covering all offences committed abroad by national public officials in the discharge of their duties or as a consequence thereof, or specifically acts of corruption committed abroad by foreign citizens exercising public authority.

Example

With respect to bribery, in one jurisdiction an extended active nationality principle applies, covering all persons who have “a close connection” with the State party, including not only citizens but also individuals ordinarily resident in the country and bodies incorporated under domestic law (including the domestic subsidiaries of foreign companies).

Issues were noted in a number of States parties with respect to the fact that the active personality principle had not been established, as envisaged in the Convention, as well as in at least three other cases where the relevant provisions did not extend to stateless persons who have their habitual residence in that State’s territory. Apart from these cases, in several States parties, the requirement of *double criminality* (or of the lack of any State authority exercising criminal power in the place of commission) is applied to offences committed abroad by a national, although this general principle may not be applicable in respect of felonies, “offences of corruption or other offences against service”, or specifically in respect of active and passive bribery and/or influence peddling towards national and foreign public officials. Furthermore, in four States parties, nationals can only be prosecuted for a number of offences committed abroad on the basis of either a complaint by the victim or its legal successors or an official denunciation by the authority of the country where the offence was committed. In one of these countries, the reviewing experts considered that for offences committed abroad by their citizens, States parties to the Convention are encouraged to establish their competence independently of any condition and for this reason recommended that the State in question remove from the law the conditions mentioned above. One should keep in mind, however, that the provisions of par. 2 of Article 42 are optional and afford States parties a wide margin of appreciation as regards the determination of the jurisdictional bases of their criminal law.

Passive personality: In about half of the States parties, the passive personality principle has not been established or is restricted or not clearly defined, drawing in some cases corresponding recommendations by the reviewing experts. Often, where there *are* provisions establishing jurisdiction over offences committed against nationals outside the territory of the State, these do not encompass offences of lesser importance; moreover the condition of dual criminality (or of the lack of a State authority exercising criminal power in the place of commission) may need to be fulfilled, as is the case also with active personality.

⁴⁴ UNCAC Legislative Guide, par. 213.

Example

The law in one State party recognizes an extended passive personality principle, according to which national courts have jurisdiction over an offence committed abroad that has been directed at a citizen, a domestic corporation, foundation or other legal entity, or a foreigner permanently resident in the country, insofar as the act is punishable by imprisonment for more than six months. Furthermore, the requirement of double criminality applies, meaning that if the offence has been committed in the territory of a foreign State, national law will only apply if the offence is punishable also under the law of the place of commission, and a sentence could have been passed on it by a court of that foreign State. In this case, a sanction that is more severe than what is provided by the law of the place of commission shall not be imposed.

State protection: Regarding the principle of State protection, in more than half of the States parties this was limited or had not been established, and recommendations were issued accordingly. Among the countries that do recognize this principle, most refer in general to acts directed “against the (national, military or economic rights or) interests” of the State, acts directed at or “interfering with the exercise of State authority” or offences against the State or the public administration. The adoption of jurisdictional bases of this kind may prove particularly important with relation to corruption cases, where a foreign person has bribed a domestic official abroad. As noted in one review, in such cases the briber (foreign person) will be prosecuted because the bribery offence has affected the proper functioning of public institutions and administration, and the interests of the State.

Article 42 par. 2(c): With regard to the optional jurisdictional basis suggested in Article 42 par. 2(c) for attempts and participatory acts committed outside the territory of a State with a view to the commission of a money-laundering offence within its territory, States parties have not normally introduced any special jurisdictional provisions intended to cover such conduct. Nevertheless, in most cases the proposed principle is satisfied by the general provisions regulating the place where an offence is deemed to have been committed, e.g. asserting jurisdiction against people acting abroad where the consequences of the act are intended to be realized in national territory or against accomplices when the principal act is committed within the national borders.

Coordination of actions: Regarding the obligation of States parties conducting an investigation, prosecution or judicial proceeding in respect of the same corrupt conduct to seek to coordinate their actions, as stipulated by par. 5 of Article 42, most countries appear to be in compliance with the above provision, based usually on established principles of mutual legal assistance and international cooperation regulations, facilitating information exchange between law enforcement agencies and central authorities in relation to extradition processes, and providing for consultation mechanisms to resolve possible conflicting jurisdictional claims over the same conduct. Such consultation procedures may result in one State party deferring to the investigation or prosecution of another, or in an agreement to pursue certain actors or offences, leaving other actors or related conduct to the other interested States parties.⁴⁵ However, some countries have provided insufficient information on the way they conform to this requirement, and in two cases the reviewing experts highlighted the need for legislative or other action to foster consultations between the competent authorities.

Example

Two States parties referred to a mechanism, in operation among EU member states, to settle disputes between States on jurisdiction conflicts. As pointed out by the authorities, there should be direct consultations between competent authorities of the States involved in order to achieve a consensus on any effective solution aimed at avoiding the adverse consequences arising from parallel proceedings and avoiding a waste of time and resources of the competent authorities. Such effective solution could notably consist in the concentration of the criminal proceedings in one State, for example through the transfer of criminal proceedings. It could also consist in any other step allowing efficient and reasonable handling of those proceedings, including concerning the allocation in

⁴⁵ UNCAC Legislative Guide, par. 512.

time, for example through a referral of the case to the above-mentioned mechanism when the competent authorities are not able to reach consensus.

Further jurisdictional bases: Finally, par. 6 of Article 42 specifies that the listing of jurisdictional bases contained in this Article is not exhaustive and that States parties may well establish rules of criminal jurisdiction which extend beyond the ones provided by the Convention – the most important example obviously being the principle of universal jurisdiction – without prejudice to norms of general international law. While there appears to be some confusion among national authorities on the meaning of this provision, and the information provided is not always adequate, it appears that no other bases of criminal jurisdiction over corruption offences have been established in the great majority of States parties. One State party mentioned that in addition to the jurisdictional bases mentioned in Article 42, it applies universal jurisdiction; however, this does not seem to specifically refer to corruption offences. In contrast, in another State party has introduced the principle of universality over active and passive bribery offences; however, some uncertainty remains and reviewing experts recommended that this point needs to be clarified in the interpretation of existing legislation on criminal jurisdiction through jurisprudence in order to enable a more comprehensive and flexible scheme of criminal jurisdiction over corruption offences.

PART TWO: INTERNATIONAL COOPERATION

A key difference among States parties with respect to the implementation of their respective international cooperation obligations stems from their different legal systems: In countries following a “dualist” approach, the domestication of the provisions of multilateral or bilateral treaties or agreements is only possible through the enactment of enabling legislation. In other words, the ratification of the Convention does not suffice for its application, but needs to be supplemented by the adaptation of an internal procedural framework that fulfils its requirements.

In contrast, the Constitution of countries with a “monist” legal system allows for the direct application of ratified international treaties, complementary to national statutory law. States parties belonging to this category of countries do not need to adopt detailed implementing legislation on international cooperation, by virtue of the fact that the provisions of the Convention regulating international cooperation (Articles 43-44 and 46) are to a significant extent self-executing (at least to the extent that they do not entail restriction or deprivation of constitutional rights), and have become an integral part of their domestic legal system, normally with a status above that of regular national laws.

Taking into account the distinction between monist and dualist systems, it becomes clear that domestic legislation serves a three-pronged purpose in relation to international cooperation: first, to give effect to the provisions of ratified multilateral or bilateral treaties or agreements in countries with a dualist system; secondly, to provide for additional or complementary procedural requirements that need to be fulfilled in extradition or mutual legal assistance proceedings; and thirdly, to be used as an alternative legal basis for international cooperation in the absence of a treaty.

A different question is whether a State party *needs* a treaty base for international cooperation, as addressed in Article 44 pars. 5-7. As will be shown below (under Article 46), States parties generally do not require a treaty base for mutual legal assistance, whereas some do for extradition. Further, some countries can use the Convention as the legal basis for extradition, while others cannot, as addressed in Article 44 par. 6.

Finally, States parties are required to apply the provisions of Article 46 pars. 9-29 (“mini-treaty”) in the absence of a bilateral mutual legal assistance treaty, and are encouraged to apply them in a complementary manner to existing mutual legal assistance treaties.⁴⁶

Chapter I. Extradition and transfer of sentenced persons

A. Extradition

Most States parties regulate extradition in their domestic legal systems, mostly in the Constitution, the Code of Criminal Procedure or special “Extradition Acts” and laws on international cooperation. Not all, however, regulate the matter with the same level of detail. For example, in two States parties, there are limited extradition-related articles in the Constitution but no ad hoc provisions. In another country, national legislation is in place, but only with respect to money-laundering offences, thus indicating a “compartmentalized” approach to extradition. This is likely to be confirmed with the adoption, by the same State party, of an anti-corruption bill which will contain extradition-related provisions limited to the area of corruption. Two States parties did not have national legislation on extradition. While some States parties rely heavily on treaties, others stressed the importance of non-binding arrangements in their extradition practice, as well as arrangements made at the sub-regional level, as they often provide a less formalistic approach to the mutual surrender of fugitives than fully-fledged treaties.

Extraditable offences: Most extradition treaties, and especially the more recent ones, appear to identify “extraditable offences” on the basis of a minimum penalty requirement as opposed to a list of offences, thereby following the example of the United Nations Model Treaty on Extradition.⁴⁷ In the majority of States parties, extraditable offences for the purposes of a criminal prosecution are those punishable by deprivation of liberty for a period of at least one year or a more severe penalty, unless otherwise provided by a special arrangement. In more rare cases, national laws or bilateral treaties set a threshold of at least two years of imprisonment for designating offences as extraditable ones, and in one State party of at least six months. Only three States parties stated that they rely on *lists* of extraditable offences. In one of those cases, the list includes bribery, embezzlement and money-laundering, but omits all other UNCAC-based offences. As a result, the reviewing experts recommended that the list of extraditable offences be amended to include, as a minimum, those conducts where criminalization is compulsory under the Convention. Finally, with regard to extradition for the purposes of enforcement of a foreign sentence, the surrender of the offender is permitted if he/she has been sentenced to imprisonment of between two and eight (usually four) months or to a more severe punishment.

One State party highlighted that the shift from rigid list-based treaties and its increasing reliance on the minimum penalty requirement approach in the negotiation of new international treaties injected an important element of flexibility into the practice of extradition. The possibility of providing for minimum penalty requirements is also explicitly acknowledged in Article 44 par. 8 of the Convention, which leaves no room for doubt that extradition is subject to the limitations of domestic law. Nevertheless, as a result of such thresholds, extradition for the purposes of prosecution may not be possible in cases where Convention-based offences are punishable by a lesser penalty. One way to address this situation would be to increase the applicable penalties to ensure that all forms of conduct criminalized in accordance with the Convention become extraditable.

In line with the spirit of Article 44 par. 3 of the Convention, most States parties make “accessory offences” extraditable if the main offence satisfies the minimum penalty requirement. Slight variations to this rule were detected in three cases: In one State party, the persons sought have to express their consent in order to be extradited for accessory offences which are not “extraditable offences” themselves (i.e. offences punishable by a

⁴⁶ Details under Article 46.

⁴⁷ Adopted by General Assembly resolution 45/116, subsequently amended by General Assembly Resolution 52/88.

period of less than 12 months). In two other cases, accessory offences are considered to be extraditable only if the maximum penalty incurred by all such offences reaches the threshold of two years' imprisonment. Nine States parties confirmed that as a rule extradition for accessory offences would not be possible, drawing appropriate recommendations by some reviewing experts. All the same, it should be kept in mind that Article 44 par. 3 contains an optional provision.

Dual criminality: Dual criminality appears as a standard condition for granting extradition of a person present in the territory of the requested State party. The majority of States parties explicitly set out the dual criminality principle (as invoked in Article 44 par. 1) in their domestic legislation; two State parties asserted that it is only applied in practice, and two further countries did not consider the absence of dual criminality as a ground for rejecting an extradition request, while another considers it as an optional, as opposed to a compulsory ground. The latter State party confirmed that it could grant extradition for conducts that do not constitute offences in its criminal legislation based on the principle of reciprocity. Furthermore, two States parties expressed an interest in, or have developed draft provisions modifying their legislation to remove the dual criminality requirement for some or all of the offences set forth in their penal laws, thus indicating their intention to implement the optional provision of Article 44 par. 2 of the Convention.

Exceptionally, some international instruments foresee an easing of the dual criminality principle among participating States. Thus, member States of the European Union stated that a wide variety of offences, including "corruption" and money-laundering, give rise to the surrender of fugitives pursuant to a "European Arrest Warrant", without the surrender being subject to the double criminality requirement. Similarly, one State party referred to the existence of bilateral treaties that dispense with this requirement, as well as to a recently signed Quadripartite Agreement on Simplified Extradition, which states that the requirement of dual criminality shall be deemed as met when extradition is requested due to the consideration of the acts concerned by the (requesting and requested) States as offences in accordance with international agreements obliging them to do so.

The dual criminality principle is usually deemed fulfilled regardless of the terminology used to denominate the offence in question, or the category of offences to which it is considered to belong. The requested States need only establish that an equivalent offence exists in their domestic law to the one for which extradition is sought. In this context, Article 43 par. 2 of the Convention, which contains a corresponding obligation, appears to codify the existing practice between States parties.⁴⁸

While some States parties have indicated that they have not encountered any obstacles in obtaining or extending cooperation to other States parties due to the operation of the dual criminality principle vis-à-vis corruption-related offences, the same does not always appear to be the case with other countries due to the non-criminalization of non-mandatory UNCAC offences, such as bribery of foreign officials, bribery in the private sector and illicit enrichment. For example, one State party highlighted the fact that the non-inclusion of foreign public officials and officials of public international organizations in the definition of public officials used in domestic legislation, coupled with a strict reading of the dual criminality principle, meant that extradition for the offences, as set forth in Article 16 of the Convention, is not possible. Taking this into account, the reviewing experts often urged States parties to consider relaxing the dual criminality requirement and granting the extradition of a person for offences that are not punishable under its domestic law. Most importantly, the full criminalization of all Convention-based offences is recommended as a way to ensure that the absence of the dual criminality requirement will no longer constitute an obstacle to the surrender of suspected corruption offenders.

Legal basis for extradition: A majority of States parties do not need a treaty basis for receiving or sending an extradition request. The reviewing experts noted that pars. 5 and 6 of Article 44, and particularly the obligation to inform the United Nations Secretary-General about the use of the Convention as a legal basis for extradition, are not directly applicable for the countries concerned. Nonetheless, States parties are encouraged by reviewers to

⁴⁸ UNCAC Legislative Guide, par. 525.

notify the Secretary-General of their readiness (or not) to use UNCAC as a legal basis for extradition, independently of the eventual lack of a binding obligation to do so.

The non-dependence on formal treaties, considered as a “good practice” by a number of reviewing experts, is also true for some States parties belonging to the so-called “common law” legal tradition, which typically requires the existence of a treaty. Four States parties, in particular, enable their respective competent authorities to make an ad hoc declaration for the purpose of considering other countries as either “extradition countries” or “comity countries” in the absence of a treaty. In most cases where extradition could be granted regardless of a treaty, a condition of reciprocity is set, with only one State party subordinating extradition to its own interest and “good relationship” with the requesting country, indirectly highlighting the importance of having the proper treaty basis in place; however, this particular State party reported major problems with offenders absconding to a country in the region with which it has not concluded an extradition treaty.

Despite the fact that the majority of States parties do not require a treaty as a basis for extradition, in practice most of them (to a greater or lesser extent) rely on treaty-based processes, in implicit acknowledgment of the formal character of the extradition procedure. In this context a vast array of different extradition arrangements was reported, from bilateral treaties and specialized conventions containing international cooperation provisions (including other anti-corruption instruments, such as the OECD Bribery Convention) to multilateral arrangements and wide-ranging regional instruments, such as the Inter-American, the European, the Economic Community of West African States Conventions on Extradition, and the London Scheme for Extradition within the Commonwealth. One State party, albeit one requiring a treaty basis for extradition, reported having concluded bilateral extradition treaties with no less than 133 States or multilateral organizations, e.g. the European Union, and that 30 new treaties have been concluded since the entry into force of the Convention. In another State party, bilateral treaties are considered to be valid and applicable, even if they have been concluded by the former colonial power of the State concerned. Three States parties had not yet concluded any bilateral agreements on extradition. Regional treaties usually take the form of fully-fledged extradition treaties, or treaties on mutual legal assistance in general containing some provisions on extradition. In general, bilateral treaties tend to be concluded with countries in the same region or those sharing the same language.

Further to existing extradition arrangements, the majority of the States parties indicated their readiness to explore possibilities to accede to or conclude new treaties to carry out or enhance the effectiveness of extradition, or indicated that they actively promote such a policy, as also encouraged in Article 44 par. 18. A few States parties provided the names of the countries with which treaty negotiations were ongoing or about to begin, and one State highlighted its current policy to prioritize negotiations with those countries in which there is a high presence of its own nationals. The reviewing experts generally encouraged such efforts as a means to achieve full implementation of Chapter IV, especially if they concern countries with limited formal extradition arrangements with other States parties.

The Convention is designed to play an important supporting role, complementing or reinforcing pre-existing provisions in the above-mentioned complex extradition networks.⁴⁹ First of all, regarding the main obligation undertaken under Article 44 par. 4, namely to deem corruption offences as included in any extradition treaty already in existence between them, most States parties consider it as implemented – at least to the extent that the offences in question have been included in the domestic law of the requested country and the penalties provided for are within the specifications stated in the existing treaties (since extradition treaties, in general, provide, as already mentioned, for a range of penalties and not for a list of specific offences). Equally, in the more unusual case of list-based bilateral treaties, even if the relevant corruption offence does not appear in the treaty list, a country may nonetheless consider a request for extradition made by the bilateral treaty partner, whether in the exercise of its discretion under this treaty or by virtue of a direct application of the Convention. Thus, one country which was found to be in compliance with par. 4 of Article 44, stated that although this alone could not constitute a legal basis, the Convention could be used to expand the scope of a bilateral treaty in terms of

⁴⁹ See also UNCAC Legislative Guide, par. 541.

extraditable offences. Finally, most States parties appeared conscious of the obligation to ensure that corruption offences are included as extraditable offences in all future treaties they may conclude.

Example of implementation

One State party applies the so-called “principle of favourable treatment”. Originally developed in connection with labour and human rights law, the jurisprudence of that State party has extended its reach to international cooperation. Accordingly, the provisions of international treaties such as the Convention, are interpreted in a manner that is most favourable to the provision of international cooperation in judicial matters. The reviewing experts considered this as good practice and an example of how policy and jurisprudence can promote international cooperation.

Furthermore, insofar as no extradition treaty exists with another State party – and independently of whether or not a non-treaty based process is also conceivable – the Convention itself may serve as a legal basis for the extradition of corruption offenders. This is particularly encouraged by Article 44 par. 5 in respect of States parties that make extradition conditional on the existence of a treaty. Most States parties confirmed this possibility, which reduces the need for additional extradition treaties being signed, and some have informed the Secretary-General of the United Nations accordingly. In two cases, it was specifically recommended that the State parties under review consider enacting the necessary legislation to enable the use of the Convention as a legal basis for extradition in order to compensate for the very limited number of bilateral or multilateral treaties in place (one of each kind in the first State and only one regional treaty in the second). Finally, some of the States parties that have not necessarily made extradition conditional on the existence of a treaty have taken further measures to ensure that extradition is always possible for Convention offences in their relationship with other States parties.

Example of implementation

One State party is able to receive extradition requests even in the absence of a bilateral extradition treaty, provided that the requesting country is declared to be an “extradition country” according to its domestic regulations. Following the signing of the Convention, this State adopted regulations specifically implementing its extradition-related provisions and providing, among others, that any country that is a party to the Convention at any given time is considered as an “extradition country”. This ensured the ability of the State party in question to meet its international obligations under the Convention without the need to amend the regulations each time a new State became party to the Convention.

Although, as noted above, most States parties can in principle use the Convention as a basis for extradition, it emerged that it had rarely been used for the purpose up until the time of the reviews. One State party argued that bilateral treaties often provided a more comprehensive and detailed regulation of extradition matters than the Convention. Another State party offered a different explanation, namely that practitioners generally were unaware of the possibility of using the Convention as a concrete legal tool for international cooperation.

Extradition procedure: With regard to par. 9 of Article 44 and the requirement to endeavour to expedite extradition procedures, substantial divergences emerged as to the average duration of the relevant proceedings, which range from 2-3 months to 12-18 months. Individual countries reported that the differences in the timeframes needed to extradite often depended on the circumstances in which the request had been submitted. One EU country, for example, indicated that it generally took a longer time (about one year) to extradite fugitives to non-EU countries. Among the common reasons cited for delays were the complexity of the case, translation requirements, the duration of appeal proceedings, parallel asylum proceedings, and back-and-forth communication was needed to obtain clarity on the extradition request. In one case, a proceeding that would normally last 12 months could be reduced to 4 months if the documentation supporting the extradition request is properly submitted. Another country has faced several obstacles in obtaining cooperation from other States parties, including delays in receiving assistance due to the high costs involved and cumbersome procedures.

About half of the States parties under review envisage simplified proceedings to address such problems; these would typically be based on the sought person’s consent to be extradited, and would further include and concrete

measures to streamline the extradition process and establish more effective cooperation networks to exchange real-time information with foreign authorities, either before a formal extradition request has been submitted or during its submission. In one State party, simplified extradition proceedings were only available to non-nationals. According to another State party, such proceedings were used in around half of the cases and could lead to extradition being granted within a few days, if not hours. Simplified proceedings and shorter timeframes are also prescribed under multilateral or regional arrangements, for example in the context of EU Framework Decision 2002/584/JHA on the European Arrest Warrant, the Third Addition Protocol to the Council of Europe Convention on Extradition, the Pacific Islands Forum scheme and the multilateral agreement on extradition between Nordic countries. The reviewing experts encouraged the introduction of measures to expedite proceedings, e.g. time limits for reaching a decision to extradite. Moreover, several reviewing experts noted the importance of having case management systems in place, enabling the monitoring of extradition cases and collecting data on the exact duration of extradition proceedings.

Examples of implementation

The reviewing experts noted the efficient use of an electronic database made by one State party in tracking incoming and outgoing extradition requests, allowing its case officers to monitor the progress of requests and identify appropriate follow-up actions. This practice was commended and could be brought to the attention of other countries as good practice.

Another State party has established a Committee on Extradition to enhance and streamline extradition procedures, and to discuss and address the main issues faced in this process. The Committee is comprised of representatives from the central authority for extradition matters, the prosecution service, the national police, Interpol, as well as other bodies.

The European Arrest Warrant, which is applied by all EU countries, has proved to be a particularly effective tool in law enforcement and has considerably improved the administration of justice within the EU. Among others, it is issued and executed directly by judicial authorities and the executive branch (ministries, etc.) no longer plays a role in the process, or they are simply reduced to that of a transmission facilitator. The warrant is issued on the same simple form in all member States, making it easy to use and translate; grounds for refusal are limited; and the time-limits for deciding on and executing the warrant are explicit, making the surrender procedure much faster than the previous extradition procedure.

Lack of uniformity was also recorded in terms of the evidentiary threshold prescribed by domestic laws in order to grant extradition. Some States parties do not require any evidence on the commission of the offence and restrict debated issues to the legal prerequisites for the extradition. This is especially the case when extradition is granted through the application of an existing treaty. The requesting country normally confines itself to providing relevant authenticated documentation, such as a statement of the offence, an extract of the applicable provisions and penalties, an arrest warrant or evidence of conviction or sentence, a description of the person sought, and a statement setting out the alleged conduct constituting the offence. A full brief of evidence is not necessary.

In contrast, other States parties set a number of minimum substantive standards that need to be met. These were expressed in terms of the common law concept of “probable cause” or of a “prima facie case”, i.e. if the offence for which surrender is sought was committed domestically, there would be sufficient evidence to place the person on trial, or at least to issue an arrest warrant against him/her. Recommendations were made in such cases to simplify the evidentiary requirements and introduce a lower standard of proof in extradition proceedings to make it easier for requesting States to formulate an extradition request with better chances of success. This was deemed necessary, as on the rare occasions (as mentioned by one State party) that an extradition request was rejected, this was due to procedural reasons, namely that the evidence provided was not sufficient to show that the person in question had committed the offence on probable grounds. On the other hand, the authorities of one State party highlighted how the higher standard of proof may be offset by the fact of a national extradition system being exclusively judicial. In this country, the executive branch has no discretion and has to surrender the person if the Supreme Court authorizes the extradition.

Examples of implementation

As a member of a sub- regional organization, one State party reported on its extradition arrangements with countries belonging to the same organization and confirmed that no evidentiary requirements were in place. Instead, extradition is implemented through the mutual endorsement of arrest warrants, which the reviewers praised as greatly facilitating the prompt and effective surrender of fugitives.

The law of another State party provides that the magistrate holding an extradition enquiry must accept as conclusive proof a certificate issued by an appropriate authority in charge of the prosecution in the foreign state, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned. This law is aimed at facilitating and accelerating the extradition process with civil law countries.

Arrest of sought person: Almost all States parties have measures in place to ensure the presence of the sought person at extradition proceedings. Custody can invariably be ordered upon request, but has to be based on national legislation and usually also on specific provisions contained in the applicable extradition treaties. In one case, local courts are empowered to consider the legality of detention during extradition proceedings in the same way as they would for pretrial custody. In several cases, while arrest during extradition proceedings remains the rule, it is possible to order the release of the sought person on bail, or to impose a prohibition to leave the country or other alternative measures, if there are circumstances justifying coercive measures of a lesser severity, notably when the chances of granting extradition appear slim, or on health grounds. National authorities and reviewers alike highlighted the role of Interpol's red notice system as an important conduit for executing the arrest of fugitives as this allows provisional arrests in urgent cases, and this prior to submitting a full formal extradition request through diplomatic channels. Furthermore, measures were proposed in some States parties to make the relevant process more effective, such as relaxing the formal requirements for arresting the sought person in urgent circumstances, or clarifying that the possibility of arresting fugitives includes the execution of arrest warrants originating from non-neighbouring States.

Aut dedere aut judicare: As noted under Article 42, most States parties have created the necessary conditions to apply the principle "aut dedere aut judicare", at least with regard to their own nationals. While it is the policy of several States parties not to refuse surrender of their citizens solely on the grounds of their nationality, thus going beyond the requirements of the Convention, most allow for prosecution in lieu of extradition if the latter were to be refused on this basis, having established jurisdiction over offences committed abroad for this purpose. It was reported, however, that in some cases the transfer of proceedings from the country requesting extradition to the country of nationality takes a disproportionately longer period of up to 2 years, thus affecting the efficiency of criminal prosecution. Indeed, such domestic prosecutions are time-consuming and require the effective operation of mutual legal assistance mechanisms, in accordance with the minimum requirements of Article 46 of the Convention, as well as the allocation of adequate human and budgetary resources, in order to succeed.⁵⁰

Example of implementation

One State party gives its nationals the choice of whether they wish to be extradited or judged domestically, unless a treaty applies to the case, which makes the extradition of nationals mandatory. If they choose the second option, the extradition is refused and they are judged following consultation with the requesting State on condition that the latter renounces its jurisdiction and transmits all available evidence.

Conditional extradition or surrender and enforcement of sentences: Most States parties could provide no information on the application of Article 44 par. 12, or stated that their laws do not foresee or that it is governmental policy to allow the temporary surrender of their own nationals on condition that they be returned after trial to serve the sentence imposed in the requesting State. However, a few exceptions exist (five States parties), including surrender procedures within the EU in the execution of the European Arrest Warrant, as well as some bilateral treaties or informal arrangements of this type between neighbouring countries.

⁵⁰ See also UNCAC Legislative Guide pars. 566-568.

Similarly, with regard to Article 44 par. 13 of the Convention, few countries appear to be able to enforce a foreign sentence whenever they reject an extradition request (sought for enforcement purposes) on nationality grounds, even in those States parties where no relevant cases have been presented. Normally, the person sought will be tried in the country of his/her nationality for the same facts. The possibility of enforcing a foreign sentence exists, however, in extradition relations where the requesting State files a request for international validity of the sentence on the basis of a pertinent international instrument, such as the Council of Europe Convention on the International Validity of Criminal Judgments or a bilateral treaty with equivalent provisions.

Example of implementation

The Criminal Procedure Code of one State party contains a provision according to which the domestic courts shall examine the enforcement of judgments or other final decisions given by the courts of other countries, in accordance with national provisions and international agreements. Indeed, some regional treaties, to which this State is a party, provide for the enforcement of sentences issued in foreign countries. Additionally, the national authorities stated that UNCAC could be applied directly, in complement to national law, given that the provision relates to procedural norms. The reviewing experts considered Article 44 par. 13 to be partially implemented and urged the State party to monitor the practical implementation of these provisions in order to ensure the application of its regional treaties or the Convention regarding enforcement of the sentence or the remainder thereof.

Apart from these few cases, States parties do not generally appear to consider the enforcement of foreign sentences, as envisaged in the Convention. One State party, in particular, mentioned that it was not in a position to execute a foreign court order, and if a sentenced person, regardless of nationality, is present on its territory, the competent authorities of that State can only initiate a new criminal proceeding for the same facts. It is another matter, independent of the extradition process, if an imprisoned person may be eligible to serve their sentence in another country under arrangements on the transfer of prisoners, as explained below under Article 45.

Fair treatment: According to most States parties, alleged offenders whose extradition is requested enjoy all due process rights and guarantees enshrined in their Constitution and their laws, as required by par. 14 of Article 44. A few States parties explicitly mentioned the applicability of relevant human rights treaties, including the International Covenant on Civil and Political Rights and the European Convention on Human Rights. Only one State party mentioned that relevant protections are available solely under “common law principles”, whereby the reviewing experts strongly noted the fundamental importance of guaranteeing fair treatment in extradition cases and reaffirmed the importance of measures being in place to address the situation where extradition cases are brought for purposes of discrimination.

Some countries provided a list of the rights and guarantees applicable under their domestic legal systems. These include: the right to be brought before court within a prescribed period after arrest; the right to a defence counsel; the right to an interpreter; the right to seek judicial review of every decision made in the extradition process, i.e. to appeal both the court ruling imposing preliminary detention and the court order authorizing extradition; the opportunity to make representations as to whether they should be surrendered prior to the final surrender determination by the Minister of Justice; and also the guarantee that the person will not be subjected to the death penalty, torture or inhuman conditions of imprisonment. Although in most countries these rights appear to be applicable to the conduct of regular criminal proceedings, they are normally considered to be extendable to other judicial proceedings, including extradition.

Grounds for refusal: Article 44 par. 8 clarifies, as already mentioned, that extradition is subject to the limitations of domestic law, including eventual grounds for refusal. As noted in one review, this paragraph is almost ipso facto complied with. States parties should seek to ensure, however, that limitations on extradition remain within the bounds of traditional and/or reasonable limitations that do not have the effect of neutralizing extradition as an effective tool of international cooperation in corruption cases.

Most States parties have an exhaustive list of grounds for refusal in their legislation; those State parties that do not have such a list deduce them from general principles of international law, due judicial process and fundamental fairness, in the absence of an applicable treaty. Interestingly, one State listed the grounds for refusal directly in its Constitution. Most countries can reject extradition requests based on the same types of grounds, which conform by and large to the list contained in Article 44 par. 15 of the Convention. Hence, the majority of States parties cannot grant extradition when grounds exist to believe that the request has been formulated with a view to persecuting or punishing the sought person on account of his or her sex, race, religion, nationality, ethnic origin or political opinions, or that compliance with the request will cause prejudice to that person's position for any one of the above reasons. Other common grounds for not granting extradition are the principle non bis in idem; the offence becoming time-barred; pending domestic criminal proceedings or sentences; and the refusal of the requesting State to provide an undertaking of specialty, or that it will not impose or carry out the death penalty should the sought person be convicted. It is worth noting that one State party's approach differs considerably from the others in that it also provides for the possibility to refuse to extradite if there are indications that a domestic prosecution or execution of the foreign criminal judgment would facilitate the social rehabilitation of the sought person.

In at least eight States parties, the risk of sex-based discrimination is not adequately considered, although one State party announced that this particular type of discrimination would be reflected in its new extradition law. Furthermore, in three countries, domestic legislation did not appear to make any reference to the "non-discrimination" clause in the context of extradition. However, as noted in one review, even in such cases Article 44 par. 15 may be considered as implemented as the Convention does not create a direct obligation for States parties to provide explicit guarantees they will reject an extradition request on these grounds but rather enables them to do so.⁵¹

Most States parties cannot reject an extradition request on the sole ground that the offence involves fiscal matters, in compliance with par. 16 of Article 44 of the Convention. In three States parties, lack of legislation or practice left a degree of uncertainty as to whether an extradition request might be denied on these grounds. Under the legislation of two States parties, some categories of offences were not extraditable due to their fiscal nature. The authorities of these States parties confirmed, however, that if the elements of a given offence are considered to constitute an act of corruption under the Convention, extradition would not be refused.

"Political" offences: Nearly all States parties include the commission of a political offence among the grounds for rejecting an extradition request. In the experience of one State party, this is the most common cause of rejection of incoming requests (together with the circumstance that the prosecution of the offence is statute-barred). Not all States parties share, however, the approach to define the notion of "political offence" in legislative terms. As a result, decisions on whether to reject an extradition request on this ground are taken on a case-by-case basis, often relying on criteria elaborated in jurisprudence. In one State party, for example, an offence is considered political if, following an evaluation of the motives of the perpetrator and the methods employed to commit the offence and all other circumstances, the political dimension of the act outweighs its criminal component. The Constitution of one State party mentions that extradition is not allowed for "political reasons", an expression that the reviewers found to be ambiguous as to its actual scope of application.

Nevertheless, despite the above basic principles, the majority of States parties confirmed that under no circumstances would a Convention-based offence be treated as a political offence, in line with the spirit of Article 44 par. 4. Equally, two States parties exclude in their legislation the possibility to invoke the political nature of an offence where an obligation to extradite or prosecute has been undertaken internationally.

Consultation procedures: There appears to be no uniform interpretation and application of the requirement to engage in consultations with the requesting State party before refusing extradition, although in many cases such consultations appear to constitute standard practice. Some States parties considered that no implementing

⁵¹ See also UNCAC Legislative Guide, par. 583.

legislation was needed, either because they consider the duty of consultation as part of international comity or practice or view Article 44 par. 17 of the Convention as being directly applicable and self-executing in their own legal system. One State party argued that prosecutors, in their capacity as representatives of the requesting State before the extradition authorities, are implicitly bound to keep the requesting State informed of all of their actions. Another State party mentioned that, although consultations can take place through diplomatic channels and any results presented to the judge during the extradition hearing, the judge cannot establish direct contact with the foreign authorities. Inversely, one country's law provides for the possibility that the requesting State participates as proxy party to the extradition proceedings. Finally, in four cases, the absence of both legislation and practice resulted in the non-implementation of the requirement, and recommendations were made for the States parties involved to consult with the requesting party before refusing an extradition request.

Examples of implementation

One State party reported that its central authority dealing with incoming and outgoing extradition requests would make every effort to consult the requesting party if, under the Convention, the request appeared to be deficient. This would include giving the requesting country the opportunity to supplement the request with additional evidence or explanations. The central authority routinely contacts treaty partners to solicit their views and encourage the supply of additional information if an extradition request appears likely to be denied.

The authorities of another country State party stated that extensive use is made of the EU judicial cooperation body (Eurojust and the European Judicial Network), as well as informal networks such as the Ibero-American Legal Assistance Network (IberRed). It is common practice that domestic judges ask for additional information in order to avoid the refusal of a request for extradition or surrender. Such additional information can involve details concerning the description of the facts of a crime, national legislation related to the statute of limitation and information relating to guarantees (e.g. with regard to the death penalty, permanent sanctions and amnesties, etc.).

Effectiveness: Many States parties reported scarce or no experience whatsoever with regard to handling extradition requests for corruption-related offences. Only a few mentioned having made or received such requests or provided statistics and figures on the numbers of requests sent out and received over the past few years, one of which reported that there were pending outgoing cases in which the UNCAC had been invoked. One country reported having made several extradition requests related to corruption offences, none of which was granted due to differences in the legal systems of the countries concerned. All in all, the data provided was limited and did not make it possible to obtain a clear picture of the volume of incoming and outgoing extradition requests for corruption-related offences or the degree to which such requests are successful. For this reason, as suggested in one review, States parties should enhance efforts to systematize information on extradition cases and gather relevant statistical data, with a view to facilitating the monitoring of such cases and assessing in a more efficient manner the effectiveness of implementation of the Convention provisions.

B. Transfer of sentenced persons

The transfer of sentenced persons, including corruption offenders, to their country of origin, in order that they complete their sentences there, is based on humanitarian principles and is usually consent-based. Most States parties have the necessary legal framework to carry out such transfers under certain conditions, notably via bilateral and multilateral agreements, as well as in accordance with the (optional) provision of Article 45 of the Convention. In some countries, transfer of prisoners can also theoretically be carried out on the basis of reciprocity; in practice, however, almost all States rely on international treaties to carry them through. Only one State party appears to rely solely on its own national provisions, while another mentioned that it has twice used diplomatic channels to effect the transfer to its territory of persons sentenced in other countries.

The number of treaties concluded by States parties on this matter varies considerably. One State party is bound by 28 bilateral agreements covering the transfer of sentenced persons, another one mentioned only one agreement, and some other countries reported that they were considering the possibility of entering into further agreements. Similarly to what was observed in relation to extradition, State parties have tended to conclude relevant agreements with neighbouring countries sharing the same language. Multilateral initiatives appear to be used rather extensively, including the Scheme for the Transfer of Convicted Offenders within the Commonwealth, the 1993 Interamerican Convention on Serving Criminal Sentences Abroad, the 1998 CIS Convention on the Transfer of Convicted Persons to Deprivation of Liberty for the Further Serving of Sentences, the Convention on the Transfer of Sentenced Persons between Members of the Community of Portuguese Language Countries, EU Framework Decision 2008/909/JHA of the Council of 27 November 2008, and particularly the 1983 European Convention on the Transfer of Sentenced Persons, which has expanded far beyond the confines of the Council of Europe and already applies to 64 jurisdictions around the world.

Eight States parties have no agreement in place for the transfer of sentenced persons; one State party mentioned that its national legislation bars such transfers when the person concerned is serving any sentence under any conviction within its territory until his or her discharge. However, the same State party expressed its intention to amend its legislation to ensure compliance with the Convention. Another State party reported that it had refused a transfer request because of the absence of a legal framework.

Finally, no precise data were available on the number of prisoners that each State party has received or transferred abroad, and much less on the number of transfers carried out specifically in relation to Convention-based offences. One State party pointed out that it has transferred thousands of prisoners, both to and from its territory since 1977, and that this was in accordance with relevant treaties.

Chapter II. Mutual legal assistance and transfer of criminal proceedings

A. Mutual legal assistance

As in the case of extradition, the extent and scope of mutual legal assistance regimes vary significantly among States parties. The majority have adopted domestic provisions setting the general framework for providing or applying for assistance, either in the form of ad hoc laws (e.g. “Mutual Assistance in Criminal Matters Acts”) or legislation on “International Cooperation in Criminal Matters”, including extensive provisions on mutual legal assistance, or (sometimes in parallel) as parts of broader pieces of legislation, such as the Penal Code or the Criminal Procedure Code. Most States parties have also concluded bilateral treaties or agreements (usually within the same region), or acceded to regional and/or international conventions regulating mutual legal assistance in criminal matters. These instruments are intended to enhance cooperation, improve the exchange of information and overcome legal and operational obstacles which hamper the provision of assistance, especially in cases involving States parties with different legal systems and traditions. For example, one country has concluded 42 bilateral treaties with countries from all continents. Among the multilateral instruments cited were the European, Inter-American, Arab League and ASEAN Conventions on Mutual Assistance in Criminal Matters,⁵² the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the CIS Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters (also known as the Harare Scheme), and the Convention on Mutual Legal Assistance in Penal Matters among the Community of Portuguese Speaking Countries. Furthermore, several countries are parties to treaties providing for mutual legal assistance, specifically

⁵² And the Additional Protocols to the European Convention on Mutual Assistance in Criminal Matters.

with respect to corruption and money-laundering offences, such as the United Nations Convention against Transnational Organized Crime, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, the Inter-American and African Union Conventions against Corruption, and the OECD Bribery Convention.

States parties reported diverse experiences relating to the application of such treaties. While some States have concluded very few instruments of this kind or stated that they did not use them in practice, others appeared to have limited or no comprehensive domestic legislation on mutual legal assistance, relying principally on treaties for such assistance. However, even in these latter cases, the absence of a treaty does not necessarily exclude mutual legal assistance as such assistance can frequently also be afforded on the basis of the principle of reciprocity or on an ad hoc basis, depending on the nature of the requested measure. As a result, there is a considerable degree of flexibility among States parties on the implementation of Article 46 of the Convention, substantially more than with respect to extradition, and only three countries appear to clearly fall short of its requirements.

In particular, Article 46 par. 1 requires States parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences established in accordance with the Convention. Thus, each State party must ensure that its existing mutual legal assistance laws and treaties are broad enough to fulfil this obligation. If existing legal instruments (domestic laws and international treaties) do not apply or appear insufficient in a given case, the countries involved should apply Article 46 of the Convention, including pars. 9-29, either directly (if they can hold these provisions as self-executing), or by adopting implementing legislation to the same effect. The Convention does not automatically override the treaties on mutual legal assistance already in place between States parties. If another treaty on mutual legal assistance exists, then the corresponding provisions of this treaty are applicable, unless the cooperating States parties agree to apply pars. 9-29 of Article 46. In any case, States parties are strongly encouraged (Article 46 par. 7 UNCAC) to apply those paragraphs (for example the innovative provisions on assistance in the absence of dual criminality contained in par. 9)⁵³ independently of the eventual existence of another treaty, if they facilitate cooperation and contribute to more effective mutual legal assistance.

Indeed, unlike the situation with extradition, most of States parties confirmed the possibility of relying on the Convention itself as a legal basis and in particular of directly applying Article 46 in cases where both the requesting and requested countries are parties to the Convention and when they are not bound by a special agreement on mutual legal assistance. Nonetheless, bilateral assistance treaties are usually considered to have priority and are expected to be invoked first (or at least in parallel to the Convention) if applicable to a corruption-related request. It is up to the competent authorities to decide whether to use the provisions of UNCAC or bilateral agreements taking into account the specificities of each particular case, given also that (as noted in Article 46 par. 6) the relevant provisions of the Convention shall neither affect obligations subsisting between the parties pursuant to other treaties or arrangements, nor prevent the parties from providing assistance to each other pursuant to new treaties or arrangements. States parties are also encouraged, as noted in Article 46 par. 30, to explore the possibility of concluding additional agreements related to mutual legal assistance as a means to give practical effect or enhance the provisions of the Convention in this area.

<u>Example of implementation</u>

⁵³ See also UNCAC Legislative Guide, par. 610.

One State party reported that its legislation on mutual legal assistance in criminal matters was complemented by special regulations facilitating the submission and receipt of mutual legal assistance requests to and from States parties to the Convention and relating specifically to offences established in accordance with the Convention.

The reviewing experts placed emphasis on the ability of States parties to fulfil the above requirements and ensure that their respective systems offer adequate guarantees that assistance will be provided in respect of a corruption-related offence. Thus, the adoption of a domestic legal framework on mutual legal assistance was praised by some reviewers, as a confirmation of the commitment of States parties to regulate the matter in a comprehensive and homogeneous manner. Equally, the reviewing experts repeatedly highlighted as a success a country's status as party to regional instruments on different forms of international cooperation, as well as to a wide range of multilateral instruments on corruption, money-laundering and organized crime, containing provisions on international cooperation in criminal matters.

In contrast, in cases where national legislation sets out only limited regulations governing mutual legal assistance in criminal matters, the reviewers encouraged the States parties concerned to consider whether the elaboration of more specific domestic legislation might facilitate the practical application of treaties and improve the transparency and predictability of procedures for the benefit of the requesting States. More specific legislation was also recommended in a State party where many of its related practices related to mutual legal assistance and procedures were undertaken in conformity with *customary* practice or informal guidelines, despite the fact that the handling of mutual legal assistance requests by the authorities of this State party was generally effective, as acknowledged by the reviewing experts. As noted in the review in question, it is true that a culture of efficiency and performance may be even more significant than specific legislative enactments in ensuring substantive compliance with the Convention. Such a situation, however, requires consistent care and vigilance on the part of the national authorities active in the field of international cooperation. The absence of enabling legislation to fully implement the provisions of Article 46 was noted in one country, and in numerous cases recommendations were issued for State parties to consider entering into (further) bilateral or multilateral cooperation agreements or arrangements, including with countries from different geographical regions than their own, regardless of the apparent effectiveness of existing formal or informal cooperation networks. States parties were encouraged to prioritize international cooperation in corruption offences and to more fully take advantage of the potential of the Convention as a basis for mutual legal assistance in relevant cases, even if other non-corruption oriented bilateral or multilateral treaty appear to be applicable. Finally, in two countries, an acute lack of experience in respect of the functioning of mutual legal assistance mechanisms was detected; it was therefore suggested measures be taken to enhance the understanding of the Convention among national institutions and agencies, and eventually to develop informal networks as an initial basis for mutual legal assistance requests.

Offences for which assistance is provided: Most States parties appear not to make any distinction between criminal offences and provide assistance regardless of their gravity, in relation to all inquiries, prosecutions and judicial proceedings pertaining to them. In one case, however, it was specified that assistance could only be provided on the grounds of a serious offence (e.g. over 12 months of potential prison penalty), which was found as a potentially limiting condition.

A majority of States parties stated in relation to par. 2 of Article 46, that they are able to grant assistance in relation to offences for which legal persons may be held liable, often through direct application of the Convention provision, although only a small percentage provided examples of actual cases in a corruption-related context, and at least six countries did not provide adequate information on the subject. Two States parties reported their intention to adopt legislation expressly regulating mutual legal assistance in relation to offences for which a legal person may be held liable.

Example

In one State party where Article 46 is deemed to be self-executing upon the ratification of the Convention, there were no additional domestic measures which needed to be adopted in order to comply with this provision. The country in question reported at least one case in which it provided legal assistance (in accordance with the Convention) in an investigation involving a corporate entity. Specifically, it provided bank records and certified copies of declaration to the authorities of a requesting State party investigating whether this company and its employees were giving kickbacks to public officials in order to obtain a large government contract.

In cases where States parties have not established the *criminal* liability of legal persons, or have established it only in respect of specific offences (such as money-laundering), the national authorities and reviewers of some States parties considered that this, in combination with the rule of double criminality, rendered mutual legal assistance impossible or restricted it only to the specific offences for which legal persons could be held criminally liable. This view does not appear, however, to be convincing, nor is it prevalent. As noted in another review, even if States parties that have not established the criminal liability of legal persons apply the double criminality rule (this is not always the case) mutual legal assistance is still possible as double criminality is conceived not as a requirement for the actual incrimination of the subject being investigated, but simply as a requirement that the act giving rise to the request for assistance constitutes a crime domestically. In other words, the potential outcomes of investigations or adjudications against legal persons, including possible indictments or convictions, appear irrelevant to the enforceability of the request for legal assistance. In any case, no State party reported having experienced any practical problems with regard to the execution of foreign mutual legal assistance requests in terms of the dual criminality requirement, nor do they appear to have encountered difficulties as requesting States when seeking legal assistance from foreign authorities regarding criminal proceedings conducted against legal persons. It should also be noted that the Convention enables States parties to go beyond the criminal nature of the offence in question and the issue of whether or not the legal persons involved are criminally liable, and whether to extend assistance in civil and administrative matters relating to corruption (Article 43 par. 1).

Nature of mutual legal assistance: The purposes for which legal assistance may be requested according to Article 46 par. 3 are to a large extent covered by domestic legislation in most States parties. Many of those do not pose limitations or restrictions as regards the mutual legal assistance measures that can be requested. In addition, several State parties indicated that the purpose of mutual legal assistance is specified or supplemented by applicable bilateral or multilateral treaties, including the Convention itself. In a few countries, domestic law did not explicitly list the purposes for which mutual legal assistance could be provided. As a result, any type of procedural action could be executed, upon request, provided that such action would be authorized in a similar domestic case. The most requested forms of assistance included effecting service or judicial documents, taking evidence from witnesses, producing official documents from public agencies, and executing searches and seizures in relation to business, bank and internet records. Some countries cited limitations to certain requests, e.g. with regard to real-time telecommunications interception, DNA sweeps, providing personal tax information, and compelling an individual against whom there are no pending charges to give evidence.

A unique feature of the Convention in comparison to other international instruments, including UNTOC, is that, according to Article 46 pars. 3(j) and 3(k), the mutual legal assistance to be afforded by States parties extends to the identification, tracing, freezing and recovery of proceeds of crime for the purpose of returning them to their legitimate owners, in accordance with the provisions of Chapter V of UNCAC. This corresponds to the character of asset recovery (and of international cooperation for this purpose) as a fundamental principle of the Convention, as emphasized also in Articles 1 and 51. In most States parties, asset recovery is not explicitly listed among the

areas of mutual legal assistance. However, the legislation of many countries contains detailed provisions intended to facilitate assistance pertaining to the identification, freezing and confiscation of proceeds of crime with a view to enabling the recovery of assets, and there are also examples of States parties with mutual legal assistance rules relating to the paying over of recovered assets to the requesting State. The reviewing experts advised national authorities, to consider international aspects of confiscation when reviewing the existing legislation, with a view to ensuring further improvements.

Examples of implementation

The types of assistance provided by one State party to other countries in relation to tracing and recovering the proceeds of crime includes: (a) production orders in respect of “property-tracking documents”, these being documents relevant to identifying/locating property of any person who has been convicted of, or charged with an offence with, or who is suspected of having committed a serious offence. These also include documents that are relevant to identifying/locating the proceeds or instruments of crime, and such orders that may be directed to banks, real estate agents, solicitors, relatives or associates of a suspect, etc.; (b) search warrants to seize the proceeds or instruments of a foreign serious offence, or to search for and seize property-tracking documents in relation to a foreign serious offence; (c) monitoring orders to obtain information about transactions conducted through an account with a domestic financial institution which is reasonably suspected of being relevant to a foreign criminal investigation or proceeding; and (d) registration and execution of foreign restraining and confiscation orders. The country in question allows for confiscated assets to be repatriated to a foreign country and supports the sharing of confiscated assets with other countries.

Another State party’s law has specific rules on the handing over of assets to the requesting foreign authority for the purpose of forfeiture or return to the person entitled to it. The national authorities pointed out the existence of domestic provisions that foresaw the partial reversal of the burden of proof in connection with assets belonging to a person who has participated in or supported a criminal organization, as well as with assets of illicit origin of politically exposed persons. Considerable amount of money (amounting to hundreds of millions of US dollars) have been returned to countries of origin through the application of these provisions in connection with requests for the return of assets. The reviewing experts considered this good practice and worthy of international study.

Spontaneous transmission of information: The main goal of spontaneous exchange of information to foreign authorities is to assist foreign counterparts in receiving evidence that could be helpful for conducting criminal proceedings in its preliminary stage, and may result in the submission of a formal mutual legal assistance request at a later time. It primarily serves the interests of the State party receiving the information. The spontaneous transmission of information, as envisaged in Article 46 pars. 4 and 5 of the Convention, is generally not specifically regulated at the national level. It is foreseen, however, in applicable multilateral treaties, for example in Article 11 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Art. 10 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, and Article 18 pars. 4-5 of the United Nations Convention against Transnational Organized Crime. Exceptionally, the domestic law of two States parties expressly foresees the spontaneous exchange of information between judicial authorities. In another country, a specific authority has been designated and empowered to transmit information without prior request.

The majority of States parties reported that, even if not foreseen, spontaneous transmission is possible to the extent that it is not explicitly prohibited. They further noted that such transmission occurs frequently (especially with countries of the same region), either directly, through ad hoc arrangements, police cooperation channels and networks of central authorities for mutual legal assistance and authorities responsible for criminal cooperation matters (such as the Inter-American Cooperation Network, Eurojust, IberRed, Interpol, Aseanapol, etc.), or even

through informal channels of communication available to law enforcement authorities (such as officials posted in overseas missions, appointed liaison officers etc.). In some cases, national authorities referred specifically to the cooperation and exchange of information taking place between national FIUs. In addition, most countries stated that they would comply with the request by foreign State to maintain the confidential nature of the information received (spontaneously or following a request for assistance) or to pose restrictions regarding its use, and that they would consult with the foreign State should this be potentially inconsistent with domestic law. Only a few States parties reported that spontaneous transmission of information was not possible.

The reviewing experts were generally satisfied with such informal regimes, although the situation remained unclear in some countries, and in four cases they suggested that a legislative amendment explicitly allowing submission of information without prior request could further enhance the application of Article 46 par. 4. They also urged States parties to expand the practice of spontaneous transmission of information to include countries that do not belong to the same geographical region.

Bank secrecy: The Convention makes clear that mutual legal assistance cannot be refused on the ground of bank secrecy. Given also the fact that for many States parties Article 46 par. 8 is a self-executing provision and can be directly applied by the competent national authorities, the vast majority among them confirmed that bank secrecy legislation did not constitute an obstacle to the provision of mutual legal assistance under the Convention. Several countries reported that they regularly provided requesting States with information obtained from financial institutions.

Often, access to bank records have to be duly authorized by judicial or other competent authorities of the requested State. States parties should ensure that this conditionality does not potentially pose an obstacle to the application of Article 46 par. 8. Thus, in one State where the transmission of bank information (even to domestic authorities) depends on prior consent by the country's central bank, the reviewing experts recommended that appropriate legislation be passed in order to ensure that bank secrecy is lifted upon the request of a foreign State.

Dual criminality: While States parties may decline to render assistance on the ground of absence of dual criminality, Article 46 par. 9(b) stipulates that even in that case they are required to render assistance involving non-coercive measures (e.g. taking voluntary witnesses statements, sharing intelligence, conducting crime scene analysis, obtaining criminal records or other publicly available material, such as identity information or company registration documents, etc.) provided this is consistent with the basic concepts of their legal system and the offence is not of a trivial nature. Furthermore, States parties are encouraged to afford assistance to the broadest extent possible in the pursuit of the main goals of the Convention, as set forth in Article 1, even in the absence of dual criminality.

Indeed, in contrast to the approach taken in relation to extradition, the majority of States parties reported that dual criminality did not, in principle, constitute a requirement for granting assistance. This practice was commented on by several reviewers; in several cases, only coercive measures (e.g. taking a person into custody, conducting an electronic surveillance, conducting a house search, seizure of items, confiscation of assets, etc.) would not be possible to be carried out in the absence of dual criminality. In some States parties, the absence of dual criminality is an optional ground to refuse assistance. The competent authority may take into consideration the circumstances of the case, including the goals of the Convention, in making a decision whether or not to grant a relevant request. As noted in one review, this optional requirement in the domestic legislation may well serve the purpose of effective implementation of Article 46 – however, only inasmuch as the discretion to require dual criminality is limited to assistance involving coercive measures.

In four further cases, the reviewers were not provided with a clear response on the matter, and ten States parties indicated that they required dual criminality for the provision of mutual legal assistance, while apparently making no exception for non-coercive measures. Although the national authorities of one of these States parties stated that in practice, once a formal criminal investigation is opened in the requesting country, mutual legal assistance is provided even in the absence of dual criminality, the reviewing experts noted that legislative clarification could contribute to enhancing the application of Article 46 par. 9.

Examples of implementation

In one jurisdiction, mutual legal assistance is afforded “in the widest sense”. Double criminality is not required by law on mutual legal assistance, but instead it is stipulated that assistance should be provided “in respect of criminal acts the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the requesting state.” As a practical matter, the State party in question has a tradition of providing mutual legal assistance even in the absence of double criminality. Taken together, this situation was identified as a good practice by the governmental experts conducting the review.

Two further States parties follow the international practice of distinguishing between mutual legal assistance requests requiring coercive measures and those that do not require such measures. Requests belonging to the first category can be executed, in principle, on the condition of dual criminality. However, even in the absence of dual criminality, mutual legal assistance involving coercive measures can exceptionally be granted, if the request is aimed at (among others) exonerating someone from criminal responsibility.

Transfer of detainees: As regards the transfer of detainees from one State party to another for purposes of providing assistance in obtaining evidence for corruption-related investigations, prosecutions or judicial proceedings, this situation does not appear to have much practical significance in corruption cases. Most States parties confirmed their compliance with respect to these procedures, as described in Article 46 pars. 10 to 12 in two ways: either by applying them directly (twelve State parties), if they did not beforehand chose to apply more specific bilateral or other multilateral treaties to which they may be parties (such as Article 9 of the EU Convention on Mutual Assistance in Criminal Matters, Article 11 of the Convention on Mutual Assistance in Criminal Matters of the Council of Europe or Article 19 of the Agreement on Mutual Legal Assistance in Criminal Matters between the States Parties of MERCOSUR, the Plurinational State of Bolivia and the Republic of Chile); or by applying detailed domestic regulations which are largely in accordance with the requirements of the Convention, in particular with regard to keeping in custody the detainee, immunity, safe conduct, return or seeking the consent of the detainee for the execution of the transfer. Seven States parties stated that they had not implemented the provisions in question, despite the fact that it might be possible for some of them to directly apply the UNCAC provisions without adopting further legislation.

Central authorities: All but three States parties designated central authorities to receive requests for mutual legal assistance to either execute them themselves or transmit them to a competent authority for execution, as stipulated by par. 13 of Article 46. Nevertheless, the required notification to the Secretary-General of the United Nations was missing in four cases. In approximately half of the States parties under review, the central authority is the Ministry of Justice; however, several States parties have designated the Office of the Attorney-General, three others the Ministry of Foreign Affairs, one the Ministry of Home Affairs, and one the national anti-corruption agency. The reviewing experts highlighted this last choice as a success. Interestingly, in another review, they also considered as an advisable and operationally preferable choice to designate the national anti-corruption agency as the central authority for all corruption cases given that it enjoys the confidence of international partners and that most international corruption cases fall within its remit.

Several States parties name a specific department, or even a specific official within the designated central authority. The majority of States parties designate the same government department for almost all international treaties on cooperation in criminal matters, including the ones relating to combating corruption, as a central authority. This makes it possible to streamline the process and the timely identification of weaknesses in the system. In contrast, the designation of different authorities for requests submitted under different treaties may result in delays in the timely provision of assistance.

While some countries are flexible about the methods of transmission of a request for assistance, allowing a foreign country to determine the most appropriate channel depending on the urgency of the matter, many States parties require in principle that requests for mutual legal assistance be submitted or at least formalized through diplomatic channels. Two of those States parties limit the use of diplomatic channels to requests submitted by States with which it has no treaty in force, or to cases where a treaty envisages such use. In eight countries, requests can be addressed directly to the competent authority from which assistance is sought. Most States parties reported that, in urgent circumstances, requests addressed through Interpol are also acceptable, even though in some cases subsequent submission through official channels is required.

Example of implementation

In some countries, the websites of the central authorities provide detailed information on how they can assist foreign countries in the provision of mutual legal assistance, as well as give links to domestic legislation and information about applicable bilateral and multilateral agreements.

Form, language and content of mutual legal assistance requests: With regard to the form of mutual legal assistance requests, the majority of States parties require that requests be sent in writing, under conditions allowing the establishment of authenticity, as foreseen also by par. 14 of Article 46. Although limited information was provided on the alternative means used to produce a written record, 11 States parties confirmed that in urgent circumstances requests submitted by fax or email would also be acceptable; and eight States parties also indicated that oral requests were also accepted. In most cases, however, such means of communication are used to take preparatory measures and facilitate data exchange before a request is submitted and a subsequent formal written request is normally required.

Examples

According to one State party, when foreign authorities submit letters rogatory by fax, email or other expedited means of communication, the Ministry of Justice transfers the request to local authorities for execution before receiving the original version of the requests. When examining the possibility of executing coercive measures, the courts of that State party do not require original materials as a precondition to make a decision.

A country from the Latin American and Caribbean Group reported using the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Organization of American States; the latter network connects regional authorities through a programme which allows encrypted real-time communications among duly authenticated authorities.

About half of the States parties have specified which languages are acceptable for incoming requests, and have accordingly informed the Secretary-General of the United Nations. In ten cases, the official language or languages of the requested State are the only acceptable languages and requests and supporting documents should be accompanied by a corresponding translation. About a dozen non-English speaking countries have notified the Secretary-General that requests for legal assistance would be accepted if submitted, among others, in English.

One State party indicated that it would accept requests translated into any of the official languages of the United Nations, while another, apart from its own two official languages, indicated no less than five additional languages from the extended region that would be acceptable. In this context, it is worth taking into account that a proposal submitted during the drafting of the Convention (and included in its interpretative notes) suggests that States parties may wish to consider the possible advantages of using electronic communications in exchanges arising under Article 46 and employ such means, whenever feasible, in order to expedite mutual legal assistance. However, the proposal also noted that such use may raise certain risks regarding interception by third parties, which obviously should be avoided.⁵⁴

The provisions of par. 15 of Article 46 in respect of the content of mutual legal assistance requests are broadly reflected in the legislation of most States parties. Given the self-executing character of these provisions, if the request is based on the Convention, the competent national authorities are obliged to draft the request in accordance with their requirements.

Execution of the request: Most States parties confirmed that their legislation neither hinders nor explicitly provides for the request of additional information (such as personal details needed to locate a witness, information to indicate whether a proceeding has commenced in the foreign country, or sufficient facts to enable a dual criminality assessment) subsequent to the receipt of the original request, as foreseen in Article 46 par. 16, when it appears necessary or when this information can facilitate the execution of the request. In most cases, the central authority of the requesting country would contact the relevant foreign central authority directly to request the information or alternatively request it through diplomatic channels, noting that it is required to expedite and execute the mutual legal assistance request.

As to the execution itself, the vast majority of States parties endeavour, sometimes in direct application of Article 46 par. 17 of the Convention, to satisfy special conditions or follow procedures stipulated by the requesting State, in particular with respect to compliance with evidentiary requirements, insofar as such requirements are not in conflict with domestic legislation or constitutional principles. Indeed, the main prerequisite for the execution of a request is that the requested action is in accordance with domestic law. For example, a country may not be able to execute an incoming request, if the requesting State seeks to compel testimony from a defendant who has a right not to incriminate himself/herself, as foreseen in the national constitution.

Videoconferencing: Hearing of witnesses and experts by videoconference has proved to be a time and cost-saving tool in the context of mutual legal assistance, and can help to overcome practical difficulties, e.g. when the person whose evidence is sought is unable or unwilling to travel to the foreign country to give evidence. Hence, there is growing acceptance and practical use of this measure by competent authorities. Videoconferencing is permissible under the domestic law of 16 States parties, and a further State party has pending legislation to introduce it. In five cases, taking testimonies by this means was considered admissible as it was not explicitly prohibited and was based on the direct application of the Convention. Nine States parties have handled requests for mutual legal assistance involving a hearing through videoconference, and some of those “regularly” or “routinely” seek assistance from, and provide assistance to, foreign countries by taking testimony via video link.

Example

One State party reported that it is party to a regional convention, the Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Judicial Systems, which regulates all aspects of the use of videoconferencing in international cooperation in judicial matters. Bilateral treaties with specific provisions on the use of this tool have also been signed. Indeed, videoconferences have been held at the request of other States parties and their use has been widely extended, especially in the context of criminal investigations and assistance in criminal matters.

⁵⁴ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 422.

In one case, the absence of domestic regulation was explained by the lack of the necessary infrastructure. It is also worth mentioning that one State party reported having “lots of difficulties” with videoconferencing cases in general, mostly due to technological differences with the requesting State.

Speciality and confidentiality: The rule of speciality in the transmission and use of information or evidence, as established in Article 46 par. 19 of the Convention, is respected by States parties in most cases. In this context it is worth noting, that according to an interpretative note the requesting State party is under a special obligation not to use any information received that is protected by bank secrecy, for any purpose other than the proceedings for which that information was requested, unless authorized to do so by the requested State party.⁵⁵ This is guaranteed either by the direct application of the Convention or by domestic laws, as well as in bilateral mutual legal assistance treaties that include provisions prohibiting the use of evidence for a purpose other than that for which it was provided and without the prior consent of the requested party.

Similarly, a majority of States parties indicated that they are in conformity with the provision of Article 46 par. 20, and that they ensure confidentiality of the facts and substance of the request if the requesting State so requires, to the extent possible under national law.

Grounds for refusal: The Convention recognizes the diversity of legal systems and allows States parties to refuse to provide mutual legal assistance under certain conditions, as enumerated in par. 21 of Article 46. This provision sets the limits of a country’s discretion with regard to the applicable grounds (“assistance *may* be refused”). This is not an obligation that their legislation corresponds exactly to the grounds listed nor an obligation to apply such grounds in each individual mutual legal assistance case. Therefore, and also taking into account the spirit of par. 17 of Article 46, the observation of some reviewing experts, according to which par. 21(c) – and by analogy the other grounds of refusal – requires that the procedures to be followed in executing the request should be in line with those typically followed in the requested State party, cannot be considered as accurate; nor the recommendations of the same experts that the national authorities introduce legislation to clearly specify that the execution of requests and actions taken shall conform to the domestic procedures of investigation, prosecution or judicial proceedings. It is the *prerogative* of the requested State to exclude actions that its own authorities would be prohibited from carrying out in respect of a domestic offence, not its obligation. In any case, the assistance a country is able to provide to other countries does not extend, as a rule, beyond the law enforcement tools and powers available to its own law enforcement agencies.

The majority of States parties have legislation in place providing for equivalent grounds for refusal to the ones listed in the Convention, without exceeding its limitations. In this context, it should be noted that par. 21 affords the requested States a wide margin of appreciation with regard to the grounds they are allowed to apply, since it suffices, for example, if the execution of the request is considered likely to prejudice its “essential interests” or its *ordre public* or if it would be “contrary to its legal system”. It is for this reason that grounds of refusal such as the political, “military”, or de minimis nature of the offence, the prejudice to an ongoing investigation in the requested country, the time-barring of the offence, had it occurred in the requested country, possible discrimination against or prejudice to universally recognized rights and fundamental freedoms of the individual, have been found to be linked to subparagraphs (a) and (d) of par. 21 of Article 46. An exception was a domestic provision enabling a country to decline mutual legal assistance on the basis that it might “burden the assets of the State”. The reviewing experts recommended that this ground of refusal be removed by providing that the costs will be borne by the requested State, unless otherwise agreed. It should be noted, however, that in another State party with a similar provision, no such recommendation was made.

⁵⁵ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 409.

Example

The domestic legislation of one State party provides simply that a request by a foreign country for assistance may be refused if, in the opinion of the Attorney-General, the assistance would prejudice the national, essential or public interests of the State, or would result in manifest unfairness or a denial of human rights or if it is otherwise appropriate, in all the circumstance of the case, that the assistance requested should not be granted.

The vast majority of States parties indicated that a mutual legal assistance request would not be refused on the sole ground that the offence also involved fiscal matters. In one case the reviewing experts recommended to amend the domestic legislation to expressly provide for the exclusion of fiscal offences from the grounds of refusal of mutual legal assistance requests, rather than relying on the discretionary powers of the Attorney-General to do so on a case-by-case basis.

Finally, most States indicated that in practice they would also provide a foreign country the reasons for refusing to provide assistance in response to a corruption-related mutual legal assistance request, and this would be in the spirit of international cooperation and in line with the express obligation contained in par. 23 of Article 46 of the Convention, as well as in other bilateral or multilateral treaties to which they are parties. In one review it was suggested that the State party also expand its domestic provisions on the reasoning of the refusal of extradition requests to cover mutual legal assistance requests as well.

Timeframe and consultation procedures: According to Article 46 par. 24 of the Convention, States parties are obliged to execute requests expeditiously and take as full account as possible of eventual deadlines facing the requesting authorities. The average time needed to respond to a mutual legal assistance request ranges from 1 to 6 months. In some cases, the processing of the request could take over a year. On the other hand, some States parties reported that in cases where the requesting State indicated that the matter needed to be addressed urgently, this period would be significantly reduced and a response would be provided within a few days. One State party affirmed that it would generally respond to all requests within 2 weeks, regarded as an exemplary performance, and another even issued a decree which contains mandatory rules for the competent prosecutorial and law enforcement authorities to implement legal assistance measures within 10 days and holds them liable for unnecessary delays. A further State party confirmed its ability to execute certain measures, such as the freezing of bank accounts, within a short time, often within an hour.

As stressed by several States parties, the time required depends to a considerable extent on the complexity of the matter, including on whether or not coercive powers need to be used, e.g. search and seizure, production of documents, tracing, restraint or confiscation of the proceeds of crime, etc., as this normally takes more time and higher-level authorizations are needed. Further factors are the quality of the request (including the quality of its translation), additional translation requirements, the place of execution of the action requested, the competent court, the grounds for urgency given by the requesting authority, mutual assistance laws and processes in the foreign country and the applicable legal instrument, etc. It was generally accepted that requests submitted by neighbouring countries or by States sharing the same legal, political or cultural background as the requested State are handled with greater facility and more expeditiously.

Several reviews highlighted the importance of giving careful consideration to data collection, making best use of statistics, and especially of putting in place a case management system within the central authority for mutual legal assistance to facilitate, inter alia, the regular monitoring of the length of mutual legal assistance proceedings in order to improve standard practice. A further measure going in the right direction consists of developing internal guidelines or “practice papers”, which set timelines for executing requests and give guidance on how to handle any problems that may arise, including how to appropriate handle any follow-up with the requesting State.

Examples of implementation

One State party reported that the staff of its central authority engage in constant, near daily communication, with counterparts in countries that have submitted a large number of mutual legal assistance requests. This central authority further seeks to have regular annual consultations with the largest partners in the areas of extradition and mutual legal assistance.

Another State party follows the status of execution of mutual legal assistance requests by using a specially designed casework database, which contains features enabling case officers to track each action taken on a matter, set reminders when next actions are due, and identify delays in the execution of the request. This was identified as good practice by the reviewing experts. In providing the assistance sought, the country in question always considers the timeframes requested by the foreign country (for example, trial dates), and regularly provides updates on the status and progress of the execution of the request to the central authority of counterparts in other countries.

Although few concrete cases of postponement of execution of requests were reported due to interference with ongoing criminal investigations, one State party did note that this was an extremely rare situation, while several other States argued that such postponement might well be envisaged in accordance with domestic legislation, or by direct application of the Convention or another international instrument, such as Article 6 par. 1 of the Council of Europe Convention on Mutual Assistance in Criminal Matters. If no national legislation exists on this issue, State parties were urged to consider developing more specific provisions on the timelines of rendering mutual legal assistance and the circumstances in which the assistance could be postponed, as this could enhance transparency and the predictability of procedures for mutual legal assistance in favour of the requesting States. Furthermore, in one State party where interference with ongoing investigations is a ground for discretionary *refusal* of the request, it was recommended that the possibility of mere postponement be introduced in the applicable laws.

Example

The central authority of one State party liaises with domestic law enforcement agencies when considering mutual legal assistance requests. If an agency has concerns that providing this assistance may prejudice a domestic criminal investigation or proceeding, the agency will immediately inform the central authority, which will then notify its foreign counterpart. The central authority will continue to liaise with the relevant agencies about the domestic investigation, and if a stage is subsequently reached at which providing the requested assistance no longer prejudices the criminal investigation or proceedings, the foreign country will be advised and the central authority will continue to process the request.

With regard to consultation procedures with the requesting State, most countries reported that they engage in such consultations before refusing or postponing a request, and some referred to bilateral treaties that expressly regulate the matter. However, only a limited number of examples were provided on how such consultations were carried out.

Examples of implementation

Upon receipt of a mutual legal assistance request which does not contain the prescribed elements, the central authority of two States parties would, as standard practice, contact the relevant foreign central authority directly and request the information or alternatively request this information through diplomatic channels, noting that it is required to further progress and execute the mutual legal assistance request.

Another State party reported that its central authority frequently carried out informal consultations before formal mutual legal assistance requests are received, and that it was common practice to accept and review draft requests before submission of a formal mutual legal assistance request. This was considered a good practice by the reviewing experts.

Safe conduct of witnesses: Safe conduct of witnesses, as envisaged in Article 46 par. 27 of the Convention, was addressed in the vast majority of States parties, either in multilateral or bilateral treaties (including by applying the Convention itself) or in domestic legislation.

Costs: With respect to “ordinary” and “reasonable” costs associated with mutual legal assistance requests, such as the costs related to obtaining testimony, collecting and seizing documents, as well as tracing, identification and seizing of property, the general rule is that these would be covered by the requested State, subject to any bilateral or multilateral agreements, ad hoc arrangements or the conditions of reciprocal cooperation. Although this is in accordance with the principle enshrined in par. 28 of Article 46, one should take into account, as stressed in an interpretative note to this provision, that developing countries might encounter difficulties in meeting basic costs and that they should be provided with appropriate assistance to enable them to meet the requirements of the Convention.⁵⁶

With respect to “extraordinary” costs, the legislation of several States parties exceptionally provides that, in principle, it is the requesting State that should cover costs associated with the execution of specific requests, such as deposit and shipping expenses, costs incurred by expert testimony, or for transferring detainees to foreign countries to give evidence in a proceeding or to assist in an investigation (Article 46 par. 10), expenses relating to organizing a hearing by telephone or videoconference (Article 46 par. 18), and for the attendance of the persons to be heard and for translators and interpreters, the latter are subject to a different arrangement. Equally, some bilateral treaties provide that the requested party shall pay the costs of executing a request, with the exception of particular expenses, such as the costs associated with translations, expert fees, expenses incurred in the conveying of persons to give evidence or any “exceptional expenses” incurred in fulfilling the request. In all of these cases, States parties should ensure that the terms and conditions under which the request shall be executed, as well as the manner in which the costs shall be borne, are not unilaterally determined by the requested State, but that this is established after a prior consultation with the requesting State. In this spirit, at least four States parties reported concrete cases where extraordinary expenses were partly covered by the requesting State pursuant to an ad hoc arrangement of the sort envisaged by par. 28 of Article 46.

Example

One State party reported having made arrangements on extraordinary costs of mutual legal assistance with other central authorities; these costs include the processing of large amounts of computer material held under a search warrant, as well as the high cost of courier fees for shipping evidence to another State and lawyers’ fees incurred as result of local court applications made on behalf of a requesting State.

In three States parties, the applicable laws provided that all costs would, in principle, be borne by the *requesting* State, unless stipulated otherwise by the States parties concerned; another country reserved for itself the decision over whether to charge the costs completely or partially to the requesting State. These practices run contrary to the principle enshrined in par. 28 of Article 46. Accordingly, as recommended by most of the reviewing experts involved in the reviews of the States in question, the relevant laws should be aligned with the Convention, by providing that the costs would be borne by the requested State in the first instance, and by introducing an obligation to consult beforehand with the requesting State in the second.

⁵⁶ *Travaux Préparatoires* of the negotiations for the elaboration of the UNCAC, 2010, p. 409.

Provision of documents: Most States parties indicated that records, documents or information available to the general public, such as material kept at company registries, certificates of birth, marriage or death and information from land registries, would be provided to the requesting State. Countries were encouraged to specify to the extent possible any relevant practices in their legislation and to be transparent on such information-sharing practices.

On the issue of non-publicly available governmental records, the pertinent requests may be satisfied, subject to the requested State's domestic legislation governing disclosure of the relevant information. For example, under the law of one country tax records or social security records cannot be provided to foreign countries in response to mutual assistance requests. One State party affirmed that it provided or would provide certain types of information not available to the general public, including police and law enforcement reports and criminal records, and under certain conditions even classified material to requesting States, while another was able to fulfil corresponding requests, to the extent that the requested documents or information would be provided to a similar domestic authority.

Finally, one State party distinguished between various types of non-public information: "classified information", which could be provided to a requesting State, "secret information" and "confidential information", which could be shared on a case-by-case basis and "absolutely secret information", which could never be provided.

Example of implementation

According to the law and constitutional principles of one State party, all documents in the possession of the authorities are public, unless an exception has explicitly been made by an Act of Parliament. If another State Party requests records, documents or information in the possession of the domestic authorities, these will be provided in the same way and on the same grounds as to any individual.

Effectiveness: Contrary to the situation with extradition, States parties appear to have gathered considerable experience with regard to mutual legal assistance in corruption-related matters and have provided ample statistical data outlining the volume of the relevant requests. Among the States parties with adequate legislative frameworks for mutual legal assistance, many reported that requests related to offences established according to the Convention are received or sent on a regular basis, without apparently having faced particular problems regarding their execution. Most importantly, Article 46 itself has been invoked and has served as the legal basis for providing assistance in numerous occasions. Although the numbers of cases are still small, eight States parties reported requests made and/or received under the Convention.

One State party reported 427 mutual legal assistance requests from foreign countries in 2010-2011, out of which 18 related to corruption offences. Eleven of these 18 requests were made under the Convention or with specific reference to the Convention. In response, the requested State provided material seized pursuant to search warrants, witness statements, material lawfully obtained by its law enforcement agencies and undertook extensive enquiries to locate the proceeds of crime. Another country reported that it received responses to its requests made in accordance with the Convention within a timeframe of 1 to 5 months, except in one case where it did not get any response at all and another where the requested country refused to provide legal assistance, citing in doing so Article 46 par. 21 (b), that this refusal was made on the basis of "sovereignty, security, *ordre public* or other essential interests".

Case example

One State party executed a formal legal assistance request on behalf of another country, which invoked the Convention. The authorities of the requested party provided certified bank records to the requesting country to assist in its investigation of a public official who was accused of participating in a large scale, complex fraud scheme, and was believed to have sent some of his illicit proceeds through banks located in its territory. The

Convention was the sole treaty basis for the request as there was no bilateral mutual legal assistance treaty between the two countries.

B. Transfer of criminal proceedings

Bearing in mind the transnational dimension of many corruption cases, Article 47 of the Convention introduces an obligation for States parties to consider consolidating the prosecution in one jurisdiction. Moreover, the transfer of criminal proceedings can also be used as a practical means of supporting the initiation of domestic criminal proceedings when extradition is denied on the grounds of nationality or other grounds, if applicable (practical application of the “aut dedere aut judicare” principle). Several States parties reported that the possibility to transfer proceedings is foreseen in general terms in their domestic legislation or in bilateral or multilateral treaties to which they are parties (such as the European Convention on the Transfer of Proceedings in Criminal Matters). The domestic legislation of a State party provided for such possibility within the framework of a regional international organization in relation to money-laundering offences. Although most of these countries did not provide any concrete examples of implementation, in two cases it was argued that the transfer of criminal proceedings was a routine practice. Another State party was found to make rather extensive use of this form of international cooperation, especially with neighbouring countries, by reporting a total of 59 incoming requests and 47 outgoing requests in the period between 2009 and 2011.

Despite the above, the majority of States parties have no domestic legislation and are not bound by any international instruments regulating the international transfer of criminal proceedings. However, some countries have stated that the transfer could be achieved through informal arrangements and three cases of such transfers taking place have been reported. Indeed, as noted in one review, no particular law is needed to implement the provision in question, as long as there is a body of practice, policy or arrangement that attests the possibility of the transfer of criminal proceedings, and States parties actually consider taking advantage of this possibility, in order to ensure the effective prosecution of Convention offences.

Chapter III. Law enforcement cooperation

A. Law enforcement cooperation

Article 48 requires States parties to cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat corruption-related offences. The measures that are foreseen to reach this goal include the establishment or enhancement of adequate channels of communication, cooperation in conducting inquiries, exchange of information on the means and methods used by offenders, facilitation of effective coordination between law enforcement agencies, and establishment of cooperation agreements or arrangements between such agencies. Most countries have taken steps to implement such measures and, to date, only one State party appears to have seriously fallen short of the relevant UNCAC requirements.

Channels of communication: Channels of communication between competent anti-corruption authorities and services with law enforcement mandate were reported to be frequent at the bilateral and regional levels, and were conducted within the regulatory framework of international or transnational organizations, such as the European Union and the Organization of American States, or within regional liaison networks, such as Aseanapol, the European Judicial Network, Europol, the OAS Network, the Pacific Transnational Crime Coordination Centre, the Southern African Police Service Cooperation, etc. The use of email for rapid communication has proven very useful in the day-to-day functioning of such networks, as well as tools such as secure databases for the sharing of information among law enforcement agencies.

Membership of Interpol was found to significantly enhance effective cross-border law enforcement cooperation and the localization of suspects of corruption-related offences; in addition, Interpol's I-24/7 global police communications system was reported as a useful tool in sharing crucial information on criminals and criminal activities worldwide in a timely and secure manner.⁵⁷ However, Interpol cannot replace direct channels of communication among law enforcement authorities, agencies and services of other States parties. Channels of communication beyond the regional context have been found to be scarce.

Information exchange appeared to be widespread among financial intelligence units (FIUs), as more than half of States parties indicated that they maintained or were developing interactions between their units and foreign FIUs, mainly through the conclusion of memoranda of understanding or membership of the Egmont Group, an international forum focused on stimulating cooperation in the areas of information exchange, training and the sharing of expertise in the fight against money-laundering. The application to become a member to this group was considered a good practice in one review. Similarly, the Customs services of some countries indicated their engagement in collaborative initiatives through the cooperation network of the World Customs Organization (RILO Network), or other arrangements. Some national police and prosecution agencies have further established cooperation with informal networks dedicated to improving cooperation in all aspects of tackling the proceeds of crime, and increasing the effectiveness of members' efforts in depriving criminals of their illicit profits through cooperative inter-agency cooperation and information sharing; these informal networks include CARIN (Camden Asset Recovery Inter-Agency Network), ARINSA (Asset Recovery Inter-Agency Network Southern Africa) or RRAG (Red de Recuperación de Activos de GAFISUD). Finally, one State party reported that its specialized anti-corruption agency had established formal partnerships (through memoranda of understanding) with no fewer than 20 foreign institutions with a similar mandate in 15 different countries around the world.

Cooperation in conducting inquiries, exchange of information and coordination: Most States parties provided an overview of their general legal and operational framework on information exchange and measures of cooperation and the purpose for which they were established, namely early identification, detection and investigation of offences covered by the Convention. Seven States parties provided information on inquiries that had been effectively conducted in cooperation with other States parties. Three States parties referred to the sharing information on research results and forensic experience related to the means or methods used to commit offences, e.g. identity theft and document forgery, nor on specific measures relating to the supply of items or substances for analytical purposes. This development reflects the rather limited practical application of subparagraphs 1(c) and 1(d) of Article 48 or at least the limited "visibility" of the relevant measures with regard to corruption offences.

Examples of implementation

One State party reported that its police forces had engaged in several joint activities with States of the same region in the areas of capacity-building, coordination and collaborative efforts in the fight against transnational crime, including corruption-related offences. These activities are undertaken through a regional "Transnational Crime Network", funded by this State party. The latter has also developed a series of multi-agency units against transnational crime comprised of law enforcement, Customs, as well as immigration authorities which are active in several countries of the region.

Another State party described a two-tier system of receiving requests for law enforcement cooperation by other countries. This system operated on a centralized level and a "decentralized" level in order to enhance efficiency and resolve cases more expeditiously. This was considered as a good practice by the reviewing experts.

Sixteen States parties have posted police liaison officers to other countries or international organizations (usually in embassies or diplomatic missions), and four State parties have deployed liaison officers to 20 or more foreign countries; however, the scope of activities of such liaison officers is not normally limited to anti-corruption.

⁵⁷ See UNODC, Manual of Mutual Legal Assistance and Extradition, 2012, pp. 31-32, 67.

Officials from law enforcement agencies frequently participate in joint training activities with international counterparts. Two States parties elaborated on the posting of its police attachés in some of its overseas embassies, making clear that although they possess diplomatic status and report to the Ambassador, their activities are conducted under the direct supervision of their police superiors.

Examples of implementation

With regard to effective coordination between authorities, agencies and services, one State party, together with other countries of the same region, has set up a joint network of liaison officers around the world, enabling police officers in any one of those States parties to act on behalf of the police of other countries.

Another State party's police force reported maintaining an "International Liaison Officer Network" with offices in 29 countries to broker collaboration with international law enforcement agencies and support bilateral or multilateral cooperation. The liaison officers involved are the State's law enforcement representatives overseas, and have well established channels of communication with local law enforcement agencies, which are constantly developed and enhanced. Furthermore, this network facilitates numerous inwards and outwards visits of national and foreign law enforcement agency delegations. Engagement with these delegations is a key component in strengthening the relationships between the national police and its international partner agencies, and has resulted in the identification of capacity-building opportunities and subsequent operational outcomes.

Finally, in one case the reviewing experts identified as a success the practice of one country to accept, based on bilateral agreements or arrangements, "visiting judges" from other States parties to adjudicate domestic cases. Although not directly linked to law enforcement cooperation, this practice was considered as useful in drawing on international expertise and reflected the country's readiness to engage in agreements aimed at enhancing coordination between the competent law enforcement agencies.

Legal basis for law enforcement cooperation: The conclusion of bilateral or multilateral agreements or arrangements on direct cooperation between law enforcement agencies, as encouraged in par. 2 of Article 48, appears to take place in a large majority of States parties, even if it is not always considered necessary for the provision of law enforcement cooperation. Most countries indicated that they have entered or are considering entering into such agreements (including memoranda of understanding, "letters of exchange" and "statements of intent"), predominantly with countries in the same region or language community. Among them, one State party has executed more than 90 interdepartmental agreements, memoranda and other international legal documents in the area of crime fighting. These agreements designate, inter alia, the respective authorities responsible for cooperation; oblige the parties to exchange the contact points of these competent authorities in order to ensure rapid and effective communication; foresee the forms, ways and means of eventual cooperation, such as the exchange of data relating to crimes which are being planned or have been committed; establish the possibility of informal consultations before initiating the submission of extradition or mutual legal assistance requests in respect of corruption-related offences; and provide for cooperation in personnel management and training. They also sometimes contain provisions focusing specifically on corruption.

While 12 States parties confirmed that they could use the Convention as a basis for law enforcement cooperation in respect of corruption-related offences, two States parties explicitly excluded that possibility. One State party reported a case where the Convention was indeed used for these purposes, while another State explicitly excluded this possibility, relying instead on other agreements and arrangements. States parties were encouraged to continue to engage in regional and bilateral dialogue by signing, if appropriate, (additional) agreements to facilitate the exchange of information for law enforcement purposes, and also to consider using the Convention as the legal basis for law enforcement cooperation in the absence of such arrangements.

Challenges of modern technology: The majority of States parties did not provide specific information on modalities of international cooperation to respond to offences committed through the use of modern technology, given that international law enforcement cooperation arrangements normally do not make distinctions based on the level of technology used by offenders. One State party stated that it had established a permanent focal

point to address all forms of cybercrime; another State party also, among others, actively cooperated with international organizations, partner countries and police attachés to tackle crimes committed through the use of modern technology by: (a) exchanging information and experience on modern investigative techniques; (b) exchanging best practices in this field through joint seminars, conferences, study visits and specific trainings; and (c) including the methods and technology used in committing crimes covered by the Convention as main topics in anti-corruption police training modules.

Effectiveness: Despite the fact that many States parties appear to have a wide array of normative and practical tools to meet the law enforcement cooperation requirements of the Convention, as well as broad experience in the use of these tools, considerable challenges remain, especially in countries with a weak national police apparatus. More specifically, the ability of some State parties to cooperate internationally in the area of law enforcement is constrained by difficulties in inter-agency coordination, as well as limited human resources and inadequate technological and institutional capacities. Furthermore, the conclusion of bilateral or multilateral cooperation agreements or arrangements does not guarantee their application in practice. Hence, for example, one review highlighted the need to circulate existing agreements among the competent authorities of all States parties in order to emphasize their importance and to gradually ensure that they are actively implemented.

B. Joint investigations

In line with Article 49, States parties are encouraged to enter into agreements or arrangements allowing the establishment of joint investigative bodies in relation to investigations, prosecutions or judicial proceedings with other States parties to the Convention. They are also encouraged to consider joint investigations on a case-by-case basis, even in the absence of pre-existing arrangements, given that this practice may significantly facilitate investigations and the exchange of information by eliminating the need to send individual requests for assistance between the team members.

About half of the States parties reported the adoption of agreements or arrangements allowing for the establishment of joint investigative bodies. Among the agreements cited were the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, and the Great Lakes Protocol on judicial cooperation. Two legal instruments that stand out in this respect are the EU Council Framework Decision 2002/465/JHA on joint investigation teams, and the Framework Agreement among the States Parties to MERCOSUR and Associated States on the Creation of Joint Investigation Teams, which expressly refers to the Convention, and to corruption in general as an offence which requires the use of enhanced investigative tools in order to combat this phenomenon.

Fourteen States parties had neither concluded bilateral nor multilateral agreements with a view to carrying out joint investigations, nor had undertaken such investigations on an ad hoc basis; however, one of these States parties indicated that draft legislation was under consideration at the time of the review. Ten States parties mentioned that their internal legislation and practice enabled them to conduct joint investigations on a case-by-case basis, and a number confirmed that they had done so on a number of occasions. One of the most experienced users of joint investigation teams reported a total of 29 such investigations, including on cases related to international corruption. Nonetheless, only three countries mentioned the formation of a joint investigation team in relation to a Convention offence. States parties were encouraged by the reviewing experts to systematize and make better use of information on joint investigations, including gathering information on the means employed and the criteria used in the establishment of joint investigation teams.

C. Special investigative techniques

Article 50 of the Convention endorses the use of special investigative techniques in the fight against corruption – at both the national and the international level – and especially with regards to controlled delivery, as well as electronic or other forms of surveillance and undercover operations. These methods were reported to constitute an effective tool for law enforcement authorities so that they can gather the evidence they need to undermine the activities of mostly secretive corrupt actors and networks. The term “controlled delivery” is defined in Article 2(i), as the “technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence”. At the international level, par. 4 of Article 50 clarifies that controlled delivery 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 Convention also supports the admissibility in court of evidence derived from such techniques. However, the decision on whether to use them in a specific circumstance is left to the discretion of the State party concerned, taking into account the basic principles of its legal system, the conditions prescribed by its law and the resources it has at its disposal.

Special investigative techniques and their admissibility in court are regulated in the legislation of a large majority of the States parties under review. Ten States parties appear not to make use of special investigative techniques, but two of them noted that such techniques would be allowed under draft legislative provisions under discussion at the time of the review. Moreover, in two cases the utilization of special investigative techniques is only authorized with respect to specific criminal offences which did not include corruption-related offences. The most commonly used methods include controlled deliveries, interception of communications, including the use of data surveillance devices, such as key logging devices or other computer-based surveillance, listening devices, optical surveillance devices and tracking devices, as well as undercover operations; the use of such methods can only normally be authorized by a court order.

Examples

The law enforcement authorities of one State party operate an undercover policing programme with a team of full and part-time covert personnel that provides high standards of evidence and intelligence collection. This is carried out across a range of investigative tasks and crime types, including high-tech crime, economic crime, money-laundering, illicit drugs, counter terrorism, people smuggling and corruption. The programme operates both nationally and internationally, and operations are conducted in other countries with the country’s consent and in keeping with its laws and regulations (and vice versa). The police in the State party concerned have joined the International Working Group (IWG) on Undercover Operations, which has a current membership of over 25 law enforcement agencies working to forge and strengthen international covert capacity and build cooperation between the respective agencies.

Another State party recently introduced a new special investigative technique – monitoring of Internet activity – which can be initiated upon the request of a foreign country. The technique involves surveillance and participation in open and covered Internet-related activities, as well as activities related to obtaining illegal computer data to identify persons committing a crime. This investigative technique is exclusively intended to facilitate the prevention of and fight against cybercrime, taking into consideration rising worldwide crime trends, including corruption-related activities, being perpetrated through the use of Internet.

It should be noted that the use of special investigative techniques often raises sensitive constitutional and human rights issues and calls for particular caution in order to ensure appropriate oversight, accountability and the respect of established principles of international law, such as the presumption of innocence, the principle *nemo tenetur se ipsum prodere/accusare* (no one is bound to accuse himself/herself), and the right to respect of one’s private life. For example, the behaviour of an undercover agent employed in the investigation of crimes should be within the limits of the rule of law and confine his or her activities to taking advantage of the opportunities

provided or facilities created by an offender that has already decided to commit the crime; this cannot take the form of illicit entrapment, which consists of an agent instigating or abetting an offence in order to entrap an offender.

International agreements or arrangements, as mentioned in Article 50 par. 2, aimed at investigating corruption-related offences were reported in 13 States parties; these usually involved counterparts in the same region or members of the same regional organization, e.g. as in the context of the Schengen accords. Among the States parties that have not concluded agreements of this kind, one reported that it would be possible to use special investigative techniques if requested by States parties with which it had concluded a general treaty on mutual legal assistance.

Finally, Article 50 par. 3 of the Convention requires countries that have not acceded to any international agreement of arrangement on the use of special investigative techniques, to have at least the ability to cooperate with other countries on a case-by-cases basis. This principally relates to the use of controlled delivery, the establishment of which is mandatory pursuant to par. 1, where this is not contrary to the basic principles of the legal system of the State concerned.⁵⁸ The information provided suggests that special investigative techniques can be used at the international level, even in the absence of relevant international agreements and on a case-by-case basis. More than half of the States parties (18) currently resort to such techniques, but two of these States parties stated that they only used such techniques on the condition of reciprocity.

Conclusion

The present study has identified an evolving process of legislative change that has marked the anti-corruption legal frameworks of the majority of States parties in recent years and has led to notable advances in the direction envisaged by Article 1 of the Convention, at least with regard to the criminalization of corruption, law enforcement and international cooperation. As observed during the implementation reviews, combating corruption is ranked among the highest priorities of Government in many States parties and substantial resources are devoted to the fight against corrupt practices. In some countries, statutory amendments and structural changes have been combined to produce tangible results in terms of legislative and regulatory enforcement action; indictments and convictions even in cases involving high-level corruption; and strong cooperative networks in terms of extradition, mutual legal assistance and transnational law enforcement. In this context, the Convention has already played a significant role in triggering reform efforts and continues to serve as a fundamental basis for the establishment of effective anti-corruption regimes.

Nonetheless, substantial challenges remain. These range from problems of the most rudimentary nature – such as the existence of obvious errors in the official translation of the Convention into one national language – and practical impediments due to lack of experience, resources and training; to difficult technical issues regarding the formulation of criminalization provisions or the incorporation of particular elements in complex procedural structures. Gaps and deviations were observed especially with regard to the implementation of Chapter III of the Convention, in relation both to criminalization and law enforcement. Although, naturally, problems were detected in varying degrees in respect of all relevant provisions, the most important challenges identified relate to the following (both mandatory and non-mandatory) provisions:

a) With regard to the criminalization provisions: the scope of coverage of the term “public official” (especially as regards the status of Members of Parliament); gaps in the formulation of the offence of bribery of national public officials (Article 15); the non-establishment of the offence of bribery of foreign public officials and officials of public international organizations (Article 16); the technical and methodological difficulties encountered by States parties in transposing the complex offence of trading in influence in their national legislation (Article 18); the non-criminalization of illicit enrichment (Article 20) – which is often due, however, to insurmountable

⁵⁸ UNCAC Legislative Guide, par. 650.

constitutional and equivalent limitations; the issues impeding the criminalization of bribery in the private sector (Article 21); the inadequate practical capabilities of competent authorities with regard to the enforcement of anti money-laundering provisions (Article 23); numerous national limitations regarding the criminalization of obstruction of justice (Article 25); and the limited application in practice of measures establishing the liability of legal persons (Article 26).

b) With regard to the measures enhancing criminal justice: the lack of balance between privileges and jurisdictional immunities afforded to public officials on the one hand and the need to effectively investigate, prosecute and adjudicate corruption-related offences on the other (Article 30 par. 2); the inadequacy or lack of harmonization of sanctions for corruption-related offences (Article 30 par. 1); the lack of measures for the disqualification of convicted persons from holding office in enterprises owned in whole or in part by the State (Article 30 par. 7b); the absence or inadequacy of measures for identifying, tracing and freezing assets (Article 31 par. 2); challenges in the administration of frozen, seized or confiscated property (Article 31 par. 3); the absence of a reversal of the burden of proof for demonstrating the lawful origin of property liable to confiscation (Article 31 par. 8); and inadequate normative frameworks on the protection of witnesses, experts, victims and reporting persons (Articles 32-33).

c) With regard to law enforcement: limitations as regards the efficiency, expertise, capabilities and independence of specialized authorities (Article 36); insufficient incentives for cooperation with law enforcement authorities (Articles 37); and the lack of effective inter-agency coordination and information exchange, especially among agencies with an anti-corruption mandate (Article 38).

Some suggestions for overcoming the identified gaps, as indicated during the country review process, are highlighted in the individual parts of this study, together with explanatory observations and interpretive comments, as well as good practices and examples of implementation, where available. Furthermore, States parties may wish to follow the example of some countries and initiate consultative processes for the development of comprehensive national anti-corruption action plans, which will include a holistic examination of how anti-corruption systems can become more effective. Such an action plan could include as one of its core elements the identification of ways and means to address delays in investigations and judicial proceedings that may frustrate efforts to efficiently curb corruption-related offences.

Finally, a cross-cutting problem regarding the implementation of Chapter III appears to be the lack in many countries of adequate statistical data or case law typologies relating to the investigation and prosecution of corruption offences, including the sentences imposed. Although some data can be made available by individual authorities or for individual offences, often there is no consistency in the methodology used and the type of data collected and no central mechanisms exist through which such data can be accessed. As emphasized in several reviews, concrete information on implementation practice is important for assessing the effectiveness of existing measures, coordinating anti-corruption institutions at the operational level, designing ad hoc crime prevention and criminal justice strategies, and taking concerted action to further the Convention goals. Therefore, States parties should seek to promote the consolidation, accessibility and scientific analysis of statistical data, which will allow a greater focus also on practical issues of enforcement and a better assessment of implementation practice.

As regards Chapter IV of the Convention, a different picture emerges. Given the self-executing character of some of the relevant provisions and the fact that the majority of States are able to make direct use of them, implementation of that Chapter appears to be more advanced, at least from a theoretical point of view. Many reviews noted the existence of robust frameworks on international cooperation, the conclusion of a notable array of bilateral and multilateral extradition and mutual legal assistance treaties, as well as wide networks aimed at facilitating inter-State law enforcement action to combat corruption-related offences.

However, in some of the reviews it was also noted that there is a significant knowledge gap with regard to international cooperation and that there are scarce resources dedicated to it. In view of this, the most importance challenges – other than the obligation of each State party to ensure that its laws and treaties are broad enough to

fulfil the Convention requirements – appear to be of an operational nature and concern putting in place measures to give practical effect to existing legal instruments. To this end, the matter of data collection surfaces again in most reviews as an important factor for the achievement of the Convention goals. States parties should systematize the collection, processing and circulation of statistics, or in their absence, provide examples of cases (e.g. indicating the length between the receipt and execution of extradition and mutual legal assistance requests, the reasons for postponement or refusal, etc.) for the purpose of assessing the efficiency and effectiveness of extradition, mutual legal assistance and law enforcement proceedings. Moreover, it is recommended that they also consider the allocation of additional resources to strengthen the efficiency and capacity of international cooperation mechanisms.
