Chapter III. Criminalization and law enforcement
The United Nations Convention against Corruption

- Prevention
- Criminalization Law Enforcement (Art. 15-42)
- Asset Recovery
- International Cooperation
Chapter III: Criminalization and law enforcement

Mandatory Offences

- Bribery of National Public Officials (Art. 15)
- Active Bribery of Foreign Public Officials (Art. 16, para. 1)
- Embezzlement, Misappropriation or Other Diversion of Property (Art. 17)
- Laundering of proceeds of crime (Art. 23)
- Obstruction of Justice (Art. 25)
- Participation in such offences (Art. 27, para. 1)

Optional Offences

- Passive Bribery of Foreign Public Official (Art. 16)
- Trading in Influence (Art. 18)
- Abuse of Functions (Art. 19)
- Illicit Enrichment (Art. 20)
- Bribery in Private Sector (Art. 21)
- Embezzlement of Property in Private Sector (Art. 22)
- Concealment (Art. 24)
- Attempt / preparation of UNCAC offences (Art. 27, paras. 2-3)
Relevant UNCAC Articles on Bribery

- **Article 15**: Bribery of National Officials
- **Article 16**: Bribery of International Officials
- **Article 21**: Bribery in the Private Sector
Bribery of Public Officials (Art. 15)

Promise, Offering or Giving

Solicitation or Acceptance by National Public Official

Undue Advantage for the Official or Another Person/Entity in Order to Act or Refrain from Acting in the Exercise of Official Duties

Passive Bribery

Active Bribery
Active Bribery of Foreign Public Officials (Art. 16)

Promise, Offering or Giving

Undue Advantage for the Official or Another Person/Entity to Obtain Business or Other Undue Advantage in Conduct of Int’l Business

Foreign Public Official or Officials of Int’l Organizations

Undue Advantage for the Official or Another Person/Entity in Order to Act or Refrain from Acting in the Exercise of Official Duties

Active Bribery of Foreign Public Officials (Art. 16)
Bribery in the Private Sector (Art. 21)

**Promise, Offering or Giving**

**Passive Bribery**
- Undue Advantage to any Person who Directs/ Works for a Private Sector Entity in Order that s/he Act or Refrain from Acting

**Active Bribery**
- Solicitation or Acceptance by any person who directs/ works (in any capacity) for a private sector entity
- Undue Advantage to any Person who Directs/ Works for a Private Sector Entity in Order that s/he Act or Refrain from Acting

**In the Course of Economic, Financial or Commercial Activities**
Embezzlement by a Public Official (Art.17)

Embezzlement, Misappropriation or other Diversion of Property by a Public Official

For his/her Benefits of any Property, Public or Private Funds or Securities or Any Thing of Value

Entrusted to Public Official by Virtue of his/her Position
Trading in Influence (Art. 18)

Promise, Offering or Giving

Undue Advantage in Order that the Public Official/Person Abuse his/her real/ supposed Influence to Obtain from an Administration or Public Authority an Undue Advantage

Solicitation or Acceptance by any a Public Official or any Other Person

Undue Advantage in Order that the Public Official/Person Abuse his/her real/ supposed Influence to Obtain from an Administration or Public Authority of the SP an Undue Advantage for the Original Instigator/ Any Other Person
Abuse of Functions (Art. 19)

Is the Performance of/ Failure to Perform an Act by a Public Official in Discharge of his/her Functions

To Obtain an Undue Advantage for himself/herself/ another person/ entity

"We'll just grant each other immunity!"
Illicit Enrichment (Art.20)

**UNCAC Art. 20**

- 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**.

**Sample Legislation: Prevention of Corruption Act 1988 Section 13 (India)**

- (1) A public servant is said to commit the **offence of criminal misconduct**, - (a) [...] (e) If he or any person on his behalf, is in possession or has, at any time during the Period of his office, been in possession for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.
Corporate Issues

- **Article 21**: Bribery in the Private Sector
- **Article 22**: Private Sector Embezzlement
- **Article 26**: Liability of Legal Persons
- **Article 34**: Annulment of Contracts / Withdrawing of Concessions due to Corruption
- **Article 39**: Cooperation Between National Authorities and Private Sector
Embezzlement of Property in the Private Sector (Art. 22)

Embezzlement by a Person who Directs/ Works in a Private Sector Entity of any Property/ Private Funds/ Securities/ Other Thing of Value Entrusted to him/her by his/her Position

In the Course of Economic, Financial or Commercial Activities
Money Laundering (Art.23)

**Mandatory Offences**

- Acquisition, Possession or Use of Proceeds of Crime
- Participation, Association, Conspiracy, Attempt...

- Conversion or Transfer of Proceeds of Crime
- Concealment or Disguise of Proceeds of Crime

**Subject to Basic Concepts of Legal System**
Concealment (Art. 24)

The Concealment/Continued Retention of Property when the Person involved knows that such Property is the Result of any UNCAC Offences
Obstruction of Justice (Art. 25)

Use of Physical Force, Threats or Intimidation
or
Promising, Offering or Giving Undue Advantage
To Interfere with Giving Evidence or Testimony

Use of Physical Force, Threats or Intimidation
To Interfere with Exercise of Duties of Judicial or Law Enforcement Officials
Liability of Legal Persons (Art. 26)

• Obligation for States parties to establish liability of legal persons for participation in UNCAC offences.
• Discretion as to the nature of liability in view of divergent national approaches: criminal, civil, administrative liability.
• No prejudice to personal criminal liability of natural persons.
• Effective, proportionate and dissuasive sanctions for legal entities, including monetary sanctions.
Participation and Attempt (Art. 27)

- Obligation for States parties to establish as criminal offence, in accordance with domestic law, the participation in an UNCAC offence in any capacity (as an accomplice, assistant or instigator).
- Discretion to criminalize, in accordance with domestic law, the attempt to commit an UNCAC offence.
Knowledge, Intent and Purpose as Elements of an Offence (Art. 28)

May be inferred from Objective Factual Circumstances
Statute of Limitations (Art. 29)

• Long statute of limitations period in which to commence proceedings for any UNCAC offence and a longer period where the alleged offender has evaded the administration of justice.
• Rationale: strike a balance between the interests of swift justice, prompt investigation and prosecution and legal accuracy and certainty of criminal proceedings for both victims and defendants on the one hand, and the recognition that corruption offences often take a long time to be discovered and effectively punished, on the other.
Prosecution, Adjudication and Sanctions (Art. 30)

- Sanctions that take into account the gravity of the offence.
- Appropriate balance between immunities/privileges and effective investigation, prosecution and adjudication.
- Non-mandatory provisions to enable:
  - Removal, suspension, re-assignment of an accused public official (with due regard to presumption of innocence).
  - Disqualification from holding public office or office in an enterprise owned in whole or in part by the State of persons convicted of UNCAC offences for a time determined by law.
  - Re-integration into society of persons convicted of UNCAC offences.
Freezing, Seizure and Confiscation (Art. 31)

- Domestic confiscation powers
- Powers to enable identification, tracing, freezing, seizure and confiscation of proceeds or property
- Shifting burden of proof: offender may have to prove lawful origin of suspicious proceeds

- Which proceeds?
  - Proceeds of crime derived from convention offences
  - Proceeds transformed or converted into other property
  - Proceeds intermingled with legitimate property
  - Income or benefits derived from proceeds
  - Property of corresponding value
  - Property, equipment, instrumentalities used in or destined for use in UNCAC offences

- No bank secrecy
- No prejudice to rights of bona fide third parties
Protection of Witness and Reporting Persons (Art. 32-33)

Protection of Reporting Persons

Protection against Any Unjustified Treatment

Protection of Witness, Experts and Victims

Effective Protection from Potential Retaliation or Intimidation

Optional

In Accordance with its Domestic Legal System and within its Means
Specialized Authorities (Art. 36)

Ensure the Existence of a Body/ Bodies/ Persons Specialized in Combating Corruption through Law Enforcement

- Necessary Independence
- In Accordance with Fundamental Principles of the State party’s legal system
- Carry Out Functions Effectively and Without any Undue Influence
- Appropriate Training
- Resources to Carry out Tasks

Link to Art. 6
Cooperation with Law Enforcement Authorities (Art. 37)

• Aim: promotion of detection, investigation and adjudication of corruption
• Measures to encourage participators in offences to supply information and provide help to competent authorities
• Extension of protection of witnesses to those persons as well.
• Consider mitigating punishment (mitigated sentence/early release or parole).
• Consider granting immunity from prosecution (enactment of legislation/discretionary powers of prosecutorial authorities).
• When the person is located in another State party, consider entering into agreements or arrangements to give practical effect to this article.
Cooperation between National Authorities (Art. 38)

• Measures required to encourage domestically the cooperation between public authorities and agencies with the powers to investigate and prosecute bribery of national public officials, bribery in the private sector and money-laundering.

• Early notification of any potential offence to ensure that alleged offenders do not flee the jurisdiction or related assets are monitored.
Cooperation Between National Authorities and the Private Sector (Art. 39)

- Cooperation between national investigating and prosecuting authorities and the private sector.
- Due to complexity of corruption cases, the role of private sector entities (e.g., financial institutions) in preventing, detecting and prosecuting actors involved in corrupt practices is important.
- Concrete collaboration of private sector with public authorities needs to be institutionalized and framed properly to avoid conflicts related to bank secrecy, confidentiality or privacy issues.
Bank Secrecy (Art. 40)

Appropriate Mechanisms Available within the Domestic Legal System to Overcome Obstacles when applying Bank Secrecy Laws
Criminal Record (Art. 41)

Take into Consideration Any Previous Conviction in another State of an Alleged Offender

Purpose: Using Such Information in Criminal Proceedings relating to an UNCAC Offence
Jurisdiction (Art.42)

No Safe Haven for Offenders

Mandatory

- Offence on Territory, Vessel or Aircraft
- Offender not Extradited Because of Nationality

Optional

- Offenders or Victims Are Nationals
- Offence against State
- Participation of Laundering Outside Territory Aimed at Laundering in Territory