



**Conference of the States Parties  
to the United Nations  
Convention against Corruption**

Distr.: General  
1 October 2013

Original: English

**Fifth session**

Panama City, 25-29 November 2013

Item 2 of the provisional agenda\*

**Review of the implementation of the United Nations  
Convention against Corruption**

**Report on regional implementation of chapter III  
(Criminalization and law enforcement) of the United  
Nations Convention against Corruption**

**Report prepared by the Secretariat**

*Summary*

The present report contains information organized by region, supplemental to the thematic report on the implementation of chapter III (Criminalization and law enforcement) of the United Nations Convention against Corruption by States parties under review in the first and second years of the first cycle of the Mechanism for the Review of Implementation of the Convention, established by the Conference of the States Parties to the Convention in its resolution 3/1.

\* CAC/COSP/2013/1.



## **I. Introduction**

1. In its resolution 3/1, the Conference adopted the terms of reference of the Review Mechanism (contained in the annex to that resolution), as well as the draft guidelines for governmental experts and the secretariat in the conduct of country reviews and the draft blueprint for country review reports (contained in the appendix to the annex to that resolution), which were finalized by the Implementation Review Group at its first session, held in Vienna from 28 June to 2 July 2010.

2. In accordance with paragraphs 35 and 44 of the terms of reference, thematic implementation reports have been prepared in order to compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the country review reports, organized by theme, for submission to the Implementation Review Group, to serve as the basis for its analytical work.

3. The present report contains information, organized by region, supplemental to the thematic reports on the implementation of chapter III (Criminalization and law enforcement) of the Convention, contained in documents CAC/COSP/2013/6, CAC/COSP/2013/7 and CAC/COSP/2013/8. This regional report is based on information included in the reports on 44 States parties under review in the first and second years of the first cycle of the Review Mechanism whose review reports had been completed, or were close to completion, at the time of the drafting of the present report.<sup>1</sup>

## **II. Implementation of selected provisions of chapter III (Criminalization and law enforcement) by regional group**

4. Two topics were initially selected from the thematic implementation report for further analysis on a regional basis: cooperation with law enforcement authorities (article 37 of the Convention) and discretionary legal powers (article 30, paragraph 3, of the Convention). The topics covered are ones for which regional nuances, good practices and challenges in implementation were prevalent and sufficient data were available from the country review reports to analyse regional trends. Further topics will be included in the regional reports as more reviews are concluded and additional data become available.

### **A. Implementation of article 37 (cooperation with law enforcement authorities) and article 30, paragraph 3 (discretionary legal powers)**

#### **African States**

5. In the nine countries in the group of African States that were covered in the thematic implementation report, commonalities in the approach and methods adopted to encourage the cooperation of participating offenders depended most

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<sup>1</sup> The data in the present report are based on country reviews as at 1 September 2013.

often on the legal systems of the countries examined, and two major groupings can be identified. On the one hand, countries associated with the civil law tradition tended to follow the principle of mandatory prosecution, whereby the prosecution services were bound by the legality principle. Those countries permitted a release from criminal liability or punishment only in the circumstances prescribed by law, but in most cases permitted the cooperation of an offender to be taken into account as a mitigating circumstance during sentencing. On the other hand, countries leaning towards the common law legal framework faced no legal barriers and allowed for both discretionary immunity from prosecution for cooperating offenders, subject in most cases to relatively clearly defined oversight measures, and the possibility of granting mitigated sentences to cooperating defendants.

6. The four countries in the region that followed the common law tradition had all adopted a system of discretionary prosecution, whereby decisions on whether to institute or withdraw proceedings could be exercised in such a way as to grant effective immunity from prosecution to cooperating defendants. Generally, in those jurisdictions, the constitution, criminal procedure code or prosecution law (in remarkably similar wording) vested the power to prosecute in the attorney general or the director of public prosecutions, who had the power, for example, in one jurisdiction, “in cases in which he considers it desirable to do so”, to institute and undertake criminal proceedings before any court and to discontinue such proceedings, typically at any stage before judgement was delivered. In the countries under consideration, that power could be and was regularly exercised to afford immunity from prosecution to cooperating defendants or collaborators of justice. In one jurisdiction it was reported that a prosecutor could decide not to file charges in a particular case against a cooperating accused person in exchange for substantial cooperation or testimony in the case at hand or other criminal proceedings. In other jurisdictions in the common law group, the accused could be used as a witness for the prosecution against co-perpetrators and be discharged from prosecution, under provisions in the criminal procedure code and common law principles. Furthermore, transactional indemnity and use immunity provisions applied mandatorily to cooperating defendants, such that their testimony or statements could not be used against them, except in situations of perjury or materially incomplete statements. One State in the common law group had adopted a detailed law on plea negotiations and agreements, which authorized the public prosecutor to withdraw or discontinue charges against an accused person in exchange for a plea of guilty to the offence charged or a lesser offence. Prosecutors in other States in the common law group had similar powers to enter into plea or reduced sentence agreements, subject to the criminal procedure law and prosecution directives, though such legislation was still under discussion in one State.

7. More generally, in three of the four common law jurisdictions examined, the discretion to prosecute was subject to specific legal and procedural oversight mechanisms, which were most commonly prescribed in the constitution, criminal procedure law, prosecution act and prosecution guidelines, including, in one case, specific legislation related to plea negotiations. These oversight measures effectively provided for “very limited discretion”, as noted in one review, and could be applied in addition to a prosecutor’s overall obligation to exercise the prosecution duty independently, “without any favour or prejudice” and with a view to protecting the public interest. It should be noted that the countries under consideration generally did not provide for an exception from prosecution for

matters considered to be *de minimis*, unlike some civil law countries. Furthermore, several States in the common law group allowed aggrieved persons to file for review or appeal against a decision not to prosecute, which was secured, in one case, at the constitutional level. Notably, in several countries in the region, the training of prosecutors and the recruitment of qualified lawyers were cited by the authorities as having enhanced the performance of the prosecution department. There was one exception among the common law countries in the region, where prosecutorial discretion was found not to be adequately circumscribed so as to ensure that discretionary legal powers were exercised to maximize the effectiveness of law enforcement measures, as provided by article 30, paragraph 3, of the Convention. In that jurisdiction, there was no evidence of any legal oversight measures or prosecution policy, and the jurisprudence referred to by national authorities on the exercise of discretionary prosecution powers was not available to the reviewers.

8. The jurisdictions in the common law tradition further allowed for the cooperation of accused persons or defendants to be taken into account as a mitigating factor by the courts during sentencing. Generally, cooperation in investigations or prosecutions was considered a mitigating factor as a general principle of sentencing, though the matter was determined on a case-by-case basis and relevant guidelines were not always in place, except in the common law and sentencing guidelines of one State. Here also, applicable provisions in the plea-bargaining law could result in recommendations being issued to the presiding judge for the determination of a reduced sentence on the basis of an accused's cooperation.

9. Among the five countries in the region affiliated more closely with the civil law tradition, the situation was slightly different. In the civil law group, immunity from prosecution could generally not be given to cooperating defendants, whether by way of an exercise of prosecutorial discretion or by judicial decision, although one country, under a provision in the criminal procedure law, allowed prosecution decisions to institute or withdraw proceedings to be applied in favour of cooperating offenders, as long as there were no contrary provisions for corruption offences that prevented the exercise of that prerogative. More often in those countries, related measures on "spontaneous confessions" were found in the substantive criminal law provisions, typically for active bribery, money-laundering and organized crime, where such offences were reported by a defendant before the acts were perpetrated or the criminal investigation commenced. Thus, one State party's anti-corruption law provided that, except in cases of recidivism, any perpetrator of or accomplice to active corruption who, before being investigated, reported the offence to an administrative or judicial authority and assisted in identifying others involved should be exempt from punishment. In another State party, for both active and passive bribery, the penal code provided an exemption from criminal liability to any person who gave or received a bribe and assisted the judicial authorities in gathering evidence thereof. A similar measure existed in another country's penal code for crimes by an organized group, which exempted from punishment those persons who confessed their involvement in a crime prepared by a group, prior to having participated in the crime. On the other hand, in one State party no relevant measures had been adopted, as cooperation could be taken into account as a mitigating factor only at sentencing. Mitigation of punishment was possible in most countries in the

civil law group. However, provisions on plea-bargaining or reduced sentence agreements had not been established in the civil law group.

10. Most of the States parties in the region, whether following the common or civil law tradition, had not adopted specific provisions for the protection of cooperating defendants (article 37, paragraph 4, of the Convention), although notably the anti-corruption law in one jurisdiction provided that, during the prosecution and trial of corruption offences, the judge or competent authority was required to take “all necessary measures to ensure [the] seamless protection” of persons who provided information about an offence and assisted authorities in the investigation or prosecution. In two common law countries in the region, the same protections as for witnesses and whistle-blowers were also available to cooperating defendants.

#### **Asia-Pacific States**

11. The group of 13 Asia-Pacific States tended to follow the same approach as those in the African group, with a primary distinction observed between countries following the common and the civil law tradition. On the one hand, common law countries, as in the African group, tended to allow for the exercise of discretionary prosecution in such a manner as to permit decisions on immunity from prosecution to be made in favour of cooperating defendants. In those countries, prosecutorial discretion was exercised to encourage defendants to provide relevant information, by dismissing or reducing charges or making recommendations to the judge or magistrate concerning levels of cooperation. Prosecutors could withdraw charges on a case-by-case basis against cooperating defendants in corruption matters, and more generally could also grant immunity to persons who agreed to testify in other prosecutions. There was one exception in the common law group, where there was no possibility of exercising prosecutorial discretion in favour of a defendant. In that country, statements by an accused to the law enforcement agencies were not generally admissible in court, but the courts were authorized under the penal code, at any stage of investigation or trial, to tender pardon in writing to a defendant or witness who made a full disclosure of the facts of the case and of every other person involved as principal or abettor. It was noted by the reviewing experts that this measure was an enabling provision allowing the court to grant pardon to an accomplice who cooperated in an investigation or trial and did not directly encourage a defendant's choice to cooperate. In addition to prosecutorial discretion, in some States parties in the common law group, more specific immunity provisions were established by law for cooperating suspects, for example, under the anti-corruption law in one State party in the case of cooperating co-defendants. Similarly, under the anti-corruption law in another country, the court could, at the written request of the anti-corruption commissioner, inform any accused person that he or she would not be prosecuted for an offence disclosed by his evidence if he or she gave full and true evidence in such proceedings, and no further prosecution was possible except in cases of perjury or wilful withholding of evidence. Measures were also in place in several States for cooperating defendants to be considered prosecution witnesses; for example, in one State party the anti-corruption law provided that, whenever two or more persons were charged with a corruption-related offence, the court could, on an application in writing by the prosecutor, require one or more of them to give evidence as a witness for the prosecution.

12. More generally, in countries in the common law group, the “absolute” discretion afforded to prosecutors to give or refuse consent to institute and discontinue (before final judgement) prosecutions was regulated, in a manner similar to that of the common law countries in the African group, either in the criminal procedure code, prosecution law or prosecutor guidelines. Protections against the abuse of prosecutorial discretion were established, including in one case through oversight by an independent review panel, which scrutinized reports about investigations and prosecutions of the anti-corruption commission. The panel had no authoritative powers but could submit recommendations to the Director of Public Prosecution if prosecutions had not been initiated or had been dismissed, although the final discretion regarding whether or not to prosecute remained fully with the Director.

13. In the civil law countries in the region, on the other hand, immunity from prosecution could generally not be given to cooperating defendants, whether by way of exercising prosecutorial discretion or by the courts, although in one State, under the criminal procedure code, the prosecution could, with permission from the Minister of Justice, request the halting of legal proceedings for criminal offences. The civil law countries in this group had generally adopted related measures in the criminal offences on “spontaneous confessions” or “effective regret” (as termed in one review). Accordingly, the bribery offence in one country’s anti-corruption law provided immunity from prosecution to an official who reported the receipt of a bribe within 30 days of receiving it. Similarly, in all of the Arab States reviewed in the region, provision was made in the criminal law for an exemption from penal liability or punishment in cases of bribery, where an offender reported the offence and assisted the authorities in apprehending other parties, before the investigation. Sometimes other offences were covered, such as criminal conspiracy, money-laundering, concealment and other economic crimes, and in some cases the offence could be reported even after the investigation commenced. For bribery, for example, in three States both the offender and an intermediary could be exempted from punishment for confessing to the offence before an action was brought and assisting in the apprehension of other participants, and it was considered a mitigating circumstance (in one State) if such notification or confession occurred after an action was brought but before the end of the proceeding. Other civil law countries in the region had adopted similar measures in their criminal codes. Thus, for example, in three other States parties in the group, the voluntary confession of a bribe prior to detection and the substantial cooperation of an offender in the investigation by clearly reporting the facts of the offence were circumstances permitting a release from punishment under the penal code, although the provisions were not always applied in practice. More generally, it was noted that the cited measures on voluntary confessions provided only basic incentives to encourage defendants to cooperate with investigating and prosecuting authorities, but did not effectively encourage the substantial cooperation of offenders. Legislation was pending in some States to enhance measures to encourage the cooperation of offenders.

14. The exercise of prosecutorial discretion in countries following the civil law tradition in the Asia-Pacific group was relatively limited and was exercised in accordance with principles of legality. Discretionary powers, to the extent established in the region, could be exercised to discontinue a case on specific grounds only, such as lack of evidence, the public interest or the *de minimis* nature

of the case. Generally, the criminal procedure codes stipulated that prosecutions in ordinary proceedings should be undertaken by the public prosecution, in some cases under the supervision of the minister of justice, following an investigation by the public prosecutor, with little possibility of exercising prosecutorial discretion. Further, in one State a separation of the office of the Attorney General from the office of the Minister of Justice ensured “a high level of prosecutorial independence,” as the supervision of the Ministry of Justice was administrative only and could not amount to any intervention in the function of the prosecution. However, in two States parties in the region, issues were raised concerning the independence of the prosecution, due, in one jurisdiction, to the Government’s extensive powers under the criminal procedure code and the anti-corruption law to direct and control the prosecution of cases and, in another State party, to reported cases of interference in the “process of investigation, prosecution and adjudication of several cases”. Recommendations to amend the law were issued accordingly in both States.

15. The possibility of granting mitigated punishment to cooperating defendants was established in both common and civil law countries in the region: in the common law countries as a general sentencing principle and under common law principles, and in the civil law countries under provisions in the penal code or criminal procedure code. Thus, in several civil law countries the law provided mitigating circumstances that could be taken into account by judges at sentencing, including the active assistance of offenders in detecting and investigating crimes, voluntary confessions or repentance, and preventing or reducing the harm caused by the offence. One country’s criminal code further specified that at least two extenuating circumstances had to exist before the courts could decide on a penalty at the lowest level stipulated by law. Plea-bargaining had been established in one common law country in the region, and enhanced measures to encourage the cooperation of offenders were under consideration in one State party following the civil law tradition.

16. While most States parties in the region had not adopted specific measures to ensure the protection of cooperating defendants, in some cases their protection and safety were governed by the general witness protection law and standard operating procedures for witness protection or the protection of informants under the anti-corruption law. Those protections specifically covered physical security and confidentiality measures.

#### **Eastern European States**

17. The situation was uniform in the 10 countries belonging to the group of Eastern European States, all of which followed the civil law tradition. In those countries, the criminal justice system was generally based on the principle of mandatory prosecution and the prosecution services were bound by the legality principle. In several countries, as in civil law countries in the other regions, provisions on the release from liability or punishment were found in the penal code for certain corruption offences, most typically active bribery and money-laundering, for persons who voluntarily informed the appropriate authorities about the commission of the offence (not necessarily before the offence was completed) and provided useful information and assistance for investigative and evidentiary purposes. As at least one review noted, however, those provisions provided only

basic incentives to encourage defendants to cooperate with law enforcement authorities and did not encourage the effective participation of collaborators of justice. Three specific country situations can be highlighted: in one case, the law permitted a release from criminal liability in cases where active bribery of public officials, trading in influence or commercial bribery had been reported, which applied to the bribe-giver, but not to the bribe-taker. This was meant to encourage persons who participated in criminal activity to provide useful information and assistance to law enforcement authorities for investigative and evidentiary purposes. In a second State, for bribery offences under the penal code, a bribe-giver or intermediary was released from criminal responsibility if he or she actively assisted in the detection or investigation of the crime or voluntarily reported the bribe-giving or intermediation in bribery to a prosecuting authority. In the third case, provisions in the criminal code on active bribery stipulated the non-punishment of persons who had offered, promised or given bribes and had informed the authorities immediately and voluntarily. By contrast, two States permitted the authorities to abstain from prosecution or dismiss a crime report only for members of a criminal organization who testified as witnesses, if their statement “was of importance” for the discovery of offences and other members of the criminal organization. While plea-bargaining systems had not been adopted in the region, agreements were reached in practice in several countries. In one State party, proceedings against a cooperating offender could be terminated under strict conditions, and in practice the prosecutor and the attorney representing the offender reach agreements on the proposed penalty, which need to be approved by the judge. In another State, the criminal procedure code provided for the conclusion of pre-judicial cooperation agreements with suspects or accused persons, which set out the conditions of responsibility depending on the person’s actions after the initiation of a criminal case or indictment.

18. Mitigating circumstances allowing for the cooperation of an offender to be considered during sentencing were also recognized in all countries in the region. For example, in one country, extenuating circumstances specified in the penal code included self-reporting by an offender, active assistance in detecting and investigating the crime, exposing and prosecuting other participants, and locating property obtained as a result of the crime. Plea bargaining had not been established in the region, though a draft law on plea bargaining had been prepared in one State, which had not had unanimous acceptance.

19. Cooperating offenders were generally considered to be witnesses for purposes of protection. Notably, in one State party the criminal procedure code stipulated the duty of prosecutors to ensure the safety not only of witnesses or victims of crime, but also of other participants in the criminal process, including cooperating defendants.

#### **Latin American and Caribbean States**

20. Most States in the group of five Latin American and Caribbean States followed a system of mandatory prosecution and had not adopted provisions conferring discretionary powers upon prosecutors in corruption cases. Prosecutorial discretion, to the extent established, was circumscribed in one country in the region to acts that did not seriously jeopardize the public interest, if the minimum penalty assigned to the offence did not exceed minor imprisonment and for offences not committed by public officials in the exercise of their functions. Similarly, in another country the

prosecution could refrain from instituting criminal proceedings only where the offences concerned did not seriously affect the public interest, although the principle of discretion to prosecute did not apply to offences committed by a public official in the exercise of his or her duties.

21. The situation in the region regarding the possibility of granting immunity to cooperating offenders was diverse. Only in two countries could immunity from prosecution be granted to persons who cooperated with justice: in one case through the exercise of prosecutorial discretion, in accordance with the rules of procedure for complex cases, and in another by the possibility of granting an exemption from punishment where a person involved in committing a crime engaged in effective cooperation. In one of those States, it was further noted that the procedure was governed by a process that did not require an agreement between the prosecution and the cooperating person, did not explicitly stipulate the possibility of granting immunity and did not apply where the maximum penalty exceeded two years' imprisonment or the offence had been committed by a public official. Conversely, three States parties in the region had not adopted measures to allow immunity from prosecution to be afforded to cooperating defendants, in one case because such measures had not been established and in the other case owing to a fundamental legal principle that forbade the granting of concessions with regard to sentences or immunity during the prosecution. In that jurisdiction, the same fundamental principle also precluded the possibility of judicial authorities mitigating the punishment of cooperating defendants, which had been established in all the remaining countries in the region, albeit sometimes limited to money-laundering, drug or terrorist-financing cases.

22. Legislation was pending in one State to enhance measures to encourage the cooperation of offenders, and provisions on immunity were under consideration in another State. The protection and safety measures available in the region to persons who cooperated effectively with law enforcement authorities were generally the same as for witnesses in criminal proceedings, although specific procedural safeguards, and provisions to encourage cooperation more generally, had not been established.

#### **Western European and other States**

23. Among the seven States parties belonging to the group of Western European and other States, divisions between civil law and common law jurisdictions were prevalent, similar to those in the African region and the Asia-Pacific region. Among the three common law countries, there were no legal barriers to the granting of discretionary immunity from prosecution or mitigated punishment to cooperating offenders, and one jurisdiction even provided that in determining the appropriate sentence upon conviction, courts must take into account the degree of cooperation with law enforcement. In that jurisdiction, decisions on immunity from prosecution could be taken by the prosecution and given to defendants in the form of written assurances that they would not be prosecuted, subject to conditions determined by the prosecution policy. Similarly, in another common law jurisdiction, a statutory framework had been established for the provision of immunity from prosecution and sentence reductions for defendants who cooperated in the investigation and prosecution of others. In the third State, the discretionary powers of the prosecution were of relevance in taking decisions on immunity for cooperating defendants, and

immunity could be granted to cooperating informants and defendants who agreed to become government trial witnesses. In addition to granting immunity, prosecutors often negotiated plea agreements with defendants to induce their cooperation by dismissing one or more of the charges or by recommending that the defendant receive a lesser sentence in exchange for his or her cooperation. The possibility of mitigated punishment also existed in the other common law States in the region. The protection and safety measures afforded to cooperating offenders were generally the same as for witnesses in criminal proceedings.

24. More generally, it should be noted that the common law countries in the group applied codes, principles or prosecution policies to govern the exercise of prosecutorial discretion, which were generally based on considerations such as strength of evidence, deterrent impact, public interest, adequacy of other remedies and collateral consequences, and did not include political or economic factors. Prosecutors could decline prosecution if there was no substantial public interest, if the person was subject to effective prosecution in another jurisdiction or if there was an adequate non-criminal alternative to prosecution.

25. More limited measures to encourage the cooperation of participating offenders were prevalent in the four civil law countries. In one case, only persons who had attempted to commit a felony or misdemeanour could be exempted from punishment if they cooperated effectively with the competent authorities, while in another State partial immunity could be granted in bribery cases. Conversely, in two States the law did not grant immunity from prosecution: in one State because such measures had not been established and the law prohibited granting advance assurances of favourable treatment, and in the other because the country adhered to the principle of mandatory prosecution, did not afford immunity from prosecution and did not recognize the “State witness” concept. However, the civil law countries generally allowed for the cooperation of accused persons with the authorities to be taken into account as a mitigating circumstance at the stage of sentencing by criminal courts, with the exception of one country where such measures were foreseen only for those who cooperated in drug trafficking or terrorism cases. The civil law countries in this group all followed systems of mandatory prosecution, under which limited discretionary powers, where established, could be exercised only in respect of “petty” offences, where a prosecution would appear unreasonable, or in “exceptionally and strictly defined cases”. Allegations of prosecutorial misconduct could also be brought before the courts at any time, including for selective prosecution based on a number of prohibited factors.

26. In the civil law jurisdictions, there were often no explicit policies in place to encourage persons who participated in the commission of corruption offences to supply information to the authorities, and no corresponding protection measures had been adopted. In one case, in particular, the witness protection law did not apply to cooperating defendants.

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