



**UNODC**

United Nations Office on Drugs and Crime

## **Country Review Report of Madagascar**

Review by Nigeria and Nicaragua of the implementation by Madagascar of articles 15 - 42 of Chapter III. “Criminalization and law enforcement” and articles 44 - 50 of Chapter IV. “International cooperation” of the United Nations Convention against Corruption for the review cycle 2010 - 2015

## **I. Introduction**

1. The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

## **II. Process**

5. The following review of the implementation by Madagascar of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Madagascar, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from Madagascar, Nigeria and Nicaragua, by means of telephone conferences and e-mail exchanges, and involving:

### Madagascar:

- Mr. LAMINA Boto Tsara Dia, Focal Point, BIANCO
- Mr. ANDRIAMIFIDY Jean Louis, Directeur Général, BIANCO
- Mr. LEJAMBLE Brice, Secrétaire exécutif, Comité pour la sauvegarde de l'intégrité
- Mr. RAFIDIMANANA Jimmy, Directeur administratif, BIANCO
- Ms. RAMANATENASOA Noëline
- Mr le Général de Corps d'armée RAVELOHARISON Herilanto
- Mr. IMBIKI Anaclet
- Ms. RAZANDRAKOTO Marie Solange
- Ms. RAKOTONDRABE RALAIVELO Noëline
- Ms. BAZEZY Rosette Jocelyne
- Mr RAZAFIMANANTSOA Georges
- Mr le Colonel RATOVOSON Benjamin Arthur
- Mr RAVALOMANDA Thierry
- Ms. MANSARE Fela Justine
- Mr R Solofonirina Théodore
- Mr. VELOTSARA Marcel
- Mr. RAZAFIMANDIMBY Tsiry Harivelo Eric
- Mr. Herimamy ROBENARIMANGASON, BIANCO

#### Nigeria:

- Ms. Ladidi MOHAMMED
- Mr. Chile OKOROMA
- Mr Adesina Isola RAHEEM

#### Nicaragua:

- Mr. Hernaldo Jose CHAMORRO DIAZ

#### Secretariat:

- Ms. Dorothee Gottwald, UNODC/DTA/CEB/CSS
- Mr. Oliver Landwehr, UNODC/DTA/CEB/CSS

6. A country visit, agreed to by Madagascar, was conducted from 2 to 6 February 2015. During the on-site visit, meetings were held with representatives from the Bureau Indépendant Anti-Corruption (BIANCO), the Comité pour la Sauvegarde de l'Intégrité (CSI), the Prosecution authorities (Procureur Général auprès de la Cour Suprême, Procureur Général auprès de la Cour d'appel d'Antananarive, Procureur au TPI Tana), the Police Nationale, the Gendarmerie Nationale, the Ministry of Foreign Affairs, the Ministry of Justice, and the Financial Intelligence Unit (SAMIFIN). The review team also met with representatives from civil society organizations (ONG Tsicoolkoly, Lawyers' association).

### **III. Executive summary**

#### ***1. Introduction: Overview of the legal and institutional framework of Madagascar in the context of implementation of the United Nations Convention against Corruption***

*The Republic of Madagascar signed the Convention on 10 December 2003 and ratified it on 22 September 2004.*

*Madagascar re-joined the African Union in 2014, after a suspension of five years because of political and institutional instability. Madagascar has a semi-presidential regime, with the President of the Republic as Head of State, and a Prime Minister as the head of the executive. The legislative power is composed of the National Assembly and the Senate.*

*Madagascar has a civil law system with the Constitution as the supreme law. Conventions, once ratified, form part of the legal system, and rank under the Constitution but above legislation. The judiciary has, below the Constitutional Court at the top, three branches (ordinary, administrative and financial) headed by the Court of Cassation, the Council of State and the Court of Auditors respectively.*

*With regard to the criminal process, investigations are led by the Prosecutor's Office, which also brings accusations in court and has to maintain an objective role during trial before the courts and tribunals. The preliminary criminal investigation in corruption matters is under the main responsibility of the Bureau indépendant anti-corruption (BIANCO) and the criminal police.*

*The main anti-corruption institutions are the BIANCO and the Comité pour la Sauvegarde de l'Intégrité (CSI). The main anti-corruption legislation is contained in the anti-corruption Law No. 2004-030 and the anti-money-laundering Law*

No. 2004-020. A circular of the Ministry of Justice regulates criminal policy in anti-corruption matters.

At the time of the country visit, Madagascar was establishing a crime statistics system and was in consultations on the adoption of a National Anti-Corruption Strategy.

## **2. Chapter III: Criminalization and law enforcement**

### **2.1. Observations on the implementation of the articles under review**

*Bribery and trading in influence (arts. 15, 16, 18 and 21)*

Active bribery is regulated in article 177.1 of the Penal Code (Code Pénal, (CP)), and a provision on gifts in article 183 CP. Passive bribery is regulated in

article 177 CP. The active bribery of foreign officials and officials of international organizations is criminalized in article 177.2 CP, but there is no provision for passive bribery of these officials.

Madagascar does not have a single definition of public officials. The bribery provisions include a broad definition that covers members of Parliament as well as judges or CEOs of public enterprises. However, other offences use different wording.

The “giving” of an advantage and third-party beneficiaries are not explicitly mentioned in the law.

Active and passive trading in influence are criminalized in 179 CP, which does not envisage third-party beneficiaries. Article 177.1, No. 3 (active bribery), also covers active trading in influence when the person abusing his/her influence (the intermediary) is a public official. The range of punishment in article 177.1, No. 3, and 179 CP is different.

Article 21 is implemented only in its passive form through article 178 CP. It covers managers, shareholders and employees as well as members of liberal professions and does not cover third-party beneficiaries.

*Money-laundering, concealment (arts. 23 and 24)*

Money-laundering is criminalized in articles 1, 2, 3, and 30 to 35 of Law No. 2004-020 and is an autonomous offence.

Madagascar applies an “all crimes approach”, including as predicate offences all offences, including those committed abroad. Those committed abroad must constitute a criminal offence in both countries, “unless it has been agreed to otherwise”. Such an exception could be created by treaty, although no such agreement exists yet. The offender himself may also be the perpetrator of the predicate crime.

Concealment is criminalized in articles 460 and 401 CP.

*Embezzlement, abuse of functions and illicit enrichment (arts. 17, 19, 20 and 22)*

Embezzlement is regulated in article 169 CP. The offence is already committed with the act of diversion, so it is irrelevant who the beneficiary of this offence is.

Article 19 is implemented through article 179.1 CP.

Madagascar has criminalized illicit enrichment in article 183.1 CP with regard to all public officials. Certain officials have the obligation to declare assets annually (Art. 1 and 2 of Law No. 2004-030, Decree No. 2004-983).

Embezzlement in the private sector is criminalized by articles 379, 401, 406, 408 CP and article 931 of the Commercial Companies Code.

*Obstruction of justice (Art. 25)*

Article 25 (a) is implemented through article 365 CP. It covers all means of obstruction of justice described, but only to induce false testimony, not to interfere in the giving of testimony or the production of evidence.

Article 25 (b) is implemented through article 27 of Law No. 2004-030, on obstructing the investigative efforts of the Director General of BIANCO, which is interpreted as referring to the entire institution. This provision does not include interference with the exercise of duties of other judicial or law enforcement officials.

#### *Liability of legal persons (Art. 26)*

Madagascar regulates criminal liability of legal persons in article 32 of Law No. 2004-020, which allows the imposition of a fine five times as high as the one for natural persons. There is no general regime for the criminal liability of legal persons, but confiscation as an accessory criminal sanction is also applied with respect to property owned by legal persons (Art. 16 of Law No. 2004-030).

Administrative liability is foreseen in article 17(2) of Law No. 2004-030 and articles 9 and 54 of the Public Procurement Code, which provide for mandatory debarment of companies from public procurement.

With regard to civil liability, Madagascar considers as a general principle of law that a legal person is liable for the conduct of its representatives.

#### *Participation and attempt (Art. 27)*

Article 27 (1) is implemented through articles 59 and 60 CP. Accomplices are generally punished like the authors of the crime. The general rule about attempt is regulated in articles 2 and 3 CP. Attempt to commit a "délit" (misdemeanour) is only criminalized where provided for in law. Convention offences are délits, except for money-laundering and embezzlement, and do not provide for the criminalization of attempt. The preparation for a corruption offence is not criminalized.

#### *Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (arts. 30 and 37)*

Sanctions for corruption offences in Madagascar range from fines to long imprisonment. Some sanctions in the law are not applied any more, for example, forced labour is transformed into imprisonment.

The immunities of the members of Parliament, as well as the procedures to lift them, are regulated in article 73 of the Constitution. Investigative steps can be taken during the procedure for lifting immunities. The President also enjoys immunity (Art. 131 of the Constitution). Magistrates benefit from procedural privileges pursuant to articles 512 and 513 of the Criminal Procedure Code (CPC).

Prosecution is not mandatory; however, a circular of the Ministry of Justice on money-laundering requests prosecutors to exercise the opportunity principle with a view to enhancing the effectiveness of law enforcement. The decision of the prosecutor to prosecute or not can be judicially reviewed.

Madagascar's CPC contains regulations on alternatives to provisional detention (arts. 342-350) and on early release or parole (arts. 574- 578).

Public officials accused of corruption can be suspended and reassigned as a matter of practice by a discretionary administrative decision. The removal of an official accused but not convicted of a corruption offence is considered unconstitutional.

As an accessory sanction, offenders can be declared ineligible to exercise public functions for a period of at least two years (arts. 180, 180.1 and 172

CP). This includes holding office in an enterprise owned in whole or in part by the State.

Madagascar has a disciplinary system regulated by its Civil Service Statute; article 43(3) clarifies that disciplinary and criminal proceedings are independent.

The Decree on the Administration of the Penitentiary System (2005) contains provisions on the reintegration into society of convicted offenders.

Madagascar has implemented article 37 of the Convention through article 180.2 CP and article 161 CPC, which provide for the mitigation of or exemption from punishment for cooperating offenders.

*Protection of witnesses and reporting persons (arts. 32 and 33)*

The protection of witnesses and whistle-blowers is provided for in articles 32 to 35 of Law No. 2004-030, which establish some of the relevant measures, for example, the protection of identity. Law enforcement agencies can provide physical protection but they lack sufficient financial resources to carry out this function at the expense of the State. Evidentiary rules for witness protection are applied as a matter of practice. The legislation does not apply to experts. A witness protection programme has not yet been established. Victims have standing in the criminal process when they ask for reparation, but not generally to express their concerns.

Reprisals against whistle-blowers or witnesses are forbidden. BIANCO is responsible for protecting their identity. Whistle-blowers may file written complaints with BIANCO, and BIANCO can thereupon approach the competent authority, which may take measures such as reinstating or reimbursement (arts. 32-35, Law No. 2004-30).

*Freezing, seizing and confiscation; bank secrecy (arts. 31 and 40)*

Madagascar has regulated conviction-based confiscation as an accessory sanction for specific offences in the Penal Code (for example in Art. 183.2 CP). In article 16 of Law No. 2004-30, there is a general authorization for, inter alia, confiscation in all corruption cases, without further detail.

Articles 36 and 37 of Law No. 2004-20 establish conviction- and non-conviction-based confiscation for money-laundering. Object-based confiscation is the rule, but value-based confiscation is possible in a subsidiary way. These provisions refer to the "object" of the offence or its value, not explicitly to the instrumentalities used in or destined for use in its commission.

The prosecutor and the investigating judge can seize and freeze assets (arts. 133-135, 210-212 and 260-261 CPC and arts. 28 and 29 of Law No. 2004-20).

Madagascar has a basic regulation on the administration of seized assets in article 260 CPC; however, it has not yet established an institutional structure.

With regard to money-laundering, all relevant measures can be taken when proceeds are transformed into other property or intermingled with property of legitimate sources, and with regard to income and other benefits derived from proceeds of crime.

Property belonging to a person convicted of a money-laundering offence or to his family members can be confiscated unless they can establish its lawful origin.

The rights of bona fide third parties are protected in articles 261 CPC and 36 No. 1 of Law No. 2004-20.

According to article 24 of Law No. 2004-030, BIANCO can inspect and request documentation on the accounts held with banks or other financial institutions by the suspect and his family members. Article 27 of the same Law No. 2004-

020 gives the judicial authorities the power to overcome bank secrecy in money-laundering investigations.

*Statute of limitations; criminal record (arts. 29 and 41)*

*The statute of limitation for crimes is 10 years and for misdemeanours 3 years, from the date of commission, if no investigative actions or prosecution have been carried out in the meantime (Art. 3 CPC). Therefore, the period prescribed for*

*money-laundering and embezzlement is 10 years and for the other corruption offences 3 years. Evasion of justice is not a reason for suspension.*

*Madagascar has not implemented article 41.*

*Jurisdiction (Art. 42)*

*Madagascar has established its jurisdiction for offences committed in its territory (Art. 27, Ordonnance 62-041), but not on board a Malagasy vessel or aircraft.*

*Jurisdiction has also been established for offences committed by Malagasy citizens and offences committed against the security of the State (Art. 507 CPC) and, upon request of the prosecutor, for those committed against Malagasy citizens*

*(Art. 508 CPC).*

*The jurisdiction to prosecute Malagasy citizens in lieu of extradition is assumed as a general principle.*

*Consequences of acts of corruption; compensation for damage (arts. 34 and 35)*

*Article 17, paragraph 1, of Law No. 2004-030 foresees that any contract, licence, permit or authorization obtained by corrupt means is automatically void.*

*Civil action for the compensation of damage can be pursued within the criminal proceedings according to articles 182-183 and 192-193 CPC.*

*Specialized authorities and inter-agency coordination (arts. 36, 38 and 39)*

*The law enforcement authorities investigating corruption are BIANCO, the police, the gendarmerie and the investigation units within the specialized Chaîne Pénale Anti-corruption (CPAC).*

*The independence of BIANCO is according to the law guaranteed by the security of the positions of its officers, the availability of sufficient resources, and the autonomy of its operations. The powers of BIANCO are set out in articles 22-30 of Law No. 2004-030.*

*CPAC is a system of specialized anti-corruption investigators, prosecutors and courts. It does not yet operate exclusively for corruption offences. Conversely, not all cases involving corruption are handled by CPAC. Unlike BIANCO, CPAC does not have a national competence.*

*Article 16 of Law No. 2004-020 and Decree No. 2007-510 provide for the establishment of a Financial Intelligence Unit (FIU - SAMIFIN).*

*The Director General of BIANCO has the power to directly ask for the support of all law enforcement agencies (Art. 23(5) of Law No. 2004-030). BIANCO and other law enforcement agencies can exchange officers with special know-how. BIANCO has memorandums of understanding with SAMIFIN and the Ministry of Justice.*

*Instructions given to prosecutors are not recorded in writing.*

*BIANCO has cooperation with the private sector, including the chamber of commerce, in the area of prevention and education. The FIU provides training and meets regularly with reporting entities.*

Complaints are received, also anonymously, by BIANCO, the police and the gendarmerie. BIANCO cooperates with Transparency International Madagascar, which provides a hotline for complaints, and plans to set up a website for the reporting of corruption offences.

## 2.2. **Successes and good practices**

The following successes and good practices are highlighted:

- The possibility to take investigative steps before the lifting of immunity (Art. 30(2)).
- The protection of whistle-blowers in article 35 of the anti-corruption Law No. 2004-030, which provides for a complaint procedure that may result in measures such as reinstating the whistle-blowers in their position or reimbursing them for damages (Art. 33).
- The procedure on the compensation of damage, which can be initiated by a verbal statement of the victim and even *ex officio* (Art. 35).

## 2.3. **Challenges in implementation**

While noting Madagascar's efforts in the field of anti-corruption, it is recommended that Madagascar:

*General part*

- Define the term "public official" in accordance with article 2, subparagraph (a), of the Convention, and consistently use this term throughout the CP.
- Continue efforts to establish a national system of crime statistics disaggregated by offence, state of the process and outcome.
- Update the system of sanctions in the CP and abolish those sanctions that are not applied any more.

*Criminalization and law enforcement*

- Include explicitly third-party benefits and the "giving" of an undue advantage in all bribery offences; more clearly delineate the elements of the provisions criminalizing active bribery (Art. 177.1 and Art. 183, para. 2 CP) with a view to avoiding overlaps between them (arts. 15 and 16, para. 1).
- Consider criminalizing passive transnational bribery (Art. 16, para 2).
- Clarify that the investigation of embezzlement as a Convention offence should fall within the competence of BIANCO (Art. 17).
- Consider including third-party benefits in trading of influence offences, consider explicitly mentioning the "giving" of an undue advantage, and consider harmonizing the provisions on trading in influence (Art. 177.1, No. 3, and Art. 179 CP) (Art. 18).
- Taking into account the existing considerations regarding criminalizing active bribery in the private sector, further pursue the criminalization of this conduct (Art. 21, subpara. (a)).
- Consider including third-party beneficiaries in bribery in the private sector (Art. 21, subpara (b)).
- Consider making embezzlement in the private sector a distinct offence (Art. 22).
- Recognizing the general criminalization of money-laundering based on predicate offences committed abroad, abolish the possibility of waiving the principle of dual criminality by treaty with a view to enhancing legal security (Art. 23, subpara 2 (c)); furnish copies of its relevant laws to the Secretary-General of the United Nations (Art. 23, subpara 2 (d)).

- *Criminalize obstruction of justice according to article 25, subparagraph (a), not only to induce false testimony, but also to interfere in the giving of testimony or the production of evidence (Art. 25, subpara (a)).*
- *Criminalize the use of physical force, threats or intimidation to interfere with the exercise of official duties by all justice and law enforcement officials (Art. 25, subpara (b)).*
- *Consider the introduction of criminal liability of legal persons for all corruption offences, and assess if the sanctions, especially the criminal fines foreseen for legal persons, are sufficiently effective and dissuasive (Art. 26).*
- *Could criminalize attempt for all corruption offences (Art. 27 para. 2).*
- *Establish a longer statute of limitations for corruption offences characterized as délits, and establish a possibility of suspending it or foresee a longer statute of limitations in the case of evasion of justice. Further, Madagascar may assess the possibility of introducing a regulation by which the statute of limitations for corruption offences starts with the discovery of the facts (Art. 29).*
- *Consider whether the use of any discretionary powers could be guided by the adoption of a policy comparable to the one in the circular on criminal policy regarding money-laundering, with a view to maximizing the effectiveness of law enforcement measures (Art. 30(3)).*
- *Adopt a comprehensive legislative regime in line with article 31 for the seizure, freezing and confiscation of proceeds and instrumentalities used in and instrumentalities destined for use in all corruption offences, and establish an institutional framework for the management of seized and confiscated assets (Art. 31).*
- *Create consolidated witness protection legislation with regard to all criminal offences, and covering all measures described in the Convention, for witnesses and experts; to the extent necessary and feasible, institute a witness protection programme and provide financing for it; consider entering into agreements for the international relocation of witnesses; and take measures to enhance the role of victims during trial (Art. 32).*
- *Establish strong coordination mechanisms between the various law enforcement bodies; take measures to ensure the independence of prosecutors, for example, by regulating that instructions to prosecutors must be given in writing; the new proactive approach of BIANCO to act ex officio was welcomed (Art. 36).*
- *In the reform of the witness protection legislation, include the protection of collaborators with justice (Art. 37, para. 4).*
- *Continue to encourage citizens to report offences, including through the establishment of hotlines (Art. 39, para. 2).*
- *Could adopt legislation to allow the taking into account of previous convictions in other States (Art. 41).*
- *Establish jurisdiction over offences committed on board national vessels or aircraft (Art. 42, subpara. 1 (b)), consider establishing jurisdiction over participation in or attempt of money-laundering committed abroad (Art. 42, subpara. 2 (c)), and consult with other States parties in the cases established in article. 42, paragraph 5. Madagascar could establish its jurisdiction over corruption offences when it does not extradite the alleged offender (Art. 42, para. 4).*

#### **2.4. Technical assistance needs identified to improve implementation of the Convention**

Madagascar indicated technical assistance needs in the context of the development and implementation of the National Anti-Corruption Strategy.

For criminalization, Madagascar requested legislative drafting assistance, including through on-site assistance by anti-corruption experts, for articles 16, paragraph 2, 20, 21, subparagraph (b), 25, 26 and 29. For law enforcement, the same forms of technical assistance are sought on articles 30-34 and 37-39, and training on articles 31-33 and 37. Assistance in the establishment of crime statistics/databases was also mentioned.

Two areas were established as a priority:

(a) The provision of legislative assistance to fully criminalize all corruption offences;

(b) The establishment of a consolidated framework and programme for the protection of witnesses, experts and collaborators with justice; and on a related matter, the further development of measures to protect officials investigating corruption.

### **3. Chapter IV: International cooperation**

#### **3.1. Observations on the implementation of the articles under review**

*Extradition; transfer of sentenced persons; transfer of criminal proceedings (arts. 44, 45 and 47)*

Extradition is regulated in two bilateral, three regional and a number of multilateral treaties to which Madagascar is a party, and, in a subsidiary manner, in the Extradition Law (1927) and in Law No. 2004-020. At the time of the review, a draft law on international cooperation (extradition and mutual legal assistance) was being finalized.

Madagascar does not require a treaty for extradition, but can extradite on the basis of reciprocity or international courtesy. Madagascar considers the Convention a legal basis for extradition.

Extradition is based on the principles of dual criminality, proportionality and specialty. However, dual criminality is practised with a large measure of flexibility and determined based on the underlying conduct.

Extraditable offences are those with maximum sanctions of deprivation of liberty of at least two years, which includes some but not all Convention offences. Using the Convention as a legal basis, all Convention offences could be considered extraditable. If a person is sought for various offences, they are extraditable if the sum of their maximum penalties reaches two years.

Extradition is excluded for political offences. Money-laundering is not considered a political offence (Art. 54, Law No. 2004-020); neither is corruption, according to general principles. Extradition for fiscal offences is not explicitly allowed.

Madagascar can arrest a person based on an INTERPOL red notice.

Based on article 5(1) of the Extradition Law, Madagascar does not extradite its nationals, while according to article 51(h) of Law No. 2004-020, nationality is an optional ground for refusal. Some of the treaties to which Madagascar is a party regulate the obligation to “extradite or prosecute” (for example, Art. 2, para. 2, of the treaty with France) and the possibility of enforcing foreign sentences (for example Art. 60 of the General Convention on Cooperation in Justice Matters between 12 States of the region).

The extradition procedure has a judicial and an administrative phase. Decisions cannot be appealed. A concern over discrimination is a mandatory ground for refusal pursuant to article 50 (b) of Law No. 2004-020. There is no legal obligation to consult with the requesting State before refusing a request.

*Extradition proceedings have a duration of approximately two months. The Extradition Law provides for specific deadlines. A simplified procedure is foreseen in article 15 of the Extradition Law and article 61 of Law No. 2004-020 if the person sought agrees to the extradition, and in the two bilateral treaties through a direct procedure between the Ministries of Justice. The court only assesses the legal requirements for extradition, not the evidence on the commission of the offence.*

*A draft of a new extradition law at the time of the country review contained provisions on a number of relevant issues, including extradition for fiscal offences, an anti-discrimination clause and a right to appeal. It maintained the minimum penalty requirement of two years and nationality as a non-mandatory ground for refusal.*

*Madagascar expressed its intention to negotiate additional bilateral treaties on extradition and mutual legal assistance, and to ratify the Southern African Development Community (SADC) Protocol against Corruption.*

*Madagascar has concluded three treaties on the transfer of sentenced persons.*

*Madagascar does not have legislation or practice on the transfer of criminal proceedings.*

*Mutual legal assistance (Art. 46)*

*Mutual legal assistance is regulated in the above-mentioned bilateral and regional treaties, in article 253, paragraph 3, CPC, as well as in Law No. 2004-020. Madagascar can provide mutual legal assistance on the basis of the Convention, although there have been no cases yet.*

*Madagascar requires dual criminality as a matter of practice, and according to article 43(d) of Law No. 2004-020. In principle, mutual legal assistance in the absence of dual criminality could be afforded on the basis of the Convention.*

*Madagascar can provide assistance for all purposes foreseen in the Convention, also with regard to procedures against legal persons, to the extent that the required act is not contrary to domestic law. This includes procedures specified in the request (Art. 44, Law No. 2004-020).*

*Madagascar has received information without prior request, which it can keep confidential according to general principles of law. It has not yet spontaneously transmitted information. Informal case coordination meetings for the preparation of mutual legal assistance requests are held especially in cases involving multiple jurisdictions or conflicts of competence.*

*The Ministry of Justice is the central authority. Requests are received in French and Malagasy through diplomatic channels unless otherwise regulated in a treaty. Some of the treaties to which Madagascar is a party allow direct transmission to the Prosecutor's Office. In urgent circumstances, requests can be received through INTERPOL, by fax or e-mail, but not orally.*

*The principles of confidentiality and speciality are regulated in articles 59 and 62 of Law No. 2004-020 and applied as general principles of law. Videoconferences for purposes of testimony have been held in practice and are contained in the draft legislation.*

*Mutual legal assistance cases in Madagascar take one year on average, and the easiest cases two to three months. A circular of the Minister of Justice in 2013 instructed officials to prioritize the timely execution of requests. The execution of requests according to deadlines suggested by the requesting State party and the provision of information on the status of a request are implemented in practice. Malagasy authorities gave examples in which they requested further information or consulted with the requesting party before refusing a request.*

*Article 43 of Law No. 2004-020 and the treaties to which Madagascar is a party contain grounds for refusal of mutual legal assistance that are largely in*

line with the Convention. Banking secrecy cannot be invoked in this regard. However, Madagascar currently cannot provide assistance for fiscal offences; for corruption offences that involve fiscal matters it could in principle be done on the basis of the Convention. Article 43 of Law No. 2004-020 establishes that reasons have to be given when refusing assistance, and mutual legal assistance can be postponed if it interferes with domestic procedures. In some of the treaties to which Madagascar is a party, safe conduct for witnesses who give evidence at the request of the requesting State is guaranteed. There is no legislation on the costs of the execution of a request; Malagasy authorities confirmed that unless the parties agree otherwise, the costs are borne by the requested State party.

*Law enforcement cooperation; joint investigations; special investigative techniques (arts. 48, 49 and 50)*

*BIANCO has cooperation agreements with its counterparts in Mauritius and France, and is developing cooperation with China and Malaysia. The police cooperate through INTERPOL, and SAMIFIN is a candidate FIU to the Egmont Group. In the region, most law enforcement cooperation is realized through the Judicial Regional Platform of the Indian Ocean Commission countries. The Platform also links Madagascar to further cooperation networks such as Eurojust, the European Judicial Network or the Sahel Judicial Platform.*

*Joint investigative teams can be formed on the basis of a treaty, including the Convention, or an ad hoc arrangement. Such teams have been established on the basis of the United Nations Convention against Transnational Organized Crime.*

*Madagascar applies all special investigative techniques mentioned in the Convention to money-laundering offences (arts. 25-26, Law No. 2004-020). In other matters, they can also be used in practice, without specific legal basis. They can be ordered by the Prosecutor-General. Electronic surveillance requires a judicial order and information gathered therefrom must be supported by other means of evidence in court. At the international level, there are no specific regulations in the relevant treaties, but Madagascar can use the techniques on the basis of the Convention or on a case-by-case basis and has already done so, although not yet in corruption offences.*

### **3.2. Successes and good practices**

- *Madagascar is making efforts to adopt comprehensive legislation on extradition and mutual legal assistance (arts. 44, 46).*
- *Madagascar has an established practice to informally consult on mutual legal assistance requests before their formal submission (Art. 46).*
- *Coordination meetings before the preparation of formal mutual legal assistance requests are held in cases involving multiple jurisdictions (Art. 46).*
- *Madagascar actively engages in cooperation through the Judicial Regional Platform of the Indian Ocean Commission countries (Art. 48).*

### **3.3. Challenges in implementation**

*It is recommended that Madagascar:*

- *Continue its efforts to adopt comprehensive legislation on extradition and mutual legal assistance; ensure that such new legislation contains all elements regulated in the Convention (arts. 44, 46).*
- *Ratify the SADC Protocol and assess whether new bilateral treaties would further international cooperation (arts. 44, 46).*
- *Madagascar could grant extradition in the absence of dual criminality (Art. 44, para. 2).*

- Recognize all Convention offences as extraditable (Art. 44, paras. 4 and 7).
- Clarify the law to the effect that corruption offences are not considered political offences (Art. 44, para. 4).
- Inform the Secretary-General that it considers the Convention a legal basis for extradition (Art. 44, para. 6).
- Regulate in its future reforms the principle “extradite or prosecute”, and the enforcement of foreign sentences (Art. 44, paras. 11 and 13).
- Allow for comprehensive judicial review of decisions on extradition, and for consultations with the requesting State before refusal of extradition (Art. 44, paras. 14 and 17).
- Regulate generally concerns about discrimination among the reasons for refusal (Art. 44, para. 15).
- Madagascar could transmit information to other States parties without prior request (Art. 46, para. 4).
- Render assistance that does not involve coercive action in the absence of dual criminality; Madagascar could also render a wider scope of assistance even in the absence of dual criminality (Art. 46, para. 9).
- Regulate the transfer of detained persons for the purposes of obtaining testimony and other evidence from and to Madagascar (Art. 46, paras. 10-12).
- Review and, if appropriate, update the notification of the Secretary-General on the designation of its central authority, and assess whether direct receipt of requests by the central authority could contribute to swift and efficient cooperation (Art. 46, para. 13).
- Madagascar could accept requests orally in urgent circumstances, on the understanding that they are confirmed in writing forthwith (Art. 46, para. 14).
- Ensure that mutual legal assistance may not be refused on the ground that the offence involves fiscal matters (Art. 46, para. 22).
- Execute mutual legal assistance requests as soon as possible and reduce the average time needed (Art. 46, para. 24).
- Clarify the limits of confidentiality of documents that are not public, and the possibility of submitting them to a requesting party (Art. 46, subpara. 29 (b)).
- Consider the possibility of transferring from or to other States parties criminal proceedings in cases where such transfer is considered to be in the interests of the proper administration of justice (Art. 47).
- Explicitly regulate the appropriate use of controlled delivery and other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, to the extent permitted by the basic principles of the domestic legal system, for all Convention offences, and for their use in international cooperation (Art. 50).

### **3.4. Technical assistance needs identified to improve implementation of the Convention**

*Madagascar indicated the following technical assistance needs:*

*In the short term, assistance was requested for the finalization of the draft international cooperation law.*

*In the medium term, specific technical assistance was needed for extradition and mutual legal assistance, including for:*

- *Strengthening institutions for implementing the new legislation.*
- *Developing international cooperation guidelines.*
- *Training law enforcement and judicial officials, including in international asset recovery.*
- *Disseminating good practices in international cooperation (arts. 44 and 46).*

*Further, Madagascar sought assistance for strengthening the active involvement of Madagascan officials in law enforcement and asset recovery networks (Art. 48, para. 1).*

*Training and on-site assistance by an anti-corruption expert on offences committed through the use of modern technology and on special investigative techniques would also contribute to the full implementation of article 48, paragraph 3, and article 50.*

## **IV. Implementation of the Convention**

### **A. Ratification of the Convention**

7. The Republic of Madagascar signed the Convention on 10 December 2003 and ratified it on 22 September 2004.
8. Madagascar has a monist legal system. According to Art. 137 of the Constitution, duly ratified conventions rank above ordinary laws and can be applied directly to the extent that they are self-executing. Bilateral conventions are applied directly under reserve of reciprocity. Penal provisions require implementation laws.

### **B. Legal system of Madagascar**

9. Madagascar is an island in the Indian Ocean. It rejoined the African Union in 2014, after a suspension of five years because of political and institutional instability in the country since 2008. Madagascar has a semi-presidential regime, with the President of the Republic as Head of State, and a Prime Minister as the head of the executive. The legislative power is composed of the National Assembly and the Senate.
10. Madagascar has a civil law system with the Constitution as the supreme law. Conventions, once ratified, form part of the legal system, and rank under the Constitution but above legislation. The judiciary has, below the Constitutional Court at the top, three branches (ordinary, administrative and financial) headed by the Court of Cassation, the Council of State and the Court of Auditors respectively.
11. With regard to the criminal process, investigations are led by the Prosecutor's Office, which also brings accusations in court and has to maintain an objective role during trial before the courts and tribunals. The preliminary criminal investigation in corruption matters is under the main responsibility of the Bureau indépendant anti-corruption (BIANCO) and the criminal police.
12. The main anti-corruption institutions are BIANCO and the Comité pour la Sauvegarde de l'Intégrité (CSI). BIANCO has a staff of 80 investigators in all of Madagascar with investigation powers similar to the police but restricted to corruption matters. It has no powers to prosecute. BIANCO has six territorial branches. The National Police and Gendarmerie also have specialized financial investigators who can be involved in investigation on a needs basis. A Financial Intelligence Unit (SAMIFIN) was created in 2008.
13. The main anti-corruption legislation is contained in the Penal Code (Code Pénal, **CP**), the anti-corruption Law No. 2004-030 and the anti-money-laundering Law No. 2004-020. A 2009 circular of the Ministry of Justice regulates criminal policy in anti-corruption matters.
14. At the time of the country visit, Madagascar was establishing a crime statistics system and was in consultations on the adoption of a National Anti-Corruption Strategy.

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## C. Implementation of selected articles

### Chapter III. Criminalization and law enforcement

#### Article 15. Bribery of national public officials

##### Subparagraph (a)

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

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

##### (a) Summary of information relevant to reviewing the implementation of the article

15. The active bribery provisions are contained in the **Anti-corruption Law n°2004-030** of 9 September 2004, which introduced Article 177.1 of the Penal Code (Code Pénal, CP), and in a provision on gifts in article 183 CP.

##### **177.1 CP**

Active corruption will be punished from two to ten years of imprisonment and a fine of 1 million to 5 million Ariary to 200 million Ariary or one or the other penalty only, will be imposed upon whomsoever proposes, without the right to do so, directly or through an intermediary, offers, promises, donations, gifts, or advantages of any kind to obtain from any person vested with public authority or charged with a public service mission or holding elected public office:

1. that such a person performs or refrains from performing an act pertaining to that person's function, mission, or mandate;
2. that such a person facilitates, by virtue of his function, mission or mandate, the performance or non-performance of an act;
3. that such a person uses her real or supposed influence in order to obtain from a public authority or administration distinctions, employment, tenders or any other favourable decision.

The same penalties will be imposed for giving any person invested with public authority or charged with a public service mission or holding elected public office that solicits it, any offers, promises, donations, gifts, or advantages of any kind to perform or refrain from performing any of the acts described in paragraphs 1 and 2, or to use such person's influence in the conditions described in 3.

Any person that has acted as an intermediary in the commission of the offences to which this article refers will be subject to the same penalties.

**Art. 183 (Law No. 2004-030) – On Gifts**

A public official or any public authority who accepts from a person a gift or any undue advantage that could have influenced or could influence the treatment of a procedure or an action related to the exercise of his duties shall be punished with 6 months to two years of imprisonment and a fine of 100 000 to 10 000 000 Ariary or one of either punishments.

The giver of the gift shall receive the same punishment.

16. Madagascar provided a list of corruption cases 2005-2012.

**(b) Observations on the implementation of the article**

17. It was noted that Madagascar does not have a single definition of public officials. The bribery provisions include a broad definition that covers members of Parliament as well as judges or CEOs of public enterprises. However, other offences use different wording.

18. The “giving” of an advantage and third-party beneficiaries are not explicitly mentioned in the law.

19. It is recommended that Madagascar:

- Define the term “public official” in accordance with article 2, subparagraph (a), of the Convention, and consistently use this term throughout the CP.
- Include explicitly third-party benefits and the “giving” of an undue advantage in all bribery offences; more clearly delineate the elements of the provisions criminalizing active bribery (Art. 177.1 and Art. 183, para. 2 CP) with a view to avoiding overlaps between them (arts. 15 and 16, para. 1).

**Subparagraph (b)**

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

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

**(a) Summary of information relevant to reviewing the implementation of the article**

20. The passive corruption provision is Article 177 CP. This section includes passive corruption by persons exercising a public function.

**Article 177 CP:**

Any person invested with public authority or charged with a public service mission or holding elected public office who has solicited or accepted, without a right directly or through a third party, offers, promises, donations, gifts, or advantages of any kind to perform or refrain from performing an act of that person’s function, mission or mandate, or facilitated by such function, mission or mandate will be punished with a term of two to ten years’ imprisonment and a fine of

5 million FMG or 1 million Ariary to one billion FMG or 200 million Ariary, or one or the other penalty only.

**(b) Observations on the implementation of the article**

21. The same observations, *mutatis mutandis*, apply as with regard to Art. 15(a).

**Article 16. Bribery of foreign public officials and officials of public international organizations**

**Paragraph 1**

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

**(a) Summary of information relevant to reviewing the implementation of the article**

22. The active bribery provision is Article 177.2 CP. This section includes the active corruption of the foreign public agents and civil servants of public international organizations.

**177.2 CP:**

The act of promising, offering, or granting a foreign public agent or a civil servant of a public international institution, directly or through a third party, an undue advantage, for himself or another person or entity, in order that he may perform or refrain from performing an act in the exercise of that person's official functions, as a means of obtaining a market or other undue advantage in connection with international commercial activities will be punished with two to ten years of imprisonment and a fine of 5,000,000 FMG or 1 million Ariary to one billion FMG or 200 million Ariary, or one or the other of these penalties.

Any person who has served as an intermediary in the commission of the offences to which this article refers will be subject to the same penalties

23. Madagascar did not provide any examples of implementation (there were no available cases). No statistical data is available.

**(b) Observations on the implementation of the article**

24. Madagascar has implemented the provision under review..

**Paragraph 2**

*2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or*

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

**(a) Summary of information relevant to reviewing the implementation of the article**

25. Madagascar confirmed that it has not implemented this provision of the Convention.

**(b) Observations on the implementation of the article**

26. It was recommended that Madagascar consider criminalizing passive transnational bribery (Art. 16, para 2).

**(c) Technical assistance**

27. Concerning criminalization, Madagascar requested legislative drafting assistance, including through on-site assistance by anti-corruption experts, for article 16, paragraph 2.

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

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

**(a) Summary of information relevant to reviewing the implementation of the article**

28. Madagascar has implemented Article 17 through Article 169 CP (as amended by Ord.n°72-014 of 04.08.72 and Law n°66-009 of 05.07.66).

**Art. 169 (Ord.n°72-014 of 04.08.72)**

Any civil agent, any employee occupying a position normally assigned to an official, any administrative or penal judge, any public or ministry official, any employee or officer of a local municipality, any employee or officer of a public establishment who has diverted, misappropriated or embezzled public or private funds, active effects, pieces, securities acts, bills, documents or any other movable objects that were in his possession under his duties or during the exercise of his duties, shall be sentenced to hard labour if the worth of the deleted, misappropriated or subtracted things is equal or superior than 200 000 Ariary.

*(Law n°66-009 of 05.07.66)* If the indirect worth of the subtracted or suppressed values exceeds 40 000 Ariary and is lower than 200 000 Ariary, the sanction will be a confinement of 2 to 10 years.

If the worth does not exceed 40 000 Ariary, the sanction will be a confinement of 2 to 5 years.

If the worth if those values is indeterminate or is not rateable in money, the punishment will be hard labour.

These provisions apply to those who, without right or title, interfered with the handling of cash, securities or other values as described in paragraph 1, divert, remove or delete this values.

**(b) Observations on the implementation of the article**

29. It was noted that the offence is already committed with the act of diversion, so it is irrelevant who the beneficiary of this offence is.
30. The law goes beyond the Convention in that the beneficiary of these crimes can be anyone, even legal persons, or other entities.
31. Unlike most corruption offences, embezzlement is a crime and not a misdemeanour (délit).
32. It was recommended to clarify that the investigation of embezzlement as a Convention offence should fall within the competence of BIANCO.

**Article 18. Trading in influence**

**Subparagraph (a)**

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

*(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;*

**(a) Summary of information relevant to reviewing the implementation of the article**

33. Madagascar has implemented subparagraph (a) of article 18 through Article 179 CP.

***Art. 179 –On trading in influence***

Whoever solicits or accepts, directly or through a third party, offers, promises, donations, gifts, or advantages of any kind to use that person's real or supposed influence in order to obtain from a public authority or administration distinctions, decorations, employment, tenders, or any other favourable decision will be punished with one to five years' imprisonment and a fine of 5 million FMG or 1 million Ariary to 500 million FMG or 100 million Ariary or one or the other of these penalties.

Acquiescing to the solicitations described in the preceding paragraph or proposing, without right, directly or through a third party, offers, promises, donations, gifts, or advantages of any kind so that a person may use his real or supposed influence in order to obtain from a public authority or administration distinctions, decorations, employment, tenders, or any other favourable decision will be subject to the same penalties.

Any person who has served as an intermediary in the commission of the offences to which this article refers will be subject to the same penalties.

**(b) Observations on the implementation of the article**

34. Active and passive trading in influence are criminalized in 179 CP, which does not envisage third-party beneficiaries. Art. 179(1) CP concerns passive trading in influence, para 2 the active side.
35. Article 177.1, No. 3 (active bribery), also covers active trading in influence when the person abusing his/her influence (the intermediary) is a public official. The range of punishment in article 177.1, No. 3, and 179 CP is different.
36. It was recommended to consider including third-party benefits in trading of influence offences, consider explicitly mentioning the “giving” of an undue advantage, and consider harmonizing the provisions on trading in influence (Art. 177.1, No. 3, and Art. 179 CP).

### **Subparagraph (b)**

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

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

#### **(a) Summary of information relevant to reviewing the implementation of the article**

37. Madagascar has implemented subparagraph (b) of article 18 through Article 179 CP.

#### **Art. 179 –On trading in influence**

Whoever solicits or accepts, directly or through a third party, offers, promises, donations, gifts, or advantages of any kind to use that person’s real or supposed influence in order to obtain from a public authority or administration distinctions, decorations, employment, tenders, or any other favourable decision will be punished with one to five years’ imprisonment and a fine of 5 million FMG or 1 million Ariary to 500 million FMG or 100 million Ariary or one or the other of these penalties.

...

Any person who has served as an intermediary in the commission of the offences to which this article refers will be subject to the same penalties.

#### **(b) Observations on the implementation of the article**

38. The same observations, *mutatis mutandis*, apply as with regard to Art. 15(a).

### **Article 19. Abuse of functions**

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

(a) **Summary of information relevant to reviewing the implementation of the article**

39. Madagascar has implemented article 19 through Article 179.1 CP.

**Art. 179.1 - On the abuse of functions:**

A public agent using his position or post to perform or refrain from performing an act, in the exercise of his functions, in violation of laws and regulations in order to obtain an undue advantage for himself or an affiliated person or entity will be punished with three months' to one year's imprisonment and a fine of 500,000 FMG or 100 thousand Ariary to 5,000,000 FMG or 1 million Ariary, or one or the other of these penalties.

Any person who has served as an intermediary in the commission of the offences to which this article refers will be subject to the same penalties.

(b) **Observations on the implementation of the article**

40. Madagascar has implemented the provision under review.

**Article 20. Illicit enrichment**

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

(a) **Summary of information relevant to reviewing the implementation of the article**

41. Madagascar indicated that it has partially implemented this provision of the convention through Article 183.1 CP.

**Art. 183.1 - On illicit enrichment**

Any person invested with public authority or in charge of a public service mission, any person holding elected public office, any leader, head of state, or salaried employee of a public company that cannot reasonably justify a substantial increase in that person's personal wealth relative to his or her lawful income will be punished with 6 months' to 5 years' imprisonment and a fine of 50 million FMG or 10 million Ariary to 200 million FMG or 40 million Ariary.

Any person that has knowingly held illicit assets or funds received from the persons cited above will be subject to the same penalties.

Illicit enrichment is an ongoing offence characterized by the holding of personal wealth or use of illicit resources.

Evidence of the licit origin of the enrichment or resources can be brought forth by any means.

However, a person who, before the opening of an inquiry or direct citation, has revealed facts to the administrative or judicial authorities and permitted the identification and conviction of the principal perpetrator will be granted immunity from prosecution pursuant to this article.

The sentence of conviction may also order the confiscation for the benefit of the State, public entity, or public and state-controlled organizations of all or part of the assets of the convicted offender up to the amount of the damages sustained

42. Asset declaration is mandatory for certain officials according to Art. 41 of the Constitution.
43. Certain officials have the obligation to declare assets annually (Art. 1 and 2 of Law No. 2004-030, Art. 2 of Decree No. 2004-983). Incorrect declarations can be punished under Art. 183.2 CP.
44. So far there have been three prosecutions for illicit enrichment; one case from 2008 with conviction. The enforcement of the law and decrees related to the declaration of assets, the adoption of a penal policy for the effectiveness of the detection and the sanctions of corruption and similar offences still need to be implemented.
45. Prescription commences with the discovery of offence. If the person is no longer enriched, he/she could still be prosecuted as long as the statute of limitations has not elapsed.

**(b) Observations on the implementation of the article**

46. It was noted that Madagascar has criminalized illicit enrichment in article 183.1 CP with regard to all public officials.
47. Madagascar has implemented the provision under review.

**(c) Technical assistance**

48. Concerning criminalization, Madagascar requested legislative drafting assistance, including through on-site assistance by anti-corruption experts, for article 20.

**Article 21. Bribery in the private sector**

**Subparagraph (a)**

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

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

**(a) Summary of information relevant to reviewing the implementation of the article**

49. Madagascar indicated that it has not implemented this provision of the Convention. Article 21 is implemented only in its passive form through article 178 CP.
50. While active corruption is not yet criminalized by the penal code, the authors of these offences could be indirectly pursued as instigators, co-authors or accomplices of the passive offence.

**(b) Observations on the implementation of the article**

51. Taking into account the existing considerations regarding criminalizing active bribery in the private sector, it was recommended to further pursue the criminalization of this conduct.

**Subparagraph (b)**

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

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

**(a) Summary of information relevant to reviewing the implementation of the article**

52. Madagascar criminalizes bribery in the private sector in its passive form through Article 178 CP. It covers managers, shareholders and employees as well as members of liberal professions but does not cover third-party beneficiaries.

***Art. 178- On the corruption of managers, shareholders, and employees of companies and members of liberal professions***

Any manager or shareholder in a private company who, without right, directly or through a third party, has either solicited or accepted offers or promises, or solicited or received donations, gifts, commissions, discounts or premiums to perform or to refrain from performing an act during the exercise of that person's functions will be punished with imprisonment of two to five years and a fine of 10 million FMG or 2 million Ariary to 500 million FMG or 100 million Ariary or one or the other of these penalties.

Any agent, employee, official or salaried employee or person remunerated by any means, either directly or through a third party, who, on behalf of and without the consent of the employer, has either solicited or accepted offers or promises, or solicited or received donations, gifts, commissions, discounts or premiums, to perform or refrain from performing an act in the exercise of that person's employment will be punished with one to three years' imprisonment and a fine of 5 million FMG or 1 million Ariary to 250 million FMG or 50 million Ariary or one or the other of these penalties.

Any member of a liberal profession who, without right, directly or through a third party, has either solicited or accepted offers or promises, or solicited or received donations, gifts, commissions, discounts or premiums, to perform or refrain from performing an act in the exercise of that person's functions will be punished with two to five years' imprisonment and a fine of 10 million FMG or 2 million Ariary to 500 million FMG or 100 million Ariary or one or the other of these penalties.

In relation to the cases provided for in the preceding paragraphs, any person who has acted as an intermediary in the commission of the offences to which this article refers will be subject to the same penalties.

**(b) Observations on the implementation of the article**

53. Madagascar has largely implemented the provision under review. However, it was recommended to consider including third-party beneficiaries in bribery in the private sector.

**(c) Technical assistance**

54. Concerning criminalization, Madagascar requested legislative drafting assistance, including through on-site assistance by anti-corruption experts, for article 21, paragraph (b).

**Article 22. Embezzlement of property in the private sector**

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

**(a) Summary of information relevant to reviewing the implementation of the article**

55. Embezzlement in the private sector is criminalized by articles 379, 401, 406, 408 CP and article 931 of the Commercial Companies Code.

**Art. 379:CP**

Anyone who has embezzled something that does not belong to him is guilty of theft.

**Art. 401 - (Ord. n°62-013 of the 10.08.62):**

The other kinds of theft non specified herein, such as larcenies and swindles, as well as the attempts to commit these same offenses, will be punished with a confinement of minimum six months and maximum of five years and could be a subject to a fine of at least 720 000 Ariary and 10 800 000 Ariary at most.

The guilty parties will also be denied of their rights mentioned in the article 42 of the present code, for at least five years and up to ten years, counting from the day they receive their sanctions.

Their stay can also be denied by the Court judgement for a period of 2 to 5 years.

**Art. 406 (law n°66-009 of the 05.07.66): CP**

Anyone who take advantage of the needs, weaknesses or the passions of a minor, in view to make him subscribe, to his/her own disfavour, obligations, receipts or discharges for loans of money or real estate, or commercial papers, no matter the shape this negotiation has either been made or disguised, the person will be punished by imprisonment of six months to five years, and may be a subject to a fine of 720 000 Ariary to 10 800 000 Ariary.

The fine may, however, be extended to a quarter of refunds and damages, if it exceeds the maximum prescribed in the preceding paragraph.

The disposition carried to the second paragraph of the previous article may also be applied.

**Art. 408: CP**

Anyone who diverts or misappropriates, to the detriment of the proprietors, owners or holders, any effects, merchandise, money, tickets, receipts or any other documents containing obligations or discharges, which would have been entrusted to him or her only as a lease, deposit, mandate, security, loan for use/commodatum, or for a remunerated or non-remunerated job, under the responsibility of returning or presenting it, or make use of it for a specific purpose, shall be subject to the penalties set forth in article 406.

(*Ord. n°76-042 of the 17.12.76*) is punished with the same sanctions as the one who received some advances in view of the execution of a contract, refuse to execute this contract nor to repay the advances.

**Art. 931 Commercial Companies Code**

Anyone who is manager of a company with a limited responsibilities, administrator, president, general manager, general administrator or assistant general manager, who with bad intentions uses goods or credits of the company for personal material or moral interests, knowing that it is against the interests of this company or encourage another person to do so, will be punished with a fine of twenty five millions or dimy tapitrisa ariary to 200 000 000 FMG or efapolo tapitrisa ariary and an imprisonment of 2 months to 2 years or either one of these sentences.

**(b) Observations on the implementation of the article**

56. Madagascar has implemented the provision under review. However, it was recommended to consider making embezzlement in the private sector a distinct offence.

**Article 23. Laundering of proceeds of crime**

**Subparagraph 1 (a) (i) and (ii)**

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

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

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

**(a) Summary of information relevant to reviewing the implementation of the article**

57. Madagascar has criminalized money-laundering through Art. 1, 2, 3, and 30 to 35 of the Anti-money laundering (AML) Law n°2004-020 of 19 August 2004; and the Circular of the Ministry of Justice on the penal policies concerning money laundering (Circular No. 010/MJ/SG/DGAJER/DAJ/CIRC/12 of 9 November 2012).

58. Madagascar applies an “all crimes approach”, including as predicate offences all offences, including those committed abroad. Those committed abroad must constitute a criminal offence in both countries, “unless it has been agreed to otherwise”. Such an exception

could be created by treaty, although no such agreement exists yet. Money-laundering is an autonomous offence. The offender himself may also be the perpetrator of the predicate crime.

***Art.1 – Definition:***

For the purposes of this law the following acts are considered as a money laundering:

- a) the conversion or the transfer of property, in view to conceal or to disguise their illicit origin or to help all person who is implied in the commission of the predicate offence to escape the legal consequences of his/her acts;
- b) the concealment or the disguise of the nature, the origin, the location, the disposition, the movement or the real owner of the property;
- c) the acquisition, the possession or the use of property, by a person who knows that these goods constitute a product of crime according to the present law.

The knowledge, the intention or the necessary motivation as element of the offence can be deduced from objective factual circumstances.

***Article 2. Terminology***

To be understood within the meaning of this law:

- 1) The term “Proceeds of Crime” is to be understood as any property or economic advantages derived directly or indirectly from a crime or offence.  
Said advantage could constitute any property as defined by paragraph 2 of this article.
- 2) The term “Property” is to be understood as all assets, material or non-material, movable or immovable, tangible or intangible, and the legal certificates or documents that evidence ownership of these assets or property rights thereto.
- 3) The term “Instrument” is to be understood as all objects used or intended to be used in any manner whatsoever, in whole or in part, to commit a criminal offence or offences.
- 4) The term “Criminal Organization” is to be understood, within the meaning of this law, as any group conformed with the purpose of committing crimes or offences.
- 5) The term “Confiscate” is to be understood as the permanent seizing of property or proceeds derived from an offence or used as means to commit said offence, upon decision of a court of law or of any other competent entity.
- 6) The term “Predicate Offence” is to be understood as any criminal offence, including those committed abroad, which allows its perpetrator to procure proceeds within the meaning of this law.
- 7) The term “Perpetrator” is to be understood as any individual involved in a crime, either as principal, co-perpetrator or an accessory.

To serve as a basis for laundering prosecutions, the predicate facts committed abroad must constitute a criminal offence in the country where they are committed and within the domestic law of Madagascar, unless it has been agreed to otherwise.

***Article 3. Professions subject to Titles II and III of this law***

Titles II and III of this law apply to any natural person or legal entity who, as part of their profession, performs, controls, or advises on transactions with regard to deposits, trades, investments, exchanges or any other movements of capital, particularly in credit institutions, and financial institutions and intermediaries.

Titles II and III of this law apply in equal measures to all operations of bureaux de change, casinos and other gaming establishments, as well as those who perform, control, or advice real property operations.

People who, as part of their profession, perform, control, or advice on transactions with regard to the movement of capital, banking institutions and both public and private financiers, delivery services, insurance corporations, mutual societies, brokerage firms, and bureaux de change shopkeepers are obligated to notify the department established by article 16, as soon as possible, of any sums of money or operations with regard to such sums, which are suspect of having been derived from offences as established by articles 95 to 97, 100, and 101 of law no. 97-039, dated November 4<sup>th</sup>, 1997, on the control of narcotics, psychotropic substances, and precursors in Madagascar, or from transnational organized crime.

### ***Article 30. Laundering***

The act of laundering, as defined by article 1, shall be punishable with a period of penal labour and a fine of 500.000 to 5.000.000 MGF or 100.000 to 1.000.000 MGA, with the amount not being less than five times the total amount of the corpus delicti.

The above sentence shall be replaced with penal labour in perpetuity:

- a) if the offence is committed in the exercise of a professional activity;
- b) if the offence is committed as part of a criminal organization.

### ***Article 31. Association or agreement with the intent to commit laundering***

Taking part in an association or agreement with the intent to commit laundering shall be subject in equal measures to the punishments set forth in article 30.

### ***Article 32. Sanctions applicable to legal entities***

Legal entities other than the State, for which one of its bodies or representatives commits an offence on its behalf or for its benefit, shall be subject to a fine equal to a rate five times the specified fines for natural persons, without prejudice to these last as the perpetrators or accessories to the offence.

The legal entities could additionally be sentenced to:

- a) a definite, or a five year period, prohibition to exercise, direct or indirectly, certain professional activities;
- b) the permanent closure, or a five year period, of their establishments which were used to commit the offence;
- c) the dissolution of those establishments which were created to carry out the incriminating acts;
- d) the broadcasting of the decision by means of the written press or any other audio-visual means of communication.

### ***Article 33. Sanctions established by the disciplinary or control authorities***

If, due to a serious lack of vigilance, or a deficiency in the organization's internal procedures for the prevention of laundering, a credit institution, financial institution, or any natural person or legal entity as set forth in article 3, is unaware of its obligations assigned by this Law: the disciplinary or control authorities shall be able to act ex officio within the conditions established by the professional and administrative regulations.

### ***Article 34. Sanctions for other offences***

1. Shall be punishable with imprisonment of 1 to 5 years and a fine of 500.000 to 5.000.000 MGF or 100.000 to 1.000.000 MGA, or only one of those two sentences:
  - a) the people and directors or employees of organizations referred to in article 3, who deliberately appropriate any amount or disclose to the perpetrator of any operation set forth in that same article, the statement which they were required to make or the follow-up actions that are to be taken;
  - b) those who deliberately destroy or delete registers or documents which are required to be preserved by articles 10, 11, 14, and 15;
  - c) those who realize or attempt to realize, under a false identity, one of the operations set forth in articles 3 to 5, 7 to 10, 14, and 15;
  - d) those who learn, by means of their profession, of an inquiry into acts of laundering, and deliberately inform by all means those put into question by said inquiry;
  - e) those who contact the judiciary authorities or competent functionaries in order to notify them on predicate offences and do not inform them that the subsequent acts or documents specified in article 15 d) have been shortened or contain errors;
  - f) those who communicate information or documents to individuals other than those set forth in article 12;
  - g) those who do not proceed to make a statement of suspicion as established by article 19, when the circumstances of an operation lead to deduce that the funds are suspect to have been derived from an offence set forth in this article;
2. Shall be punishable with a fine of 250.000 to 2.500.000 MGF or 50.000 to 500.000 MGA:
  - a) those who omit making a statement of suspicion as established by article 19;
  - b) those who carry out or accept payment in cash for amounts larger than the total amount authorized by the regulations;
  - c) those who contravene the dispositions of article 5 with regard to the transfer of international funds;
  - d) the directors and employees of bureaux de change, casinos, gaming establishments, credit institutions, and financial institutions who contravene the dispositions of articles 7 to 15
3. Persons who have been found guilty of one or more offences, specified in paragraphs 1 and 2 above, could equally be sentenced to a definite prohibition, or for a period of up to five years, of exercising their profession with regard to the offence committed.

### ***Article 35. Predicate Offence***

The provisions of title IV will apply when the perpetrator of the predicate offence will be neither prosecuted nor sentenced, or when he lacks a condition in order to be taken to court for said offence. The perpetrator of the predicate offence could equally be prosecuted for the offence of laundering

**(b) Observations on the implementation of the article**

59. Madagascar has implemented the provision under review.

**Subparagraph 1 (b) (i)**

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

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

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

**(a) Summary of information relevant to reviewing the implementation of the article**

60. Madagascar has implemented article 23 subparagraph 1(b)(i) through article 1(c) of the AML Law n° 2004-020.

***Art.1 – Definition:***

For the purposes of this law the following acts are considered as a money laundering:

...

c) the acquisition, the possession or the use of property, by a person who knows that these goods constitute a product of crime according to the present law.

**(b) Observations on the implementation of the article**

61. Madagascar has implemented the provision under review.

**Subparagraph 1 (b) (ii)**

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

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

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

**(a) Summary of information relevant to reviewing the implementation of the article**

62. Madagascar has implemented article 23 subparagraph 1(b)(ii) through articles 2 and 31 of the AML Law n° 2004-020.

***Article 2. Terminology***

To be understood within the meaning of this law:

...

7) The term “Perpetrator” is to be understood as any individual involved in a crime, either as principal, co-perpetrator or an accessory.

***Article 31. Association or agreement with the intent to commit laundering***

Taking part in an association or agreement with the intent to commit laundering shall be subject in equal measures to the punishments set forth in article 30.

63. Madagascar confirmed that for crimes, attempt is always punishable, Art. 2 PC.

**(b) Observations on the implementation of the article**

64. Madagascar has implemented the provision under review.

**Subparagraphs 2 (a) and 2 (b)**

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

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

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

**(a) Summary of information relevant to reviewing the implementation of the article**

65. Madagascar has implemented article 23 subparagraph 2(a) and 2(b) through article 2 of the AML Law n° 2004-020.

***Article 2. Terminology***

To be understood within the meaning of this law:

...

6) The term “Predicate Offence” is to be understood as any criminal offence, including those committed abroad, which allows its perpetrator to procure proceeds within the meaning of this law.

**(b) Observations on the implementation of the article**

66. Madagascar has implemented the provision under review.

## **Subparagraph 2 (c)**

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

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

### **(a) Summary of information relevant to reviewing the implementation of the article**

67. Madagascar has implemented article 23 subparagraph 2(c) through article 2 of the AML Law n° 2004-020.

#### ***Article 2. Terminology***

To be understood within the meaning of this law:

...

6) The term “Predicate Offence” is to be understood as any criminal offence, including those committed abroad, which allows its perpetrator to procure proceeds within the meaning of this law.

To serve as a basis for laundering prosecutions, the predicate facts committed abroad must constitute a criminal offence in the country where they are committed and within the domestic law of Madagascar, unless it has been agreed to otherwise.

### **(b) Observations on the implementation of the article**

68. Madagascar has implemented the provision under review. However, with a view to enhancing legal certainty, it was recommended to abolish the possibility of waiving the principle of dual criminality by treaty (Art. 2 no. 6 in fine).

## **Subparagraph 2 (d)**

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

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

### **(a) Summary of information relevant to reviewing the implementation of the article**

69. Madagascar has not furnished copies of its laws to the Secretary-General of the United Nations as prescribed above.

### **(b) Observations on the implementation of the article**

70. It was noted that Madagascar has not furnish copies of its relevant laws to the Secretary-General of the United Nations. However, in the course of this review, UNODC received such copies. Therefore, it was concluded that Madagascar has fulfilled its obligations.

### **Subparagraph 2 (e)**

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

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

71. Madagascar's domestic system does not contain any fundamental principles as referred to in the provision above.

#### **Article 35. Predicate Offence**

The provisions of title IV will apply when the perpetrator of the predicate offence will be neither prosecuted nor sentenced, or when he lacks a condition in order to be taken to court for said offence. The perpetrator of the predicate offence could equally be prosecuted for the offence of laundering.

### **(b) Observations on the implementation of the article**

72. Madagascar has implemented the provision under review.

### **Article 24. Concealment**

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

### **(a) Summary of information relevant to reviewing the implementation of the article**

73. Concealment is criminalized in articles 460 and 401 CP.

#### **Art. 460 CP**

Those who have knowingly concealed, removed, misappropriated or criminally obtained things, whole or in parts, shall be liable to the penalties provided by article 401. The fine may be more than 10 800 000 Ariary and up to half of the values of the stolen goods. The all without prejudice of stronger sanctions, if him there is need, in case of complicity of crime, in accordance with the articles 59, 60 and 61.

#### **Art. 401 CP (Ord. n°62-013 of 10.08.62)**

The other kinds of thefts non specified in the present, such as larcenies and swindles, as well as the tentative to commit these same offenses, will be punished with a confinement of six months to five years and may a subject to a fine of 720 000 Ariary to 10 800 000 Ariary.

The guilty parties will also be denied of their rights mentioned in the article 42 of the present code, for at least five years and up to ten years, counting from the day they receive their sanctions.

Their stay can also be denied by the Court judgement for a period of 2 to 5 years.

**(b) Observations on the implementation of the article**

74. Madagascar has implemented the provision under review.

**Article 25. Obstruction of justice**

**Subparagraph (a)**

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

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

**(a) Summary of information relevant to reviewing the implementation of the article**

75. Madagascar has implemented article 25(a) through Art. 365 CP.

**Art. 365 CP**

Anyone who, either in the course of a procedure and in any event, or in any matter in view of a claim or legal defence, makes use of promises, offers or presents, pressure, threats, assault, manoeuvres or contrivances in order to influence others into doing or delivering a false deposition, statement or testimony, will be subject, whether this subornation achieved the intended purpose or not, to imprisonment of one to three years and a fine of 300 000 to 4 500 000 MGA, or only one of those two sentences, without prejudice to more severe sentences as established in previous articles, if they are an accessory to a false testimony considered a crime or offence

**(b) Observations on the implementation of the article**

76. It was noted that article 365 CP covers all modalities of obstruction of justice described in Art. 25(a), but only for the purpose of inducing false testimony, not in order to interfere in the giving of testimony or the production of evidence.

77. Accordingly, it was recommended to criminalize obstruction of justice not only to induce false testimony, but also to interfere in the giving of testimony or the production of evidence.

**(c) Technical assistance**

78. Concerning criminalization, Madagascar requested legislative drafting assistance, including through on-site assistance by anti-corruption experts, for article 25(a).

### **Subparagraph (b)**

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

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

#### **(a) Summary of information relevant to reviewing the implementation of the article**

79. Madagascar has implemented article 25(b) through Article 27 of law n° 2004-030.

##### ***Article 27 of law n° 2004-030***

Refusal or hindrance of the investigative efforts of the Director General in the exercise of his duties is considered an obstruction of the proper functioning of justice and is qualified accordingly as an offence, punishable by one month's to three years' imprisonment and a fine of 250 000 FMG or 50,000 Ariary to 1 000 000 FMG or 200 thousand Ariary or one of the two penalties only.

The same applies to any falsification of documents.

Any violation of Article 24, paragraph 2, 1 and 2, when committed by a public agent, will be considered a fault separate from his public duties, and as such may entail the personal liability of the agent.

#### **(b) Observations on the implementation of the article**

80. It was noted that article 27 of Law No. 2004-030, on obstructing the investigative efforts of the *Director General* of BIANCO, is interpreted as referring to the entire institution. This provision does not include interference with the exercise of duties of other judicial or law enforcement officials.

81. It was recommended to criminalize the use of physical force, threats or intimidation to interfere with the exercise of official duties by all justice and law enforcement officials.

#### **(c) Technical assistance**

82. Concerning criminalization, Madagascar requested legislative drafting assistance, including through on-site assistance by anti-corruption experts, for article 25(b).

## **Article 26. Liability of legal persons**

### **Paragraphs 1 and 2**

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

**(a) Summary of information relevant to reviewing the implementation of the article**

83. Madagascar regulates criminal liability of legal persons only in article 32 of the AML Law No. 2004-020, which allows the imposition of a fine five times as high as the one for natural persons.

***Art 32 of law n°2004 020***

Legal entities other than the State, for which one of its bodies or representatives commits an offence on its behalf or for its benefit, shall be subject to a fine equal to a rate five times the specified fines for natural persons, without prejudice to these last as the perpetrators or accessories to the offence.

The legal entities could additionally be sentenced to:

- a) a definite, or a five year period, prohibition to exercise, direct or indirectly, certain professional activities;
- b) the permanent closure, or a five year period, of their establishments which were used to commit the offence;
- c) the dissolution of those establishments which were created to carry out the incriminating acts;
- d) the broadcasting of the decision by means of the written press or any other audio-visual means of communication

84. There is no general regime for the criminal liability of legal persons, but confiscation as an accessory criminal sanction is also applied with respect to property owned by legal persons (Art. 16 of Law No. 2004-030).

85. Administrative liability is foreseen in article 17(2) of Law No. 2004-030 and articles 9 and 54 of the Public Procurement Code, which provide for mandatory debarment of companies from public procurement (see Art. 34 below).

86. With regard to civil liability, Madagascar considers as a general principle of law that a legal person is liable for the conduct of its representatives.

87. So far, there have been no prosecutions against legal persons.

**(b) Observations on the implementation of the article**

88. It was recommended to consider the introduction of criminal liability of legal persons for all corruption offences, and assess if the sanctions, especially the criminal fines foreseen for legal persons, are sufficiently effective and dissuasive.

**(c) Technical assistance**

89. Concerning criminalization, Madagascar requested legislative drafting assistance, including through on-site assistance by anti-corruption experts, for article 26.

**Paragraph 3**

*3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

90. Madagascar confirmed that natural persons could, in theory, be prosecuted independently of the legal person. However, since there was no prosecution of a legal person yet, the question had not yet come up in reality.

**(b) Observations on the implementation of the article**

91. Madagascar has implemented the provision under review only under the AML Law.

**Paragraph 4**

*4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions*

**(a) Summary of information relevant to reviewing the implementation of the article**

92. Article 32 of the AML Law No. 2004-020 allows the imposition of a fine five times as high as the one for natural persons.

**(b) Observations on the implementation of the article**

93. Madagascar has implemented the provision under review only under the AML Law.

94. It was recommended to assess if the sanctions, especially the criminal fines foreseen for legal persons, are sufficiently effective and dissuasive.

**Article 27. Participation and attempt**

**Paragraph 1**

*1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

95. Madagascar has implemented paragraph 1 of Article 27 through Articles 59 and 60 CP. Accomplices are generally punished like the authors of the crime.

***Art. 59 CP***

Accomplices of an offence or a crime are punishable with the same sentence as the actual authors of the crime, except when the law states differently.

***Art. 60 CP***

Those who, through gifts, promises, threats, abuse of authority or power, scheming or contrivance, have led to the commission of crime or an offence or have given instructions to commit it, shall be punished as accomplices to a crime.

...

Those that will have, knowingly, helped or assisted the author or the authors of the action, have helped or facilitated it, or those that have consumed it, without prejudice of the sentences that will especially be carried by the present Code against the authors of conspiracies or provocations attempt threatening the national or international safety of the state, even in the case where the crime that was the object of the conspirators or challengers has not been committed.

**(b) Observations on the implementation of the article**

96. Madagascar has implemented the provision under review.

**Paragraph 2**

*2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

97. The general rule about attempt is regulated in articles 2 and 3 CP.

98. Attempt to commit a “*délit*” (misdemeanour) is only criminalized where provided for in law. Convention offences are *délits*, except for money-laundering and embezzlement, and do not provide for the criminalization of attempt. Sometimes, attempt is part of the definition of the crime e.g. Art. 175.2 (favoritism).

***Art. 2***

Any attempts to commit a crime, shown by a beginning of execution, if it hasn't been stopped, or even if it didn't have the desired effects because of circumstances beyond the control of the offender, is still considered as a crime.

***Art. 3***

Attempt to commit a misdemeanour is considered as an offence only in the case when they are determined by a special disposition of the law.

**(b) Observations on the implementation of the article**

99. It was noted that Madagascar could criminalize attempt for all corruption offences, not just money-laundering and embezzlement (which are crimes).

**Paragraph 3**

*3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

100. The preparation for a corruption offence as such is not criminalized. However, preparations to form a “criminal association” could be punished under Art. 265 and 266 CP.

101. Art. 31 of the AML Law mentions “conspiracy for money-laundering”.

**(b) Observations on the implementation of the article**

102. It was noted that – with a few exceptions for particular cases – this optional provision has not been implemented.

**Article 29. Statute of limitations**

*Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.*

**(a) Summary of information relevant to reviewing the implementation of the article**

103. Madagascar has implemented Article 29 through Article 2, 3, and 4 of the Criminal Procedure Code (CPC).

104. The statute of limitation for crimes is 10 years and for misdemeanours 3 years, from the date of commission, if no investigative actions or prosecution have been carried out in the meantime (Art. 3 CPC). Therefore, the period prescribed for money-laundering and embezzlement is 10 years and for the other corruption offences 3 years. Evasion of justice is not a reason for suspension.

105. Some offences, like illicit enrichment, are ongoing offences where the statute of limitation does not start to run as long as the illicit situation continues.

*Art. 2.*

The public action for the application of the penalty ends with the delinquent's death, the, prescription, the amnesty or with the repeal of the penal law and the judged thing.

It may also end with a transaction or with a payment of a fine when the law foresees it; it also applies for the cases when there is a complaint withdrawal, when the complaint is a necessary condition for the prosecution.

**Art. 3.**

As regards crimes, the lapse for public action is of ten years starting from the date in which the crime was committed, if during this interval, no investigative actions or prosecution have been carried out. If these are carried out within this interval, they will not lapse until after ten years starting from the last act. The same shall apply to those individuals who are not implicated by these investigative actions or prosecution

**Art. 4.**

As regards misdemeanours, the lapse for public action is of three years, except in the case where a short delay is set into place by specific laws. The lapse is carried out according to the distinctions specified in the previous article.

**(b) Observations on the implementation of the article**

106. It was recommended to establish a longer statute of limitations for corruption offences characterized as *délits*, and establish a possibility of suspending it or foresee a longer statute of limitations in the case of evasion of justice.

107. Further, Madagascar may assess the possibility of introducing a regulation by which the statute of limitations for corruption offences starts with the discovery of the facts.

**(c) Technical assistance**

108. Concerning criminalization, Madagascar requested legislative drafting assistance, including through on-site assistance by anti-corruption experts, for article 29.

**Article 30. Prosecution, adjudication and sanctions**

**Paragraph 1**

*1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

109. Sanctions for corruption offences in Malagasy legislation (Criminal Code and Law No. 2004-20) range from fines to long imprisonment, as shown in the following table:

Article of the Convention	Article of the Criminal Code or Law No. 2004-20	Penalty (Imprisonment or other)
---------------------------	---	---------------------------------

15 a	177.1	2-10 years, 1 mio to 5 mio ariary
	183	6 months to 2 years, 100 000 to 10 million ariary
15 b	177	2-10years, 1 mio to 200 mio ariary
16 (1)	177.2	2-10 years, 1 mio to 200 mio ariary
16 (2)	-	-
17	169	crime Hard labour (over 200.000 ariary value or immaterial) 2-10 years (40.000 to 20.000 ariary value) 2-5 years (under 40.000 ariary value)
18 (a)	179	1-5 years, 1 mio to 100 mio ariary
18 (b)	179	1-5 years, 1 mio to 100 mio ariary
19	179.1	3 months to 1 year, 100.000 to 1 mio ariary
20	183.1	6 months to 5 years, 10 mio to 40 mio. Ariary, confiscation
21 a)		
21 b)	178 (1)	2-5 years, 2 mio to 100 mio ariary
	178 (2)	1-3 years, 1 mio to 50 mio ariary
	178 (3)	2-5 years, 2mio to 100 mio ariary
22	379	refers to 401 et seq.
	401	6 months-5 years, 720.000 to 10.8 mio ariary
	408	6 months-5 years, 720.000 to 10.8 mio ariary
	931 Commercial Companies Code	2 months-2 years, 25 million to 200 million ariary
23	1, 30 (1) MLA Act	Penal labor, 100.000 to 1 mio ariary
	1, 30 (2) MLA Act	Penal labour in perpetuity
	34 (1)	1-5 years, 100.000 to 1 mio ariary

	34 (2)	50.000 to 500.000 ariary
24	460, 401	6 months-5 years, 720.000 to 10.8 mio ariary
25	27 Law no. 2004-030	1 month-3years, 50.000 to 200.000 ariary
	365	1-3 years, 300.000 to 4,5 mio ariary

110. Malagasy authorities explained that some sanctions in the law are not applied any more, for example, forced labour is transformed into imprisonment.

111. The judge is responsible for taking into account the gravity of the offence when determining the specific sanction in a case, upon request of the prosecutor. In this regard, the Circular on the implementation of the criminal anti-corruption policy (Circular N° 009//MJ/SG/DGAJER/DAJ/CIRC/09) of 23 November 2009 states the following:

*Ministry of Justice.*

*Directorate-General for judicial affairs, studies and reforms*

*Directorate for the administration of Justice*

**N° 09//MJ/SG/DGAJER/DAJ/CIRC/09**

Re: Circular on the implementation of the criminal anti-corruption policy before the Courts and Tribunals ...

1) Zero tolerance against corrupt conduct

... The offences linked to these practices must be the object of particular attention of the prosecutor's offices. Severe sanctions must be requested before the criminal court, to ensure the eradication of acts of judicial corruption, which seriously harm the reputation of the judiciary and its actors.

2) Equality before law

... The representative of the prosecutor's office shall exercise the prosecution with strict respect to the legislation in force, taking into account the categories of offences, the importance of the financial interest at stake, and the damage suffered by the victims, as well as the seriousness of damage at the moral or social level.

3) The application of severe sanctions to perpetrators and accomplices that have been recognized as culpable of corruption or similar conduct

A policy based on severity must be implemented by the prosecutors of the Republic, to make corruption an activity that is non-profitable and dangerous for its perpetrators and facilitators.

The perpetrators and accomplices of acts of corruption must be firmly sanctioned, not only with regard to measures of deprivation of liberty, but also at the financial level, because motivation for corruption is often personal enrichment; it is therefore only fair to sanction the delinquent with regard to his assets. This must also allow to compensate the damage suffered by the plaintiff or the State.

Therefore it is responsibility of every prosecutor or his substitutes to ensure that the financial sanctions foreseen in the Criminal Code are ordered; the prosecutor's office shall explicitly request their application in its submission and, when necessary, submit appeals against any decision which does not take into account these provisions.

112. The Circular on the implementation of the criminal policy on money-laundering (Circular N° 010 /MJ/SG/DGAJER/DAJ/CIRC/12) from 9 November 2012 foresees similar measures:

*Ministry of Justice.*

*Directorate-General for judicial affairs, studies and reforms*

*Directorate for the administration of Justice*

*N° 010 /MJ/SG/DGAJER/DAJ/CIRC/12*

Re: Circular on the implementation of the criminal policy on money-laundering before the Courts and Tribunals ...

In the judgement phase

- The prosecutor must request severe sanctions against the perpetrators and accomplices of money-laundering offences who he is prosecuting.
- He must also request the confiscation of the product of crime identified during the procedure (art 36 Law No. 2004-20), even if the court competent for the judgement cannot pronounce a conviction, as long as it is proven that the assets are of illicit origin
- When a decision contrary to these requests is issued, the Prosecutor's Office must mandatorily use the possibilities of appeal foreseen by law.
- The fines and confiscation orders issued must be effectively executed.

**(b) Observations on the implementation of the article**

113. Madagascar has implemented the provision under review.

**Paragraph 2**

*2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

114. The immunities of the members of Parliament, as well as the procedures to lift them, are regulated in article 73 of the Constitution.

Art. 73 Constitution

No deputy may be prosecuted, investigated, arrested, detained or tried in respect of opinions expressed or votes cast in the exercise of his functions.

Deputies may, during the sessions, only be prosecuted and arrested in a criminal or correctional matter with the authorization of the Assembly, except in cases of flagrant offences.

Deputies shall, out of session, only be arrested with the authorization of the Bureau of the Assembly, except in cases of flagrant offences or, of authorized prosecutions or final convictions.

Any person with a justified interest may bring a matter involving a deputy in writing before the Permanent Bureau of the National Assembly.

The Office has to send a detailed response within three months.

115. The President also enjoys immunity (Art. 131 of the Constitution).

Art. 131 Constitution

Article 131.- The President of the Republic is not responsible for acts performed related to the exercise of his duties except for cases of high treason, serious violation or repeated violations of the Constitution, or a breach of his duties manifestly incompatible with the exercise of his mandate.

He can only be accused by the National Assembly by open ballot and by a majority of two thirds of its members.

The High Court of Justice has jurisdiction over him. The accusation may result in the dismissal from his mandate.

116. Malagasy authorities explained that investigative steps can be taken during the procedure for lifting immunities. They mentioned that the procedure of lifting immunities in practice takes 2-3 months. The Bureau is composed of approximately 30 persons and decides by majority.

117. Magistrates benefit from procedural privileges pursuant to articles 512 and 513 of the Criminal Procedure Code (CPC).

Art. 512 CPC

When a member of the Superior Council of Institutions, the Grand Chancellor of the National Order, the Chief of General Staff, a magistrate of the Supreme Court or an Appeal Court, the President of a Tribunal of first instance or a Prosecutor of the Republic is likely to be charged with a crime or offence committed in the exercise or during the exercise of his functions, the prosecution can only be initiated by order of the Keeper of the Seals, the Minister of Justice. The Prosecutor-General at the Supreme Court designates the magistrate responsible for exercising the public action, and the First President of the same court designates the investigating magistrate. Both of them must be at least of the same professional level as the defendant, if the latter belongs to the judiciary.

The criminal division of the Supreme Court designates the members of the trial courts in correctional matters. It is necessary to bring the matter before a criminal court, this must be chaired by the First President of the Appeal Court or by a magistrate of the Supreme Court.

Art. 513

When a magistrate of the court of first instance and of different sections of the tribunal than the ones mentioned in the preceding article, a delegated judge, a president of police court, is likely to be charged with a crime or an offence committed in the exercise or during the exercise of his functions, the prosecution can only be initiated by order of the Prosecutor-General before the Court of Appeals.

The Antananarivo Courts have jurisdiction for the prosecution, investigation and judgment of these offences.

If the accused is based in Antananarivo, the First President of the Court of Appeals designates, after consulting with the Prosecutor General, the competent courts, subject to

the control of the Supreme Court foreseen in article 40 of the present Code.  
Investigative steps can be taken during the procedure for lifting immunities.

118. As can be seen above, in article 513 it is specifically regulated that investigative steps can be taken during the procedure of immunities.
119. Related is also article 37 of Decree 2008-176, which, however, states in its last part that it will not affect the provisions relating to the immunities and privileges of prosecution:

**Art. 37**

When the investigation is at the stage of the penal procedure taking place before the prosecution, the acts of investigating may be conducted by BIANCO, without prior authorization, on all persons, following a mandate emanating from the General manager or Deputy general manager or the responsible for acting, in case of absence or incapacity of the General manager and the Deputy general manager.

The signing authority of the written authorization may be subject to an express delegation of the Chief Executive to the area directors, or in his absence, of the Deputy Director General or in charge of default or temporary, with the possibility to sub-delegate an officer of the Bureau with at least the rank of chief officer in accordance with the staff classification.

The foregoing provisions shall not affect the special measures provided by constitutional or statutory provisions relating to the immunities and privileges of prosecution.

**(b) Observations on the implementation of the article**

120. Madagascar has implemented the provision under review.

**(c) Successes and good practices**

121. The possibility to take investigative steps before the lifting of immunity is considered a good practice.

**Paragraph 3**

*3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

122. In the Malagasy legal system, prosecution is not mandatory.

**Art. 161CPC**

The Prosecutor of the Republic receives the complaints and the reports and decides to proceed with the accusation or not. ...

Art. 175. CPC

When the prosecutor's office considers it appropriate to prosecute the perpetrator of an offence, it can use to this effect the four procedures below, depending on the case:

- 1° The voluntary appearance of the pursued parties, after notification of a warning,
- 2° The citation issued directly to the prosecuted person and those civilly liable;
- 3° The summary informational proceeding;
- 4° The preparatory investigation.

123. The decision of the prosecutor to prosecute or not can be judicially reviewed.

124. The above-mentioned Circular on the implementation of the criminal policy on money-laundering (Circular N° 010 /MJ/SG/DGAJER/DAJ/CIRC/12) requests prosecutors to exercise the opportunity principle with a view to enhancing the effectiveness of law enforcement:

At the prosecution stage:

- Reports from the SAMIFIN must always be subject to follow-up;
- The qualification of a conduct qualified as money-laundering shall always be retained, and the conduct always be pursued in case of sufficient evidence;
- Except in the case of total absence of any duly motivated charges, the prosecutor's office must request the transferral of the proceedings to the competent court;
- If the facts cannot lead to a prosecution, the prosecutor's office handling the case may request from the President of the Civil Court a forfeiture order on the assets, by providing proof of their illicit origin (Art. 37 Law 2004-20).

**(b) Observations on the implementation of the article**

125. It is recommended that Madagascar consider whether the use of any discretionary powers could be guided by the adoption of a policy comparable to the one in the circular on criminal policy regarding money-laundering, with a view to maximizing the effectiveness of law enforcement measures.

**Paragraph 4**

*4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

126. Madagascar's CPC contains regulations on alternatives to provisional detention (arts. 342-350 CPP).

127. Release pending trial has to be granted by a judge (Art. 342-343 CPP). Conditions can be imposed, particularly, bail or a guarantee of a bank (Art. 347). The accused in provisional liberty has the obligation to present himself at least on the day before trial (Art. 350).

Art. 342. (Law n° 97-036 of 10/30/97) – Provisional release of a detainee may be

requested at any time by the Attorney General or by the detainee or his legal counsel, subject to the obligations established in the preceding article.

Requests by the Attorney General are referred to the acting judge, who immediately forwards the case file to the court responsible for ruling on provisional detention.

The request from the detainee or his legal counsel directed to the acting judge is referred to the public prosecutor with the case file for purposes of their enquiries.

The order of notification issued for such purposes is notified or delivered by the bearer against dated acknowledgement, to the plaintiff, who may present observations.

The public prosecutor must conduct its enquiries within twenty-four hours and state if it objects to the request, or has no objection or defers to the judgment of the court.

The case file, with the enquiries of the public prosecutor, is referred to the court responsible for ruling on provisional detention.

In the sections of courts without a permanently seated substitute, the public prosecutor is always assumed to intend to defer to the judgment of the court, and the request, with the case file, is immediately referred to the court responsible for ruling on provisional detention.

Art. 343. (Law n° 97-036 of 10/30/97) – The court mentioned in Article 223 bis of this Code must rule on the request for provisional release in a duly founded decision in three days following notification to the public prosecutor. The ruling must mention requests from the public prosecutor, subject to a fine of 20,000 francs imposed upon the court clerk by the president of the court of indictment.

Art. 344. (Law n° 97-036 of 10/30/97) – The judgment on provisional release rendered on requests, when the public prosecutor raises no objection, is immediately executed.

Execution of a judgment on provisional release rendered on requests, when the public prosecutor objects or submits to the court, is suspended pending the outcome of an appeal by the attorney general or in case it is appealed.

If the public prosecutor does not appeal, the ruling is executed the day after the expiration of the term of appeal granted to the Attorney General under Article 317.

In case of appeal, execution is deferred until the court of appeals rules.

Art. 345. (Law n° 97-036 of 10/30/97) – Before release is granted, the detainee must state a domicile in the jurisdiction where the case is pending. His statement will be entered in the case file.

Following provisional release, if the defendant fails to answer a summons to appear or if new circumstances render his detention necessary, the acting judge may issue a new warrant for his apprehension.

However, if provisional release has been granted by the court of appeals overturning a ruling of the court responsible for ruling on provisional detention, the acting judge may not issue a new warrant until the court of appeals, on written requests from the public prosecutor, has denied the defendant the benefit of its decision.

Art. 346. (Law n° 97-036 of 10/30/97) - Provisional release may be subject to the obligation to post bail, the nature and value of which are set by the court responsible for ruling on provisional detention.

Such bail will be divided in two parts, which guarantee:

1 – The defendant's appearance at all procedural acts and for execution of the final judgment.

2 - Payment in the following order:

- expenses incurred by the plaintiff;

- court costs;

- fines;

- damages and injuries.

The ruling granting provisional release will determine the amount allocated to each of the two parts of the bail posted.

Art. 347. – Bail may be real or personal.

In the first case, it will be made up by collateral, banknotes, certified check, or bearer instruments issued or guaranteed by the state. It will be delivered to the court clerk or collector, against receipt.

In the second case, it will consist of a bond delivered to the clerk by a bank or insurance company of proven solvency and authorized to practice in Madagascar. The bond must provide for payment to the court collector of the stated amount if the defendant fails to appear when required.

The decision granting provisional release will be executed on confirmation of the aforementioned receipt or acknowledgement of submission.

Art. 348. (Law n° 97-036 of 30 10 1997) – The first part of the bail posted will be returned if the defendant appears at all procedural acts and for execution of the final judgment.

It will be forfeited to the state if the defendant, without a legitimate reason, fails to appear at any procedural act or for execution of the final judgment. The validity of such reasons will be subject to the determination of the court responsible for ruling on provisional detention which renders a judgment subject to appeal. Notwithstanding, in case of dismissal, said court may order the reimbursement of that part of the bail.

The second part of the bail will always be reimbursed in case of dismissal, discharge, or acquittal. In case of conviction, it will be applied to expenses, fines, and compensation or damages and injuries, in the order indicated in Article 346. The remainder will be refunded.

Art. 349. – The public prosecutor must present to the collector's office, either a certificate evidencing the defendant's failure to appear or an extract of the sentence of conviction, as the case may be.

If the amounts payable are not released, the collector's office may seek recovery through compulsory action.

The bonding party is responsible for distributing the amounts deposited or recovered to the entitled persons without delay.

Any reply on these various points will be considered on request, in the judge's chambers, as a motion for execution of sentence.

Art. 350. – A defendant who has been granted provisional release and for whom execution of an arrest warrant has been deferred must surrender to the detaining authority no later than the day prior to the hearing.

If, duly summoned through administrative notice from the clerk of the criminal court to receive notification of the latest procedural acts and be advised by the presiding judge, the defendant fails to appear on the day set and fails to provide legitimate reasons to justify his absence, the warrant for his arrest will be immediately executed.

128. These provisions provide a framework for prosecutors and judges to take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

129. Further, the Circular on the implementation of the criminal anti-corruption policy (Circular N° 09//MJ/SG/DGAJER/DAJ/CIRC/09) from 23 November 2009 states the following:

Further, all measures will be taken to preserve the evidence in the course of these investigations and ensure the presence of the accused individuals in court, i.e., if appropriate, through preventive detention.

**(b) Observations on the implementation of the article**

130. Madagascar has implemented the provision under review.

## Paragraph 5

*5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.*

### (a) Summary of information relevant to reviewing the implementation of the article

131. Madagascar's Criminal Procedure Code contains regulations on early release or parole in its articles 574-578. Generally, parole can only be granted when the convicted person has served half of the penalty, for repeat offenders after two thirds of the penalty (Art. 574). The release on parole can only be granted by a decree of the Minister of Justice (Art. 575).

#### TITLE IV PAROLE

Art. 574.- Any person who has been sentenced to serve one or more prison penalties may be released on parole if he provides sufficient evidence of good conduct and if he provides serious guarantees of social rehabilitation.

The release on parole is reserved to sentenced persons who have served three months of their penalty, if the penalty is inferior to three months, and half of the penalty otherwise. For sentenced persons who incurred in recidivism, the probation period is six months if the penalty is inferior to nine months, and two thirds of the penalty otherwise. For those sentenced to hard labour for life, the probation period will be fifteen years.

Art. 575. (Law No. 66-008 from 7.5.66) – The release on parole is granted by a decree of the Minister of Justice. The file includes the opinion of the director of the establishment or the penitentiary jurisdiction of the detained, the prosecution of the jurisdiction that issued the ruling and the prosecutor of the jurisdiction where the penalty is actually served.

Art. 576. - The order for release on parole establishes the modalities for the execution and the conditions to which the concession or the preservation of freedom shall be subject. It may establish measures related to the control or the reclassification of the person being released.

Art. 577. - In the event of a new sentence, of evident misconduct, or of a violation of the conditions established by the release order, the Minister of Justice may revoke the decision, after consulting with the assistant prefect and the prosecution of the habitual place of residence of the released person.

In urgent circumstances, the magistrate or the prosecution official of the place of residence of the released person may order his provisional detention, with the obligation of immediately notifying the Minister of Justice.

After the revocation, the sentenced person must serve the entirety or any remainder of the penalty that he still had to serve at the time of being released on parole, on cumulative basis, if applicable, with any new penalty he may have incurred in. The effects of the revocation go back to the date of the provisional detention, and the detention shall be computed into the execution of the penalty.

If the revocation doesn't take place before the expiration of the probation period

established by the conditional release order, the liberation will be definitive. In this case, the penalty is considered finished since the day of the release on parole. If the order doesn't establish a probation period, it will be equivalent to the remainder of the penalty yet to be served, but under no circumstance shall it exceed ten years.

Art. 578. - An order issued at the request of the Minister of Justice determines the forms and conditions to grant the release on parole, the surveillance, control and reclassification modalities for those released, and the institutions or persons to be in charge of reviewing the performance of the latter.

132. These provisions provide a framework that allows to take into consideration the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted.

**(b) Observations on the implementation of the article**

133. Madagascar has implemented the provision under review.

**Paragraph 6**

*6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.*

**(a) Summary of information relevant to reviewing the implementation of the article**

134. Madagascar does not have legislation on the suspension or reassignment of public officials accused of corruption. However, Malagasy authorities explained accused officials can be suspended and reassigned as a matter of practice by a discretionary administrative decision. They also explained that reassignment is practiced frequently after accusation of a public official.

135. The removal of an official accused but not convicted of a corruption offence is considered unconstitutional.

**(b) Observations on the implementation of the article**

136. Madagascar has implemented the provision under review.

**Subparagraph 7**

*7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:*

*(a) Holding public office;*

*(b) Holding office in an enterprise owned in whole or in part by the State.*

**(a) Summary of information relevant to reviewing the implementation of the article**

137. As an accessory sanction to some corruption offences, offenders in Madagascar can be declared ineligible to exercise public functions for a period of at least two years (arts. 180, 180.1 and 172 CP). This includes holding office in an enterprise owned in whole or in part by the State.
138. With regard to 177 and 179 (bribery and trading in influence), Art. 174 to 174.3 and 177 to 179 (graft, bribery and trading in influence), Art. 180 states:

**Penal Code**

**Art. 180 - On incidental penalties**

In the cases provided for in Articles 177 and 179, if the guilty person is a military or similar person, the provisions of Article 200 of the Justice Code for national service with regard to penalties shall apply. If the guilty person is an officer, he is subject in addition to destitution.

In the cases provided for in Articles 174 to 174.3 and 177 to 179 inclusive, the offender will be declared ineligible to exercise public functions for a period of at least two years.

**Art.180.1 – On additional penalties**

In all the cases provided for in new Articles 174 through 179 inclusive, the courts may impose, as additional penalty, one or two of the following measures:

- 1° permanent ban from the territory or for a determined period that cannot be less than two years for all foreign nationals;
- 2° permanent ban or for a determined period that cannot be less than two years from the exercise of a profession during the exercise of which the offence was committed;
- 3° suspension of the rights cited in Article 42 of this Code for a period of two to ten years.

Without prejudice, as applicable, to provisions providing for more severe penalties, whoever shall contravene one of the offences enumerated in this article will be punished with three months' to three years' imprisonment and a fine of 100,000 FMG or 20 thousand Ariary to 2,000,000 FMG or 40 thousand Ariary.

139. Ordonnance No. 72-024 of 18 September 1972 added a new paragraph 3 to article 180:

Paragraph 3 (new) – In the cases provided for in articles 174 and 177 to 179 inclusively, the convicted persons will be declared as forever unable to exercise any public function; they can also be excluded from the rights mentioned in article 42 of the Criminal Code, for at least five years and up to ten years, from the day when they will have undergone their sentence.

140. With regard to Art. 169 and 171 (embezzlement), Art. 172 para. 1 foresees:

Art. 172 In all cases contained in articles 169 and 171, the convicted person will be declared incapable to ever again exercise any public function.

141. Article 42 of the Criminal Code foresees the following:

**Art. 42**

The tribunals judging in correctional matters can, in certain cases, prohibit, fully or partly, the exercise of the following civic, civil or family rights:

- 3° To be called or nominated to functions of a jury member or other public functions; or to

employment in the administration or to exercise functions or employments;

**(b) Observations on the implementation of the article**

142. Madagascar has implemented the provision under review.

**Paragraph 8**

*8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.*

**(a) Summary of information relevant to reviewing the implementation of the article**

143. Madagascar has a disciplinary system regulated by Law No. 60-003 from 15 February 1960 (Civil Service Statute) and Decree No. 60-050 from 9 March 1960, which regulates the modalities of application of Law No. 60-003 with regard to the disciplinary regime.

144. The Civil Service Statute only applies to permanently employed persons in the public sector, not to all civil servants. Also, judges are excluded (Art. 1 Law No. 60-2003).

145. Article 43 para. 3 regulates that disciplinary and criminal proceedings are independent:

Article 43 para. 3 Law No. 60-003

Similarly, on the official sentenced to an afflictive or infamous sanction, or to correctional imprisonment without suspension, by a final court decision, a disciplinary sanction can also be imposed, up to and including dismissal, without need to consult the disciplinary council, subject, however, to the provisions of article 46 below.

Art. 46

When a disciplinary sanction was imposed pending the outcome of criminal prosecution against the same official on who the disciplinary sanction was imposed, the criminal following conviction of the interested person cannot contain an aggravation of the disciplinary sanction that was imposed for the same facts. However, if the court found in this official reproachable facts that were not known to the administration at the delivery of the first sanction, it can be subject, as such, of a new disciplinary sanction.

**(b) Observations on the implementation of the article**

146. Madagascar has implemented the provision under review.

**Paragraph 10**

*10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

147. The Decree on the Administration of the Penitentiary System (2005) contains provisions on the reintegration into society of convicted offenders.

**(b) Observations on the implementation of the article**

148. Madagascar has implemented the provision under review.

**(d) Challenges, where applicable**

149. Madagascar has indicated the following challenges in the full implementation of the article under review:

- Limited resources for implementation,
- Inter-agency co-ordination,
- Limited capacity.

**(e) Technical assistance needs**

150. Madagascar indicated that legislative drafting assistance, including through on-site assistance by anti-corruption experts, would be helpful for the full implementation of this article.

151. Part of the technical assistance previously mentioned has already been provided by the Service de coopération et d'actions culturelles de l'ambassade de France, Embassy of France. An expansion of such assistance would help Madagascar with fully implementing article 30.

**Article 31. Freezing, seizure and confiscation**

**Subparagraph 1 (a)**

*1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

*(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;*

**(a) Summary of information relevant to reviewing the implementation of the article**

152. Madagascar has regulated conviction-based confiscation as an accessory sanction for specific offences in the Criminal Code (for example in Art. 183.1 paragraph 6 CC).

Art. 183.1 - On illicit enrichment

Any person invested with public authority or in charge of a public service mission, any person holding elected public office, any leader, head of state, or salaried employee of a public company that cannot reasonably justify a substantial increase in that person's personal wealth relative to his or her lawful income will be punished with 6 months' to 5 years' imprisonment and a fine of 50 million FMG or 10 million Ariary to 200 million FMG or 40 million Ariary.

Any person that has knowingly held illicit assets or funds received from the persons cited above will be subject to the same penalties.

Illicit enrichment is an ongoing offence characterized by the holding of personal wealth or use of illicit resources.

Evidence of the licit origin of the enrichment or resources can be brought forth by any means.

However, a person who, before the opening of an inquiry or direct citation, has revealed facts to the administrative or judicial authorities and permitted the identification and conviction of the principal perpetrator will be granted immunity from prosecution pursuant to this article.

The sentence of conviction may also order the confiscation for the benefit of the State, public entity, or public and state-controlled organizations of all or part of the assets of the convicted offender up to the amount of the damages sustained.

153. Article 183.1 foresees value-based confiscation, not of the proceeds of the crime but up to the value of the damage caused. In many cases, especially in the context of the illicit enrichment offence, this equals the products generated by the offence.

154. However, confiscation in the sense of Art. 183.1 does not apply to most of the Convention offences (see above Art. 15-25).

155. In article 16 of Law No. 2004-30, there is a general authorization for, inter alia, confiscation of the product of an offence in all corruption cases, without further detail.

***Article 16 of the law 2004 030***

Illicit income and assets obtained through acts of corruption may be seized, frozen, or confiscated by court order.

156. Articles 36 and 37 of Law No. 2004-20 establish confiscation for money-laundering.

***Article 36 - Confiscation***

In the event of a conviction for actual or attempted money-laundering, an order shall be issued for the confiscation:

1. Of the property forming the subject of the offence, including income and other benefits obtained there from, against any person to whom they may belong, unless their owner can establish that he acquired them by actually paying a fair price or in return for the provision of services corresponding to their value or on any other legitimate grounds and that he was unaware of their illicit origin;
2. Of property belonging directly or indirectly to a person convicted of a laundering offence to his spouse, cohabitee or children, unless the parties concerned can establish the lawful origin thereof.

Moreover, if, in cases where an offence is established by the court, the perpetrator or perpetrators thereof cannot be convicted, the court may nevertheless order the confiscation of the property to which the offence related.

An order may additionally be issued for the confiscation of property, wheresoever located, that has directly or indirectly become part of the assets of the convicted offender or his spouse, cohabitee or children, from the date of the earliest of the acts forming the basis of his conviction, unless the parties concerned can establish the lawful origin thereof.

Where property derived directly or indirectly from the offence has been intermingled with property acquired from legitimate sources, the confiscation of the latter property shall be ordered solely up to the value, as assessed by the court, of the proceeds and property referred to above.

The confiscation order shall specify the property concerned and contain the necessary details to identify and locate it.

If the property to be confiscated cannot be produced, confiscation may be ordered for its value.

***Article 37 - Confiscation orders***

In cases where the facts cannot lead to the institution of legal proceedings, the public

prosecutor's office may request the judge to have an order issued for the confiscation of the seized property.

The judge to whom the request is referred may issue a confiscation order:

(1) If evidence is adduced that the aforesaid property constitutes proceeds of crime as defined herein;

(2) If the perpetrators of the offence which generated the proceeds cannot be prosecuted, either because they are unknown or because there is a legal impediment to prosecution for that offence, except where the case is time-barred.

157. The Malagasy confiscation system is conviction-based (Art. 36 para. 1). Non-conviction based forfeiture is possible in a subsidiary manner when judicial proceedings cannot be instituted (Art. 36 para. 3, Art. 37). However, Malagasy authorities informed that non-conviction based confiscation is very rarely applied in practice.

158. Object-based confiscation is the rule, but value-based confiscation is possible in a subsidiary way “if the property to be confiscated cannot be produced” (Art. 36).

159. These provisions refer to the “object” of the offence or its value. This covers the product of crime derived from offences established in accordance with this Convention (object-based system) or property the value of which corresponds to that of such proceeds (value-based system), as foreseen in Art. 31 para. 1 a).

**(b) Observations on the implementation of the article**

160. It is recommended that Madagascar adopt a comprehensive legislative regime in line with article 31, including regulations allowing for the confiscation of proceeds of all corruption offences.

**Subparagraph 1 (b)**

*1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:*

*(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

161. The rules on confiscation foreseen in specific corruption offences (for example Art. 182.1 CC) address the damage caused by the offence, which in many cases can cover the product of the offence (see above), but does not address the instrumentalities used in or destined for use in corruption offences.

162. Law No. 2004-30 prescribes the confiscation of assets “obtained through acts of corruption”, which refers exclusively to the products, excluding therefore the instrumentalities used in or destined for use in the offence.

163. Art. 36 and 37 of Law No. 2004-20 refer to “property forming the subject of the offence, including income and other benefits obtained there from” (Art. 36) and property that “constitutes proceeds of crime”. Also here, instrumentalities used in or destined for use in the commission of the offence are not included.

**(b) Observations on the implementation of the article**

164. It is recommended that Madagascar adopt a comprehensive legislative regime in line with article 31 para. 1 b) for the confiscation of property, equipment or other instrumentalities used in or destined for use in corruption offences.

**Paragraph 2**

*2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.*

**(a) Summary of information relevant to reviewing the implementation of the article**

165. The prosecutor and the investigating judge can seize and freeze assets (arts. 133-135, 210-212 and 260-261 CPC and arts. 28 and 29 of Law No. 2004-20).

**Criminal Procedure Code**

Art. 133. The officers of the judicial police conduct preliminary investigations whenever it is necessary to investigate the perpetrators or gather evidence of the offence, either upon instructions of the judge or the officials of the prosecutor's office or ex officio.

In cases of crimes or offences observed in flagranti, or related offences, they may proceed by way of a summary information in accordance with articles 206 and following.

Art. 134. The officers of the judicial police may request directly to any other officer of the judicial police with responsibility in the territory of the Republic to collect information or evidence and to verify them as it seems useful for their investigation.

Art. 135. Searches, house searches and seizures of evidence cannot be made without the explicit consent of the person with whom the operation takes place. This consent must be expressed either by a written statement from the hand of the person concerned, or by a certification of two officers or agents of the judicial police or two witnesses. The officer of the judicial police observes also the forms foreseen by articles 210, 211 and 212.

Art. 210.- If the nature of the crime or the offence is such that the evidence may be obtained by seizing papers, documents, substances or other objects in the possession of those suspect of having participated in the offence, the judicial police officer shall immediately travel to their residence and proceed to a search, of which he shall prepare a report.

The judicial police officer shall seize all papers, documents, objects or substances that may serve as evidence both for the prosecution and the defence.

These evidence shall be immediately placed under seals. It shall remain open to the extent possible, or otherwise, it may be closed. The seals shall be numbered, inventoried and listed in the report.

Art. 211. - The operations contemplated in the preceding article shall take place in the presence of the person who is suspected of having participated in the offence and, if the suspect is not able or willing to attend, in the presence of any person that he may immediately appoint. In their absence, the judicial police officer shall chose two witnesses, chosen for that purpose outside the members of the judicial police.

The report of the search and the seizures, prepared on the field, is signed by the concerned party and the witnesses referred to above, and initiated in each page;

If they refuse, it shall be mentioned in the report by the judicial police officer.

Art 212. – Except when there is a claim from inside the house, or as provided for in the law, any searches and house visits in locales that are not open to the public may not start before five in the morning or seven in the afternoon, subject to annulment.

The report shall mention the hour in which the operation started.

Any search started before seven in the afternoon may proceed until the operation is completed.

Art. 260. The judge of instruction can proceed with the seizure of all papers, documents, objects, or substances that could be used as evidence, as well as of all objects, values or goods appearing to come from the pursued offences. Any objects and documents seized are immediately inventoried and placed under seal, open, if at all possible, otherwise, under closed seals, in envelopes, bags or closed containers.

Closed seals shall be subsequently opened in the presence of the accused, assisted by his attorney, after being duly summoned.

If the seizure involves cash, ingots, effects or instruments whose conservation may not be possible to guarantee to the court clerk tribunal, the investigative judge may authorize the clerk to deposit them with the agent of the jurisdiction.

Art 261. - Any person who claims to have a right over objects in the custody of the justice, may demand their restitution to the investigative judge in writing.

The request shall be communicated to the prosecution, the accused and the complainant, who may submit their comments within three days.

The investigative judge issues his decision in an order that is notified to the parties, and subject to appeal, without the appeal being able to delay the progress of the information. The restitution is placed on hold until there is a decision by the indictment chamber.

166. After the dismissal, the investigative judge remains competent to decide on the restitution of the objects seized. He shall issue his decision as provided in the preceding paragraph.

**Art. 28 of Law 2004-020. The seizure**

Judicial authorities and relevant officials responsible for the detection and punishment of offenses related to money laundering can seize any goods in relation with the investigated offense, as well as all elements that may allow to identify them, in accordance with the rules of common law.

**Art. 29 of Law 2004-020. On conservatory measures**

In order to establish conservatory measures, the competent judicial authority may, ex officio or at the request of the public prosecutor or a competent administration, order such measures, at the expense of the State, including the freezing of assets and operations on financial assets, regardless of the nature, which may be seized or confiscated.

The withdrawal of these measures may be ordered at any time at the request of the Public ministry or, after a notice from the Ministry, at the demand of the competent administration or the owner.

167. However, Art. 133 to 135 and 210 to 210 CPC refer to evidence, leaving only Art. 260 and 261 (“objects, values or goods appearing to come from the pursued offences”) as the immediate scope of application for the seizure of proceeds of crime.

168. Art. 260 and 261 do not refer to instrumentalities, and seem to cover only physical assets.

169. Articles 28 and 29 of Law No. 2004-40 can cover both proceeds and instrumentalities (“in relation with the investigated offence”), but only apply to money-laundering cases.

**(b) Observations on the implementation of the article**

170. It is recommended that Madagascar adopt a comprehensive legislative regime in line with article 31 para. 2 for the identification, tracing, freezing or seizure of proceeds and instrumentalities used or destined for use in any corruption offence.

**Paragraph 3**

*3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

171. Madagascar has a basic regulation on the administration of seized assets in article 260 CPC, especially in its paragraph 2:

Art. 260. of the Criminal Procedure Code

The judge of instruction can proceed with the seizure of all papers, documents, objects, or substances that could be used as evidence, as well as of all objects, values or goods appearing to come from the pursued offences.

All seized objects and documents are immediately inventoried and are placed opened under seal, if it is possible, otherwise placed closed under seal by means of sealed envelopes, of bags or silos. Closed seals are subsequently opened in the presence of the accused, assisted by his advisor or other duly called. If the seizure is about the species, ingots, effects or values whose conservation does not appear to be efficiently achieved with the clerk of the court, the judge may authorize the clerk to make the deposit at the paying location the judge of instruction can allow the clerk to deposit it with the payer.

172. The disposal of confiscated assets is regulated for money-laundering offences, in article 40 of Law 2004-20:

Article 40 - Disposal of confiscated property

Confiscated property and proceeds shall accrue to the State, which shall be empowered to allocate them to a fund for combating organized crime or drug trafficking. They shall remain encumbered, up to their value, by any rights in rem lawfully established in favour of third parties.

In cases where confiscation is ordered under a judgment by default, the confiscated property shall accrue to the State and be realized in accordance with the relevant procedures laid down. However, if the court, ruling on an application to set aside such

judgment, acquits the person prosecuted, it shall order restitution to the value of the confiscated property by the State, unless it is established that such property is the proceeds of crime.

173. However, Madagascar has not yet established an institutional structure for the management of seized and confiscated assets.

**(b) Observations on the implementation of the article**

174. It is recommended that Madagascar adopt a comprehensive legislative regime for the administration of frozen, seized or confiscated property, and establish an institutional framework for the management of such assets.

**Paragraph 4 to 6**

*4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.*

*5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.*

*6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.*

**(a) Summary of information relevant to reviewing the implementation of the article**

175. With regard to money-laundering, all relevant measures can be taken when proceeds are transformed into other property or intermingled with property of legitimate sources, and with regard to income and other benefits derived from proceeds of crime.

**Article 36 - Confiscation**

In the event of a conviction for actual or attempted money-laundering, an order shall be issued for the confiscation:

1. Of the property forming the subject of the offence, **including income and other benefits obtained there from**, against any person to whom they may belong, unless their owner can establish that he acquired them by actually paying a fair price or in return for the provision of services corresponding to their value or on any other legitimate grounds and that he was unaware of their illicit origin;

2. Of property **belonging directly or indirectly to a person convicted of a laundering offence** to his spouse, cohabitee or children, unless the parties concerned can establish the lawful origin thereof.

Moreover, if, in cases where an offence is established by the court, the perpetrator or perpetrators thereof cannot be convicted, the court may nevertheless order the confiscation of **the property to which the offence related**.

An order may additionally be issued for the confiscation of property, wheresoever located, that has directly or indirectly become part of the assets of the convicted offender or his spouse, cohabitee or children, from the date of the earliest of the acts forming the basis of his conviction, unless the parties concerned can establish the lawful origin thereof.

**Where property derived directly or indirectly from the offence has been intermingled with property acquired from legitimate sources, the confiscation of the latter property shall be ordered solely up to the value, as assessed by the court, of the**

**proceeds and property referred to above.**

The confiscation order shall specify the property concerned and contain the necessary details to identify and locate it.

**If the property to be confiscated cannot be produced, confiscation may be ordered for its value.**

176. Article 36 foresees that proceeds of money-laundering that have been transformed or converted into other property (para. 4 of article 31) can be confiscated (para. 1 No. 2), because all property belonging directly or indirectly to the perpetrator can be confiscated. However, the wording of the provision is not quite clear with regard to the value up to which the property can be confiscated.
177. Para. 2 foresees a specific regulation for such property that has been intermingled with property acquired from legitimate sources (para. 5 of article 31).
178. Para. 1 specifically mentions income and other benefits obtained from proceeds of crime (para. 6 of article 31).

**(b) Observations on the implementation of the article**

179. It is recommended that Madagascar adopt a comprehensive legislative regime in line with article 31 para. 4 to 6 that refers to all corruption offences and covers proceeds of corruption that have been transformed into other property or intermingled with property of legitimate sources, and with regard to income and other benefits derived from proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled.

**Paragraph 5**

**Paragraph 7**

*7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.*

**(a) Summary of information relevant to reviewing the implementation of the article**

180. Article 260 of the Criminal Procedure Code foresees that the instruction judge can order the seizure of all documents that can be used as evidence in court. This also applies to financial and commercial records. Therefore, Malagasy authorities cannot decline to provide them for the purposes of international cooperation in asset recovery on the ground of bank secrecy.

181. As will be discussed in greater detail below (Art. 40), BIANCO and the judicial authorities, in their respective fields of competence, can lift the banking secrecy.

**Art. 260. of the Criminal Procedure Code –**

The judge of instruction can proceed with the seizure of all papers, documents, objects, or substances that could be used as evidence, as well as of all objects, values or goods appearing to come from the pursued offences.

All seized objects and documents are immediately inventoried and are placed opened under seal, if it is possible, otherwise placed closed under seal by means of sealed envelopes, of bags or silos. Closed seals are subsequently opened in the presence of the accused, assisted by his advisor or other duly called. If the seizure is about the species, ingots, effects or values whose conservation does not appear to be efficiently achieved with the clerk of the court, the judge may authorize the clerk to make the deposit at the paying location the judge of instruction can allow the clerk to deposit it with the payer.

**(b) Observations on the implementation of the article**

182. Madagascar has implemented the provision under review.

**Paragraph 8**

*8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

183. Madagascar has regulated that the offender and their family demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation for money-laundering offences, in article 36 para. 1 No. 2 of Law No. 2004-20:

**Article 36 - Confiscation**

In the event of a conviction for actual or attempted money-laundering, an order shall be issued for the confiscation:

2. Of property belonging directly or indirectly to a person convicted of a laundering offence to his spouse, cohabitee or children, unless the parties concerned can establish the lawful origin thereof.

184. As mentioned above, the wording of the provision is not quite clear with regard to the value to be confiscated.

**(b) Observations on the implementation of the article**

185. Madagascar has implemented this provision with regard to money-laundering offences, and may consider the possibility of requiring also for other corruption offences that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation.

**Paragraph 9**

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

**(a) Summary of information relevant to reviewing the implementation of the article**

186. Madagascar has implemented the measures of paragraph 9 of Article 31 through Art. 261 CPC and article 36 No. 1 of Law No. 2004-20.

***Art. 261. Criminal Procedure Code***

Any person claiming to be entitled to an object, placed in the hands of the justice, can require restitution from the judge by a written request. This request is communicated to the public ministry, to the accused and to the civil party, they can all propose observations in the three following days.

The judge rules an order given to the parties, and susceptible to appeal, without this call may delay the progress of information. The restitution is held in suspense until the decision of the accusation room. After the decision of dismissal, the judge retains jurisdiction to rule on the return of the seized items. He shall act in accordance with the preceding paragraph.

***Art. 36 No. 1 Law No. 2004-20***

***Article 36 - Confiscation***

In the event of a conviction for actual or attempted money-laundering, an order shall be issued for the confiscation:

1. Of the property forming the subject of the offence, including income and other benefits obtained there from, against any person to whom they may belong, unless their owner can establish that he acquired them by actually paying a fair price or in return for the provision of services corresponding to their value or on any other legitimate grounds and that he was unaware of their illicit origin;

**(b) Observations on the implementation of the article**

187. Madagascar has implemented the provision under review.

188. It is recommended to ensure that the issue of protection of third parties be included when adopting a comprehensive legislative regime in line with article 31.

**(d) Challenges, where applicable**

189. Madagascar has identified the following challenges for the implementation of this article:

- Limited resources for implementation,
- Inter-agency co-ordination,
- Limited capacity.

**(e) Technical assistance needs**

190. Madagascar identified the following technical assistance needs for the full implementation of the article:

- Legislative drafting assistance, including through on-site assistance by anti-corruption experts,
- Capacity-building programmes for authorities responsible for identifying and tracing proceeds or

- instrumentalities,
- Capacity-building programmes for authorities responsible for the establishment and management of systems for the administration of frozen, seized or confiscated property

191. Madagascar has not received any of the aforementioned forms of technical assistance.

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

### **Paragraphs 1 and 2(a)**

*1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.*

*2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

*(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

179. The protection of witnesses and whistle-blowers is provided for in articles 32 to 35 of Law No. 2004-030, which establish some of the relevant measures, for example, the protection of identity. Law enforcement agencies can provide physical protection but they lack sufficient financial resources to carry out this function at the expense of the State.

180. The legislation does not apply to experts. A witness protection programme has not yet been established.

### ***Chapter V – On the Protection of Whistleblowers and Witnesses***

#### ***Article 32***

The Director General is responsible for ensuring that:

1. the identity of the persons involved in a denunciation is protected, namely that of whistleblowers, witnesses, and the presumed perpetrators of an act of corruption;
2. the mechanisms aimed at ensuring the protection of the information collected and linked to a denunciation are put in place.

#### ***Article 33***

During the course of a civil or penal trial, the witness to an act of corruption cannot be forced to reveal the name and address of a whistleblower or informant of the Independent Anti-Corruption Bureau or to answer questions leading to an identification of the name and address of the whistleblower or informant of the Independent Anti-Corruption Bureau when the whistleblower or informant himself is not cited as a witness in the trial.

If, after a complete investigation of the matter, it becomes evident that the declarations of the whistleblower were false or did not reflect the truth, or that the judicial system cannot decide

on the matter without knowing the identity of the whistleblower or informant, the court may lift the restriction cited in the preceding paragraph.

**Article 34**

It is forbidden to exercise any reprisals against a whistleblower or witness.

**Article 35**

Any whistle-blower or witness believing himself to be a victim of reprisals may file a written complaint with the Independent Anti-Corruption Bureau.

Upon receipt of such a complaint, the Independent Anti-Corruption Bureau may assist the parties in settling the dispute or investigating the matter. If the Bureau concludes that the complainant has indeed been the victim of reprisals, it may approach the competent judicial authority and advise it of the results of its investigation. The competent judicial authority may, as warranted, enjoin the administration or employer in question to take actions in favour of the victim necessary to:

- a. reinstate him in his position;
- b. pay him an indemnification equivalent, at most, to the pay he would have received in case of suspension of salary;
- c. cancel any disciplinary measure or other taken against him. If the person is a public agent, pay him an indemnification that is equal at most to the pecuniary sanction or other that he was made to pay;
- d. reimburse him for expenses and financial losses that directly resulted from the reprisals;
- e. cause any form of reprisal to cease.

181. The Ministry of Justice has issued directions in a Circular on witness protection.

**(b) Observations on the implementation of the article**

182. It is recommended that Madagascar create consolidated witness protection legislation with regard to all criminal offences, and covering all measures described in the Convention, for witnesses and experts; to the extent necessary and feasible, institute a witness protection programme and provide financing for it; consider entering into agreements for the international relocation of witnesses; and take measures to enhance the role of victims during trial.

**Subparagraph 2 (b)**

*2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:*

*(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.*

**(a) Summary of information relevant to reviewing the implementation of the article**

183. Madagascar has partially implemented subparagraph 2(b) of Article 32 through Article 33 of AC Law No. 2004-030.

184. Evidentiary rules for witness protection are applied as a matter of practice. E.g. some measures like the distortion of a witness's voice can be ordered by the judge but there is no explicit legal basis for this. It is possible for BIANCO to act on anonymous reports if they seem credible.

**Article 33**

During the course of a civil or penal trial, the witness to an act of corruption cannot be forced to reveal the name and address of a whistleblower or informant of the Independent Anti-Corruption Bureau or to answer questions leading to an identification of the name and address of the whistleblower or informant of the Independent Anti-Corruption Bureau when the whistleblower or informant himself is not cited as a witness in the trial.

If, after a complete investigation of the matter, it becomes evident that the declarations of the whistleblower were false or did not reflect the truth, or that the judicial system cannot decide on the matter without knowing the identity of the whistleblower or informant, the court may lift the restriction cited in the preceding paragraph.

185. There is no legal basis for video testimony yet but it has used in a murder case with France. The courts can use a screen to protect witnesses, anonymous testimony

**(b) Observations on the implementation of the article**

186. See the comments under para. 1 above.

**Paragraph 3**

*3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

192. Madagascar confirmed that it has not adopted or implemented this provision of the Convention.

**(b) Observations on the implementation of the article**

187. See the comments under para. 1 above.

**Paragraph 4**

*4. The provisions of this article shall also apply to victims insofar as they are witnesses.*

**(a) Summary of information relevant to reviewing the implementation of the article**

188. Madagascar has partially implemented paragraph 4 of Article 32 through Articles 32 through 35 of AC Law No. 2004-030 (see above).

**(b) Observations on the implementation of the article**

189. See the comments under para. 1 above.

## **Paragraph 5**

*5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

190. Madagascar has partially implemented paragraph 4 of Article 32 through Chapter V of AC Law No. 2004-030 (see above). Victims have standing in the criminal process when they ask for reparation, but not generally to express their concerns.

### **(b) Observations on the implementation of the article**

191. See the comments under para. 1 above.

### **(c) Challenges, where applicable**

192. Madagascar has listed the following challenges for the implementation of this article: Inter-agency co-ordination, Limited capacity, Limited awareness of state-of-the-art programmes and practices for witness and expert protection, Limited resources for implementation.

### **(d) Technical assistance needs**

193. Madagascar has listed the following technical assistance needs: Summary of good practices/lessons learned, Legal advice, Model legislation, Capacity-building programmes for authorities responsible for establishing and managing witness and expert protection programmes, On-site assistance by a relevant expert, Development of an action plan for implementation, Capacity-building programmes for authorities responsible for establishing and managing witness, expert and victim protection programmes

194. Madagascar has not received any of the aforementioned forms of technical assistance.

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

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

### **(a) Summary of information relevant to reviewing the implementation of the article**

195. The protection of witnesses and whistle-blowers is provided for in articles 32 to 35 of Law No. 2004-030, which establish some of the relevant measures, for example, the protection of identity. Law enforcement agencies can provide physical protection but they lack sufficient financial resources to carry out this function at the expense of the State. Evidentiary rules for witness protection are applied as a matter of practice.
196. Reprisals against whistle-blowers are forbidden. BIANCO is responsible for protecting their identity. Whistle-blowers may file written complaints with BIANCO, and BIANCO can thereupon approach the competent authority, which may take measures such as reinstating or reimbursement (arts. 32-35, Law No. 2004-30).

## **CHAPTER V**

### ***The protection of whistleblowers and witnesses;***

#### **Article 32**

The Director General is responsible for ensuring that:

1. the identity of the persons involved in a denunciation is protected, namely that of whistleblowers, witnesses, and the presumed perpetrators of an act of corruption;
2. the mechanisms aimed at ensuring the protection of the information collected and linked to a denunciation are put in place.

#### **Article 33**

During the course of a civil or penal trial, the witness to an act of corruption cannot be forced to reveal the name and address of a whistleblower or informant of the Independent Anti-Corruption Bureau or to answer questions leading to an identification of the name and address of the whistleblower or informant of the Independent Anti-Corruption Bureau when the whistleblower or informant himself is not cited as a witness in the trial.

If, after a complete investigation of the matter, it becomes evident that the declarations of the whistleblower were false or did not reflect the truth, or that the judicial system cannot decide on the matter without knowing the identity of the whistleblower or informant, the court may lift the restriction cited in the preceding paragraph.

#### **Article 34**

It is forbidden to exercise any reprisals against a whistleblower or witness.

#### **Article 35**

Any whistle-blower or witness believing himself to be a victim of reprisals may file a written complaint with the Independent Anti-Corruption Bureau.

Upon receipt of such a complaint, the Independent Anti-Corruption Bureau may assist the parties in settling the dispute or investigating the matter. If the Bureau concludes that the complainant has indeed been the victim of reprisals, it may approach the competent judicial authority and advise it of the results of its investigation. The competent judicial authority may, as warranted, enjoin the administration or employer in question to take actions in favour of the victim necessary to:

- a. reinstate him in his position;
- b. pay him an indemnification equivalent, at most, to the pay he would have received in case of suspension of salary;
- c. cancel any disciplinary measure or other taken against him. If the person is a public agent, pay him an indemnification that is equal at most to the pecuniary sanction or other that he was made to pay;

- d. reimburse him for expenses and financial losses that directly resulted from the reprisals;
- e. cause any form of reprisal to cease.

**(b) Observations on the implementation of the article**

197. Madagascar has legislatively implemented the provision under review.

**(c) Successes and good practices**

198. The protection of whistle-blowers in article 35 of the anti-corruption Law No. 2004-030, which provides for a complaint procedure that may result in measures such as reinstating the whistle-blowers in their position or reimbursing them for damages, was considered a good practice.

**(d) Challenges, where applicable**

199. Madagascar has identified Specificities in our legal system, Limited awareness of state-of-the-art systems and programmes to protect reporting persons, Limited capacity, and Limited resources for implementation as challenges to implementation of this provision

**(e) Technical assistance needs**

200. Madagascar has identified the following technical assistance needs: Summary of good practices/lessons learned, Legal advice, Model legislation, Capacity-building programmes for authorities responsible for establishing and managing protection programmes for reporting persons, On-site assistance by a relevant expert, and a Development of an action plan for implementation

201. Madagascar has not received any of the previously mentioned forms of technical assistance.

**Article 34. Consequences of acts of corruption**

*With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.*

**(a) Summary of information relevant to reviewing the implementation of the article**

202. Madagascar has implemented Article 34 through Art. 16 and 17 of Law No. 2004-030.

203. Article 17, paragraph 1, of Law No. 2004-030 foresees that any contract, licence, permit or authorization obtained by corrupt means is automatically void.

### ***CHAPTER III: OF THE EFFECTS OF THE CORRUPTION INFRINGEMENTS***

#### ***Article 16***

Illicit income and assets obtained through acts of corruption may be seized, frozen, or confiscated by court order.

#### ***Article 17***

Any contract, license, permit, or authorization obtained by corrupt means shall be automatically null and void.

Any company holding a contract, license, permit, or authorization obtained by corrupt means shall be deprived of the right to participate in any public procurement.

204. Art. 9 of the Public Procurement Code also provides for the exclusion from public tenders:

#### ***Art. 9 – Exclusion from public tenders***

The following shall be excluded from competing for public tenders:

...

- natural or legal persons that have temporarily or definitively been excluded as a result of an offence against the Penal Code or that have been excluded by the Public Procurement Authority for violations of the public procurement regulations.

### **(b) Observations on the implementation of the article**

205. Madagascar has implemented the provision under review.

### **(c) Challenges, where applicable**

206. Madagascar has identified Inter-agency co-ordination, Limited capacity, and Limited resources for implementation as challenges.

### **(d) Technical assistance needs**

207. Madagascar has identified the following technical assistance needs: Summary of good practices/lessons learned, Legislative drafting, Legal advice, and Development of an action plan for implementation. Madagascar has not received any of the previously mentioned forms of technical assistance.

## **Article 35. Compensation for damage**

*Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.*

(a) **Summary of information relevant to reviewing the implementation of the article**

208. Civil action for the compensation of damage can be pursued within the criminal proceedings according to articles 182-183 and 192-193 CPC.

***CODE OF CRIMINAL PROCEDURE***

***Art. 182***

Anyone who claims to have been affected by an offence may directly summon before the criminal court the perpetrator of said offence, the civil liabilities and, as the case may be, their liable insurer.

Anyone who claims to have been affected by a minor offence may summon the same defendants before the court of first instance or the court section, delivering in matters of the police court, or the competent police court with territorial jurisdiction.

The summons are to be delivered following the forms and methods established by articles 76 and those that follow of the present Code.

The plaintiff shall select a domicile located within the jurisdiction seized by the court for the summons, unless the plaintiff is domiciled there.

In the case where, following the preliminary investigation, the court must seize the property, the plaintiff may not make use of the procedure of direct summons.

***Art. 183***

Anyone who claims to have been affected by a crime or offence may, having pressed charges, take civil action before an investigative judge.

They may withdraw within a twenty four hour period. Failing that, the public action is set in motion and no later withdrawal may put a stop to the course

***Art. 192***

Civil action may be taken at any point during the prosecution, investigation and hearing, however, it must be taken at the latest before the final requisitions of the prosecutor of first instance, at penalty of inadmissibility.

The impact of taking civil action demonstrated in the course of the preliminary investigation or summary information by means of intervention is subject to the entitlement to a trial court by the prosecutor. It is obligatory to convoke or summon the plaintiff to attend the hearings, if they have not renounced to this in advance. In any case, the civil action may be declared as inadmissible by the jurisdiction in charge. This ruling may be reversed by the prosecutor, the defendant or accused, the civil liability or another plaintiff.

***Art. 193***

Civil action taken by means of intervention in the course of a prosecution undertaken by the prosecutor is not subject to any particular form. It could result from a verbal statement made to

a judicial police officer, a magistrate or prosecution officer, an investigating judge, or to the trial court in the course of a hearing.

**(b) Observations on the implementation of the article**

209. Madagascar has implemented the provision under review.

**(c) Successes and good practices**

210. The procedure on the compensation of damage, which can be initiated by a verbal statement of the victim and even ex officio, was considered a good practice.

**Article 36. Specialized authorities**

*Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State*

*Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.*

**(a) Summary of information relevant to reviewing the implementation of the article**

211. Madagascar has two specialized anti-corruption authorities, the Bureau indépendant anti-corruption (BIANCO) and the Comité pour la Sauvegarde de l'Intégrité (CSI). BIANCO has 179 total staff, of which 80 are investigators with powers similar to the police but restricted to corruption matters. It has no powers to prosecute. BIANCO has six territorial branches. It has a budget of around 3 bn ARI (1m euros) and is financed by the State and international partners like UNDP.

212. The law enforcement authorities investigating corruption are BIANCO, the police, the gendarmerie and the investigation units within the specialized Chaînes Pénales Économiques et Anti-corruption (CPEAC).

213. The independence of BIANCO is according to the law guaranteed by the security of the positions of its officers, the availability of sufficient resources, and the autonomy of its operations. The powers of BIANCO are set out in articles 22-30 of Law No. 2004-030.

214. CPEAC is a system of specialized anti-corruption investigators, prosecutors and courts. By Decree No. 2015-141, a Coordinator for the CPEAC was created who is tasked with coordinating their activities, support their work and ensure the implementation of the anti-corruption policy. The CPEAC does not yet operate exclusively for corruption offences. Conversely, not all cases involving corruption are handled by CPEAC. The CPEAC only exist in the courts of first instance of the six regional capitals. Unlike

BIANCO, the CPEAC do not have a national competence. Judges and prosecutors are trained at the École nationale de la magistrature.

215. Article 16 of Law No. 2004-020 and Decree No. 2007-510 provide for the establishment of a Financial Intelligence Unit (FIU - SAMIFIN).
216. The Director General of BIANCO has the power to directly ask for the support of all law enforcement agencies (Art. 23(5) of Law No. 2004-030). BIANCO and other law enforcement agencies can exchange officers with special know-how. If BIANCO wants to close a file, there is a supervisory committee that has to give its consent. So far, BIANCO has been acting mostly on the basis of complaints. Recently, however, it has started to act also ex officio. This will be explicitly enshrined in the framework of the new anti-corruption strategy. BIANCO has memorandums of understanding with SAMIFIN and the Ministry of Justice.
217. Prosecutors are nominated by the Conseil Supérieur de la Magistrature, which is chaired by the President of the Republic (Art. 107 of the Constitution). The Ministry of Justice can give orders to prosecutor in ordinary criminal matters. Instructions given to prosecutors are not recorded in writing. However, in corruption matters, no orders can be given to BIANCO.
218. Data exchange between the Ministry of Justice and BIANCO is foreseen on the basis of a convention between the two. This convention is currently being implemented.
219. BIANCO has cooperation with the private sector, including the chamber of commerce, in the area of prevention and education. The FIU provides training and meets regularly with reporting entities.
220. Complaints are received, also anonymously, by BIANCO, the police and the gendarmerie. BIANCO cooperates with Transparency International Madagascar, which provides a hotline for complaints, and plans to set up a website for the reporting of corruption offences.
221. The CSI replaced the High Council for the Fight against Corruption (CSLCC, Art. 18 of Law no. 2004-030). The CSI has wider mandate than the CSLCC that comprises not just anti-corruption but also good governance. While the CSLCC had a supervisory role over BIANCO, the CSI does not have that role anymore. It has no operational mandate but is responsible for the development of policies.

***Article 18 of Law n°2004 030***

In order to implement the national anti-corruption policy, the following institutional framework is put into place:

- a High Council for the Fight against Corruption (CSLCC);
- an Independent Anti-Corruption Bureau (BIANCO).

The organization and functioning of these organs will be governed by regulatory provisions.

193. By Decree n° 2006-207, the CSLCC was abolished and replaced by the Committee for the Protection of Integrity (*Comité pour la Sauvegarde de l'Intégrité*).

**Article 20**

The Independent Anti-Corruption Bureau is headed by a Director General, who is assisted by a Deputy Director General.

The independence of the Bureau is guaranteed by the security of the positions of its officers, the availability of sufficient resources, and the autonomy of its operations.

In the exercise of his duties, the Director General is protected from any form of pressure or intimidation from political or economic entities or any others.

The Director General is appointed, for a non-renewable term of 5 years, by decree of the President of the Republic, from among three candidates proposed by the High Council for the Fight against Corruption, by simple majority of the members convened in a special meeting for the purpose.

The Deputy Director General is appointed for a term of 3 years renewable only once, by decree of the President of the Republic, from among two candidates proposed by the Director General.

The officers of BIANCO may not be removed from their functions before the end of their terms of appointment, except by decision to revoke their appointment taken in response to duly substantiated complaints or denunciations of incapacity or unworthy or inappropriate conduct, by virtue of a recommendation of the High Council for the Fight against Corruption deciding with an unanimous decision of its members, and being of a sufficiently serious nature.

Before assuming their functions, the Director General and the Deputy Director General must take an oath before the Supreme Court.

The decision to revoke their appointment is made known by presidential decree.

The necessary funds to accomplish the mission of BIANCO are provided for in the law on finances.

194. However, according to Decree n° 2008-176, the procedure for the appointment of the Director General has been changed.

***Law 2004 020 of August 19, 2004 on the fight against money laundering;***

***Art. 16. General arrangements***

A financial intelligence unit, organized under the conditions established by a decree, is responsible for receiving, analysing and processing reports required from persons and entities specified in Article 3. II. This unit also receives all useful information, including those provided by the judicial authorities. Its agents are sworn to secrecy of the collected information and cannot use it for purposes other than those provided by this text.

The composition and powers of service, conditions to ensure or enhance their independence as well as the content and methods of transmission of the statements that the unit receives, are determined by law.

**(b) Observations on the implementation of the article**

222. It is recommended to

- establish strong coordination mechanisms between the various law enforcement bodies;
- take measures to ensure the independence of prosecutors, for example, by regulating that instructions to prosecutors must be given in writing;

223. The new proactive approach of BIANCO to act ex officio was welcomed.

## **Article 37. Cooperation with law enforcement authorities**

### **Paragraphs 1, 2 and 3**

*1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.*

*2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

*3. Each State Party shall consider providing for the possibility, in accordance with the fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

224. Madagascar has implemented paragraphs 1-3 of Article 37 through Art. 180.2 CP (inserted by Art. 12 of Law No. 2004-030) and Art. 161 CPC, which provide for the mitigation of or exemption from punishment for cooperating offenders.

#### ***Art. 180.2 - On exemptions and reductions of penalties:***

Except in the case of a repeat offence relating to corruption, any perpetrator of acts of corruption comprising one or more of the offences mentioned in Articles 177 to 179, who, before any investigation, has revealed the offence to the administrative or judicial authority and assisted in the identification of other persons involved will be exempted from any penalty.

Except in the case provided in the immediately preceding paragraph, the maximum penalty applicable to any person, perpetrator, or accomplice of one of the offences mentioned in Articles 177 to 179 and 181 who, after the beginning of the investigation, has permitted or facilitated the arrest of other persons involved, will be reduced by half. In addition, that person will be exempted from optional incidental or additional penalties provided for in Articles 180 and 180.1.

Except in the case provided for in the first paragraph of this article, compensation will never be made to the corrupting person the objects delivered by him, nor of their value. They will be confiscated for the benefit of the Treasury.

#### ***Code of Criminal Procedure***

#### ***Art. 161***

The Prosecutor of the Republic receives the complaints and the denunciations and decides to proceed with the accusation or not.

**(b) Observations on the implementation of the article**

225. Madagascar has implemented the provision under review.

**Paragraph 4 of article 37**

*4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

226. Madagascar initially indicated that it had implemented paragraph 4 of Article 37 through Articles 32 to 34 of Law No. 2004-030. However, these laws are not relevant for the protection of cooperating offenders.

**(b) Observations on the implementation of the article**

227. It is recommended to include, in the reform of the witness protection legislation, the protection of collaborators with justice.

**Paragraph 5 of article 37**

*5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

228. Madagascar concluded a Memorandum between BIANCO and the Independent Commission against Corruption (ICAC) of Mauritius in 2005.

229. Madagascar is further considering entering into agreements with other States Parties, including Malaysia, Hong Kong (ICAC) and the People's Republic of China.

**(b) Observations on the implementation of the article**

230. Madagascar has implemented the provision under review.

**(c) Challenges, where applicable**

231. Madagascar has identified Inter-agency co-ordination, Limited capacity, Limited resources for implementation, and Limited awareness of state-of-the-art protection programmes and systems as challenges.

**(d) Technical assistance needs**

232. Madagascar has identified the following technical assistance needs: Summary of good practices/lessons learned, Legislative drafting, Legal advice, On-site assistance by a relevant expert, Development of an action plan for implementation, Model legislation, Capacity-building programmes for authorities responsible for establishing and managing protection programmes, Model agreement/arrangement

233. Madagascar has not received any of the previously mentioned forms of technical assistance.

**Article 38. Cooperation between national authorities**

*Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:*

*(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or*

*(b) Providing, upon request, to the latter authorities all necessary information.*

**(a) Summary of information relevant to reviewing the implementation of the article**

234. The relationship between the different anti-corruption investigation authorities is characterized by the principle of non-exclusive competence. Whichever authority is seized of a case first is competent. Joint investigations are possible. The police can inform BIANCO and collaborate. Parallel investigations are avoided because only one prosecutor's office will receive the investigation from different bodies.

235. The Director General of BIANCO has the power to directly ask for the support of all law enforcement agencies (Art. 23(5) of Law No. 2004-030). BIANCO and other law enforcement agencies can exchange officers with special know-how.

236. BIANCO has memorandums of understanding with SAMIFIN (Accord de partenariat, 2010) and the Ministry of Justice (Cadre de collaboration).

**(b) Observations on the implementation of the article**

237. Madagascar has implemented the provision under review

**(c) Challenges, where applicable**

238. Madagascar has identified Limited capacity, Limited resources for implementation, and Inter-agency co-ordination as challenges.

**(d) Technical assistance needs**

239. Madagascar has identified the following technical assistance needs: Summary of good practices/lessons learned, Legal advice, On-site assistance by a relevant expert, Development of an action plan for implementation
240. Madagascar has not received any of the previously mentioned forms of technical assistance.

**Article 39. Cooperation between national authorities and the private sector**

**Paragraph 1**

*1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

241. BIANCO has cooperation with the private sector, including the chamber of commerce, in the area of prevention and education. BIANCO has a 2010 memorandum of understanding (Accord de partenariat) with the FIU (SAMIFIN).
242. The FIU was established by Decree No. 2007-510 of 4 June 2007 on the creation of the Service des Renseignements Financiers (SAMIFIN). It is an independent, administrative type of FIU. Its DG is appointed by the President of the Republic upon advice from the CSI. It is tasked with receiving, analyzing and disseminating STRs. there are no cash transaction reports or electronic transaction reports. It has powers to access information and issue stop notices for 48 hours. It can apply for freezing orders (for 8 days) to the courts. Administrative sanctions for non-cooperation can be applied e.g. by the Banking Regulator.
243. The results of its investigations are sent to the prosecution or tax authorities (if predicate offence is tax fraud).
244. SAMIFIN has cooperation with foreign FIUs and formal MoUs with its counterparts in Thailand, UAE, Seychelles and Belgium. SAMIFIN has applied to become a member of the Egmont Group of FIUs.
245. SAMIFIN provides training and meets regularly with reporting entities.

**(b) Observations on the implementation of the article**

246. Madagascar has implemented the provision under review

**Paragraph 2**

*2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

247. Complaints are received, also anonymously, by BIANCO, the police and the gendarmerie. BIANCO cooperates with Transparency International Madagascar, which provides a hotline for complaints, and plans to set up a website for the reporting of corruption offences.

248. Madagascar cited the right to complain according to general principle and the penal procedure.

**Art. 182. CPC**

Anyone who claims to have been affected by an offence may directly summon before the criminal court the perpetrator of said offence, the civil liabilities and, as the case may be, their liable insurer.

**(b) Observations on the implementation of the article**

249. It is recommended to continue to encourage citizens to report offences, including through the establishment of hotlines.

**Article 40. Bank secrecy**

*Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.*

**(a) Summary of information relevant to reviewing the implementation of the article**

250. According to article 24 of Law No. 2004-030, BIANCO can inspect and request documentation on the accounts held with banks or other financial institutions by the suspect and his family members. Article 27 of the Law No. 2004-020 gives the judicial authorities, and under their control the FIU, the power to overcome bank secrecy in money-laundering investigations.

*Article 24 of Law n° 2004 030*

In the exercise of his duties, the Director General has the power to authorize an Officer to lead investigations and searches.

A written order from the Director General is required to:

1. access and verify data, documents, and dossiers on any medium relating to the public service of the State, Territorial Public authorities or public establishments, any provisions to the contrary notwithstanding;
2. enter public locales and buildings and request that public agents or authorities, regardless of their rank, furnish information on the organization, functioning, and powers within the service and to produce related documents;
3. examine and use the information contained in declarations of personal wealth;
4. audit the accounts of private sector entities and request disclosure of any document needed for investigative purposes. The secret or confidential nature of documents may not be claimed as grounds to oppose such a request;
5. inspect the bank accounts or accounts with other financial institutions of the suspect, his spouse, parents or children, and request any document required for the investigation. The secret or confidential nature of documents may not be claimed as grounds to oppose such a request;

***AML Law No. 2004-020***

***Art. 27 – Prohibition to invoke bank secrecy***

Bank secrecy or professional secrecy may not be invoked in order to refuse to provide the information laid down in Art 12 or requested in an investigation into money-laundering that has been instructed by the judicial authorities or carried out under their supervision.

251. In order to use this information as evidence in court, the prosecutor or investigating judge has to request the documents again under Art. 260 CPC (see Art. 31(7) above). A court order is not required.

**(b) Observations on the implementation of the article**

252. Madagascar has implemented the provision under review.

**Article 41. Criminal record**

*Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

253. Madagascar confirmed that it has not implemented this provision of the Convention.

**(b) Observations on the implementation of the article**

254. Madagascar could adopt legislation to allow the taking into account of previous convictions in other States..

## **Article 42. Jurisdiction**

### **Subparagraph 1**

*1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:*

- (a) The offence is committed in the territory of that State Party; or*
- (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

255. Madagascar has established its jurisdiction for offences committed in its territory (Art. 27, Ordonnance 62-041), but not on board a Malagasy vessel or aircraft..

*Art. 27 –*

The police and security laws apply to all inhabitants of the national territory.

*CPC*

*Art 510. –*

Any offense of which an act characterized as one of its constitutive elements is performed in Madagascar will be considered as committed in the territory of the Republic.

#### **(b) Observations on the implementation of the article**

256. It was recommended that Madagascar establish jurisdiction over offences committed on board national vessels or aircraft (Art. 42, subpara. 1 (b)).

### **Subparagraph 2 (a) and (b)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

- (a) The offence is committed against a national of that State Party; or*
- (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

257. Madagascar has established jurisdiction, upon request of the prosecutor, for offences committed against Malagasy citizens (Art. 508 CPC). Jurisdiction has also been established for offences committed by Malagasy citizens (Art. 507 CPC).

**Art 507. –**

*Any Malagasy citizen who, outside the territory of Madagascar, committed an act qualified as a crime punished by Malagasy law, may be prosecuted and tried by Malagasy jurisdictions.*

*Any Malagasy citizen who, outside the territory of Madagascar, committed an act qualified as a misdemeanour by Malagasy law, may be prosecuted and tried by Malagasy jurisdictions if the act is punished by the laws of the country where it was committed.*

...

*The provisions of this article apply to offenders who have acquired Malagasy nationality only after the commission of the act for which they are accused.*

**Art. 508. –**

*No prosecution shall take place for the crimes or offences contemplated in the previous article, if the accused has received a final sentence abroad and, if sentenced, having served the penalty, having been pardoned or that the penalty has prescribed.*

*For misdemeanours committed against Malagasy or foreign private citizens, the prosecution may not take place except when requested by the public prosecutor with a complaint brought by the affected person or an accusation brought by the authorities of the country where the crime was committed.*

*No prosecution shall take place before the return of the perpetrator to Madagascar, except for the crimes contemplated in the following article.*

**(b) Observations on the implementation of the article**

258. Madagascar has implemented the active and passive personality principle.

**Subparagraph 2 (c)**

*2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:*

...

*(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph (a) (i) or (ii) or (b) (i), of this Convention within its territory; or*

**(a) Summary of information relevant to reviewing the implementation of the article**

259. Madagascar confirmed that it has not implemented this provision of the Convention.

**(b) Observations on the implementation of the article**

260. It is recommended that Madagascar consider establishing jurisdiction over participation in or attempt of money-laundering committed abroad,

## Subparagraph 2 (d)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(d) The offence is committed against the State Party.

### (a) Summary of information relevant to reviewing the implementation of the article

261. Madagascar has established jurisdiction for offences committed against the security of the State (art. 507, 509 CPC), albeit not in the context of corruption offences.

*Art 507. –*

...

*Offences against the security of the State, the offence of counterfeiting the seal of the State or national legal tender of Madagascar, committed outside the territory of Madagascar, are punishable as the offences committed in the territory.*

...

*Art 509. –*

*Any foreign national who, outside the territory of Madagascar, is convicted as perpetrator or as an accessory, in the case of a crime or an offense against the security of the State, for counterfeiting the seal of the State, the currency or notes of national banks, which are legal tender in Madagascar, may be prosecuted and tried under Malagasy law, if the person is arrested in Madagascar or if the government obtains his or her extradition.*

*No prosecution shall be brought against a foreigner for a crime or offence committed in Madagascar if the accused justifies having received a final sentence abroad and, if sentenced, having served the penalty, having been pardoned or that the penalty has prescribed.*

### (b) Observations on the implementation of the article

262. Madagascar has implemented this optional provision.

## Paragraph 3

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

### (a) Summary of information relevant to reviewing the implementation of the article

263. The jurisdiction to prosecute Malagasy citizens in lieu of extradition is assumed as a general principle.

### (b) Observations on the implementation of the article

264. Madagascar has implemented the provision under review.

#### **Paragraph 4**

*4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.*

**(a) Summary of information relevant to reviewing the implementation of the article**

265. Madagascar has not implemented this provision of the convention.

**(b) Observations on the implementation of the article**

266. Madagascar could establish its jurisdiction over corruption offences when it does not extradite the alleged offender.

#### **Paragraph 5**

*5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

267. Madagascar stated that in practice, consultations were held in conformity with this provision of the convention.

**(b) Observations on the implementation of the article**

268. It is recommended that Madagascar consult with other States parties in the cases established in article. 42, paragraph 5.

## IV. International cooperation

### **Article 44. Extradition**

#### **Paragraph 1**

*1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Extradition is regulated in two bilateral, three regional and a number of multilateral treaties to which Madagascar is a party or in the process of becoming a party, and, in a subsidiary manner, in the Extradition Law (1927) and in Law No. 2004-020.

Madagascar does not require a treaty for extradition, but can extradite on the basis of reciprocity or international courtesy. Madagascar considers the Convention as a legal basis for extradition.

Extradition is based on the principles of dual criminality, proportionality and specialty. However, dual criminality is practised with a large measure of flexibility and determined based on the underlying conduct.

The extradition procedure has a judicial and an administrative phase.

The procedure for passive extradition is regulated in the Extradition Law (1927), which is applicable unless a treaty provides for a different procedure. Extradition requests directed to the Malagasy Government have to be submitted through the diplomatic channels, with a summary of the case, the applicable laws in the requesting State and the judicial documentation (arrest warrant, judgment or similar) provided in originals or certified copies (art. 9 Extradition Law). The Ministry of Foreign Affairs transfers the request to the Ministry of Justice, which is the Prosecutor-General's Office (art. 10 Extradition Law). The sought person can be arrested and interrogated by the Prosecutor's Office; the responsible authority is the Prosecutor's Office before the Appeal Court in which jurisdiction the sought person was arrested (art. 11-12 Extradition Law, art. 30 CPP). A public audience is held before the accusation chamber, in which the prosecutor and the sought person are heard; the representation of the requesting country is not foreseen (art. 14-15 Extradition Law). The court decides in a decision that cannot be appealed (art. 16, 17 Extradition Law). If the judicial phase is concluded with a positive decision, the Minister of Justice transfers the draft extradition order to the President of the Republic for his signature. After signature, the sought person can be transferred within one month (art. 18 Extradition Law). There are simplified procedures in some of the treaties: For example, in the Treaty with France, the Minister of Justice can issue an order authorizing extradition himself (art. 15 Treaty with France).

The procedure for active extradition is not regulated in Malagasy legislation. In the absence of a treaty and legislative regulations, the Model Extradition Treaty by the General Assembly (resolution 45/116) is applicable (art. 48 Law No. 2004-020), which foresees procedural regulations in its articles 5 to 8.

Extraditable offences are those with maximum sanctions of deprivation of liberty of at least two years, which includes some but not all Convention offences (see above article 30). Using the Convention as a legal basis, all Convention offences could be considered extraditable.

With regard to recent cases, most of them are passive extradition cases. In this context, Madagascar presented the following statistics on passive extradition (for all offences, not limited to corruption):

ANNEE	Nombre de dossiers	PAYS REQUERANT	PAYS REQUIS
2002	01	Madagascar	Comores
2008	01	Madagascar	Comores
2009	03	France	Madagascar
2010	02	France	Madagascar
2011	01	France	Madagascar
2013	01 (3 personnes)	République Populaire de Chine	Madagascar
2014	01 (en cours)	France	Madagascar

Except in the ongoing case with France in 2014, all sought persons had been extradited.

With regard to active extradition, authorities mentioned only two cases with the Comoros.

At the time of the country visit, draft legislation on international cooperation (extradition and mutual legal assistance) was being finalized, with a view to adopting it soon thereafter. With regard to extradition, the draft contained a number of relevant provisions, including on:

- Dual criminality
- Extradition for fiscal matters
- Political offences
- Anti-discrimination clause
- Extradite or prosecute

In the following, the relevant provisions on extradition of the draft law will be presented in parallel with law in force. However, it is presented for information purposes only; it was not subject to review by the reviewing experts.

At the time of the country visit efforts were being made to develop a handbook and website on mutual legal assistance and extradition, and Madagascar is encouraged to conclude actions on these efforts.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar continue its efforts to adopt comprehensive legislation on extradition and ensure that such new legislation contains all elements regulated in the Convention.

It is further recommended that Madagascar ratify the SADC Protocol against Corruption and assess whether new bilateral treaties would further international cooperation.

**(c) Successes and good practices**

Madagascar is making efforts to adopt comprehensive legislation on extradition and mutual legal assistance.

**Paragraph 2**

*2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Extradition is based on the principle of dual criminality.

The dual criminality requirement is regulated in article 3 of the Treaty with France:

Article 3

The following are subject to extradition:

1. Any person prosecuted for crimes or offences punished by the laws of the two States with a minimum penalty of one year of prison;

Also art. 43 of the General Convention on Cooperation in Justice Matters foresees dual criminality, as well as article 3 of the treaty with the Comoros.

Further, it is foreseen in article 4 para. 2 of the Extradition Law:

Art. 4 – ...

2. Under no circumstances shall the extradition be agreed to by the French<sup>1</sup> government if the act is not punishable under French law with a criminal or correctional sentence.

Malagasy authorities indicated that in practice, the dual criminality requirement is applied with a large measure of flexibility and determined based on the underlying conduct.

Exceptions to the dual criminality requirement are not foreseen.

In the draft law, dual criminality is still required but the mentioned flexibility is explicitly regulated:

Section 3: Offences that result in extradition

1. Extradition may only be granted if:

- a. the offences for which the extradition is requested are punished by Malagasy law and the laws of the requiring party with a minimum prison penalty or another security measure of two years.

- b. the minimum length of the prison penalty or other security measure that remains to be served is six months.

2. For the purposes of extradition, if the acts that give rise to the request are qualified differently under Malagasy law and under the laws of the requiring party, it will not be taken into consideration provided that they constitute an offence under Malagasy law.

**(b) Observations on the implementation of the article**

Madagascar could grant extradition in the absence of dual criminality.

**Paragraph 3**

*3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar has a minimum penalty requirement of two years (resp. 6 months for extradition after

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<sup>1</sup> The Extradition Law literally refers to France; however, the law was made applicable to Madagascar by decision from 23 June 1927 and therefore the whole text is to be read applying to Madagascar instead of France.

conviction) (art. 4 para. 1 Extradition Law).

If a person is sought for various offences, they are extraditable if the sum of their maximum penalties reaches two years (art. 4 para. 4 Extradition Law).

#### Art. 4

If the request is for several offences committed by the individual being requested and which have not yet been judged, the extradition is granted only if the maximum sentence incurred, under the law of the requesting State, for the entirety of these offences, is equal to or greater than two years of imprisonment.

Extradition for accessory offences in other cases, as described in article 44 para. 3 of the Convention, is not explicitly foreseen, but the cited provision has the same effect.

The draft law contains the same minimum penalty requirement in its art. 3 para. 1, but does not contain any provisions with regard to extradition for accessory offences.

#### **(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

#### **Paragraph 4**

*4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

In the Treaty with France, a minimum penalty requirement of one year is foreseen:

##### Article 3

The following are subject to extradition:

1. Any person prosecuted for crimes or offences punished by the laws of the two States with a minimum penalty of one year of prison;
2. Any person who is sentenced by the courts of the requiring State, after trial or in absence, to a minimum prison term of two months for crimes or offences punished by the law of the required State.

A similar provision is contained in article 3 of the Treaty with the Comoros, and in the General Convention on Cooperation in Justice Matters between 12 States (art. 43). A one-year minimum penalty requirement includes some but not all Convention offences (see table under article 30 para. 1).

In the Malagasy legislation, extraditable offences are defined by a minimum penalty requirement of 2 years:

Art. 4 – The acts that are extraditable, whether for requesting or granting, are the following:

1° all acts punishable with criminal sentences by the law of the requesting State;

2° the acts punishable with correctional sentences by the law of the requesting State, when the maximum sentence incurred, as per this law, is two years or more or, in the case of a convict, when the sentence imposed by the jurisdiction of the requesting State is equal or greater than two months of imprisonment.

Still under the minimum penalty requirement of 2 years, not all Convention offences are covered (see table

under art. 30 para. 1: Art. 179.1 CC has a sanction of 3 months to 1 year, art. 34.2 MLA Act does not have prison sanctions at all).

The Malagasy authorities indicated that using the Convention as a legal basis, all Convention offences could be considered extraditable, although there are no examples of this yet in practice.

Madagascar has not ratified any extradition treaty after the ratification of the Convention, so it cannot be assessed whether it has included all Convention offences as extraditable offences in these treaties.

With regard to extradition for political offences, the Treaty with France indicates:

#### Article 4

The extradition may be refused if the offence for which the person is sought is considered by the required State as a political offence, or conduct connected with such an offence.

A similar clause is contained in art. 4 of the Treaty with the Comoros and art. 44 of the General Convention on Cooperation in Justice Matters.

Article 5 num. 2 Extradition Law foresees the following:

Art. 5 – The extradition shall not be granted:

1° when the individual subject to the request is a French citizen or protected by the French government, with the quality of citizen or protected individual being assessed at the time of the offence for which the extradition is requested;

2° when the crime or offence is of a political nature or when, due to the circumstances, it appears that the extradition is being requested for political reasons.

With regard to acts committed in the course of an insurrection or a civil war, by either of the parties engaged in the fighting and in the interest of their cause, these shall not give place to an extradition unless they constitute abhorrent acts of barbarity and vandalism prohibited by the laws of war, and only once the civil war has come to an end;

There is no definition of a political offence in Malagasy legislation, and no jurisprudence to this effect. Malagasy authorities confirmed that corruption is not considered a political offence, according to general principles. On money-laundering, there is a specific regulation in the Law No. 2004-020:

#### Article 54 - Political nature of offences

For the purposes of the present law, the offences referred to in articles 30, 31 and 34.1 shall not be regarded as offences of a political nature.

In the draft extradition law, the following provision refers to political offences:

#### Section 4: Political offences

1. The extradition may be refused if the offence for which it is requested is considered by the Republic of Madagascar as a political offence, or conduct connected with such an offence.

2. Paragraph 1 shall not apply if a Treaty to which the Republic of Madagascar is a party prevents it from considering the offence for which extradition is requested as a political offence, or conduct connected with such an offence.

### **(b) Observations on the implementation of the article**

It is recommended that Madagascar recognize all Convention offences as extraditable.

Further, it is recommended to clarify the law to the effect that corruption offences are not considered political offences.

### **Paragraph 5**

*5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar does not make extradition conditional on the existence of a treaty, but can extradite on the basis of reciprocity or international courtesy. There is a case example of a Chinese citizen who was extradited to China on the basis of reciprocity and in application of the Extradition Law.

Madagascar considers the Convention as a legal basis for extradition in respect of the Convention offences.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**Paragraph 6**

*6. A State Party that makes extradition conditional on the existence of a treaty shall:*

*(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and*

*(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar does not make extradition conditional on the existence of a treaty (see above para. 5). It has not informed the Secretary-General of the United Nations of the fact that it takes the Convention as the legal basis for cooperation on extradition with other States parties to the Convention.

**(b) Observations on the implementation of the article**

Although paragraph 6 strictly only applies to those States parties that make extradition conditional on the existence of a treaty, it is recommended that Madagascar inform the Secretary-General that it considers the Convention a legal basis for extradition.

**Paragraph 7**

*7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Malagasy treaties and legislation consider some, but not all of the Convention offences as extraditable offences (see above para. 4).

**(b) Observations on the implementation of the article**

It is recommended that Madagascar recognize all Convention offences as extraditable.

**Paragraph 8**

*8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.*

**(a) Summary of information relevant to reviewing the implementation of the article**

As mentioned before, Malagasy treaties and legislation have minimum penalties of one or two years. Further conditions refer to the nationality, the form of the request etc. (see above).

**(b) Observations on the implementation of the article**

Madagascar complies with the provision under review.

**Paragraph 9**

*9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The treaty with France foresees that the extradition request does not have to be transmitted through the diplomatic channel, but is received directly between the Ministries of Justice:

Article 8

The extradition request shall be addressed directly to the Ministry of Justice of the required State by the Ministry of Justice of the requiring State.

A similar regulation is contained in article 49 of the General Convention on Cooperation in Justice Matters and in article 7 of the treaty with Comoros.

Malagasy legislation foresees specific time lines in order to extradite the procedure:

After 20 days of arrest, the sought person has to be released.

Art. 20 – The individual provisionally arrested under the conditions provided for by article 12 may, if there is no need to apply the provisions contained in articles 7, 8 and 9 of the law of December 3, 1849, be released if, within a period of twenty days from the date of their arrest, provided such arrest was carried out at the request of the government of an adjoining country, the French government has not received any of the documents mentioned in article 9.

The aforementioned period of twenty days shall be extended to a month if the territory of the requesting State is not adjoining and to three months if this territory is outside of Europe.

The release shall be delivered upon request addressed to the criminal division, which shall rule without recourse, within the week. If, subsequently, the abovementioned documents are submitted to the French government, the procedure shall be resumed, according to article 10 and subsequent articles.

Further, after the notification of the decree authorizing the extradition, the sought person has to be transferred within one month:

Art. 18 – Otherwise, the minister of justice shall propose, as the case may be, upon signature of the President of the Republic, a decree authorizing the extradition. If, within a period of one month from the notification of this act, the extradited individual has not been received by the agents of the requesting State, they shall be released, and cannot be requested for the same reason.

Malagasy authorities indicated that the complete procedure normally takes not more than two months.

With regard to abbreviated procedures in case the sought person agrees to the extradition, the Treaty with France foresees that in this case, no court decision is necessary:

#### Article 13

If, during his appearance, the person waives the benefit of the provisions of this annex and formally consents to be surrendered to the authorities of the requiring State, a record of the statement is prepared by the court.

The magistrate of the competent prosecution shall take any measures that may assist to guarantee that the surrender of the person to the authorities of the requiring State takes place as soon as possible.

#### Article 14

Otherwise, the court shall give its reasoned opinion on the extradition request. This opinion shall be negative if the court considers that the legal conditions have not been met, or if there is any evident mistake.

The file must be submitted to the Ministry of Justice within eight hours of the expiration of the period established in article 12.

Similarly, an abbreviated procedure in case the sought person agrees to the extradition is foreseen in the Extradition Law:

Art. 15 – If, during their appearance, the concerned individual renounces their benefits as conferred by the law hereby and formally consents to being handed over to the authorities of the requesting party, a document acknowledging such statement shall be submitted by the court.

A copy of this decision shall be delivered without delay by the attorney general to the minister of justice, for all practical uses.

Art. 16 – On the contrary, the criminal division, through a ruling without recourse, shall give its justified opinion on the request for extradition. ...

Article 61 of Law No. 2004-20 also foresees a similar regulation:

#### Article 61 - Simplified extradition procedure

With regard to the offences provided for under the present law, Madagascar may grant extradition after receipt of a request for provisional arrest, provided that the person whose extradition is requested explicitly consents thereto.

A relevant regulation is also foreseen in art. 24 of the draft law.

The court only assesses the legal requirements for extradition, not the evidence on the commission of the offence.

#### **(b) Observations on the implementation of the article**

Madagascar complies with the provision under review.

#### **Paragraph 10**

*10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The Treaty with France regulates provisional detention in its articles 9 to 11:

Article 9

In cases of urgency, and upon request of the competent authorities of the requiring State, the provisional arrest shall proceed, pending the arrival of the extradition request and the documents mentioned in paragraph 2 and 3 of article 8.

The request for provisional arrest is transmitted to the competent authorities of the required State directly by post or telegraph, or by any other method that provides a written record of the request.

It shall mention the existence of one of the documents listed in paragraph 2 of article 8 and of the intent of the requiring authority to submit an extradition request. It shall specify the offence for which the extradition is requested, the date and place of commission, as well as the description of the person sought; The requiring authority shall be promptly informed of the response to its request.

Article 10

Provisional arrest may be terminated if, within twenty days after the arrest, the required authority has not received one of the documents listed in paragraph 2 of article 8.

Release from custody of the person shall not prevent the extradition provided for in this annex if the request for extradition is subsequently received.

However, the provisions of the preceding articles shall not exclude a provisional release from custody by the courts of the required State: but they shall take any measures it may consider necessary in order to prevent the person's escape.

Article 11

Within twenty-four hours of the reception of the documents submitted in support of the extradition request, the competent Public Prosecutor notifies the person the charge on which the arrest is based.

Provisional detention is also regulated in articles 19 and 20 of the Extradition Law:

Art. 19 – In an emergency and at the direct request of the judicial authorities of the requesting State, the public prosecutors may, through a simple notice delivered either by post or by any other faster means of transmission which leaves a written trail or a materially equivalent trail of the existence of one of the documents indicated by article 9, order the provisional arrest of the foreigner.

A regular notice of the request must be delivered, at the same time, through diplomatic channels, by post, telegraph or any other mode of transmission which leaves a written trail, to the minister of foreign affairs.

The public prosecutors must give notice of this arrest to the minister of justice and the attorney general.

Art. 20 – The individual provisionally arrested under the conditions provided for by article 12 may, if there is no need to apply the provisions contained in articles 7, 8 and 9 of the law of December 3, 1849, be released if, within a period of twenty days from the date of their arrest, provided such arrest was carried out at the request of the government of an adjoining country, the French government has not received any of the documents mentioned in article 9.

The aforementioned period of twenty days shall be extended to a month if the territory of the requesting State is not adjoining and to three months if this territory is outside of Europe.

The release shall be delivered upon request addressed to the criminal division, which shall rule without recourse, within the week. If, subsequently, the abovementioned documents are submitted to

the French government, the procedure shall be resumed, according to article 10 and subsequent articles.

In the draft law, provisional detention is foreseen as follows:

#### Section 21: Provisional Detention

The territorially competent Attorney General, following a request by the requiring State, may order the provisional detention of the person sought pending the reception of the formal extradition request, if there is certainty that the criteria of the extradition treaty have been met, or, in the absence of a treaty, if the criteria of Malagasy law have been met and if serious reason exists to believe that:

- a) The person sought is in the territory of the Republic of Madagascar or in route toward Madagascar or that the person visits Madagascar regularly;
- b) The request for provisional detention is related to an extraditable offence under section 3 of this law;
- c) The foreign State will submit an extradition request for that person within 20 days.

Any request for the provisional detention and any document communicated in support of the request must be accompanied by their translation (into an official language of the Republic of Madagascar) (in Malagasy or French).

#### **(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

#### **Paragraph 11**

*11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Under the Treaty with France, Madagascar and France do not extradite their nationals. The obligation to extradite or prosecute is regulated in art. 2, para. 2.

##### Article 2

The two States will not extradite their own nationals. The nationality of the person will be considered at the moment of the commission of the offense for which the extradition is requested.

If the person sought is a national of the required State, this State, at the request of the requiring State, shall submit the case to its competent authorities, so that the judicial proceedings are started, if applicable, against that person. The requiring State will be kept informed of the response to the request.

This is also regulated in article 2 of the treaty with Comoros.

Also based on article 5 (1) of the Extradition Law, Madagascar cannot extradite its nationals, while according to article 51 (h) of Law No. 2004-020, nationality is an optional ground for refusal:

Extradition Law

Art. 5 – The extradition shall not be granted:

1° when the individual subject to the request is a French citizen or protected by the French government, with the quality of citizen or protected individual being assessed at the time of the offence for which the extradition is requested;

Law No. 2004-020

Art. 51. Optional grounds for refusal:

Extradition can be refused:

h) when the sought person is a Malagasy citizen.

The obligation to “extradite or prosecute” is not explicitly regulated but can be applied on the basis of the Convention.

In the draft law, the nationality of the sought person is an optional ground for refusal, which is not applicable to offences with criminal sanctions under the condition of reciprocity:

Art. 12: Non-extradition of nationals

Extradition can be refused when the sought person is a Malagasy citizen, except for offences with criminal sanctions and under the condition of reciprocity.

The obligation to extradite or prosecute is regulated under the following terms in the draft law:

Section 16: Aut Dedere Aut Judicare

1. If an act or an omission was committed outside the territory of the Republic of Madagascar, the Minister of Justice shall engage the territorially competent Attorney General without undue delay to prosecute the person who committed this act or omission if:

a) The person is in the territory of the Republic of Madagascar; and

b) the extradition of this person has been refused for one of the reasons contemplated in sections 4, 6, 7, 8, 12, 13 or 14 of this law; and

c) The requiring State requested the Republic of Madagascar to prosecute the person for the offence for which extradition was requested; and

d) The acts criminalized in the requiring State giving rise to the extradition request constitute an offence under Malagasy criminal law.

2. If the Republic of Madagascar is a party to a treaty that binds it to submit the case to the judicial authority for prosecution, the case must be submitted to the Attorney General of Antananarivo without undue delay and without exception, even if any of the conditions contemplated in paragraph 1 has not been met. He shall decide to prosecute or not in the same conditions as he would for any other serious offence under Malagasy law.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar regulate explicitly, in its future reforms, the principle “extradite or prosecute”.

**Paragraph 12**

*12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Malagasy law does not contain such conditions.

**(b) Observations on the implementation of the article**

There are no observations.

**Paragraph 13 of article 44**

*13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Some of the treaties to which Madagascar is a party regulate the possibility of enforcing foreign sentences, for example, art. 60 of the General Convention on Cooperation in Justice Matters:

Enforcement of Sentences

Article 60:

The High Contracting Parties undertake to enforce in their prisons, at the request of the judicial authorities of the requesting State, the sanctions that imply deprivation of liberty, whatever the duration, issued by the courts of the requesting State against any individual, whatever his nationality, who is found in the territory of the requested State.

Subject to the foregoing principles, the execution of these sentences is subject to the rules and requirements of form and substance provided on extradition with articles 43 and 49.

These provisions can be used in the case referred to in paragraph 13, although no practical examples were available.

The legislation does not refer to the enforcement of sentences.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar regulate in its future reforms the enforcement of foreign sentences.

**Paragraph 14 of article 44**

*14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The extradition procedure in its first stage is of judicial character, so that all guarantees for fair treatment provided by the domestic law of Madagascar for judicial procedures are applicable.

It is explicitly regulated that the sought person has right to a lawyer and interpreter in the hearing before

court:

Art. 14 – The criminal division shall receive on the spot the aforementioned minutes and any other documents. The foreigner shall appear before it within a maximum period of eight days from the notification of the evidence. At the request of the prosecutor or of the appearing individual, an additional period of eight days can be agreed to before the proceedings. An interrogation shall be immediately carried out, the minutes of which are recorded. The hearing shall be public, unless it is decided otherwise at the request of the prosecutor or of the appearing individual.

The prosecutor and the concerned party shall be heard. This latter may be assisted by a registered attorney and an interpreter. They may be provisionally released at any point during the procedure, and according to the rules that govern the matter.

However, extradition decisions are not subject to appeal:

Art. 16 – On the contrary, the criminal division, through a ruling without recourse, shall give its justified opinion on the request for extradition.

The draft law contains a provision on appeals:

#### Section 25: Appeal

The Public Prosecutor or the person sought may appeal the decision of the Court within three days after the decision.

The hearing before the indictments chamber shall take place within ten days starting on the declaration of the appeal.

If the Indictments Chamber definitively concludes that the person sought is extraditable, it shall transmit the file of the case and the decision to the Minister of Justice.

If the Indictments Chamber definitively concludes that the person sought is not extraditable, it shall order the release of the person, except if section 16 (Aut Dedere Aut Judicare) of this law applies.

The decision of the Indictments Chamber is not subject to appeal.

#### **(b) Observations on the implementation of the article**

It is recommended that Madagascar allow for comprehensive judicial review of decisions on extradition.

#### **Paragraph 15**

*15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The Extradition Law does not contain a specific anti-discrimination clause.

A concern of discrimination is a mandatory ground for refusal pursuant to article 50 (b) of Law No. 2004-020, which covers all reasons for discrimination mentioned in the Convention, but only applies to money-laundering offences.

Article 50 - Mandatory grounds for refusal

Extradition shall not be granted:

(b) If there are substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that that person's position may be

prejudiced for any of those reasons;

The draft law contains an anti-discrimination clause in its Section 5:

**Section 5: Anti-discrimination Clause**

Extradition may not be granted if serious reason exists to believe that the extradition request was submitted to prosecute or to punish a person due to their race, their religion, nationality, or their ethnic origin, their political opinions, their sex or their status, or that complying with the request may affect the situation of the person for any of these reasons.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar generally regulate concerns about discrimination among the reasons for refusal.

**Paragraph 16**

*16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.*

**(a) Summary of information relevant to reviewing the implementation of the article**

In the Treaty with France, article 4 foresees:

**Article 5**

On fiscal, customs, and currency exchange matters, extradition is granted under the conditions established in this annex, by a simple exchange of letters, to the extent it is agreed for each offence of offence category that is specially designated.

There is no specific legislation on extradition for fiscal offences. However, Malagasy authorities indicated that extradition is not refused on the sole ground that the offence is also considered to involve fiscal matters, based on a general principle.

The draft law contains a specific provision in its Section 3, paragraph 3:

**Section 3: Offences that result in extradition**

3. Offences related to taxes, customs and exchange fees, in the laws of the requiring State will be extraditable offences if they are considered offences of the same nature under Malagasy law.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision based on a general principle, although there is no legislation to this effect.

**Paragraph 17**

*17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.*

**(a) Summary of information relevant to reviewing the implementation of the article**

In the Treaty with France, there is a procedure to request additional information:

## Article 16

If complementary information is required to verify that the conditions provided for in this annex are fulfilled, the authorities of the required State, considering the omission may be remedied, inform the fact to the authorities of the requiring State before refusing the request. A deadline may be established by the authorities of the required State to obtain the information.

Neither in the treaties nor in Malagasy legislation there is a legal obligation to consult with the requesting State party to provide it with an opportunity to present its opinions and to provide information relevant to its allegation before refusing a request. In the court hearing according to articles 14 and 15 of the Extradition Law, the representation of the requesting State is not foreseen. No information is available on recent court or other cases and illustrations of relevant exchanges between Madagascar and other States.

The draft law foresees the possibility for a non-obligatory representation of the requesting State in its Section 24 para. 2:

### Section 24: Extradition Hearing

2. The court may authorize the requiring State to intervene at the hearing through a person appointed by the State for that purpose. While the requiring State is authorized to intervene, it shall not become a party to the procedure .

## **(b) Observations on the implementation of the article**

It is recommended that Madagascar consult with the requesting State before refusal of extradition.

## **Paragraph 18**

*18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.*

## **(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar is a party in the following treaties:

### Bilateral:

- Judicial Convention between the State of the Comoros and the Republic of Madagascar from 12 November 1976.
- French-Malagasy Agreement on Cooperation of 4 June 1973, in matters of mutual legal assistance, recognition and execution of judicial decisions and simplified extradition.

### Regional:

- African Union Convention against Corruption (ratification 2004)
- General Convention on Cooperation in Justice Matters (Cameroon, Central African Republic, Congo, Cote D'Ivoire, Dahomey, Haute-Volta, Madagascar, Mauritania, Niger, Senegal, Chad) (1961).
- Agreement on extradition and mutual legal assistance in the Francophone Countries of Africa (Rabat Convention) (signed 2009, in course of ratification)

### Multilateral:

- 16 universal instruments against terrorism (Madagascar has ratified 13, the remaining three being in the process of ratification)
- Three United Nations Conventions on drugs, psychotropic substance and the illicit trafficking of drugs and psychotropic substances (ratification and accession 1974)
- The United Nations Convention against Transnational Organized Crime and its three Additional

**(b) Observations on the implementation of the article**

It is recommended that Madagascar ratify the SADC Protocol and assess whether new bilateral treaties would further international cooperation (see above paragraph 1).

**(d) Challenges, where applicable**

Madagascar has identified the following challenges for the implementation of this article:

- Inter-agency co-ordination,
- Inadequacy of existing normative measures (constitution, laws, regulations, etc. ),
- Limited capacity, and
- Limited resources for implementation.

**(e) Technical assistance needs**

Madagascar indicated the following technical assistance needs:

In the short term, assistance was requested for the finalization of the draft international cooperation law.

In the medium term, specific technical assistance was needed, including for:

- Strengthening institutions for implementing the new legislation.
- Developing international cooperation guidelines.
- Training law enforcement and judicial officials.
- Disseminating good practices in international cooperation.

Madagascar has not received any of the previously mentioned forms of technical assistance.

**Article 45. Transfer of sentenced persons**

*States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar has concluded three treaties on the transfer of sentenced persons:

- Judicial Convention between the State of the Comoros and the Republic of Madagascar from 12 November 1976.
- French-Malagasy Agreement on Cooperation of 4 June 1973, in matters of mutual legal assistance, recognition and execution of judicial decisions and simplified extradition.
- Convention with Mauritius on the transfer of sentenced persons (2008).

Malagasy authorities provided statistics about the transfer of sentenced persons under the latter agreement with Mauritius, according to which in 2013, three persons were transferred to Madagascar from Mauritius, and since then, ten new cases were in process.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**(c) Challenges, where applicable**

Madagascar has identified the following challenges:

- Inter-agency co-ordination,
- Limited capacity,
- Limited resources for implementation.

**Article 46. Mutual legal assistance**

**Paragraph 1**

*1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Mutual legal assistance is regulated in the same treaties as extradition (two bilateral, three regional and a number of multilateral treaties). Further, art. 253, paragraph 3 of the Criminal Procedure Code contains a provision on active mutual legal assistance:

Art. 253. – Within his jurisdiction, the instruction judge can request any judge of his court, any officer of the prosecutor's office and any police officer in his jurisdiction to make inquiries that he considers necessary, by sending them a letter rogatory to this effect.

Any other instruction judge or section president of a tribunal can request the same outside of his jurisdiction.

He also can send international letters rogatory to foreign judicial authorities, in accordance with international Conventions.

Law No. 2004-20 foresees the following for money-laundering offences:

Chapter I. Requests for mutual legal assistance

Article 41 - Purpose of requests for mutual assistance

Upon application by a foreign State, requests for mutual assistance in connection with offences provided for in articles 30, 31 and 34 of the present law shall be executed in accordance with the principles set out in this title. Mutual assistance may include in particular:

- Taking evidence or statements from persons;
- Assisting in making detained persons or others available to the judicial authorities of the requesting State in order to give evidence or assist in investigations;
- Effecting service of judicial documents;
- Carrying out searches and seizures;
- Examining objects and sites;
- Providing information and evidentiary items;
- Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.

#### Article 43 - Refusal to execute requests

A request for mutual assistance may be refused only:

- (a) If it was not made by a competent authority according to the legislation of the requesting country or if it was not transmitted in the proper manner;
- (b) If its execution is likely to prejudice the law and order, sovereignty, security or fundamental principles of the law of Madagascar;
- (c) If the offence to which it relates is the subject of criminal proceedings or has already been the subject of a final judgment in the territory of Madagascar;
- (d) If the offence referred to in the request is not provided for under the legislation of Madagascar or does not have features in common with an offence provided for under the legislation of Madagascar;
- (e) If the measures requested, or any other measures having similar effects, are not permitted by the legislation of Madagascar or if, under the legislation of Madagascar, they are not applicable to the offence referred to in the request;
- (f) If the measures requested cannot be ordered or executed by reason of the time-barring of the laundering offence under the legislation of Madagascar or the law of the requesting State;
- (g) If the decision whose execution is being requested is not enforceable under the legislation of Madagascar;
- (h) If the decision rendered abroad was delivered under conditions that did not afford sufficient guarantees as to the rights of the defence;
- (i) If there are substantial grounds for believing that the measure or order being sought is directed at the person in question solely on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status;
- (j) If the request relates to an offence of a political nature or is motivated by political considerations;
- (k) If the case is not sufficiently important to justify the measures requested or the enforcement of the decision rendered abroad.

Bank secrecy may not be invoked as a ground for refusal to comply with the request.

The public prosecutor's office may appeal against a court's decision to refuse compliance within 03 days following such decision.

The Government of Madagascar shall promptly inform the foreign Government of the grounds for refusal to comply with its request.

#### Article 44 - Requests for investigatory measures

Investigatory measures shall be undertaken in conformity with the legislation of Madagascar unless the competent foreign authorities have requested that a specific procedure compatible with the legislation of Madagascar be followed.

A judicial officer or public official appointed by the competent foreign authority may attend the execution of the measures, depending on whether they are carried out by a judicial officer or by a public official.

#### Article 45 - Requests for provisional measures

The court to which a request from a competent foreign authority for the taking of provisional measures is referred shall order such requested measures in accordance with its own legislation. It may also take a measure whose effects correspond most closely to the measures sought. If the request is worded in general terms, the court shall order the most appropriate measures provided for under the legislation.

Should it refuse to comply with measures not provided for under its legislation, the court to which a request for the execution of provisional measures ordered abroad is referred may replace them by measures which are provided for under that legislation and whose effects correspond most closely to the measures whose execution is being sought.

The provisions relating to the lifting of provisional measures as laid down in the second paragraph of article 29 of the present law shall be applicable.

#### Article 46 - Requests for confiscation

In the case of a request for mutual legal assistance with a view to the making of a confiscation order, the court shall rule after referring the matter to the prosecuting authority. The confiscation order shall apply to property representing the proceeds or instrumentality of an offence and located in the territory Madagascar or shall consist in a requirement to pay a sum of money corresponding to the value of that property.

The court to which a request for the enforcement of a confiscation order issued abroad is referred shall be bound by the findings as to the facts on which the order is based, and it may refuse to grant the request solely on one of the grounds stated in article 43.

#### Article 47 - Disposal of confiscated property

The State of Madagascar shall have power of disposal of property confiscated on its territory at the request of foreign authorities, unless otherwise decided under an agreement concluded with the requesting Government.

#### Article 55 - Transmission of requests

Requests sent by competent foreign authorities with a view to establishing laundering offences or to enforcing or ordering provisional measures or confiscations or for purposes of extradition shall be transmitted through diplomatic channels. In urgent cases, such requests may be sent through the International Criminal Police Organization (ICPO/Interpol) or directly by the foreign authorities to the judicial authorities of Madagascar, either by post or by any other, more rapid means of transmission leaving a written or materially equivalent record. In such cases, no action shall be taken on the request unless notice is given through diplomatic channels.

Requests and their annexes shall be accompanied by a translation in a language acceptable to Madagascar.

#### Article 57 - Handling of requests

The minister of justice of Madagascar, after verifying that the request has been made in the proper manner, shall forward it to the public prosecutor's office at the place where the investigations are to be conducted or where the proceeds or property in question are situated or where the person whose extradition is being requested is located.

The public prosecutor's office shall refer the matter to the officials competent to deal with requests for investigation or to the court competent to deal with requests relating to provisional measures, confiscations or extradition.

A judicial officer or a public official appointed by the competent foreign authority may attend the execution of the measures, depending on whether they are carried out by a judicial officer or by a public official.

The Ministry of Justice has been designated as the central authority. Article 2.1.1 of the Decree 2008-438 foresees the role of the Ministry of Justice (Directorate for Administration of the Judiciary) in mutual legal assistance as follows:

##### 2.1.1. Directorate for Administration of the Judiciary

The Directorate for Administration of the Judiciary is responsible for:

... execute international mutual legal assistance in criminal, civil, commercial and social matters.

Within the Directorate, the Service for Specialized Criminal Justice is responsible for receiving and transmitting requests.

Madagascar requires dual criminality as a matter of practice, and according to article 43(d) of Law No. 2004-020. In principle, however, mutual legal assistance could be afforded in the absence of dual criminality on the basis of the Convention. There are no examples on this yet.

Madagascar does not need a treaty base for mutual legal assistance, but provides assistance on the basis of reciprocity or international courtesy. It has received assistance on the basis of reciprocity in cases with China, Seychelles, Mauritius and others. Madagascar can also use the Convention as a legal basis and apply it directly to mutual legal assistance cases.

The process for active mutual legal assistance is (in basic terms) regulated in article 253 paragraph 3 of the Criminal Procedure Code. The instruction judge develops the request and sends it through diplomatic channels to the requested countries. If foreseen in a treaty, the communication can go directly through central authorities, and in urgent cases, also directly to the competent judicial authorities.

Passive mutual legal assistance is not regulated in Malagasy legislation. In practice, the request is received through diplomatic channels and transferred to the central authority (or directly received by the central authority, if so foreseen in the applicable treaty), which submits it to the competent judicial authority for its execution. A circular of the Minister of Justice (Circular N° 005 – MJ/DAJ/Circ) from 26 August 2013 obliges all responsible officials of the judicial system to prioritize foreign mutual legal assistance requests and expedite their execution.

Madagascar is regularly exchanging information and relevant considerations with foreign authorities before submitting or receiving a formal mutual legal assistance request. This was exemplified by a big transnational organized crime case on illegal trafficking of rose wood, in which pre-mutual legal assistance consultations were held with various jurisdictions in Africa and Asia, and case coordination meetings were organized. As a result of this informal coordination, successful mutual legal assistance requests were sent and provisional measures were taken. The legal basis for mutual legal assistance in this case was UNTOC and CITES.

Madagascar provided the following statistics on active and passive mutual legal assistance (the following statistics refer to all offences, not only to corruption):

ANNEE	NOMBRE	PAYS REQUERANT	PAYS REQUIS
2011	19	France : 15 M/car : 03 Australie : 01	Madagascar France Madagascar
2012	22	France : 13  M/car : 09	Madagascar  France : 08 Canada : 01
2013	14	France : 11 M/car : 01 CPI: 01 Mayotte : 01	Madagascar France Madagascar Madagascar
2014	18	France : 16 Comores : 01 Rwanda : 01	Madagascar Madagascar Madagascar

ANNEE	NOMBRE	PAYS REQUERANT	PAYS REQUIS
2001	01	France	Madagascar
2002	01	Madagascar	Comores
2003	01	France	Madagascar
2004	01	France	Madagascar
2005	01	Russie	Madagascar
2006	04	France	Madagascar
2007	05	France	Madagascar
2008	12	France : 08 M/car : 03 M/car : 01	Madagascar France Chine (Hong Kong)
2009	18	France : 05 M/car : 12 Allemagne : 01	Madagascar France Madagascar
2010	17	France : 15 M/car : 02	Madagascar France

Madagascar has not yet had active nor passive cases on the basis of the Convention. There were also rare cases on mutual legal assistance for corruption cases in general, although the mentioned transnational organized crime case on illegal trafficking of rose wood, which required various mutual legal assistance requests, had an important corruption component.

At the time of the country visit, Malagasy authorities were working on a draft law on international cooperation that would also comprise provisions on mutual legal assistance. The mutual legal assistance component is, different to the extradition component, not presented in this report as it had not yet been shared with the reviewing experts at the time of the review.

Further, as mentioned above, at the time of the country visit efforts were being made to develop a handbook and website on mutual legal assistance and extradition, and Madagascar is encouraged to conclude actions on these efforts.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar continue its efforts to adopt comprehensive legislation and mutual legal assistance and ensure that such new legislation contains all elements regulated in the Convention.

Further, it is recommended that Madagascar ratify the SADC Protocol and assess whether new bilateral treaties would further international cooperation.

**(c) Successes and good practices**

Madagascar is making efforts to adopt comprehensive legislation on mutual legal assistance.

Madagascar has an established practice to informally consult on mutual legal assistance requests before their formal submission.

Coordination meetings before the preparation of formal mutual legal assistance requests are held in cases involving multiple jurisdictions.

**Paragraph 2 of article 46**

2. *Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar can provide assistance for all purposes foreseen in the Convention, also with regard to procedures against legal persons, to the extent that the required act is not contrary to domestic law. This includes procedures in relation to the offences for which a legal person may be held liable.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**Paragraph 3**

3. *Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:*

*(a) Taking evidence or statements from persons; (b) Effecting service of judicial documents;*

*(c) Executing searches and seizures, and freezing;*

*(d) Examining objects and sites;*

*(e) Providing information, evidentiary items and expert evaluations;*

*(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*

*(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*

*(h) Facilitating the voluntary appearance of persons in the requesting State Party;*

*(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*

*(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*

*(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Law No. 2004-20 foresees the following for money-laundering offences:

Chapter I. Requests for mutual legal assistance

Article 41 - Purpose of requests for mutual assistance

Upon application by a foreign State, requests for mutual assistance in connection with offences provided for in articles 30, 31 and 34 of the present law shall be executed in accordance with the principles set out in this title. Mutual assistance may include in particular:

- Taking evidence or statements from persons;

- Assisting in making detained persons or others available to the judicial authorities of the requesting State in order to give evidence or assist in investigations;

- Effecting service of judicial documents;
- Carrying out searches and seizures;
- Examining objects and sites;
- Providing information and evidentiary items;
- Providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.

This list of measures is not limiting, since the text reads that “mutual legal assistance may include in particular” the measures listed in the following.

In the following articles of the same law, specific measures are regulated in detail:

#### Article 44 - Requests for investigatory measures

Investigatory measures shall be undertaken in conformity with the legislation of Madagascar unless the competent foreign authorities have requested that a specific procedure compatible with the legislation of Madagascar be followed.

A judicial officer or public official appointed by the competent foreign authority may attend the execution of the measures, depending on whether they are carried out by a judicial officer or by a public official.

#### Article 45 - Requests for provisional measures

The court to which a request from a competent foreign authority for the taking of provisional measures is referred shall order such requested measures in accordance with its own legislation. It may also take a measure whose effects correspond most closely to the measures sought. If the request is worded in general terms, the court shall order the most appropriate measures provided for under the legislation.

Should it refuse to comply with measures not provided for under its legislation, the court to which a request for the execution of provisional measures ordered abroad is referred may replace them by measures which are provided for under that legislation and whose effects correspond most closely to the measures whose execution is being sought.

The provisions relating to the lifting of provisional measures as laid down in the second paragraph of article 29 of the present law shall be applicable.

#### Article 46 - Requests for confiscation

In the case of a request for mutual legal assistance with a view to the making of a confiscation order, the court shall rule after referring the matter to the prosecuting authority. The confiscation order shall apply to property representing the proceeds or instrumentality of an offence and located in the territory Madagascar or shall consist in a requirement to pay a sum of money corresponding to the value of that property.

The court to which a request for the enforcement of a confiscation order issued abroad is referred shall be bound by the findings as to the facts on which the order is based, and it may refuse to grant the request solely on one of the grounds stated in article 43.

#### Article 47 - Disposal of confiscated property

The State of Madagascar shall have power of disposal of property confiscated on its territory at the request of foreign authorities, unless otherwise decided under an agreement concluded with the requesting Government.

Malagasy authorities confirmed that Madagascar can provide mutual legal assistance for all measures that are not contrary to domestic law.

It is highlighted as a positive example that the quoted law (art. 44 of Law No. 2004-20 ) explicitly permits officials of foreign competent authorities to be present during the execution of the request or measure.

### **(b) Observations on the implementation of the article**

Madagascar is in compliance with the provision under review.

#### **Paragraphs 4 and 5**

*4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party to this Convention.*

*5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restriction on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar has received information without prior request. This has happened specifically in police-to-police cooperation, customs cooperation and FIU-to-FIU cooperation. Another example is the receipt of information from Mauritius on the basis of the cooperation agreement between Bianco and the Independent Anti-Corruption Commission of Mauritius (ICAC) from August 2005. After verifying the information received, Madagascar has used such information for the preparation for an MLA request. Madagascar can keep the received information confidential according to general principles of law.

Madagascar has not yet spontaneously transmitted information. There are no laws or other rules that would impede the spontaneous transmission of information to other States parties, however, there is no established practice in that respect.

#### **(b) Observations on the implementation of the article**

Madagascar could transmit information to other States parties without prior request.

#### **Paragraph 8**

*8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.*

#### **(a) Summary of information relevant to reviewing the implementation of the article**

The treaties to which Madagascar is a party provide for reasons for refusal (see below paragraph 20) that do not include bank secrecy regulations.

Article 43 of Law 2004-20 foresees specifically that bank secrecy cannot be invoked to refuse mutual legal assistance requests.

Article 43 - Refusal to execute requests

...

Bank secrecy may not be invoked as a ground for refusal to comply with the request.

Further, the bank secrecy can be lifted by BIANCO according to article 24 of Law no. 2004-30 and by the judicial authorities according to article 27 of Law No. 2004-20 (see above article 40).

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**Subparagraph 9**

*9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;*

*(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;*

*(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Generally, Madagascar requires dual criminality for the provision of mutual legal assistance.

The treaties in which Madagascar is a party do not foresee regulations in this respect.

Article 43 of Law 2004-20 foresees the dual criminality principle explicitly for money-laundering cases:

Article 43 - Refusal to execute requests

A request for mutual assistance may be refused only:

(d) If the offence referred to in the request is not provided for under the legislation of Madagascar or does not have features in common with an offence provided for under the legislation of Madagascar;

However, given the direct applicability of the Convention, mutual legal assistance in the absence of dual criminality could in principle be afforded on the basis of the Convention, although there are no practical examples yet.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar render assistance that does not involve coercive action in the absence of dual criminality.

Madagascar could also render a wider scope of assistance even in the absence of dual criminality.

**Paragraphs 10 to 12 of article 46**

*10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:*

*(a) The person freely gives his or her informed consent;*

*(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.*

*11. For the purposes of paragraph 10 of this article:*

*(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;*

*(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;*

*(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;*

*(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.*

*12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Article 11 of the Treaty with France states:

Article 11

Any requests for the transfer of detained witnesses shall be communicated to the Ministry of Justice of the other State

It is acted upon immediately, unless special considerations exist, subject to the obligation of returning the detained persons as soon as possible.

Similar regulations are contained in article 12 of the Treaty with the Comoros and article 20 of the General Convention on Cooperation in Justice Matters.

Madagascar does not have legislation on the transferral of detained persons who are requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings.

**(b) Observations on the implementation of the article**

Madagascar could regulate the transfer of detained persons for the purposes of obtaining testimony and other evidence from and to Madagascar.

**Paragraphs 13 and 14 of article 46**

*13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification,*

*acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.*

*14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The Ministry of Justice has been designated as the central authority. Article 2.1.1 of the Decree 2008-438 foresees the role of the Ministry of Justice (Directorate for Administration of the Judiciary) in mutual legal assistance as follows:

2.1.1. Directorate for Administration of the Judiciary

The Directorate for Administration of the Judiciary is responsible for:

... execute international mutual legal assistance in criminal, civil, commercial and social matters.

Articles 3, 7 and 15 of the Treaty with France foresee the direct transmission of requests from central authority to central authority, and even, in urgent cases, directly to the judicial authorities implementing the request:

Article 3

The transmission of judicial documents related to the execution of this Convention and the annexes provided for in article 9 below, subject to other provisions included therein, will be carried out directly between the Ministers of Justice of the two States.

Article 7

Procedural documents and judicial rulings that must be notified to any person who is in the territory of one of the two States shall be addressed directly by the Ministry of Justice of the requiring State to the Ministry of Justice of the required State.

Article 15

Letters rogatory in criminal matters shall be communicated in conformance with the provisions of article 7.

In urgent circumstances, they may be communicated directly by the judicial authorities of the requiring State to the judicial authorities of the required State. If the required authority has no jurisdiction, it shall transmit ex officio the letter rogatory to the competent authority and it immediately notifies the requiring authority. Letters rogatory shall be accompanied with any documents related to their execution as provided for in article 7.

The required State orders the execution, as provided for in its legislation, of any letters rogatory related to a criminal case that are transmitted to it by the judicial authorities of the requiring State for the particular purpose of executing investigations or to communicate evidence, files or documents.

The required State shall only transmit certified copies or photocopies of the files or documents requested; However, if the requiring State expressly requires the transmission of originals, this request shall be honoured whenever possible.

Similar regulations are contained in article 1 and 6 of Annex 1 of the treaty with the Comoros, and in article 8 and 14 of the General Convention on Cooperation in Justice Matters.

Also article 55 of Law 2004-20 foresees for money-laundering cases:

## Article 55 - Transmission of requests

Requests sent by competent foreign authorities with a view to establishing laundering offences or to enforcing or ordering provisional measures or confiscations or for purposes of extradition shall be transmitted through diplomatic channels. In urgent cases, such requests may be sent through the International Criminal Police Organization (ICPO/Interpol) or directly by the foreign authorities to the judicial authorities of Madagascar, either by post or by any other, more rapid means of transmission leaving a written or materially equivalent record. In such cases, no action shall be taken on the request unless notice is given through diplomatic channels.

Requests and their annexes shall be accompanied by a translation in a language acceptable to Madagascar.

If none of these instruments apply, Madagascar does not accept the direct communication of formal requests between central authorities, but has to send or receive the requests through diplomatic channels.

Madagascar has informed the Secretary-General of its central authority; however, the notification indicates BIANCO as the central authority, which seems to be outdated since the designation of the Ministry of Justice in Decree 2008-438.

Madagascar accepts requests in urgent circumstances (and where agreed by the States Parties) through the International Criminal Police Organization.

Requests have to be made in writing in either French or Malagasy language. Madagascar has notified the Secretary-General accordingly.

Even in urgent circumstances, oral requests are not accepted. However, advance copies of requests are regularly accepted for consultation purposes.

### **(b) Observations on the implementation of the article**

It is recommended that Madagascar review and, if appropriate, update the notification of the Secretary-General on the designation of its central authority, and assess whether direct receipt of requests by the central authority could contribute to swift and efficient cooperation.

Further, Madagascar could accept requests orally in urgent circumstances, on the understanding that they are confirmed in writing forthwith.

### **Paragraphs 15 and 16**

*15. A request for mutual legal assistance shall contain:*

*(a) The identity of the authority making the request;*

*(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;*

*(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;*

*(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;*

*(e) Where possible, the identity, location and nationality of any person concerned; and*

*(f) The purpose for which the evidence, information or action is sought.*

*16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

Article 56 of Law 2004-20 foresees the following for money-laundering cases:

## Article 56 - Content of requests

Requests shall specify:

1. The authority requesting the measure;
2. The requested authority;
3. The purpose of the request and any relevant contextual remarks;
4. The facts in support of the request;
5. Any known details that may facilitate identification of the persons concerned, in particular marital status, nationality, address and occupation;
6. Any information necessary for identifying and tracing the persons, instrumentalities, proceeds or property in question;
7. The text of the statutory provision establishing the offence or, where applicable, a statement of the law applicable to the offence and an indication of the penalty that can be imposed for the offence.

In addition, requests shall include the following particulars in certain specific cases:

1. In the case of requests for the taking of provisional measures: a description of the measures sought;
2. In the case of requests for the making of a confiscation order: a statement of the relevant facts and arguments to enable the judicial authorities to order the confiscation under domestic law;
3. In the case of requests for the enforcement of orders relating to provisional measures or confiscations:
  - (a) A certified true copy of the order, and a statement of the grounds on whose basis the order was made if they are not indicated in the order itself;
  - (b) A document certifying that the order is enforceable and not subject to ordinary means of appeal;
  - (c) An indication of the extent to which the order is to be enforced and, where applicable, the amount of the sum for which recovery is to be sought in the item or items of property;
  - (d) Where necessary and if possible, any information concerning third-party rights of claim on the instrumentalities, proceeds, property or other things in question;

For other cases, Madagascar does not have specific rules on the contents of a mutual legal assistance request, but would require sufficient information for the execution of the request and therefore a similar set of information to that mentioned in article 46, paragraph 15 of the Convention.

When it appears necessary for the execution of the request or can facilitate such execution, Madagascar requests additional information. Malagasy authorities confirmed that this was a frequent practice, in the same context as the above-mentioned practice of informal consultations before submission of formal requests.

### **(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

### **Paragraph 17**

*17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

Article 9 of the treaty with the Comoros foresees:

## Article 9

At the explicit request of the requesting authority, the requested authority shall execute the request in a special form, if it is not contrary to the legislation of the State where the enforcement of the request takes place. Further, it has to timely inform the requesting authority of the date and place where the enforcement will take place, so that interested parties may be present under the legislation of the State of the requested authority.

A similar provision is contained in article 17 of the General Convention on Cooperation in Justice Matters.

Madagascar can execute all measures, also in accordance with the procedures specified in the request, that are not contrary to its domestic law. Malagasy authorities stated that in practice, there would generally be informal contacts before the formal request, so that the procedures could be clarified and a refusal of the request avoided.

Article 44 of Law 2004-20 foresees for money-laundering cases:

### Article 44 - Requests for investigatory measures

Investigatory measures shall be undertaken in conformity with the legislation of Madagascar unless the competent foreign authorities have requested that a specific procedure compatible with the legislation of Madagascar be followed.

## (b) Observations on the implementation of the article

Madagascar has implemented the provision under review.

## Paragraph 18

*18. Whenever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.*

## (a) Summary of information relevant to reviewing the implementation of the article

Madagascar has implemented this provision in practice.

In an active mutual legal assistance case in a murder investigation, Malagasy authorities have heard a witness who was detained in Paris by video conference. The evidence was accepted in a Malagasy court.

Video conferences for the purposes of testimony are also contained in the draft legislation.

## (b) Observations on the implementation of the article

Madagascar has implemented the provision under review in practice.

## Paragraph 19

*19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance*

*notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.*

*20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.*

**(a) Summary of information relevant to reviewing the implementation of the article**

For money-laundering cases, the principles of specialty and confidentiality are regulated in articles 59 and 62 of Law No. 2004-20.

Article 59 - Requirement of confidentiality

Where a request requires that its existence and substance be kept confidential, such requirement shall be observed except to the extent necessary to give effect to the request. If that is not possible, the requesting authorities shall be promptly informed thereof.

Article 62 - Restriction on the use of evidence

The communication or use, for investigations or proceedings other than those specified in the foreign request, of evidentiary facts contained therein shall be prohibited on pain of invalidation of such investigations or proceedings, except with the prior consent of the foreign Government.

For other cases than money-laundering, the principles of specialty and confidentiality are implemented as a matter of practice, although there is no rule in Malagasy legislation to this effect.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**Paragraph 21**

*21. Mutual legal assistance may be refused:*

- (a) If the request is not made in conformity with the provisions of this article;*
- (b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;*
- (c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;*
- (d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.*

**(a) Summary of information relevant to reviewing the implementation of the article**

The Treaty with France foresees the following:

Article 27

The mutual legal assistance in civil, social, commercial, criminal or administrative matters may be refused if the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, or its public order.

The mutual legal assistance in criminal matters shall be refused if the request involves offences considered by the required State as the violation of military obligations.

A similar regulation is contained in article 15 of the General Convention on Cooperation in Justice Matters.

Article 43 of Law 2004-20 contains a list of grounds for refusal of a mutual legal assistance request in money-laundering cases:

Article 43 - Refusal to execute requests

A request for mutual assistance may be refused only:

- (a) If it was not made by a competent authority according to the legislation of the requesting country or if it was not transmitted in the proper manner;
- (b) If its execution is likely to prejudice the law and order, sovereignty, security or fundamental principles of the law of Madagascar;
- (c) If the offence to which it relates is the subject of criminal proceedings or has already been the subject of a final judgment in the territory of Madagascar;
- (d) If the offence referred to in the request is not provided for under the legislation of Madagascar or does not have features in common with an offence provided for under the legislation of Madagascar;
- (e) If the measures requested, or any other measures having similar effects, are not permitted by the legislation of Madagascar or if, under the legislation of Madagascar, they are not applicable to the offence referred to in the request;
- (f) If the measures requested cannot be ordered or executed by reason of the time-barring of the laundering offence under the legislation of Madagascar or the law of the requesting State;
- (g) If the decision whose execution is being requested is not enforceable under the legislation of Madagascar;
- (h) If the decision rendered abroad was delivered under conditions that did not afford sufficient guarantees as to the rights of the defence;
- (i) If there are substantial grounds for believing that the measure or order being sought is directed at the person in question solely on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status;
- (j) If the request relates to an offence of a political nature or is motivated by political considerations;
- (k) If the case is not sufficiently important to justify the measures requested or the enforcement of the decision rendered abroad.

Bank secrecy may not be invoked as a ground for refusal to comply with the request.

The public prosecutor's office may appeal against a court's decision to refuse compliance within 03 days following such decision.

The Government of Madagascar shall promptly inform the foreign Government of the grounds for refusal to comply with its request.

These grounds for refusal are exclusive (“may be refused only”) and largely in line with the Convention.

Similar grounds are applied as general principles of law or can be applied on the basis of the Convention in cases not relating to money-laundering.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**Paragraph 22**

*22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Malagasy authorities confirmed that, although it is not excluded by any specific rule, currently Madagascar cannot provide assistance for fiscal offences.

For corruption offences that also involve fiscal matters it could in principle be done on the basis of the Convention; however this has not been practiced yet.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar ensure that mutual legal assistance may not be refused on the ground that the offence involves fiscal matters.

**Paragraph 23**

*23. Reasons shall be given for any refusal of mutual legal assistance.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Article 43 of Law 2004-20 foresees that reasons shall be given for any refusal of mutual legal assistance:

Article 43 - Refusal to execute requests

...

The Government of Madagascar shall promptly inform the foreign Government of the grounds for refusal to comply with its request.

In cases not related to money-laundering, Malagasy authorities confirmed that this is done as a matter of practice.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**Paragraph 24**

*24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.*

**(a) Summary of information relevant to reviewing the implementation of the article**

In Madagascar, there are no set deadlines in legislation for the execution of mutual legal assistance requests, but their duration depends on each case. In practice, due to the fact that the procedure goes through the Prosecutor-General and takes some time, simple requests take 2-3 months, but regular or more complex requests can take up to one year.

The above-mentioned circular of the Minister of Justice (Circular N° 005 – MJ/DAJ/Circ) from 26 August 2013 obliges all responsible officials of the judicial system to prioritize foreign mutual legal assistance requests and expedite their execution:

*Ministry of Justice.*

*Directorate-General for judicial affairs, studies and reforms*

*Directorate for the administration of Justice*

**N° 005 – MJ/DAJ/Circ**

RE: Circular on the processing of mutual legal assistance files in criminal matters

Taking into account the constant reminders from foreign judicial authorities relating to the follow-up to mutual legal assistance files, I have the honour to draw your particular attention to the importance of the present circular.

My attention was drawn to the fact that very often, due to the number of files to process or to the organization of work of the officers of the Judicial Police, the magistrates in charge of such files lag behind in their the replies to such mutual legal assistance requests.

Furthermore, the deadlines for the execution of and return of mutual legal assistance requests, when specified therein, are not respected in most cases, causing the criminal prosecution being delayed and damaging the processes with the foreign judicial authorities.

It should be noted that such delays carry the risk of the impression of a reproachable neglect of bilateral, regional and international agreements on mutual legal assistance and could damage the image of Malagasy judicial authorities.

Therefore, I ask you to kindly:

- Prioritize the processing of mutual legal assistance requests;
- Take the necessary measures to ensure that judicial police officers, recipients of these judicial requests for their execution, treat them also with priority and expeditiously;
- Expedite the replies to all correspondence relating to requests for mutual legal assistance;
- Always accompany the documents for execution with the original of the warrant to be transmitted back to foreign judicial authorities.

Kindly acknowledge receipt of this circular which will be filed in the register provided for this purpose.

**Copy to:**

- ***First President of the Supreme Court***
- ***Prosecutor-General before the Supreme Court***
- ***The First Presidents of the Appeal Courts***
- ***The Presidents of the First Instance Courts***
- ***All magistrates of the judiciary***

***For their information.***

The execution of requests according to deadlines suggested by the requesting State party and the provision of information on the status of a request are implemented in practice.

Further, Malagasy authorities reported it is common practice that Madagascar updates the requesting country on the progress made in the execution of the request.

**(b) Observations on the implementation of the article**

Madagascar is encouraged to execute mutual legal assistance requests as soon as possible and reduce the average time needed.

**Paragraph 25**

*25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Article 17 of the Treaty with France contains the following regulation:

Article 17

The required State may postpone the delivery of the objects, files or documents whose transmission has been requested, if they are necessary for an ongoing criminal proceeding.

Any objects, as well as any original files and documents that are communicated in the execution of a letter rogatory shall be returned as soon as possible by the requiring State to the required State, unless the latter waives this right.

Article 60 of Law 2004-20 foresees for money-laundering cases:

Article 60 - Postponement

The public prosecutor's office may postpone referring the matter to the police authorities or to the court only if the measure or order sought could interfere with ongoing investigations or proceedings. It shall immediately inform the requesting authority accordingly by diplomatic channels or directly.

In other cases, mutual legal assistance can be postponed on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding, as a matter of practice.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review as a matter of practice, although there is no legislation in this regard.

**Paragraph 26**

*26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Additional information can be requested according to article 58 Law 2004-20, in money-laundering cases:

Article 58 - Additional information

The ministry of justice or the public prosecutor's office shall, ex officio or at the request of the court to which the matter is referred, be entitled to request, through diplomatic channels or directly, the competent foreign authority to provide all additional information necessary for complying with the request or facilitating compliance therewith.

Malagasy authorities confirmed that consultations during the execution of a request and especially before refusing and postponing the execution are a very common practice. They referred to the extensive informal consultations during the rose wood trafficking case (see above) as an example.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review as a matter of practice, although there is no legislation in this regard.

**Paragraph 27**

*27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other*

*restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.*

**(a) Summary of information relevant to reviewing the implementation of the article**

In some of the treaties to which Madagascar is a party, safe conduct for witnesses who give evidence at the request of the requesting State is guaranteed.

Article 10 of the Treaty with France foresees:

Article 10

If a criminal proceeding requires the personal appearance of a witness, the required State on the territory of which the witness resides shall urge him to honour the invitation that shall be made to him. In this case, any travel and subsistence allowances, estimated from the residence of the witness, shall be at a minimum equal to those awarded under the current rates and rules in the State where the hearing is to take place; an advance of all, or a part, of the costs of the voyage shall be made, at its request, through the consular authorities of the requiring State.

Any witness who, summoned in one of the States, voluntarily appears before the judges of the other State, cannot be prosecuted or detained for any acts or sentences that are previous to his departure from the territory of the required State. This immunity shall cease thirty days after the date in which his deposition has been completed, or when the witness has become free to return.

Further than that, there is no rule in Malagasy legislation on safe conduct, but the Convention can be applied directly.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**Paragraph 28**

*28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne*

**(a) Summary of information relevant to reviewing the implementation of the article**

For money-laundering cases, article 63 of Law 2004-20 foresees:

Article 63 - Costs

Costs incurred in complying with requests provided for under the present title shall be borne by the State of Madagascar unless otherwise agreed with the requesting country.

In other cases, Malagasy authorities confirmed that as a matter of practice, unless the parties agree otherwise, the costs are borne by the requested State party.

Extraordinary costs can be subject to a special agreement, for example, for a video conference or travel costs.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**Subparagraph 29 (a)**

*29. The requested State Party:*

*(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;*

*(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar has no limitations in providing to the requesting State copies of such documents that are available to the general public, without any specific procedure.

However, documents that are not available to the general public generally remain confidential also during a mutual legal assistance procedure. There are no rules that facilitate the lifting of confidentiality and allow those working on the case file to disclose information during the mutual legal assistance proceeding.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar clarify the limits of confidentiality of documents that are not public, and the possibility of submitting them to a requesting party.

**Paragraph 30**

*30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this article.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar is a party to the following mutual legal assistance treaties:

Bilateral:

- Judicial Convention between the State of the Comoros and the Republic of Madagascar from 12 November 1976.
- French-Malagasy Agreement on Cooperation of 4 June 1973, in matters of mutual legal assistance, recognition and execution of judicial decisions and simplified extradition.

Regional:

- African Union Convention against Corruption (ratification 2004)
- General Convention on Cooperation in Justice Matters (Cameroon, Central African Republic, Congo, Cote D'Ivoire, Dahomey, Haute-Volta, Madagascar, Mauritania, Niger, Senegal, Chad) (1961).
- Agreement on extradition and mutual legal assistance in the Francophone Countries of Africa (Rabat Convention) (signed 2009, in course of ratification)

Multilateral:

- 16 universal instruments against terrorism (Madagascar has ratified 13, the remaining three being in the process of ratification)

- Three United Nations Conventions on drugs, psychotropic substance and the illicit trafficking of drugs and psychotropic substances (ratification and accession 1974)
- The United Nations Convention against Transnational Organized Crime and its three Additional Protocols (ratification 2005)

**(b) Observations on the implementation of the article**

It is recommended that Madagascar ratify the SADC Protocol and assess whether new bilateral treaties would further international cooperation (see above paragraph 1).

**(d) Challenges, where applicable**

Madagascar identified the following challenges:

- Inter-agency co-ordination,
- Limited capacity,
- Limited resources for implementation

**(e) Technical assistance needs**

Madagascar indicated the following technical assistance needs:

In the short term, assistance was requested for the finalization of the draft international cooperation law.

In the medium term, specific technical assistance was needed for mutual legal assistance, including for:

- Strengthening institutions for implementing the new legislation.
- Developing international cooperation guidelines.
- Training law enforcement and judicial officials, including in international asset recovery.
- Disseminating good practices in international cooperation.

Madagascar has not received any of the previously mentioned forms of technical assistance.

**Article 47. Transfer of criminal proceedings**

*States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar does not have legislation or practice on the transfer of criminal proceedings.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar consider the possibility of transferring from or to other States parties criminal proceedings in cases where such transfer is considered to be in the interests of the proper administration of justice.

**(d) Challenges, where applicable**

Madagascar identified the following challenges:

- Inter-agency co-ordination,
- Limited capacity,
- Limited resources for implementation

**Article 48. Law enforcement cooperation**

*1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:*

*(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;*

*(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:*

*(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;*

*(ii) The movement of proceeds of crime or property derived from the commission of such offences;*

*(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;*

*(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;*

*(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;*

*(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;*

*(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.*

*2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.*

*3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar, without having specific legislation or treaties on law enforcement cooperation, has undertaken a number of activities to allow for efficient cooperation and information exchange of its law enforcement authorities with their counterparts abroad.

The Police regularly cooperates and exchanges information through INTERPOL.

SAMIFIN is a candidate FIU to the EGMONT Group.

Within the region, most law enforcement cooperation is implemented through the Regional Platform of the Indian Ocean Commission (IOC) countries. The Platform has a judicial component and a security (police) component. The Judicial Platform was created by five countries in 2008 for supporting organized crime prosecutions, with the assistance of UNODC. The Member States are Comoros, France (La Réunion), Madagascar, Mauritius, and Seychelles. It is composed of two judicial focal points per country (member and alternate member), who are either judges or prosecutors in charge of extradition and mutual legal assistance cases.

The Platform has three objectives:

- a) Strengthen judicial cooperation in criminal matters, including through expediting the processing of cooperation requests.
- b) Strengthen police cooperation.
- c) Ensure compliance with the international commitments of the five States.

The Platform holds annual combined meetings of its judicial and security components. Further, ad hoc bilateral and multilateral meetings are held (with the support of the IOC and UNODC) upon request of one or more States. Activities include training, exchange on the development of legislation or development of bilateral agreements. Further, the Platform has collected the bilateral, regional and international treaties on mutual legal assistance and extradition (with the assistance of UNODC and IOC), and developed fact sheets with a view to supporting authorities in making effective requests to States of the IOC.

The Platform also links Madagascar to further cooperation networks such as Eurojust, the European Judicial Network or the Sahel Platform. An interconnection meeting with the EJM, Eurojust and the Sahel countries was held in 2012 in The Hague, Netherlands.

BIANCO also has cooperation agreements with its counterparts in Mauritius and France:

- The Memorandum of Cooperation between the Independent Anti-Corruption Commission of the Island of Mauritius and the Independent Anti-Corruption Office of Madagascar
- A memorandum of cooperation with BIANCO's counterpart in France

BIANCO also is developing a cooperation with the IACA of Hong Kong, the MACA of Malaysia and counterparts in China; BIANCO regularly sends staff to China for an exchange programme.

Madagascar can use the Convention as a legal basis for law enforcement cooperation.

The cooperation, in particular through the networks and secure platforms, can also be used to respond to corruption offences committed through the use of modern technology, although there has not been much experience in this regard.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**(c) Successes and good practices**

Madagascar actively engages in cooperation through the Judicial Regional Platform of the Indian Ocean Commission countries

**(d) Challenges, where applicable**

Madagascar has identified the following challenges:

- Inter-agency co-ordination,
- Limited capacity,
- Limited resources for implementation.

**(e) Technical assistance needs**

Madagascar sought assistance for strengthening the active involvement of Madagascan officials in law enforcement and asset recovery networks (art. 48, para. 1).

Training and on-site assistance by an anti-corruption expert on offences committed through the use of modern technology would also contribute to the full implementation of article 48, paragraph 3.

Madagascar has not received any of the previously mentioned forms of technical assistance.

**Article 49. Joint investigations**

*States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Joint investigative teams can be formed on the basis of one of the memorandums of cooperation of law enforcement bodies (see above article 48) or on the basis of a treaty, including the Convention. They are also possible on the basis of an ad hoc arrangement.

No experience with the establishment of such teams exists yet on the basis of the Convention, but some teams have been established on the basis of the United Nations Convention against Transnational Organized Crime, inter alia, in the above-mentioned case on rose wood trafficking.

Further, parallel investigations have been carried out with a number of countries, including France, Mauritius and Comoros.

**(b) Observations on the implementation of the article**

Madagascar has implemented the provision under review.

**Article 50. Special investigative techniques**

**Paragraph 1**

*1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its*

*means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.*

**(a) Summary of information relevant to reviewing the implementation of the article**

Madagascar applies all special investigative techniques mentioned in the Convention to money-laundering offences (arts. 25-26, Law No. 2004-020).

Chapter III. Investigative techniques

Article 25 - Special investigative techniques

For the purpose of obtaining evidence of the predicate offence and evidence of offences provided for under the present law, the judicial authorities may order for a specific period:

- (a) The monitoring of bank accounts and the like;
- (b) Access to computer systems, networks and servers;
- (c) The placing under surveillance or tapping of telephone lines, facsimile machines or electronic transmission or communication facilities;
- (d) The audio or video recording of acts and behaviour or conversations;
- (e) The communication of notarial and private deeds, or of bank, financial and commercial records.

The judicial authorities may also order the seizure of the aforementioned documents.

However, these operations shall be possible only when there are strong grounds for suspecting that such accounts, telephone lines, computer systems and networks or documents are or may be used by persons suspected of participating in offences referred to in the first paragraph of this article.

Article 26 - Undercover operations and controlled delivery

No punishment may be imposed on officials competent to investigate the predicate and laundering offences who, for the sole purpose of obtaining evidence relating to offences referred to in the present law, perform, in the manner specified in the following paragraph, acts which might be construed as elements constituting any of the offences referred to in articles 30, 31 and 34.

The authorization of the Public Prosecutor shall be obtained prior to any operation as described in the preceding paragraph. A detailed report shall be transmitted to that authority upon completion of the operation. The authority may, by substantiated ruling issued at the request of the officials competent to investigate the predicate and laundering offences carrying out such operation, delay the freezing or seizure of the money, or any other property or advantage, until the inquiries have been completed and, if necessary, order specific measures for the safe keeping thereof.

In other cases, they can also be used in practice, however, there is no specific legal basis. They can be ordered by the Prosecutor-General. Electronic surveillance requires a judicial order, which can be obtained within one day.

Malagasy authorities indicated that the use of controlled delivery, mostly cash delivery, is a very frequent practice used by BIANCO. Electronic surveillance was not used very often due to resource constraints. Generally, evidence generated by special investigative techniques is not considered sufficient in court as such, but has to be supported by other evidence.

**(b) Observations on the implementation of the article**

It is recommended that Madagascar explicitly regulate the appropriate use of controlled delivery and other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, to the extent permitted by the basic principles of the domestic legal system, for all Convention offences.

## Paragraphs 2-4

*2. For the purpose of investigating the offences covered by this Convention, States parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.*

*3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.*

*4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.*

### **(a) Summary of information relevant to reviewing the implementation of the article**

At the international level, there are no specific regulations in the relevant treaties, but Madagascar can use the techniques on the basis of the Convention or on a case-by-case basis and has already done so, although not yet in corruption offences. Madagascar mentioned a murder case in which electronic surveillance data were generated and exchanged at the international level with two other jurisdictions.

### **(b) Observations on the implementation of the article**

It is recommended that Madagascar, when explicitly regulating the appropriate use of controlled delivery and other special investigative techniques, such as electronic or other forms of surveillance and undercover operations for all Convention offences, include in this regulation their use in international cooperation (art. 50).

### **(d) Challenges, where applicable**

Madagascar has identified the following challenges:

- Inter-agency co-ordination,
- Limited capacity,
- Limited awareness of state-of-the-art special investigative techniques,
- Limited resources for implementation.

### **(e) Technical assistance needs**

Madagascar has identified the following technical assistance needs: Training and on-site assistance by an anti-corruption expert on special investigative techniques would contribute to the full implementation of article 50.

Madagascar has not received any of the previously mentioned forms of technical assistance.