

**STATE OF IMPLEMENTATION OF THE  
UNITED NATIONS CONVENTION AGAINST CORRUPTION**



## **Criminalization, law enforcement and international cooperation**

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## Executive summary

The establishment and operation of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption have allowed for the collection, systematization and dissemination of an unprecedented wealth of information that is useful for furthering the goals of the Convention. The present study is based on that information and contains a comprehensive analysis of the implementation of chapters III (Criminalization and law enforcement) and IV (International cooperation) by the 68 States parties reviewed at the time of drafting as part of the first cycle of the Implementation Review Mechanism (2010-2015). More specifically, the study: (a) identifies and describes trends and patterns in the implementation of the above-mentioned chapters, focusing on systematic or, where possible, regional commonalities and variations; (b) highlights successes and good practices on the one hand, and challenges in implementation on the other; and (c) provides an overview of the understanding of the Convention and differences in the reviews, where they have emerged.

The study identifies legislative and institutional changes that have characterized the anti-corruption frameworks of most States parties in recent years and have led to a notable furthering of the purposes of the Convention. Combating corruption appears to rank among the highest priorities of many national Governments. In some countries, statutory amendments and structural changes have produced legislative and institutional reforms and enforcement, as well as strong frameworks for extradition, mutual legal assistance and law enforcement cooperation. The Convention has already played a significant role in triggering change and continues to serve as a basis for the establishment of effective anti-corruption regimes.

Nonetheless, substantial challenges remain. These range from the most rudimentary problems and practical impediments that are caused by a lack of experience, resources and training, to technical issues in the formulation of criminalization provisions or the incorporation of particular elements of the Convention into complex procedural structures. Gaps are more obvious in the implementation of chapter III of the Convention, in relation both to criminalization and law enforcement, given that in those areas, the Convention requires States parties to implement a particularly wide range of measures. Implementation of chapter IV appears to be more advanced, at least from a theoretical point of view, maybe as a result of its more compact and focused nature, and the self-executing character of many of its provisions. The biggest challenges regarding this chapter appear to be operational.

Numerous recommendations concerning the introduction of new provisions and laws were made during the reviews. Those included recommendations on considering the consolidation of existing legislation and the adoption of stand-alone legislative frameworks with anti-corruption measures. In many cases, recommendations were made on resource allocation and the capacities of anti-corruption bodies and institutions, enhancing law enforcement cooperation and inter-agency coordination, establishing suitable statistical data-collection systems or case law typologies, simplifying international cooperation procedures and promoting a culture of open dialogue between jurisdictions.

## Introduction

The establishment and operation of an effective intergovernmental process for the review of the implementation of the United Nations Convention against Corruption<sup>1</sup> are in many ways a significant achievement. The Mechanism for the Review of Implementation of the Convention constitutes a remarkable demonstration of the commitment of States parties to effectively preventing and combating corruption at the global level, and a demonstration of their determination to avoid the Convention being simply symbolic. It is an acknowledgment of the paramount importance of ensuring appropriate follow-up to international legal instruments, even when they are as broad and universal in scope as the Convention against Corruption. Furthermore, it offers the opportunity to collect, systematize and disseminate an unprecedented wealth of information that is useful for furthering the goals of the Convention, drawing from the experience gathered and lessons learned by States with different legal traditions and varied levels of economic and institutional development, from every region in the world.

The details of a concrete implementation mechanism were not included in the text of the Convention itself. Nevertheless, the question of what would be the appropriate features of such a mechanism was debated intensely during the negotiations of the instrument, and most delegations expressed their preference for a system emulating that of the United Nations Convention against Transnational Organized Crime, i.e. establishing a conference of the parties, formulating a sufficiently general mandate for that body and leaving details and procedures up to the conference to determine.<sup>2</sup> Indeed, article 63 provides the basic principles for a Conference of the States Parties to the United Nations Convention against Corruption. The Conference of the States Parties was convened for the first time in 2006, with a clear mandate to improve the capacity of and cooperation between States parties to achieve the objectives of the Convention and to promote and review its implementation. Pursuant to paragraph 7 of the above article, the Conference of the States Parties was given the authority to establish, if it deemed necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention. Additionally, the provision of information by States parties through such a review mechanism in order to give the Conference of the States Parties knowledge of implementation levels is foreseen under paragraph 5 of article 63.

After examining several possible compliance mechanisms, including review methods employed for other regional, sectoral and international instruments,<sup>3</sup> and

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<sup>1</sup> The Convention was adopted by the General Assembly in its resolution 58/4 of 31 October 2003 and it entered into force on 14 December 2005.

<sup>2</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* (United Nations publication, Sales No. E.10.V.13 and corrigenda), chap VII, para. 3 (p. 555).

<sup>3</sup> See the background paper prepared by the Secretariat entitled “Methods for the review of the implementation of the United Nations Convention against Corruption” (CAC/COSP/2006/5 and Corr.1); the background paper prepared by the Secretariat entitled “Parameters for defining the review mechanism for the United Nations Convention against Corruption” (CAC/COSP/2008/10); and the conference room paper entitled “Results of the informal consultations on the implementation of the United Nations Convention against Corruption held in Lisbon from 22 to 24 March 2006 and in Buenos Aires from 30 October to 1 November 2006” (CAC/COSP/2006/CRP.2).

after assessing the results of a voluntary pilot programme launched by the United Nations Office on Drugs and Crime (UNODC) for reviewing the implementation of the Convention in a limited number of countries,<sup>4</sup> the Conference adopted, at its third session, held in Doha in November 2009, the terms of reference of the Mechanism for the Review of Implementation of the Convention and established the Implementation Review Group to oversee the review process under the authority of the Conference.<sup>5</sup> Thanks to the strong momentum that had made the Convention possible, States parties managed to successfully conclude the relevant consultations, opting for a genuinely transparent, collaborative and pragmatic approach to the conduct of the reviews: each State party is reviewed by two other States parties, one of which is from the same geographical region and has, to the extent possible, a similar legal system. Governmental experts of the reviewing States carry out, in accordance with a set of guidelines endorsed by the Implementation Review Group, a desk review of the responses given to a comprehensive self-assessment checklist and of any supplementary information provided by the State party under review. This desk review is complemented by further means of direct dialogue, such as a country visit or a joint meeting at the United Nations Office at Vienna. The process leads to the drafting of a country review report, which is finalized upon agreement between the reviewing States parties and the State party under review.<sup>6</sup>

In drafting the terms of reference of the Mechanism, the Conference of the States Parties took particular note of 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 and of non-intervention in the domestic affairs of other States. It was decided from the beginning, therefore, that the review process would be of a technical nature, that it would be non-intrusive, inclusive and impartial, that it would not produce any form of ranking and that it would be non-adversarial and non-punitive. Indeed, the

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<sup>4</sup> See the background paper prepared by the Secretariat entitled “The pilot review programme: an assessment” (CAC/COSP/2008/9); and the note by the Secretariat on good practices and lessons learned from implementing the programme (CAC/COSP/2009/CRP.8).

<sup>5</sup> Conference of the States Parties to the Convention resolution 3/1 (contained in document CAC/COSP/2009/15). For the process leading up to the establishment of the Mechanism, see Conference of the States Parties resolution 1/1 (contained in document CAC/COSP/2006/12); Conference of the States Parties resolution 2/1 (contained in document CAC/COSP/2008/15); the report on the meeting of the Open-ended Intergovernmental Working Group on Review of the Implementation of the United Nations Convention against Corruption held in Vienna from 29 to 31 August 2007 (CAC/COSP/2008/3); the report of the Secretariat entitled “Work of the Open-ended Intergovernmental Working Group on Review of the Implementation of the United Nations Convention against Corruption” (CAC/COSP/2009/2); and the note by the Secretariat entitled “Recommendations of the Open-ended Intergovernmental Working Group on Review of the Implementation of the United Nations Convention against Corruption” (CAC/COSP/2009/6).

<sup>6</sup> In addition to the terms of reference, see the guidelines for governmental experts and the secretariat in the conduct of country reviews and the blueprint for country review reports and executive summaries (CAC/COSP/IRG/2010/7, annex I); the note by the Secretariat entitled “Overview of the review process” (CAC/COSP/2011/8); the notes by the Secretariat entitled “Progress report on the implementation of the mandates of the Implementation Review Group” (CAC/COSP/IRG/2012/4, CAC/COSP/IRG/2013/4, CAC/COSP/2013/13, CAC/COSP/IRG/2014/4 and CAC/COSP/IRG/2015/2); and the notes by the Secretariat entitled “Assessment of the performance of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption” (CAC/COSP/IRG/2014/12 and CAC/COSP/IRG/2015/3).

Mechanism follows an inherently positive approach and is not oriented towards evaluating performance or finding fault with compliance. Its purpose is to assist States parties in implementing the principles of the Convention. Accordingly, it is geared towards finding ways to foster and support national anti-corruption efforts, e.g. by providing opportunities to share good practices, and identifying, at the earliest stage possible, difficulties encountered by States parties in the fulfilment of their obligations, as well as needs for technical assistance. In this spirit, the final product of each review usually includes recommendations, conclusions or suggestions made by the experts and discussed and agreed with the country under review, as well as any plans or commitments formulated by the reviewed State.<sup>7</sup>

The phases, cycles and duration of the review process are determined by the Conference of the States Parties, as are the scope, thematic sequence and details of the review. At its third session, the Conference decided that each implementation review phase would be composed of two review cycles of five years each, and that one quarter of the States parties would be reviewed in each of the first four years of each review cycle. The first cycle, covering chapters III (Criminalization and law enforcement) and IV (International cooperation), began in 2010. During that cycle, the Secretariat, in accordance with paragraphs 35 and 44 of the terms of reference, submitted to the Implementation Review Group, on a regular basis, thematic implementation reports and regional supplementary addenda, in order to compile the most common and relevant information on successes, good practices, challenges and observations contained in the country review reports, organized by theme.

The first cycle of the review process has been concluded and a significant number of reviews have been done. It is therefore time to proceed with a general assessment of the state of implementation of the Convention, as part of the tools aimed at enhancing the knowledge of anti-corruption stakeholders, gaining full understanding of the Convention provisions, updating anti-corruption policies and priorities and creating a global benchmark against which future trends can be detected and progress can be measured.

The present study<sup>8</sup> builds on the thematic reports described above and offers a comprehensive analysis of the implementation of chapters III and IV of the Convention by States parties under review in the first cycle of the Implementation Review Mechanism. It is based on information included in the review reports on 68 States parties that had been completed, or were close to completion, at the time of drafting. More specifically, the present study has been prepared in order to:

(a) Identify and describe trends and patterns in the implementation of chapters III and IV of the Convention, focusing on systematic or, where possible, regional commonalities and variations. By summarizing the different solutions available to address the issues arising in the Convention, the study presents a range of policy options available to States parties;

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<sup>7</sup> On the language and typology of the recommendations made in the review reports, see the report prepared by the Secretariat containing a thematic overview of recommendations made with regard to the implementation of chapters III and IV of the Convention (CAC/COSP/IRG/2014/10).

<sup>8</sup> A preliminary draft of the present study was made available to the Conference of the States Parties at its fifth session, as conference room paper CAC/COSP/2013/CRP.7.

(b) Highlight successes and good practices on the one hand, and problems and challenges on the other, as a means of facilitating and streamlining the implementation efforts of States parties. The study is aimed at identifying problems and challenges, particularly in relation to existing legislative and implementation gaps and, to a lesser extent, regarding capacity, resources, training and similar practicalities. For reasons of convenience, the most noteworthy good practices and/or prevalent current challenges relating to each provision are highlighted separately (in text boxes and at the end of each provision). Additionally, the study draws on examples of implementation emerging from the reviews that are considered illustrative, representative or noteworthy. Issues relating to technical assistance are not included in the study;

(c) Provide — to the extent possible and taking fully into account the *Legislative Guide for the Implementation of the United Nations Convention against Corruption*<sup>9</sup> and the *Technical Guide to the United Nations Convention against Corruption*,<sup>10</sup> the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* and a range of other United Nations documents pertaining to its application — an overview of explanatory observations on the implementation of the provisions of the Convention, based on the significant input and findings of the States parties under review and the governmental experts who contributed to the country review reports. For this purpose, the study includes remarks on the understanding of the above actors of the concepts contained in the Convention, as well as on the legislative intention of each provision.

The study follows the text of the Convention and is structured in two parts, one for each chapter under review. The first part, covering chapter III of the Convention, is subdivided into the following chapters: Criminalization, Measures to enhance criminal justice and Law enforcement. The second part of the study, covering chapter IV of the Convention, is subdivided into the following chapters: Extradition and transfer of sentenced persons, Mutual legal assistance and transfer of criminal proceedings and Law enforcement cooperation.

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<sup>9</sup> 2nd ed. (Vienna, 2012).

<sup>10</sup> UNODC and United Nations Interregional Crime and Justice Research Institute (Vienna, 2009).



# **PART ONE: CRIMINALIZATION AND LAW ENFORCEMENT**

## **General observations**

### **1. Implementation effects**

In ratifying the United Nations Convention against Corruption, States parties have made a significant commitment towards fighting corruption and implementing the necessary reforms in their domestic legal and institutional frameworks, even if progress is sometimes observed to be slow. Several countries have drafted or introduced new legislation for the purpose of fulfilling their criminalization and law enforcement obligations under chapter III of the Convention (e.g. widening the range of and increasing the penalties for corruption offences; aligning national provisions regarding the definition of public officials with article 2 of the Convention and, in particular, equating the treatment of members of parliament and other public officials; introducing the offence of foreign bribery; criminalizing self-laundering; introducing a regime governing the liability of legal persons for offences established in accordance with the Convention; expanding the protection of witnesses and victims; and strengthening the mandates and functions of specialized anti-corruption authorities). In this context, concepts that were new in some jurisdictions, such as “illicit enrichment”, were analysed in order for States parties to gain an understanding of their content and enable the implementation of the relevant Convention provisions.

In addition to the above-mentioned implementation measures, the Convention has triggered concerted and wide-ranging efforts to assess the anti-corruption regimes of States parties, identify areas where national capacities are lacking and plan for future action. For example, in at least three countries, comprehensive action plans on implementation of the Convention have been approved by national Governments. These include actions such as setting up implementation road maps and establishing ad hoc working groups that include representatives of various branches of Government, academia and civil society. In another State, the authorities have initiated a governance and anti-corruption project, aimed at equipping it with the laws and institutions necessary to ensure conformity with the Convention. This project is based on a set of working parties, which include a Convention against Corruption review team responsible for, among other tasks, assessing the current state of implementation of the Convention provisions, highlighting shortcomings and achievements and identifying the issues where rapid progress could be made to foster national capacities.

Initiatives of this kind are also being launched with the support of international organizations or development agencies of individual countries. For example, the technical cooperation agency of one country provided the funding for a number of States parties to conduct their own gap analysis with respect to the Convention, putting them in a position to combine their efforts and share their experiences with one another.<sup>1</sup> UNODC, in particular, has provided wide-ranging legislative and capacity-building technical assistance to States parties upon request, in the context

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<sup>1</sup> See the background paper prepared by the Secretariat on South-South cooperation in the fight against corruption (CAC/COSP/2009/CRP.6), para. 62.

of the implementation review process, or within the framework of mutually reinforcing thematic and regional programmes, and has developed a number of tools facilitating the implementation of the Convention, including an online legal library of anti-corruption legislation and jurisprudence, case studies, guides and policy analyses.<sup>2</sup> Finally, the goals of the Convention are being promoted through the organization of major events, such as the Latin American and Caribbean Regional Conference on the Implementation of the Convention that took place in La Paz in December 2007<sup>3</sup> and the first South-South Anti-Corruption Regional Conference, which was held in Mombasa, Kenya, in May 2011.<sup>4</sup>

Naturally, these developments did not take place in a vacuum; they reinforced pre-existing criminal systems and anti-corruption mechanisms. Many countries had already made considerable efforts to reform their legal systems to address issues of corruption, in anticipation of their upcoming reviews, as well as by reason of their participation in other international and regional initiatives focusing on corruption-related matters, e.g. in the framework of the Council of Europe, the Organization of American States, the European Union, the Organization for Economic Cooperation and Development (OECD), the Financial Action Task Force and similar regional bodies, the African Union, the Economic Community of West African States and the Southern African Development Community. As the most comprehensive and the only truly global international criminalization instrument in this field, the Convention complements the legal frameworks at the disposal of States parties and provides a strong incentive for progress in and the finalization of anti-corruption reforms. Hence, as the result of this evolving process of countries' accession to major international treaties against corruption and their membership in other anti-corruption monitoring mechanisms, culminating in their ratification of the Convention and participation in the Implementation Review Group, the criminalization of a wide array of corruption-related conduct was identified as a significant strength of national legislation in the country reviews of some States parties.

In general, national efforts to strengthen criminal legislation against corruption were praised and national authorities were urged to continue such efforts with a view to further improving their existing anti-corruption standards. National authorities were invited, in particular, not to rely solely on external evaluations in the context of the various anti-corruption mechanisms, but also to conduct formal internal assessments of the effectiveness of implementation measures for the provisions of the

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<sup>2</sup> An overview of the wide-ranging activities of UNODC in delivering technical assistance in support of the implementation of the Convention, can be found in documents CAC/COSP/2011/10 and Corr.1, CAC/COSP/IRG/2012/3, CAC/COSP/IRG/2013/2 and Corr.1, CAC/COSP/2013/4 and CAC/COSP/IRG/2014/2, and in conference room paper CAC/COSP/IRG/2011/CRP.7. See also the note by the Secretariat on the impact of the Implementation Review Mechanism (CAC/COSP/2013/14); and UNODC, "Thematic programme: action against corruption, economic fraud and identity-related crime (2012-2015)" (Vienna, 2012).

<sup>3</sup> See the annex to the note verbale dated 22 January 2008 from the Permanent Mission of Argentina to the United Nations (Vienna), addressed to UNODC (CAC/COSP/2008/14).

<sup>4</sup> See the background paper prepared by the Secretariat on South-South cooperation in the fight against corruption (CAC/COSP/2011/CRP.2), para. 46.

Convention.<sup>5</sup> Furthermore, due emphasis was placed on the need to ensure complementarity, coherence, robustness and consistency in the overall anti-corruption legal framework. As shown during the implementation review process, hurried and overstretched legislative changes may result in discrepancies and legal uncertainties and may have the opposite effect to the one meant to be achieved by the criminalization requirements of the Convention. It is therefore recommended that States parties with fragmented, complicated and overlapping legal regimes consider consolidating and simplifying the different provisions that target acts of corruption.

## **2. Definition of a public official (article 2)**

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

### *Definitional concepts*

There are a number of (barely distinguishable) methods used by States parties to define a public official. Most have incorporated an explicit definition of the relevant term in the legislation (usually the penal code) typically used for the purposes of all offences related to the exercise of official duties, not only legislation used for corruption offences. In most cases, this definition covers any person performing a public function, entrusted with a public task or holding a responsible official position, or to whom public functions have been assigned, regardless of whether the person has been elected or appointed, is paid or unpaid and is appointed on a permanent or a temporary basis. Under this concept, it is immaterial under which legal status a person performs tasks in the public service. What is decisive is that he or she accomplishes the tasks of the State, irrespective of the nature of the contractual relation between the public sector and the individual concerned. In rare cases, the law also focuses on officials with a leadership role, a decision-making authority, the right to deal with public property or financial resources or a position that involves a specific responsibility of custody, maintenance, supervision, control, inquiry or punishment in a public entity, in which cases stricter penalties are applied.

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<sup>5</sup> In this context, see also Pauline Tamesis and Samuel De Jaegere, eds., “Guidance note: UNCAC self-assessments — going beyond the minimum” (Bangkok, United Nations Development Programme, 2010).

*Examples of implementation*

Two States parties, although not using a clear-cut definition of “public official”, stipulate in their bribery offences, in identical terms, that the advantages should be directed at a “person bestowed with public authority, discharging a public service mission or vested with a public electoral mandate”.

In another jurisdiction, although the penal code does not contain an autonomous definition of “public official”, the exact scope of the term has been determined through established case law. It is understood to include anyone who has been appointed by the public authorities to a public position, in order to perform a part of the duties of the State and its bodies. Whether the person can also be classified as a public official in terms of employment law is irrelevant. Instead, it matters that the person has been appointed under the supervision and responsibility of the Government to a position whose public nature cannot be denied. In addition to the application of the aforementioned criteria, it was explicitly specified by law that the term includes members of general representative bodies, arbitrators and all individuals belonging to the armed forces.

A second approach, followed by a smaller group of States parties, is to dispense with the “functional” definition given above, and opt for a more comprehensive enumeration of either the various types of office holders that fall under the notion of a “civil servant” or a “public official”, or of the public bodies for which a person has to work in order to be considered a public official. Interestingly, some countries in the first group also use exhaustive lists of institutions or employees thereof that may be liable to prosecution for corruption offences; these lists have been designed to complement the functional definition employed in relation to offences committed during the exercise of official duties. This method appears to offer more guarantees that all the possible categories of persons are included, as envisaged by the Convention. However, using only lists of offices or office holders may not be adequate. States parties should examine the possibility of defining the term “public official” by mentioning at least some general criteria distinguishing the persons in question (e.g. the character of their duties or the applicable appointment procedure), without relying exclusively on an exhaustive enumeration, as this presents the danger that some categories of persons performing public functions or providing public services would not fall under such a definition.

Finally, a few States parties make no distinction between public officials and private employees for the purposes of corruption offences. In four countries, the law uses the terms “official” or “functionary” (*personne chargée d’une fonction*) — encompassing public officials as well as private sector managers and employees or representatives — or refers to anyone who is employed or performs a function, in which case a function can be the result of any kind of agreement, contract, election, duty or mandate. In four further States parties, the law, following a traditional concept of common law jurisdictions, uses the term “agent” to designate all persons employed or acting for another, in any capacity whatsoever. Nevertheless, in some of those cases it seems that other terms, such as “public servant”, “public officer” and “officer of a public body”, are also employed for the purposes of bribery and other corruption-related offences, a situation which raises concerns of a potentially inconsistent use of terminology and has led to recommendations with regard to addressing that problem.

In a more advanced version of the above-mentioned uniform concept, two other States parties dispense with the need for a definition of a public official by encompassing in their legislation any person receiving an improper advantage in connection with a post, office or commission or in connection with the procurement of a thing of general interest. In the first case, the terms “post, office or commission” are wide-ranging and embrace any type of employment, office or commission for public or private employers and clients, including persons holding political offices, board appointments or honorary offices, office holders in associations, unions and organizations, members of parliament, local councils and other elected representatives, as well as judges and arbitrators. In the second case, a “thing of general interest” is defined as an interest that transcends the framework of individual rights and interests of individuals and is important for society. Based on this concept, the offence of committing a bribe is not dependent on the finding that the individual receiving the bribe is acting as a public official, although it was noted that a heavier punishment may be applied where the offender is found to be attempting to bribe or actually bribing an individual acting in that capacity.

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

In a significant number (more than one quarter) of States parties, the relevant laws were found not to definitively cover all categories of persons enumerated in the Convention or were found to use inconsistent terms to define the class of covered officials. In one case it was stated that the term “public officer”, used in the legislation covering bribery offences, related to “a person who works for the State”, without further clarification. With respect to the offence of abuse of functions, in particular, it was noted in one jurisdiction that prosecutions often resulted in acquittals. This was due to an established court practice of excluding liability for a wide range of persons who were not considered as officials, leading to the identification of the need for a new criminal law approach. In this context, States parties are advised to avoid multiple or overlapping definitions with divergent contents located in different pieces of legislation (e.g. the penal code and a special anti-corruption law), as these are likely to create problems of coherency and doubts as to the applicable terms.

#### *Members of the judiciary*

Not all States parties view members of the judiciary as occupying a position equal or equivalent to that of a regular public official. Accordingly, in some cases, separate corruption offences apply only to judges, public prosecutors, jurors, arbitrators and other persons involved in the judicial process, and these usually (but not in all circumstances) carry higher penalties in comparison with general corruption offences. While this practice in principle reflects the predominant

position historically occupied by the bribery of judges (especially its passive version) as the subject of criminal legislation in this field, it does not run contrary to the requirements of the Convention. However, caution should be taken: given that article 2, subparagraph (a), specifically addresses persons holding a judicial office, any special offences of this kind should include all elements of the offences established in accordance with the Convention, as in the case of offences involving other public officials. Thus, the offence of bribery should not be limited to particular acts or omissions in the exercise of judicial duties (e.g. deciding a case one way or another or pronouncing, delaying or omitting a ruling or sentence relating to a case under adjudication), leaving other official duties unaddressed.

The similar practice of some States parties of including members of the judiciary (or other equivalent categories of public servants, such as members of the national anti-corruption agency) in the general definition of a public official and applying the basic corruption offences to them, but also having separate offences, e.g. for the aggravated case of a judge receiving a bribe regarding a ruling pronounced by him or her, in relation to a case which has been submitted to his or her judgement or with a view to obtaining a conviction in a case, should be considered acceptable.

#### *Parliamentarians*

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

Similarly to the situation with members of the judiciary, in some jurisdictions, the bribery of members of parliament is regulated, albeit separately from bribery involving public officials. This was the case in one of the States parties where members of parliament are not considered as public officials. Again, as with members of the judiciary, the relevant practice can be considered as being in accordance with the Convention, as long as all elements of the corresponding Convention provision are covered and the scope of the special offence involving members of parliament is not restricted to particular acts. For example, in the above-mentioned State party, the relevant provisions apply only in cases where the benefit is intended to induce the member of parliament to act in his or her parliamentary mandate in such a manner that a matter being considered or to be considered by parliament would be decided in a certain way. This does not appear to cover cases where the bribe is intended to cause the member of parliament to act or refrain from acting in other ways that might breach the duties of his or her mandate or that do not involve a parliamentary vote, e.g. during considerations of whether to

raise an issue in parliament or during parliamentary committees, etc. Therefore, the offences specified were found to fall short of the requirements of the Convention.

#### *Military personnel*

In rare cases, separate bribery offences are also applicable to members of the military, without seeming to have caused any additional problems.

#### *Persons performing public functions for public enterprises*

The extent to which persons performing public functions for public enterprises can be held liable for bribery offences is not always clear and in at least one State party this category was not included in the definition of a public official. However, this was not a point that was dwelled upon in the majority of reviews. Exceptionally, a number of States reported having extended the definition of public officials, especially for the application of the bribery offences, to the employees and/or executive officers of all State-owned or State-controlled enterprises and organizations, independently of the public nature of their functions.

## **Chapter I. Criminalization**

### **A. Bribery in the public sector**

#### **1. Bribery of national public officials (article 15)**

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

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

In contrast to active bribery, the offence of passive bribery naturally presupposes as a perpetrator a public official, as defined in article 2, subparagraph (a). Interestingly, in at least five States parties, the relevant provision (and in one case also the corresponding active bribery provision) is also applicable to someone expecting or due to become or who has prospects of an appointment as a public servant, expanding thus the scope of the offence beyond the minimum requirements of the Convention. It should be noted, that in two of those cases, the recipient of the bribe has to actually become a public official afterwards in order to be considered liable for the relevant behaviour. Finally, in one State party, the bribery provisions also explicitly cover former public officials, to the extent that a gift, promise or service is provided, offered, etc. in response to or in connection with a service that the former official carried out or failed to carry out in the execution of his or her duties.

#### *Basic criminal behaviour*

The structures and terminology used to establish and describe the basic unlawful behaviour in bribery offences vary widely among States parties. As to the methods adopted, the majority of States parties, including all countries even loosely affiliated with the civil law system, tend to follow an approach similar to the one set out in article 15 of the Convention, and provide descriptions of the unlawful behaviour that are intended to be restrictive and concise. For example, in one case, the relevant legislation and article 15 are almost identical, which reviewers considered a good practice.

#### *Example of implementation*

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

Any public official who asks or accepts for himself or for a third party a promise or a gift to perform or to abstain from any of the activities of his office, shall be penalized by incarceration for a period not exceeding 10 years and a fine equivalent to double the value of what he is given or promised, provided that it shall not be less than [...]. The provision of this article shall apply even if the activity provided in the preceding paragraph is not included within the activities of the office of the receiver, yet he assumes or thinks the same. Likewise, the provision of this article shall apply even if the receiver intends not to perform the activity or to abstain therefrom.

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

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

*Example of implementation*

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

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

Penalty

Individual: imprisonment for 10 years and/or 10,000 penalty units.

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

- (2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew:
  - (a) that the official was a [...] public official; or
  - (b) that the duties were duties as a [...] public official.
- (3) A [...] public official is guilty of an offence if:
  - (a) the official dishonestly:
    - (i) asks for a benefit for himself, herself or another person; or
    - (ii) receives or obtains a benefit for himself, herself or another person; or
    - (iii) agrees to receive or obtain a benefit for himself, herself or another person; and
  - (b) the official does so with the intention:
    - (i) that the exercise of the official's duties as a [...] public official will be influenced; or
    - (ii) of inducing, fostering or sustaining a belief that the exercise of the official's duties as a [...] public official will be influenced.

Penalty

Individual: imprisonment for 10 years and/or 10,000 penalty units.

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

It should be noted that the first model appears to be significantly more widespread and is followed in principle by several countries with a common law system, while five other States parties appear to have overlapping offences, each one sometimes following a different concept or adhering to a different model. In such cases, it was generally recommended that the unification of corruption-related laws be considered, which would ensure consistency in the application of the bribery offences, eliminate doubts about their scope and mitigate the risk of duplicate investigations and jurisdictional conflicts.

Interestingly, in two of the common law countries mentioned above, the relevant articles of the penal code (and in general, all offences contained therein) are complemented by so-called “explanations” and “illustrations” of the way they are applied in practice — an unusual feature that could be adopted, for example, in the explanatory report of a law; this was identified as a good practice as it was seen as a useful means for clarifying the scope of the offences. A similar practice is followed in some countries from the Group of Eastern European States and the Group of Asia-Pacific States. Those countries use notes as an integral commentary accompanying the text of certain provisions of their criminal laws.

*Successes and good practices*

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

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

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

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

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

Both methods of describing the above-mentioned criminal conduct can be equally effective in satisfying the obligations prescribed by the Convention. However, in a significant number of cases, some of the basic elements of the offensive behaviour contained therein (promise, offering or giving on the active side; solicitation or acceptance on the passive side) seem to be missing altogether. In particular, while

the elements of “giving” and “acceptance” rarely pose a problem, in several States parties, the promise of an undue advantage (i.e. undertaking to provide or holding out the prospect of such an advantage) is not explicitly covered or is indirectly covered — through doctrinal and case law interpretations — as preparation or attempt to commit a crime, or under related (or, from a linguistic point of view, interchangeable) concepts, such as the “offer” of a bribe. Additionally, several States have adopted a “conduct-based” approach whereby only the actual exchange is the subject of the offence, while an offer of bribery is not explicitly covered, although in most of these cases the act of offering could be potentially prosecuted as an attempted or “incomplete” crime or a “preparation” thereof. Finally, there are jurisdictions where the element of “solicitation” is also missing from the description of the offence.

In view of the above, numerous recommendations were issued with regard to proceeding with the necessary legislative amendments or at least developing guidelines on judicial practice, or with regard to monitoring the way courts interpret the relevant provisions in the future. The evaluation of national legislation with regard to the wording of the applicable provisions should take into account article 30, paragraph 9, of the Convention, which contains the principle that the description of the offences established in accordance with the Convention is reserved to the domestic law of the States parties. Thus, it may be possible to cover related acts under the provisions of the general part of the national penal code, e.g. regarding preparation for or attempt to commit a crime, although it may warrant further study as to whether this approach can be a substitute for full criminalization.<sup>6</sup> Moreover, one should be aware of the fact that the use of such general provisions runs the danger of applying significantly lower sanctions and raises issues of disparate sentencing regarding comparable transgressions. This is the reason why the autonomous incrimination of the different forms of basic corrupt behaviour is generally viewed as a better practice. Having said that, the provisions on attempt and preparation that are used should be clearly delineated and not contain limitations (e.g. “subject to the condition that public danger results from the act”) or make exceptions (e.g. for “crimes of lesser gravity”) that restrict criminal liability as foreseen by the Convention.

States parties should ensure above all that, in the case of both active and passive bribery, the legislation and practice do not require demonstrating the existence of a corrupt agreement between the bribe-giver and the bribe-taker. The active offence should be considered as autonomous and not reliant on the agreement of the passive party, so that the simple offer or giving of the undue benefit suffices for holding the bribe-giver criminally liable; the criminal intent and guilt of the official as the bribe-taker is irrelevant. The contrary is true as well, since otherwise determining the guilt of the author of passive bribery would prejudice that of the bribe-giver. Moreover, requiring the demonstration of an underlying corrupt agreement would set the standard of evidence at an unreasonably high level, since such agreements are seldom formalized in a tangible manner. Theoretically, the only situation where an agreement would be important to substantiate is where an official is prosecuted for having made a deal (accepting a request or offer) but the bribe has not yet changed hands. In practice, however, these situations are rather marginal, since

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<sup>6</sup> See also *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 197.

corruption-related acts are by nature secretive and difficult to investigate. When cases are taken to court, the undue benefit has usually already changed hands.

The necessary autonomy between the active and passive bribery offences would appear not to exist in cases such as the one mentioned above, namely that of a State party punishing active bribery only as a participatory act (“abetment”) to the offence of passive bribery. Insofar as the punishment of abetting passive bribery would be dependent on the actual commission of the passive bribery offence, i.e. on the public official accepting, obtaining, agreeing to accept or attempting to obtain an undue advantage, the simple offer of a bribe, without the official agreeing to it, would remain outside the scope of the criminal law. In this respect, the State party concerned would fall short of satisfying the requirements of the Convention.

It should, however, be noted that in the particular jurisdiction that gave occasion to the present discussion, the law appears to allow a different viewpoint. The governmental experts conducting the review made no comment on the practice in question. Nevertheless, the national definition of abetment includes an explanation, according to which “to constitute the offence of abetment it is not necessary that the act abetted should be committed or that the effect requisite to constitute the offence should be caused”. In other words, the law punishes not only the “usual” participatory acts, but also the mere incitement (attempted instigation) of an offence, a practice that has been observed in other jurisdictions as well (see section F, subsection 2, below). According to this interpretation of the national legislation, no agreement between bribe-givers and unlawful recipients is necessary and the national provisions suffice for the purposes of the Convention.

#### *Indirect bribery*

In several cases, gaps were identified as to the coverage of indirect bribery involving intermediaries. It should be clear that, according to the Convention, it is not necessary for the briber to hand the undue advantage to the public official directly. Likewise, a promise of such an advantage does not need to concern a gift or service to be rendered by the perpetrator in person. It may also involve an understanding that, if the public official performs or omits to do a certain act, he will receive something from or through a third party.

As to the methods used to fulfil these requirements, some countries explicitly provide for the execution of the prohibited conduct through an intermediary, while others argue that they cover indirect bribery through the provisions on participation and/or the definition of principals (those who carry out the act by themselves or by means of another person whom they use as an instrument) in the general part of their criminal code. In five States with no explicit provisions, reference was also made to the preparatory works for the relevant legislation, or to decisions or resolutions of their supreme courts providing guidance on this issue and indicating that bribery may also be committed indirectly through an intermediary. These arguments were accepted as valid and the countries in question were considered as complying with the provision under review, to the extent that these general references remove any obstacles to prosecuting bribery offences involving intermediaries.

Unusually, in one State party, the penal code contains a stand-alone offence that specifically incriminates the conduct of an intermediary in cases where a bribe is

given to the intermediary and he or she fails to deliver it. Although it was confirmed that this could cover indirect bribery, this legislative practice was considered to be outdated and redundant. It was thus recommended that the State party in question reconsider the usefulness of maintaining it and consider the possibility of including in the bribery provisions, *expressis verbis*, the phrase “directly or indirectly”.

#### *Scope of the undue advantage*

In the Convention, the term “advantage” is intended to apply as broadly as possible and also to cover instances where intangible items or non-pecuniary benefits (for instance honorary positions and titles or sexual favours) are offered, insofar as they create or may create a sense of obligation on the side of the recipient towards the giver. In many cases, States parties use parallel or similar terms that are either coupled with expansive definitions or allow broad interpretations (such as “any gratification”, “any gift or consideration” or “gift or some other gain”), which reflect the spirit of the Convention and have even been identified as good practice.

#### *Examples of implementation*

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

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

This requirement has, however, proved to pose a problem in a considerable number of States parties. In three cases, the domestic bribery provision requires either the payment of cash or the transfer of property or else an element of economic or material benefit, which was interpreted to cover only money and benefits subject to some form of pecuniary valuation and not any other undue advantage. A similar issue was noted in two States where a “value-based” approach is followed in national jurisprudence; in this instance, bribery is only punished when it involves material advantages. In another case, it was unclear whether the phrase “any valuable thing” in the national law includes intangible items and thus adequately covers undue advantages. Other examples of ambiguities include a State party where the meaning of “bribe”, as used in the public bribery offence, is unclear and there is uncertainty if this notion corresponds to the term “illegal benefit”, used in the private bribery offence. Doubts also remain in another country as to whether the jurisprudence might interpret the term “gift” as excluding non-quantifiable benefits. In all of the above cases, recommendations were made on broadening the scope of the applicable provisions or ensuring that the domestic legislation is interpreted in a way that addresses benefits of a non-material nature. Ambivalent and imprecise jurisprudence is not deemed satisfactory. States parties should strive to provide for certainty, clarity and uniformity in the definitions contained in the bribery offences

and to address issues of potential inconsistencies in the manner that such definitions are interpreted domestically, at the levels of both legislation and application of criminal laws.

The fact that the benefits involved in a corrupt transaction exceed a certain monetary value functions as an aggravating circumstance in some jurisdictions, although this cannot always be considered an indication of the severity of the crime. On the other hand, in one State party, the legislation contains a specific limitation for all acts of bribery falling below a certain threshold amount; in this case the perpetrator is only punished if the act causes “serious consequences” or is the subject of repeated violations. Although this provision is possibly aimed at the exclusion of socially “adequate” advantages, as discussed below, it should be treated with caution as it leaves room for considering all offerings of small advantages as justified and acceptable, regardless of their motivation. It is one thing to prohibit all benefits above a certain threshold, allowing some flexibility for gifts not exceeding it, and quite another to allow all benefits below a certain threshold, demanding the fulfilment of further conditions to render them punishable.

#### *Socially “adequate” advantages*

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

While it is true that in one State the proposal was made to eliminate this exemption and prohibit the acceptance of any gifts or tokens of appreciation in order to avoid interpretational challenges about acceptable values and amounts, and although in another State the law actually precludes a public officer from receiving gifts in the discharge of his or her official duties and disallows evidence that any such gratification is customary in a given profession, trade, vocation or calling or on a social occasion, the explicit or implicit distinction between genuine gifts and undue advantages should be seen as being in accordance with the Convention. Its application in practice can be facilitated by clear administrative rules and guidelines on the items a public official may receive without running contrary to his or her duties or undermining the authority of his or her office, as well as by clear instructions on the factors that should be taken into consideration by prosecutors in determining, on a case-by-case basis, whether a gift should entail punishment and whether a criminal prosecution is expedient or not. In this respect, inflexible statutory distinctions based on the monetary value of the gift should be treated with caution, on the one hand because they could easily be overhauled by the ever-changing social realities regarding what value would be considered appropriate in a given instance, and on the other hand because they could have the undesirable effect that gifts entailing relatively small advantages for the public servant but given for official acts that must certainly be considered reprehensible, would, by definition, fall outside the scope of the criminal provisions.

*Examples of implementation*

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

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

The bribery provisions of a further country include the prefix “undue”, albeit not with regard to advantages offered for performing or refraining from performing an official act in violation of the official’s duties, since these would never be considered as socially “adequate”. Where the bribe is intended to influence the activity of a public official with no breach of duty involved, the following advantages are not considered “undue”:

- (a) advantages, the acceptance of which is explicitly permitted by law, or which are granted in the framework of events which are being attended because of an official or objective interest;
- (b) advantages for charitable purposes, over the usage of which the official does not exercise any influence;
- (c) if there are no laws in the sense of item (a), advantages of minor value given in accordance with local customs, unless the act is committed on a professional scale.

Finally, a State party gives the definition of a “casual gift” as follows:

Any conventional hospitality of a modest scale or unsolicited gift of modest value offered to a person in recognition or appreciation of that person’s services, or as a gesture of goodwill towards that person, including any inexpensive seasonal gift offered to staff or associates by public and private bodies or private individuals on festive or other special occasions, which is not in any way connected with the performance of a person’s official duty so as to constitute an offence.

*Third-party benefits*

Under article 15, States parties are required to prohibit the giving of a gift, concession or other advantage to, or for the benefit of, a person or entity other than

the public official, such as a relative or political organization. Nevertheless, in several countries there are gaps as to the accrual of third-party benefits: in one jurisdiction, provisions criminalizing bribery aimed specifically at obtaining the performance of acts not contrary to the duties of national public officials do not cover all instances of undue advantages for third parties. In three further cases, it was not clear whether the phrase “for himself or for any other person” also included all other entities, as stipulated in the Convention, and especially political parties. Finally, and most importantly, in more than one third of States parties, the conduct of active and/or passive bribery is described without any further specification of whether the gratification is for the agent himself or herself, or for a third party or entity. In some of these cases, particularly where this is supported by the pertinent domestic jurisprudence, it could be argued that third-party benefits are automatically included or perform the same function as undue advantages for personal gain, since no mention of the purpose of the bribe is made. Nonetheless, it was recommended that any grounds for ambiguity should be removed and that all relevant provisions should be aligned, in order to ensure consistency in their application.

Such a need was detected, for example, where the element of a third-party beneficiary is absent from the bribery offence but is foreseen in other parts of the legislation (e.g. the trading in influence offence), as well as where there is specific reference to a third-party beneficiary in the passive bribery provision, but not in the active bribery provision. In respect of this last case, the national authorities of one State argued, by virtue of a theory of mirroring provisions, that the offence of active bribery should be considered to implicitly contain the element of third-party beneficiaries as well. However, besides the important fact that the jurisprudence provided was not entirely clear on this point, the reasoning of the authorities seemed to allow, by analogy, the implementation in an active bribery case of another provision dealing with the passive form of such bribery, to the detriment of the accused, and this appeared to be problematic from a legal point of view. Moreover, such an interpretation might not suffice in cases of parallel proceedings on both active and passive bribery, whereby the criminal proceeding on passive bribery is closed (for any reason, such as the death of the accused), while the criminal proceeding on active bribery continues.

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

#### *Action or omission by the recipient*

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

According to the Convention, the commission of the crime of bribery should not be dependent on whether the action or omission by the public official was realized as

planned. The mere offer, promise, acceptance of the promise, reception, etc., of the benefits should suffice. Indeed, most, if not all, States parties have adhered to this principle. Interestingly, in one State party, the law foresees a higher penalty for the public official if he or she proceeds with the performance of the envisioned act. Nonetheless, in the same State, the active bribery offence makes no general reference to an act or omission by the recipient, but is limited only to instances where a person offers a bribe “demanding an injustice, buying a vote, or seeking to achieve or assure by corruption the result of any pretension”.

#### *Ex post facto payments*

In some jurisdictions, it is a criminal offence to give or accept an undue advantage, even if this happens after the public official has carried out (or omitted to carry out) an act, as a reward or a token of gratitude (succeeding rewards or bribery a posteriori). This goes further than the requirements of article 15, which covers bribes offered as an inducement to future acts or omissions by the recipient, and can make the prosecution easier in cases of repeated offences or when agreement has been reached that the bribe would be paid after the accomplishment or omission of an official act and the prosecutorial authorities have difficulties in proving the existence of such a previous agreement.

In the same vein, the laws of two States from the Group of African States do not punish ex post facto bribes per se, but use them to establish a rebuttable presumption of fact, in the sense that they consider the acceptance or offer of a valuable consideration on account of an official act previously performed as proof that an act of corruption took place beforehand.

#### *In the exercise of official duties*

The Convention refers to acts or omissions by the recipient “in the exercise of his or her official duties”. Most States parties use the same terms, or terms which were deemed equivalent, such as “in relation to his or her functions”, “in respect of the duties of his or her office” or “inherent to his or her official functions”. Additionally, in some cases, the law contains special offences or separate provisions addressing specific situations, such as bribery aimed at helping or impeding another person from doing business with the State, bribery in relation to the promotion, administration, execution or procurement of a contract with a public body, or bribery affecting the integrity of public, commercial betting systems in relation to sports and other events and competitions. One possible limitation concerns the common law countries that build their bribery offences around the principal-agent relationship and cover acts of omissions in relation to the principal’s affairs of business. This wording was not deemed fully satisfactory for the purposes of the Convention, although its precise practical implications remain unclear and may warrant further monitoring.

Article 15 does not extend to the offering or acceptance of advantages for the performance by the recipient of an act outside the general framework of official activities, in a capacity other than the one of a public official (e.g. providing an expert opinion in a private capacity). Indeed, few (if any) countries appear to have criminalized such behaviour. Equally, the Convention does not oblige States parties to include in their bribery provisions benefits designed to induce an official to perform an act other than those that fall within the scope of his or her official duties,

but which he or she nonetheless has an opportunity to perform as a result of his or her official function. In one case, a different opinion was expressed and the question was raised as to whether the non-criminalization of bribery for such acts is in full compliance with article 15, considering that the latter requires the criminalization of the acts of the public official, if committed “in the exercise of his or her official duties”, regardless of whether they fall within or without the scope of the public official’s competence. The Convention does not refer in general, however, to corrupt transactions taking place while the official exercises his or her duties, but to bribes aiming at actions or omissions by the official in the exercise of his or her concrete duties, i.e. actions or omissions that fall within the official’s competence, or his or her statutory remit.

Independently of this, it is certainly helpful for the purpose of enabling successful and effective prosecution to develop consistent case law regarding whether it is necessary for the actions of the public official to fall within the scope of his or her functions or whether it suffices that these functions enabled him or her to carry out the desired act. Furthermore, in cases where national law appeared to cover this last scenario or measures had been proposed to this effect, it was often pointed out that this could be considered as a success or good practice for the purposes of the Convention. This view is corroborated by the fact that part of the questionable behaviour can be considered as falling under the optional requirements of article 18 of the Convention.

*Successes and good practices*

The criminal code of one State criminalizes active and passive bribery for the legal or illegal performance or omission by a public official within the scope of his or her authority. However, the national authorities reported that the new criminal code explicitly criminalized acts and omissions not only within, but also outside, the scope of the public official’s authority. This was found to be conducive to ensuring compliance with article 15 of the Convention.

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

In almost one third of the States parties, most of them with a civil law background, a distinction was drawn, in some cases more explicitly than in others, between a gratuity (expediting or facilitating an otherwise lawful administrative procedure — hence also the commonly used term “facilitation payments”, which is not included in the Convention) and a bribe *sensu stricto* (where the intended purpose is to induce the official to act in breach of his or her duty or obligation), with the acceptance or giving of the latter punishable by a more severe penalty. Certain governmental experts expressed reservations about this and even issued

recommendations to abolish it, or to harmonize the applicable sanctions, since the Convention does not foresee such a distinction. On the other hand, in most reviews no such question was raised and in one case it was even considered a challenge that the new criminal code, contrary to the previous one, does not distinguish between taking a bribe and receiving an undue advantage. Indeed, the consideration of a bribe intended to induce a breach of duty as an aggravating circumstance is a relatively common feature of the criminal law system of civil law countries, and can be seen as not being in breach of the requirements of the Convention, as long as it does not in any way involve some kind of approval of facilitation payments.

It is a different matter if the national law extends only to bribes, leaving facilitation payments outside the scope of criminal liability, or if the provisions on bribery aiming at obtaining the performance of acts that would not be contrary to the duties of the public official are lacking in scope (e.g. do not include advantages given in favour of third parties). It is also a different matter if the offence includes additional objective requirements, such as causing damage to the interests of the State and society or to the rights and interests of citizens, which may limit its application. In such cases, the State party clearly falls short of fulfilling the Convention requirements.

#### *Investive corruption*

Some States parties go further than the minimum requirements of the Convention by also covering (often with lower penalties) so-called “investive” corruption practices that involve the offer or acceptance of benefits given by virtue of the public official’s position, without a direct link to a concrete act or omission in the unlawful exercise of the recipient’s official duties. Such benefits — while exceeding simple courtesy gifts and other “socially adequate” benefits — are not directed at any particular favour at that particular time, but are offered in order to establish, maintain or improve a relationship between the parties to the transaction, in anticipation of future situations when a favour may be required. The criminalization of such behaviour has been identified as a good practice.

#### *Successes and good practices*

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

#### *Immunities and mitigating factors for reporting persons*

In several States parties, especially from the Group of Eastern European States and the Group of Asia-Pacific States, the possibility is foreseen of granting immunity from prosecution to persons engaged in bribery who voluntarily report the presentation of the bribe at the earliest opportunity thereafter, or before the authorities receive information about it from other sources, or who confess to the offence before a criminal action is brought against them (in three cases, there is the possibility of having all or part of the property that was involved in the commission of the offence returned). In a number of States parties, it is explicitly stipulated that

such notification or confession of an act of bribery is a mitigating factor, if it occurs after a criminal action has been brought against the reporting person and until the end of the proceedings. Finally, in other States, the law specifically provides for mitigated punishment whenever the perpetrator of a corruption offence assists in the collection of decisive evidence for the identification and capture of other persons responsible, not to mention the general sentencing rules mitigating the criminal liability of cooperating persons, common in the legislation of most States parties.

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

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

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

#### *Immunities for victims of extortion*

A few States parties, again from the Group of Eastern European States and the Group of Asia-Pacific States, also grant immunity from prosecution to persons who engage in active bribery under threat, inducement, compulsion, coercion, duress or intimidation by a public official, in order to prevent harmful consequences with respect to their rights and lawful interests. In at least two cases, it is further stipulated that the cash or property used for the bribe are returned to the perceived victim. Although this practice was not commented upon in the reviews, its use and possible boundaries (e.g. when the defence is so broadly worded that it could be considered to include cases of simple solicitation by the public official) also merit further consideration.

### *Mens rea*

The matter of mens rea was the subject of limited analysis and was only raised in a small number of reviews. This is an indication that, in the vast majority of cases, the subjective requirements of the Convention seem to be met. Acts committed intentionally are punishable as criminal offences, whereby a clear subjective link must be established between the promise, offering, giving, etc., of the advantage and influencing the conduct of the recipient.<sup>7</sup> The mental element of the offence is often not explicitly mentioned in the bribery provisions, but can be gathered from the provisions in the general part of the applicable penal code. Interestingly, in three cases, the passive bribery provisions of the States under review explicitly mention that they apply regardless of the intention of the public official to actually carry out or refrain from performing the act in the exercise of his or her duties.

Moreover, in two jurisdictions, the subjective requirements for acts of passive bribery seem to be even lower than the ones indicated in the Convention. Normally, the public official should have knowledge both of the fact that an advantage is offered and of the undue character of such advantage. However, one State party has also criminalized acts of negligence, by including cases where the public official accepts an illicit benefit knowing or reasonably suspecting that such benefit is offered in order to induce him or her to act or to refrain from acting, or as a result of something he or she has done or has refrained from doing, in the execution of his or her duties. This is interpreted to mean that the public official will also be liable for punishment if it is established that he or she should have understood that he or she received an advantage for a particular purpose. In this way, criminal action can be taken in the event of “culpable naivety” or perhaps fictitious innocence on the part of the public official. Another State goes even further, by making clear that it does not at all matter if the perpetrator knows or believes that the request, agreement or acceptance of the unlawful benefit is improper. The State party in question takes the strict view that a civil servant should know what is expected from him or her.

Several States parties, following an old tradition in common law jurisdictions, require, in the description of the bribery offences, that the perpetrator should act “corruptly”. This term functions as a kind of subjective element of wrongdoing (“corrupt intent”) and is supposed to play a qualifying role in restricting the combinations of facts liable to bring about a conviction, including the exemption of socially “adequate” advantages. The establishment of this mental element in a concrete case may be facilitated by the existence of a rebuttable presumption of guilt once the essential objective ingredients of the offence have been established by the prosecution, as explained in section F, subsection 3, below. The precise meaning of the term “corruptly”, and even its necessity, however, remain contentious, and its interpretation among different jurisdictions is inconsistent. Therefore, concerns have been raised in the majority of cases about how it is employed when implementing the relevant legislation.

### *Effectiveness*

Although only two reviews found that the national provisions corresponding to article 15 had been successfully implemented in practice, and some countries stated that they had not assessed the effectiveness of the provisions establishing the

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<sup>7</sup> See *ibid.*, para. 198.

bribery of domestic public officials as a criminal offence, the great majority of States parties presented statistical data or even concrete examples of the implementation of legislation covering domestic bribery offences. This shows a consistent application of the relevant provisions and reflects their traditional role and established position in national criminal law.

### *Challenges*

The most common challenges in the implementation of article 15 relate to the scope of public officials covered by the bribery offence, including its application to members of parliament; the coverage of the promise, in addition to the offer or exchange, of an undue advantage; the coverage of indirect bribery; the scope of the undue advantage, in particular as regards non-material benefits; and the application of the bribery offence to benefits extended to third persons and entities.

As to the practical application of the bribery offence, in some jurisdictions, problems arose on the collection, consolidation and accessibility of statistical data related to the investigation and prosecution of corruption offences, including the sentences and fines imposed. This is related to the need to establish more comprehensive case-planning systems, which would not only facilitate better management of individual cases, but would also help in the identification of bottlenecks that cause delays and prevent progress in prosecuting offences. Apart from that, the main challenges identified by some countries are the lack of specialized practitioners (investigators, prosecutors and magistrates) and the limited resources available for implementation of the bribery provisions. Bribery investigations are considered particularly difficult because of the secretive nature of the crime and the difficulties in securing testimony or other evidence from one of the parties involved. Therefore, a need was reported to strengthen the “sound and good practice” of using special investigative techniques to overcome these obstacles, such as undercover operations and controlled deliveries, as referred to in article 50 of the Convention.

## **2. Bribery of foreign public officials and officials of public international organizations (article 16)**

Contrary to the situation regarding bribery of national public officials, comparatively few States parties have introduced or taken steps towards establishing as criminal offences the bribery of foreign public officials and officials of public international organizations. This relates mostly to the novelty of these particular offences, which appeared for the first time in national criminal laws in 1977 and have only applied at the international level since 1996. Among States parties that have adopted specific measures to criminalize the bribery of foreign public officials, the large majority were already bound by previous international instruments containing the relevant obligation (in particular the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions) and have already undergone mutual evaluation reviews on the implementation of these instruments (e.g. by the OECD Working Group on Bribery in International Business Transactions, the Group of States against Corruption of the Council of Europe, the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption of the Organization of American States and the OECD Anti-Corruption Network for Eastern Europe and Central Asia). In contrast, States parties

that were for the first time obliged under the Convention against Corruption to proceed with criminalization have, as a rule, not yet made the necessary adjustments.

In 25 States, the relevant conduct has not been criminalized or has been criminalized to a very limited extent (e.g. regarding officials of a particular regional organization), almost all of them from the Group of Asia-Pacific States and the Group of African States, although legislation to this effect was pending in eight of these States. Significantly, in the Group of Asia-Pacific States, only four countries are party to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. In Africa, only one country is party to that convention. At the regional level, there is no multilateral instrument against foreign bribery for the Asia-Pacific region, while in Africa the follow-up mechanism of the African Union Convention on Preventing and Combating Corruption does not involve monitoring assessments. This confirms that the absence of such measures could be an important factor behind the lacunae cited in many of the countries in those regions in relation to foreign bribery.

The fulfilment of the criminalization obligation under article 16 requires a conscious and irrefutable expansion of the protective scope of national criminal law, clearly reflected in the applicable anti-corruption provisions or in national jurisprudence. This requirement applies not only to countries where the wording of the relevant offences leaves no room for doubt that bribery must be directed towards a domestic public official, but also to countries with definitions of a public official that, although silent as far as the national identity of the affected public administration is concerned, have never been used in respect of foreign bribery. In such cases, the inclusion of foreign sovereign or supra-individual interests within the protective scope of the bribery offences would most likely not correspond to the legislative history or stated objectives of the respective provisions. Accordingly, the claim of two countries that the generic notions of a “civil servant” or a “public functionary”, found in the traditional bribery offences, could be interpreted to include foreign public officials and officials of public international organizations could not be accepted, given the lack of any case law to support it.

A more valid claim that foreign bribery is covered by national law is made by States parties where the bribery provisions in place refer in more general terms to an “agent” or “any person” as a recipient of the bribe, and are designed specifically as measures against anti-competitive practices or violations of trust between agents and their principals. In three cases of States with provisions that could potentially be applied in foreign bribery cases, the reviewing experts rejected the relevant claims of the governmental authorities and considered such provisions as raising issues of legal uncertainty or lack of clarity for not including a clear link to the functions of foreign public officials — recommendations were therefore issued on ensuring more focused and specific legislation in that regard. These countries are included in the 25 States mentioned above. Nonetheless, in view of the principle contained in article 30, paragraph 9, of the Convention, and taking into account that in another State with similar legislation the reviewing experts appeared to have a different view on the matter, provisions of this kind could eventually be considered as adequate for the purposes of the Convention, insofar as there are no limitations implied by their protective rationale (e.g. harmful consequences for the internal market) and the State in question has manifested its willingness to apply them in the sense of article 16, ideally through examples of investigations and prosecutions.

As regards the method of criminalization, about half of the States parties that comply with this provision have established separate, autonomous offences that only address the bribery of foreign public officials and functionaries, while the other half have opted to apply the principle of equating domestic public officials with foreign public officials and deal with all such cases under a common bribery offence. As a general rule, the legislation of countries that have criminalized international bribery as separate offences is of a high standard and conforms, for the most part, to the requirements of the Convention. In States parties that have chosen the method of equating, criminalization of foreign bribery usually incorporates the same problems and implications of domestic bribery offences, with respect, for example, to third-party beneficiaries or immunities, bribes for acts or omissions that are not in breach of the official's duties and mitigating factors for reporting persons or victims of extortion. On the other hand, in this group of countries, criminalization tends to go further than the requirements of article 16.

Apart from the above, a number of special issues were raised concerning the scope of foreign bribery offences. These are set out below.

#### *Criminalization of passive bribery*

In those countries that have criminalized the bribery of foreign public officials, a considerable number (about one quarter) have done so only with respect to active bribery. In another country, the need for an explicit and more direct statute covering the relevant conduct was noted. In one of the cases without a passive bribery offence, the requirement to criminalize the corruption of foreign public officials was deemed satisfied by the "normal" passive bribery provisions, in conjunction with the internal rules of the countries to which the officials belong. This cannot, however, be accepted as valid, since, as noted above, the Convention clearly implies a widening of the interests protected by national criminal law by going beyond existing internal provisions and even extending them to the passive bribery of officials of public international organizations. Lack of corresponding action by a State party is not remedied by the internal provisions of other jurisdictions punishing the bribery of their own officials. While it is true that the core of the underlying conduct addressed by article 16, paragraph 2, is already covered by article 15, subparagraph (b), this only accounts for the decision to accord a non-mandatory nature to the provision in question.<sup>8</sup> It does not mean there is no need to consider criminalizing the passive bribery of foreign officials and, in particular, of officials of international organizations, which is not addressed in any way by the mandatory provision of article 15.<sup>9</sup>

Some countries have argued that, given the non-mandatory nature of article 16, paragraph 2, they have considered and opted not to introduce the offence in question because of policy and jurisdictional concerns, as they believe that there is limited nexus to their own territory and that the country of the official concerned would be better suited to prosecute such an official (under the offence of active bribery of national officials). In other words, they consider it appropriate for States parties to

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<sup>8</sup> See the note by the Secretariat entitled "The question of bribery of officials of public international organizations" (CAC/COSP/2006/8), para. 7.

<sup>9</sup> See the note by the Secretariat entitled "Implementation of resolution 1/7 of the Conference of the States Parties to the United Nations Convention against Corruption" (CAC/COSP/2008/7), para. 4.

pursue the conduct of their officials in their own jurisdictions, which is likely to be where the majority of the evidence is located. As an alternative, one of these countries has stated that it readily shares evidence and information relating to bribery cases with the country of citizenship of the foreign public official for possible domestic investigation and prosecution, while two others have made it clear that they can and have repeatedly prosecuted corrupt foreign officials for other offences, such as breach of trust and money-laundering, based on bribery as a predicate offence. In all of the above cases, the answers provided were deemed satisfactory.

#### *Scope of officials covered*

One of the main issues that came under scrutiny in the country reviews was whether the terms “foreign public official” and “official of a public international organization” are defined by States parties in accordance with article 2, subparagraphs (b) and (c), of the Convention, as including, among others, officials of countries that are not States parties, members of foreign parliaments and individuals exercising a public function for a public agency or public enterprise of a foreign country. While some countries have established broad, autonomous definitions of the term “foreign public official” (following the legislative method consistently recommended by other monitoring mechanisms, such as the OECD Working Group on Bribery in International Business Transactions), in others there was apparently no need for an explicit definition, without this proving to be a detriment for the purposes of the Convention. Thus, in some cases, the law implicitly establishes a link to the concurrent, broadly defined concept of a national public official, while other States parties also provide no stand-alone definition but instead state in the bribery offences that the advantages should be directed at a person performing a public function, holding public authority or discharging a public service mission, or an electoral mandate in a foreign State or within a public international organization.

Indeed, linking the definition of a foreign public official to the definition of a national public official should be considered as acceptable, to the extent that the latter clearly covers all the categories of persons falling under article 2, subparagraphs (b) and (c), including persons exercising a public function for State-controlled enterprises. In contrast, the experience of other monitoring mechanisms has shown that linking the foreign bribery offence in a strict manner to the definition of the foreign public official in his or her own jurisdiction raises issues of compliance with the criminalization requirements, given, among other reasons, that proof of the definition under the law in the foreign public official’s country can be difficult to obtain.

#### *Examples of implementation*

One State’s law stipulates simply that persons holding “appropriate powers” in foreign State institutions, international public organizations or international judicial institutions, including official candidates for such positions, are held as equivalent to civil servants within the meaning of the criminal code. This broad wording is used to expand the circle of persons falling within the list of public officials under the different laws of foreign States so as not to restrict the scope of the applicable offence. Accordingly, any powers held by a person at a foreign State institution, an

international public organization or an international judicial institution would be evaluated on an ad hoc basis (taking into account the differences in laws of foreign States on the relationships of civil service, etc.), seeking to establish whether he or she holds appropriate powers that allow the conclusion that the person is a foreign public official or an official of a public international organization within the meaning of the Convention. The reviewing experts, despite their initial concerns, were satisfied that this approach does not create any obstacles to the effective implementation of the foreign bribery offence.

In another case, the country involved has introduced a very broad definition of foreign public official, which extends to officials designated by both foreign law and custom, and in particular to any individual who holds or performs the duties of an appointment, office or position created by custom or convention in a foreign country or part of a foreign country. This was considered to be a success by the reviewing experts.

Finally, a third State has opted for an exhaustive enumeration of persons considered as foreign public officials. These are:

- (a) Any person holding legislative, administrative, or judicial office in a foreign Government (at all levels, from the central level to the local level), whether appointed or elected;
- (b) Any person exercising a public function for a foreign country and falling under any of the following items:
  - (i) Any person carrying out public affairs delegated by a foreign Government;
  - (ii) Any person holding office in a public organization or public agency established by any act and subordinate statutes to carry out specific public affairs;
  - (iii) Any executive or employee of an enterprise in which a foreign Government has invested in excess of 50 per cent of its paid-in capital or over which a foreign Government has de facto control as regards all aspects of its management, such as decision-making on important business operations and the appointment and removal of executives; excluded herefrom is any enterprise engaging in a business in competition at arm's length with general private business entities without any privilege conferred thereon, such as discriminative subsidies;
- (c) Any person acting for a public international organization.

Despite compliance by most countries with the above principles, in several cases, gaps were discovered in the pertinent legislation: in some States parties, the legislation does not extend to officials of public international organizations (with the exception, in one case, of United Nations officials exercising their function within the territory of the country involved) or extends only to persons who are gainfully employed. In two further States from the Group of Eastern European States, the scope of the definition of foreign officials covered was considered to be narrower than the definition in article 2, subparagraph (c), of the Convention, being limited to foreign officials of public international organizations or assemblies of which the State party in question is a member and of international courts whose jurisdiction they recognize. It should be noted, however, that these same restrictions in other States were not considered as incompatible with the Convention.

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

#### *Facilitation payments*

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

The basis for this exception seems to be the reference made in article 16 (and in corresponding provisions of other international instruments) to the bribe being offered in order to obtain or retain business or other undue advantage. Following this example, in two of the four above-mentioned States parties, the law excludes bribes made to obtain or retain business advantages that are “legitimately due to the recipient” of this advantage. In one case, it is further stipulated that in working out if a business advantage is not legitimately due, one should disregard: “(a) the fact that the business advantage may be customary, or perceived to be customary, in the situation; (b) the value of the business advantage; and (c) any official tolerance of the business advantage.” Finally, and even more significantly, the law of one State excludes from the application of its foreign bribery offence not only cases where the payment to an official is permitted or demanded pursuant to any applicable statute of the country to which the foreign public official belongs, but also cases where a small amount of money or any other advantage is promised or given to a foreign public official who performs daily routine duties, with intent to encourage the official to perform his or her duties in a fair manner.

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

Indeed, an exception for bribes made to obtain or retain business advantages that are “legitimately due to the recipient” would be unacceptable if it were interpreted in a way that would enable the perpetrators to evade criminal responsibility based on the fact that they were entitled to the advantage that they obtained through the exercise of the discretionary powers of a public official. The bribers would then just argue, for example, that they were the best qualified bidder in the case of a public procurement contract, or that they had fulfilled all the criteria for lucrative business licences or permits to build factories or establish mining and oil and gas concessions.

Nonetheless, it should be stressed that an interpretative note to article 16, paragraph 1, of the Convention stipulates that “a statute that defined the offence in terms of payments ‘to induce a breach of the official’s duty’ could meet the standard set forth in each of these paragraphs, provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and that this was an ‘autonomous’ definition not requiring proof of the law or regulations of the particular official’s country or international organization”.<sup>10</sup> Taking this into account, and to the extent that national legislation and its interpretation by the courts meet the conditions set forth in this interpretative note — especially the obligation to cover bribes offered in a way that may influence the exercise of the discretionary powers of a foreign public official to the detriment of another — States parties should be considered to be in compliance with the Convention. The matter merits further consideration in order to fully clarify the role of the term “undue” in the text of article 16.

#### *Relation to the conduct of international business*

The offence of active international bribery, as foreseen in the Convention, is linked to the conduct of international business, which includes, according to an interpretative note, the provision of international aid.<sup>11</sup> While the matter of facilitation payments, as discussed above, remains controversial, governmental experts — insofar as they touch upon the matter — appear to unanimously approve in principle and even to consider as a success and good practice the decision of some States parties not to limit the foreign bribery offence to activities in relation to the conduct of international business, thus exceeding the minimum requirements of article 16, paragraph 1, of the Convention.

#### *Successes and good practices*

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

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<sup>10</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. III, art. 16, sect. C, para. 1 (b) (p. 176).

<sup>11</sup> *Ibid.*, para. 1 (c) (p. 176).

### *Immunities for reporting persons*

A matter of particular interest is the fact that some States, especially those that equate foreign officials with domestic public officials, also apply the immunity provisions applicable to persons who voluntarily report the offering of bribes prior to their detection by the investigative bodies (discussed in subsection 1 above) to cases of active foreign bribery. In one State it was argued that, as the purpose of article 16 is not the prosecution of foreign officials per se but rather the general enforcement of the foreign bribery offence, it is debatable whether the domestic provisions applying leniency measures for denouncing persons facilitate the eradication of foreign bribery or if they should be deemed to be non-applicable in such cases. It is worth noting that this is also the position of other international monitoring mechanisms and in particular the OECD Working Group on Bribery in International Business Transactions, which has identified this tactic as potentially detrimental to effectively combating the supply side of bribery of foreign public officials. The Working Group believes that the “effective regret” defence is not useful in foreign bribery cases, as the foreign public official is normally in a completely different jurisdiction, and even if the jurisdiction of the briber has implemented article 16, paragraph 2, on passive foreign bribery, the practical difficulties in enforcing this offence are enormous. As a result, when a member of the Working Group extends its defence of “effective regret” to the bribery of foreign public officials, it is recommended that the defence is repealed or the criteria for its application restricted, so that it cannot be an obstacle to the effective enforcement of the supply side foreign of the bribery offence.

On the other hand, it could be argued that there is nothing in the Convention that prohibits granting immunity to a reporting person. In contrast, there is a clear, possibly overriding obligation under article 37, paragraph 1, to take appropriate measures to encourage persons who have participated in the commission of a corruption-related offence, including foreign bribery, to supply information useful 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. Article 37, paragraph 3, in particular, encourages States parties to consider granting immunity to such persons. There may also be significant policy reasons for having such a measure in place: allowing the investigation of offences that would otherwise go unnoticed; enabling the prosecution of corrupt foreign public officials, either by the State to which such officials belong, or even (if the foreign State is not willing to prosecute) by the State that has granted immunity (if it has criminalized an offence equivalent to that covered in article 16, paragraph 2, of the Convention); enabling the prosecution of corrupt officials of public international organizations and facilitating the appropriate responses by such entities; and opening the way for ancillary measures, including the recovery of the proceeds of the corrupt transaction, the application of sanctions to the legal persons involved therein, the initiation of proceedings for the annulment of contracts or the withdrawal of concessions and the compensation of entities or persons who have suffered damage as a result of the offence. Moreover, as discussed in chapter III, section A, subsection 2, below, the application of immunity provisions often entails a significant element of prosecutorial and judicial discretion, including an evaluation of the degree to which the oral or written disclosures of the offender are voluntary and amount to a true and full account of the act, before decisions are made regarding preferential treatment for that offender.

In view of the above, the matter warrants further discussion in order to determine the degree to which measures granting immunity to the perpetrators of active bribery of foreign public officials who report their acts to the authorities are compatible with the Convention.

#### *Effectiveness*

In most reviews of States parties that have the requisite legislation in place, it was noted that the law enforcement authorities were aware of few, if any, reports of foreign bribery, owing to the difficulties in detecting the offence, and that only a small number of relevant cases had reached the criminal justice system. Although some States parties have confirmed the existence and partly furnished statistics and/or concrete examples of investigations and prosecutions for foreign bribery, only a handful of cases were cited where final decisions and convictions were reached: six States parties reported between one and three convictions each. Two further countries reported relatively high numbers of convictions; however, it was not clear how many were final and how many individual cases were involved. In only one case was a significant level of enforcement demonstrated and commended. Significantly, this particular State party, as well as another, have emphasized that the crime of foreign bribery is taken very seriously and constitutes a priority for the competent authorities.

#### *Challenges*

The major challenge in the implementation of article 16 is the complete absence in many States of a criminal offence addressing the bribery of foreign public officials and officials of public international organizations. This concerns above all countries from the Group of Asia-Pacific States and the Group of African States, where, until now, the introduction of a corresponding offence was not considered to be of particular priority. It is worth pointing out that the non-criminalization of the “supply side” of foreign bribery also creates obstacles to the effective enforcement of the offence by States parties that have criminalized it, as it may prevent them from applying extraterritorial jurisdiction and obtaining mutual legal assistance where dual criminality is required.

The comparatively low interest towards the criminalization of foreign bribery has been exacerbated by the general reluctance of States parties to extend the reach of their criminal law to foreign public officials, as demonstrated by the even lower number of jurisdictions having adopted the non-mandatory offence of passive bribery of foreign public officials and officials of public international organizations. This situation is best illustrated by the example of one State party which (in the same way as other countries) gave as a reason for not implementing article 16 in its domestic legal system the possible contradiction between criminalizing the behaviour of foreign public officials and officials of public international organizations and the immunities offered to international public officials mentioned in the Convention on the Privileges and Immunities of the United Nations. It should be clear, however, that no such contradiction exists, as the provisions of article 16 are legally distinct from the question of the immunities bestowed upon officials of

public international organizations and do not affect, nor are they meant to affect, such immunities.<sup>12</sup>

Apart from the non-existence of normative measures, common challenges relate to the scope of foreign public officials and officials of public international organizations covered by the offence, and especially to the apparent ineffectiveness of the existing legislation, which runs the risk of being downgraded to the level of fulfilling a merely symbolic function. As with non-criminalization, the issue of immunities has again surfaced here and was invoked by one State as a factor that has contributed to the failure of law enforcement authorities to investigate and effectively prosecute foreign corruption cases. Nevertheless, this issue (which in any case concerns only the passive bribery offence) should account for only a part of the problem and can be addressed in practice when any relevant allegations come up. As indicated in the interpretative notes to the Convention, States parties have noted the possible relevance of immunities in this context and have simply encouraged public international organizations to waive such immunities in appropriate cases.<sup>13</sup> National prosecution authorities that are reluctant to take on cases of alleged corruption of officials of international organizations or would refrain from requesting a waiver of immunity should be given clear guidance on the extent and limitations of such privileges and on the procedures to overcome them in accordance with applicable international legal instruments.<sup>14</sup>

To determine the factors impeding investigations of foreign bribery and develop a more effective way to tackle such cases, one State has recently commissioned a study on the enforcement of the relevant national offence. One of the main conclusions of the analysis is that, in order to achieve better results in the fight against foreign corruption, the various agencies involved need to increase their cooperation. A successful approach was found to entail setting up combined, multidisciplinary investigation teams comprising investigators from different agencies with expertise in both politically sensitive investigations and investigating financial crime. Such teams are reported to have achieved positive results.

## **B. Diversion of property, trading in influence, abuse of functions and illicit enrichment**

### **1. Embezzlement, misappropriation or other diversion of property by a public official (article 17)**

All of the States parties have established measures to criminalize the embezzlement and misappropriation of public funds. Even if there is no single approach in the various jurisdictions, but rather a wide array of terms and concepts under which the relevant conduct is subsumed (for example, “theft”, “embezzlement”, “peculation”,

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<sup>12</sup> See also *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, paras. 211 and 275; the report of the Conference of the States Parties on its first session (CAC/COSP/2006/12), paras. 105 and 107; CAC/COSP/2008/7, para. 5; and the report of the Conference of the States Parties on its second session (CAC/COSP/2008/15), para. 116.

<sup>13</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. III, art. 16, sect. C, subpara. (a) (p. 176). See also CAC/COSP/2006/8, para. 7; and CAC/COSP/IRG/2013/12, para. 35.

<sup>14</sup> See CAC/COSP/2008/7, paras. 29 and 62.

“conversion”, “misappropriation”, “mismanagement”, “criminal breach of trust”, “unauthorized use of things”, “squandering of property” or “spending budgetary funds for the wrong purposes”), some national legislation covers in principle the stealing of funds entrusted to a public official by virtue of his or her position, as well as more generally the misuse and maladministration of public funds and resources for purposes other than the ones for which they were intended, for the benefit of the official himself or herself, or for the benefit of another person or entity. Accordingly, the results of the reviews were mostly satisfactory, despite the terminological variety, fragmentation of statutes and even numerous inconsistencies and overlaps observed among the factual elements of the applicable offences.

Two notable exceptions relate to the case of a State party that covers misappropriation but not embezzlement, and to the case of another one that only uses the terms “misappropriation” and “conversion”, leaving aside “embezzlement” and “diversion”. In respect of this latter case, the reviewers expressed the view that “diversion” is a general term that encompasses something more than “conversion”, creating the impression that the conduct in question is not sufficiently covered. Nevertheless, in another State party with identical provisions, no such comment was made. Further, it should be pointed out that, according to one interpretative note to the Convention, the term “diversion”, as used in article 17, could be understood as covered by or synonymous with the terms “embezzlement” and “misappropriation”.<sup>15</sup>

In almost half of the jurisdictions involved, the basic legislation addressing the conduct in question does not differentiate between acts committed in the public sector and acts committed in the private sector. It contains broad offences that apply not only to public officials but also to all persons who are entrusted with another’s property, including company directors, officers, members and agents. All the same, in many of these cases, the embezzlement or misappropriation of public funds can constitute an aggravating circumstance, while in other jurisdictions if the relevant offences are committed by public officials it appears possible to concurrently apply additional offences such as abuse of public office or using a public position in bad faith, resulting in higher punishments than for ordinary citizens. Such practices were generally not contested, with the exception of three cases, where they argued in favour of putting in place ad hoc criminalization provisions to cover acts of embezzlement, misappropriation or diversion of property by a public official. This apparently did not have to do, however, with a fundamental objection to subsuming the public and the private sectors under a common offence, but rather with the need to ensure an appropriate differentiation in the applicable sanctions and with the fact that some forms of behaviour falling under article 17 were not covered by the national provisions of the countries in question.

A further point of interest is that it is often considered an aggravating circumstance if the act through which the property was appropriated was forgery of documents or making false entries in registers, ledgers or records, distortion, deletion or damage to accounts, securities or other instruments and in general any act aimed at preventing the discovery of the misappropriation.

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<sup>15</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. III, art. 17, sect. C, subpara. (b) (p. 181).

### *Subject matter of the offence*

A common issue encountered relates to the scope of the property that constitutes the “material object” of the offence. Article 17 extends to “any property, public or private funds or securities or any other thing of value”, whereby according to article 2, subparagraph (d), “property” covers “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.” Moreover, the term “assets of every kind” is understood to include funds and legal rights to assets.<sup>16</sup> In the same spirit, many States parties rely on wide definitions of “property” or on jurisprudence that has the same effect.

#### *Example of implementation*

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

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

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

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<sup>16</sup> Ibid., part one, chap. I, art. 2, sect. C, subpara. (e) (p. 53).

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

Finally, as with the bribery provisions, jurisdictions exist where, in respect of property valued below a certain threshold, the offence of embezzlement either applies only if the act causes serious consequences or does not apply at all and the act is dealt with administratively. Conditions and limitations of this kind are not explicitly foreseen in the Convention and in some countries were found not to match its requirements. However, it is true that, according to an interpretative note, article 17 does not require the prosecution of *de minimis* offences.<sup>17</sup>

#### *Third-party benefits*

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

#### *Mens rea*

Intentional misconduct is covered in all countries with embezzlement offences. In one case, the reviewing experts objected to the element of intention being absent from the wording of the relevant law and stressed the importance of all elements required by the Convention explicitly appearing in the relevant provisions. This, however, seems to be somewhat exaggerated, insofar as the mental element is implicitly addressed, according to the general features of the penal system in question, and it is clear that intentional conduct is covered in case law applying such offences.

On another note, in two States parties, the law also specifically addresses cases where the offence results from acts of negligence by the concerned official, while in another, the offence of embezzlement itself could be committed negligently or with gross negligence. This last possibility was observed to be a good practice.

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<sup>17</sup> Ibid., part one, chap. III, art. 17, sect. C, subpara. (a) (p. 181).

### *Effectiveness*

Embezzlement is one of the most common crimes against property. Many countries have provided statistics or case law, often without differentiating between the public and the private sector, given the uniform approach many of them have adopted. In only one case was a potential challenge in the operational implementation of the national provisions highlighted, given that no examples of prosecutions were provided by the State party under review.

## **2. Trading in influence (article 18)**

Trading in influence, a non-mandatory provision, has been established to some extent as a criminal offence in more than two thirds of States parties, and legislation has been drafted or introduced to criminalize trading in influence in several jurisdictions. In eight cases, only the passive version of the offence has been fully or partially established, with legislation pending to fully implement the offence in two of them. Further, there are countries where active trading in influence could possibly be addressed as abetment or instigation of passive trading in influence, given the existence of solely a passive trading in influence offence.

In three cases, all of them from the Group of Western European and other States, the adoption of implementing legislation was considered but eventually rejected. This rejection came because the concept of trading in influence was considered overly vague and not in keeping with the level of clarity and predictability required in criminal law or because the legislator, taking also into account the difficulty of distinguishing trading in influence from socially acceptable forms of pressure (e.g. lobbying from representatives of interest groups) decided to focus on the most dangerous acts, especially those that undermine confidence in public administration, justice and the authorities in general, preferring the path of prevention and establishing rules of professional ethics for the conduct in question. In one of these countries, the reluctance to introduce criminal law measures in this field was also attributed to the fact that many international non-governmental organizations were active and involved in lobbying activities on its soil. Recommendations were issued on reconsidering the possibility of introducing appropriate criminal legislation.

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

Some reviewers have accepted that trading in influence could be adequately covered simply by jointly applying the basic provisions on bribery and the provisions on participation of the general part of the penal code. According to this theory, if a private person promises or offers a benefit to another private person (or a public official) to exercise influence over a public official, the first private person would be qualified as an instigator of active bribery and the second private person (or public official) would be considered the bribe-giver in the bribery offence. Nonetheless, the accuracy of this reading of the national legislation is doubtful, since it presupposes that the public official responsible for the intended administrative action did somehow get involved in the corrupt scheme, and overlooks the requirement that criminal liability should be established even if the public official has not been approached with the aim of influencing him or her. Therefore, some reviewing experts rejected similar claims by governmental authorities and concluded that it was not possible to impose a sentence in respect of all cases of trading in influence pursuant to the bribery provisions with regard to active and passive bribery (whether in the form of an attempt or in combination with the provisions on participation).

A more accurate depiction of the various possibilities is found in the review of another country with similar legal principles as the above: the offence of bribery and the provisions on participation are jointly applicable in certain cases where the public official to be influenced takes part in or accepts the deal. For instance, depending on the content of the agreement among the various parties, the third party could be guilty of active bribery (or instigating active bribery to exercise influence over a public official), the public official of passive bribery and the intermediary of active bribery (or incitement or complicity). Furthermore, where the person promising the advantage agrees with the intermediary that the latter will bribe an official directly, but the intermediary does not do so, this could constitute an “attempted instigation” of active bribery, insofar as such a concept exists in the law of the country in question. Other than that, cases where no official decision maker is involved, even if only indirectly as the ultimate recipient of the undue advantage, are not covered.

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

#### *“Influence peddling” by public officials*

A serious deviation from the spirit of the Convention concerns the fact that some States parties only criminalize acts by or vis-à-vis public officials, i.e. the offer or acceptance of advantages in order that a public official abuses his or her influence over another public official.

This behaviour constitutes undoubtedly the most serious form of trading in influence falling under the scope of the Convention. It is no accident that some countries explicitly provide for its punishment in the context of the main corruption offences, or that, as mentioned above in the context of article 15, some States parties partially address the relevant conduct by including in their bribery provisions benefits designed to induce an official to perform any act in connection with his or her official activity, other than those that fall within the scope of his or her official duties. A State that does not include such benefits in its main bribery offences and at the same time does not consider a public official as a possible influence peddler for the purposes of the trading in influence offence should be deemed to fall short of the Convention requirements.

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

#### *International trading in influence*

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

Although in the vast majority of cases, the governmental experts did not comment on the matter of international trading in influence, they did sometimes highlight the criminalization of such practices as a success. Moreover, in one case concerning a country where the law already partly addresses the problem by covering officials of international organizations and courts, it was observed that making trading in influence an offence in every country is an important means of improving the transparency and impartiality of public decision-making and eliminating the risk of corruption therefrom. Generally, persons seeking to corrupt foreign public officials use subtle methods and employ intermediaries which make it very difficult to prove the intention by the foreign public official to accept bribes, as payments of money cannot be traced in many situations. Therefore, the attention of the national authorities was drawn to the importance of being able to use the trading in influence offence in such situations and States parties were encouraged to consider expanding it to include foreign public officials and members of foreign public assemblies.

#### *Abuse of influence*

Article 18 refers to the offer, solicitation, etc., of benefits that intend to induce the abuse of influence by the recipient or influence peddler. The offence clearly includes situations where the capacity of the recipient to exert influence is not real, thus covering cases where fraudulent claims are used to induce the offer of the undue advantage. In six States parties from the Group of Eastern European States and the Group of Asia-Pacific States, the abuse of supposed influence did not appear to be covered; the relevant offences were therefore not fully in line with the Convention. This includes a case where the offence refers only to influence peddlers

having a family or close personal relation with a public official, giving rise to intimacy which assures free access to his or her office.

The national authorities in four of those States argued that the matters pertaining to supposed influence could fall under the fraud provisions in the criminal code. The reviews partially accepted that argument. Indeed, even countries that include fraudulent claims in the trading in influence offence sometimes concurrently apply the fraud offence, based on the different legal interests protected by the respective provisions. As an offence of an economic nature, fraud requires, as a rule, however, the act causing or having the clear potential to cause direct economic loss — a restrictive condition that is bound to leave a range of situations falling under article 18 not covered, e.g. when the benefit involved is of a non-pecuniary nature.

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

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

Less controversy surrounds the characterization as a good practice of the establishment of the offence of trading in influence in cases where the recipient uses his or her supposed official, professional or social position, in place or in addition to the standard cases where he or she uses his or her actual or assumed influence. This

wording was considered to broaden the scope of the offence in comparison with article 18, although in all three countries with relevant legislation there were no cases to demonstrate the practical significance of this interpretation.

#### *Obtaining an undue advantage*

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

#### *Example of implementation*

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

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

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

#### *Effectiveness*

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

#### *Challenges*

The main challenge regarding article 18 seems to be its inherent complexity and the ensuing technical and methodological difficulties encountered by States parties in

transposing it into their national legislation. This may explain the lack of provisions criminalizing the relevant conduct — especially in its active form — in several countries, including the cases where the establishment of the offence of trading in influence has been considered but ultimately rejected. This also accounts for the serious interpretational issues that surfaced during the reviews and led the reviewers, in some cases, to contradictory readings of the national texts, e.g. regarding the possible application of the general provisions on participation or the adequacy of laws criminalizing solely the abuse of influence in order to obtain a favourable decision. Other challenges relate to the criminalization of influence peddling by private persons, not only by public officials claiming to have influence over their colleagues, and of situations where the proclaimed capacity to exert influence is not real.

### **3. Abuse of functions (article 19)**

The offence of abuse of functions — as foreseen in the non-mandatory provision of article 19 — is designed to cover a wide range of official misconduct and has an auxiliary role in relation to other, narrower corruption offences. This was confirmed in a State party where the authorities stated that the corresponding statute was used in some cases as an alternative to a prosecution for bribery if there was not sufficient evidence to cover all of the necessary elements of that particular offence. As indicated in the interpretative note to article 19, abuse of functions “may encompass various types of conduct, such as improper disclosure by a public official of classified or privileged information”.<sup>18</sup>

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

In most States parties, national legislation (or in rare cases common law) contains a general offence that includes the main constituent elements of article 19 — under titles such as “abuse of authority and failure to discharge official duties”, “abuse of public office”, “criminal breach of trust”, “abuse of official position” or “misconduct in public office” — focusing on the violation of laws by a public official in the discharge of his or her functions, through the wilful performance of an act or the failure to perform his or her duty. Sometimes, the relevant provisions go a step further, dispensing with a reference to a particular act or omission by the official and covering any use or abuse of office or position for the purpose of obtaining some kind of advantage.

Aside from these general offences, States parties referred to a wide variety of special offences in their legislation, which they deemed as relevant for the implementation of article 19, such as refusing or delaying beyond the legal time limits the granting of a special permission or the processing or resolution of a matter; having a personal interest in contracts or transactions in which the official participates by virtue of his or her duties and failing to disclose the nature of such interest; illegal levying of rates, fees, taxes or other benefits; and alteration, damage or destruction of official documents, computer data or software.

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<sup>18</sup> *Ibid.*, part one, chap. III, art. 19, sect. C (p. 194).

*Example of implementation*

The penal code of one State party provides for the special offence of “incompatible transactions”, according to which:

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

The criminalization of this special form of abuse of functions is deemed to protect the interests of the community, the prestige of public officials and, especially, the transparency of administrative work, guaranteeing the impartiality of the public service. The action of “becoming interested” means seeking a benefit different to the one established by the public service, that is to say, a benefit contrary to the proper performance of official duties. The provision in question does not require demonstrating the damage to the State or the perpetrator’s personal gain. The perpetrator’s interest is enough to charge him or her with abuse of functions.

There are, however, jurisdictions where no general offence, encompassing the basic forms of conduct envisaged under the Convention, exists. In at least 11 States parties, only certain specific instances of abuse of functions were cited as falling under the prohibitions of the applicable criminal law; these related for example to acts of bribery, the improper use of confidential information, acting despite a conflict of interest, preventing the execution of official orders or the implementation of State laws, abusing authority to compel someone to act in a certain way, embezzling public funds and intimidation and assault. In one particular case, the national authorities argued (and the reviewing experts agreed with them) that the definition of the acts covered by article 19 was already largely covered under the forms of bribery to be made a punishable offence pursuant to article 15. According to this view, abuse of functions will often concern non-completed forms of bribery, for example attempted passive bribery and incitement to active bribery. Furthermore, it was argued that, under certain circumstances, the questionable behaviour falls within the scope of offences against property, such as embezzlement and theft. However, as much as these offences may indeed address to a certain extent the behaviour described in article 19, they remain bound by significant limitations and cannot be considered as entirely satisfactory for the purposes of the Convention, which calls for a much wider offence protecting the integrity of public service.

Accordingly, recommendations were issued for the States parties mentioned above to consider reproducing more precisely the criminal offence described in article 19 and enacting legislation addressing more broadly the abuse of functions by public officials. In contrast, in three States with larger and seemingly more complete catalogues of special offences falling under the category of “abuse of functions” (bribery, obstructing the implementation of a law, misappropriation, unlawful taking of interests, favouritism, violation of the duty of secrecy, neglecting or refusing to act within a reasonable time, etc.), the reviewers were reasonably satisfied that the national law was in line with the Convention, despite the lack of a general offence following the concept of article 19.

### *Mens rea*

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

### *Obtaining an undue advantage*

In most jurisdictions, criminal liability for abuse of functions presupposes that the public official acts with the special purpose of obtaining an undue advantage for himself or herself or another person — as foreseen by the Convention — or with the purpose of causing harm to another person. Thus, there are many jurisdictions where the official could be held liable even if he or she did not seek to secure an undue advantage, or any advantage at all. Moreover, in some cases, the law goes even further and the perpetrator is considered criminally liable independently of whether he or she acted for one of the above purposes, as long as he or she acted arbitrarily or violated his or her official duties. The fact that the crime occasioned serious harm to an individual or the public sector or a substantial improper benefit may then constitute an aggravating circumstance.

### *Examples of implementation*

One State's legislation includes two separate abuse-of-office offences, with different subjective requirements, that in effect complement each other. The first one covers any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another; and the second one extends to all public officers who use their office or position in a public body to obtain a valuable consideration, whether for the benefit of themselves or for any other person.

Another State party appears to go much further, covering (again in two separate abuse-of-office offences) any public official who, in the performance of his or her duties, performs any illegal or arbitrary act, harassment or abuse against persons or damage to property; uses unlawful or unnecessary means for the performance of the function or service or permits a third party to perform it; or simply illegally omits, avoids or delays any act proper to his or her function.

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

The most significant deviation from the text of the Convention is observed in a considerable number of States where some degree of damage (often “major” or “substantial”) has to accrue to the rights or legal interests of a natural or legal person, society or the State for abuse of functions to be considered as a criminal offence. Additionally, in one of these States, the application of the relevant offences is subject to a threshold, such that abuses involving amounts below a certain sum of money are not criminalized but are dealt with administratively. With regard to this

precondition of causing damage or loss to someone, caution is advised. Most — though not all — review teams issued recommendations on the elimination of such restrictive requirements. In two examples, however, the reviewers appeared to disregard the prerequisite of the national provisions that the arbitrary act of the public official should be prejudicial to the interests or harm the rights of another person. They considered instead that the absence of the qualification of a purpose of obtaining an undue advantage widened the scope of application of article 19, or they accepted the argument of the national authorities that a violation of laws will almost always harm the State (the legal order). They concluded thus that the laws in question were in line with the Convention. This does not appear to be justified, to the extent that no explanation is offered for dismissing the restrictive effect of the aforementioned additional requirements. In contrast, in a State with similar provisions, the same conclusion was reached only after taking into account the relevant jurisprudence, which allowed the conclusion that all arbitrary acts of a public official cause some form of prejudice to a citizen, be it financial damage or the loss of his or her right to an informed and lawful decision.

#### *Third-party benefits*

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

#### *Effectiveness*

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

#### *Challenges*

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

#### **4. Illicit enrichment (article 20)**

Illicit enrichment, a non-mandatory provision, has not been established as a criminal offence in the majority of States parties, although legislation is pending in several cases. Countries from the Group of Latin American and Caribbean States seem the most willing to adopt legislation covering such an offence, while States parties from the Group of Western European and other States are most likely to reject it, and none have yet recognized the concept of illicit enrichment. Significantly, in one out of two States from the Group of Eastern European States that have criminalized the conduct in question, the reviewers considered it noteworthy and classified it under

successes and good practices. In some cases where such an offence has been introduced in national legislation, it was the result of the implementation of regional anti-corruption instruments, such as the Inter-American Convention against Corruption.

In two States with near-identical legislation, the provisions criminalizing illicit enrichment were found not to operate independently, but as part of existing investigations against corrupt public officials. In other words, measures to pursue illicit enrichment can only be taken when an investigation of another corruption offence is under way. If, in the course of such an investigation, there are reasonable grounds to believe that a public official is in possession of property in excess of his present or past emoluments, he or she is asked to explain such excess or else be considered guilty of an offence that is separate to the main investigation. The limitations of this system were noticed by the reviewers of one of these States, who expressed the view that the country in question should consider eliminating this prior investigation requirement, which appears to restrict the scope of application of the offence envisaged under article 20.

It should be noted that many States parties have considered the possibility of adopting an illicit enrichment offence and have made a genuine effort to assess whether its introduction would be compatible with their national legal system, but concluded that it would not be appropriate or had serious doubts about the perceived breach of fundamental principles of justice that it entails, as well as the constitutional limitations pertaining, above all, to the right to be presumed innocent until proved guilty under the law.<sup>19</sup> The presumption of innocence is invoked because the crime of illicit enrichment hinges on the presumption that the accumulated wealth is corruptly acquired, unless the contrary is proved. This perceived reversal of the burden of proof in a criminal case — which should rather be described as a rebuttable presumption — is not regarded as compatible with fundamental principles of the domestic legal system in many jurisdictions, as it is believed that it could lead to a significant risk of convicting innocent individuals when their explanation is simply not believed. This is why the authorities in some of these countries have made it absolutely clear that no plans exist to include such an offence in a future revised text of the criminal code.

Given the optional character of the criminalization requirement and the broad discretion that States parties enjoy regarding its application, reviewers have generally accepted such arguments and considered that the countries involved have fulfilled the obligation under article 20 to consider establishing an illicit enrichment offence.<sup>20</sup> In only three cases did they insist that the States parties should give further consideration to the criminalization of illicit enrichment: in one of them, reviewers sought to invalidate the arguments of the authorities regarding the presumption of innocence and even went so far as to express the view that if there

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<sup>19</sup> See the reports of the Implementation Review Group on its resumed third session, held in Vienna from 14 to 16 November 2012 (CAC/COSP/IRG/2012/6/Add.1), para. 31, and on its resumed fifth session, held in Vienna from 13 to 15 October 2014 (CAC/COSP/IRG/2014/11/Add.1), para. 26. On issues relating to the criminalization of illicit enrichment, see Lindy Muzila and others, *On the Take: Criminalizing Illicit Enrichment to Fight Corruption, Stolen Asset Recovery (StAR) series*. (Washington, D.C., World Bank, 2012).

<sup>20</sup> See also *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 297.

were constitutional impediments to the criminalization of illicit enrichment, the constitution should be amended or, at a minimum, asset forfeiture provisions should be adopted. Equally, in cases where no compelling reason for not implementing the measures was given, despite inadequacies in the national legal framework, the States parties in question were invited to explore the possibility of reassessing the appropriateness of establishing this particular offence.

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

#### *Increase in assets*

The main element of the offence is the significant increase in the assets of a public official in comparison with his or her lawful income that he or she can reasonably account for, i.e. the fact that he or she is found to have financial resources or property disproportionate to his or her present or past sources of income or assets, or — as more generally put by a number of national laws — that he or she maintains a standard of living above that which is commensurate with his or her present or past known earnings. In one case, only the accumulation or acquisition of ill-gotten assets above a certain threshold is covered. Normally, it is the task of the prosecutor to prove the unjustified enrichment, i.e. the possession of the questionable property. Once enough evidence has been gathered that the defendant has greater assets than can be accounted for by his or her salary and other legal income, it is then up to the defendant to prove that these assets were acquired legally. This supports the theory that the offence of illicit enrichment should not be considered as a crime of omission, but an active offence, centring on the significant increase in the assets of a public official in a way that he or she cannot reasonably explain in relation to his or her lawful income.

Regarding the time period in which an increase in assets is relevant, in most cases the law places under scrutiny the whole period of time after a person becomes a public official. Nevertheless, in two cases it is specified that the period during which a person's financial situation may be checked ends two and five years after

leaving office, and in another it seems that only increases in wealth during the tenure of the public official fall under the scope of the offence.

#### *Scope of persons covered*

Article 20 intends to cover the significant increase in the assets of a public official, without any further personal specifications. National legislation covering corresponding offences tends to be more precise regarding the scope of persons whose assets are subject to scrutiny.

It should first be noted that not all countries limit the application of the relevant offences to the possession of disproportionate assets by public officials. In at least five States parties, the applicable provisions appear to extend also to private persons when there are sufficient and reasonable grounds to believe that they have obtained ownership of moveable or immovable property through dishonest means and the property is not consistent with their known sources of income. Moreover, the legislation of one State includes a specific offence addressing the illicit enrichment of bank employees. Such provisions were generally welcomed and it was considered useful even for States lacking them to consider the possibility of expanding their legislation to investigate illicit enrichment in the private sector.

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

#### *Example of implementation*

The criminal law of one State party provides that:

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

#### *Rebuttable presumption*

As most national laws establishing an offence of illicit enrichment make clear, the onus to prove the legitimate provenance of the funds or property in question lies with the person being investigated. Unless he or she gives a satisfactory explanation to the court as to how he or she was able to maintain their standard of living or how certain financial resources or property came under his or her control, a person will be guilty of the offence. Thus, it seems that a rebuttable presumption of guilt is established: once the case on the disproportionate increase in assets is made, the

defendant can then offer a reasonable or credible explanation to avoid punishment.<sup>21</sup> This presumption is explicitly affirmed in some jurisdictions.

*Example of implementation*

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

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

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

*Examples of implementation*

In two States parties with identical provisions, where a court is satisfied in any proceedings for illicit enrichment that, having regard to the closeness of his or her relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such resources or property as a gift, or loan without adequate consideration, from the accused, such resources or property shall, until the contrary is proved, be deemed to have been under the control or in the possession of the accused.

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

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<sup>21</sup> Ibid.

### *Using asset and income declarations in lieu of illicit enrichment*

In some jurisdictions where illicit enrichment has not been criminalized, it was argued, and partly accepted, that a similar — though not fully equivalent — effect could be achieved by way of having in place a stringent and functioning control system on the income and assets of public officials (e.g. keeping the salary and taxation of public officials a matter of public record); this facilitates the gathering of information and supports monitoring and investigation. Even more effective is a binding legal requirement that public officials submit asset and income declarations for themselves, as well as for their spouses and dependent children (usually prior to assuming their office and after that on an annual basis). Persons required to file a declaration are liable to be asked to explain any asset increases described in their disclosures. Failing to submit the declaration and declaring false information constitutes, depending on the jurisdiction, a disciplinary, administrative or even criminal offence. Such a system is in accordance with the obligation of States parties to develop policies that promote transparency and accountability, as stipulated in article 5, paragraph 1, of the Convention — indeed, one State party stated that its financial disclosure law was adopted, after heated discussions in parliament, specifically in the context of implementing this particular article.

#### *Successes and good practices*

One State party indicated that it had a declaration of assets regime, which required all public servants to declare all sources of income in a prescribed form. The declarations are analysed and verified and records are kept for each public officer. Although declarations are not publicly disclosed, the national constitution provides that all declarations are made available for inspection by any citizen on such terms and conditions as the national assembly may prescribe. In practice, it was explained that declarations can be accessed by the public upon payment of a fee to the relevant agency.

Another country goes even further, having established in general the public nature of all tax statements. Details of taxpayers' annual income, wealth and tax returns are publicly available online. Additionally, measures such as accounting and auditing rules, as well as rules on freedom of information, contribute to preventing illicit enrichment and also make it difficult to hide possible attempts to accumulate illicit gains. This culture of accountability and transparency was positively noted by the reviewing team.

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

Taking into account the non-mandatory nature of article 20, the value of this alternative solution was acknowledged, and recommendations were issued for States parties to consider establishing asset declaration (and not only interest declaration) systems, at least for high-ranking officials and members of parliament, and in general to take measures to improve the effectiveness of existing systems, reduce operational weaknesses and provide for more effective sanctions in dealing with incorrect declarations. For example, in several States parties, it was noted that in practice, asset and income declaration forms are completed and submitted but not verified, because no verification process exists or because of a lack of adequate personnel. Therefore, it was recommended that the countries under review consider unifying and streamlining the process of income and asset declarations, whereby one dedicated institution would be responsible for the task of verifying the information received. This could be done through a system of spot-checking specific declarations (e.g. focusing on higher-risk categories of public officials) or by rotating, on a yearly basis, the public agencies on which the verification process would focus. Consideration could also be given to increasing public access to the income and asset declarations of some categories of officials to enable public comment to be received as to their veracity. In one particular case, it was noted that the current legislation on illicit enrichment did not obtain satisfactory results, owing to a cumbersome prejudicial procedure for offences of illicit enrichment, according to which the body responsible for the verification of asset declarations did not have the authority to directly solicit the banking information of an official from the financial and banking entities but had to first obtain a positive resolution of the full court of the supreme court of justice. It was therefore recommended that the applicable legislation was amended. In another State party, a recommendation was issued to introduce stricter sanctions for deliberately falsifying or providing wrong information on an asset and income declaration, such as the forfeiture of undeclared property. Finally, in a further case, it was recommended that the regulations on asset declarations were extended to cover all public officials, not only ministers and deputy ministers, as is currently the case.<sup>22</sup>

*Using extended powers of confiscation or non-conviction-based forfeiture in lieu of illicit enrichment*

Some countries have used other ways to achieve a similar effect to the one envisaged by article 20. These are linked to the confiscation regime foreseen by article 31 — although it should be clear that the principles of confiscation and illicit enrichment are conceptually different and aim at fundamentally different purposes. First of all, in a more general context, the acquisition of illegal gains following criminal acts related to corruption may lead to property sanctions, including seizure and confiscation of proceeds of crime or property derived from or used in the

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<sup>22</sup> See the report of the Implementation Review Group on its resumed third session (CAC/COSP/IRG/2012/6/Add.1), para. 31, where the importance of covering key officials, such as parliamentarians and members of the judiciary, and having in place effective follow-up mechanisms is noted. On the development of effective income and asset declaration systems for public officials, see The World Bank and UNODC, *Public Office, Private Interests: Accountability through Income and Asset Disclosure* Stolen Asset Recovery (StAR) series (Washington, D.C., World Bank, 2012); and Ruxandra Burdescu and others, *Income and Asset Declarations: Tools and Trade-Offs*. Stolen Asset Recovery (StAR) series (Washington, D.C., World Bank, 2012).

commission of such criminal acts. Some States parties have further developed this concept and introduced legislation, according to which unexplained wealth can be restrained and confiscated: (a) without the criminal court having to prove that it derived from the particular offence for which the owner was convicted (extended powers of confiscation); or (b) in civil proceedings (non-conviction-based civil forfeiture). These two possibilities are explained in more depth below.

Under extended powers of confiscation, if a court convicts a person of a serious criminal offence, it (or in some cases a civil court acting on a suit by the public prosecutor) may, in the cases provided by law, confiscate a part or all of the criminal offender's assets if these belong to the offender at the time of the making of the judgement and if the nature of the criminal offence, the legal income, the difference between the financial situation and the standard of living of the person or another fact give reason to presume that the person has acquired the assets through other criminal activities. The decision to apply extended confiscation is made on the basis of proof that the property originated from criminal activity, in the absence of contrary proof. In other words, confiscation is not applied to assets proved to have been acquired with lawfully received funds.

Non-conviction-based forfeiture originally comes from the common law tradition but has also been adopted in a number of civil law countries in recent years. Whereas in the case of extended confiscation a criminal conviction for at least one offence has to be attained, with non-conviction-based forfeiture no one is charged with a crime. Where there are reasonable grounds to suspect that a person's total wealth exceeds the value of wealth that was lawfully acquired, a civil court or authorities conducting preliminary financial investigations before the case is submitted to court can compel the person to prove that his or her wealth was not derived from an offence. The relevant civil proceedings involve a lower standard of proof than beyond a reasonable doubt. If the authorities establish — based on a balance of probabilities and the preponderance of the evidence — that the assets derived from criminal activities and the person involved cannot demonstrate their legal origin, the court may order the forfeiture of the assets or order him or her to pay a proportion that corresponds to their value.

This innovative approach to addressing concerns of unexplained wealth and illicit enrichment outside the scope of the criminal justice system was well received. Notably, in one case where the relevant provisions are combined with considerable protection for the defendant, it was remarked that the effectiveness of these measures will be of interest in future reviews as an important alternative to addressing the problem of illicit enrichment. On the other hand, States parties should ensure the effectiveness of the applicable procedures. Thus, in one case where forfeiture was made all but impossible owing to a requirement of proving that the value of unexplained property was at least 1,500 times the minimum wage, it was recommended that the hurdle posed by that threshold should be eliminated.

#### *Procedural measures*

Even in cases where no general criminal statutes or equivalent punitive measures have been adopted to address illicit enrichment by public officials, there are practical procedural measures that can be taken to effectively deal with such conduct. For example, a detailed mechanism facilitating the investigation of

suspected illicit wealth cases was highlighted in one case as a good practice which furthers the goals of the Convention.

#### *Successes and good practices*

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

#### *Effectiveness*

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

#### *Challenges*

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

## C. Private sector offences

### 1. Bribery in the private sector (article 21)

Article 21 of the Convention is a non-mandatory provision that highlights the importance of requiring integrity and honesty in economic, financial or commercial activities.<sup>23</sup> It also addresses the increasing trend of outsourcing or privatizing sectors of activity — including public and utility services — traditionally conducted by States or public bodies, as well as the use of public-private partnerships. Under these circumstances, getting a picture of who is an official or employee of a public body may present considerable difficulties. It is thus important that the private sector is not treated too differently from the public sector for the purposes of anti-corruption policies.

At the time of the reviews, more than half of the States parties had adopted measures to criminalize bribery in the private sector, partly on account of earlier regional instruments, such as the Criminal Law Convention on Corruption and Council of the European Union framework decision 2003/568/JHA on combating corruption in the private sector. In one State party with a federal structure, notwithstanding the lack of a federal commercial bribery law, private sector bribery has been effectively prosecuted under related laws and has been further criminalized to a considerable degree at the state level. Furthermore, in two cases, acts of passive bribery in the private sector could potentially meet the requirements of general offences regarding breach of faith or the acquisition of assets through illicit ways. In nine cases, legislation for the criminalization of bribery in the private sector has been introduced, and the need to enact similar legislation in another State party was noted as a priority.

In some civil law jurisdictions from the Group of Latin American and Caribbean States, the countries under review argued (or examined the possibility) that the conduct in question could be pursued as a type of fraudulent behaviour under the relevant provisions of their respective penal codes. However, this possibility should be viewed with reservations, as it is unlikely that the applicable fraud offences, which include as a rule the restrictive elements of deception and economic loss, could cover the situations envisaged under article 21.

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

The basic elements of the optional offences of active and passive bribery are identical to the ones contained in article 15 (promise, offering or giving and solicitation or acceptance, directly or indirectly, of an undue advantage, for the recipient or another). The offences cover tangible and intangible advantages, whether pecuniary or non-pecuniary, as well as instances where no gift or other benefit is actually offered. Similar problems as the ones observed in relation to

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<sup>23</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 298.

article 15, e.g. regarding the elements of promising and offering, indirect bribery, third-party benefits or the scope of undue advantages, sometimes exist in national laws; however, such problems seem to be encountered less frequently and cause fewer obstacles than those encountered in relation to article 15. Moreover, in some cases, national legislation goes further than the Convention in ways similar to the ones described in relation to article 15, covering for example ex post facto payments or cases where a clear connection between the illicit benefit and an act or omission by the recipient cannot be established.

#### *Scope of private individuals covered*

Under article 21, a potential unlawful recipient is any person who directs or works, in any capacity, for a private sector entity, independently of his or her position. It therefore applies to managers and employees at all hierarchical levels of private sector entities, as well as agents and consultants of companies, professionals and sole entrepreneurs, and even non-profit legal entities or foundations (to the extent of course that the latter are engaged in economic, financial or commercial activities). At least five States parties with criminal provisions against bribery in the private sector, mostly from the Group of Eastern European States, faced issues with regard to the scope of private individuals covered. In these jurisdictions, national law covers an incomplete range of legal entities (e.g. only companies or financial institutions), regulates the conduct of only selected categories of potential receivers of bribes (e.g. brokers or intermediaries) or uses narrower definitions of the persons concerned (e.g. those who administer another's business or direct a legal person of private law, act on behalf of such person or act on behalf of another natural person, and who perform administrative, supervisory or managerial functions or functions relating to the organization of movements of assets), covering mostly individuals in senior management positions. Accordingly, amendments were deemed necessary in order to fully comply with the requirements of the Convention.

An opposite approach is taken in another jurisdiction, where it is clear that the bribery offence applies to any person who directs or works, in any capacity, for a private sector entity, even if the person's function or activity has no connection with, or is performed outside, the country, covering thus all private employees irrespective of their country of employment, the nationality of their employer or the effects of their acts for internal competition or the course of activities in the State involved. Such an approach is conducive to achieving the purposes of the Convention. Equally, in another State, the term used to describe the potential recipient of the bribe is interpreted in a way that includes any person performing a task in the service of a natural or legal person, regardless of that person being registered or not with a labour contract. It is enough if the person in question has been given a task in the legal person's service which may or may not be remunerated.

Using the term "agent" and basing the private bribery offence on the agent–principal relationship — a concept which, as already mentioned, is relatively widespread among common law countries — has created controversy as to whether it could be considered adequate in terms of fulfilling the requirements of article 21. It is true that, in four cases, the reviewing experts appeared to express reservations with regard to this method, mostly on account of an apparent uncertainty about the coverage of directors and senior management personnel, and recommended that the

States in question consider broadening the scope of criminalization to encompass transactions outside of this context and to cover the full scope of conduct envisaged by article 21 of the Convention. However, in two other States with almost identical provisions, the reviewing experts confirmed that the term “agent”, as defined in common law jurisdictions, means any person employed by or acting for another, including chief executive officers and directors of legal persons, and came to the conclusion that article 21 had been fully implemented. The subject therefore merits further examination, in view of the significant number of countries concerned.

#### *Breach of duties*

With regard to the intended behaviour of the bribe-taker, article 21 is construed in principle as a breach-of-faith offence, addressing cases where the unlawful recipients are induced to act or refrain from acting in breach of their duties, and as a means of primarily safeguarding the relation of trust between employer and employee. Indeed, most States have adopted this criterion to delineate the scope of their offences, or employ largely equivalent standards, such as the concealment of the illicit advantage from the employer or principal in violation of the requirements of good faith, or the lack of consent of the person responsible for the employees’ activities. This includes a number of common law countries in which the private bribery offence addresses any transaction, whereby a gift or consideration is corruptly offered to, promised, accepted by etc. an agent (i.e. a person employed by or acting for another) as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his or her principal’s affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his or her principal’s affairs or business. The term “corruptly”, as interpreted here, indicates that the transaction has to take place covertly, in breach of the agent’s obligations.

Given that the duties of the person receiving the bribe are defined, for the most part, by reference to the instructions and assent of his or her employer, such alternative standards should also be considered as being, for the most part, in accordance with the spirit of the Convention. This said, it should be noted that the reviewing experts generally recommended removing them or welcomed legislative plans to substitute them and place the central focus on conduct contrary to the recipient’s duty, in order to more closely align national provisions with the wording of article 21.

### *Examples of implementation*

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

In another State, the central element in the criminalization of private sector bribery is not the breach of duties as such, but the concealment of the gift or promise from the employer, contrary to the requirements of good faith. The decisive factor is whether the employee was obliged to disclose the gift or promise in accordance with objective criteria, to be determined and assessed from an external point of view. This also means that the employee, when in doubt as to whether he or she should disclose a particular gift, is obliged to inform or at least consult his or her employer. Only benefits that can be considered to constitute customary business gifts — on the basis of objective social standards, including recognized business practices — do not have to be disclosed. This entails the provision that the gifts to be reported are generally already questionable in nature, or, at any rate, intended to achieve above-average influencing. The perpetrator of active private corruption remains liable to punishment even if the receiving employee, against his or her expectations, does disclose the gift to his or her employer.

Apart from the above, in some cases, States parties have introduced additional provisions addressing specific situations where the corrupt employee does not fulfil his or her obligations towards his or her employer, such as acts of bribery for procuring the withdrawal of a tender or for refraining from making a tender for a contract, or bribes aimed at the procurement of a loan, an advance, a guarantee or any other credit facility by a director, manager, officer or employee of a bank.

Wherever national law does not require a breach of duty as a constituent element of the offence, as is often the case, for example when States parties use a common definition of bribery in the public and in the private sector, this goes beyond the requirements of the Convention and accords in effect equal, if not more, weight to the protection of free competition. The same may be considered true for laws that require that the illicit advantage be given in order that the employees perform or fail to perform some act in the interests of the giver, insofar as it is clear that no inducement of a breach of duty can fall outside the scope of the relevant provision. On the contrary, national legislation which requires that the act of the bribe-taker causes damage or a detriment to those whom he or she represents, or that it disrupts the production system of the country, adds a further constituent element in the description of the offence, which narrows its scope, which is a deviation from the provisions of the Convention.

### *In the course of economic, financial or commercial activities*

In some countries, the law stipulates that bribery in the private sector occurs only insofar as the act has been committed in the course of economic or business activities, following thus the basic concept of article 21. The broad interpretation accorded to the term “business activities” by one State, which includes even unpaid

charitable work or work for non-governmental organizations (NGOs), was identified as a good practice. The same observation should be considered as even more pertinent for the practice of the majority of States parties to completely dispense with an economic or commercial link and apply more general offences, making no reference whatsoever to the nature of the relevant activities.

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

### *Effectiveness*

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

### *Challenges*

An important challenge in many countries regarding the implementation of article 21 appears to be overcoming an apparent preoccupation with protecting the public sector. In a number of cases, bribery in the private sector is covered only insofar as the business or company is owned in part by the State. As observed by the national authorities in one country, there is a perception in various sectors that the general criminalization of such conduct might have negative consequences; this indicates the need to initiate consultations among all relevant stakeholders (civil society, business community, Government and legislators) as a step towards the implementation of the provision under discussion. The criminalization of private bribery may require a fundamental change of attitudes, especially in countries from the Group of Asia-Pacific States, which seem to have the most reservations regarding this particular offence.

## **2. Embezzlement of property in the private sector (article 22)**

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

As with embezzlement in the public sector, there is a wide array of different terms and concepts used to hold people criminally responsible for the relevant conduct, including, for example “fraud by officers of a company”, “stealing”, “unlawful appropriation”, “breach of trust”, “abuse of position” and “authorizations”. In two cases, recommendations were issued for States parties to consider adopting provisions that reproduce more precisely the type of crime described in article 22, and in another to consider consolidating the scattered national legislation into one provision, in order to increase the operational value of the law.

#### *Scope of individuals covered*

As noted with regard to article 17, many countries do not distinguish between the private and public sectors, but apply the same embezzlement and misappropriation offences to both. In one of those cases, the general embezzlement offences extend only to private individuals who administer public-sector funds or assets, private property that is under judicial administration or has been frozen or seized, or private-company assets with a State shareholding, thus falling short of the Convention requirements.

Among countries with separate provisions for the private sector, one State’s embezzlement offences appear to be limited to directors and officers of corporations or companies. Although this should be able to cover the vast majority of cases, the Convention refers, using the same wording as article 21, to all persons who direct or work, in any capacity, in a private sector entity, including low-level employees and persons working for independent professionals and sole entrepreneurs. Accordingly, it was recommended for the country in question to, at least, monitor the application of the relevant offences in order to assess and address the existence of possible gaps.

#### *Subject matter of the offence*

Some of the problems discussed with regard to article 17 that also surface here are acts causing minimal damage and the coverage of all forms of property, especially of immovable assets. This latter issue constitutes a challenge even in States with separate offences of embezzlement in the private sector, leading to recommendations that these countries consider amending their legislation and, in particular, adopting the necessary measures to extend existing definitions that currently cover moveable property to any property, private funds or securities or any other thing of value. Similarly, an issue of more closely aligning national law with the spirit of the Convention was raised in one State which covers only property received by loan, borrowing, hiring or contract.

#### *Breach of trust*

Article 22 refers to property, private funds or securities or any other thing of value entrusted to a person in a private sector entity by virtue of his or her position, thus encompassing a concept of breach of fiduciary duties of trust and care. The practice in certain States to take into account the exact capacity in which the offender received the embezzled assets (e.g. as a curator or judicial custodian), in order to determine whether to apply an aggravated version of the offence, was noted as a success.

*Successes and good practices*

In two States with a common legal tradition, the penalties for embezzlement would be aggravated according to the value of the embezzled asset, and would be further aggravated if the offender received the asset upon deposit imposed by law, by reasons of occupation, employment or profession, or as a tutor, trustee or court custodian.

*In the course of economic, financial or commercial activities*

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

*Effectiveness*

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

## **D. Money-laundering and related conduct**

### **1. Laundering of proceeds of crime (article 23)**

There is remarkable uniformity among States parties with regard to the criminalization of money-laundering, despite the wide scope of this particular offence, its complex nature and the many controversies it has generated since it has come to international public attention. As became evident from the country reviews, national provisions against money-laundering have been largely drawn up on the basis of the principles set out in a series of international conventions and instruments, including — apart from the present Convention, which builds on and advances earlier initiatives — the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the United Nations Convention against Transnational Organized Crime (signed in Palermo, Italy, in 2000). An important role in determining and harmonizing the contents of the relevant legislation is undeniably also played by the focused periodical evaluations conducted by mechanisms such as the Financial Action Task Force and similar regional bodies.<sup>24</sup> Many countries have benefited from the technical assistance and recommendations provided by those specialized groups.

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<sup>24</sup> Such bodies include the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism of the Council of Europe, the Asia/Pacific Group on Money Laundering, the Eastern and Southern Africa Anti-Money Laundering Group, the Financial Action Task Force of Latin America against Money-Laundering (known by its Spanish acronym GAFILAT, formerly GAFISUD), the Eurasian Group on Combating Money Laundering and Financing of Terrorism, the Caribbean Financial Action Task Force, the Inter-governmental Action Group against Money-Laundering in West Africa, and the Middle East and North Africa Financial Action Task Force.

Almost all States parties have taken measures to establish money-laundering as a criminal offence. In most countries, including almost all countries from the Group of Eastern European States and the Group of Western European and other States, this has been done in their penal codes. In other countries, including all those from the Group of African States, in special laws against money-laundering. The governmental reviewers occasionally found strong, solid and robust regimes designed to deter and detect money-laundering, despite technical deficiencies or even significant gaps being found in several cases in the implementing laws, especially with regard to the conduct described in paragraphs (1) (a) (ii) and (1) (b) (i) of article 23, as well as parts of paragraphs (2) (a)-(c). Furthermore, in one State party, acts covered by the Convention are not considered as predicate offences for the purposes of money-laundering, while in another State the scope of the money-laundering offence is limited to banking, financial and other economic operations which, though widely interpreted, were observed not to cover all potential areas of laundering of proceeds. As a result of the above shortcomings, and while noting, in some cases, that legislation to fully implement the article had been introduced, appropriate and, in at least one case, urgent recommendations were issued for the countries involved to enact the necessary legislation. More specific information is provided below.

#### *Conversion or transfer*

First, article 23, paragraph 1 (a) (i), requires the conversion or transfer of property to be an offence when the defendant knows that the property involved is the proceeds of crime and converts or transfers it for one of the following two purposes: (a) concealing or disguising its illicit origin (e.g. by helping to prevent its discovery); or (b) helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action. The term “conversion or transfer” includes instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase precious metals or real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.<sup>25</sup> States parties are generally in compliance with this basic requirement, with three notable exceptions, using various versions of provisions designed to address the relevant conduct.

#### *Example of implementation*

In one State party, money-laundering is defined broadly to include giving “a legal form” (e.g. through the use, acquisition, possession, conversion, transfer or any other action) to illegal or simply undocumented property to conceal its illegal and/or undocumented origin, or to help any person to evade the legal consequences of his or her actions. The inclusion of undocumented property extends liability to property suspected of being derived from criminal activity.

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<sup>25</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 231.

Acts of conversion or transfer of property for the purpose of helping a person involved in the commission of the predicate offence to evade the legal consequences of his or her actions are sometimes covered by general provisions related to aiding and abetting after the commission of a criminal offence. Moreover, a number of States cover all cases where the perpetrator converts or transfers property while knowing or having reasonable grounds to believe or suspecting or having reasonable grounds to suspect that the property is criminal proceeds, without requiring an additional purpose of concealing their illicit origin or helping another person evade the legal consequences of his action, thus going further than the Convention.

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

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

Additionally, the State under review pointed out that in any event, its legislation penalizing concealment specifically covers the conduct of a person who helps another person to evade the inquiries of the authorities or helps the principal or accomplice to secure the product or proceeds of a crime.

On the other hand, the reviewing experts, while accepting that the national authorities had made a valid point with regard to the dual purposes under article 23, paragraph 1 (a) (i), noted that in other international mechanisms evaluating the same article, namely the Financial Action Task Force and similar regional bodies, a stricter interpretation, requiring national legislation to include both or none of the purposes of that paragraph, had been adopted. Moreover, they pointed out that paragraph 233 of the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* also makes specific reference to the fact that the

conversion or transfer must be for either purpose. Finally, they noted that the domestic provisions on concealment, which include the second purpose of the conversion or transfer offence, corresponded to the offence of concealment or disguise covered by article 23, paragraph 1 (a) (ii), i.e. a technically different offence from that of conversion or transfer, covered by article 23, paragraph 1 (a) (i). Taking the above into account, the reviewing experts concluded that the legislation of the State under review was fraught with a technical deficiency relating to the missing alternative purpose of the conversion or transfer aspect of the offence.

Independently of this conclusion, however, the subject raises a number of important interpretative and methodological issues, already encountered in part under previous articles, which may merit further analysis: the degree to which a country is bound to adopt the Convention text and structure; the application of the concept of functional equivalence; the role of article 30, paragraph 9; and the extent to which an authoritative value should be accorded to evaluations and interpretations adopted by other review mechanisms. It is worth noting in this regard that paragraph 3 (j) of the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption specifies that the Mechanism is intended to “complement existing international and regional review mechanisms in order that the Conference may, as appropriate, cooperate with those mechanisms and avoid duplication of effort”. This does not necessarily exclude, however, the adoption of standards and interpretation techniques that diverge from the ones adhered to by other evaluation mechanisms (e.g. in respect of the range of options of States parties, or with regard to the possibility of using equivalent terms instead of the exact wording of the Convention text, or the necessity of introducing ad hoc provisions instead of general catch-all offences) where this is deemed appropriate and more consistent with the nature of the Convention and the priorities of the States parties.

#### *Concealment or disguise*

A number of comparatively more substantial problems were observed with regard to the application of paragraph 1 (a) (ii) of article 23, relating to the broader offence of concealment or disguise of property. For example, in one case, this particular component of the money-laundering offence was missing from national legislation, while in another it was found to refer only to proceeds from the previous criminal conduct of the perpetrator himself or herself, and appeared (somewhat peculiarly) to be confined solely to cases of self-laundering. For this reason, it was recommended that the provision in question should be amended and the scope of this money-laundering conduct widened to the proceeds of crimes committed by other people as well.

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

Finally, in one State party, there is an exemption from criminal liability where the offence of concealment is committed to benefit a “spouse, a relative whose tie does not exceed the fourth degree of consanguinity or second degree of affinity, an innermost friend or a person to whom a special gratitude is owed”. The exemption does not apply where the offence is committed to assure the benefits of the crime, as

is usually the case, or where the act was done for a profitable purpose. The authorities of the country in question explained that, in practice, this concerns only a small category of persons. Nonetheless, it was considered a deficiency that may erode the overall efficacy of the regime against money-laundering. In any event, the *Legislative Guide for the Implementation of the United Nations Convention against Corruption* refers to the understanding that national drafters should also consider concealment for other purposes, or in cases where no purpose has been established, to be included in the scope of the offence.<sup>26</sup>

*Acquisition, possession and use*

Article 23, paragraph 1 (b) (i), contains as a mandatory offence the acquisition, possession or use of proceeds of crime, while knowing at the time of receipt that such property represents the proceeds of a crime. In several jurisdictions, one or more types of this behaviour (especially the mere possession, but also the acquisition or use of proceeds of crime) are missing from the applicable provisions or are only partly (under certain restrictive conditions, such as that the person concerned acted with a view to avoiding the identification of their origin, their seizure or confiscation) or at best implicitly covered, through related concepts, such as “receiving” or “applying”.

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

*Example of implementation*

In one State party, the law provides, as a rule, that a person living in a joint household with the offender and who only used or consumed property obtained by the offender for ordinary needs in the joint household cannot be sentenced for money-laundering. This exemption is not foreseen in the Convention. However, the national authorities explained, to the satisfaction of the reviewers, that this provision was inserted into the law to allow for considerations of equity, and thus complies with fundamental principles of justice. If a person commits an offence, e.g. sells drugs or steals property, and he or she uses the proceeds to pay for the rent or buy food, it is regarded as inequitable to punish anyone living in his or her household for continuing to use the residence, or for eating the food put on the table. Moreover, in such minor cases it would often be difficult to prove that this other person knew that the money was the proceeds of crime. The above exemption was reported to be used restrictively, in cases where the sums were indeed small. In practice, a person may continue to live in the apartment and eat food without committing an offence, but a person going, for example, on an expensive trip to an exotic destination, will be deemed to have committed the offence in question.

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<sup>26</sup> Ibid., para. 237.

### *Participation and attempt*

Article 23, paragraph 1 (b) (ii), requires the criminalization, subject to the basic concepts of the legal system of the State party, of participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with the article. Participation and related conduct, as well as attempt, are usually covered by the general provisions of the respective national criminal codes or by comparable general legislation (e.g. accessories and abettors acts or interpretation acts), which is also relevant for the application of article 27 of the Convention, and more rarely in additional provisions related specifically to money-laundering. In two cases, insufficient information was provided on the existence of provisions covering participation, aiding and abetting or conspiracy, while in two further cases, uniquely, attempted money-laundering is not punishable, or is punishable only in relation to acts which are considered “gross” although this would apparently be covered in amendments to the law that were pending at the time of the review.

#### *Example of implementation*

In one State, the act of money-laundering itself is partly described as an act of aiding and abetting (“who aids and abets the securing of proceeds for another person”), whereby aiding and abetting is deemed to include collecting, storing, concealing, transporting, sending, transferring, converting, disposing of, pledging or mortgaging, or investing the proceeds.

The possible penalties for accomplices and participants in acts of money-laundering are often less severe than the ones foreseen for the principals of said acts. The reviewing experts in one State party objected to this practice and recommended that an amendment should be considered to bring the relevant provisions more fully into line with the Convention. Such a recommendation, however, should not be considered pertinent for all States parties with similar legislation, given the discretion they enjoy in principle in the way they formulate their sanctions regime and the special characteristics governing each individual criminal justice system.<sup>27</sup>

A more important issue has arisen in some countries with regard to the punishment of “conspiracy” — a concept that is not part of the civil law tradition of many countries and covers a preparatory stage more distant to the full offence than attempt, involving the agreement between two or more persons to commit a crime, and in many cases (but not always), additionally, at least one of the conspirators taking some concrete action in furtherance of the criminal plan. States parties are only obliged to criminalize the various participatory acts and attempt, including conspiracies, subject to the basic concepts of their legal system. The extent of their obligation depends therefore on whether they recognize conspiracies as behaviour which may possibly be subject to criminal penalties. However, this principle does not always appear to be put into practice in relation to the implementation of article 23. For example, in two cases from the Group of Latin American and Caribbean States, it was noted that the concept of conspiracy was not applicable for money-laundering offences, despite the fact that it is recognized and applied for other

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<sup>27</sup> See also chapter II, section A, below.

categories of crimes (e.g. related to the security of the State). In other jurisdictions, recommendations were issued for the criminalization of conspiracy to carry out money-laundering, and in one case the authorities stated that they were preparing an amendment to address this matter — even though conspiracy did not appear to be a familiar concept in the relevant legal systems.

In contrast, three States have introduced and apply the concept of conspiracy, specifically with regard to some money-laundering offences, despite the fact that in these particular legal systems the use of this concept is considered highly unusual and such behaviour, as a general rule, goes unpunished. Significantly, in one of these cases, the relevant provision was introduced especially with a view to fulfilling the requirements of article 23, paragraph 1 (b) (ii), of the Convention.

#### *Proceeds of crime*

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

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

#### *Examples of implementation*

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

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

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

In one State party, an issue arose regarding the coverage of indirect proceeds of crime, owing to the fact that the national legislation does not contain the word “indirectly”. The authorities argued that the general wording of the law under

review (“things or property derived from a crime” and “products or benefits of the crime”) was sufficient to cover indirect proceeds and referred to the relevant jurisprudence. However, the State party concerned was again advised to adhere to the stricter interpretation of other mechanisms such as the Financial Action Task Force and to adopt language that is more clearly consistent with article 2, subparagraph (e).

#### *Predicate offences*

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

Other countries follow a threshold approach in defining predicate offences for money-laundering purposes, i.e. applying the law only to “serious offences”, “socially dangerous unlawful actions” or “felonies”, defined as such when subject to penalties above a particular threshold, whereby the applicable thresholds differ depending on the features of the legal system in question. Here, although there are cases where the selected threshold (e.g. at least 6 or 12 months’ or even three years’ imprisonment) appears enough to cover offences established in accordance with the Convention, in some jurisdictions it is too high (e.g. five years’ imprisonment), resulting in recommendations to proceed with the enactment of new laws, with a view to expanding the scope of predicate offences by reducing the applicable threshold (e.g. from five years to one year) or even by increasing the applicable penalties.

A third group of States parties does not establish the predicate offences of money-laundering depending on the severity of the applicable penalty, but uses an exhaustive list enumerating the offences deemed essential. Here again, the national laws were sometimes found to be lacking, leading to recommendations for States parties to extend the list to include at least all mandatory offences established in accordance with the Convention, and in one case to consider the possibility of including those relating to bribery and embezzlement in the private sector, while recognizing the optional nature of those provisions. A factor which should also be considered when assessing the usefulness of the list approach is the ease with which the pertinent list can be amended to account for new and emerging crimes (for example, by act of parliament, gazette or ministerial decision). Interestingly, one

State has covered the Convention offences (or at least the mandatory ones) by including by definition in the list all crimes set forth in the international conventions to which the State adheres, including, of course, the Convention against Corruption.

Finally, a number of countries adopt a mixed approach, combining a more or less comprehensive list of specific offences with a threshold applying to all crimes other than those included in the list. Again, in one of these cases, there was doubt as to the inclusion of all corruption-related offences, while in two others the threshold was definitely considered too high or the list incomplete, leaving some offences, such as trading in influence or bribery in the private sector, outside the scope of the national provision and leading to recommendations to address this situation.

As regards the handling of the predicate offences themselves, an interpretative note to the Convention clarifies that “money-laundering offences established in accordance with this article are understood to be independent and autonomous offences and that a prior conviction for the predicate offence is not necessary to establish the illicit nature or origin of the assets laundered. The illicit nature or origin of the assets and, in accordance with article 28, any knowledge, intent or purpose may be established during the course of the money-laundering prosecution and may be inferred from objective factual circumstances”.<sup>28</sup> Most States under review have confirmed that this is indeed the case in their jurisdictions and that this is the practice followed by their courts.

#### *Successes and good practices*

In one State, the fact that it is sufficient to establish the criminal nature of the proceeds, without the need to identify the predicate offence, for a money-laundering conviction was positively noted as conducive to the pursuit of money-laundering cases.

Similarly, the supreme court of another State has determined that it is not necessary to prove that funds or property are proceeds of a specific criminal offence but that it would be sufficient to establish that objects must have been derived from criminal activity. Accordingly, in one case, the money-laundering conviction was upheld based on the conclusion that the existence and origin of the money were to remain concealed and thus the possibility that the money might have been obtained legally is so improbable that it can be assumed that it was derived from a criminal activity. That court has also clarified that it is not necessary to show that the entire funds or assets stem from a criminal activity. Funds or assets that only partially represent proceeds of crime and partially stem from licit sources are considered proceeds of crime in their entirety.

#### *Foreign predicate offences*

Regarding predicate offences committed outside the jurisdiction of a State party, in most cases, national legislation contained standards similar to those listed in article 23, paragraph 2 (c), providing for the application of the money-laundering offences, under the condition that the relevant conduct is also punishable under the domestic law of the State where it was committed (dual criminality). In other words, it is

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<sup>28</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. III, art. 23, sect. C (p. 223).

sufficient that the offence is punishable in the place of commission and constitutes a predicate offence for the laundering of assets originating from that conduct to be sanctioned. One State reported that, in practice, it helped if there was a foreign indictment in order to count the foreign indictable offence as a predicate offence.

In numerous cases, national laws seem to go one step further, dispensing with dual criminality, as well as making no distinction regarding predicate offences that do not come under their jurisdiction but would have constituted offences if they had been committed within their territory. Although in one case the reviewing experts appear to have expressed serious reservations about this practice, considering it unfair, in particular, to initiate proceedings on the basis of acts that would not have constituted a crime in the place of commission, nothing in the Convention justifies excluding this possibility. On the contrary, article 23 itself includes the obligation to seek to apply the money-laundering offence to the widest range of predicate offences. Moreover, considering as the only prerequisite that the conduct would have constituted a predicate offence, had it occurred domestically, is in line with the standards accepted by the interpretation of other international instruments, such as the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation of the Financial Action Task Force.

Nevertheless, in several cases, issues were encountered with respect to the coverage of foreign predicate offences. For example, in at least 12 cases, the extension to these acts was at best implicit, as the law did not address the question of whether foreign predicate offences were covered in respect of proceeds laundered domestically, and no jurisprudence was presented to demonstrate that such cases are covered in practice. Moreover, in at least four cases, offences committed outside the State party were clearly not considered predicate offences, or were considered as such only in certain limited cases, even if legislation was pending to address the matter. It is also worth noting that the matter of foreign predicate offences is sometimes confused with the more general issue of exercising jurisdiction over money-laundering acts committed abroad, which falls under the ambit of article 42 of the Convention.

#### *Self-laundering*

The exception contained in article 23, paragraph 2 (e), does not apply in the legislation of most States parties, so that a person can be convicted of both a money-laundering offence and the underlying predicate offence or offences (so-called “self-laundering”). This was sometimes considered as a good practice. Significantly, one State from the Group of Eastern European States provided statistical data showing that about half of those convicted of money-laundering offences during the last few years had been accused of self-laundering.

Another option is to make use of the possibility afforded by the above provision and exclude cases of self-laundering. For example, some States consider that the punishment of the offender for both the predicate offence and laundering of proceeds from that offence would run against the prohibition of double assessment of the facts; accordingly, the use or transfer of the object obtained from someone’s criminal activities would be assessed solely as “post-offence behaviour” or “co-punished acts”, and the perpetrator would not be held liable if he or she had been convicted for the predicate offence. This approach is not inconsistent with the requirements of the Convention, even if it would be better if the countries which

follow similar principles reconsidered the application of the provision on self-laundering in the future. The same applies in some countries where the principle of double jeopardy bars the authorities from prosecuting for both the predicate offence and the money-laundering offence, specifically in a scenario where the perpetrator engages merely in possession of his or her criminal proceeds.

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

#### *Mens rea*

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

Similarly, in other cases, it was noted as a good practice that the laundering of proceeds of crime is criminalized not only when the alleged offender knew but also when he or she ought reasonably to have known that the assets laundered resulted from a crime, or when he or she acted based on a duty to know, a rational assumption or an inexcusable ignorance of such fact. Several States apply similar standards in their domestic legislation.

#### *Providing copies of against money-laundering laws*

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

#### *Effectiveness*

Although there were cases where the lack of comprehensive statistics on money-laundering cases was noted, and some countries with recent legislation against money-laundering confirmed that few, if any, prosecutions had been raised as yet, a large number of countries provided (sometimes extensive) statistical data and detailed examples of cases of money-laundering prosecutions, alluding to a fairly widespread application of the relative provisions. In two States parties, the practical effectiveness of the criminal legislation on the matter, demonstrated by the unusually large number of prosecutions and convictions for laundering of proceeds of crime (over 1,000 convictions during the period 2003 to 2009), was declared a good practice. Close cooperation between the agencies involved in combating

money-laundering was described as indispensable for an effective and efficient system. Such cooperation should take place at both the political and operational levels and include mechanisms to coordinate policy and to jointly investigate cases (e.g. by sharing information).

As to the lessons learned from this practical experience, one State outlined for the benefit of the review the most common ways in which money-laundering occurs, according to the knowledge gathered by its investigation and prosecution authorities; it involved the use of false documents to conceal and disguise the illicit origin of proceeds; intermingling of proceeds of crime with legal businesses; use of fictitious and offshore companies, fictitious directors and representatives; providing the competent bodies with false information regarding trading with goods; and having particular businesses to justify the movement of illicit funds.

### *Challenges*

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

## **2. Concealment (article 24)**

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

### *Example of implementation*

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

One State party's law also covers the mere suspicion that property constitutes or represents a person's benefit from criminal conduct, thus extending beyond the requirements of the Convention. It should be noted, however, that the offence is not recognized by all States parties, and a number of countries did not provide enough information to allow a full assessment of their implementation of article 24. Furthermore, in a few States parties that have established concealment as a criminal offence, there are issues with respect to the continued retention of property resulting from an offence established in accordance with the Convention. For example, in one State, the offence of receiving is expressly limited to property attained by another by means of a typical unlawful act against the property. Thus, it falls short of the requirements of article 24, since most offences established according to the Convention are not property crimes. Legislation has been drafted or introduced in some jurisdictions to fully implement this provision.

## **E. Obstruction of justice (article 25)**

Obstruction of justice is established as a criminal offence in all States parties, albeit with varying degrees of success. In about one third of cases, serious limitations have been observed. With the exception of a few States that appear to rely on a single, wide obstruction-of-justice offence, including one country that relies solely on the common law offence of attempting to pervert the course of justice, the tendency among States parties is not to have an overarching offence encompassing all forms of illicit behaviour, as contained in article 25 of the Convention, but to seek to achieve the intended (mandatory) result through a combination of multiple, partly overlapping provisions.

### *Examples of implementation*

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

In contrast, another State's law includes a single obstruction-of-justice offence that covers any person who by means of violence, threats, damage or other unlawful conduct aimed at a participator in the administration of justice or any of his or her next-of-kin behaves in such a way as is likely to influence the participator to perform or omit to perform an act, task or service in connection with a criminal or civil case, or retaliates for any act, task or service which the participator has performed in connection with a criminal or civil case. The term "participator in the administration of justice" includes witnesses, experts and others who provide testimony or evidence in a criminal proceeding, as well as anyone who works or performs a service for the police, the prosecuting authority, the court or the correctional services.

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

*Use of coercive means to interfere in the giving of testimony or the production of evidence*

Under article 25, subparagraph (a), the criminalization of the use of coercive means (i.e. physical force, threats or intimidation) in order to influence potential witnesses and others in a position to provide the authorities with relevant evidence or testimony, in proceedings in relation to the commission of offences established in accordance with the Convention, is required. The term “proceedings” must be interpreted broadly to cover all official governmental actions related to the investigation and adjudication of corruption-related offences, including pretrial processes.<sup>29</sup> Thus, in one case where the applicable domestic provisions are limited to interference with the giving of testimony before a judicial body, it was recommended that those provisions were expanded to also include pretrial proceedings and criminal investigations conducted by the police.

It is irrelevant whether the act of intimidation is carried out in the presence of the victim or whether the victim has been directly intimidated, or through a third party. It is also irrelevant if the perpetrator achieved the intended result (i.e. the inducement of false testimony or interference in the giving of testimony or the production of evidence). Therefore, it is not enough if the national legislation criminalizes only the act of the “principal” offender, who gives false testimony, causes the disappearance of evidence, destroys documents to prevent them from being used as evidence, etc. In two countries where this was more or less the case, recommendations on addressing this point were issued.

In the same line of thought, the reviewers, in their majority, have viewed with obvious reservation the claims or intimations by some national authorities that cases of inducement to give false testimony could be punished as abetting or instigating the principal offence of perjury, even in cases where the inducement was unsuccessful and no perjury was actually committed. Although this is a matter of contention — given that a number of reviewers seem to hold a different view — it appears most likely that only in the event that the inducement succeeds would the perpetrator be punished as an accomplice to the false statement made by the witness. The problem is overcome if the country in question belongs to the jurisdictions where, as described below, under section F, subsection 2, it is also possible to punish attempted instigation (incitement) of an offence, including perjury. In any case, however, such an approach does not suffice to cover interference in the giving of testimony or the production of evidence other than the inducement to give false testimony.

In fact, several States seem to principally rely on general provisions on threat, criminal intimidation, attempted coercion, or duress in order to cover the conduct in

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<sup>29</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 257.

question, punishing the use of threats to alarm or intimidate one or more persons, regardless of a link to giving of testimony, the production of evidence or the carrying out of judicial proceedings. The existence of such a link, e.g. if the action is directed against persons who have the status of victims or witnesses, may be considered as an aggravating circumstance.

*Example of implementation*

According to the penal codes of three States from the Group of Asia-Pacific States, “whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.”

Even if some reviewers have expressed their preference for more focused and specific legislative provisions, the above practice can be considered in principle as being in accordance with the Convention, as long as it is ensured that all coercive means listed under article 25 are included within the scope of the applicable provisions. Furthermore, criminal intimidation should not be linked to restrictive requirements, such as intending to cause detriment to the compelled person; nor should it be confined, as in the example above, to threatening someone with any injury to his or her person, reputation or property, or to the person or reputation of anyone in whom that person is interested. The Convention does not condition the application of the offence on whether the threatened harm was directed against specific interests or individuals. This was pointed out in the review of one State, though not in another with identical provisions.

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

*Example of implementation*

The identical laws of two States subsume under the offence of conspiracy to defeat justice and interference with witnesses the conduct of any person who, in order to obstruct the due course of justice, dissuades, hinders or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so, or obstructs or in any way, interferes with or knowingly prevents the execution of any legal process, civil or criminal.

It should be noted, that in several cases, issues arose relating to the scope of coverage of the applicable offences, e.g. regarding the use not just of threats and intimidation but also of physical force, the intimidation of witnesses to induce false testimony (rather than simply not testifying at all) and conduct intended to interfere not just with the giving of testimony but also with the production of non-oral evidence (such as a document or expert opinion) by persons involved in criminal proceedings. Even if such conduct might sometimes fall under the general offence of criminal intimidation, the latter usually carries a lower sanction, creating a discrepancy regarding the applicable penalties in similar situations.

*Use of corrupt means to interfere in the giving of testimony or the production of evidence*

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

Most countries fulfil this requirement through special provisions covering the bribery of a witness or expert, attempting to induce false testimony or the giving of false expert evidence, attempted incitement to a false statement, attempted subornation of perjury or attempted corruption of witnesses, but also through more general offences such as attempting to pervert justice or influencing the course of justice. Frequently, these provisions coincide with the ones referring to the use of coercive means, and are marked by the same problems as discussed above (e.g. with regard to considering inducement to give false testimony as instigation of perjury or with regard to addressing conduct related to the production of non-oral evidence).

*Examples of implementation*

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

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

In the case of at least six States parties, the law does not extend to the means referred to in subparagraph (a) of article 25. Some States only criminalize the use of threats, coercion or criminal intimidation. Therefore, it was recommended that the

authorities ensure that the criminalization of obstruction of justice is achieved through ad hoc criminal law provisions, in line with the specific requirements set forth in the Convention. Some issues also arose with regard to the failure of some laws to explicitly refer to the promise and offering, as done with the giving of an undue advantage as an inducement, although such behaviour would most likely be treated as an attempt to give the advantage in question. Finally, in one State, the law was found not to be in full compliance with the Convention because it did not ensure that the domestic provisions on obstruction of justice applied even if persons other than the witness, expert witness or trial participant himself or herself (such as his or her close relatives) were the recipients of an undue advantage.

*Use of coercive means to interfere with the exercise of official duties by justice or law enforcement officials*

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

*Example of implementation*

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

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

*Example of implementation*

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

As to the problems and shortcomings encountered, in at least one case the domestic provisions covered intentional insult, assault or the use of criminal force but not threats or intimidation, while only one kind of physical force was covered in another case. Furthermore, isolated cases were located where the conduct in question was not covered or where criminal liability for interference with the exercise of judicial duties was limited to acts committed by persons who are public officials themselves, excluding all other perpetrators. General provisions related to coercion and intimidation were generally found to be adequate, although in some cases it was deemed necessary to specifically cover acts directed against the administration of public authority. Finally, in one State party, even though the applicable provisions on assault, intimidation, contempt and defeating or obstructing the course of justice appeared to satisfy the requirements of the Convention, it was recommended that the authorities consider a special statutory prohibition for the obstruction of judicial officers consistent with a similar special prohibition already in existence with regard to law enforcement officials and police.

*Challenges*

No particular challenges were identified other than the numerous limitations in the establishment of domestic offences mentioned above and, in some cases, the excessive fragmentation of the applicable legislation and the lack of a consolidated obstruction of justice offence addressing all elements of the conduct in question. Few States parties have provided statistical data or examples of cases, making it difficult for the time being to assess the effectiveness of provisions regulating obstruction of justice. Nevertheless, there is no doubt that some countries, despite adequate legislative measures, face serious weaknesses regarding the practical application of the relevant provisions. This is illustrated by the example of one State party, whose officials reported significant and continued physical attacks and threats against and intimidation of witnesses, investigators, prosecutors, heads of agencies and judges, hampering these persons in the full exercise of their duties.

## **F. Provisions supporting criminalization**

### **1. Liability of legal persons (article 26)**

All but four States parties have adopted measures to establish the liability of legal persons for participation in the offences established in accordance with the Convention, although some of these countries have no general liability provision and there is considerable variation with regard to the type and scope of such liability. One State appears to have established some form of liability, but only in relation to money-laundering. In almost all cases — with the exception of one State whose

applicable provisions need to be clarified — it appears clear that the liability of the legal entity, be it criminal, civil or administrative, is without prejudice to the criminal liability of the natural persons who have committed the offences, and is therefore in compliance with article 26, paragraph 3, of the Convention. In practical terms, this means that the procedural decisions taken in relation to the legal person will not influence decisions affecting the natural person; the fact that the legal person is held liable will not provide any compelling advantage (or disadvantage) to the natural person, nor will it hinder the establishment of their criminal liability.

These principles apply in respect of all individual perpetrators or accomplices in a corruption offence, regardless of their eventual position within the legal person. It may be that the legal representatives of a company represent it during investigations and proceedings instituted against it for corruption or corruption-related offences. Nevertheless, they may not be convicted for the offences committed by the legal persons they represent, unless they are found individually responsible. It is true that in some, mostly common law countries, the law provides that any conduct constituting a crime for which a corporate body is or was liable to prosecution, may be deemed to have been the conduct of every person who at the time was a director or employee of the corporate body. Although, however, at first glance this appears to introduce a kind of objective liability of the persons in question, the law makes clear that the relevant provisions do not apply where it is proved that the director or employee of the corporate body took no part in the critical conduct, or took all reasonable steps to prevent it.

At the same time, it should also be possible to hold the legal person accountable despite an inquiry failing to identify the individual offender — which may often be the case in the increasingly decentralized, complex corporate structures, where corporate operations and decision-making are diffuse — or to establish his or her liability, for instance as a result of procedural obstacles. In contrast to these principles, in at least two cases it was noted that the (criminal) liability of legal persons was tied to the liability of a natural person and that the latter was to a significant extent a precondition of the former.

#### *Nature of liability, civil liability*

As to the type of liability involved, in most cases there seems to be no question that the possibility exists of holding a legal person accountable through the general rules of civil responsibility or an administrative rule, although often inadequate or confused information on these possibilities was provided during the reviews. In several jurisdictions, multiple forms of liability apply.

Where information was provided on civil liability regimes, it referred for the most part either to provisions enabling claims of compensation for moral or material damage against legal persons, in accordance with article 35, or to provisions establishing the possibility of applying sanctions to such persons through civil or quasi-civil procedures.

### *Examples of implementation*

In one State party with no criminal liability for legal persons, the penal code establishes a special subsidiary (secondary) civil liability of corporate bodies for all offences committed on their behalf, as well the joint civil liability of legal persons specifically in cases of domestic or foreign bribery. In those cases, the legal entities are held jointly liable for damages with the natural persons who were declared criminally liable as principals or participants, and it is up to the court to determine the indemnity due by each party in proportion to their contribution to the criminal result. It was recommended that the national authorities adopt a less restrictive definition of the civil liability for legal persons, which would allow for a joint liability between the natural and the legal person for every crime foreseen in the Convention.

The civil code of another State provides for the special option of dissolving, under certain circumstances, a legal person, on application by the public prosecution service. Such a remedy is available, for instance, where the activities of a legal person are in conflict with the public order. It is conceivable that a legal person that has bribed a domestic or foreign public official would fit this scenario. A similar procedure for companies that have an illegal purpose or cause is foreseen in the code of commerce of a further State, although the relevant procedure appears to have an administrative rather than civil character.

Interestingly, it appears that civil liability, in the form of the possibility of victims of corruption offences claiming civil damages from the legal persons implicated, is not always considered as a clear equivalent to its criminal and administrative counterparts. Hence, in one State that foresees criminal liability for money-laundering and foreign bribery and civil liability in the above sense for other corruption-related offences, although it was concluded that the provision under review has generally been implemented, the reviewers felt it necessary to encourage the country to consider the possibility of introducing clear legislative provisions providing for the criminal and/or administrative liability of legal persons for all corruption offences.

### *Criminal liability*

The main issue related to the application of article 26 is whether States parties have confined themselves to the application of civil and administrative penalties, or have gone a step further and made legal persons subject to criminal sanctions. The second alternative clearly prevails. More than two thirds of States parties have established some form of criminal liability of legal persons for corruption offences. This includes cases where States parties, in order to avoid constitutional challenges related to the obligation to prove the guilt of the accused party, have established “indirect” versions of such liability, according to which if it is ascertained during the course of criminal proceedings against a natural person that the criminal offence was committed in the course of business activities or in the interests of a legal person, fines or other coercive measures may be applied against that legal person by a reasoned decision of the criminal court.

Whereas the criminal liability of legal persons was a distinctive feature of a number of common law systems in the past, at the time of the reviews there were at least as many civil law countries with corresponding rules, including liability rules which are not genuinely criminal but are contained in criminal law statutes. More States parties around the world are now increasingly following this trend, as reflected in the example of three countries from different regions with civil and/or administrative regimes in force, where either a law introducing criminal liability, had already been signed and was expected to become effective within weeks, or a commitment had been made — in one case, apparently under the influence of the OECD Working Group on Bribery in International Business Transactions to introduce such liability and legislation to this effect was pending. It is equally telling that in two of the four States with no or with limited legislation enacting the liability of legal persons for corruption offences, the national authorities indicated that their Governments intended to prioritize the enactment of criminal liability measures, despite the fact that, as noted in one case, alternative forms of civil and administrative liability would also satisfy the requirements of the Convention.

Much of the relevant legislation is recent and untested, or has not been the subject of comprehensive analysis. This partly explains its limited or non-existent practical impact in some countries and the still-existing uncertainty as to the way in which the courts will assess some of its aspects, such as the attribution of intent and guilt, the applicable evidentiary rules and the criteria of choosing between different types of sanctions against legal persons.

The more traditional way to regulate the criminal liability of legal persons — and the one prevalent in common law jurisdictions — is to deem all applicable offences (with only very limited exceptions, such as minor transgressions or certain tax offences) as referring to both natural and legal persons and apply them in the same way, with only the necessary adaptations.

*Examples of implementation*

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

The laws of another country define the word “person” to include any company or association or body of persons, whether incorporated or not. This definition is not exhaustive and covers both natural and legal persons like corporations, proprietorships, firms or unincorporated associations. In general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted of offences including those requiring mens rea. There are, however, crimes which a corporation is incapable of committing or of which a corporation cannot be found guilty as a principal; moreover, a corporation cannot be convicted of a crime for which death, physical punishment or imprisonment are the only penalties.

Many countries follow a narrower approach, whereby legal persons are liable to criminal punishment only for specific offences, usually those considered more serious or falling under the category of economic offences. In terms of compliance with the Convention, this may lead to deficiencies insofar as no complementary civil and/or administrative provisions are in place. For example, in five cases, liability is limited to offences such as money-laundering and the bribery of national and foreign officials, or to crimes that involve a person enriching himself or herself or a corporation in such a way as to be detrimental to the finances of the State. It was therefore recommended that those countries consider extending the scope of the law to include all offences established in accordance with the Convention. Equally, in other cases with somewhat broader provisions, certain offences were excluded from the scope of coverage, such as embezzlement in the public and private sectors, abuse of functions and obstruction of justice. There are also certain limitations with regard to the possible perpetrator of an offence. For example, in one jurisdiction, the scope of the criminal liability of legal persons was overly narrowed by an exception covering not just the State, local governments or public law legal persons (as is also the case in other countries), but also State-owned enterprises.

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

*Examples of implementation*

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

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

One of the objectives of the establishment of corporate liability is clearly to encourage legal persons to adopt adequate corruption prevention mechanisms, such

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

*Successes and good practices*

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

*Administrative liability*

Under article 26, paragraph 1, of the Convention, States parties are required to take the necessary steps, consistent with their legal principles, to provide for corporate liability for the offences established in accordance with the Convention. There is no obligation to establish criminal liability, consistent with other international initiatives that acknowledge and accommodate the diversity of approaches adopted by different legal systems.<sup>30</sup> Several States parties have indeed opted to rely on administrative sanctions (sometimes in conjunction with civil liability), citing fundamental principles of their legal system and established doctrine. According to these, only a natural person could be considered criminally responsible and thus subject to criminal liability. Corporations do not have a blameworthy state of mind and it is not possible to establish their guilt as a subjective and mental attitude; nor can they be at the receiving end of a genuine criminal penalty (*societas delinquere non potest*).

In most cases, the reviewing experts accepted the national choice on the preferred form of liability and noted that systems with administrative sanctions are in full compliance with the requirements set forth in article 26. It should be noted, however, that a number of reviewing experts, despite the wide margin of discretion of States parties in this matter, have recommended pursuing the establishment of criminal

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<sup>30</sup> See *ibid.*, paras. 323-327.

liability. In the same spirit, the establishment of criminal liability of legal persons involved in the commission of offences established in accordance with the Convention was highlighted as good practice in some cases, taking into account the innovative nature of such a measure in civil law legal systems.

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

*Example of implementation*

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

*Sanctions*

Sanctions generally vary, ranging from the most common variants of pecuniary penalties (e.g. up to five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence or equal to twice to ten times the value of the illicit values received, accepted, solicited, agreed or promised), forfeiture and publication of an extract of the judgement, to penalties of an administrative nature, including partial or total loss of tax incentives and benefits or absolute prohibitions from receiving them for a specified period, temporary or perpetual prohibition (“blacklisting”) from entering public tenders or concluding acts and contracts with State agencies, cancellation of authorizations to settle in the country as branches of foreign firms, prohibition of capital increases, deprivation of business licence and temporary prohibitions from engaging in a commercial or other activity, and even, as a most drastic tool (especially if the legal person was created specifically to perform criminal activities such as money-laundering, or if, having diverted from its primary legitimate objective, it has changed its activity for the sake of the commission of a crime), dissolution of the corporate body or cancellation of the legal personality, as well as different combinations of the above. The absence of a statutory maximum fine for corporations in one country was positively noted and considered to be conducive to deterrence.

Monetary sanctions for legal persons are generally harsher than the ones foreseen for natural persons. However, it was frequently felt that the maximum fines for corporations could be higher, taking into account the seriousness of the offences, the often significant profits involved and the economic strength of the entities in question. Accordingly, specific recommendations were issued in a significant number of cases to consider increasing the level of fines available for corruption-related offences (e.g. up to a percentage of the company’s turnover), or to extend the types of sanctions applicable to legal persons beyond pecuniary sanctions, with

legislation to address the issue pending in three further cases. In three cases, the absence of a public criminal record or a blacklisting system for companies and their principals was considered to be a deficiency. Finally, in one case, a recommendation was made to seek clarity in jurisprudence with respect to the imposition of sanctions on legal persons for specific offences; this entailed identifying penalty thresholds and specifying appropriate indicators for the application of a certain type of penalty, taking into consideration the size or the financial situation of the legal person.

Other factors which are normally taken into account when applying sanctions to legal persons are the type of activities of the legal person; the particular circumstances of commission of the criminal offence; the status of the natural person within the institutional framework of the legal person; the actual actions of the legal person; the nature of the operations performed by the legal person and the consequences caused by such operations; and, as noted above, the measures taken by the legal person in order to prevent the commission of the criminal offence.<sup>31</sup>

### *Effectiveness*

As already mentioned, rules on corporate liability are often recent and untested. It was reported that penalties for legal persons are not being applied widely, especially with respect to corruption offences, and that national prosecutors rarely demand that a legal person is declared criminally responsible for the commission of economic crimes. Law enforcement agencies, like the police and public prosecutor's office, do not always have systems in place to report criminal cases involving legal persons to the administrative authorities responsible for imposing the relevant sanctions. Equally, statistics and case analyses were seldom provided, making it difficult to conclude whether the national sanctions regimes could be considered as being effective, proportionate and dissuasive.

In only four cases did the reviewing teams declare themselves satisfied with the effectiveness of national regimes: in one of those, the system of criminal liability was considered a success because of the prosecutions and sanctions imposed on major corporations for corruption; and in another, the standard of liability was found to be direct and effective, resulting in an impressive number of law enforcement actions in the past five years.

### *Challenges*

Common challenges related to the inadequacy of existing normative measures, specificities in national legal systems and the establishment of appropriate penalties in accordance with paragraph 4 of article 26. Apart from that, the main challenge was the limited practical enforcement of existing regulations, the reasons for which lay partly in systemic deficiencies or rooted negative preconceptions on the usefulness of such measures. Two examples illustrate this situation: in one State, the minimal use of corporate liability laws was partly attributed to the limited capacity of law enforcement agencies, i.e. to a lack of knowledge among investigators and

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<sup>31</sup> On the issue of the measures at the disposal of States parties for sanctioning private sector entities, especially monetary fines, confiscation of proceeds, suspension, debarment, and denial of government benefits, see UNODC, *The United Nations Convention against Corruption: a Resource Guide on State Measures for Strengthening Corporate Integrity* (Vienna, 2013), pp. 16-26.

prosecutors on how to investigate and prosecute the offence; and in another State, where no case had yet been brought to court against a legal person, the authorities stated that there was a general perception that bribery was not a problem associated with the private sector, but instead concerned public officials receiving or soliciting bribes.

Last but not least, more information is needed, especially on the administrative option preferred by many countries. It was therefore recommended that statistics on administrative penalties and proceedings against legal persons, as well as on criminal cases and sanctions under criminal regimes, should be kept.

## **2. Participation and attempt (article 27)**

Almost all of the States parties have adopted adequate measures to criminalize the joint commission, participation and (barring four countries with clear deficiencies) attempt to commit the offences established in accordance with the Convention, usually not through special provisions referring to each of them separately, but through provisions contained in the general part of their penal codes. The same is not the case with respect to the preparation of a corruption offence, a non-mandatory provision which is criminalized only in about two thirds of States parties.

### *Participation*

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

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

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

#### *Attempt*

An attempt is usually defined as the conduct of a person who commences the commission of a crime (i.e. proceeds with an act that is more than merely preparatory and enables the realization of the offence) but who ultimately fails owing to circumstances beyond his or her control. The perpetrator of an attempt is mostly punished with the sanctions provided for the completed crime, although there are several countries where the sentence is merely reduced. In many States, it is explicitly stated that no punishment (or mitigated punishment) is imposed if the crime is not completed owing to voluntary action or inaction of the offender (not owing to external conditions or objective circumstances independent of his or her will, such as an unforeseen risk of being exposed). Moreover, in some countries, the attempt may not be liable to punishment (or may be liable to a lesser penalty) if the offence could not have been completed under any circumstances for lack of the perpetrator’s personal qualities or circumstances required under the law, or on account of the type of action or object of the offence.

There are countries where the law only punishes attempts regarding specific criminal offences or offences which are deemed serious or which carry a penalty above a certain threshold. In some cases this has created uncertainty with respect to the coverage of all corruption offences, and five States were identified as having definite weaknesses. In the first one, although attempts to commit the offence of passive bribery are specifically criminalized, there is no general provision on attempt covering all offences established in accordance with the Convention; in three others, attempts of various corruption offences (such as obstruction of justice and trading in influence) are not covered; and in the fifth one, attempts to commit an offence are only charged or punished if deemed dangerous for society — a requirement considered to imply a higher threshold than necessary.

It should be noted that many countries have limited room to apply measures on the attempted commission of Convention offences, in particular with respect to bribery and trading in influence. As already mentioned under section A, subsection 1, above, although several States parties consider the acts of promising and offering an undue advantage as attempts to commit the crime of bribery, many more States directly cover the promise and offer, as well as the acceptance of a promise or an offer, as complete bribery offences. In such cases, as pointed out in a number of reviews, no nexus of any kind is required between the active and passive actors; the subsequent behaviour of the opposite party is irrelevant and it does not matter if the illicit advantage is actually given and received or not. On the other hand, it is also not entirely accurate that there is no room at all for an attempt, as argued in three reviews. It is possible, for example, that an envelope containing a bribe offer is sent through the post, but intercepted without ever reaching its intended recipient. This would normally amount to attempted active bribery.

### *Preparation of an offence*

Contrary to the situation with attempt, preparatory acts are not normally viewed as a matter that always calls for penal measures and can accordingly be regulated collectively, e.g. in the general part of a criminal code. In more than one third of States parties, the mere preparation of a corruption-related offence (paragraph 3 of article 27) does not appear to be criminalized in any of its forms (including conspiracy, which, as observed with regard to article 23, paragraph 1 (b) (ii), is in principle considered to fall under the concept of preparation). In two of these cases, the States under review argued that the criminalization of preparation is reserved solely for the most severe criminal offences (crimes against the constitutional organization and security, international terrorism, etc.) or that it does not easily fit in with the national legal system and its basic principles, which require clear identification of the reproachable conduct that constitutes the offence. Given the optional character of the obligation in question, these explanations were deemed satisfactory.

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

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

#### *Example of implementation*

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

Many more States, primarily the ones with a common law background, confine preparatory conduct to a special offence of conspiracy, which, as explained in section D, subsection 1, above, usually involves a person entering an agreement with one or more other persons to commit an offence, often a serious one, so long as

at least one overt act (which can be an act in preparation to commit the offence) has occurred.

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

### **3. Knowledge, intent and purpose as elements of an offence (article 28)**

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

The point of article 28 is that the evidentiary provisions of each State party should allow inferences with respect to the mental state of an offender, based on objective factual circumstances, rather than direct evidence, such as a confession, before the mental state is deemed proved.<sup>32</sup> Indeed, in most States parties, given that the mental situation of the accused is not directly accessible to the perception of the court and there is rarely direct evidence on the state of his or her mind, proof of the subjective element of the offence may be achieved through so-called circumstantial evidence, i.e. by means of a logical reasoning process of inferring valid conclusions on the missing element from known and proven facts through direct pieces of evidence (for example, documents, witnesses and expert reports), taking into account the personal circumstances of the accused, the general context of the case and the maxims of experience and matters of common knowledge. As explained in one review, with the exception of spontaneous confession, the intent must be induced, legally and rationally, from many circumstances revolving around — before, during and after — the behaviour being prosecuted, the analysis of which cannot lack the study of the personality of the author, his or her knowledge, training, professionalism, social situation and interests (whether economic, professional, altruistic or otherwise). All this information is used to shape the intimate conviction of the judges and prove beyond a reasonable doubt the subjective element of the offence.

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

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

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<sup>32</sup> Ibid., para. 368.

*Examples of implementation*

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

Another State has a specific legislative provision on money-laundering which explicitly provides that knowledge, intention or purpose may be deduced from objective factual circumstances, such as the nature of an unusual transaction.

It is worth mentioning that, in order to facilitate the prosecution of corruption offences, especially bribery, embezzlement and abuse of office, national laws sometimes (in common law countries from the Group of African States and the Group of Asia-Pacific States) contain compelling, albeit rebuttable, presumptions of dishonest intention that have to be invoked once the essential factual ingredients of an offence (e.g. the giving of a gift or other consideration to a public official) have been established. Equally, as acknowledged by one State party, trial judges sometimes resort, as a matter of practice, to similar presumptions to infer, from acts carried out, the intention of their author. It is also common for judges in the criminal courts to take into account the fact that the perpetrator had a certain quality that ought to have led him or her to be fully aware of committing the offence.

While some governmental experts considered presumptions of the above kind, at least when included in national law, as running against the presumption of innocence enshrined in article 14, paragraph 2, of the International Covenant on Civil and Political Rights and sometimes in national constitutions, the majority commented on them positively, even considering them as welcome developments. The matter therefore calls for further examination, in order to determine the proper evaluation of such practices.

#### *Examples of implementation*

The laws of two States parties from the Group of Asia-Pacific States contain rebuttable presumptions, according to which once it has been established that a gratification has been offered, given, accepted or received, it shall be presumed that this occurred corruptly, unless the contrary is proved by the accused. The burden of proof is that of a party to a civil case, i.e. to prove one's case on a balance of probabilities. This is a higher burden than the ordinary burden placed on the accused to create a reasonable doubt. If the accused fails to rebut the presumption on the balance of probabilities, it is still upon the prosecution to prove its case, as a whole, beyond a reasonable doubt. In one of the States in question, similar presumptions exist with respect to embezzlement in the public and private sectors, as well as abuse of functions by public officials. Such legislative presumptions were deemed powerful tools for the prosecution and good examples of measures that can increase the possibility of successful prosecutions.

In another country, also from the Group of Asia-Pacific States and with a similar (common law) legal system, the criteria to infer knowledge, intent or purpose are not regulated by statute, but are left to the courts' objective judgement. Nevertheless, domestic standards enable the courts to presume, as in the above examples, a certain mental state of a person accused of corruption. In other words the courts may presume mens rea (e.g. the intention of obtaining a special favour from the corrupt official) on proof of actus reus (e.g. the giving or offering of a gratification to the public official). Again, this was described as a good practice, facilitating proof of the offence. It is also worth mentioning that the law of the State party in question is one of those mentioned in section B, subsection 4, above, explicitly providing that when a person who is charged with corruption is in possession of pecuniary resources for which he or she is unable to satisfactorily account for, the courts may take this into consideration as corroborating evidence in deciding his or her culpability.

#### **4. Statute of limitations (article 29)**

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

##### *Statute of limitations period*

Compliance with article 29 was assured in a considerable number of States parties where no statute of limitations is in place for corruption offences, either because a statute prescribing a time limit for the beginning of criminal proceedings does not exist for any domestic offence, or because it exists only for crimes subject to low penalties (e.g. a maximum term of imprisonment below six months or a small fine), which does not include the ones established in accordance with the Convention. This practice, most widespread among common law countries, was generally welcomed and described as prosecution-friendly and conducive to the full prosecution of corruption cases, even if it did not specifically target corruption offences. In one case, however, the disadvantages of having no statute of limitations

were also noted, including the danger of abusing the system and having to rely on deteriorating evidence. This is why in another State it was clarified that, despite the lack of a statute of limitations, aspects like the public interest are taken into account in order to reach a decision on whether to proceed with the prosecution of cases which happened a very long time ago. Equally, in some common law countries it is up to the court to determine whether the time needed to initiate a criminal process and bring the case to a hearing is reasonable given the particular circumstances of the case.

The majority of States parties have established a statute of limitations period for offences established in accordance with the Convention that is calculated from the date of commission of the crime and ranges from a minimum of one year in one case to a maximum of 25 years in two others, depending usually on the classification of the offence (e.g. as a misdemeanour or felony, or as a less serious or serious crime) and the gravity of their punishment. In many cases, the prescription is suspended or (much more effectively) interrupted by an action of the relevant prosecution bodies, especially when the procedure is formally directed against the accused (e.g. at the time of the first hearing of someone as an accused person, the first threatening or execution of an official act of coercion against him or her, the first application for the approval or execution of an investigation measure, the issuing of an ordinance to search or arrest the accused, the application for the imposition of pretrial detention or the tabling of the indictment), or for other reasons specified in the law (e.g. the submission of a mutual legal assistance request, the commission of a new crime before the termination of the prescription period or the lack of legal authorization or of a judgement to be issued by a non-criminal court), resulting in a possible extension of the prescription period (e.g. up to a maximum of 15 years from the commission of the act, up to a maximum of 25 years from the date of the institution of the public prosecution, or even, as it appears in one case, for lack of information to the contrary, indefinitely).

Moreover, there are jurisdictions where case law or legislature have come to further lengthen the statute of limitations for the offences in question, e.g. by taking the time when the substantive effect of the offence comes about as a point of renewal of the limitation period that started with the completion of the punishable conduct; by holding that each successive act of bribery in the context of the same corrupt relationship renews the limitation period for the preceding acts; by allowing the retroactive effect of a legislative act prolonging the limitation period of bribery offences; by not counting as part of the limitation period of offences in office the time the implicated official still occupied his or her post; or by considering as the starting point for the limitation period of many offences (embezzlement, misuse of company assets, trading in influence, misappropriation of public funds, etc.) the date of discovery of the offence and not the date of its commission. Interestingly, the use of this last possibility is recommended in the *Legislative Guide for the Implementation of the United Nations Convention against Corruption*,<sup>33</sup> as well as by a number of reviewing experts concerned about the discrete nature of the offences established in accordance with the Convention.

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<sup>33</sup> Paras. 370 and 373.

*Successes and good practices*

In one jurisdiction, the period of limitation begins as soon as the punishable action is completed or the punishable conduct has ended. However, if the “success”, or effect, of the offence only occurs after the punishable action has been completed or the punishable conduct has ended, the period of limitation does not end before it has also expired, calculated from the occurrence of the effect or if one and a half times the period of limitation or three years have passed since the date of the punishable conduct. Moreover, if the offender commits another offence “stemming from the same bad inclination” during the period of limitation, the initial offence does not become time-barred until the limitation period for the newly committed offence has also expired. Finally, any investigative step against the accused suspends the limitation period.

Three States parties from the Group of Latin American and Caribbean States have a similar regime significantly extending the limitation period for corruption offences, offences occurring while in office or offences against the public administration or the property of public entities committed by public officials. The statute of limitations does not commence or is considered suspended until the public officials implicated in the respective case leave their post or are removed from office. In one of those States, it was also specified that if a corruption case involves more than one person and one of them is a public official, the statute of limitations period is stopped for all other persons involved in the commission of the crime, no matter whether they are public officials or not. These practices provide the examining magistrates with a longer term to conduct investigations, which is very useful in the event of complex inquiries and were highlighted in most cases as conducive to achieving the goals of the Convention.

In a number of reviews, the governmental experts felt that the statute of limitations periods were not long enough for the purposes of the Convention and issued recommendations to prolong them. For example, in one State party they urged the authorities to reconsider the periods of three years and two years, respectively, for offences punishable by more than one year and by up to one year or a fine (noting that a legislative amendment to that effect was pending). It should be emphasized, however, that the concept of “long” periods, as used in article 29, is not fixed, and there is no definite threshold under which the statute of limitations period must be considered insufficient. Thus, although the reviewers were initially concerned about one country’s two-year limitations period for certain offences, and an even shorter one-year period for others, they received (and eventually accepted) the assurances of all relevant authorities that the statute of limitations did not present impediments to effective and timely prosecutions. A factor to be taken into account is whether or not, in cases of short statute of limitations periods, there are sufficient guarantees that the proper administration of justice is not affected (e.g. through the possible prolongation, suspension or interruption of the limitation period). The time limits and these guarantees should be considered jointly in each case. Reviewers should also take into account the number of criminal cases and law enforcement capacities of each individual State and ensure that the national time limits strike a fair balance between the interests of swift justice, closure and fairness to victims and defendants on the one hand and the recognition that corruption offences are often complex, take

a long time to be discovered and established, and may also involve multiple jurisdictions on the other.<sup>34</sup>

*Suspension in cases of evasion of justice*

In numerous States parties, the statute of limitations is suspended (and the basic prosecution time limit, as defined above, extended) if the alleged offender evades the administration of justice, as required under article 29. Again, the suspension can be indefinite (the limitation period resumes from the moment of detention of the person, or from the time that he or she gives himself or herself up) or temporary (e.g. lasting for up to a maximum of 3 years or until 15 years from the commission of the criminal offence have passed). It is worth noting that a special rule suspending the period of limitation where the alleged offender has evaded the administration of justice or fled the country is not always necessary, insofar as general rules on the interruption of the period of limitation by the initiation of legal proceedings or where there are legal impediments to prosecution apply and such rules do not require the presence of the alleged offender.

*Example of implementation*

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

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

In contrast, it was noted that several States parties do not provide for a suspension or interruption of the statute of limitations where the alleged offender has evaded the administration of justice. In 12 further cases, not entirely comprehensive information (or no information at all) was provided on this issue, creating doubts about the compliance of the States parties involved. The lack of a suspension possibility was described as a major gap in the legal system, as absconding to another country is a frequent practice in corruption cases and extradition procedures are often hampered by considerable delays. Accordingly, appropriate

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<sup>34</sup> See *ibid.*, paras. 370 and 371.

recommendations were made, including in one case to provide for the limitation period to start only when the crime comes to the notice of the authorities.

## Chapter II. Measures to enhance criminal justice

### A. Prosecution, adjudication and sanctions (article 30)

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

#### *Sanctions*

Paragraph 1 of article 30 is a provision complementing the more special provision contained in article 26, paragraph 4, and requires States parties to give serious consideration to the gravity of the offences when they decide on the appropriate punishment. This reflects the range of penalties at the disposal of the national courts. Corruption offences are universally punished with custodial sentences, and frequently accompanied by pecuniary or other penalties, such as confiscation of property or deprivation of certain rights. Additionally, the criminal law or jurisprudence of each country normally establishes sentencing principles and specific criteria that courts are obliged to take into account in order to determine an appropriate sentence, which include the nature and gravity of the offence, the personal qualities of the offender and any circumstances mitigating or aggravating punishment (e.g. the value of the illicit advantage, the level of breach of trust, the type of position of the public official involved or the damage caused). The establishment of such criteria may be pursued through the additional use of sentencing guidelines, a practice generally welcomed and encouraged by reviewers as a measure promoting consistency, but also as a safeguard against the possible arbitrary exercise of exaggerated discretionary powers by the courts.<sup>35</sup>

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

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<sup>35</sup> See also *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 30, subsect. II.1.

*Successes and good practices*

An innovative approach followed by some States involves the imposition of a fine calculated as a multiple of either the value of the gratification offered or received or of the proceeds of the offence as a sanction for bribery and commercial corruption. Similarly, the law of another country provides that any person committing bribery shall be subject to three layers of aggravated punishment, depending on the amount which he or she receives or promises. The review teams of two of the above States considered that these approaches are bound to deter large bribery deals and highlighted them emphatically as good practices for international anti-bribery efforts. Nevertheless, as noted in other reviews, the quantification and calculation of the multiple or the imposition of the aggravated punishment may prove difficult in cases where it is not possible to attach an exact monetary value to the benefits involved or to the illicit advantages acquired by the corrupt act. Accordingly, a recommendation was made for one of these States to consider drafting the relevant provision in a way that determines more specifically the method for calculating the applicable fines.

On another note, the laws of one jurisdiction provide that all pecuniary fines are adjusted to the rate of inflation every three years by the central bank upon suggestion of the minister of justice and approval by the council of ministers. This was highlighted as a useful way of maintaining the proportionality of the relevant sanctions.

In some cases, recommendations were made on account of penalties which were considered too lenient. For example, in one State, it was noted that no first instance judgements on corruption had been appealed, a fact which was mainly the result, apparently, of the low level of sanctions imposed. Similarly, in another State, the need to revisit the applicable penalties for money-laundering was made evident by the fact that prosecutors routinely charged money-launderers with a less relevant offence (obtaining by false pretences), which carried a maximum seven-year sentence, rather than with money-laundering, which carried a maximum three-year sentence. Finally, in two cases, the establishment of non-discretionary minimum sentences for corruption offences was deemed preferable to the exercise of judicial discretion, which could lead to impunity and a lack of deterrence. It should be stressed, however, that as with the length of the statute of limitations, there is no definite standard on which the appropriateness of each State's levels of sanctions can be measured. Effectiveness and proportionality are matters that should be considered in the light of the prevalent legal culture, as well as the overall system of sanctions and the functionality of the criminal justice system in a country — taking into account paragraph 9 of article 30, which affirms the primacy of national law in respect of the determination of the nature and severity of punishments.<sup>36</sup>

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<sup>36</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 383; and *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 30, subsect. II.1.

*Example of implementation*

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

A relevant point has to do with the internal consistency and coherence of the national sanctions system. The obligation to make corruption offences subject to penalties that take into account the gravity of the offence means on the one hand that the sanctions available for corruption offences should not diverge from the sanctions foreseen for comparable crimes (e.g. economic crimes or offences in the exercise of public power), and on the other hand that States parties should differentiate appropriately between the relevant offences themselves and eliminate possible discrepancies. Thus, in one case it was recommended that the State under review provide for an aggravated form of bribery in respect of parliamentarians, taking note that this conduct carried at the time a lower minimum sentence than the offence of aggravated bribery. Equally, in another State, the reviewers noted that abuse of functions is punishable with life imprisonment, while the active bribery offence is only punishable with between one to five years of imprisonment, and recommended a reassessment of these penalties. A third country was advised to address disparities in the sanctioning measures applied against basic forms of bribery, as the offering of a bribe in the public sector was subject to less severe sanctions than the giving of the same. Finally, in two cases, it was suggested that differentiating sanctions between persons carrying out public and non-public functions, in the light of the heightened obligation of trust of public officials, should be considered, e.g. by providing for aggravated forms of the relevant offences, although a universal regime applicable to both categories of persons was deemed to be compatible with the principles of the Convention and in keeping with the existence of different legislative traditions. In one of these countries, as well as in a third State, the reviewing experts suggested, as a possible alternative, issuing sentencing guidelines for corruption offences which would reduce the uncertainty surrounding the range of applicable penalties and ensure greater overall consistency in this matter, while at the same time maintaining the basic discretion of the courts.

Such recommendations are understandably not standardized, nor always aligned with one another, given the different needs of each State party and the different conditions prevailing therein. This is illustrated by the positions adopted with regard to the possible differentiation of penalties applicable to active bribery and passive bribery. In most countries that apply higher penalties to passive bribery, the reviewers either did not comment on or did not discourage this practice, or suggested enhancing the overall sanctions framework related to bribery without

necessarily altering the existing differentiation. Having more severe penalties in place for the act of receiving a bribe than for giving a bribe was felt to be appropriate in principle, in order to discourage the solicitation of bribes by public officials and to encourage the reporting of bribery incidents. In contrast, in two States, which happen to be immediate neighbours, the experts were, exceptionally, firmly of the view that sanctions for active and passive bribery should be harmonized, despite the historic reasons apparently noted for the existing disparity.<sup>37</sup> The different treatment of the two parties of the bribery offence was not considered justified and it was pointed out that harmonization would also have the effect of removing the potential for difficulties arising from a shorter statute of limitations period for active bribery.

Most countries confirmed that paragraph 1 of article 30 is without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants, as required under paragraph 8 of article 30. Disciplinary and criminal processes can run in parallel, so that a public official acquitted of wrongdoing could still face disciplinary measures. There are, however, instances where this principle is not followed. In one State party, for example, there appear to be no regulations which the public service can use to take disciplinary action against a corrupt civil servant. Conversely, in another country, an internal ethics committee appears to be exclusively responsible for minor cases of bribery of police officers. In this regard, it was observed that the use of internal, non-criminal procedures for corruption offences could be a cause of public distrust. Any case of corruption in the police, no matter how trivial, is damaging to the credibility of the law enforcement process and should be regarded, in principle, as a matter for the courts.

Independently of the above, the need was highlighted for national authorities to ensure that the administrative sanctions imposed as a result of the exercise of disciplinary powers against civil servants take into account the gravity of the act and the related infringement. The establishment of a common code of conduct or ethics for all civil servants and the creation of a central independent body to ensure a coherent application of the relevant sanctions were also recommended.

#### *Successes and good practices*

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

#### *Immunities and jurisdictional privileges*

Immunities and jurisdictional privileges are a common element in the criminal justice systems of States parties, creating potentially serious challenges regarding the investigation, prosecution and adjudication of offences established in accordance with the Convention. In most cases, they are granted at the constitutional level (and more rarely in ordinary laws) to certain categories of domestic public officials, in order to assure the unimpeded performance of public

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<sup>37</sup> Some mention of these historic reasons is made at the beginning of chapter I, section A, subsection 1, above.

functions and avoid targeted prosecutions, defamations or even political persecutions. These categories regularly include members of parliament or the constitutional assembly, leaders or members of Government and members of the judiciary, and apply to conduct that took place either with respect to the performance of their functions (functional immunity, e.g. for votes cast and speeches delivered in parliament) or, more generally, while they were in office (absolute immunity). Article 30, paragraph 2, refers in principle to this last form of immunity as the one most likely to be invoked in the context of criminal proceedings for corruption offences.

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

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

The critical question regarding the application of article 30, paragraph 2, is whether there is an appropriate balance between such immunities and privileges and the need to be able to effectively investigate, prosecute and adjudicate corruption offences. In answering this question, the following criteria need to be taken into account:

(a) The percentage of immunities which have been lifted in recent years — insofar as such data is provided. In at least one case, it was recommended that appropriate statistics should be kept;

(b) The circle of persons enjoying immunity, which should not be too broad, but reasonably compact and clearly defined. This was not the case, for example, in a

State party where a broad constitutional provision provided immunity to any person acting on behalf or under the authority of the Head of State. In this regard, doubts were expressed as to whether criminal proceedings could be initiated in cases where it was not certain whether the perpetrator had acted under or on behalf of the Head of State, or whether the latter had not been informed correctly about the factual circumstances of the matter. A relevant issue concerns the extent to which there exist persons who may indirectly profit from the immunity of others. In one country where the lifting of a member of parliament's immunity is required not only if the member of parliament is the subject of the investigation but also if the investigation only touches upon the member of parliament's sphere, i.e. if the investigation concerns another person but would imply measures extending to the member of parliament, ensuring that the process for lifting the immunity is strictly restricted to those cases where the member of parliament himself or herself is the subject of the investigation was recommended. In general, States parties should consider limiting the effect of immunities and jurisdictional privileges to those cases where an exception from the normal flow of criminal proceedings is actually essential for the unperturbed execution of the public function in question;<sup>38</sup>

(c) The scope of immunities afforded (whether immunity is functional or absolute, whether it is restricted to the raising of criminal charges or extends to the preliminary and investigative stage, etc.). For example, in one federal country, the near-absolute immunity enjoyed by sitting state governors and deputy governors was deemed to be excessive. States parties should consider limiting such privileges to acts committed in the performance of official duties. In four further cases, it was recommended that immunities should be limited to those prosecutorial measures that are directly aimed at the person concerned (i.e. excluding his or her arrest or indictment until the immunity is lifted) and that all other investigative steps and the collection and securing of evidence should be possible. Otherwise, it will be unavoidable that the person enjoying immunity will gain premature knowledge about the investigation and this entails the obvious risk that, during the time it takes to lift the immunity, evidence can disappear or be tampered with;

(d) The procedure for lifting immunities, which should not be too cumbersome or unwieldy, being the cause of excessive delays and the loss of evidence or otherwise impairing the application of the offences established in accordance with the Convention. For example, in one State party, where the lifting of immunities of members of parliament and judges required the filing of a petition by the prosecutor general to parliament or a judicial council, the reviewers recommended a relaxation of the relevant standards and procedures. Similarly, in another case, where a suspension of immunities by parliament was needed to investigate certain categories of public officials, there were doubts about the independence of the persons responsible for the relevant decisions and, above all, there was no legal procedure to resolve cases where requests to suspend immunities remained unanswered (an apparently common phenomenon), leading to appropriate recommendations. In contrast, it was commended as a success that in one State party, the immunity of members of the Government and of the parliament has been lifted on several occasions and high-ranking officials have undergone prosecutions and trials. States parties should seek to ensure that the relevant decisions are taken

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<sup>38</sup> See also *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 30, subsect. II.2.

in ways that minimize the risk of conflicts of interest and politically motivated influence. A good practice could also be to establish guidelines and specific criteria on the lifting of immunities, in order to limit unjustified denials, as well as inconsistent and arbitrary decisions;

(e) The nature of the decision denying the lifting of immunities, which should leave reasonable room for a possible reassessment of the case. The limitation of immunity to the period of time public officials hold a public office, and the possibility of conducting criminal proceedings after the cessation of immunity, can be considered as respecting the balance needed for an effective investigation, prosecution and adjudication of the offences established in accordance with the Convention. Accordingly, in one State party, a recommendation was issued that decisions rejecting a request for the deprivation of privileges and immunities at the end of the investigation stage should not prevent subsequent investigations once the officials in question are no longer in service. In this context, it may be helpful if the statute of limitations is suspended during tenure of office or during the time that a criminal proceeding cannot be initiated or continued because the authority having the power to suspend the immunity did not do so.<sup>39</sup>

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

These examples come in addition to the already significant number of States parties — about one third of the total, mostly with common law systems — where public officials do not benefit from immunities or procedural or jurisdictional privileges — other than sometimes being tried by special courts for acts committed in the exercise of their duties. Limited exceptions are usually only made for the Head of State, or in some cases for members of parliament, who may be afforded some form of immunity or protection regarding their opinions expressed in parliament or their conduct in the consideration of a parliamentary matter (parliamentary privilege). Additionally, the detention or arrest of members of parliament may also be conditioned on parliamentary consent.

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<sup>39</sup> Ibid.

*Example of implementation*

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

Such practices were favourably noted and States parties were encouraged to further expand them. In one case, for example, it was recommended that the absolute immunity of former Heads of State for acts carried out while in office should be abolished. Indeed, the purpose of article 30, paragraph 2, is to eliminate and prevent, where possible, cases where corrupt public officials manage to shield themselves from accountability and investigation or prosecution.<sup>40</sup>

*Successes and good practices*

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

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

*Discretionary legal powers*

Some implementation issues were also encountered with regard to paragraph 3 of article 30, on discretionary legal powers relating to the prosecution of persons for offences established under the Convention. This provision does not necessarily compel States parties to use discretionary powers in order to enhance the effectiveness of law enforcement measures, as urged in one review. What is important, however, is to ensure, especially in corruption-related cases, that

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<sup>40</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 387.

investigation and prosecution are the norm, while the dismissal of proceedings in application of discretionary powers should remain an exception and would need to be justified (for instance, when the conditions of article 37, paragraph 3, are fulfilled), taking of course into consideration the rule of law principles and with due regard to the rights of the defence. On the other hand, it should be acknowledged that pragmatic reasons may exist that dictate the targeted use of discretionary powers in a way that, under the circumstances, guarantees the best possible result. This would be the case, for example, where an acute lack of resources compels the prosecuting authorities to direct their efforts to the most serious instances of corruption, e.g. the ones involving high-level public officials and significant criminal proceeds for the offenders.<sup>41</sup>

Several States — mostly the ones with a common law tradition — follow a discretionary prosecutorial model, according to which a public prosecutor is allowed, under certain conditions, not to initiate a criminal prosecution or halt a process that has already been initiated (the so-called “principle of opportunity”). The main criterion for exercising this discretionary power is normally the extent to which the public interest calls for a prosecution, taking into account factors such as the seriousness of the alleged offence, whether the suspect is a repeat offender, the effect on public order, the availability and efficacy of any available alternatives, the need for deterrence, the consequences of any resulting conviction, the attitude of the victim and the likely length and expense of a trial. Practical considerations may also play an important role. To illustrate this, the offence of bribery is often accompanied by other, more easily provable crimes, such as forgery, fraud or the disclosure of confidential information to unauthorized people. A conviction for bribery does not always lead to a significantly higher sentence. The public prosecutor may therefore decide not to prosecute for bribery but for another (equivalent, but easier to prove) offence. Many variations of this model were observed, including cases where immunity from prosecution is granted in exchange for the restitution of assets and the cooperation of a participant in criminal activities, as described in chapter III, section A, subsection 2, below.

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<sup>41</sup> See also *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 30, subsect. II.3.

*Example of implementation*

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

In contrast to the above, a number of States parties — all of them civil law jurisdictions — apply the principle of legality, according to which prosecution is mandatory in principle and no substantial discretionary powers are conferred to the competent authorities — provided of course that there is some minimum legal and factual basis for raising criminal charges. There may be limited exceptions, strictly defined by law, regarding, for example, petty criminality, acts which entail minimal public hazard and cases where it would be unreasonable to charge the offender or where a punishment does not appear to be appropriate in order to dissuade the accused or others from committing criminal offences. Sometimes, the need for restorative justice and compensation of the victim or the undertaking by the offender to perform public service work or contribute to a humanitarian cause are also taken into account at the initial stages of investigation and issuance of indictments, although it was observed that caution should be exercised when having recourse to such solutions, as they may not have a sufficiently deterrent effect. In any case, given the seriousness of allegations of corruption and the important public interests involved, it is unlikely that prosecution in such a case would be waived. This is illustrated by the example of some States, especially from the Group of Latin American and Caribbean States, where the principle of legality is applied specifically with regard to corruption-related offences or offences committed by public officials in the exercise of their functions. Interestingly, most of the civil law jurisdictions that apply the principle in question do not have provisions granting immunity from prosecution to cooperating offenders, in contrast to the above-mentioned common law countries.

*Example of implementation*

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

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

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

(b) The possibility of reviewing the decision of the public prosecutor not to prosecute. The review is usually conducted by a higher-ranking prosecutor, either on his or her own initiative or following a complaint by the victim, the person who has reported the crime or even any interested party or person aggrieved by the decision not to prosecute. Equivalent measures should be taken in all cases where discretionary considerations influence the raising of criminal charges, including out-of-court settlements and the various plea arrangements discussed under chapter III, section A, subsection 2, below. In some cases, including in particular one State which operates a scheme allowing self-reporting companies to reach out-of-court civil settlements with the main investigating authority, which is partly funded by monies recovered in such settlements, it was suggested that all settlements should be subjected to judicial scrutiny independent from the prosecutor's office and that an independent body could review sensitive cases. Moreover, companies that reach settlements could be asked to commit to compliance programmes and the appointment of independent experts to monitor where remedial action is warranted. In general, adequate transparency and predictability should be ensured in such procedures, given that the lack thereof may undermine the effective pursuit of corruption cases, as well as public confidence in the overall integrity of the system;

(c) Official, written guidelines or directives on the exercise of discretionary rights and the preparation and content of a decision on non-prosecution, setting out rules, standards and priorities (this is mostly relevant for countries with a

discretionary prosecutorial model). A similar effect may be achieved through circulars sent periodically to the prosecutors, stressing the importance of a firm and appropriate response to certain types of acts, such as international corruption. Ideally, guidelines on the exercise of discretionary powers should be made publicly available and be as specific as possible, in order for the parties involved to be aware of the criteria that govern the relevant decision.<sup>42</sup>

#### *Examples of implementation*

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

Another State party has established an independent operation review panel, which scrutinizes reports about investigations and prosecutions. The panel has no authoritative powers capable of influencing the independence and discretion of the public prosecution, but can, for instance, submit a recommendation if a case has not been followed up or has been dismissed and the panel disagrees with this decision. The final decision on whether to prosecute or not remains with the prosecution. This was considered to be a noteworthy support mechanism.

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

#### *Release pending trial or appeal*

Under paragraph 4 of article 30, States parties are required to take measures to ensure that those charged with offences established in accordance with the Convention appear at subsequent criminal proceedings, consistent with their law and the rights of the defence. This relates to decisions on the defendant's release pending trial or appeal and the conditions imposed in connection with such decisions. States parties should be aware of the risk of the imprudent use of pretrial and pre-appeal releases and impose conditions capable of ensuring, to the extent possible, that the defendants do not abscond.<sup>43</sup> In this context, an interpretative note to the Convention makes clear that the expression "pending trial" is considered to include the investigation phase.<sup>44</sup>

Few problems have been brought to light with regard to the implementation of this provision, notably because of the wide margin of discretion enjoyed by States parties in the determination of the relevant rules, as well as the fact that most

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<sup>42</sup> See also *ibid.*

<sup>43</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 390.

<sup>44</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. III, art. 30, sect. C (p. 261).

countries do not normally have provisions on release pending trial or appeal applied specifically to corruption-related offences. Furthermore, the reviews contain only some information on the national regimes governing pretrial release and the conditions imposed pending trial. Pre-appeal release and the conditions imposed pending the appeal trial were rarely brought up, much less scrutinized, often because such information was not made available for the reviews.

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

In two States parties, corruption offences (including, in one case, money-laundering), are deemed to be non-bailable, except in exceptional circumstances. In contrast, some countries apply preventive detention only in respect of offences punishable with imprisonment above a certain threshold. As a consequence, in at least one State party where crimes against public service, including corruption, are punished with lower penalties, preventive detention is unlikely to be ordered; thus, persons under investigation can remain free, albeit with some limitations depending on the conditions imposed. The reviewing experts have not objected to this practice, evidently recognizing the wide discretion a country enjoys in determining the appropriate measures for compliance with the provision under discussion. In the same spirit, other reviewers have accepted the infrequent use of pretrial detention in corruption cases and noted with concern the extension of provisional detention periods despite the existence of alternatives. Independently of this, however, it is worth bearing in mind that, especially in corruption-related cases, some alternative coercive measures may have a diminished dissuasive effect. This is true, for example, with respect to bail, given the substantial profits potentially generated by corrupt transactions and the significant resources available accordingly to the accused for such acts, especially in cases in which the law enforcement authorities have not been able to seize the proceeds of the offence.<sup>45</sup> States parties, therefore, may wish to consider keeping their options open and aiming for a more individualized approach, in order to lower the risk of law enforcement being undermined.

Regarding the selection of the appropriate coercive measure by the competent authorities, most reviews attach importance to the existence of provisions in national legislation stipulating that decisions granting bail or imposing other conditions for the release of the defendant before trial take into account first and foremost the likelihood of the alleged offender absconding from the criminal proceedings, based on an objective provisional assessment of the facts and keeping in mind the presumption of innocence and the rights of the defence. Other factors playing a role are usually the likelihood of the defendant reoffending or obstructing

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<sup>45</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 390; and *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 30, subsect. II.4.

the course of the investigation (e.g. through the destruction of evidence or interference with witnesses), the seriousness and nature of the offence, the personal circumstances of the accused person and previous convictions. Sometimes, wider grounds for imposing pretrial detention apply to non-nationals who do not have a place of residence in the country involved. For example, people in this position can be subject to pretrial detention even if they have not been accused of committing a serious offence. Normally, the selection of the appropriate measure follows the principle of necessity, according to which a measure is not selected if the same effect may be achieved by a less severe measure.

*Example of implementation*

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

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

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

*Early release or parole*

Under article 30, paragraph 5, a strict but fair post-conviction regime is encouraged, requiring States parties to take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of corruption offences. Some jurisdictions stipulate that, in principle, individuals incarcerated for corruption-related offences cannot be released before their sentence has been served in its entirety, and only limited exceptions may apply. Similarly, one State has provided statistics showing that persons who have benefited from conditional release during the last few years do not include persons convicted for

corruption offences. Clearly, under the Convention, States parties are not required to introduce a programme of early release or parole if their system does not provide for it. Those States which provide for early release or parole are, however, urged to consider adapting the eligibility criteria to the gravity of the offence.<sup>46</sup> This includes the criteria pertinent to the granting of pardon or any form of executive clemency, which, although political in nature, should not be misused to create a situation of impunity.

As with the previous provision, most reviews offer a rather brief discussion of the relevant legislation. Equally, comparatively few implementation problems have emerged, although the criteria used by reviewers to determine compliance are not always uniform and sometimes seem to follow a diverging logic. The majority of States parties do not distinguish specifically between corruption-related and other offences in the way they regulate the possibility of early release or parole. Nevertheless, many apply different policies depending on the length of the sentence imposed or the general classification of the crime, or make exceptions for certain crimes considered extremely serious. Thus, for example, a defendant who is convicted of an offence classified as of no major public danger may serve a lesser portion of the sentence in order to qualify for early release or parole than a defendant convicted of a serious crime. One State party follows a similar, more individualized approach, providing that if a court sentences a person to imprisonment for a period of two years or longer, the court may, as part of the sentence, fix a period during which the person may not be placed on parole. Thus, courts must account for the gravity of the offence at the time of sentencing. Finally, there are countries that have moved completely away from the classic parole system, preferring a “true sentence” that includes a period of supervised release following imprisonment, the length of which is linked to the seriousness of the crime. Provisions falling under any of the above categories can be considered as making up a first, basic way in which States take into account the seriousness of the crime in parole matter and may be considered sufficient for the purposes of the Convention.

*Successes and good practices*

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

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

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<sup>46</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 385.

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

*Example of implementation*

In one State party, the following provision applies:

In deciding release on parole, the court shall take into consideration the circumstances relating to the commission of the criminal offence, the personality of the convicted offender, his or her previous personal history and conduct during the service of the sentence, his or her living conditions and the consequences which release on parole may bring about for the convicted offender. It was observed that, although the gravity of offences committed is not explicitly mentioned as a factor to be taken into account, the reference to the (aggravating or mitigating) circumstances of the offence could be interpreted to the same effect.

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

It is worth noting that several reviews also considered the fact that the State party determines a mandatory portion of the sentence that must be served before any offender becomes eligible for release as having appropriately taken into account the gravity of the offence. Similarly, some appear to focus on the length of the minimum eligibility period, or on the percentage of the sentence remitted, and accept that the gravity of the offences is sufficiently taken into account when the corresponding levels are considered high enough. A possible explanation for this could be that the reviewers involved adhere to the view that paragraph 5 of article 30 implies that all offences established in accordance with the Convention are of exceptional gravity, justifying special consideration or long common minimum eligibility periods — an important interpretational issue which merits further examination.

*Removal, suspension and reassignment*

Several States parties have taken measures to implement paragraph 6 of article 30 — a non-mandatory provision — on the suspension, removal from office or reassignment of public officials accused of corruption offences, with a view to facilitating investigations and preventing tampering with evidence or the

commission of new crimes. In some cases where gaps were identified (especially regarding reassignment and removal), recommendations were issued encouraging States parties to consider adopting clearer and more specific measures.

Suspension of public officials (also called “interdiction”) is possible in the large majority of jurisdictions, and is applied as a rule, either for a specific period of time or indefinitely, when the official finds himself or herself under criminal investigation, pending the resolution of the investigation or a court procedure. The same usually applies for the transfer or reassignment of an employee allegedly involved in an offence — although not as many States have provided information in this regard, and in one case it was pointed out that the effectiveness of provisions on reassignment depends on ensuring that they truly fulfil the purpose of disciplinary action.

The measures on suspension and reassignment are normally based on the disciplinary regulations governing breaches of duty by civil servants, as contained, for example, in public service codes of conduct, public ethics acts and rules on administrative inquiries. Special rules (e.g. police or judicial service regulations or rules governing diplomatic and consular missions) may govern the treatment of particular categories of public employees; in some cases, caution was advised regarding the dangers of fragmentation and of applying inconsistent standards among civil servants. In general, the existence of such disciplinary procedures meets the requirements of the Convention, although it should be noted that few reviews made any reference to the guarantees related to the due process rights of the person affected, evidentiary standards, remedies or the possible impact on the presumption of innocence. These are issues that merit further attention, given the real danger of measures of suspension and removal being manipulated in order to achieve political goals or used against persons considered a threat or a nuisance.<sup>47</sup>

*Successes and good practices*

In one State party, the public service commission’s rules and practice for recording disciplinary and ethics proceedings and for producing transcripts in a timely manner were observed to promote transparency, accountability and consistency and to significantly enhance public confidence in its decision-making processes. The average period in which disciplinary and ethics cases are completed by the relevant tribunal has been reduced in recent years from several years to between three and six months. Moreover, training of civil servants on matters related to ethics, discipline and good governance involves the participation of a wide range of government ministries, departments and agencies, including the anti-corruption agency, the police, the prosecutor’s office, the office of the auditor general and the ministry of finance. Regular surveys and studies to gauge the impact of these training sessions are carried out by the public service commission.

Interestingly, in some States parties, mostly those with a common legal tradition and from the Group of Eastern European States, temporary suspension (also referred to as removal or exclusion) from office is also regulated in the code of criminal procedure as a type of coercive measure available during an investigation: if the

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<sup>47</sup> *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 30, subsect. II.6.

prosecuting and investigating authorities consider it necessary to suspend a person from their position in order to suppress his or her illicit influence, protect victims and witnesses or prevent the commission of new crimes, the prosecutor in charge refers the matter to a court authority, which decides on the application of the measure. The persons affected can be reinstated if the charges are not substantiated. Furthermore, in some cases, temporary suspension from public office appears as a form of criminal sanction imposed upon conviction by the court, or as an inevitable consequence of conviction, for the duration of the sentence.

While in most States parties suspension is discretionary, in some States parties the start of a criminal proceeding, i.e. the point where it is clear that the breach of official duties is considered to represent criminal misconduct, triggers an automatic suspension of the public official from service. In some States parties, it is only the arrest or preventive detention of the official that triggers an automatic suspension — a practice not deemed sufficient in one case, where it was recommended that procedures should be established through which the official is suspended at the point of investigation. In contrast, other reviewers cautioned against introducing the automatic suspension of public officials accused of corruption, taking note of the importance of safeguarding the principle of the presumption of innocence, as foreseen by the Convention.

The above possibilities do not normally apply to members of parliament, suggesting that their treatment should form the subject of a separate review. Few countries have provided information about equivalent procedures leading to the suspension or removal of elected officials under criminal investigation for corruption. In one State party, suspension is possible at the discretion of parliament, which may pass a suspension motion upon an individual member, if it receives a majority vote. In another, the Constitution foresees the automatic suspension of persons enjoying jurisdictional privilege, if their immunity is lifted. In contrast, the authorities of a further State clearly stated that elected officials could not be revoked or suspended following an accusation of corruption, nor could they be subject to any form of disciplinary measures.

#### *Disqualification*

Disqualification from holding public office as a result of conviction on corruption offences, as envisaged in the non-mandatory provision contained in article 30, paragraph 7 (a), appears possible in the majority of States parties. First of all, in most States parties, the conviction of a public official opens the door for his or her permanent removal. Depending on the national system, if the conviction is for a crime committed against public service, is punishable beyond a certain threshold and/or seriously violates the principle of administrative probity, it triggers an administrative procedure which can lead to the dismissal of the offender. Corruption offences are usually offences that can result in this outcome. In some States, removal appears to be an automatic consequence of the conviction, while in others, such a decision is at the discretion of the competent authority.

*Example of implementation*

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

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

Again, different rules may govern the removal from office of members of parliament, the Government or the judiciary who are under sentence for bribery or other indictable offences. For example, in one State party, contrary to what happens with public officials or even members of municipal councils, the law does not provide for the forfeiture of parliamentary seats in case of conviction for a corruption-related offence, either automatically or following a court order, because this is an elective office and it is considered that it is primarily a matter for the electorate to decide who it chooses as a representative. A special procedure exists under the constitution, however, whereby parliamentarians may be dismissed in the event that they have been sentenced to imprisonment for a deliberate crime and the offence is such that the accused does not command the trust and respect necessary for his or her office. In this particular country, it was recommended that the possibility of introducing a system for the automatic dismissal of members of parliament should be explored, e.g. when they are convicted for aggravated bribery.

Many of the above-mentioned disciplinary proceedings and criminal sanctions that lead to the cessation of current functions and immediate removal of persons already having an official capacity also entail the disqualification of the convicted persons from holding public office for a specific period of time or sometimes even for life (temporary or perpetual disqualification). In several cases, disqualification is not mandatory but is left to the discretion of the court or other competent authority, depending on factors such as the length of the main sentence and the seriousness of the breach of the inherent duties of the offender's position. The Convention leaves the duration of the disqualification to the discretion of the States parties, consistent with their domestic law and the importance accorded to the gravity of the offence of which the official was convicted.<sup>48</sup> Nonetheless, in one case, the period of disqualification was deemed to be too short, resulting in instances of convicted persons being transferred to other public offices.

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<sup>48</sup> See also *ibid.*, chap. III, art. 30, subsect. II.7.

*Examples of implementation*

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

In a State with more straightforward legislation, a person who commits a corruption offence is considered forever incapable of being elected or appointed as a member of a public body or of holding any other public office, and forfeits any such office held at the time of his or her conviction. "Public body" includes the cabinet, houses of parliament, local, statutory and public authorities of all descriptions and all State enterprises and the boards thereof. "Public office" means any office or employment of a person as a member, officer or servant of a public body.

In a number of countries, there are no specific provisions in place that completely exclude persons who are convicted of a criminal offence from employment or re-employment in the public sector. However, some alternative measures were cited, which, while not equivalent to full implementation, indirectly promote the purposes of the Convention or ensure, at least partially, some form of compliance. As pointed out in several States, persons appointed to public office may be screened for their past conduct or be required to submit a certificate stating that they have not been convicted of any crime before assuming office; a criminal record can be taken into account in making a decision as to whether to employ a person, especially where the criminal conviction is relevant to the specific requirements of a particular vacancy. Similarly, dismissal from office on grounds of criminal conduct would be recorded in the personnel file of a public official, and thus would be known to an official or authority who is considering the possible appointment of the person to a new public office. According to regulations in two further countries, re-employment after dismissal on grounds of unsatisfactory work or conduct is only possible in special and exceptional cases. Finally, in one State, defendants who plead guilty to corruption offences are routinely required by the prosecution authorities to agree not to accept or compete for public office or positions in the future.

In addition to the above, several States — even some without general disqualification rules — have special provisions for the suspension of political rights or disqualification of persons who have been convicted of corruption-related offences from being elected as members of parliament or city or municipal councils

or from being elected or appointed as a member of Government or the judiciary for a certain period, although sometimes this period appears too short, or the persons involved are allowed to be nominated as soon as they have completed their sentence.

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

Despite these measures, implementation of paragraph 7 (b) of article 30 is somewhat lower in comparison with paragraph 7 (a). Many countries appear not to have taken any relevant action other than applying the usual vetting procedures for private sector employees, or not to cover all commercial enterprises owned in whole or in part by the State, while in one country it was made clear that persons holding office in State-owned enterprises cannot be dismissed on the basis of a conviction, despite the fact that there are regulations prohibiting a person convicted of offences connected with commercial activities from engaging directly or indirectly in business for a certain period of years. Accordingly, recommendations were issued on considering the establishment of disqualification procedures for such persons, when convicted of offences established in accordance with the Convention, to the extent consistent with the fundamental principles of the national legal system.

Finally, it should be clear that, as with other provisions of the Convention, implementation is not ensured if the measures taken are not proved to be legally binding and effective. This seems not to be the case for example in one State party where contradictory information was offered on the existence of appropriate measures, and it was stated that it was common for a person accused of a crime to hold public office again in a different organization shortly after his or her removal from office. In another State party, despite the theoretical possibility of applying complementary penalties disqualifying persons from holding public office, such penalties have apparently almost never been applied in practice (at least, as it seems, regarding elected officials). An example was mentioned where a mayor convicted of bribery in the exercise of his duties was re-elected as a mayor in the municipality where he lived following his release from prison. It was therefore suggested that the State in question should declare someone elected to a public position ineligible to be re-elected after committing a corruption offence, thereby sending a signal about the seriousness of this kind of illicit practice. The length of the non-eligibility period should depend on the gravity of the offence.

### *Reintegration*

Under article 30, paragraph 10, States parties are encouraged to promote the reintegration into society of persons convicted of offences established in accordance with the Convention, recognizing reintegration as an important goal of criminal justice systems.<sup>49</sup> Indeed, many States parties referred to correction, re-education and reintegration as important objectives of their criminal justice systems, and cited a wide array of measures in that regard, including the maximum possible individualization of sentences, the suspension of custodial penalties, probation coupled with psychological intervention as a substitute for deprivation of liberty, the recruitment of adequate staff with the necessary technical and scientific skills to support the process of reintegration of prisoners, the introduction of social activities, educational, qualification and rehabilitation programmes, work regimes, cultural and sports activities and religious support for convicts, expanded visitation rights, exit permits from prison, release on parole, supervised release, community service, assistance in finding employment, health care and other forms of social aid after release, legal and judicial rehabilitation and the cessation of legal consequences of convictions.

#### *Examples of implementation*

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

In another State, the prisons department has launched the Yellow Ribbon Project, a community-based initiative. The goals of the project consist of creating awareness among the community of the need to give a second chance to ex-offenders, generating acceptance of ex-offenders and their families by the community and inspiring community action to support the rehabilitation and reintegration of ex-offenders.

A third State party implements a comprehensive plan for the integration of convicted inmates back into the community through a wide range of educational, vocational, cultural, sporting and social activities while inside the correctional establishment. Furthermore, work is progressing on the amendment of legislation governing the work of reform and rehabilitation centres and the adoption of alternative penalties, the expansion of inmate employment, the development of new productive projects, partnerships with the private sector and the establishment of an independent specialized centre for the follow-up care of former convicts.

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<sup>49</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 395.

Given the broad content of the provision in question and the wide range of options available to States parties on how they should implement it, the reviewers were, for the most part, satisfied with the information provided and considered the legislative efforts and measures cited, even if only limited or declaratory, as in line with the spirit of the Convention. Only a few States from the Group of African States and the Group of Asia-Pacific States indicated that they had no legal provisions promoting reintegration, or described their existing policies as vague, unspecific or weak, especially regarding the mechanisms for their implementation and the responsibilities of the agencies, organizations and individuals involved. Equally, in some States, the legal environment for the reintegration of former convicts into society was described as inadequate, resulting in people experiencing enormous difficulties after release, particularly in finding employment.

It is worth mentioning that, in one of the above-mentioned countries, the authorities referred to the “surrogate” contribution of NGOs and faith-based organizations in trying to help former convicts reintegrate into society. Although the efforts of private actors and civil society in this field were duly noted, it was recommended that the State itself attempt to promote the reintegration of persons convicted of offences established in accordance with the Convention, as required in the Convention. This of course does not exclude public-private programmes and partnerships with community leaders and volunteers, as evidenced by the example of other countries.

A further challenge for national authorities is posed by the overpopulation and deterioration of penitentiary systems, which may hamper the implementation of mechanisms aiming at social reintegration, even if there is adequate legislation in force. This was obvious in a State party where inmates exceeded the capacity of the jail system by 650 per cent, as a result of considering the sector as a low priority for many years.

A final observation concerns the fact that reintegration measures usually apply to convicts and subsequent parolees in a general sense, making no specific reference to persons who were convicted of corruption offences. States parties may choose to examine the possibility of specific forms of assistance that may be necessary for the reintegration of these persons owing to the stigma associated with a conviction for an offence established in accordance with the Convention. Thus, for example, the supreme court of one country has issued regulations aimed at monitoring the execution of sanctions affecting persons convicted of economic or corruption-related offences. Courts of all instances have established control systems aimed at the systematic and individualized implementation of social reintegration provisions, and keep special registers in which the information needed to monitor the processing and resolution of issues related to the perpetrators of crimes of this nature are entered. According to the reviewers of another State, the option of a temporary, instead of a permanent, dismissal of public officials convicted of corrupt practices might be a measure which could also foster reintegration in this field — depending on the gravity of the case, the damage caused and the public interests involved. However, as indicated above, in the paragraphs on sanctions, a recommendation of this kind should be weighed up against the voices calling for harsher penalties against corruption offenders and considered in the light of the legal culture and the individual needs of the criminal justice system of each country.

### *Challenges*

The most common challenges in the implementation of article 30 related to: (a) the levels of monetary and other sanctions, especially the internal consistency and coherence of national systems regarding the sanctioning of corruption-related offences; (b) the balance between privileges and jurisdictional immunities afforded to public officials and the possibility of effectively investigating, prosecuting and adjudicating offences under the Convention; (c) the adoption of measures for the disqualification of convicted persons from holding office in enterprises owned in whole or in part by the State; (d) the proper exercise of discretionary prosecutorial powers; and (e) the adoption of clear procedures for the removal, suspension or reassignment of accused persons.

## **B. Freezing, seizure and confiscation (article 31)**

Article 31 of the Convention contains important provisions (designed in tandem with articles 23 and 40 and chapter V) to prevent offenders from profiting from their crimes and to remove the incentive for corrupt practices. While a number of common implementation issues were observed during the reviews and more efforts need to be made to achieve a degree of uniformity equivalent to the one regarding the relevant issue of national legislation against money-laundering, there is an obvious trend towards legislative convergence and enhancement of the applicable measures in accordance with the standards of the Convention. In this context, many countries have profited from the continuous monitoring of international evaluation mechanisms, such as those that are part of the European Union, OECD, the Council of Europe and the Financial Action Task Force and similar regional bodies. Although, as confirmed in paragraph 10 of article 31, it is a matter for States parties to determine the form of legislative compliance with the Convention and its reliance on several laws is not in itself objectionable, the need for clear and coherent legislative frameworks on the confiscation, seizure and freezing of criminal proceeds and instrumentalities was pointed out. Complex and fragmented legislation may hinder the effective implementation of the domestic anti-corruption measures.

### *Confiscation of proceeds of crime*

Almost all States parties provide in principle for the confiscation of proceeds (or an estimate of the proceeds) of crime derived from offences established in accordance with the Convention, whereby the term “confiscation” is understood to mean, in accordance with article 2, subparagraph (g), the permanent deprivation of property by order of a court or other competent authority. Three jurisdictions depart considerably from this rule, indicating a need for a complete revision of the relevant legislative framework. In the first case, confiscation is provided for only in respect of the proceeds and instrumentalities of money-laundering, with the additional constraint that not all corruption offences are included as predicate offences. In the second case, apart from offences related to money-laundering, only instrumentalities are covered. In the third case, again apart from money-laundering, confiscation does not directly refer to proceeds but is conceived as a penalty covering all or part of the total property making up the assets of the convicted person, after satisfaction of any potential rights of his or her spouse, co-owners or co-inheritors. In other words, the State party in question appears to apply a penalty of “total confiscation” of the

convicted person's property without requiring a link between the confiscated assets and a crime — a practice which has created issues of compatibility with fundamental legal principles (on the precision and predictability of criminal provisions) in other countries where it has been applied.

With the exception of these three countries, States parties have usually established general confiscation provisions (e.g. in the criminal code and sometimes even in the constitution itself) applying to most offences in the domestic legislation, and often special provisions as well, for particular offences (e.g. bribery, regarding the undue advantage or the value thereof, or money-laundering). While, as a rule, confiscation is ordered as an additional criminal sanction — or a security measure — in the context of criminal proceedings, a number of States have opted for a primarily civil scheme (even if operating during the criminal trial), taking advantage of the lower evidentiary standards that are needed in such cases.

States parties should ensure that all offences established in accordance with the Convention are covered by national provisions. This is usually the case, including when countries have general regulations referring to serious or indictable offences. In contrast, in three jurisdictions, certain corruption-related offences, such as bribery in the private sector or certain minor offences, punishable by penalties below a certain threshold, do not fall within the scope of the forfeiture laws, although in two of those cases legislation was being prepared to more fully implement article 31. In a further case, concern was raised as to the wording of the law, which appears to exclude property obtained by criminal means but transferred to third parties, leading to the observation that confiscation measures need to be applied more consistently in criminal cases.

#### *Value-based confiscation*

There are two basic systems used to cover proceeds of crime, one property-based and one value-based.<sup>50</sup> In most States, the law provides for a value-based or combined approach, allowing confiscation of property of a corresponding value to that of the proceeds of the crime, frequently in the form of pecuniary orders or fines imposed by the court and requiring a person to pay an amount equal to his or her criminal profits. The application of “ordinary” or value-based confiscation lies normally at the discretion of the court. When determining the value of proceeds concerning criminal offences committed by two or more persons, the Court may order that these persons be jointly and severally responsible for the payment obligation, or for a specific part to be determined by the Court. In some cases, the law specifies that value confiscation is incurred only if the forfeiture of the actual proceeds of a crime in favour of the State is impossible or unreasonable for some reason that was valid at the time the decision was taken, e.g. when the bribe was used or was taken out of the country or when the property went missing or was expropriated.

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<sup>50</sup> See article 31, paragraph 1 (a) (“proceeds of crime [...] or property the value of which corresponds to that of such proceeds”); *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, paras. 398 and 399; and *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 31, sect. III.

*Example of implementation*

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

In several countries, the confiscation of property corresponding to the value of the proceeds of corruption-related crime is not covered, as the national laws are based on the principle of object (in natura) confiscation and do not recognize value confiscation. As a consequence, if the exact property in question has been spent or cannot be traced, there is no immediate redress available. At the same time, as noted below, difficulties arise with regard to indirect proceeds and proceeds that have been intermingled with legal assets or transferred to bona fide third parties. Accordingly, recommendations to address this issue were made. In two of these cases, the situation was being reviewed and laws providing for the option of freezing, seizing and confiscating property of an equivalent value were being drafted. In a further case, it was noted that, while the power to confiscate assets corresponding to the value of criminal proceeds is not addressed in the legislation, other than with regard to bribery cases, this has not presented issues in practice; nonetheless it was recommended that it should be considered, including in terms of value-based confiscation, in the context of ongoing legislative amendments.

*Confiscation of instrumentalities*

In article 31, paragraph 1 (b), the confiscation obligation is expanded to property, equipment or any other instrumentalities used or destined for use in offences established in accordance with the Convention. It aims to deprive offenders of property used to carry out a corrupt act, but also to prevent objects or means of a hazardous nature (e.g. software used to divert funds, weapons used to obstruct investigations or corporate schemes set up to transfer illicit benefits) being used for corrupt purposes, having thus both a punitive and a protective character.<sup>51</sup>

Measures to enable the confiscation of instrumentalities of corruption offences are in place in the majority of States parties; however, some States did not provide for such a possibility, leading to corresponding recommendations. Furthermore, in at least five States, only instruments and means used by the convict to commit a criminal offence and not instrumentalities destined for use in corruption offences are covered. In one of those cases, although current legislation does not prohibit the application to instrumentalities destined for use in corruption offences, it has not previously been applied in this particular circumstance. Therefore, it was

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<sup>51</sup> See *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 31, sect. II.

recommended that, should the judiciary not interpret the law accordingly in future cases, legislative clarification should be considered.

#### *Extended confiscation*

The classic paradigm of confiscation is one of a criminal penalty imposed after the conviction of a person for an offence and targeting the property acquired directly or indirectly from that particular offence. While this remains the dominant legal formula leading to confiscation, some States, especially from the Group of Eastern European States, provide the criminal courts, as already seen in chapter I, section B, subsection 4, above, with the additional power to confiscate all or part of the wealth belonging to the offender at the time of the making of the judgement and presumed with good reason to derive from his or her criminal activity, if it is not considered insignificant. In other words, the court still has to be satisfied, on the basis of the circumstances of the case and the available evidence, that the assets are proceeds of crime, but does not need to establish that they are proceeds of the particular crime for which the accused was convicted. In such cases, the offender is obliged to prove the lawfulness of the acquisition of the property.

Extended confiscation, which applies especially to assets obtained in temporal proximity to the criminal act (e.g. during the five years leading up to its commission), may also be ordered on a family member, close relative, trustee or receiver by reason of the offender's bankruptcy, or any other natural or legal person linked to the offender, if there is reason to believe that the property has been conveyed to that person to avoid confiscation or liability. In some States parties, as with confiscation measures in general, the relevant power is exercised in a civil process, raised after an application or lawsuit has been filed by the public prosecutor. The use of such extended powers of confiscation, independently of whether they are exercised in the context of a criminal or a civil procedure, is considered as a good practice. Thus, in cases where the scope of the relevant provisions is limited (e.g. to money-laundering and organized crime), it was recommended that the possibility of expanding it to include all corruption-related offences should be explored.

#### *Successes and good practices*

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

Another jurisdiction has established comprehensive forfeiture mechanisms, including the potential invocation, at the discretion of the prosecutor, of a legal presumption against so-called "lifestyle criminals" with unexplained wealth, where it is impossible to prove all the crimes they have committed over many years. According to this presumption, upon conviction of a particularly serious offence, all assets and property acquired during the previous seven years are considered as criminal proceeds and subject to (civil) forfeiture, unless their lawful origin can be established by the defendant.

### *Non-conviction-based confiscation*

Many States parties provide, in parallel, for non-conviction-based processes, provided that a Court is satisfied that a serious offence has been committed in the past and that the property in question is the proceeds or the instrument of such activity. This issue has already been discussed briefly in chapter I, section B, subsection 4, above, where the increasing appearance in countries from all regions of non-conviction-based forfeiture regimes (also called “in rem forfeiture”, in contrast to the conviction-based “in personam forfeiture”) was noted, with particular reference to provisions targeting persons unable to demonstrate the legal provenance of their assets and enabling the countries involved to achieve an effect similar to the one envisaged by the criminalization of illicit enrichment, irrespective of prosecution. Independently of this, however, and even more importantly, in many jurisdictions, non-conviction-based schemes have a decisive role in the confiscation of proceeds from corruption-related offences, notwithstanding their use in addressing unexplained wealth.

As with extended powers of confiscation, non-conviction-based forfeiture has been highlighted as a good practice in the countries that have introduced and developed corresponding regimes, including civil law jurisdictions. Significantly, legislation on unexplained wealth or introducing non-conviction-based forfeiture was reported to be pending in four further States, illustrating the substantial dynamic of this method as an innovative legislative approach. Indeed, this mechanism is particularly useful in corruption cases as it is often difficult to gather sufficient evidence to secure a conviction, the evidentiary benefits being particularly relevant in those, mostly common law, countries that have different standards of proof for criminal and civil matters. All the same, it is worth noting that non-conviction-based asset forfeiture schemes, for all their advantages, are not necessarily a simpler alternative to criminal prosecution and that undertaking non-conviction-based investigations and litigation requires a significant investment in both resource capacity and training in new skills for investigators, lawyers and judges.

#### *Successes and good practices*

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

In a related, more limited version of a non-conviction-based process, confiscation is allowed when the penal procedure could not proceed (or was started but was suspended) owing to a number of reasons specified in law, e.g. because the perpetrator lacked criminal capacity or was exempt from criminal liability; because he or she died, absconded, fell into a durable mental disorder or suffered another serious ailment; because an amnesty was given; or because the penal procedure was

discontinued because of the statute of limitations. Similarly, a corporation may be subject to a forfeiture order, even if the individual committing the offence cannot be identified or cannot be convicted for some other reason. Under the above scenarios, non-conviction-based confiscation may be imposed by the criminal court or a judicial council involved in the criminal investigation at the time the reason for suspending the procedure became apparent. Nonetheless, some States handle all the eventualities above under the same non-conviction-based forfeiture scheme, in the context of civil proceedings. Both of these methods are in line with Convention requirements that call on States parties to consider as an option, in the context of mutual legal assistance, the confiscation of property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (article 54, paragraph 1 (c)).<sup>52</sup>

#### *Identification, tracing, freezing and seizure*

Under article 31, States parties are required to establish a strong confiscation regime, which includes, as specified in paragraph 2, such measures as may be necessary to enable the identification, tracing, freezing or seizure of proceeds and instrumentalities for the purpose of eventual confiscation.

First, as regards measures to identify and trace property, while some States parties stated that no detailed rules exist, or failed to provide any relevant information, others have pointed to a wide array of information-gathering tools, including, in some cases, special powers of investigation for tracing the profits from corruption offences. These tools include: (a) orders requiring any person to furnish a statutory declaration listing all movable or immovable property belonging to or possessed by them and their family; (b) orders requiring any person to attend an examination and answer questions about the nature and location of certain property, and any activities that may demonstrate that they (or another person) have engaged in unlawful activity; (c) orders requiring a person, company or institution to produce documents of any kind that are relevant to identifying, locating or quantifying certain property or are necessary for the transfer of that property; (d) notices to financial institutions requiring them to confirm the existence of an account of any kind, a stored value card or a safe-deposit box, and the balance, signatories and any recent transactions; (e) monitoring orders, requiring a financial institution to provide information on transactions conducted during a particular period through an account held by a particular person with the institution or made using a stored value card issued to a particular person by a financial institution; (f) warrants for the search of premises or vehicles and seizure of tainted property; and (g) other “traditional” investigation techniques, such as covert surveillance methods. States parties should also consider creating and granting the competent enforcement authorities access to databases containing information relevant to the identification of property rights subject to freezing and confiscation (e.g. land, title and company registers).<sup>53</sup>

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<sup>52</sup> On the implementation of this provision and, more generally, on the issue of enacting and implementing a non-conviction-based asset forfeiture regime, see Theodore S. Greenberg and others, *A Good Practices Guide for Non-Conviction Based Asset Forfeiture, Stolen Asset Recovery (StAR) series* (Washington, D.C., World Bank, 2009).

<sup>53</sup> See *ibid.*, chap. III, art. 31, sect. V.

### *Successes and good practices*

Two neighbouring States recently introduced the possibility of conducting special financial investigations to check the legality of the origin of the property of persons involved in criminal offences, when reasonable grounds exist to suspect that they possess considerable assets deriving therefrom. A public prosecutor is in charge of conducting the financial investigation and collects evidence on the incomes and property of the defendant, his or her legal successors and any person the defendant has transferred his or her property to.

Similarly, in another State, in addition to the normal measures that can be taken during a criminal investigation, a special financial criminal investigation may be initiated when a preliminary investigation into an offence has shown the likelihood of illegally obtained profits or advantages above a certain threshold. The relevant framework consists of extended powers to obtain documents and other information or to seize goods or assets and provides a basis for continued investigations into financial aspects of criminal offences after the investigations into the underlying criminal offences have ended. Most importantly, in the State in question, value confiscation occurs in a separate proceeding that may take place within two years following a conviction, permitting time for a thorough investigation relating to the criminal proceeds, amounts and sources.

Normally, national financial intelligence units also have the authority to access financial accounts and banking records under the legislation and framework against money-laundering and the financing of terrorism. Furthermore, the above possibilities are sometimes carried out not only through the usual prosecutorial and law enforcement channels but also by specialized authorities (such as asset recovery offices), adding considerably to their practical effectiveness.

### *Example of implementation*

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

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

Despite the importance of such measures, in at least four countries, measures to enable the freezing or seizure of proceeds or instrumentalities of crime for purposes of eventual confiscation were lacking or did not appear to cover the product of the criminal act in all corruption-related offences. In another case, the reviewers expressed reservations that the regulation of seizures and freezing of property could be achieved (with the exception of money-laundering) only by reference to the civil procedure code, and recommended addressing this matter in a uniform manner to avoid its fragmentation in different legislative pillars and to limit possible questions of interpretation.

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

Apart from these “regular” freezing or restraining procedures, further precautionary measures are possible in several cases. These can take the form of urgent, short-term freezing orders, issued ex parte without a court order, preventing a financial institution from processing withdrawals from a specified account or restricting the transfer or disposal of other property constituting the object of a suspicious transaction for a certain period (from 24 hours to 60 days under certain conditions) in order to avoid offenders dissipating funds. These short-term freezing orders can be issued by the public prosecutor, by individual magistrates following the application of certain law enforcement officials or by the national financial intelligence unit that receives suspicious transaction reports in money-laundering cases (administrative freezing orders). It was generally agreed that such

administrative powers to temporarily freeze transactions based on suspicious activity are useful and that appropriate measures by States parties are welcome.<sup>54</sup> In one case, the central bank is able to freeze an account without warning for 30 days, which can be extended for a further 30 days and beyond that, subject to a court order. Finally, in one State, the domestic financial institutions detecting a suspicious transaction and reporting it to the financial intelligence unit have to freeze the funds involved, on their own initiative, for a maximum of five days. The criminal authorities, and not the financial intelligence unit, decide on the extension of the freezing.

#### *Administration of property*

Several States parties faced issues with regard to the administration of frozen, seized and confiscated property. In two cases, no efforts have been made to implement paragraph 3 of article 31, and a number of States parties provided no information on the subject under review. A wide variety of policies were addressed, ranging from the most basic (e.g. regulations for the deposit of money, securities, gold or precious stones in a banking entity or for the sale, donation or disposal of seized items consisting of hazardous, perishable material or subject to rapid devaluation or high maintenance, mostly by police officials), to tailored solutions according to the nature of the property in question.

#### *Example of implementation*

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

Most reviews focus on the administration of seized and frozen assets, which presents great challenges for implementing States parties. Particular importance is attached to the development of clear and comprehensive rules to ensure the safety and cost-effective conservation of the property involved and address all kinds of situations and assets, no matter how substantial. In this context, many recommendations aim at improving the management capacities of the States parties concerned. For example, a recommendation was made in the case of one State party to build the capacity of the different public institutions assigned to receive seized property and to handle complex assets requiring extensive administrative measures, e.g. businesses, once such assets have been seized. Similarly, in another State, it was reported that the seizure of any substantial asset, such as a house, would present a serious challenge to the management capacity of the law enforcement authorities; as

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<sup>54</sup> For more information on administrative and automatic freezing systems, see *ibid.*

a consequence, major seizures are rarely undertaken. In other reviews, recommendations were issued on considering the strengthening of measures for the management of seized, frozen and confiscated property in order to regulate the process more methodically and not limit it, for example, to seized items or cases where the property is perishable or its value may rapidly depreciate.

On the question of which of the reported asset management systems was the most adequate, the governmental experts were generally in favour of systems that provide for the possibility of entrusting property on a case-by-case basis, e.g. when in risk of depreciation or deterioration, to a skilled person (e.g. a custodian, a curator bonis, a receiver, an asset manager or an administrator) or agency authorized to take care of and administer the property and perform any necessary act for that purpose. Such a solution might involve the outsourcing of certain administrative tasks to private enterprises, if this fits better with the system of the country in question. Equally, it should not be excluded that the property upon which an attachment is imposed is simply left with the owner or user thereof, or his or her family members, if this better serves the purposes of preserving the asset in question. Other than that, the reviewers sometimes appear to favour centralized services (asset management offices), capable of handling all relevant situations. In three cases, where the establishment of central agencies to administer seized assets was under consideration, replacing local authorities or a multitude of different agencies entrusted with this responsibility, this development was welcomed, and the States parties under review were generally encouraged to continue to pursue the creation of such specialized bodies. However, there is a need for financially sound solutions, given that the management of frozen assets may be costly in itself and the operation of an ineffective system may offset any benefit from the eventual confiscation of such assets.<sup>55</sup>

*Successes and good practices*

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

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

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<sup>55</sup> Ibid.

proceeds of a crime will form part of the amounts that are confiscated, if this takes place.

The situation in relation to the use of confiscated assets again appears fragmented, as States parties pursue different goals and priorities. Confiscated values are often deposited in a State account, and confiscated property (other than that which is required to be destroyed by law) is sold by public auction or by other commercially profitable means, and the proceeds of the sale are then deposited into the State treasury. In this context, one State party was encouraged to proceed with the establishment of a special confiscated assets trust fund into which all confiscated moneys and all profits derived from investments and sales made in relation to confiscated property would be paid.

*Successes and good practices*

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

In general, there are no clear policies on the reuse of confiscated assets. However, in some cases, States parties have special agencies in place to handle the management of confiscated property and pursue specific objectives centred on further enhancing their law enforcement capabilities or diminishing the consequences of crime. Therefore, the observation of the authorities in one State party that once assets are confiscated, the issue of asset administration does not arise, as they become property of the State, is not quite accurate. For example, in one country, funds obtained from the sale of confiscated assets, after deducting the costs for value assessment, storage, preservation and the sale of seized property, are paid into the State budget and used to finance projects aimed at strengthening the capacity of judicial, prosecutorial and authorities responsible for internal affairs. In another State, the proceeds of public auctions of confiscated assets are given to the victims (including State entities or agencies affected) as redress. In the event that no victim can be determined, the law provides that goods seized under criminal proceedings, confiscated property and any other revenue from judicial proceedings belong to the judicial branch. And in a third case, the proceeds of the disposal of the property and securities, as well as the confiscated money, are allocated to a special fund of the ministry of the interior, in order to be used in programmes for drug prevention and treatment and the rehabilitation of drug addicts.

*Scope of property subject to freezing, seizure and confiscation*

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

the same manner and to the same extent as proceeds of crime (article 31, paragraph 6).

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

*Example of implementation*

One State party uses the following definition of proceeds:

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

Gaps were found in the legislation of a significant number of countries with regard to one or more of the above types of property, especially in those that do not have value-based confiscation. Numerous recommendations were issued on pursuing a clear delineation of the concept of property as a subject of confiscation proceedings and ensuring, as a matter of priority, that proceeds of all corruption offences (and not, as in some cases, solely of money-laundering) transformed into other property, intermingled proceeds and income or other benefits derived from such proceeds (i.e. secondary profits) may be liable to the measures covered in article 31, paragraph 1.

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

*Production of bank, financial or commercial records*

Article 31, paragraph 7, sets forth procedural law requirements to facilitate the operation of the other provisions of article 31 (and also of article 55, on international cooperation for purposes of confiscation). It requires States parties to

ensure that bank records, financial records (such as those of other financial services companies) and commercial records (such as those of real estate transactions, shipping lines, freight forwarders and insurers) are subject to compulsory production, for example through production orders, search and seizure or similar means that ensure their availability to law enforcement officials. The same paragraph establishes the principle that bank secrecy cannot be raised by States as a ground for not implementing its provisions.<sup>56</sup>

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

*Examples of implementation*

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

Similarly, in another country, it was explained that no court order was required to make bank, financial or commercial records available; such records may be requested by the prosecutor or the investigating authority. In practice, the relevant request is answered within 8-30 days. In case of refusal, a fine can be imposed on the requested institution.

In view of the above, the levels of implementation were generally deemed satisfactory and recommendations were issued only sporadically for States parties to consider a relaxation of the relevant standards and formal procedural requirements, most of all, as explained in chapter III, section B, subsection 1, below, in the light of possible delays that may occur with respect to the obtaining of court orders for the lifting of bank secrecy. Moreover, in four cases, doubts were raised about the applicable provisions and on whether the legislation cited covers all corruption offences or has been applied in practice. Finally, in two States where the collection of bank information for domestic investigations is possible in principle only when the offence under investigation is punished by a maximum imprisonment of at least

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<sup>56</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 421.

four years, the national authorities were encouraged to proceed either with enacting legislation increasing the maximum sanctions for bribery or with stipulating that bank secrecy does not apply in the investigation of any corruption offence, in order to ensure full compliance with the provision in question.

#### *Reversal of the burden of proof*

A reversal of the burden of proof for demonstrating the lawful origin of alleged proceeds of crime or other property liable to confiscation (as the relevant provision of the Convention was interpreted by several States parties) has not been introduced in about half of the jurisdictions under review, at least with respect to corruption offences. States parties rejecting the relevant (optional) measure usually view it as a violation of the principle of the presumption of innocence, established at the constitutional level in many countries, and as inconsistent with the restrictive view taken by national criminal justice systems towards any reversal of the burden of proof in criminal cases. Even though the relevant measure does not necessarily concern the stage before the offender is proved guilty according to law, but can be applied at the subsequent stage of the determination of the applicable sanctions, these arguments were generally accepted, given the wide discretion of States parties as to whether to implement the provision in question. In one case, however, as well as in countries where no such justification was offered, it was recommended that the States may wish to consider adopting the necessary legislative amendments. No issue of implementation arose in one particular State party, in which the constitution itself not only prohibits the confiscation of legally acquired assets but also enshrines the presumption of licit acquisition of all wealth.

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

#### *Successes and good practices*

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

Additionally, the evidentiary presumption mentioned above is also standard practice in both conviction-based or non-conviction-based civil forfeiture proceedings, as indicated above and also in chapter I, section B, subsection 4, above. In one of these cases, the accused has to make a declaration in writing in order to prove the legal nature of the property and, if he or she fails to make such declaration or if the declaration is incomplete, the property is presumed to have been derived from

criminal activity. Similarly, in another State, a person whose property has been restrained or forfeited may apply for the property to be excluded from restraint or forfeiture. The applicant bears the burden of proof in demonstrating that the property was lawfully acquired.

*Rights of bona fide third parties*

Few issues have arisen with regard to paragraph 9 of article 31 and few, if any, observations were made by reviewers. In the context of the in-depth review, the question of the rights of bona fide third parties appears to have been one of the hardest provisions of the Convention to examine, as external experts sought to establish whether a body of legislation prejudices or not the rights of third parties. It is telling that in two cases, the reviewing experts observed that the information provided by the authorities (on the national provisions on confiscation) did not demonstrate any positive disposition with regard to the principle of protection of the rights of bona fide third parties, and at the end had to employ an *a contrario* reasoning to conclude that they cannot (or only as a matter of exception) be subject to measures such as confiscation, seizure or freezing of assets. In only three cases were genuine concerns expressed on whether the rights of bona fide third parties are adequately safeguarded in practice in all cases involving corruption-related offences.

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

*Example of implementation*

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

### *Effectiveness*

A relatively small number of States provided information, examples of cases and statistical data on the implementation and operational value of relevant legislation, and in one case it was specifically recommended that statistics on confiscation be made publicly available and regularly updated. It should be emphasized, however, that it is often difficult to get an accurate picture of the total amount of money confiscated in relation to corruption cases, since prosecutions may be conducted for different, graver or more easily provable offences. This means that not all confiscated proceeds in corruption cases are visible in statistics. Despite this, some notable successes were observed, including cases where the domestic provisions have facilitated the confiscation of assets in matters involving foreign corruption offences and the repatriation of those assets to the countries in which the corrupt conduct was perpetrated. The most distinctive example of this is the system that one State has set up for the seizure of funds misappropriated by politically exposed persons and which has led to the confiscation and restitution of very large amounts of money over the past 15 years; this was identified both as a success and a good practice in the implementation of the provisions of article 31, but also in the area of mutual legal assistance in view of asset recovery.

### *Challenges*

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

## **C. Protection of witnesses, experts and victims (article 32)**

There was wide variation among the States parties with regard to the protection of witnesses, experts and victims against potential retaliation or intimidation. The end balance of a comparative overview of national legislation can be considered positive,

although it was noted that no measures have been taken in several jurisdictions for the effective implementation of article 32. Equally, a number of States parties pointed to limited and fragmented efforts to structure a comprehensive witness protection system, including fairly standard provisions criminalizing the obstruction of justice (as foreseen by article 25), informal practical steps taken by the police, or provisions on the non-disclosure of the identity or whereabouts of witnesses or informers, or of matters which might lead to their discovery. Most of these States parties lack more enhanced procedures for the physical protection of witnesses, experts and their families, and for providing them with new identities or for their relocation. There are also cases where existing laws providing some forms of legal and physical protection of witnesses have yet to be implemented, are not applicable to corruption-related offences or are only applied in very restricted circumstances.

The absence of a comprehensive witness protection or relocation programme did (and should) not automatically lead governmental experts to consider all of the above States as being in breach of the Convention provisions. The requirements of article 32, paragraph 1, are mandatory, but only where considered appropriate, necessary, feasible and within the means of the State party concerned. This implies, as noted in the *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, that “the obligation to provide effective protection for witnesses is limited to specific cases or prescribed conditions where, in the view of the implementing State party, such means are appropriate. For instance, officials might be given discretion to assess the threat or risks in each case and to extend protection accordingly”.<sup>57</sup> Equally, the obligation to provide protection arises only insofar as the State party concerned has the available resources and technical capabilities to offer such protection. In view of the above principles and the wide discretionary powers accorded to States parties regarding the implementation of article 32, the reviewers are requested to adapt their findings to the special conditions they encounter in each country and to ask the national authorities whether any technical assistance is needed. Hence, in one State with no comprehensive witness protection programme, the review team took into account that it was dealing with a relatively small and homogenous country, with an extensive degree of transparency and a high level of technology available across the country — rendering very difficult, for example, the successful relocation of a person from one part of the country to another, and that, from a practical point of view, there was, at the time of the review, no pressing need for a relocation programme. The experts therefore came to the conclusion that the State in question should be deemed to be in compliance with the Convention requirements, and confined themselves to urging the authorities to strengthen measures to protect the identity of witnesses in order to alleviate concerns that their names could be traced.

Nevertheless, such conclusions were not possible in the majority of countries lacking comprehensive witness protection programmes, especially countries in the Group of African States and the Group of Asia-Pacific States. National authorities repeatedly pointed out the absence of such systems as a major weakness in the fight against corruption: witnesses lack the necessary assurances for their safety and security in order to testify in courts and, in cases where they appear, they are hesitant to speak the truth, especially when they feel that the accused persons are politically, financially or otherwise influential. In practice, this has prevented cases

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<sup>57</sup> Para. 438.

from being prosecuted, as witnesses were not prepared to testify. There is also reluctance on the part of the general public to report instances of potential retaliation or intimidation. Accordingly, several recommendations were issued, including on enacting comprehensive legislation and systems for the protection of experts, witnesses, victims and their relatives, where these were absent, and giving adequate attention to such measures on the ground, for example by raising awareness of them among the police and other law enforcement agencies responsible for their implementation.

The negative impression created by this situation is counterbalanced by a considerable number of countries with adequate and sometimes broad and progressive witness protection programmes — based on solid bodies of legal standards. In several cases, the manner in which the relevant issues are regulated was highlighted as a good practice in advancing the goals of the Convention. In one State party, the right of victims and witnesses to receive adequate protection in the course of criminal proceedings is even recognized at the constitutional level. Furthermore, in some cases, the relevant legislation was drafted with the assistance of UNODC experts and the contribution of partner countries, or is the result of efforts to comply with the requirements of regional instruments, such as the Council of the European Union resolution of 23 November 1995 on the protection of the witnesses in the fight against international organized crime, recommendation No. R (97) 13 of the Committee of Ministers of the Council of Europe to Member States concerning the intimidation of witnesses and the rights of the defence, and Council of the European Union framework decision 2001/220/JHA on the standing of victims in criminal proceedings. Most significantly, in at least one State, a law on the protection of witnesses, experts and informants on acts of corruption was adopted following a gap assessment of national legislation with regard to the Convention.

Apart from general provisions (e.g. in national criminal codes or codes of criminal procedure) providing protection to witnesses identified as being at a real risk because of the assistance they have provided to police and other law enforcement agencies in significant criminal prosecutions, many States have special national witness protection programmes, witness protection acts and similar laws or ordinances that specify the types of protection afforded, the persons enjoying it, the scope and duration of protection and the duties of the competent bodies and authorities. As a rule, such protection covers both witnesses and experts giving testimony concerning offences established in accordance with the Convention — with some notable exceptions — and is provided irrespective of the nationality of the witness and may be extended, when appropriate, to their relatives or individuals with whom the protected person is in a particularly close relationship, as required under article 32, paragraph 1. Equally, national mechanisms to protect persons giving evidence in judicial proceedings usually make no distinction between victims who act as witnesses and third parties or experts who testify at trials, which is in line with the spirit of article 32, paragraph 4. Finally, it appears that the applicable national provisions extend in most cases to the protection of persons who participate or have participated in the offences established in accordance with the Convention and who then cooperate with or assist law enforcement, as required under article 37, paragraph 4. Generally, States parties may consider taking a broad view of the terms “witness” and “expert”, by applying existing protection measures, if necessary, to any person who contributes evidence or expertise or appears willing to cooperate at

an early stage of the investigative process, irrespective of his or her formal legal status, even when it is uncertain whether the person in question will actually end up giving testimony in trial or in a court hearing.<sup>58</sup>

As with States parties with more constrained legislative efforts, the exact contents of national witness protection programmes should be evaluated based on the actual needs of the criminal justice system of each country and the limits posed by existing structures, resources and capacities. Comparatively inexpensive or short-term measures may be sufficient and preferable to other alternatives, and countries may wish to differentiate the types and level of protection granted, depending on the seriousness of the crime, the contribution of the witness or victim involved and other contextual factors.<sup>59</sup> For example, in one jurisdiction, the law on witness protection only applies to offences carrying a maximum penalty of 10 years' imprisonment or more, thus excluding a series of offences established in accordance with the Convention. The national authorities explained that that reflected the balance of resources in the domestic criminal justice system and noted that they might consider changing the threshold once they were in the process of reforming the law — an explanation which was apparently deemed satisfactory, given the wide range of options available to States parties that is noted above. On the other hand, in two other States parties, the legal system provides protection for witnesses, experts and victims, but the inclusion of corruption offences is not automatic or depends on whether they are qualified as offences of organized crime. In these particular cases, recommendations were issued to extend such protection in a direct and explicit fashion to witnesses and victims of corruption offences, taking into account existing and future resources.

The following measures are indicative of the way States parties have built up their witness protection programmes, in accordance with paragraph 2 of article 32.<sup>60</sup>

#### *Physical protection*

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

(a) Measures for the immediate physical protection of the safety and welfare of witnesses who may be subject to intimidation or harassment as a result of giving evidence, such as guarding the protected person and his or her home and property; equipping their place of residence with fire safety and security devices, such as

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<sup>58</sup> *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 32, subsect. II.1.

<sup>59</sup> See *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 439; and *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 32, subsect. II.2.

<sup>60</sup> For more details on the content and organizational setup of witness protection programmes, see UNODC, *Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime* (Vienna, 2008), chap. IV.

alarm systems; changing their phone numbers and the registration numbers of their vehicles; installing facilities and procedures for emergency police communications, such as telephone hotline numbers; providing security during travel; issuing the protected person with special personal protection equipment and warning him or her of existing danger; temporary billeting of the protected person in a secure place; and (if the protected persons are kept in an investigation jail or prison facility) transferring them from one investigation jail or prison facility to another, or keeping them separated from other inmates or in solitary confinement;

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

(c) Ensuring the safe integration of witnesses and their families participating in the programme back into the community; ancillary measures related to social, medical, psychological, legal or financial assistance, such as payment of full salary or wage while acting as a witness, and free medical treatment, hospitalization and medicine for any injury or illness incurred or suffered during this period; access to information and help to resolve organizational issues; compensation for the total of the eventual transfer and relocation costs; and even burial benefits and free education for the minor or dependent children of witnesses who die or are permanently incapacitated because of their participation in a witness protection programme;

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

*Examples of implementation*

In one State party, police and law enforcement agencies have access to an extensive range of measures to protect witnesses and experts, based on the provisions of tailored legislation, including full witness protection programmes involving permanent relocation, change of identity, personal and home security measures and a high degree of confidentiality. Protection arrangements are transposed in writing and taken in full consultation with witnesses, who are assisted by a specialized witness protection service. Written agreements of this kind (e.g. memorandums of understanding or protocols between the State and the witnesses under protection) are generally considered as a way to enhance cooperation, since they help in

clarifying the relationship between the parties and providing certainty regarding the scope of the protection to be granted.<sup>a</sup>

One State party (among many others) grants additional protection for witnesses through the setting of bail conditions for accused persons. The Court can take into account, in granting bail to a person, the likelihood of that person harassing or endangering the safety or welfare of a person, or interfering with evidence, intimidating a witness or obstructing the course of justice.

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

#### *Evidentiary rules*

In addition to physical protection, comprehensive witness protection programmes include evidentiary rules to ensure the safety of witnesses and victims.

Such measures include those specifically aimed at keeping the identity of protected witnesses secret during pretrial and trial proceedings, including hearing of witnesses under pseudonyms; listing the address of court facilities as the address of the witness for the purpose of summons and citations; placing testifying persons behind a screen; disguise and voice alteration methods; and suppressing the publication of evidence.

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<sup>a</sup>*Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 32, subsect. II.2.

*Examples of implementation*

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

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

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

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

*Examples of implementation*

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

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

Evidentiary rules for the protection of witnesses may be in conflict with fundamental principles of a fair criminal process in States parties, principles that are related to the protection of the rights of the accused and enshrined in the criminal procedural law, the constitution or even texts of international treaties prevailing over contrary national provisions. This is also reflected in article 32, which provides that the measures implemented should be “without prejudice to the rights of the defendant, including the right to due process”. The non-disclosure of the witnesses’ identity or the employment of methods for their private or long-distance interrogation may contradict, to give a few examples, the right of the accused to be informed of the charges and the evidence against him or her, the principle of equality of arms, the right to a public hearing, the oral character of the main criminal process, the principles of direct and personal evaluation of evidence and the right of the accused to be present at one’s own trial and examine the witnesses of the prosecution.<sup>61</sup>

Conflicting interests of this sort should be taken into account and the possibility considered that the absence of certain measures to guarantee the safety of witnesses, experts and victims is a result of the impossibility of reconciling them with established rights of the defence. For instance, in one State, the authorities explained that the constitution provides for the right of the accused to be confronted with the witnesses against him, thereby excluding the use of video testimony in a trial. Only exceptionally have some children been permitted to testify via closed-circuit television, and in rare cases some victims or witnesses have also been allowed to testify while partially disguised by a wig or glasses, or while screened from the public but not the jury. The reviewing experts accepted this explanation and did not alter their view that the State party under review had taken the appropriate measures to satisfy the requirements of the Convention.

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<sup>61</sup> See *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 445.

### *Relocation agreements*

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

Indeed, it was reported that some national witness protection departments enter into informal arrangements or memorandums of understanding with foreign authorities, on the basis of which relocation of protected persons ensues. For every case, there is a separate arrangement, though for security reasons it was not possible to provide concrete examples. Other States parties reported that they were parties to multilateral agreements on witness protection that provide a more general framework for the relocation of the protected person in the territory of a State party from the same geographical region or with similar linguistic or cultural characteristics, such as the Agreement on the Protection of Participants in Criminal Proceedings among States members of the Commonwealth of Independent States, the witness protection agreement signed by States members of the Salzburg Forum, the Police Cooperation Convention for South-East Europe, the Balkan agreement on witness protection and the Central American Convention for the Protection of Victims, Witnesses, Experts and other Persons Involved in Criminal Investigations and Prosecution, particularly against Drug Trafficking and Organized Crime (not yet in force).

### *Participation of victims*

Regarding the obligation of States parties to consider the perspective of victims of corruption, some countries provided insufficient information or did not elaborate on the exact nature of the possible involvement of the victim in the different stages of criminal proceedings, apart from the right to protection which he or she enjoys. Other States parties, especially from the Group of African States and the Group of Asia-Pacific States, appear to have no provisions whatsoever to facilitate the presentation and consideration of the views and concerns of victims, or do not seem to provide other than a basic opportunity, e.g. if called as witnesses, for victims to voice their views and concerns in relation to how the case has affected them personally or professionally; the authorities sometimes simply stated that nothing in domestic law prevented them from doing so and that it rested on the presiding judge as to whether or not such views and concerns would be heard. These unsatisfactory practices led to recommendations urging the national authorities to clarify the role of victims in trial and enhance the possibilities for them to make their position known to the court. The authorities in one State party argued that in corruption cases the law does not contain any provisions that allow victims to give testimony because victims are not usually identifiable in such cases. This does not apply, however, to all offences established in accordance with the Convention, nor does it release

States parties from the obligation to enable the victims who can be identified to state their position.

Turning to the States parties that provide this opportunity, the largest group among them, composed of countries with civil law systems, enable the victims of corruption offences not only to file private actions before the civil courts or to give testimony when called to act as witnesses, but also to present their views as civil plaintiffs or private prosecution parties in the criminal trial, enjoying a variety of rights at all stages of the criminal proceedings. In the past, even in those States, authorities were more concerned with punishing the perpetrators of crime. In recent years, however, government policy has apparently shifted towards improving the position of victims at the same time as punishing offenders. The aforementioned rights include the right to contest a refusal to commence or the termination of criminal proceedings; be informed of the nature of the charge; be granted the assistance of a lawyer and interpreter; take knowledge of the case file and examine and make copies of the materials contained therein; give consent to the application of temporary restraining orders or request the application of a restraining order; submit evidence to include in the case file for examination in court; file requests and complaints and summon witnesses; examine the reports on procedural acts and give statements, on record, on the conditions, course, results and minutes of the procedural acts; participate as a full party in the court hearings; give consent to the application of settlement proceedings or refuse to give such consent; present an opinion concerning the charges and even the punishment, as well as the damage set out in the charges and the civil action; and appeal the decision. In one State party, a recommendation was issued on ensuring that the status of victims in criminal proceedings is afforded to both natural and legal persons, while in another State it was recommended ensuring that the relevant rights are extended also to victims who do not have the status of a witness.

#### *Examples of implementation*

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

In another State, upon their request, victims may be granted psychosocial and legal assistance during court proceedings, insofar as this is necessary for reasons of protecting their procedural rights, under maximum consideration for their personal welfare. Psychosocial assistance comprises the preparation of the affected person for the proceedings and for the emotional burden related to it, as well as accompanying the person to the hearings during investigative proceedings and the main trial. In this context, some States parties cited their obligations stemming from directive 2012/29/EU of the European Parliament and of the Council of the European Union establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council framework decision 2001/220/JHA.

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

Finally, a third group of States parties following a common law system provide a possibility for the victim to appear and present his or her views at the stage after the accused has been convicted, in order to exclude that information prejudicial to the rights of the defence will be disclosed beforehand. This is achieved by means of oral or written statements (often called victim impact statements) that provide details to the court of the harm suffered by victims resulting from the offence and that are submitted during sentencing (occasionally also at proceedings involving release, plea or parole). The shape, form and content provided in a victim statement varies according to the governing legislative scheme. In some jurisdictions, the defendant or his or her lawyer may call a victim to be cross-examined on the statement. There are also victim support schemes providing advice and counselling services when attending court, part of which entails providing assistance with preparing and presenting a victim statement. The reviewing experts were generally satisfied that the provision under review was adequately implemented in such post-conviction victim participation measures, even in one (somewhat problematic) case where the authorities clarified that the victim does not have a right per se to address the court, and that the decision to call a victim to make a statement at the time of sentencing lies with the prosecutor.

### *Effectiveness*

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

### *Challenges*

The major challenge in respect of the implementation of article 32 is that of addressing inadequate normative frameworks, and sometimes the complete absence of witness protection programmes in many States parties. This is explained by the significant costs of such programmes, limited awareness of state-of-the-art measures and practices for witness and expert protection, specificities of the national legal systems, weak inter-agency coordination and limited capacities of the countries involved (e.g. human resources and technological and institutional infrastructure). A further challenge concerns the non-application of existing measures in practice,

owing to the novelty of witness protection laws and methods, lack of instructions and regulations for their implementation and lack of experience in running the relevant programmes. Regarding relocation agreements with other States parties, the reviewers noted that one State party had not entered into arrangements of this kind, mostly because of the alleged high complexity of such an operation. Finally, many States parties do not have provisions in place to enable the presentation and consideration of the views and concerns of victims.

#### **D. Protection of reporting persons (article 33)**

As with the protection of witnesses, experts and victims, there was considerable variation among States parties with regard to the implementation of article 33 — a non-mandatory provision — and the incorporation into domestic legal systems of appropriate measures for the protection of reporting persons, i.e. persons who report in good faith and on reasonable grounds any facts concerning offences established in accordance with the Convention (so-called “whistle-blowers”). A significant number of States parties have not established comprehensive whistle-blower protection measures or were found to be only partially in compliance with the provision under review, although legislation was pending in several cases. Accordingly, numerous recommendations were issued either to pursue or even prioritize the adoption of such legislation, covering all offences established in accordance with the Convention, or to take further steps towards protecting whistle-blowers, in accordance with the spirit of the Convention. It should be noted that such a recommendation was deemed necessary, even in four cases from the Group of Eastern European States where provisions in various laws provided to an adequate extent protection for reporting persons, but where no ad hoc legislation on whistle-blower protection was currently in place. It thus appears that sometimes — given that no such requirement derives from the Convention and not all reviews reached the same conclusion — the existence of piecemeal and fragmented provisions may undermine the effectiveness of the afforded protection.

The lack of adequate measures appears particularly manifest in States parties where the law contains a duty of public officials or other citizens to report suspicions of corrupt practices, but does not provide any corresponding protection against unjustified treatment. In some cases where no specific whistle-blower protection framework exists, the authorities made reference to the domestic provisions on witness and expert protection. Nevertheless, it should be made clear that such provisions are not sufficient. While physical safety is often a major preoccupation of informers and the application of witness protection measures in their favour certainly promotes the reporting of corruption offences, article 33 implies measures of a different nature and scope and covers not only witnesses, but also persons who do not participate in any official capacity and may not become directly involved in the criminal process, for instance in cases that do not progress beyond the investigation stage. Furthermore, there are individuals who may possess information at an early stage of a case which is not of such detail as to constitute evidence in the legal sense of the word, but is still capable of providing a serious indication of wrongdoing and alerting the authorities to the need for launching an investigation.<sup>62</sup>

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<sup>62</sup> *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 33, sect. I.

Hence, the main focus of the provision in question lies in the application of protection measures to the employment context in both the public and the private sectors.

In contrast to the above-mentioned group of States parties, a number of countries, especially those with a common law background, have introduced special legislation on public interest disclosures and whistle-blower protection, which in some cases was found to be elaborate and to represent a good practice. At least one of these States parties received help to this effect from an international institution, in this case the Asian Development Bank. In some cases, reference was made to the implementation of binding international instruments foreseeing the protection of employees, such as the Civil Law Convention on Corruption (article 9) of the Council of Europe. As to the form of protection afforded to persons reporting corruption-related activities in good faith and on reasonable grounds (apart from the extension of the physical protection provided to witnesses to also cover, if needed, this group of persons), the three sets of measures described below were considered as being of significance.

Some types of protection, described by some reviewers as good practices, are of a mainly procedural nature and concern the possibility of accepting and investigating information derived from anonymous reports (e.g. submitted through special mailboxes installed for this purpose in public institutions or via the Internet, e-mail or telephone hotlines) and, more importantly, in the case of non-anonymous reporting, the protection of the identity of reporting persons against third parties (insofar as those individuals do not consent to the disclosure of their identities), as well as the ensuring of secrecy regarding the information, records and documents delivered or indicated at the time of reporting. The protection of the reporting person's identity, in particular, should be ensured at least at the beginning of an investigation and up to the point where justice cannot be fully served without the disclosure of the informer's identity, e.g. until he or she is called to testify as a witness.

A second set of measures refers to protection against court action, i.e. the explicit prohibition of civil suits, prosecutions (especially for defamation, perjury and false accusation), or any other legal proceedings related to disclosures made in good faith, even if the facts presented by the whistle-blower were not sufficient to allow a decision to prosecute or to convict. Some States parties grant this privilege especially to persons reporting suspicious transactions indicating the commission of money-laundering offences. It should be borne in mind, however, that in many criminal systems it may be difficult to reconcile such measures with the rights of those against whom allegations are made,<sup>63</sup> or to determine the point when such advance immunity ceases to be valid or absolute. In any case, the success of a civil or criminal court action against the reporting person would probably depend on proving the maliciousness of the acts involved, something that in itself constitutes a form of protective guarantee and may be considered to reduce the added value of the measures under discussion.

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<sup>63</sup> In *ibid.*, subsections II.1 and II.5, it is underlined that the rights and reputation of the targets of allegations must be protected, and that the law should contain minimum measures to restore damaged reputation.

A third (and, as it appears from the weight attributed to them in the reviews, the most important) set of measures for the protection of persons who report misconduct or corruption concern their employment conditions and are often found, for that reason, in the labour legislation or civil service codes of States parties. Bearing in mind the optional nature of article 33, the protection of whistle-blowers should include measures to prevent discriminatory treatment or disciplinary sanctions against reporting persons, including where these are initiated for alleged breaches of the rules on professional secrecy or discretion. Unless an employee is legally assured of protection from reprisals in the workplace, he or she may never come forward to give information to his or her employer or to the regulatory authorities. In this context, some reviews indicate that general provisions protecting against wrongful termination of an employment contract and establishing a right to take the matter to court may not suffice for the protection of employees reporting corruption practices. A clear delineation of a reporting person's rights and special measures for the enhancement of his or her protection are needed, including the explicit prohibition of discriminatory transfer, reassignment, demotion, pay cut, suspension from employment, dismissal, forced retirement or any other professional disadvantage that may follow a whistle-blower report; the right to be transferred on request, without the possibility of refusal, if the disclosures lead to the filing of charges; and eventually shifting the burden of proof in related labour proceedings to the employer. Further measures can be taken to enhance the obligation of the competent authorities to protect the reporting person when he or she is a victim of actual harassment, mobbing, intimidation or aggression by colleagues or even to provide financial compensation in advance for part of the costs of judicial procedures initiated by whistle-blowers who challenge a decision to dismiss them or otherwise infringe on their rights. Finally, it may be helpful, as two States parties have done, to have a special agency in place to which persons can bring their own actions or complaints of adverse treatment, as well as to explore ways to expedite access to existing protections mechanisms and remove cumbersome processes.

*Successes and good practices*

In one State party, a new anti-corruption law provides for a reversal of the burden of proof to protect victims of retaliation measures: as things stood before, a reporting person in the public or private sectors who believed he or she was being subjected to retaliation could file a complaint, thereby initiating a lengthy process. The new law streamlines this regime by shifting the burden of proof to the employer, after the reporting person has shown that his or her whistle-blowing action was a contributing factor to the alleged retaliation. Similar regimes apply in an increasing number of States parties, including cases where any application of disciplinary sanctions against reporting public officials is presumed abusive, until proved otherwise, when taking place within one year of their disclosures.

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

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

It should be noted that specific legislative mechanisms of this kind exist in some States parties for both public and private sector whistle-blower protection, but that in several cases only public officials, and not private persons, are afforded such protection; accordingly, recommendations were issued to consider extending the rules offering protection against unjustified treatment (e.g. unfair dismissal) to encourage persons other than public officials to report offences established in accordance with the Convention. Special consideration should be given to the

protection of journalists, insofar as their reporting meets the criterion of acting in good faith and based on reasonable grounds.<sup>64</sup>

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

In view of the above, States parties should make every effort to strike a balance between acknowledging the loyalty and confidentiality obligations of civil servants and private employees towards the State and their employer, respectively, and the obligation to provide protection against any "unjustified" treatment of reporting persons. Breach of confidentiality should not be allowed to become an obstacle to providing protection so long as the reporting is done in good faith. This could be done by establishing special oversight bodies or confidentiality counsellors that are responsible for receiving reports of misconduct that may cause major damage to the pertinent organization, or by providing for different spheres of disclosure, with corresponding levels of protection — the first one within the organization for which the reporting person works and the next at external agencies and institutions, in cases where the first-level disclosures are not likely or have failed to produce appropriate results.<sup>65</sup>

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<sup>64</sup> Ibid., subsect. II.3.

<sup>65</sup> Ibid., subsect. II.4.

### *Examples of implementation*

This solution is illustrated by the example of one State party's system of three disclosure spheres. The whistle-blower's own employer is the safest recipient of concerns concerning corruption. An internal disclosure will be protected if the whistle-blower acts in good faith and follows the process set out for such disclosures by the employer. Disclosures to specified regulatory bodies (i.e. the office of the public protector and the auditor general) are also protected, without a need that the concern should first have been raised with the employer, where the whistle-blower makes the disclosure in good faith and the employee reasonably believes that the regulatory body would usually deal with this kind of problem. Wider disclosures (e.g. to the police, members of parliament and the media) can be protected, insofar as the disclosure is reasonable, made in good faith and, crucially, there was a good cause for going outside the first two spheres.

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

### *Challenges*

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

## **E. Consequences of acts of corruption (article 34)**

Article 34 creates a general obligation for States parties to take measures to address the consequences of corruption and is specifically intended to ensure that persons (both natural and legal) do not benefit from contracts, concessions or similar advantages obtained through corrupt means. Although a number of States parties tend to cite the sanctions and penalties imposed on natural and legal persons convicted of corruption offences (from terms of imprisonment, pecuniary penalties and disqualifications to withdrawal of professional and corporate licences and blacklisting), the provision in question seeks to address issues not already covered

by more special rules, such as the ones contained in article 26, article 30, paragraph 1, and article 35, and to ensure, according to one of the basic principles of the Convention, that corruption does not pay. In other words, the condemnation of corrupt practices must go beyond criminal sanctions and must translate into all relevant fields of law, be it private law, competition law, administrative law, tax law, the law of contracts or the law of torts.<sup>66</sup>

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

Corruption is a factor in the annulment or rescindment of contracts or the withdrawal of concessions or similar instruments in a large number of countries, although at least eight jurisdictions appear to offer no such possibility or did not provide adequate information. The standard method used to achieve this is through the application of general (either common law or civil code) principles of contractual law that permit annulment or rescission of a contract on the basis of mala fides (bad faith or fraudulent misrepresentation) on the part of at least one of the contractual parties. The aggrieved party and persons with a legitimate interest may challenge the relevant contract. It is worth noting that a number of countries are bound in this regard by the Civil Law Convention on Corruption, which, in article 8, paragraph 2, obliges the parties to provide in their internal law for the possibility for all parties to a contract whose consent has been undermined by an act of corruption to be able to apply to the court for the contract to be declared void, notwithstanding their right to claim for damages.

#### *Successes and good practices*

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

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

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<sup>66</sup> Ibid., art. 34, sect. I.

While the above principles refer normally to contracts with a lawful content but which are achieved through corrupt influence, and render such contracts voidable, some reviews also made mention of the general possibility to consider as ab initio void a contract whose object is illegal or contradicts public order or good morals. Under the relevant provisions, a contract that is drawn up following an act of corruption will be void if the corrupt act has substantially influenced the content of the contract, or if the object of the contract is the corrupt transaction itself, e.g. the agreement of a specific fee for the services of an intermediary who has offered to exert unlawful influence on a public official. Some countries alluded again in this regard to the application of the Civil Law Convention on Corruption, in article 8, paragraph 1, of which it is stated that the parties shall provide in their internal law for any contract or clause of a contract providing for corruption to be null and void. It should be clear, however, that this invalidity alone does not address sufficiently the requirements of the Convention against Corruption, as the objective of article 34 is not to protect the interests of a party which is itself involved in a corrupt transaction.

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

*Examples of implementation*

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

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

In three States parties, the penal code also provides for the possibility of restitution, returning things to their previous state or repairing the civil consequences and damages of corruption, based on an order contained in the sentence issued after a

criminal conviction. An annulment of the contract, concession or other legal instrument is considered part of such reparation of damages.

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

*Successes and good practices*

In one State party it was considered good practice (in the context of article 34) that the State institutions affected by the commission of an offence are obliged to file a complaint and become a plaintiff in order to protect the institution's interests, regardless of the criminal proceedings instituted by the public prosecution service.

## **F. Compensation for damage (article 35)**

Article 35, on compensation for damage, appears to be one of the least problematic provisions of the entire Convention in terms of compliance, and all but seven of the reviewed States parties have adopted measures to fully or partly implement the article. In four of the States found to have inadequate provisions, the national law gives the criminal court, when considering the punishment to be imposed on the offender, the option to order the compensation of the victim, usually taking into account the nature and seriousness of the offence, the degree and nature of any personal injury or damage to property suffered by any person as a result of its commission and any factors which may be considered in mitigation or aggravation of the punishment. This “compensation order” is a form of punishment issued at the discretion of the court, either on its own initiative or following an application by the public prosecutor. It does not, however, necessarily give persons who have suffered damage the right to claim compensation from those responsible, as envisaged in the provision under review; nor did the national authorities of the States in question indicate that the relevant provisions would allow a victim to file an application for compensation, as was the case in countries with similar legislation. Therefore, this solution was considered insufficient for the purposes of the Convention. On top of that, in one of the cases under discussion, the national anti-corruption law that addresses the matter refers only to the compensation of damages suffered specifically by the principal whose agent has been convicted of a corruption offence, and has no provisions in place stating the rules and procedure to be followed by the court to order the compensation of the victim.

The intent of article 35 is to urge States parties to provide legal grounds for those who have suffered some type of damage as a result of acts of corruption to enable them to pursue compensation from actors involved in such actions. Indeed, as a rule, national legal systems provide procedures allowing persons or entities to seek compensation for damages (material or immaterial), or any detrimental consequence suffered as a result of acts of corruption. An interpretative note to the Convention indicates that any entities or persons suffering damages from corrupt acts should have the right to seek compensation. The expression “entities or persons” is deemed

to include States, as well as legal and natural persons.<sup>67</sup> Most countries appear to follow this interpretation. As to who may be found liable, a remedy allowing for damages to be claimed should be available even where a public authority is alleged to have been complicit in a corrupt process. The elements of liability, such as causality and the extent of damage inflicted on the claimant because of an act of corruption (“damage as a result of”), will have to be substantiated in accordance with the principles of the domestic law of each State that govern causality and the extent of due compensation. In the context of intent, and in line with the provisions of the Convention, it was noted that the absence of personal interaction between the perpetrator(s) and the claimant(s), or if the perpetrator was not aware of the specific damage to specific claimants’ interests, should not serve as a defence nor as a legal obstacle for those who have suffered damage and try to pursue compensation. In other words, the means to seek compensation should be available, insofar as the actors of a corrupt transaction intended or were aware that damage was going to be inflicted on a certain group of persons.

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

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<sup>67</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. III, art. 35, sect. C (p. 299).

### *Successes and good practices*

The court of cassation of one State party has expressly recognized that it is admissible for an enterprise to be a civil party in a criminal procedure when its bids were rejected because of the corruption of a public official by one of its competitors. Similarly, the court recognized that a third party, outside the corruption agreement, can invoke the material and moral damage caused to it by the consequences of this criminal contract. Thus, it has been declared admissible for a public office of the social housing department to bring a civil action during a prosecution for passive bribery of its director and secretary because of the damage to its reputation which had been caused by the actions of its employees. In the same State, a court of cassation decision allowed a non-governmental organization active in corruption prevention to bring a civil action in criminal proceedings related to a corruption offence. The reviewers stressed that they considered this to be a good practice for other States parties planning to increase the role and participation of civil society in their domestic legal processes.

Legislative provisions providing for the return of property confiscated from a corrupt criminal to the victim were also commended as good practice in the context of article 35. One State in particular has established a special compensation fund within the ministry of justice, which is responsible for the enforcement of the decisions of criminal courts regarding civil liability and compensation for damage. The fund takes the necessary measures for the collection of the amounts due from the obligated persons (including through the seizure of salaries, wages and other income) and their transmission to the victims. It also guarantees compensation in cases where the perpetrators do not meet their responsibilities by drawing funds from other sources, such as from discounts in the remuneration for the work of prisoners, seized moneys which have not been claimed within one year from the finality of judgement, the value of confiscated assets, compensation amounts from previous cases which were not claimed within the legal term and surcharges imposed in cases of delayed payments.

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

## **Chapter III. Law enforcement**

### **A. Institutional provisions**

#### **1. Specialized authorities (article 36)**

Article 36 calls upon States parties to ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. All but two of the States parties have established one or more bodies or specialized departments for this purpose. In one further case, legislation has been prepared for the creation of such a body. Most countries have opted for a single, specialized anti-corruption

agency, commission, bureau, directorate, department, office or task force operating (or about to become operational) within the institutional framework of the national ministry of justice or prosecutor general's office. These new anti-corruption entities are empowered to various degrees to investigate and/or prosecute corruption-related offences, as well as to centralize information relating to operational modes and methods used to commit the relevant infringements.

Some of those bodies have exclusive operational competence to conduct enquiries that are aimed at the detection of instances of corruption and to use special means and techniques in the course of criminal investigations. This is the case, for example, in a country that established an anti-corruption department within the prosecutorial authority following the implementation of recommendations of the Anti-Corruption Network for Eastern Europe and Central Asia. Others share law enforcement capabilities in corruption matters with judicial authorities and "regular" police and public prosecution services. Specialized agencies of this kind often focus on the more serious and complex corruption cases, or cases involving high-ranking public officials, leaving regular law enforcement bodies to deal with lower-level cases of corruption. Moreover, some anti-corruption bodies with investigative and law enforcement powers also fulfil preventive functions, such as education, awareness-raising and coordination, and have the right to draft and propose amendments to existing legislation. This practice is in line with an interpretative note to the Convention, which states that the body or bodies referred to in article 36 may be the same as those referred to in article 6.<sup>68</sup>

#### *Examples of implementation*

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

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

The mandate of the anti-corruption commission of a third State party involves raising public awareness and education about corruption, conducting corruption prevention activities, carrying out undercover operations, inquiries and investigations to detect cases of corruption and reviewing and inspecting the assets and income declarations of high-level public officials. Experts observed that this approach was conducive to fighting corruption because it embraced the three key strategies of education, prevention and enforcement. Furthermore, it was noted that anti-corruption laws contained a unique provision prohibiting a decrease in the anti-corruption agency's budget from the previous year, and requiring the agency's corruption-related recommendations to public sector institutions to be implemented. A three-sided agreement between the agency, Government and civil society is in

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<sup>68</sup> Ibid., art. 36, sect. C (p. 303).

place to promote collaboration in combating corruption, and representatives of civil society also hold a seat on the advisory council of the agency.<sup>a</sup>

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

A third group of States parties follow a multi-agency approach, which vests responsibility for combating corruption in numerous independent agencies or law enforcement divisions scattered within various authorities or ministries (e.g. both the ministry of justice and the ministry of the interior), including in some cases agencies combating money-laundering that have law enforcement powers beyond those of a basic financial intelligence unit. This is based on the idea that no single body should be solely responsible for fighting corruption. Instead, a range of different bodies and government initiatives are designed to promote accountability and transparency. Examples of this approach were deemed satisfactory and article 36 was considered as fully implemented. In one case, however, it was noted that much of the focus of the specialized units was on foreign fraud and bribery rather than domestic corruption. Although this was found to be commendable and in many ways unique among other countries, the national authorities were urged to consider focusing additional resources on the domestic sphere and developing a national anti-corruption strategy.

While all of the above three systems have been found to be in line with the requirements of the Convention, given the broad discretion of States parties to select the model that best suits their needs and structural conditions,<sup>69</sup> the reviewing experts have tended to favour the more centralized approaches or integrated models

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<sup>a</sup> For similar examples of the establishment of independent anti-corruption bodies with a mixed mandate (albeit with a focus on prevention), which were presented as good practices by States parties, see the report of the Conference of the States Parties to the Convention on its second session, held in Nusa Dua, Indonesia, from 28 January to 1 February 2008 (CAC/COSP/2006/15), paras. 55-56. For an example of an authority with a focus on law enforcement, see paragraph 65 of the same report.

<sup>69</sup> On the criteria to be taken into account for the selection of the appropriate model and the arguments for and against the concentration of anti-corruption work within a single authority, see *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 36, subsect. II.1.

that minimize the risk of friction and overlap of functions. Thus, in one State, they expressed their support for a plan to strengthen the public prosecution service through the establishment of a supra-regional prosecution office responsible for prosecuting highly complex cases. Equally, in two States with a multi-agency approach, they urged the authorities to continue progress on the establishment of a commission of integrity or similar national anti-corruption body, or to overcome the challenges of inter-agency coordination by granting a competent anti-corruption authority the necessary law enforcement and prosecutorial powers, the appropriate resources and training and a clear legislative mandate to carry out its functions effectively in the whole of the country. Finally, in one case, they commended the establishment and functioning of specialized bodies at each stage of the law enforcement process (namely, an anti-corruption police bureau for the purposes of investigation, a special prosecution office with responsibility for prosecuting corruption-related offences and a specialized criminal court with exclusive jurisdiction in relation to the main corruption offences and other serious economic crimes), taking into account that the members of those bodies had proved to be highly motivated and that the statistics demonstrated a significant increase in the number of corruption cases brought before the courts following the introduction of the structure.

A further measure favoured by reviewers appears to be the appointment of judges specialized in handling corruption and financial and economic crimes and the establishment of special anti-corruption courts. Such courts can serve as a way of reducing case backlog and provide a good opportunity for judicial officers to familiarize themselves with the technical details of corruption cases and deal with their intricacies promptly, effectively and efficiently.<sup>70</sup>

#### *Successes and good practices*

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

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

The body or bodies or persons envisaged in article 36 must be granted the necessary independence in accordance with the fundamental principles of the legal system of each State party in order to be able to carry out their functions effectively, free from political interference or other undue influence. In this context, the creation of one country's current anti-corruption agency was the result of a judgement of the

<sup>70</sup> See also CAC/COSP/IRG/2014/11/Add.1, para. 27.

domestic constitutional court, which found, firstly, that the constitution and a number of binding international law agreements imposed an obligation on the State to set up and maintain an effective and independent body to combat corruption and, secondly, that the law regulating the police directorate, which had been responsible until then for corruption cases, was inconsistent with the constitution and invalid to the extent that it failed to secure an adequate degree of independence.

Among the elements examined to confirm compliance with this article are the budget and fiscal autonomy of the bodies concerned; the manner of appointment and removal from office of their members and leadership; the length of term of these persons; the salary, benefits, employment security and possible immunities (e.g. against civil litigation) they enjoy; the extent to which they can authorize special investigative measures (such as the interception of communications), prioritize investigations or initiate court proceedings without any external supervision; the reporting and accountability obligations they are subject to (e.g. the obligation to present an annual report on their activities); and the existence of monitoring mechanisms and “checks and balances” systems (including through the participation of NGOs) as a guarantee for their effective and fair operation, and the existence of regulations on conflict of interest.

*Example of implementation*

The anti-corruption department of one State party is attached to the office of the prosecutor general without, however, formally being part of it. This implies that other departments of the prosecutor general’s office cannot interfere in its activities. The director of the department is procedurally independent and is entitled to endorse bills of indictment, which are required to submit cases to court. The salary of the employees of the department is defined separately by the Head of State. The latter also endorses the nomination of the candidate for the post of department director. The department enjoys the power of a prosecutorial agency, which, in accordance with the constitution, is a body within the judiciary branch of power.

In several cases, observations were made on the operational independence of national anti-corruption bodies. For example, in one case, there was concern about the fact that the independence of the anti-corruption agency was not established in its enabling statute, and the chair of the agency could be removed from office by sole decision of the country’s President, in the interest of the public or the commission. In another country, corruption investigations or related actions against public officials required the prior authorization of the prosecutor’s office. While it was noted that the anti-corruption law prohibited influencing or interfering in the operation of the agency, a recommendation was issued on considering the establishment of criminal sanctions against persons doing so (and also to widen the agency’s mandate to cover the investigation of all offences established in accordance with the Convention). Finally, in a third State party, a legislative proposal was pending that would grant the Government similar authorization powers as well as the competence to appoint a high-ranking official of the agency. Additional concerns were raised as to the independence of contractors and staff members of the agency who could hold office outside the agency (including secondments to other institutions and ministries) and who were not subject to any law or conflict of interest. The country concerned was urged to ensure that officials

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

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

*Example of implementation*

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

*Challenges*

As newly created bodies, national anti-corruption authorities often face challenges related to limited capacity and resources for implementation, as well as competing priorities. Recommendations were issued in a number of cases on ensuring, preserving or increasing the workforce and resources for training and providing for the capacity-building of the agencies or bodies involved; to strengthening their presence in the regions and provinces; widening their mandate in law enforcement; considering ways and means of better using available resources, including creating synergies among investigative and prosecutorial authorities; ensuring more efficient and effective case management; increasing political support; and continuing efforts to combat corruption through independent law enforcement bodies focusing, in particular, on addressing implementation challenges in this field. In at least eight cases, recommendations were made on considering clarifying the lines of responsibility between the various law enforcement authorities, as there was a certain overlap in their various functions, and on improving their staffing and training. The reviewing experts also noted in several other jurisdictions a need for effective inter-agency coordination to prevent fragmentation of efforts and ensure that an efficient "checks and balances" system is in place, as well as a need to

improve the flow of information among agencies and develop statistical indicators to establish benchmarks, develop strategies and measure the progress of the anti-corruption body in question.

## **2. Cooperation with law enforcement authorities (article 37)**

Article 37 of the Convention requires that States parties take measures to encourage cooperation with law enforcement authorities of persons who (in contrast to whistleblowers or regular witnesses) are themselves (potentially) subject to prosecution, in view of their direct or indirect participation in corruption offences (so-called “collaborators of justice”). First of all, according to paragraph 4 of the provision in question, States parties should ensure that this special category of witnesses enjoy, *mutatis mutandis*, the protection from potential retaliation or intimidation provided for in article 32. This is generally the case among States parties, insofar as national law contains adequate witness protection programmes, with problems arising where national provisions fail to reach and uphold the standards of article 32. In some reviews, additional concerns were raised on the absence of specific protection measures for cooperating offenders, or of specific data on concrete cases where such measures have been applied. All but one of the States parties do not foresee or keep a record of protection measures that are applied separately for collaborators of justice.

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

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

### *Mitigated punishment*

Most States parties have implemented measures in accordance with the spirit of article 37, paragraph 1. While there are a few cases where special provisions foresee the imposition of reduced sentences on corruption offenders who cooperate during the proceedings, the provisions that are in place in the majority of States parties are of a generic nature (found usually in the criminal code) and allow collaboration to be considered as a circumstance mitigating criminal liability and to be taken into account by the court during sentencing, i.e. at the stage of determining the perpetrator’s individual punishment. In one case, this possibility had not been

explicitly enshrined in the law, but was acknowledged nonetheless to constitute a matter of standard practice for domestic courts.

The consideration of the cooperation of the accused in the above sense only has tangible effects during court deliberations and no advance assurances are provided to the interested party. Acts of collaboration which may lead to a mitigated treatment (e.g. imposing a sentence below the minimum provided for or substituting a penalty, such as imprisonment, by a less harsh one, such as a monetary fine) normally include active steps which may have led to the detection and disclosure of an offence, such as a person giving himself or herself up and confessing to a crime, exposing other accomplices, collaborating in collecting evidence and also rendering assistance in the investigation and detection of criminal proceeds, as a form of repairing the harm caused or preventing further harmful consequences of the offence. The extent to which a lighter sentence is imposed usually depends on the degree of cooperation of the particular defendant and the effect it had in reducing the harm caused by the offence, and is left to the discretion of the court. Since this is a general principle of sentencing, there are normally no guidelines or other criteria in this regard and every case is dealt with on its own merit.

It should be noted that generic provisions of this kind are not always considered sufficient for the purposes of the Convention. In the case of one State party, it was recommended that the scope of the domestic legislation on the mitigation of punishment should be expanded and that the possibility of non-punishment of spontaneous and active collaborators should be provided for, although the criminal code of the country already recognizes as grounds for decreasing punishment any attempt by the perpetrator to prevent, remove or clear up the effects of the offence. Similarly, extensive recommendations were made to the authorities of a State party with even more limited provisions, according to which only the “spontaneous confession of a crime”, a concept often viewed critically by governmental experts, is considered a circumstance warranting a mitigated punishment.

In some countries, provisions exist to provide special incentives aimed at the recovery of the proceeds of specific offences, e.g. in the case of embezzlement of public or private funds. In these cases, the return of the embezzled property before the criminal proceedings reach a certain point (e.g. before the indictment of the accused) can imply the imposition of a substantially lower penalty. This approach is in many ways desirable from the victims’ perspectives, as it means they can receive compensation immediately instead of waiting until the conclusion of the trial, which may take years.

*Examples of implementation*

In one State, the penalties for embezzlement and misappropriation are reduced by half if the harm caused or the benefit gained by the perpetrator is very minimal or if he or she fully reimburses the victim for the harm done before the case is referred to court. If the reimbursement happens during trial and before the judgement is passed, then the penalty is reduced by a quarter.

In another State, defendants in some high-profile corruption cases are offered the option of voluntary pretrial asset forfeiture, which can then be taken into account at sentencing. Though not part of a formal procedure, this possibility was praised as conducive to achieving the purposes of the Convention and to safeguarding the interests of victims.

In addition, laws instituting various forms of plea bargaining, pre-judicial cooperation agreements and summary prosecutions are in place or are being developed in several States parties. Under the relevant arrangements, the defendant may have to confess to being entirely guilty of an offence, accept possible civil claims (including the renunciation of title to or surrender of objects that have been seized and are subject to forfeiture and confiscation, and payment of the estimated proceeds acquired from the criminal offence or their assessed value and compensation for any damage caused) and not question the circumstances in the indictment, in exchange for a lesser charge or a reduced penalty. In these cases, the court does not hold a regular hearing but pronounces the verdict based on the evidence collected in the pretrial proceedings, confirming in effect the agreement between the prosecutor and the cooperating person's defence counsel. A similar regime specifically with regard to corruption offences appears to apply in one State party; in this case, the national anti-corruption commission can reduce or otherwise modify charges on a case-by-case basis in appropriate instances of cooperation. Simplified procedures of this kind are considered an important incentive for offenders who may be eager to avoid the negative impact on their reputation of a criminal trial, and are thus ready to cooperate with the authorities by admitting the charges against them. However, the possibility of mitigating a sentence may not be only related to cooperation, but also to the seriousness of the crime and the guilt of the accused person, taking into account the principle of proportionality. Therefore, mitigation of punishment may be excluded in the case of a major corruption offence or where there are circumstances seriously aggravating the behaviour of the cooperating person.<sup>71</sup>

In plea-bargaining cases, the court normally retains a measure of discretion with respect to the authorization of the agreement, in order to ascertain that the accused has enjoyed the assistance of a lawyer, that he or she understands the right to assert his or her innocence and demand a trial, that he or she makes a plea voluntarily, that he or she understands the terms of any agreement and the consequences of a guilty plea, in particular the waiver of the right to file an appeal against the decision issued on the basis of the agreement, and that he or she has not been subject to coercion or improper promises on the part of the prosecutor. Indeed, as noted in the *Legislative Guide for the Implementation of the United Nations Convention against Corruption*,<sup>72</sup> the possibility that judges would be required to impose more lenient sentences should be approached with caution, as it might raise concerns about judicial independence and create potential for the corruption of the prosecutors.

#### *Immunity from prosecution*

In contrast to mitigated punishment, several States parties have not established any substantial possibility of granting immunity from prosecution to accused co-operators. Interestingly, in two countries, there is apparently no prospect of a law that provides for immunity, or an equivalent measure, because of fundamental principles of domestic law that forbid granting immunity during prosecution. Similarly, in another State party, the authorities also argued that such a practice would be inconsistent with their legal tradition. Although all three of these States parties have a civil law system, it should be noted that not all countries with similar

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<sup>71</sup> Ibid., art. 37, subsect. II.2.

<sup>72</sup> Para. 475 (a).

legal traditions appear to share their reservations, at least not to the same extent. In any case, as mentioned in chapter I, section A, subsection 1, above, the provision of article 37, paragraph 3, points to the possibility of providing competent national authorities with the option of giving such a strong incentive to a cooperating person, should this be judged appropriate.

Among the States parties that do provide for some form of immunity (if not from prosecution itself then from imposing punishment), several countries (especially the ones with a common law system) alluded to the broad discretionary powers of public prosecutors, which allow them, under certain conditions and in line with article 31, paragraph 3, not to initiate, to suspend or to discontinue a criminal prosecution (or to make a relevant motion to the court) in exchange for the substantial cooperation of a participant in criminal activities with a law enforcement body. In addition, other States parties cited special statutory provisions regulating the favourable treatment of cooperating persons, either generally in respect of all offences or specifically in respect of economic crimes or corruption-related charges. Full immunity under those provisions normally presupposes that the person in question provides decisive evidence necessary for the conviction of a public official or another principal, accomplice or accessory in the commission of the relevant violation.

*Examples of implementation*

In one State party, a special provision of the criminal code empowers the public prosecutor's office to terminate criminal proceedings against a suspected or accused person, with his or her consent, if the suspect or accused has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence which is important from the point of view of the public interest in the proceedings; and if, without this assistance, the detection of the criminal offence and collection of evidence would have been precluded or essentially complicated. The public prosecutor's office may, by its order, resume proceedings if the suspect or accused has stopped providing assistance, or if he or she has intentionally committed a new criminal offence within three years after the proceedings have been terminated.

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

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

Apart from the above possibilities, in several cases, as already seen in chapter I, section A, subsection 1, above, immunity can be granted under certain conditions in cases of active bribery (and more rarely in cases of passive bribery or trading in influence), where the offender voluntarily, before being recognized as a suspect and without delay, or within a short period of time (one or two months), informs the appropriate authorities about the presentation of the bribe. A similar approach, which is more akin to granting immunity than to mitigating punishment, is followed in some cases with regard to money-laundering, whereby the perpetrator is not punished if, before the offence is completed, he or she puts an end to his or her participation and/or notifies the authorities thereof before it is revealed by another source.

Interestingly, one of the States applying the above principle to persons reporting their participation in the offences of active bribery and trading in influence reported the results of an analysis, drawn up in 2012, according to which it was found, among others, that: (a) the immunity clause for reporting offenders had proved to be a useful tool for discovering and investigating corruption offences, in the absence of another equally efficient instrument provided by the national criminal procedure; (b) if the relevant legal provision had not existed, the number of cases in which the national anti-corruption authority carried out investigations involving the offences of passive bribery and trading in influence and in which final convictions were reached would have been two thirds smaller; (c) in case this legal provision had not existed, the organized forms of committing corruption offences would have been much more difficult to identify; and (d) no cases were reported in which this clause was applied abusively.

Taking into account considerations of the above kind, most review teams were satisfied with such provisions in the context of article 37 and in some cases encouraged national authorities to consider the expansion of the scope of the relevant legislation to cover specific instances of a broader range of offences under the Convention, not only those of active bribery or money-laundering.

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

even if broader national measures could be seen as more effective to the full implementation of the Convention.

Whether and to what extent law enforcement authorities should have discretion over any decision to grant immunity to the defendants in question is a different matter. This is indeed a contested issue: the lack of discretion in the aforementioned case and in other States parties was viewed by some reviewers as an element undermining the goals of the Convention, whereas other reviewers considered the fact that the authorities had discretionary powers and did not provide automatic immunity from prosecution in cases of self-denunciation as a factor that discouraged cooperation by persons who had participated in the commission of an offence. For example, in one State party where the law empowers the investigating judge or the court, at any stage of the proceedings, to offer a pardon to a person on condition that he or she makes a full and true disclosure of the circumstances within his or her knowledge relating to the offence and of every other person involved in its commission, the national authorities argued (and the review team appeared to accept) that this arrangement does not ensure sufficient cooperation because, among others, it does not provide an accomplice with the choice to cooperate of his or her own accord to claim any immunity or exemption. The problem here seems to be none other than the discretionary character of the decision on granting pardon.

Such conflicting views indicate that the prerogative of the appropriate solution for the procedural implementation of the various forms of immunity should be best left to the States parties themselves. However, it should be noted that some degree of discretion appears unavoidable in most cases, if only regarding the level of cooperation and the sincerity and value of the disclosures made by the cooperating person. Based on such discretion, a more flexible application of the relevant provisions is possible, allowing the public prosecutor to “weigh”, on a case-by-case basis, the degree of cooperation of the perpetrator of the crime. This is probably the reason why, as evidenced in the majority of reviews, entirely non-discretionary measures are not common. Release from liability or exemption from penalty is normally granted on a discretionary basis by prosecutors or courts. Where this applies, it is important to make an effort to preclude doubts and reservations towards the method used by taking all necessary precautions to curb possible abuses. For example, as is the practice in one State party, law enforcement agencies could seek to corroborate the information provided before granting immunity to a collaborator. If the decision is taken by the prosecution authorities, some form of judicial review may have to be provided for, in order to ratify the terms of any informal arrangements and render the decision binding on all parties.<sup>73</sup> The national laws could foresee the possibility of withdrawing immunity in the event that the person involved has tried to mislead a law enforcement body. In addition, the State party could issue guidelines setting out in detail the principles of exercising the available discretion, which could serve to assist the competent authorities in deciding whether the granting of immunity from prosecution may be appropriate in the interests of justice.<sup>74</sup>

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<sup>73</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 475 (b).

<sup>74</sup> See also *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 37, subsect. II.3.

Finally, while immunity can be a powerful inducement to a person involved in an offence to cooperate and may serve to bring to court major corruption cases that would otherwise remain unsolved, one should bear in mind, as noted in the *Technical Guide to the United Nations Convention against Corruption*, that the complete exception from punishment of an offender may undermine the validity of anti-corruption norms when it is applied too often or, even worse, when the public gets the impression that immunity is granted to persons with political or financial influence. Thus, it is necessary to strike a balance between the indisputable advantages of granting immunity to deal with specific cases and the need to safeguard public confidence in the administration of justice.<sup>75</sup>

#### *Other measures of encouragement*

Apart from the basic measures of mitigating punishment and granting immunity from prosecution, there are a number of further important inducements and incentives that can be used in order to encourage corruption offenders to cooperate with the authorities. Though only one State provided concrete examples, possible measures include: (a) the public prosecution service agreeing to or refraining from opposing a request by the accused for suspension of remand in custody; (b) the accelerating of the return of seized items belonging to the offender, insofar as this does not oppose the interests of the prosecution; (c) the authorities ensuring a milder prison regime for the cooperating offender after conviction; (d) the enforcement of remand in custody of the suspect or accused taking place in a detention centre closer to his or her place of residence; (e) the authorities promoting a situation whereby the enforcement of a sentence imposed abroad is continued in domestic facilities; and (f) the public prosecutor acting as an intermediary between the offender and administrative bodies handling matters involving him or her, such as the immigration and naturalization agencies, the tax and customs administration or even foreign authorities. In such cases, where the consent or cooperation of third parties is required for the granting of an incentive, the prosecutor may assume the obligation to perform the mediation task to the best of his or her ability, even if no guarantees can be offered about the intended result.

#### *International arrangements*

Paragraph 5 of article 37 urges States parties to consider entering into agreements or arrangements with each other on potentially allowing the provision of preferential treatment by the competent authorities of one State party to a cooperating person located in another country. Despite the importance of this provision and the solutions it might give to the problems arising from the increase of criminal proceedings running in parallel in more than one State based on the same facts (e.g. regarding active bribery of foreign public officials in one State and passive bribery of domestic public officials in another), the great majority of States parties have not entered into any such arrangements and have not given any indication that they have considered doing so, leading in most cases to corresponding recommendations. Some States parties expressed willingness to take compliance measures and others simply noted that there was no obstacle in their legislation to entering into ad hoc arrangements where such a need arose, as stipulated in the provision under review. In at least one State party, the national authorities expressed interest in learning

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<sup>75</sup> Ibid.

about the experience of other countries on this issue, and in receiving model agreements or arrangements.

### 3. Cooperation between national authorities (article 38)

The collaboration of public authorities and officials with the agencies and authorities in charge of investigating and prosecuting criminal offences is essential to overall anti-corruption efforts, and most States parties have taken measures designed to encourage and foster such cooperation. Article 38 urges States parties to ensure in particular that public officials and institutions notify, on their own initiative, law enforcement authorities where there are reasonable grounds for them to believe that an offence of bribery of national public officials, bribery in the private sector or money-laundering has been committed and also to provide all necessary information for the investigation of such offences to law enforcement authorities.

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

#### *Examples of implementation*

The legislation of one State party specifies the procedures that public officials should follow to report information on any reasonable grounds they may have to believe that a corruption offence took place. Information received by a public official or public institution from citizens regarding an alleged corruption offence should be referred to the internal investigation unit of that institution. The internal investigation unit conducts a preliminary review and, in case there are sufficient grounds to believe that elements of a corruption offence are detected, it can recommend that the head of that institution refer the matter to the law enforcement agencies (the prosecutor's office, according to the criminal procedure code).

Similarly, in another State party, reporting administrative errors and violations that create conditions for corruption, fraud or irregularities is a direct obligation of every public official, as specified in existing ethical codes and the law on civil servants. In addition, every central public body has specialized inspectorates that are responsible for collecting, analysing and checking for signs of corruption and informing the prosecuting authorities of evidence concerning criminal activities. A chief inspectorate attached to the council of ministers coordinates and supports the activities of each of the inspectorates.

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

imprisonment of up to five years in some cases. Denunciation may not be mandatory when it reasonably risks the official's own criminal prosecution, or that of his or her family members.

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

*Example of implementation*

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

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

the difference in mandates. In their view, as long as the prosecutors and law enforcement officers were working closely together, critical and relevant information would be shared.

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

#### *Successes and good practices*

Staff secondments among different Government and law enforcement agencies with an anti-corruption mandate, as well as placing inspection personnel of the anti-corruption authority in each ministry and at the regional level, were deemed to foster cooperation and inter-agency coordination and to contribute to the efficient functioning of the agencies involved.

#### *Challenges*

The most common challenges in this area relate to ensuring effective inter-agency coordination, especially among agencies with an anti-corruption mandate; enhancing the implementation capacities of anti-corruption bodies and law enforcement agencies, especially regarding communication and data-sharing; and considering ways and means to better use available resources, e.g. through the creation of synergies in order to establish comprehensive statistics on anti-corruption, ensure a more efficient management of corruption cases and reduce the risk of parallel investigations. Several observations and recommendations were made with regard to these problem areas. As noted in the context of both article 38 and article 36, improved and enhanced inter-agency coordination could prevent fragmentation of efforts and ensure the existence of an efficient “checks and balances” system as an effective response to corruption.

Apart from the above, in some cases, public officials were reported to be reluctant to notify law enforcement bodies on their own initiative, especially where anonymous reporting is not provided for, and to fear possible retaliation. It is therefore important to assure persons who report in good faith and cooperate with requests for information that they will not suffer adverse consequences if the assistance provided does not lead to concrete results.<sup>76</sup> The lack of funding to cover the costs of officials testifying in corruption cases and the absence of financial incentives for retired public officials to testify were also reported as challenges in fully implementing the article under review. Furthermore, in one State party, public organizations do not regularly report incidents of corruption but instead resolve the incidents by taking administrative measures of their own; this was considered to amount to a compromise in the fight against corruption.

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<sup>76</sup> Ibid., art. 38, sect. II.

#### 4. Cooperation between national authorities and the private sector (article 39)

Article 39 requires States parties to foster a cooperative relationship between their investigating and prosecuting authorities and the private sector in matters pertaining to corruption offences. This is in recognition of the fact that such a cooperative relationship is instrumental to the detection of corrupt acts and the effective conduct of the relevant investigations.<sup>77</sup> Indeed, several States parties reported strong regulatory and co-regulatory frameworks governing the relationship between the private sector and law enforcement authorities, with various measures encouraging cooperation and promoting internal controls, ranging from corporate governance principles and recommendations and codes of conduct to memorandums of understanding, integrity pacts, corporate integrity pledges and other official or unofficial partnerships with private sector stakeholders, regulators and practitioners. Further frameworks include legal provisions empowering members of the public prosecution services or national anti-corruption agency to request reports and evidence from private entities and individuals, as partly described under article 31, paragraph 7, and providing for punishment in case of failure to comply.

##### *Examples of implementation*

In one State party, the anti-corruption agency actively cooperates with civil society and has signed a memorandum of understanding with a network of NGOs to combat corruption. Agency officers regularly participate in events organized by NGOs, conduct public awareness-raising activities against corruption, appear on television and radio and participate in round tables and other public discussions. At the same time, civil society representatives contribute to the training of agency officers, while the NGOs provide the agency with information on corruption allegations.

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

The measures cited by States parties are most often related to financial institutions — one of the main target areas of article 39, paragraph 1 — and often focus on money-laundering. They concern to a large extent the activities of national financial intelligence units and especially the obligation of a series of reporting entities from the private sector specified in legislation against money-laundering (e.g. banks, credit institutions, financial houses, stock agents, futures and options brokers and exchange bureaux) to take due diligence measures, inform the respective financial intelligence unit (or in some cases the public prosecutor) of any suspicious fact or transaction, for the purposes of detecting criminal offences, and to provide information and documents to authorized officers upon request. Normally, during the investigation of a report of suspicious transactions, the individuals involved may not use the argument of banking, stock or professional secrecy against the financial

<sup>77</sup> In this context, see also UNODC, *An Anti-Corruption Ethics and Compliance Programme for Business: a Practical Guide* (Vienna, 2013), pp. 90-93.

intelligence unit, or any legal or contractual commitments related to confidentiality. Related measures in the area of money-laundering include training courses and workshops for financial intermediaries and auditors, as well as initiatives aimed at raising awareness within the competent national authorities and the private sector.

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

#### *Encouraging the reporting of corruption offences*

Paragraph 2 of article 39 — a non-mandatory provision — urges States parties to encourage their nationals and persons with a habitual residence in their territory to report to the law enforcement authorities the commission of a corruption offence in the same manner as public officials. Indeed, a number of States parties have established a general obligation to report corruption incidents that applies to all citizens or encompasses specific categories of professionals in the private sector. Furthermore, as with public officials, non-disclosure by citizens may sometimes constitute a crime in itself. Nevertheless, the number of States parties with provisions of this kind is far lower than those States imposing an obligation to report on their public officials. Normally, the private sector has discretion on whether to report cases involving offences established in accordance with the Convention to law enforcement agencies. This was generally accepted by the reviewing experts, although in some cases recommendations were issued on adopting equivalent measures, particularly to the extent that the countries involved had introduced or planned to introduce the offence of corruption in the private sector in their legal framework.

Some reviews also referred to further measures encouraging private persons to report corruption offences, including practical procedures facilitating corruption reports, establishing telephone hotlines, Internet services and electronic tools to report crime in general and corruption in particular, raising social awareness of these possibilities (e.g. through lectures, exhibitions, media publicity and promotions) and running cooperative programmes to fight and prevent crime, involving all relevant stakeholders (members of the Government, the police, the media and the community). The launch of a special corruption hotline by the anti-corruption department of the prosecutor's office in one State was considered a significant and positive example of implementing paragraph 2 of article 39, while in another case the establishment and operation of a national portal for examining complaints and reports were positively noted. In the same context, it was emphasized that a better and more effective implementation of the provision at the domestic level could be achieved through building the capacity to collect and systematize information collected through corruption hotlines (e.g. number of reports received, number of reports that have contributed to the investigation or prosecution of corruption offences and follow-up to these reports). It should be

noted that some of these measures coincide with those described in chapter II, sections C and D above, and raise many of the same issues discussed there, e.g. with regard to keeping the identity of the reporting person confidential and providing for the possibility of anonymous reports.

*Example of implementation*

In order to facilitate the reporting of corruption by any person to prosecuting authorities, the attorney general's office of one country has created an electronic tool by means of which the person reporting the alleged offence must describe the facts of the offence, insert the dates, identify the suspect and the entities involved and explain how that information came to his or her knowledge. The person who reports the acts has a password to access his or her communication and has access to the investigation. The identity of the reporting person is protected. The reports are confidential and may or may not lead to the opening of criminal proceedings.

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

A matter of concern was the fact that private sector entities are sometimes reported to be more willing to approach their umbrella business associations for assistance, in order to have a corruption-related dispute resolved in a civil manner, rather than going through the formal criminal process. In a similar context, one review looked into the aspects of anti-corruption policy covered by article 39, paragraph 2, under a broader perspective, bringing to attention the critical importance of instilling public confidence and trust in the institutional framework charged with upholding the rule of law as a basic precondition for convincing citizens, as well as private sector entities, to report corruption offences. This requires ensuring the transparency, accountability and consistency of the judicial system, including the timely resolution of criminal prosecutions. It was noted with appreciation that, in furtherance of these objectives, the State in question had, among others, recognized the limits of self-regulation with respect to the oversight of the legal profession; had prohibited in-camera judicial proceedings and ex parte meetings; had improved the disciplinary system with respect to the possibility of misconduct by judges; and had proceeded with case management reforms eliminating the possibility of choosing judges, and otherwise improving case processing.

## B. Other provisions

### 1. Bank secrecy (article 40)

As already noted in chapter II, section B, above, in most jurisdictions, bank secrecy does not appear to present significant issues. The fulfilment of the Convention provisions for reporting of suspicious transactions and for the establishment of a financial intelligence unit (articles 14 and 58) can already be considered as a basic step towards removing obstacles to domestic criminal investigations from the application of bank secrecy. Article 40 complements these provisions by introducing a wider obligation to ensure that laws and regulations protecting banking information are amended for the purpose of effectively implementing anti-corruption measures.

Indeed, even in cases where strict bank secrecy rules are in place, States parties reported having appropriate mechanisms available to overcome the obstacles arising out of such rules when investigating offences established in accordance with the Convention, and to compel banks and financial institutions to disclose the information they have on their clients, or any operation or business they do with them, upon request by a judge, a public prosecutor or another competent authority (including, in most cases, the national financial intelligence unit), usually depending on the stage of the proceedings.<sup>78</sup> This also implies that those persons providing reports or information to the competent authorities are immune from civil, criminal or administrative sanctions and exempted from liability arising from secrecy disclosure, i.e. the disclosure of information they are obliged not to divulge. Particular reference was made to the practice of granting law enforcement agencies effective and prompt access to financial information. Legislative provisions reducing the evidentiary or procedural requirements for orders involving the lifting of banking secrecy in the context of criminal investigations and allowing prosecutors or other persons in charge of preliminary investigations to prohibit financial institutions from informing customers and external parties that certain checks are being carried out were applauded.

#### *Successes and good practices*

In one State party, a national register of bank accounts has been created to facilitate the work of investigative services. The register is maintained by the general directorate of public finance and is used to identify accounts of all kinds (banking, postal, savings, etc.) and to provide authorized persons (including the judiciary and judicial police officers investigating a criminal offence) with information on accounts held by individuals or companies. Similar centralized banking account registers, maintained by tax authorities, central banks or financial intelligence units, exist in other countries and were recommended by practitioners as an efficient means of saving time and increasing the effectiveness of the relevant procedures.<sup>a</sup>

Exceptionally, the laws of three States were found to be fraught with serious limitations: in the first two, already mentioned under chapter II, section B, above, the collection and submission of bank information is not possible for offences

<sup>78</sup> On the matter of who should have the authority to overcome bank secrecy, under what circumstances and for what purposes, see *ibid.*, art. 40, subsect. II.1.

<sup>a</sup> See also *ibid.*, subsect. II.4.

punishable by a maximum imprisonment of less than four years, including a number of offences established in accordance with the Convention — although in one case a bill was pending to address this matter. In the third State, the legal ways of overcoming obstacles arising from bank secrecy laws appear to relate only to domestic investigations of money-laundering cases and do not extend to other corruption-related offences.

Apart from these exceptions, in the few jurisdictions where the lifting of bank secrecy was an area of concern, it was noted that the obstacles were mostly related to possible delays during the process of obtaining judicial authorization for this purpose. Such delays may lead, among others, to suspects prematurely learning about an ongoing investigation. Accordingly, a number of recommendations were issued for States to consider relaxing the relevant standards and procedures in the context of domestic investigations of corruption cases, taking into account the overall approach of the national legislation as to the authority capable of providing the necessary authorization. For example, in one case where the lifting of bank secrecy is provided through court permission, upon request by a prosecutor when there is evidence of the commission of a criminal offence, it was recommended that the formal requirements for obtaining authorization should be eased — possibly bearing in mind a simplified procedure already in place in the State party in question with regard to money-laundering, according to which the prosecutor general is able to require banks to produce the relevant data. A similar recommendation was made in a State where a court order to disclose information must first be sent to the country's banking associations, and only then forwarded to their (several hundred) member banks, and both the associations and the banks concerned can challenge the court order in a process that can take up to several weeks.

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

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

## **2. Criminal record (article 41)**

Article 41 — an optional provision — suggests that States parties evaluate whether it would be appropriate to take into consideration any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with the Convention.

According to an interpretative note, the term “conviction” should be understood to refer to a conviction no longer subject to appeal.<sup>79</sup>

This article has not been implemented in several jurisdictions. In some cases, no laws or practice appear to exist with regard to the use of foreign criminal records, whereas in other States parties it is clear that previous convictions in another State party cannot be taken into account with regard to corruption offences, or can be taken into account to a limited extent (e.g. when related to money-laundering). The penal code of one country stipulates that, if a crime has been prosecuted in another jurisdiction and resulted in conviction and execution of a sentence, the domestic court (trying the same case) shall, in determining the punishment, take account of the executed foreign sentence. The reviewing experts considered this as being in accordance with the Convention. Provisions of this kind do not involve, however, a general consideration of the foreign criminal records of offenders (i.e. in the course of criminal proceedings for different facts) and are only marginally relevant for the implementation of the article in question.

On the other hand, in many cases, national courts can take into account convictions that have been recorded elsewhere, either in the course of determining the liability of a person charged with a corruption offence (e.g. as evidence of a person’s bad character or lack of credibility), or, as is most often the case, at the stage of sentencing a convicted person (e.g. when determining recidivism and the application of mitigating circumstances such as past irreproachable conduct). Among the States that provide for this possibility, many are bound by international instruments such as the European Convention on the International Validity of Criminal Judgments (article 56) and Council of the European Union framework decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the States members of the European Union in the course of new criminal proceedings, establishing a minimum obligation to attach to a foreign conviction all or some of the effects which their law attaches to judgements rendered in their territory.

*Example of implementation*

The penal code of one State party provides that foreign convictions are considered in principle as equal to domestic convictions, if the offender was convicted for an offence which is also punishable under domestic law, and if the judgement was rendered as a result of proceedings which were in conformity with the principles set forth in article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The conditions in which a previous conviction is taken into consideration, the consequences attached by the different national laws to the existence of previous convictions, whether those effects are regarded by national law as matters of fact or of procedural or substantive law, and whether they apply at the pretrial stage (e.g. with regard to the rules relating to provisional detention), during a trial or at the time of execution of the conviction are all matters left to the discretion of States parties. Although some reviewers appear to consider the use of foreign criminal records solely during the sentencing stage as only partly sufficient, any one of the

<sup>79</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. III, art. 41, sect. C (p. 325).

above-mentioned options addresses the provision of the Convention that States may take into consideration previous foreign convictions in criminal proceedings relating to corruption offences, under such terms as and for the purpose that they deem appropriate. Indeed, the logic of criminal registers in most States is none other than to enable the imposition of adequate and proportional penalties and security measures, guaranteeing the necessary preventive effects and reflecting, among others, the personality and previous behaviour of the offender.<sup>80</sup>

Nevertheless, the existence solely of a theoretical possibility to the above effect may prove to be insufficient, to the extent that no foreign convictions come to the attention of the national authorities. States parties should therefore strive to collect data from foreign criminal records, which is often achieved by reference to bilateral mutual legal assistance agreements or other international legal instruments in criminal matters, such as the Riyadh Arab Agreement for Judicial Cooperation (article 5), Council of the European Union framework decision 2009/315/JHA of 26 February 2009 on the organization and content of the exchange of information extracted from the criminal record between States members, the Convention on Legal Assistance in Criminal Matters between the States Members of the Community of Portuguese-Speaking Countries (article 17), the Commonwealth of Independent States Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (article 79), and the European Convention on Mutual Assistance in Criminal Matters (articles 13 and 22). These instruments set forth provisions on the exchange of national judgement data with other States and, more specifically, on the regular exchange of information about criminal convictions or security measures imposed on nationals or residents of the participating States within one another's territory. Additionally, information on judgements imposed on offenders by foreign countries is regularly exchanged through general instruments on mutual legal assistance and police channels, as well as through networks of financial intelligence units (e.g. in relation to predicate offences for money-laundering).

#### *Examples of implementation*

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

In 2012, States members of the European Union established the computerized European Criminal Records Information System, which allows for the exchange of information on convictions and extracts of criminal records in an almost fully automated and secure fashion, with automatic translation and using a table of offences and penalties that are valid for all member States and that allocate a unique code for each family of offences and form of punishment. The system gives judges and prosecutors easy access to comprehensive information on the conviction history

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<sup>80</sup> See *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 41, sect. II.

of any European Union citizen, no matter in which European Union member State that person has been convicted in the past.<sup>a</sup>

States parties considering a more thorough application of article 41 may find it convenient to allow other countries to have direct access to their criminal records, both from a legal and technical standpoint. With regard to the former, States parties must evaluate whether their legislation allows for the international transfer of data such as criminal records, and update it to this effect. With regard to the technical aspect, it may prove convenient for States parties to appoint a central authority to be in charge of the international exchange of the relevant information; this duty could be assigned to the national authority in charge of international cooperation in criminal matters.<sup>81</sup>

### 3. Jurisdiction (article 42)

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

#### *Territoriality and flag principles*

All but one of the States parties have established jurisdiction over acts committed wholly or partly within (or having effect on) their territory, irrespective of the nationality of the offender, as required by article 42, paragraph 1 (a), and the relevant interpretative note to the Convention.<sup>82</sup> The sole major exception concerns a country where the main body of anti-corruption legislation is not applicable to a semi-autonomous part of its territory, while a few further States apply limitations with regard to offences perpetrated on board foreign ships in national ports or in its territorial waters, as well as aircraft flying in national airspace. The establishment of territorial jurisdiction normally also refers to offences committed through the use of computer technology, whereby there should be a general understanding that the Convention covers the exercise of jurisdiction over offences that were committed using computers, even if the effects of the offence occurred outside the territory of the State party.

The great majority of States parties also extend their territorial jurisdiction over offences committed wholly or partly on board aircraft and vessels registered under their respective laws, as required by the provision of article 42, paragraph 1 (b). In contrast, at least seven States parties, most of them with common law systems, do not appear to apply the flag principle in all possible occasions, and in most cases appropriate recommendations were issued in this regard.

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<sup>a</sup> See Council of the European Union decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System in application of article 11 of framework decision 2009/315/JHA.

<sup>81</sup> *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 41, sect. II.

<sup>82</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. III, art. 42, sect. C (p. 336).

*Successes and good practices*

According to the jurisdictional rules of one State party, a criminal offence is considered as having been committed in the national territory if the offender: (a) committed the act, at least in part, in the national territory, even if the actual breach of or threat to a protected interest took place or was intended to take place, in whole or in part, outside of such territory; (b) committed the act outside of national territory, if the actual breach of or threat to a protected interest was intended to take place in its territory, or such a consequence should have taken place, at least in part, in its territory; or (c) committed the act outside national territory aboard a vessel navigating under the national flag, or on board an aircraft entered into the national aircraft register.

*Aut dedere aut judicare*

As to the adoption of the principle of *aut dedere aut judicare*, which requires above all the possibility of establishing jurisdiction over offences committed abroad by a country's own nationals, most States parties have (at least to some extent) implemented the relevant requirement, and were sometimes commended by reviewers for this practice. Several States parties have established measures that prohibit the extradition of nationals or allow such extradition only when applying international treaties, and according to the principle of reciprocity, as discussed further under part II, chapter I, section A, below. Nonetheless, it should be noted that in a number of cases there are no constitutional or legal limitations to the surrender, by extradition, of a country's own nationals. Indeed, the tendency among many States parties is not to refuse to extradite one's own nationals on the basis of nationality, so in those countries the issue of prosecution in lieu of extradition ends up being of no particular practical significance.

In contrast, article 42, paragraph 4, which urges States parties to establish their jurisdiction in all cases where an extradition of the alleged offender does not take place, does not seem to apply, or applies in limited circumstances (when stipulated in a bilateral or multilateral treaty), in the majority of States. In those countries, the application of the principle of *aut dedere aut judicare* is limited to allowing extraterritorial jurisdiction over cases of non-extradition of nationals. It should be noted, however, that often there may be other reasons which prevent extradition of an offender, such as issues relating to the human rights conditions in the requesting State. These situations may particularly arise in cases involving corruption offences. It is therefore important that these bars to extradition should not allow for the impunity of the offender.

### *Examples of implementation*

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

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

Finally, the law of a third jurisdiction is applicable to any crime committed by a foreign citizen abroad, if it is considered a crime in accordance with national law and is also punishable in accordance with the law of the country where it was committed. A jurisdictional basis is provided not only when extradition is denied on the ground of nationality but also when extradition is denied for other reasons not related to the nature of the offences.

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

### *Active personality*

Among the alternative extraterritorial jurisdictional bases, the one to which the most importance should be attached appears to be the active personality principle, given also the necessity of covering offences such as international bribery, which is usually committed by nationals abroad.<sup>83</sup> Most States parties have introduced this principle, at least with regard to the most pertinent offences of foreign bribery

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<sup>83</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 213; *Technical Guide to the United Nations Convention against Corruption*, chap. III, art. 42, subsect. II.3.

and/or money-laundering. Reviewing experts have commented on the broad jurisdictional provisions of this nature, applying both to conduct within the country and to conduct by citizens, residents and companies overseas, and highlighted as good practice extended versions of the active personality principle, covering all offences committed abroad by national public officials and members of the diplomatic corps in the discharge of their duties or as a consequence thereof, or specifically acts of corruption committed abroad by foreign citizens exercising domestic public authority or by persons in the public service of an international organization based on national territory.

*Example of implementation*

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

Issues were noted in a number of States parties with respect to the fact that the active personality principle had not been established, as envisaged in the Convention, as well as in at least 10 other cases where the relevant provisions did not extend to stateless persons habitually residing in that State’s territory. Apart from these cases, in several States parties, the requirement of dual criminality (or of the lack of any State authority exercising criminal power in the place of commission) is applied to offences committed abroad by a national, although this general principle may not be applicable in respect of felonies, offences of corruption or other offences against service, or specifically in respect of active and passive bribery and/or influence-peddling towards national and foreign public officials. The requirement of dual criminality normally means that the questionable conduct should be subject to punishment in the country where it was committed. The qualification of the offence does not have to be the same in both countries, nor is it of importance if it is actually possible to prosecute the crime. For example, it is irrelevant if offences are extinguished by the expiry of the period of limitation under the law of the other country.

Furthermore, in four States parties, nationals can only be prosecuted for a number of offences committed abroad on the basis of either a complaint by the victim or the legal successors of the victim or an official denunciation by the authority of the country where the offence was committed. In one of these countries, the reviewing experts considered that for offences committed abroad by their citizens, States parties to the Convention are encouraged to establish their competence independently of any condition and for this reason recommended that the State in question remove from the law the conditions mentioned above. A similar recommendation was made in a State whose national jurisdiction extends to crimes committed by nationals abroad only when they run against the legal rights of another national, or when an extradition request by the foreign State is denied owing to the nationality of the offender, in keeping with the principle of *aut dedere aut judicare*. However, the provisions of paragraph 2 of article 42 are optional and afford States parties a wide range of options as regards the determination of the jurisdictional bases of their criminal law.

### *Passive personality*

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

#### *Example of implementation*

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

### *State protection*

In more than half of the States parties, the principle of State protection was limited or had not been established with regard to offences established in accordance with the Convention, and recommendations were issued accordingly. They included countries whose jurisdictional rules refer to offences directed against national security, the external or internal security or the constitutional system of the State, since corruption offences can hardly be considered as falling under these categories. Among the countries that do recognize the State protection principle, most refer in general to acts directed against the national, military or economic rights or interests of the State, acts directed at or interfering with the exercise of State authority or offences against the State or the public administration. The adoption of jurisdictional bases of this kind may prove particularly important in relation to corruption cases where a foreign person has bribed a domestic official abroad. In such cases, the State protection principle allows the prosecution of the briber (foreign person), because the bribery offence targets the interests of the State, i.e. the proper functioning of its public institutions and administration.

#### *Example of implementation*

According to the law of one State party, the following criminal acts committed abroad are subject to prosecution irrespective of the criminal law of the foreign State where the criminal act was committed: (a) criminal violations of official duty, corruption and other related criminal acts, if the act was committed for the benefit of a domestic public official; and (b) criminal acts committed against a domestic public official in connection with the exercise of their official functions.

### *Jurisdiction over preparatory acts to money-laundering*

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

Caution is advised with regard to the fact that article 42, paragraph 2 (c), does not concern the issue of applying domestic money-laundering offences to proceeds or instruments of crime relating to predicate offences committed in another country. As noted in chapter I, section D, subsection 1, above, the distinction of this matter from the present issue of exercising jurisdiction over participatory acts committed abroad is sometimes a source of confusion among national authorities and reviewing experts.

### *Coordination of actions*

Most countries appear to be in compliance with the obligation to seek to coordinate their actions with other States parties when conducting an investigation, prosecution or judicial proceeding in respect of the same corrupt conduct, as stipulated by paragraph 5 of article 42. Such coordination is usually based on established principles of mutual legal assistance and international cooperation regulations (including through the direct application of the Convention), facilitating information exchange between law enforcement agencies and central authorities in relation to extradition processes and providing for consultation mechanisms to resolve possible conflicting jurisdictional claims over the same conduct. Such consultation procedures may result in one State party deferring to the investigation or prosecution of another, or in an agreement to pursue certain actors or offences, leaving other actors or related conduct to the other interested States parties.<sup>84</sup> However, some countries have provided insufficient information on the way they conform to this requirement, and in at least five cases the reviewing experts highlighted the need for legislative or other action to foster consultations between the competent authorities.

### *Further jurisdictional bases*

Finally, in paragraph 6 of article 42, it is specified that the listing of jurisdictional bases contained in this article is not exhaustive and that States parties may well establish rules of criminal jurisdiction which extend beyond the ones provided by the Convention — the most important example obviously being the principle of universal jurisdiction — without prejudice to norms of general international law. While there appears to be some confusion among national authorities on the meaning of this provision, and the information provided is not always adequate, it

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<sup>84</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 512.

appears that no other bases of criminal jurisdiction over corruption offences have been established in the great majority of States parties. One State party mentioned that in addition to the jurisdictional bases mentioned in article 42, it applies universal jurisdiction; however, this does not seem to specifically refer to corruption offences. In contrast, two other States parties have apparently introduced the principle of universality over active and passive bribery offences; however, some uncertainty remains and reviewing experts recommended that the relevant issues need to be clarified with regard to the interpretation of existing legislation on criminal jurisdiction through jurisprudence in order to ensure a comprehensive and flexible scheme of criminal jurisdiction over corruption offences.

## PART TWO: INTERNATIONAL COOPERATION

### General observations

One of the central goals of the Convention, as clearly stated under article 1, subparagraph (b), is to promote, facilitate and support international cooperation in the fight against corruption. Chapter IV thus contains detailed provisions on the main modalities of international cooperation in criminal matters, such as extradition and mutual legal assistance. In order to contribute to the implementation of those provisions, the Conference of the States Parties decided, in 2011, to convene special open-ended intergovernmental expert meetings on international cooperation.<sup>85</sup> Such meetings aim, among others, to facilitate the exchange of experiences among States, to disseminate information on good practices in order to strengthen capacities at the national level and to build confidence and encourage cooperation between requesting and requested States by bringing together competent authorities, anti-corruption bodies and practitioners involved in extradition and mutual legal assistance.<sup>86</sup>

A key difference emerges among States parties with respect to the implementation of their respective obligations as a result of their different legal systems. In countries following a dualist approach, the incorporation of the provisions of multilateral or bilateral treaties or agreements into domestic legislation is only possible through the enactment of enabling legislation. In other words, the ratification of the Convention alone does not ensure its application, but needs to be supplemented by the adaptation of an internal procedural framework that fulfils the requirements of the Convention.

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

Taking into account this distinction between monist and dualist systems,<sup>87</sup> it becomes clear that domestic legislation serves a three-pronged purpose in relation to international cooperation: firstly, to give effect to the provisions of ratified multilateral or bilateral treaties or agreements in countries with a dualist system;

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<sup>85</sup> See CAC/COSP/2011/14, chap. I, sect. A, resolution 4/2. See also CAC/COSP/2013/18, chap. I, sect. A, resolution 5/1.

<sup>86</sup> For the work of this expert group, see the report on the meeting of experts to enhance international cooperation under the United Nations Convention against Corruption held in Vienna on 22 and 23 October 2012 (CAC/COSP/EG.1/2012/2); the progress report on implementing the mandates of the expert group on international cooperation (CAC/COSP/EG.1/2013/2); and the report of the third open-ended intergovernmental expert meeting to enhance international cooperation under the United Nations Convention against Corruption, held in Vienna on 9 and 10 October 2014 (CAC/COSP/EG.1/2014/3).

<sup>87</sup> See also UNODC, *Manual on Mutual Legal Assistance and Extradition* (Vienna, 2012), pp. 9-10.

secondly, to provide for additional or complementary procedural requirements that must be fulfilled in extradition or mutual legal assistance proceedings; and thirdly, to be used as an alternative legal framework for international cooperation in the absence of a treaty.

A different question is whether a State party needs a treaty basis for international cooperation, as addressed in article 44, paragraphs 5 to 7. As will be shown below in relation to article 46, States parties generally do not require a treaty basis for mutual legal assistance, whereas some do for extradition. Further, some countries can use the Convention as the legal basis for extradition, while others cannot, as addressed in article 44, paragraph 6.

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

## **Chapter I. Extradition and transfer of sentenced persons**

### **A. Extradition (article 44)**

Most States parties regulate extradition in their domestic legal systems, usually in their constitutions, codes of criminal procedure or special extradition acts and laws on international cooperation. Not all, however, regulate the matter with the same level of detail. For example, three States parties have extradition-related articles that are limited in scope in their constitutions but no other ad hoc provisions. Another country has national legislation in place but only with respect to money-laundering offences, thus indicating a compartmentalized approach to extradition. This is likely to be confirmed with the adoption, by the same State party, of an anti-corruption bill, which will contain extradition-related provisions limited to the area of corruption. Two States parties do not have any kind of national legislation on extradition. While some States parties rely heavily on treaties, others stressed the importance of non-binding arrangements in their extradition practices, as well as arrangements made at the subregional level, because they often provide a less formal approach to the mutual surrender of fugitives.

#### *Extraditable offences*

Most national laws and extradition treaties, especially the more recent ones, appear to identify extraditable offences on the basis of a minimum penalty requirement as opposed to a list of offences, thereby following the example of the Model Treaty on Extradition.<sup>88</sup> In the majority of States parties, extraditable offences for the purposes of a criminal prosecution are those punishable by deprivation of liberty for a period of at least one year or a more severe penalty, unless otherwise provided for by a special arrangement. In more rare cases, national laws or bilateral treaties set a threshold of at least two years of imprisonment in order for an offence to be extraditable, and in one State party, the threshold is of at least six months. Only five States parties appear to rely entirely on lists of extraditable offences, leading in

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<sup>88</sup> General Assembly resolution 45/116, annex, and resolution 52/88, annex.

some cases to problems of implementation. For example, in one of those States, the list includes bribery, embezzlement and money-laundering, but omits all other offences established in accordance with the Convention. As a result, it was recommended that the list of extraditable offences be amended to include, as a minimum, acts that must be criminalized in accordance with the Convention. Finally, with regard to extradition for the purposes of enforcement of a foreign sentence, the surrender of the offender is permitted if he or she has been sentenced to imprisonment of between two and eight months (usually four) or a more severe punishment.

As highlighted in some cases, the shift away from rigid list-based treaties and increasing reliance on a minimum penalty requirement in the negotiation of new international treaties adds a degree of flexibility to the extradition process. The possibility of providing for minimum penalty requirements is also explicitly acknowledged in article 44, paragraph 8, of the Convention, which leaves no room for doubt that extradition is subject to the limitations of domestic law. Nevertheless, as a result of such thresholds, extradition for the purposes of prosecution may not be possible in cases where offences covered by the Convention are punishable by a lesser penalty. The way to address this situation would be either to revisit the minimum threshold under the applicable national laws and treaties and consider harmonizing it with international standards, or to increase the applicable penalties to ensure that all forms of conduct criminalized in accordance with the Convention become extraditable.<sup>89</sup>

In line with article 44, paragraph 3, of the Convention, most States parties make accessory offences extraditable if the main offence satisfies the minimum penalty requirement. Slight variations to this rule were detected in three cases: in one State party, the persons sought have to express their consent in order to be extradited for accessory offences that are not extraditable offences themselves (i.e. offences punishable by a period of less than 12 months); in two other cases, accessory offences are considered to be extraditable only if the maximum penalty incurred by all such offences reaches the threshold of two years' imprisonment. On the other hand, close to one third of States parties strictly apply the threshold requirement and confirmed that, as a rule, extradition for accessory offences would not be possible, drawing on appropriate recommendations by some reviewing experts. All the same, it should be kept in mind that article 44, paragraph 3, of the Convention contains an optional provision.

#### *Dual criminality*

Dual criminality appears to be a standard condition for granting the extradition of a person present in the territory of the requested State party. The majority of States parties explicitly set out the dual criminality principle, as invoked in article 44, paragraph 1, of the Convention, in their domestic legislation, while two further countries asserted that it was applied in practice. Two States parties do not consider the absence of dual criminality to be a ground for rejecting an extradition request, while another considers it to be an optional ground. The latter State party confirmed that it could grant extradition for acts that did not constitute offences in its criminal

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<sup>89</sup> *Technical Guide to the United Nations Convention against Corruption*, chap III, art. 30, subsect. II.1.

legislation based on the principle of reciprocity. Furthermore, two States parties expressed an interest in removing, or have developed draft provisions modifying their legislation to remove, the dual criminality requirement for some or all of the offences set forth in their penal laws, thus indicating their intention to implement the optional provision of article 44, paragraph 2, of the Convention.

Exceptionally, some international instruments foresee an easing of the dual criminality principle among participating States. Thus, States members of the European Union stated that a wide variety of offences, including corruption and money-laundering, gave rise to the surrender of fugitives pursuant to a European arrest warrant, in accordance with the Council of the European Union framework decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member States, without the surrender being subject to the dual criminality requirement. Similarly, other States parties referred to the agreement on the surrender procedures between the Nordic countries, bilateral treaties that dispense with this requirement and a recently signed quadripartite agreement on simplified extradition, which states that the requirement of dual criminality must be fulfilled when extradition is requested on account of acts considered to be offences by both the requesting and requested States, in accordance with international agreements.

The dual criminality principle is usually deemed to have been fulfilled regardless of the terminology used to denominate the offence in question or the category of offences to which it is considered to belong. The requested States need only establish that an offence equivalent to the one for which extradition is sought exists in their domestic law. In several cases, this interpretative approach, focusing on the conduct underlying the offence, was highlighted as a success and good practice by the experts conducting the reviews. It should be clear, however, that article 43, paragraph 2, of the Convention contains a corresponding obligation, which appears simply to codify the existing practice between States parties.<sup>90</sup>

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

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<sup>90</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 525.

### *Legal basis for extradition*

The majority of States parties do not need a treaty basis for receiving or sending an extradition request. Accordingly, article 44, paragraphs 5 and 6, in particular the obligation to inform the Secretary-General of the United Nations about the use of the Convention as the legal basis for extradition, are not directly applicable for the countries concerned. Nonetheless, States parties are encouraged to notify the Secretary-General whether or not they will take the Convention as the legal basis for extradition, regardless of the lack of a binding obligation to do so.

The lack of dependence on formal treaties, considered to be a good practice by a number of reviewing experts, is also true for some States parties belonging to the common law legal tradition, even though many among them still typically require the existence of a treaty, or allow extradition on a non-treaty basis only with regard to designated members of the Commonwealth. Five States parties in particular enable their respective competent authorities to make an ad hoc declaration for the purpose of considering other countries as either extradition countries or comity countries in the absence of a treaty. In most cases where extradition could be granted regardless of a treaty, a condition of reciprocity is set, and only one State party grants extradition subject to its own interests and good relationship with the requesting country. However, this particular State party reported major problems with offenders absconding to a country in the region with which it had not concluded an extradition treaty, thus indirectly highlighting the importance of having a proper treaty basis in place.

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

Further to existing extradition arrangements, the majority of the States parties indicated their readiness to explore possibilities relating to acceding to or concluding new treaties, or to reviewing and renegotiating existing ones, in order to

carry out or enhance the effectiveness of extradition consistent with the provisions of the Convention, or indicated that they actively promoted such a policy, as encouraged in article 44, paragraph 18. A few States parties provided the names of the countries with which treaty negotiations were ongoing or about to begin, and one State highlighted its current policy of prioritizing negotiations with countries in which there is a high presence of its own nationals. Such efforts were generally encouraged as a means to achieve full implementation of chapter IV, especially if they concern countries with limited formal extradition arrangements with other States parties.

The Convention is designed to play an important supporting role to the above-mentioned complex extradition networks, complementing or reinforcing pre-existing provisions.<sup>91</sup> First of all, the main obligation under article 44, paragraph 4, is namely that each of the offences to which the article applies is deemed to be included as an extraditable offence in any extradition treaty existing between States. Most States consider that they have fulfilled this obligation, at least inasmuch as the offences in question have been included in the domestic law of the requested country and the penalties provided for are within the specifications stated in the existing treaties (since, as already mentioned, extradition treaties in general provide for a range of penalties and do not contain a list of specific offences). Equally, in the more unusual case of list-based bilateral treaties, even if the relevant corruption offence does not appear in the treaty, a country may nonetheless consider a request for extradition made by the bilateral treaty partner, whether in the exercise of its discretion under the treaty in question or by virtue of the direct application of the Convention. Thus, two countries which were found to be in compliance with article 44, paragraph 4, stated that although the Convention itself could not constitute the legal basis for extradition, it could be used to expand the scope of a bilateral treaty in terms of extraditable offences. Finally, most States parties appeared conscious of the obligation to ensure that corruption offences are included as extraditable offences in all future treaties they may conclude.

*Successes and good practices*

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

Furthermore, if no extradition treaty exists with another State party, and independently of whether or not a non-treaty-based process can be employed, the Convention itself may serve as the legal basis for the extradition of corruption offenders. This is particularly encouraged by article 44, paragraph 5, in respect of States parties that make extradition conditional on the existence of a treaty. Most

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<sup>91</sup> Ibid., para. 541; and *Technical Guide to the United Nations Convention against Corruption*, chap. IV, art. 44, subsect. II.3.

States parties confirmed this possibility, which reduces the need for additional extradition treaties to be signed, and some have informed the Secretary-General accordingly. In eight cases, it was specifically recommended that the States parties under review consider completing the process of incorporating the Convention into their national legislation, revoking their existing reservations and enacting the necessary legislation to enable the use of the Convention as the legal basis for extradition in order to compensate for the limited number of bilateral or multilateral treaties in place, especially with countries in other regions.

*Successes and good practices*

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

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

*Extradition procedure*

With regard to article 44, paragraph 9, and the requirement to endeavour to expedite extradition procedures, substantial divergences emerged as to the average duration of the relevant judicial and/or administrative proceedings, which range from 1-2 months to 12-18 months. Individual countries reported that the differences in the time frames needed to extradite often depended on the circumstances in which the request had been submitted. One European Union country, for example, indicated that it generally took a longer time (about one year) to extradite fugitives to non-European Union countries. Among the common reasons cited for delays were the complexity of the case, translation requirements, the duration of appeal proceedings, parallel asylum proceedings and the back-and-forth communication needed to clarify the extradition request. In one case, a proceeding that would normally last 12 months could be reduced to 4 months if the documentation supporting the extradition request is properly submitted. Another country has faced several obstacles in obtaining cooperation from other States parties, including delays in receiving assistance owing to the high costs involved and cumbersome procedures.

About half of the States parties under review envisage simplified proceedings to address such problems; these are typically based on the consent of the person sought to be extradited, or involve concrete measures to streamline the extradition process and establish more effective cooperation networks to exchange real-time

information with foreign authorities, either before a formal extradition request has been submitted or during its submission. In two States parties, simplified extradition proceedings were only available to non-nationals. According to another State party, such proceedings were used in around half of the cases and could lead to extradition being granted within a few days, if not hours. Simplified proceedings and shorter time frames are also prescribed under multilateral or regional arrangements, for example in the context of the London Scheme for Extradition within the Commonwealth, the Council of Europe framework decision 2002/584/JHA on the European arrest warrant, the Inter-American Convention on Extradition, the Third Additional Protocol to the European Convention on Extradition, the Pacific Islands Forum scheme and the agreement on the surrender procedures between the Nordic countries.

States parties were encouraged to introduce measures to expedite proceedings, such as time limits for reaching a decision to extradite, guidance principles for internal use by competent authorities, and open channels of communication with foreign counterparts. Moreover, the importance was noted of having case management systems in place to enable the monitoring of extradition cases and the collection of data on the exact duration of extradition proceedings, as well as of taking proactive steps to raise awareness among all relevant stakeholders of the applicable law and procedures and the time frames to be followed.

#### *Successes and good practices*

The reviewing experts noted the efficient use by one State party of an electronic database to track incoming and outgoing extradition requests, allowing its case officers to monitor the progress of requests and identify appropriate follow-up actions. They also noted the introduction of clear practical procedures by another State, through the use of an extradition manual, a workflow chart and an extradition checklist, providing administrative and legal certainty for lodging and processing extradition requests.

One country has established a committee on extradition to enhance and streamline extradition procedures, and to discuss and address the main issues faced in this process. The committee comprises representatives from the central authority for extradition matters, the prosecution service, the national police and the International Criminal Police Organization (INTERPOL), as well as other bodies.

The European arrest warrant, which is applied by all European Union countries based on the principle of mutual recognition of judicial decisions, has proved to be a particularly effective tool in law enforcement and has considerably improved the administration of justice within the European Union. Among others, it is issued and executed directly by judicial authorities, and the executive branch (e.g. ministries) no longer plays a role in the process, or its role is simply reduced to that of facilitating transmission. The warrant is issued in the same simple form in all member States, making it easy to use and translate. The grounds for refusal are limited and the time limits for deciding on and executing the warrant are explicit, making the surrender procedure much faster than under the previous extradition procedure. It was provisionally estimated that the average time taken to execute a warrant had fallen from more than nine months to 43 days. This does not include

cases where the person consents to his or her surrender, whereby the average time was estimated at only 13 days.<sup>a</sup>

Lack of uniformity was also recorded in terms of the evidentiary threshold prescribed by domestic laws in order to grant extradition. Some States parties do not require any evidence on the commission of the offence and restrict discussions on the proceedings to the legal prerequisites for the extradition. This is especially the case when extradition is granted through the application of an existing treaty. The requesting country normally confines itself to providing relevant authenticated documentation, such as a statement of the offence for which extradition is requested, containing the time and place of its commission, an extract of the applicable criminal provisions and penalties, an arrest warrant or evidence of conviction or sentence, a description of the person sought together with any other information that will help to establish his or her identity and nationality, and a statement setting out the alleged act constituting the offence. A full brief of evidence is not necessary.

In contrast, other States parties set a number of minimum substantive standards that need to be met. These were expressed in terms of the common law concept of probable cause or of a prima facie case, i.e. if the offence for which surrender is sought was committed domestically, there would be sufficient evidence to place the person on trial or at least to issue an arrest warrant against him or her. Equally, in some countries, extradition for the purpose of serving a sentence may not be granted if there are specific grounds to believe that the judgement was not passed on a correct appraisal of the question of the accused person's guilt.

In such cases, recommendations were made to simplify the evidentiary requirements and introduce a lower standard of proof in extradition proceedings to make it easier for requesting States to formulate an extradition request with better chances of success. This was deemed necessary given the statement of one country that, on the rare occasions when it had rejected an extradition request, it had been because the evidence provided had not been sufficient to show that the person in question had committed the offence on probable grounds. On the other hand, the authorities of one State party highlighted how the higher standard of proof may be offset by a national extradition system being exclusively judicial. In this country, the executive branch has no discretion and has to surrender the person if the supreme court authorizes the extradition.

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<sup>a</sup>*Technical Guide to the United Nations Convention against Corruption*, chap. IV, art. 44, subsect. II.4.

### *Successes and good practices*

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

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

A third State reported that, although national law requires the prima facie standard to be applicable for extradition cases, the relevant requirement could be dispensed with if a similar provision existed in a binding arrangement on extradition with another country. Under the bilateral extradition treaties to which the State in question is a party, the dispensation of the prima facie requirement would encompass all extraditable offences.

### *Arrest of the person sought*

Almost all States parties have measures in place to ensure the presence of the person sought at extradition proceedings. Custody can invariably be ordered upon request, but has to be based on national legislation and usually also on specific provisions contained in the applicable extradition treaties. In one case, local courts are empowered to consider the legality of detention during extradition proceedings in the same way as they would during pretrial custody. While it remains the rule to keep the sought person under arrest during extradition proceedings, in several cases it is possible to order the release of the sought person on bail, prohibit him or her from leaving the country or impose alternative measures if there are circumstances justifying coercive measures of a lesser severity, notably when he or she does not represent a flight risk, when the chances of granting extradition appear slim or on health grounds.

National authorities and reviewers alike highlighted the role of the INTERPOL system of red notices as an important conduit for arresting fugitives because it allows provisional arrests in urgent cases, prior to submitting a full formal request for extradition through diplomatic channels. Furthermore, measures were proposed in some States parties to make the relevant process more effective, such as relaxing the formal requirements for arresting the person sought in urgent circumstances or clarifying that fugitives may be arrested on the basis of arrest warrants from non-neighbouring States.

### *Aut dedere aut judicare*

In accordance with article 42, most States parties have created the necessary conditions to apply the principle of *aut dedere aut judicare*, at least with regard to their own nationals. While it is the policy of several States parties, especially those with a common law system, not to refuse the surrender of their citizens solely on the

grounds that they are nationals of their countries, thus going beyond the requirements of the Convention, most allow for prosecution in lieu of extradition if the latter were to be refused on this basis, having established jurisdiction over offences committed abroad for that purpose. In some countries where there is no obligation to prosecute in cases where extradition is denied, or the relevant decision is at the discretion of the authorities (based usually on whether there is enough evidence to justify the prosecution), recommendations were issued to render prosecution mandatory regardless of whether prosecution is requested by the State that requests extradition. On the other hand, general provisions stipulating that prosecutors and investigators have an obligation to act upon receipt of information about the commission of an offence should be considered adequate for the purposes of the Convention, even if there are no separate provisions referring to the opening of criminal proceedings if extradition is denied.

According to article 44, paragraph 11, a State party that does not extradite 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. It was reported, however, that in some cases the transfer of proceedings from the country requesting extradition to the country of nationality of the sought person takes a disproportionately longer period of up to two years, thus affecting the efficiency of criminal prosecution. Indeed, such domestic prosecutions are time-consuming and require the effective operation of mutual legal assistance mechanisms, in accordance with the minimum requirements of article 46 of the Convention, as well as the allocation of adequate human and budgetary resources, in order to succeed.<sup>92</sup>

#### *Successes and good practices*

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

#### *Conditional extradition or surrender and enforcement of sentences*

Most States parties could provide no information on the application of article 44, paragraph 12, or stated that their laws did not foresee, or that it was not governmental policy to allow, the temporary surrender of their own nationals on the condition that they be returned after trial to serve the sentence imposed in the requesting State. However, there are exceptions, including surrender procedures among European States in the execution of the European or Nordic arrest warrants, as well as some bilateral treaties or informal arrangements of this type between neighbouring countries.

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<sup>92</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, paras. 566-568.

*Example of implementation*

The domestic law of one State party provides that the extradition of nationals for the purposes of criminal proceedings could be conceded in some circumstances, if the legal system of the requesting State guarantees a fair trial. In such cases, extradition may only take place if the requesting State gives assurances that it will return the extradited person to serve the sanction or measure eventually imposed on him or her, once the sentenced is reviewed and confirmed in accordance with national law, unless the extradited person expressly refuses to be returned.

Similarly, with regard to article 44, paragraph 13, of the Convention, few countries, especially those from the Group of Eastern European States, appear to be able to enforce a foreign sentence whenever they reject a request for extradition, sought for the purpose of enforcing a sentence, on the grounds that the person sought is a national of their country. The possibility of enforcing a foreign sentence does exist, however, when the requesting State files a request for international validity of the sentence on the basis of a pertinent international instrument, such as the European Convention on the International Validity of Criminal Judgments, the Riyadh Arab Agreement on Judicial Cooperation, the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences, the Additional Protocol to the Convention on the Transfer of Sentenced Persons or a bilateral treaty with equivalent provisions.

*Successes and good practices*

The code of criminal procedure of one State party contains a provision according to which the domestic courts shall examine the enforcement of judgements or other final decisions given by the courts of other countries in accordance with national provisions and international agreements. Indeed, some regional treaties, to which this State is a party, provide for the enforcement of sentences issued in foreign countries. Additionally, the national authorities stated that the Convention could be applied directly, in complement to national law, given that the provision related to procedural norms. In view of the above, article 44, paragraph 13, was considered to be partially implemented and the State party was urged to monitor the practical implementation of those provisions in order to ensure the application of its regional treaties or the Convention regarding enforcement of the sentence or the remainder thereof.

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

### *Fair treatment*

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

Some countries provided a list of the rights and guarantees applicable under their domestic legal systems. These include the right to be brought before court within a prescribed period after arrest, the right to a defence counsel, the right to an interpreter, the opportunity to make representations as to whether one should be surrendered prior to the final decision on surrender by the minister of justice and the guarantee that the person sought will not be tried in absentia or subjected to torture or inhuman conditions of imprisonment. The right to seek judicial review of every decision made in the extradition process, i.e. to appeal both the court ruling imposing preliminary detention and the court order authorizing extradition, was deemed part of the rights and guarantees in some reviews, while in others, the absence of such a right was noted and no recommendation was made for it to be introduced. Although in most countries these rights appear to be applicable to regular criminal proceedings, they are normally considered to be extendable to other judicial proceedings, including extradition.

### *Grounds for refusal*

As already mentioned, article 44, paragraph 8, clarifies that extradition is subject to the conditions provided for by domestic law, including conditions in relation to the possible grounds for refusal. This paragraph is almost automatically complied with. States parties should seek to ensure, however, that limitations on extradition remain within the bounds of traditional and/or reasonable limitations and do not neutralize extradition as an effective tool for international cooperation in corruption cases.

Most States parties have an exhaustive list of grounds for refusal in their legislation; States parties that do not have such a list deduce grounds for refusal from general principles of international law, due judicial process and fundamental fairness, in the absence of an applicable treaty. Interestingly, one State lists the grounds for refusal in its Constitution. Most countries can reject extradition requests based on the same types of grounds, which conform by and large to the list contained in article 44, paragraph 15, of the Convention. Hence, the majority of States parties cannot grant extradition when there are grounds to believe that the request has been made with a view to persecuting or punishing the person sought on account of his or her sex, race, religion, nationality, ethnic origin or political opinions, or that compliance with the request will cause prejudice to that person's position for any one of the above reasons. Other common grounds for not granting extradition include the double jeopardy principle, the offence becoming time-barred, amnesty, pending domestic criminal proceedings or sentences, the refusal of the requesting State to provide an undertaking of speciality or to confirm that it will not impose or carry

out the death penalty should the sought person be convicted and, more rarely, the possibility that the requested person, if extradited, would suffer from exceptional hardship because of his or her youth, age or ill health. It is worth noting that one State party's approach differs considerably from the others in that it also provides for the possibility to refuse to extradite if there are indications that a domestic prosecution or the execution of a foreign criminal judgement would better facilitate the social rehabilitation of the person sought.

In at least 12 States parties, the risk of sex-based discrimination appears not to be adequately considered, although two of them announced that that particular type of discrimination would be reflected in their new extradition laws. Moreover, in some cases, it was noted that the national Constitution prevented discrimination on the ground of sex and, accordingly, that the extradition laws would have to be interpreted in light of that provision. In seven countries, domestic legislation does not appear to make any reference to the non-discrimination clause in the context of extradition. However, even in such cases, article 44, paragraph 15, may be considered to be implemented since the Convention does not create a direct obligation for States parties to provide explicit guarantees that they will reject an extradition request on these grounds but rather enables them to do so.<sup>93</sup>

Most States parties cannot reject an extradition request on the sole ground that the offence involves fiscal matters, in compliance with article 44, paragraph 16, of the Convention. In 10 States parties, a lack of clear legislation or practice left a degree of uncertainty as to whether an extradition request might be denied on those grounds. Under the legislation of two States parties, some categories of offences are not extraditable because of their fiscal nature. The authorities of these States parties confirmed, however, that if the elements of a given offence were considered to constitute an act of corruption under the Convention, extradition would not be refused.

#### *Political offences*

Nearly all States parties include the commission of a political offence among the grounds for rejecting an extradition request. In the experience of one State party, this is the most common reason for rejecting incoming requests, together with the prosecution of the offence being statute-barred. It is also the rule among States parties not to define the notion "political offence" in legislative terms, or to define such offences only in negative terms (e.g. excluding attempts on the life or liberty of a Head of State or a member of the reigning house of the country). Indicatively, the constitution of one State party simply mentions that extradition is not allowed for political reasons, an expression that the reviewers found to be ambiguous as to its actual scope of application. As a result, decisions on whether to reject an extradition request on this ground are usually taken on a case-by-case basis, often relying on criteria contained in jurisprudence. In one State party, for example, an offence is considered political if, following an evaluation of the motives of the perpetrator and the methods employed to commit the offence and all other circumstances, the political dimension of the act outweighs its criminal component.

Nevertheless, despite the above, the majority of States parties confirmed that under no circumstances would an offence covered by the Convention be treated as a

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<sup>93</sup> Ibid., para. 583.

political offence, in line with article 44, paragraph 4. Equally, at least seven States parties exclude in their legislation the possibility of invoking the political nature of an offence where an obligation to extradite or prosecute has been undertaken internationally, especially where both the requesting and requested countries are parties to a multilateral treaty, such as the Convention. This reflects a trend towards limiting the scope of the political offence exception, in accordance with the revised version of article 3, subparagraph (a), of the Model Treaty on Extradition. States parties were generally encouraged to continue to ensure in future that any crime established in accordance with the Convention is not to be considered or identified as a political offence, which may hinder extradition, especially in cases involving persons entrusted with prominent public functions, whereby claims regarding the political nature of the offence or the supposed political persecution of the offender in the requesting State might arise.

#### *Consultation procedures*

There appears to be no uniform interpretation and application of the requirement to engage in consultations with the requesting State party before refusing extradition, although in many cases such consultations appear to constitute standard practice. While several countries' laws explicitly provide for the possibility of the requesting State participating as a proxy party to the extradition proceedings or being represented in the hearing, some States parties considered that no implementing legislation was needed, either because they consider the duty of consultation to be part of international comity or practice, or because they view article 44, paragraph 17, of the Convention as directly applicable and self-executing in their own legal systems. In the same spirit, one State party argued that prosecutors, in their capacity as representatives of the requesting State before the extradition authorities, are implicitly bound to keep the requesting State informed of all of their actions.

Indeed, as emerges from most reviews, the provision in question can be implemented through established practice and administrative procedures without the need for express legislation or internal regulations, as long as there is no contrary provision in the national law. At the same time, however, the provision is a mandatory requirement of the Convention. Therefore, it should be demonstrated with a high degree of certainty that a practice that complies with the provision has gained the force of law through long-term usage and is applied uniformly without exception. Otherwise, States parties may wish to consider directly addressing the matter in their extradition laws and reviewing their treaties to ensure compliance with the Convention.

### *Successes and good practices*

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

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

In contrast to the above, one State party mentioned that, although consultations could take place through diplomatic channels and any results could be presented to the judge during the extradition hearing, the judge could not establish direct contact with the foreign authorities. Finally, in seven cases, the absence of both legislation and practice clearly resulted in the non-implementation of the requirement, and recommendations were made for the States parties involved to issue appropriate regulations or guidelines and consult with the requesting party before refusing an extradition request.

### *Effectiveness*

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

## B. Transfer of sentenced persons (article 45)

The transfer of sentenced persons, including corruption offenders, to their country of origin, in order that they complete their sentences there, is based on humanitarian principles and usually on the consent of the sentenced person. Nevertheless, there may be circumstances allowing for the transfer of a sentenced person to his or her home State even without that person's consent, for example if, taking into account the age or physical or mental state of the person, there is reason to believe that taking over the execution of his or her punishment is necessary for his or her overall well-being. The possibility of transfer refers to instances when a person is sentenced to imprisonment, or another measure entailing deprivation of liberty, and an adequate part of the sentence (usually at least six months) remains to be served. It is sometimes also possible to transfer a mentally disturbed offender when he or she is subject to compulsory psychiatric care and treatment in a medical institution as a security measure.

Most States parties have the necessary legal framework to carry out such transfers under certain conditions, notably via bilateral and multilateral agreements, in accordance with the optional provision of article 45 of the Convention. In some countries, transfer of prisoners can also theoretically be carried out on the basis of reciprocity. In practice, however, almost all States rely on international treaties to carry out such transfers. Only three States parties appear to rely solely on their own national provisions, while another mentioned that it had twice used diplomatic channels to transfer to its territory persons sentenced in other countries.

### *Successes and good practices*

Not only has one State concluded several bilateral agreements on the transfer of sentenced persons, but it has also developed a model agreement of its own and indicated that it was ready to conclude further agreements on that basis.

The number of treaties concluded by States parties on this matter varies considerably. One State party is bound by 28 bilateral agreements covering the transfer of sentenced persons, another one mentioned only 1 agreement and others reported that they were considering the possibility of entering into further agreements. Similarly to what was observed in relation to extradition, States parties have tended to conclude relevant agreements with neighbouring countries or with countries sharing the same language. Multilateral initiatives appear to be used rather extensively, including the Scheme for the Transfer of Convicted Offenders within the Commonwealth, the Inter-American Convention on Serving Criminal Sentences Abroad, the Commonwealth of Independent States Convention on the Transfer of Persons Sentenced to Deprivation of Liberty for the Further Serving of Sentences, the Convention on the Transfer of Sentenced Persons between States Members of the Community of Portuguese-Speaking Countries, Council of the European Union framework decision 2008/909/JHA on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, the Riyadh Arab Agreement on Judicial Cooperation and, in particular, the Convention on the Transfer of Sentenced Persons, which has

expanded far beyond the confines of the Council of Europe and already applies to 64 jurisdictions around the world.

Ten States parties have no agreement in place for the transfer of sentenced persons. One State party mentioned that its national legislation barred such transfers when the person concerned was serving any sentence under any conviction within its territory until his or her discharge. However, the same State party expressed its intention to amend its legislation to ensure compliance with the Convention. Another country reported that it had refused a transfer request because of the absence of a legal framework. States parties have the possibility of using the Model Agreement on the Transfer of Foreign Prisoners and recommendations on the treatment of foreign prisoners,<sup>94</sup> as guidance on how to address these gaps.

No precise data were available on the number of prisoners that each State party has received or transferred abroad, and few data were available on the number of transfers carried out specifically in relation to offences covered by the Convention. One State party pointed out that it had transferred thousands of prisoners both to and from its territory since 1977, in accordance with relevant treaties.

Finally, a number of difficulties were reported regarding the practical implementation of transfer agreements, because some States parties do not regulate in sufficient detail the administrative procedures for executing the relevant measures. In the same context, issues have arisen with regard to transferring prisoners to countries with considerably divergent sanction regimes, ensuring the timely execution of transfer requests, resolving the question of which party should cover the cost of the transfer and avoiding the break-up of family units if a prisoner has a family abroad but wishes to be transferred back to his or her home country to serve the sentence.

## **Chapter II. Mutual legal assistance and transfer of criminal proceedings**

### **A. Mutual legal assistance (article 46)**

As in the case of extradition, the extent and scope of mutual legal assistance regimes vary significantly among States parties. The majority have adopted domestic provisions setting the general framework for providing or applying for assistance, either in the form of ad hoc laws (e.g. acts on mutual assistance in criminal matters) or legislation on international cooperation in criminal matters, including extensive provisions on mutual legal assistance, or, sometimes in parallel, as parts of broader pieces of legislation, such as the penal code or the code of criminal procedure. Most States parties have also concluded bilateral treaties or agreements, usually within the same region, or acceded to regional and/or international conventions regulating mutual legal assistance in criminal matters. These instruments are intended to enhance cooperation, improve the exchange of

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<sup>94</sup> *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report of the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.1, annex I. See also UNODC, *Handbook on the International Transfer of Sentenced Persons*, Criminal Justice Handbook Series (Vienna, 2012).

information and overcome legal and operational obstacles that hamper the provision of assistance, especially in cases involving States parties with different legal systems and traditions. For example, one country has concluded 42 bilateral treaties with countries from all continents.

Among the multilateral instruments cited were the European Convention on Mutual Assistance in Criminal Matters and its additional protocols, the Inter-American Convention on Mutual Assistance in Criminal Matters, the Treaty on Mutual Legal Assistance in Criminal Matters between the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, the Riyadh Arab Agreement on Judicial Cooperation, the Economic Community of West African States Convention on Mutual Assistance in Criminal Matters, the Association of Southeast Asian Nations Treaty on Mutual Assistance in Criminal Matters, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the Commonwealth of Independent States Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, the Commonwealth Scheme for Mutual Assistance in Criminal Matters and the Convention on Legal Assistance in Criminal Matters between the States Members of the Community of Portuguese-Speaking Countries. Furthermore, several countries are parties to treaties providing for mutual legal assistance, specifically with respect to corruption and money-laundering offences, such as the Organized Crime Convention (article 18), the Criminal Law Convention on Corruption (article 26) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (articles 8 to 10), the Inter-American Convention against Corruption, the African Union Convention on Preventing and Combating Corruption (articles 14 and 18 to 20) and the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (article 9).

States parties reported diverse experiences relating to the application of such treaties. While some States have concluded very few instruments of this kind, or stated that they did not use them in practice, others appeared to have limited or no comprehensive domestic legislation on mutual legal assistance, relying principally on treaties for such assistance. However, even in these latter cases, the absence of a treaty does not necessarily exclude mutual legal assistance, since such assistance can normally also be afforded on the basis of the principle of reciprocity or on an ad hoc basis, depending on the nature of the requested measure (e.g. depending on whether the evidence sought can be obtained without the use of compulsive measures). As a result, States parties exercise a considerable degree of flexibility with respect to the implementation of article 46 of the Convention, substantially more so than with respect to extradition, and only four countries appear to fall clearly short of its requirements.

Article 46, paragraph 1, requires States parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. Thus, each State party must ensure that its existing laws and treaties on mutual legal assistance are broad enough to fulfil this obligation. If existing legal instruments, such as domestic laws and international treaties, do not apply or appear insufficient in a given case, the countries involved must apply article 46 of the Convention, including paragraphs 9 to 29, either directly, if these provisions can be considered self-

executing, or by adopting implementing legislation to the same effect. The Convention does not automatically override the treaties on mutual legal assistance already in place between States parties. If another treaty on mutual legal assistance exists, the corresponding provisions of this treaty are applicable, unless the cooperating States parties agree to apply article 46, paragraphs 9 to 29. In any case, States parties are strongly encouraged under article 46, paragraph 7, of the Convention to apply those paragraphs, for example the innovative provisions on assistance in the absence of dual criminality contained in paragraph 9,<sup>95</sup> regardless of the existence of another treaty, if they facilitate cooperation and contribute to more effective mutual legal assistance.

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

*Successes and good practices*

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

The reviewing experts placed emphasis on the ability of States parties to fulfil the above requirements and ensure that their respective systems offered adequate guarantees that assistance would be provided in respect of a corruption-related offence. Thus, the preparation or adoption of a domestic legal framework on mutual legal assistance was praised as confirmation of the commitment of States parties to regulating the matter in a comprehensive and homogeneous manner. Equally, the reviewing experts repeatedly highlighted as a success countries' status as parties to regional instruments for different forms of international cooperation, as well as to a wide range of multilateral instruments on corruption, money-laundering and

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<sup>95</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 610.

organized crime containing provisions on international cooperation in criminal matters.

In contrast, in cases where national legislation sets out only limited regulations governing mutual legal assistance in criminal matters, as well as in the few cases where the Convention is not directly applicable, the States parties concerned were encouraged to consider whether the implementation of more specific domestic legislation might facilitate the practical application of existing treaties and improve the transparency and predictability of procedures for the benefit of the requesting States. More specific legislation was also recommended in a State party where many of the practices and procedures relating to mutual legal assistance were undertaken in conformity with customary practice or informal guidelines, despite the fact that the handling of requests for mutual legal assistance by the authorities of this State party was generally effective, as acknowledged by the reviewing experts. As noted in the review in question, it is true that fostering a culture of efficiency and performance may be even more significant than enacting specific legislation in ensuring substantive compliance with the Convention. Such a situation, however, requires consistent care and vigilance on the part of the national authorities actively involved in international cooperation.

The absence of enabling legislation to fully implement the provisions of article 46 was noted in three countries, and in numerous cases recommendations were issued for States parties to consider entering into further bilateral or multilateral cooperation agreements or arrangements, including with countries from different geographical regions, regardless of the apparent effectiveness of existing formal or informal cooperation networks. States parties were encouraged to prioritize international cooperation in corruption offences and to take more full advantage of the potential of the Convention as the basis for mutual legal assistance in relevant cases, even if other bilateral or multilateral treaties unrelated to corruption appeared to be applicable. Finally, in four countries, an acute lack of experience in respect of the functioning of mutual legal assistance mechanisms was detected. It was therefore suggested that measures be taken to enhance the understanding of the Convention among national institutions and agencies, to learn from the experience of other countries and international best practices, and eventually to develop informal networks to form an initial basis for requests for mutual legal assistance.

#### *Offences for which assistance is provided*

Most States parties do not make any distinction between criminal offences and provide assistance regardless of their gravity, in relation to all inquiries, prosecutions and judicial proceedings pertaining to them. In four cases, however, it was specified that assistance, at least in certain forms (e.g. search, seizure and sequestration of assets), could only be provided on the grounds of a serious offence (e.g. one that entailed a penalty of over 12 months' imprisonment), which was considered to be a potentially limiting condition. In general, requests for minor or trivial offences are unlikely to be prioritized by the authorities of requested States. Given their sometimes limited resources, priority is normally given to requests that involve serious crimes, evidence that is at risk of being concealed or destroyed, ongoing cases, cases where the safety of witnesses or the public is at risk and cases where a trial date is imminent.

*Successes and good practices*

One State party has clarified that mutual assistance is afforded in proceedings initiated before administrative authorities for crimes punishable under the legislation of the requesting or the requested State in such cases where a decision of the administrative authority may be the grounds for instituting criminal proceedings. This was considered to be a good practice by the experts conducting the review.

The majority of States parties stated, in relation to article 46, paragraph 2, that they were able to grant assistance in relation to offences for which legal persons may be held liable, often through direct application of the Convention. However, only a small percentage provided examples of actual cases in a corruption-related context, and at least six countries did not provide adequate information on the subject. Domestic laws, as well as bilateral and multilateral treaties on mutual legal assistance, do not normally include specific regulations on the handling of cases involving legal persons. Two States parties reported their intention to adopt legislation expressly regulating mutual legal assistance in relation to offences for which a legal person may be held liable. The most common requests for assistance related to legal persons appear to involve obtaining bank account and financial records and verifying data from corporate registers.

The situation appears more complicated in States parties that have not established the criminal liability of legal persons, or have established it only in respect of specific offences, such as money-laundering. The national authorities and reviewers of some of those States considered that this, in combination with the rule of dual criminality, rendered mutual legal assistance impossible or restricted it only to the specific offences for which legal persons could be held criminally liable or to instances in which dual criminality was not required.<sup>96</sup> This view does not appear, however, to be convincing, nor is it prevalent. It was shown during the reviews that, even if States parties that have not established the criminal liability of legal persons apply the dual criminality rule (which is not always the case), mutual legal assistance is still possible given that dual criminality is conceived not as a requirement for the actual incrimination of the subject being investigated, but simply as a requirement that the act giving rise to the request for assistance constitutes a crime domestically. In other words, the potential outcomes of investigations or adjudications against legal persons, including possible indictments or convictions, appear to be irrelevant in terms of executing the request for legal assistance. Moreover, it should be clear that treaties on mutual legal assistance are entered into to provide assistance to the contracting parties in connection with the prevention, investigation and prosecution of criminal offences, and in proceedings related to criminal matters, without making any qualification as to whether the crime being investigated has been committed by natural or legal persons.

In any case, no State party reported having experienced any practical problems with regard to the execution of foreign requests for mutual legal assistance in terms of

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<sup>96</sup> This matter also came under discussion at the meetings of the expert group on international cooperation. See CAC/COSP/EG.1/2013/2, which includes information on responses received by a number of States parties regarding the issue of the liability of legal persons in the context of the provision of mutual legal assistance in criminal matters.

the dual criminality requirement with regard to legal persons, nor do they appear to have encountered difficulties as requesting States when seeking legal assistance from foreign authorities regarding criminal proceedings conducted against legal persons. It should also be noted that article 43, paragraph 1, of the Convention enables States parties to go beyond the criminal nature of the offence in question and the issue of whether or not the legal persons involved are criminally liable, and to extend assistance in civil and administrative matters relating to corruption.

#### *Nature of mutual legal assistance*

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

A unique feature of the Convention in comparison to other international instruments, including the Organized Crime Convention, is that, according to article 46, paragraphs 3 (j) and (k), the mutual legal assistance to be afforded by States parties extends to identifying, freezing and tracing proceeds of crime and the recovery of assets for the purpose of returning them to their legitimate owners, in accordance with the provisions of chapter V of the Convention. This corresponds to asset recovery (and international cooperation for this purpose) being a fundamental principle of the Convention, as emphasized also in articles 1 and 51. In most States parties, asset recovery is not explicitly listed among the areas of mutual legal assistance. However, the legislation of many countries contains detailed provisions intended to facilitate assistance pertaining to the identification, freezing and confiscation of proceeds of crime with a view to enabling the recovery of assets, and there are also examples of States parties with rules on mutual legal assistance relating to the return of recovered assets to the requesting State. National authorities were advised to consider international aspects of confiscation when reviewing existing legislation with a view to ensuring further improvements.<sup>97</sup> States parties should also review their current treaties on mutual legal assistance to ensure that these sources of legal authority are broad enough to cover the forms of cooperation mentioned above.

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<sup>97</sup> On this topic, see also UNODC, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (Vienna, 2012).

### *Successes and good practices*

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

Another State party's law has specific rules on the handing over of assets to the requesting foreign authority for the purposes of forfeiture or return to the person entitled to them. The national authorities highlighted the existence of domestic provisions that foresee the partial reversal of the burden of proof in connection with assets belonging to a person who has participated in or supported a criminal organization, as well as with assets of illicit origin of politically exposed persons. Considerable amounts of money (totalling hundreds of millions of United States dollars) have been returned to countries of origin through the application of these provisions in connection with requests for the return of assets. This was considered as a good practice and worthy of international study.

### *Spontaneous transmission of information*

The main goal of spontaneous exchange of information to foreign authorities is to assist foreign counterparts in obtaining information that could be helpful for conducting the preliminary stage of criminal proceedings. Such exchange of information may result in the submission of a formal request for mutual legal assistance at a later time. It primarily serves the interests of the State party receiving the information. The spontaneous transmission of information as envisaged in article 46, paragraphs 4 and 5, of the Convention is generally not specifically regulated at the national level. It is foreseen, however, in applicable multilateral treaties, for example in article 11 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, article 10 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, article 46 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders and article 18, paragraphs 4 and 5, of the Organized Crime

Convention. Exceptionally, the domestic law of five States parties expressly foresees the spontaneous exchange of information between judicial authorities. In another country, a specific authority has been designated and empowered to transmit information without prior request.

The majority of States parties reported that, even if not foreseen, spontaneous transmission was possible to insofar as it was not explicitly prohibited. They further noted that such transmission occurred frequently, especially with countries of the same region, either directly through ad hoc arrangements, police cooperation channels and networks of central authorities for mutual legal assistance and authorities responsible for criminal cooperation matters, such as IberRed, Eurojust, INTERPOL and the Association of Southeast Asian Nations Chiefs of Police, or even through informal channels of communication available to law enforcement authorities, such as officials posted in overseas missions and appointed liaison officers. In some cases, national authorities referred specifically to the cooperation and exchange of information taking place between national financial intelligence units. In addition, most countries stated that they would comply with the request by a foreign State to maintain the confidentiality of the information received spontaneously or following a request for assistance, or to pose restrictions regarding its use, and that they would consult with the foreign State should this be potentially inconsistent with domestic law. Only a few States parties reported that spontaneous transmission of information was not possible.

The use of informal arrangements for the spontaneous transmission of information was generally deemed satisfactory. However, the situation remained unclear in some countries, and in at least seven cases, it was suggested that legislative amendments explicitly allowing the submission of information without prior request or ensuring compliance with requests to maintain confidentiality could further enhance the application of article 46, paragraphs 4 and 5. A matter which calls for closer attention is that spontaneous cooperation at the police level, though noted and evaluated positively, was not always considered sufficient for the purposes of the above provisions. Thus, in one case where no other possibility for spontaneous cooperation other than the exchange of information between police services was reported, it was recommended that cooperation via informal channels between government ministries or central authorities, including through the increased use of the international judicial cooperation networks to which States parties already belonged, should be enhanced. States parties were also urged to expand the practice of spontaneous transmission of information to include countries that did not belong to the same geographical region.

#### *Bank secrecy*

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

Access to bank records often has to be duly authorized by judicial or other competent authorities of the requested State. States parties should ensure that this condition, as well as practical difficulties, minimum thresholds and burdensome procedures of the sort described in chapter III, section B, subsection 1, above, with regard to bank secrecy, do not potentially pose an obstacle to the application of article 46, paragraph 8. Thus, for example, in one State where the transmission of bank information, even to domestic authorities, depends on the prior consent of the country's central bank, it was recommended that appropriate legislation be passed in order to ensure that bank secrecy was lifted upon the request of a foreign State. Equally, another State was advised not to make the lifting of bank secrecy subject to reciprocity.

#### *Dual criminality*

While States parties may decline to render assistance on the ground of absence of dual criminality, article 46, paragraph 9 (b), stipulates that even in that case they are required to render assistance that does not involve coercive action (e.g. effecting service of judicial documents, taking voluntary witnesses statements, sharing intelligence, conducting crime scene analyses and obtaining criminal records or other publicly available material, such as identity information or company registration documents) provided this is consistent with the basic concepts of their legal system and the offence is not of a *de minimis* nature. This is an area where the Convention goes further than the Organized Crime Convention, which does not contain a special obligation regarding non-coercive measures. Furthermore, States parties are encouraged to afford assistance to the broadest extent possible in the pursuit of the main goals of the Convention, as set forth in article 1, even in the absence of dual criminality.

Indeed, in contrast to the approach taken in relation to extradition, the majority of States parties reported that dual criminality did not in principle constitute a requirement for granting assistance; this practice was commended by several reviewers. In several cases, it would only not be possible to carry out coercive measures (e.g. taking a person into custody, conducting electronic surveillance, conducting a house search, seizing items or confiscating assets) in the absence of dual criminality (e.g. when this is stipulated by internal law, when there is no treaty with the requesting State or when such a treaty exists but the requesting State does not reciprocate the application of compulsory measures regarding offences that are not criminally punishable in that State).

In some States parties, mostly with a common law system, the absence of dual criminality is an optional ground to refuse assistance. The competent authority may take into consideration the circumstances of the case, as well as the goals of the Convention, when deciding whether or not to grant a relevant request. This optional requirement in the domestic legislation may well serve to implement article 46, but only inasmuch as the discretion to require dual criminality is limited to assistance involving coercive measures, where consistent with the basic concepts of the national legal system. Therefore, it might be advisable to adopt internal rules and/or guidelines in respect of the exercise of discretionary powers, explaining when and under what conditions the competent authority (e.g. a minister) should dismiss requests for mutual legal assistance.

In four further cases, the reviewers were not provided with a clear response on the matter, and 10 States parties indicated that they required dual criminality for the provision of mutual legal assistance, while apparently making no exception for non-coercive measures. Although the national authorities of three of these States parties stated that in practice mutual legal assistance could be provided even in the absence of dual criminality once a formal criminal investigation had been opened in the requesting country, it was noted that legislative clarification could contribute to enhancing the application of article 46, paragraph 9. Equally, and given the partly mandatory nature of this provision, the need for legislative action to embrace clearly the possibility of rendering non-coercive assistance was noted, even in cases where national authorities take a broad approach when considering requests and strive to ask the requesting State to provide alternative charges in order to fulfil the dual criminality requirement.

#### *Successes and good practices*

In one jurisdiction, mutual legal assistance is afforded in the widest sense. Dual criminality is not required by the relevant law, but it is stipulated that assistance should be provided in respect of criminal acts the punishment of which falls within the jurisdiction of the requesting State at the time when the request for assistance is made. As a practical matter, the State party in question has a tradition of providing mutual legal assistance even in the absence of dual criminality. Taken together, this was identified as a good practice.

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

#### *Transfer of detainees*

There does not appear to have been much practical experience of transferring detainees from one State party to another for the purpose of providing assistance in obtaining evidence for corruption-related investigations, prosecutions or judicial proceedings. Most States parties confirmed their compliance with respect to those procedures, as described in article 46, paragraphs 10 to 12, in two ways: either, as was the case in close to one third of States parties, by applying them directly if they did not choose to apply more specific bilateral or other multilateral treaties to which they may be parties, such as articles 9 and 11 of the European Convention on Mutual Assistance in Criminal Matters or article 19 of the Agreement on Mutual Legal Assistance in Criminal Matters between the States Parties of the Southern Common Market, Bolivia (Plurinational State of) and Chile; or by applying detailed domestic regulations which are largely in accordance with the requirements of the Convention, in particular with regard to keeping the detainee in custody, immunity, safe conduct, return or seeking the consent of the detainee for the execution of the transfer. Eight States parties stated that they had not implemented the provisions in

question, despite the fact that it might be possible for some of them to apply the provisions of the Convention directly without adopting further legislation.

#### *Central authorities*

All but three States parties have designated central authorities to receive requests for mutual legal assistance, which either execute such requests themselves or transmit them to a competent authority for execution, as stipulated by article 46, paragraph 13. Nevertheless, the Secretary-General was not notified of the designated central authority, as required under the same article, in 16 cases.<sup>98</sup> In approximately half of the States parties under review, the central authority is the ministry of justice. However, several States parties have designated the attorney general's office or the directorate of public prosecutions, while four States parties (all of them from the Group of Latin American and Caribbean States) have designated the ministry of foreign affairs, one —the ministry of home affairs and one —the national anti-corruption agency. This last choice was highlighted as a success. Interestingly, in another review, it was considered advisable and operationally preferable to designate the national anti-corruption agency as the central authority for all corruption cases given that it enjoys the confidence of international partners and most international corruption cases fall within its remit.

Several States parties name a specific department or even a specific official within the designated central authority to receive requests for mutual legal assistance. The majority of States parties designate the same government department for almost all international treaties on cooperation in criminal matters, including the ones relating to combating corruption, as the central authority. This makes it possible to streamline the process and allows the timely identification of weaknesses in the system. In contrast, the designation of different authorities for requests submitted under different treaties may result in delays in the timely provision of assistance. More generally, the establishment of a single, specialized unit on international cooperation in criminal matters, tasked with handling all requests for extradition and mutual legal assistance, is considered conducive to the effective and timely administration of such cases.<sup>99</sup>

#### *Successes and good practices*

In one State, the attorney general's office, which is the central authority, has a dedicated unit on international cooperation that is well equipped in terms of experienced and skilled staff, with approximately 70 staff members, as well as in terms of resources and facilities. This department works closely with investigators from various law enforcement agencies in preparing and responding to requests for mutual legal assistance and encourages their speedy and proper execution. The national financial investigation unit, for example, regularly provides bank and financial records in response to requests for mutual legal assistance and even provides early notifications of forthcoming requests to reporting institutions in order to enable them to provide a timely response.

<sup>98</sup> A list of central authorities for mutual legal assistance matters, based on notifications submitted up until 31 October 2013 is included in conference room paper CAC/COSP/2013/CRP.5.

<sup>99</sup> *Technical Guide to the United Nations Convention against Corruption*, chap. IV, art. 46, sect. I.

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

*Successes and good practices*

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

*Form, language and content of requests for mutual legal assistance*

With regard to the form of requests for mutual legal assistance, the majority of States parties require that requests be sent in writing, under conditions allowing the requested State party to establish their authenticity, as foreseen also by article 46, paragraph 14. Although limited information was provided on the alternative means used to produce a written record, several States parties confirmed that in urgent circumstances requests submitted by fax or e-mail would be acceptable and eight countries indicated that oral requests were also accepted. In most of the above cases, however, such means of communication were used to take preparatory measures and facilitate data exchange before a request was submitted, and a subsequent formal written request was normally required.

In this context, it is worth taking into account that a proposal submitted during the drafting of the Convention and included in its interpretative notes suggests that States parties may wish to consider the possible advantages of using electronic communications in exchanges arising in accordance with article 46 and employ such means, whenever feasible, in order to expedite mutual legal assistance. However, the proposal also noted that such use may entail certain risks, including interception by third parties, which obviously should be avoided.<sup>100</sup>

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<sup>100</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. IV, art. 48, sect. C, subpara. (c) (p. 422).

### *Examples of implementation*

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

Two countries from the Group of Latin American and Caribbean States reported using the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Organization of American States. This network connects regional authorities through a programme that allows encrypted real-time communications among duly authenticated authorities and provides a platform for virtual meetings and the exchange of documents.

About half of the States parties have specified which languages are acceptable for incoming requests and accordingly informed the Secretary-General. In more than one third of States parties, the official language or languages of the requested State are the only acceptable languages, and requests and supporting documents should be accompanied by a corresponding translation. Nevertheless, States parties were encouraged to consider the possibility that accepting requests for mutual legal assistance in one of the official United Nations languages, apart from their own, could considerably facilitate the provision of international cooperation. Indeed, no less than 18 non-English-speaking countries have notified the Secretary-General or otherwise confirmed that requests for legal assistance would be accepted if submitted in English, among other languages. One State party indicated that it would accept requests translated into any of the official languages of the United Nations, while another, apart from its own two official languages, indicated no less than five additional languages from the extended region that would be acceptable.

With respect to the content of requests for mutual legal assistance, the provisions of article 46, paragraph 15, are broadly reflected in the legislation of most States parties. Given the self-executing character of these provisions, the competent national authorities are obliged to draft the request in accordance with their requirements in order to comply with the Convention.

### *Execution of the request*

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

With regard to the execution of the request, the vast majority of States parties endeavour, sometimes by directly applying article 46, paragraph 17, of the Convention, to satisfy special conditions or follow procedures stipulated by the requesting State, in particular with respect to compliance with evidentiary requirements (e.g. cautioning witnesses in a particular way before taking their statements or collecting evidence in a particular format), insofar as such requirements do not conflict with domestic legislation or constitutional principles. Indeed, the main prerequisite for the execution of a request is that the requested action complies with domestic law. For example, a country may not be able to execute an incoming request if the requesting State seeks to compel testimony from a defendant who has a right not to incriminate himself or herself, as foreseen in the national constitution.

#### *Videoconferencing*

The hearing of witnesses and experts by videoconference has proved to be a time- and cost-saving tool in the context of mutual legal assistance and can help to overcome practical difficulties, for example when the person whose evidence is sought is unable or unwilling to travel to the foreign country to give evidence. Hence, there is growing acceptance and practical use of this measure by competent authorities. Videoconferencing is permissible in the majority of States parties, and three States parties have legislation pending that will introduce it. It should be noted, however, that in some of the above cases, taking testimonies by those means was considered admissible only insofar as they were not explicitly prohibited by domestic law and their use was conceivable based on the direct application of the Convention. Almost one quarter of the States parties have concrete experience in handling requests for mutual legal assistance involving a hearing through videoconference, and some of those regularly or routinely seek assistance from and provide assistance to foreign countries by taking testimony via video link.

#### *Example of implementation*

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

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

#### *Speciality and confidentiality*

The rules of speciality in the transmission and use of information or evidence, as contained in article 46, paragraph 19, of the Convention, are respected by States parties in most cases. In this context it is worth noting that, according to an

interpretative note, the requesting State party is under a special obligation not to use any information received that is protected by bank secrecy for any purpose other than the proceedings for which that information was requested, unless authorized to do so by the requested State party.<sup>101</sup> This is guaranteed either by the direct application of the Convention or by domestic laws, as well as in bilateral treaties on mutual legal assistance that include provisions prohibiting the use of evidence for purposes other than those provided for and without the prior consent of the requested party.

Similarly, the majority of States parties indicated that they complied with the provision of article 46, paragraph 20, and ensured the confidentiality of the facts and substance of the request if the requesting State so required, to the extent possible under national law.

#### *Grounds for refusal*

The Convention recognizes the diversity of legal systems and allows States parties to refuse to provide mutual legal assistance under certain conditions, as enumerated in article 46, paragraph 21. This provision sets the limits of a country's discretion with regard to the applicable grounds, stating that assistance may be refused. This is neither an obligation for national legislation to include the grounds listed exactly, nor an obligation to apply such grounds in each individual case of mutual legal assistance. Therefore, and also taking into account article 46, paragraph 17, the observation of some reviewing experts that article 46, paragraph 21 (c) — and by analogy the other grounds for refusal — requires that the procedures to be followed in executing the request should be in line with those typically followed in the requested State party, cannot be considered to be accurate; nor can the recommendations of the same experts that the national authorities introduce legislation to specify clearly that the execution of requests and actions taken should conform to the domestic procedures of investigation, prosecution or judicial proceedings. It is the prerogative rather than the obligation of the requested State to exclude actions that its own authorities would be prohibited from carrying out in respect of a domestic offence. In any case, the assistance a country is able to provide to other countries does not extend, as a rule, beyond the law enforcement tools and powers available to its own law enforcement agencies.

The majority of States parties have legislation in place providing for grounds for refusal equivalent to the ones listed in the Convention, without exceeding its limitations. In this context, it should be noted that article 46, paragraph 21, affords the requested States a wide margin of discretion in terms of the grounds they are allowed to apply, since assistance may be refused, for example, if the execution of the request is considered likely to prejudice its essential interests or its *ordre public*, or if it would be contrary to its legal system. It is for this reason that domestic grounds for refusal, such as the political, military or *de minimis* nature of the offence, its prejudice to an ongoing investigation in the requested country, the time-barring of the offence if it occurred in the requested country and possible discrimination against or prejudice to universally recognized rights and fundamental freedoms of the individual, have been found to be linked to article 46, paragraphs 21 (a) and (d), and are thus in line with the Convention.

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<sup>101</sup> Ibid., art. 46, sect. C, subpara. (b) (p. 409).

An exception was a domestic provision enabling a country to decline mutual legal assistance on the basis that it might burden the assets of the State. It was recommended that this ground for refusal be removed by providing that the costs shall be borne by the requested State, unless otherwise agreed. It should be noted, however, that in at least four States parties with similar provisions, no such recommendation was made.

The vast majority of States parties indicated that a request for mutual legal assistance concerning an offence covered by the Convention would not be refused on the sole ground that the offence also involved fiscal matters. There were, however, a few cases where the clarification of the legal regime was deemed necessary, and in one case it was recommended that the domestic legislation should be amended to provide expressly for the exclusion of fiscal offences from the grounds for refusal of requests for mutual legal assistance, rather than relying on the discretionary powers of the attorney-general to do so on a case-by-case basis.

Finally, most States indicated that, in practice, they would also provide a foreign country the reasons for refusing to provide assistance in response to a request for mutual legal assistance related to corruption in the spirit of international cooperation and in line with the express obligation contained in article 46, paragraph 23, of the Convention, as well as in other bilateral or multilateral treaties to which they were parties. In three countries, national legislation was found not to comply with the provision under review and, in one case, it was suggested that the State party expand its domestic provisions on the reasoning for the refusal of extradition requests to cover requests for mutual legal assistance as well.

#### *Time frame and consultation procedures*

According to article 46, paragraph 24, of the Convention, States parties are obliged to execute requests expeditiously and take as full account as possible of any deadlines suggested by the requesting authorities. The average period of time needed to respond to a request for mutual legal assistance is generally shorter than the time required to respond to one for extradition and ranges from one to six months. In some cases, the processing of the request could take over a year. The provision of mutual legal assistance was normally found to be a paper-intensive process. The request is transmitted to a State's central authority, which assesses its contents and refers it to the police or prosecuting body in the relevant locality. Once the material is obtained, it must once again be transmitted back through the central authority. While this level of formality is time-consuming, it is part of the rationale underpinning mutual legal assistance. Conducting the process through a formal Government-to-Government channel is intended to give all parties some level of assurance that the information has been obtained through appropriate means and that the continuity of the chain of evidence has not been broken. This ensures a higher level of protection of sensitive information and helps to avoid problems related to the admissibility of evidence.

On the other hand, some States parties reported that in cases where the requesting State indicated that the matter needed to be addressed urgently, the period would be significantly reduced. Two States parties affirmed that they would generally respond to all requests within one or two weeks, which was regarded as an exemplary performance, and another has even issued a decree which contains mandatory rules for the competent prosecutorial and law enforcement authorities to implement legal

assistance measures within 10 days and holds them liable for unnecessary delays. Two further States parties confirmed their ability to execute certain measures, such as the freezing of bank accounts, within a short time, often within hours.

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

In order to improve the situation, the importance was highlighted of giving careful consideration to data collection, making the best use of statistics and, in particular, putting in place workflow processes or a case management system within the central authority for mutual legal assistance to facilitate, inter alia, the regular monitoring of the length of mutual legal assistance proceedings in order to improve standard practice. A further positive measure consists of developing internal guidelines, procedural manuals, written standard operating procedures, methodology notes or practice papers which set timelines for executing requests and give guidance on how to handle any problems that may arise, including how to handle any follow-up with the requesting State in an appropriate manner.

### *Successes and good practices*

One State party reported that the staff of its central authority engaged in constant, near-daily communication with counterparts in countries that had submitted a large number of requests for mutual legal assistance. The central authority further sought to have annual consultations with its largest partners in the areas of extradition and mutual legal assistance.

Another State party tracks the status of the execution of requests for mutual legal assistance by using a specially designed casework database, which contains features enabling case officers to track each action taken on a particular matter, set reminders when next actions are due and identify delays in the execution of the request. This was identified as a good practice by the reviewing experts. When providing assistance sought, the country in question always considers the timeframes requested by the foreign country (e.g. trial dates) and regularly provides updates on the status and progress of the execution of the request to the central authorities of counterparts in other countries.

Finally, another State has in place an even more innovative system of processing requests for mutual legal assistance, which ensures accuracy, efficiency and expedience. This country's central authority has developed an electronic database and information management system, a case-tracking database and a quality management process certified by the International Organization for Standardization. When using this database, specific timelines for the handling and execution of requests for mutual legal assistance and extradition must be met and the workflows are specifically regulated. Alerts are sent to the supervising officer if a file has not been updated every two days. Incoming requests are tracked in the database from the day the request is registered. The system allows the central authority to respond quickly to requests for status updates, and steps were under development to enable foreign missions to access the database directly to obtain status updates on the processing of their requests. This service would be available on the website of the central authority. The State in question was commended for this innovation, which was noted as a good practice, and encouraged to consider sharing this innovative process with other countries which could emulate such tracking methods, including through international forums, conferences and working groups.

There were few concrete cases whereby the execution of requests was postponed owing to interference with ongoing criminal investigations. One State party noted that postponement on that ground was extremely rare, while several other States argued that such postponement might well be envisaged in accordance with domestic legislation or by direct application of the Convention or another international instrument, such as article 6, paragraph 1, of the European Convention on Mutual Assistance in Criminal Matters. If no national legislation existed on the issue, States parties were urged to consider developing more specific provisions on the timelines of rendering mutual legal assistance and the circumstances in which the assistance could be postponed, because that could enhance the transparency and predictability of procedures for mutual legal assistance in favour of the requesting States. Furthermore, in a limited number of States parties where interference with ongoing investigations is a ground for the discretionary refusal of a request, it was

recommended that the possibility of merely postponing the execution of requests be introduced in the applicable laws. However, there were also countries with similar legislation where that was not deemed necessary, since the relevant provisions were interpreted, as a matter of practice, to allow for the postponement of mutual legal assistance.

*Example of implementation*

The central authority of one State party liaises with domestic law enforcement agencies when considering requests for mutual legal assistance. If an agency is concerned that providing assistance may prejudice a domestic criminal investigation or proceedings, the agency will immediately inform the central authority, which will then notify its foreign counterpart. The central authority will continue to liaise with the relevant agencies about the domestic investigation, and if a stage is subsequently reached at which providing the assistance requested no longer prejudices the criminal investigation or proceedings, the foreign country will be advised and the central authority will continue to process the request.

With regard to consultation procedures with the requesting State, most countries reported that they engaged in such consultations before refusing or postponing a request, and some referred to bilateral treaties that expressly regulated the matter. However, only a limited number of examples were provided on how such consultations were carried out.

*Successes and good practices*

Upon receipt of a request for mutual legal assistance that does not contain the prescribed elements, the central authority of two States parties would, as standard practice, contact the relevant foreign central authority directly and request the information, or request the information through diplomatic channels, noting that such information was required to progress and execute the request for mutual legal assistance.

Another State party reported that its central authority frequently carried out informal consultations before formal requests for mutual legal assistance were received and that it was common practice to accept and review draft requests before the submission of a formal request for mutual legal assistance. This was considered to be a good practice by the reviewing experts.

*Safe conduct of witnesses*

Safe conduct of witnesses, as envisaged in article 46, paragraph 27, of the Convention, was addressed in the vast majority of States parties, either in multilateral or bilateral treaties, including by applying the Convention itself, or (additionally) in domestic legislation. In three cases where the period of safe conduct under national law was shorter than in the provisions of the Convention (8-10 days rather than 15 days), the countries under review were encouraged to amend their legislation in that regard.

### *Costs*

With respect to ordinary and reasonable costs associated with requests for mutual legal assistance, such as the costs related to obtaining testimony, collecting and seizing documents, and tracing, identifying and seizing property, the general rule is that those costs would be borne by the requested State, subject to any bilateral or multilateral agreements, ad hoc arrangements or the conditions of reciprocal cooperation. Although this is in accordance with the principle enshrined in article 46, paragraph 28, it should be taken into account, as stressed in an interpretative note to this provision, that developing countries might encounter difficulties in meeting basic costs and should be provided with appropriate assistance to enable them to meet the requirements of the Convention.<sup>102</sup>

Although the respective legislation does not always touch upon the issue of extraordinary costs, in several States parties, it is foreseen as a principle that the requesting State should cover: costs associated with the execution of specific requests, such as deposit and shipping expenses; costs incurred by expert testimony or for transferring detainees to foreign countries, as envisaged by article 46, paragraph 10, to give evidence in proceedings or to assist in an investigation; expenses relating to organizing a hearing by telephone or videoconference, as envisaged by article 46, paragraph 18; expenses for the attendance of persons to be heard; and expenses for translators and interpreters. Equally, some bilateral treaties provide that the requested party shall pay the costs of executing a request, with the exception of particular expenses, such as the costs associated with translations, expert fees, expenses incurred in the conveying of persons to give evidence or any exceptional expenses incurred in fulfilling the request. In any event, in relation to extraordinary costs, it was recommended, based on the Convention, that States parties ensure that the terms and conditions under which the request shall be executed, as well as the manner in which the costs shall be borne, are not unilaterally determined by the requested State, but are established after a prior consultation with the requesting State. In this regard, at least five States parties reported concrete cases where extraordinary expenses had partly been covered by the requesting State pursuant to an ad hoc arrangement of the sort envisaged by article 46, paragraph 28.

#### *Example of implementation*

One State party reported having made arrangements with other central authorities in relation to extraordinary costs of mutual legal assistance. Such costs include the cost of processing large amounts of computer material held under a search warrant, the high cost of courier fees for shipping evidence to another State and lawyers' fees incurred as a result of local court applications made on behalf of a requesting State.

In six States parties, the applicable laws or a multilateral treaty to which the countries in question are parties (i.e. the Treaty on Mutual Legal Assistance in Criminal Matters) provide that all costs shall in principle be borne by the requesting State, unless otherwise stipulated by the States parties concerned. Two further

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<sup>102</sup> *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption*, part one, chap. IV, art. 46, sect. C, subpara. (c) (p. 409).

countries appear to reserve for themselves the decision of whether to charge the costs completely or partially to the requesting State. Such practices run contrary to the principle enshrined in article 46, paragraph 28. Accordingly, the relevant laws and existing agreements should be aligned with the Convention by providing that the costs would be borne by the requested State in the first instance and introducing an obligation to consult with the requesting State beforehand in the second.

#### *Provision of documents*

Most States parties indicated that records, documents or information available to the general public, such as material kept at company registries, certificates of birth, marriage or death and information from land registries, would be provided to the requesting State. Countries were encouraged to specify to the extent possible any relevant practices in their legislation and be transparent about their information-sharing practices.

With regard to governmental records that are not available to the public, the pertinent requests may be satisfied subject to the requested State's domestic legislation governing disclosure of the relevant information. For example, under the law of one country, tax records or social security records cannot be provided to foreign countries in response to requests for mutual legal assistance. More than one third of the States parties affirmed that in principle they could provide certain types of information not available to the general public, including police and law enforcement reports, information on bank supervisory matters and criminal records, and, under certain conditions, even classified material to requesting States. Five States were able to fulfil corresponding requests inasmuch as the requested documents or information would be provided to a similar domestic authority.

Finally, one State party distinguished between various types of non-public information as follows: "classified information", which could be provided to a requesting State; "secret information" and "confidential information", which could be shared on a case-by-case basis; and "absolutely secret information", which could never be provided.

#### *Successes and good practices*

According to the law and constitutional principles of one State party, all documents in the possession of the authorities are public unless an exception has explicitly been made by an act of parliament. If another State Party requests records, documents or information in the possession of the domestic authorities, they will be provided in the same way and on the same grounds as to any individual.

#### *Effectiveness*

Contrary to the situation with extradition, States parties appear to have gathered considerable experience of mutual legal assistance in corruption-related matters and they have provided ample statistical data outlining the volume of the relevant requests. Among the States parties with adequate legislative frameworks for mutual legal assistance, many reported that requests related to offences established in accordance with the Convention were received or sent on a regular basis and no

particular problems seem to have been faced in the execution thereof. Most importantly, article 46 itself has been invoked and served as the legal basis for providing assistance on numerous occasions. Although the numbers of cases are still small, 17 States parties reported requests made and/or received in accordance with the Convention.

In the most significant example, one State party reported 427 requests for mutual legal assistance from foreign countries in 2010-2011, 18 of which pertained to corruption-related offences. Eleven of those 18 requests were made in accordance with the Convention or with specific reference to the Convention. In response, the requested State provided material seized pursuant to search warrants, witness statements and material lawfully obtained by its law enforcement agencies, and undertook extensive enquiries to locate the proceeds of crime. Another country reported that it received responses to its requests made in accordance with the Convention within a timeframe of 1-5 months, except in one case where it did not receive any response at all and another where the requested country refused to provide legal assistance on the basis that the request was likely to prejudice its sovereignty, security, *ordre public* or other essential interests, citing article 46, paragraph 21 (b).

#### *Case examples*

One State party executed on behalf of another country a formal request for legal assistance which invoked the Convention. The authorities of the requested party provided certified bank records to the requesting country to assist in its investigation of a public official who was accused of participating in a large-scale, complex fraud scheme and was believed to have sent some of his illicit proceeds through banks located on its territory. The Convention was the sole treaty basis for the request since there was no bilateral treaty on mutual legal assistance between the two countries.

Another State party was asked, on the basis of the Convention, to observe and monitor a suspect, provide information concerning his date of entry into the country, trace his possessions and financial assets, and conduct a house search in order to freeze and confiscate his (financial) possessions. The criminal investigation concerned a national of the requesting State who was suspected of embezzlement while acting in an official capacity. The suspect had fled the country and was living in the requested country when the request was made. All the requested assistance was provided, and the information and seized goods were handed over to the requesting country.

## **B. Transfer of criminal proceedings (article 47)**

Bearing in mind the transnational dimension of many corruption cases, article 47 of the Convention introduces an obligation for States parties to consider, in cases where several jurisdictions are involved, concentrating the prosecution in one jurisdiction, where, for example, a particular State may be in a better position to collect evidence and have closer ties to the case and the defendant. Moreover, by applying the principle of *aut dedere aut judicare*, the transfer of criminal proceedings can be used to support the initiation of domestic criminal proceedings

when extradition is denied on the grounds of nationality or other grounds, if applicable.

More than one third of the States parties reported that the possibility of transferring proceedings was foreseen in general terms in their domestic legislation or in bilateral or multilateral treaties to which they were parties, such as the European Convention on the Transfer of Proceedings in Criminal Matters, which constitutes the main international instrument in this field. The domestic legislation of one State party provided for such a possibility within the framework of a regional organization in relation to money-laundering offences. Although most of those countries did not provide any concrete examples of implementation or any information on the criteria used to determine the most appropriate forum for investigation and prosecution,<sup>103</sup> in two cases it was argued that the transfer of criminal proceedings was a routine practice, and two States reported the transfer of proceedings involving the prosecution of bribery offences. Another State party was found to make rather extensive use of this form of international cooperation, especially with neighbouring countries, reporting a total of 59 incoming requests and 47 outgoing requests in the period between 2009 and 2011.

Despite the above, the majority of States parties have no domestic legislation and are not bound by any international instruments regulating the international transfer of criminal proceedings. However, some countries have stated that transfers could be made through informal arrangements, and four actually reported cases of such transfers having taken place. Indeed, as noted in one review, no particular law was needed to implement the provision in question, as long as there was a practice, policy or arrangement that provided for the possibility of transferring criminal proceedings and States parties actually considered taking advantage of this possibility in order to ensure the effective prosecution of offences covered by the Convention. More formal agreements would help to consolidate this practice and determine the effects of a possible transfer on the States involved. In this context, States parties could profit from taking into account the Model Treaty on the Transfer of Proceedings in Criminal Matters.<sup>104</sup>

## **Chapter III. Law enforcement cooperation**

### **A. Law enforcement cooperation (article 48)**

Article 48 requires States parties to cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat offences covered by the Convention. The measures that are foreseen to reach this goal include the establishment or enhancement of adequate channels of communication, cooperation in conducting inquiries, exchange of information on the means and methods used by offenders, facilitation of effective coordination between law enforcement agencies and establishment of cooperation agreements or arrangements between such agencies. Most countries have taken steps to implement such measures and to date

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<sup>103</sup> For such policy criteria, see *Technical Guide*, pp. 173-174.

<sup>104</sup> General Assembly resolution 45/118, annex.

only three States parties appear to have seriously fallen short of the relevant requirements of the Convention.

#### *Channels of communication*

Channels of communication between services with a mandate for law enforcement were reported to be used frequently at the bilateral and regional levels and conducted within the regulatory framework of international or transnational organizations, such as the European Union and the Organization of American States, or within regional operational and liaison networks, such as the Association of Caribbean Commissioners of Police, the Association of Southeast Asian Nations Association of Heads of Police (with a secure database), the Caribbean Community with its Standing Committee of Heads of Intelligence and Financial Investigative Units, Joint Regional Communications Centre and Regional Intelligence Fusion Centre, the Eastern Africa Police Chiefs Cooperation Organization, Europol, Eurojust, the European Judicial Network, the Hemispheric Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition of the Organization of American States (supported by the secure information exchange platform Groove), the Ibero-American Network for International Legal Cooperation (also operating with a secure platform), the Network of Prosecutors against Organized Crime, the European Anti-Fraud Office, the Pacific Transnational Crime Coordination Centre, the Legal and Judiciary Network of the Community of Portuguese-Speaking Countries, the Southern African Regional Police Chiefs Cooperation Organization, the South Asian Association for Regional Cooperation Drug Offences Monitoring Desk, the Southern African Development Community Police, the Southeast European Law Enforcement Center, the Schengen Information System and the Southern African Police Service Cooperation. It is worth noting that one State party has proposed to create a further regional network for law enforcement cooperation under the auspices of the Economic Cooperation Organization, to be named ECOPOL. The use of e-mail for rapid communication has proved very useful in the day-to-day functioning of such networks, as well as tools such as secure databases for the sharing of information among law enforcement agencies.

Membership of INTERPOL was found to enhance significantly effective cross-border law enforcement cooperation and the locating of suspects of corruption-related offences. In addition, the INTERPOL I-24/7 Global Police Communications System was reported to be a useful tool in sharing crucial information on criminals and criminal activities worldwide in a timely and secure manner.<sup>105</sup> Apart from that, channels of communication beyond the regional context were found to be scarce.

Information exchange appeared to be widespread among financial intelligence units, with more than half of States parties indicating that they maintained or were developing interactions between their units and foreign financial intelligence units, mainly through the conclusion of memorandums of understanding concerning cooperation in the transnational investigation and prosecution of persons involved in money-laundering activities, or through membership to the Egmont Group of Financial Intelligence Units, an international forum focused on stimulating cooperation in the areas of information exchange, training and the sharing of

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<sup>105</sup> *Manual on Mutual Legal Assistance and Extradition*, pp. 31-32 and 67.

expertise in the fight against money-laundering. The application to become a member of this group, as well as the existence of a large number of agreements between national financial intelligence units and other jurisdictions abroad, were considered good practices. Similarly, the customs services of some countries indicated their engagement in collaborative initiatives through the World Customs Organization Regional Intelligence Liaison Offices network or other arrangements. Some national police and prosecution agencies have further established contacts within informal networks dedicated to improving cooperation in all aspects of tackling the proceeds of crime and increasing the effectiveness of members' efforts in depriving criminals of their illicit profits through cooperative inter-agency coordination and information sharing. These informal networks include the Camden Assets Recovery Inter-Agency Network, the Asset Recovery Inter-Agency Network of Southern Africa and the Inter-agency Asset Recovery Network of the Financial Action Task Force of South America against Money Laundering. Similar networks have been established in the Asia-Pacific region (Asset Recovery Inter-Agency Network for Asia and the Pacific) and Eastern Africa (Asset Recovery Inter-Agency Network for Eastern Africa).

Finally, channels of communication were reported to operate between specialized anti-corruption authorities, for example in the framework of the South East Asia Parties Against Corruption mechanism, the Southern African Forum against Corruption, the European Partners against Corruption, Council Decision 2008/852/JHA on a contact point-network against corruption, the East African Association of Anti-corruption Agencies, the Association of Anti-Corruption Authorities in Africa and the International Association of Anti-Corruption Authorities. One State party reported that its anti-corruption agency had established formal partnerships through memorandums of understanding with no fewer than 20 foreign institutions with a similar mandate in 15 different countries around the world.

#### *Cooperation in conducting inquiries, exchange of information and coordination*

Most States parties provided an overview of their general legal and operational frameworks on information exchange and measures of cooperation, as well as the purposes for which they were established, namely early identification, detection and investigation of offences covered by the Convention. One quarter of States parties provided information on inquiries that had been effectively conducted in cooperation with other States parties. Few States parties referred to the sharing of information on research results and forensic experience related to the means or methods used to commit offences, for example identity theft and document forgery, and equally few mentioned specific measures relating to the provision of items or substances for analytical purposes. This reflects the rather limited practical application of article 48, paragraph 1 (c) and (d), or at least the limited visibility of the relevant measures with regard to corruption offences.

*Successes and good practices*

One State party reported that its police forces had engaged in several joint activities with States of the same region in the areas of capacity-building, coordination and collaborative efforts in the fight against transnational crime, including corruption-related offences. Such activities were undertaken through a regional transnational crime network, funded by the State party. It has also developed a series of multi-agency units against transnational crime, active in several countries of the region and composed of law enforcement, customs and immigration authorities.

Another State party described a two-tier system of receiving requests for law enforcement cooperation from other countries. The system operated on centralized and decentralized levels in order to enhance efficiency and resolve cases more expeditiously. This was considered to be a good practice by the reviewing experts.

More than one third of States parties have posted police liaison officers or, more rarely, prosecutors to other countries or international organizations, usually to embassies or diplomatic missions, and five States parties have deployed liaison officers to 20 or more foreign countries. However, the scope of activities of such liaison officers is not normally limited to anti-corruption. Officials from law enforcement agencies frequently participate in joint training activities and capacity-building exchange programmes with international counterparts. Two States parties elaborated on the posting of their police attachés to embassies abroad, making clear that, although they possessed diplomatic status and reported to the ambassador in matters regarding international law, foreign affairs and protocol, their operational activities were conducted under the direct supervision of their police superiors.

*Successes and good practices*

With regard to effective coordination between authorities, agencies and services, one State party, together with other countries of the same region, has set up a joint network of liaison officers around the world, enabling police officers of any one of those States parties to act on behalf of the police of any of the other participating countries.

Another State party's police force reported maintaining an international liaison officer network with offices in 29 countries to broker collaboration with international law enforcement agencies and support bilateral or multilateral cooperation. The liaison officers involved are the State's overseas law enforcement representatives, who have well-established channels of communication with local law enforcement agencies, which are constantly being developed and enhanced. Furthermore, this network facilitates numerous visits of national and foreign delegations of law enforcement agencies. Engagement with these delegations is a key component in strengthening the relationships between the national police and its international partner agencies and has resulted in the identification of capacity-building opportunities and subsequent operational outcomes.

Finally, one country accepts, on the basis of bilateral agreements or arrangements, visiting judges from other States parties to adjudicate domestic cases. Although not directly linked to law enforcement cooperation, this practice was identified as a success by the reviewing experts and considered to be useful in terms of drawing on international expertise. It also reflects the country's readiness to engage in agreements aimed at enhancing coordination between the competent law enforcement agencies.

### *Legal basis for law enforcement cooperation*

The conclusion of bilateral or multilateral agreements or arrangements on direct cooperation between law enforcement agencies, as encouraged in article 48, paragraph 2, appears to take place in a large majority of States parties, even if it is not always considered a condition for the provision of law enforcement cooperation. Most countries indicated that they had entered or were considering entering into such agreements (including memorandums of understanding, letters of exchange, statements of intent and agreements on the establishment of joint permanent consultative commissions), predominantly with countries in the same region or language community. Among them, one State party has executed more than 90 interdepartmental agreements, memorandums and other international legal documents in the area of fighting crime. These agreements designate, inter alia, the respective authorities responsible for cooperation; oblige the parties to exchange the contact points of these competent authorities in order to ensure rapid and effective communication; foresee the forms, ways and means of eventual cooperation, such as the exchange of data relating to crimes which are being planned or have been committed; establish the possibility of informal consultations before submitting requests for extradition or mutual legal assistance in respect of corruption-related offences; provide for cooperation in personnel management and training; and sometimes contain provisions focusing specifically on corruption.

#### *Successes and good practices*

As a sign of its commitment to law enforcement cooperation, one State party has developed a model memorandum of understanding on combating transnational crime and development of police cooperation between its national police agency and foreign counterparts.

More than half of the States parties confirmed that they could use the Convention as the basis for law enforcement cooperation with respect to corruption-related offences, and two countries reported cases where the Convention had indeed been used for those purposes. However, four States explicitly excluded such a possibility, relying instead on other agreements and formal or informal arrangements. States parties were encouraged to continue to engage in regional and bilateral dialogue by signing, if appropriate, agreements to facilitate the exchange of information for law enforcement purposes, and to consider using the Convention as the legal basis for law enforcement cooperation in the absence of such arrangements.

#### *Challenges of modern technology*

The majority of States parties did not provide specific information on the modalities of international cooperation to respond to offences committed using modern technology, given that international law enforcement cooperation arrangements normally do not make distinctions based on the level of technology used by offenders. One State party stated that it had established a permanent focal point in the framework of a regional treaty to address all forms of cybercrime. Another State party also actively cooperated with international organizations, partner countries and police attachés to tackle crimes committed through the use of modern technology by exchanging information and experience on modern investigative techniques, exchanging best practices in this field through joint seminars,

conferences, study visits and specific training and including the methods and technology used in committing crimes covered by the Convention as main topics in anti-corruption police training modules. Further, a number of States parties are also parties to the Council of Europe Convention on Cybercrime.

#### *Effectiveness*

Despite the fact that many States parties appear to have a wide array of normative and practical tools to meet the law enforcement cooperation requirements of the Convention, as well as broad experience in the use of such tools, considerable challenges remain, especially in countries with a weak national police structure. More specifically, the ability of some States parties to cooperate internationally in the area of law enforcement is constrained by difficulties in inter-agency coordination, as well as limited human resources and inadequate technological and institutional capacities. Furthermore, the conclusion of bilateral or multilateral cooperation agreements or arrangements does not guarantee their application in practice. Hence, for example, one review highlighted the need to circulate existing agreements among the competent authorities of all States parties in order to emphasize their importance and ensure their gradual implementation.

### **B. Joint investigations (article 49)**

Article 49 encourages States parties to enter into agreements or arrangements allowing the establishment of joint investigative bodies in relation to investigations, prosecutions or judicial proceedings conducted in accordance with the Convention. States parties are also encouraged to consider joint investigations on a case-by-case basis, even in the absence of pre-existing agreements, given that this practice may significantly facilitate investigations and the exchange of information by eliminating the need to send individual requests for assistance between the team members.

Almost one third of the States parties reported the adoption of agreements or arrangements allowing for the establishment of joint investigative bodies. Among the agreements cited were the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters and the International Conference on the Great Lakes Region Protocol on Judicial Cooperation. Two legal instruments that stand out in this respect are the Council of the European Union framework decision 2002/465/JHA on joint investigation teams and the Framework Agreement for Cooperation among the States Parties to the Southern Common Market and Associated States for the Establishment of Joint Investigation Teams, which expressly refers to the Convention and to corruption in general as an offence that requires the use of enhanced investigative tools in order to combat it.

On the other hand, almost one quarter of the States parties have neither concluded bilateral or multilateral agreements with a view to carrying out joint investigations, nor undertaken such investigations on an ad hoc basis. However, one of those States parties indicated that draft legislation was under consideration at the time of the review. More importantly, more than half of the States parties mentioned that their

internal legislation and practice, including the direct application of the Convention, enabled them to conduct joint investigations on a case-by-case basis, and several confirmed that they had done so on a number of occasions. One of the countries with the most experience of using joint investigation teams reported a total of 29 such investigations, including investigations into cases related to international corruption. Nonetheless, only 12 countries mentioned the formation of a joint investigation team in relation to an offence covered by the Convention. States parties were encouraged to systematize and make better use of information on joint investigations, including gathering information on the means employed and the criteria used in the establishment of joint investigation teams.

*Successes and good practices*

Two neighbouring States parties have entered into a bilateral agreement for joint investigations and formed an operational working group to empower the establishment of joint investigative bodies. This group comprises officers from the investigation and intelligence divisions of the national anti-corruption authorities and meets annually to review the need to establish joint investigative teams in specific corruption-related cases. Between 2004 and 2012, nine such teams were set up.

### **C. Special investigative techniques (article 50)**

Article 50 of the Convention endorses the use of special investigative techniques in the fight against corruption at both the national and international levels, especially with regard to controlled delivery, as well as electronic or other forms of surveillance and undercover operations. As already noted in chapter I, section A, subsection 1, above, these methods were reported to constitute an effective tool for law enforcement authorities, enabling them to gather the evidence they needed to undermine the activities of mostly secretive corrupt actors and networks. The term “controlled delivery” is defined in article 2, subparagraph (i), as the “technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence”. At the international level, article 50, paragraph 4, clarifies that controlled delivery may include methods such as intercepting and allowing goods or funds to continue intact or be removed or replaced in whole or in part. The Convention also supports the admissibility in court of evidence derived from such techniques. However, the decision of whether to use them in a specific circumstance is left to the discretion of the State party concerned, taking into account the basic principles of its legal system, the legalization and authentication conditions prescribed by its law and the resources it has at its disposal.

Special investigative techniques and their admissibility in court are regulated through legislation or established practice in a large majority of the States parties under review. Eleven States parties appear not to employ special investigative techniques, or to have no legal framework clearly providing for their use, but two of them noted that such techniques would be allowed under draft legislative provisions

under discussion at the time of the review. Moreover, in three countries, the use of special investigative techniques is only authorized with respect to specific criminal offences, which do not include corruption-related offences. The most commonly used methods include controlled deliveries; interception of communications, including the use of data surveillance devices such as keylogging devices or other computer-based surveillance; listening, optical surveillance and tracking devices; and undercover operations. The use of such methods can normally only be authorized by a court order.

*Examples of implementation*

The law enforcement authorities of one State party operate an undercover policing programme with a team of full- and part-time covert personnel that provides high standards of evidence and intelligence collection. This is carried out across a range of investigative tasks and crime types, including high-tech crime, economic crime, money-laundering, illicit drugs, counter-terrorism, smuggling of persons and corruption. The programme operates both nationally and internationally, and operations are conducted in other countries with the country's consent and in keeping with its laws and regulations (and vice versa). The police force in the State party concerned is part of the International Working Group on Undercover Operations, which has a current membership of over 25 law enforcement agencies working to forge and strengthen international covert capacity and build cooperation between the respective agencies.

Another State party recently introduced a new special investigative technique — monitoring of Internet activity — which can be initiated upon the request of a foreign country. The technique involves surveillance and participation in open and covered Internet-related activities, as well as activities related to obtaining computer data to identify persons committing a crime. This investigative technique is exclusively intended to facilitate the prevention of and fight against cybercrime, taking into consideration rising worldwide crime trends, including corruption-related activities perpetrated through the Internet.

It should be noted that the use of special investigative techniques has to be carefully assessed in the light of human rights protection and the evidentiary requirements of any subsequent legal proceedings. Therefore, serious consideration should be given to a careful assessment of appropriate and proportionate checks and balances to secure human rights protection.<sup>106</sup> Moreover, consideration should be given to existing restrictions intended to prevent entrapment, which consists of an agent committing or instigating an offence in order to entrap a person who was not predisposed towards carrying out the corrupt act.

International agreements or arrangements, as mentioned in article 50, paragraph 2, aimed at investigating corruption-related offences were reported in more than one third of the States parties. They usually involve counterparts in the same region or members of the same regional organization, for example the Convention implementing the Schengen Agreement, which provides for cross-border

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<sup>106</sup> *Technical Guide to the United Nations Convention against Corruption*, chap. IV, art. 50, sect. II.

surveillance activities, use of controlled deliveries and covert investigations. Among the States parties that have not concluded agreements of this kind, one reported that it would be possible to use special investigative techniques if requested by States parties with which it had concluded a general treaty on mutual legal assistance.

Finally, article 50, paragraph 3, of the Convention requires countries that have not acceded to any international agreement or arrangement on the use of special investigative techniques to have at least the ability to cooperate with other countries on a case-by-case basis. This relates above all to the use of controlled delivery, the establishment of which is mandatory pursuant to article 50, paragraph 1, where this is not contrary to the basic principles of the legal system of the State concerned.<sup>107</sup> The information provided suggests that special investigative techniques can be used at the international level, even in the absence of relevant international agreements and on a case-by-case basis. Almost half of the States parties have the ability to resort to such techniques, although few practical examples were provided, and three of those States parties stated that they would only use them on the condition of reciprocity.

### *Effectiveness*

Despite their usefulness, special investigative techniques do not appear to be particularly widely used with regard to corruption offences, especially at the international level. In terms of the difficulties States parties face in fully implementing the provision in question, one reported legal limitations (e.g. the prohibition of wiretapping in corruption cases), competing priorities, lack of inter-agency coordination and law enforcement procedures that inhibit the fast execution of measures involving such techniques. Many more referred to the lack of qualified staff to handle complex surveillance technology and the interception of communications, limited equipment and resources for gathering electronic evidence in corruption cases, and limited awareness of state-of-the-art special investigative techniques.

## **Conclusion**

The present study has identified an evolving process of legislative change in the anti-corruption legal frameworks of the majority of States parties over recent years, which has led to notable advances in the direction envisaged by article 1 of the Convention, at least with regard to the criminalization of corruption, law enforcement and international cooperation. As observed during the implementation reviews, combating corruption is ranked among the highest governmental priorities in many States parties and substantial resources are devoted to that end. In some countries, statutory amendments and structural changes have been combined to produce tangible results in terms of legislative and regulatory enforcement action, indictments and convictions, even in cases involving high-level corruption, and strong cooperative networks for extradition, mutual legal assistance and transnational law enforcement. In some country review reports, representatives of the private sector and civil society organizations in particular reported that, although

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<sup>107</sup> *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, para. 650.

the prosecution of corruption offences in the countries involved had increased in the last few years, further efforts could be made to ensure the consistency and effectiveness of implementation. In this context, the Convention has already played a significant role in triggering reform efforts and continues to serve as a fundamental basis for the establishment of effective anti-corruption regimes.

It is worth noting that the Implementation Review Mechanism and the work of the Implementation Review Group appear to have had a positive effect on transforming the global landscape in the fight against corruption. On the one hand, they have created a renewed momentum for States to ratify or accede to the Convention; on the other hand, they have proved beneficial for efforts to further the implementation of the Convention at the national level, setting in motion or facilitating broad inter-agency consultations about the necessary legislative and institutional reforms, either prior to the country reviews or in response to the outcomes of the reviews. There is also evidence that the extensive exchange of ideas and sharing of information among governmental experts in the course of the reviews has contributed to desensitizing and depoliticizing the issue of corruption,<sup>108</sup> as well as to dispelling some doubts about how to deal with a number of issues pertaining to the substantive requirements of the Convention.

Nonetheless, substantial challenges remain. These range from problems of the most rudimentary nature, such as obvious errors in the translations of the Convention into non-official United Nations languages and practical impediments owing to lack of experience, resources and training, to complicated technical issues regarding the formulation of criminalization provisions or the incorporation of particular elements into complex procedural structures. Gaps and deviations were more obvious with regard to the implementation of chapter III of the Convention (Criminalization and law enforcement), given that the Convention requires a particularly wide and multifaceted range of measures on the part of States parties in those areas. Although problems were detected in varying degrees in respect of all relevant provisions, the most important challenges identified are set out below.

With regard to criminalization, the most notable outstanding issues concern the inadequate execution of measures which are mandatory according to the Convention. More specifically, these include limitations in the scope of coverage of the term “public official”, especially in respect of members of national parliamentary assemblies; gaps in the establishment of bribery of national public officials as an offence (article 15); active bribery of foreign public officials and officials of public international organizations not being established as an offence and the apparent ineffectiveness of existing legislation (article 16, paragraph 1); inadequate practical capabilities of competent authorities with regard to the enforcement of provisions on the laundering of proceeds of crime (article 23); numerous national limitations regarding the criminalization of obstruction of justice (article 25); and the limited application in practice of measures to establish the criminal or non-criminal liability of legal persons (article 26).

Challenges related to the implementation of non-mandatory criminalization provisions are less pronounced but equally widespread. Principal among them are

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<sup>108</sup> Note prepared by the Secretariat entitled “Translating commitment into results: impact of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption” (CAC/COSP/2013/14), para. 3. See also paras. 2, 4, 19 and 24-26 of that document.

the low number of jurisdictions to have established passive bribery of foreign public officials and officials of public international organizations as an offence (article 16, paragraph 2); the technical and methodological difficulties encountered by States parties in incorporating the complex offence of trading in influence into their national legislation (article 18); the lack of criminalization of illicit enrichment (article 20), which is often attributed, however, to constitutional guarantees and legal limitations; and the issues impeding the criminalization of bribery in the private sector (article 21).

With regard to measures to enhance criminal justice, the most significant problems relate to the mandatory requirements to establish adequate and consistent sanctions for corruption-related offences (article 30, paragraph 1); establish and maintain an appropriate balance between any immunities or jurisdictional privileges accorded to public officials, on the one hand, and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with the Convention on the other (article 30, paragraph 2); take measures to enable the identification, tracing, freezing or seizure of assets (article 31, paragraph 2); adopt measures to regulate the administration of frozen, seized or confiscated property (article 31, paragraph 3); and create adequate normative frameworks for the protection of witnesses, experts and victims (article 32).

In respect of the non-mandatory provisions of the Convention, the main challenges are the lack of measures for the disqualification of convicted persons from holding office in an enterprise owned in whole or in part by the State (article 30, paragraph 7 (b)); the absence of a reversal of the burden of proof for demonstrating the lawful origin of property liable to confiscation, in particular because of constitutional guarantees and legal limitations (article 31, paragraph 8); and inadequate normative frameworks on the protection of reporting persons (article 33).

With regard to law enforcement, challenges often arise because of limitations in relation to the efficiency, expertise, capabilities and independence of specialized authorities (article 36); insufficient incentives for cooperation with law enforcement authorities (article 37); and a lack of effective inter-agency coordination and information exchange, especially among agencies with an anti-corruption mandate (article 38).

Some suggestions for overcoming the gaps identified, as indicated during the country review process, are highlighted in the individual parts of this study, together with explanatory observations and interpretative comments, as well as examples of good practices and implementation, where available. In numerous cases, it is recommended that new provisions and laws are adopted and, in the context of ongoing legal reforms, the consolidation of existing legislation and adoption of stand-alone legislative frameworks on corruption or accompanying anti-corruption measures are considered, such as those related to the protection of witnesses and reporting persons. On the other hand, it should be acknowledged that certain reviews, especially when dealing with non-mandatory provisions (e.g. article 20 and article 31, paragraph 8), often accept that States parties have opted not to adopt the relevant provisions after due consideration; such reviews are therefore limited to describing the state of the law without making any suggestions as to how it could or should be amended.<sup>109</sup> It should also be noted that the broad scope of the review

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<sup>109</sup> See also CAC/COSP/IRG/2014/10, para. 4.

process (at least in comparison to other international review mechanisms) and the multitude of issues raised during its course have apparently, for practical reasons, not always allowed for an in-depth evaluation of all the provisions contained in chapter III. Thus, the information provided by individual countries was often lacking, and some provisions, such as those contained in article 30, paragraphs 4, 5 and 10, article 32, paragraph 5, and article 42, as well as the essentially non-criminal provisions of articles 34 and 35, are comparatively underrepresented and do not appear to have attracted the same degree of attention as provisions that are considered to be more important.

Recommendations were frequently made, particularly in the context of articles 32, 36 and 38, concerning resource allocation and the capacity of anti-corruption bodies and institutions, for example, to provide sufficient financial and human resources to ensure their operational independence and efficiency and enhance law enforcement cooperation and inter-agency coordination.<sup>110</sup> Another cross-cutting problem regarding the implementation of chapter III appears to be the lack, in many countries, of adequate statistical data or case law typologies relating to the investigation and prosecution of corruption offences, including the sentences imposed and the assets forfeited or confiscated. Although some data can be made available by individual authorities or for individual offences, the methodology used and the type of data collected is not consistent across institutions, the information available is not disaggregated by type of offence and no central mechanisms exist through which such data can be accessed. As emphasized in several reviews, concrete information on enforcement practices is important for assessing the effectiveness of existing measures, coordinating anti-corruption institutions at the operational level, designing ad hoc crime prevention and criminal justice strategies and taking concerted action to further the goals of the Convention. Therefore, States parties should seek to promote the consolidation, accessibility and scientific analysis of statistical data (e.g. through the direct entry by courts and law enforcement authorities of figures on criminal cases into an electronic database maintained by the statistics department of the ministry of justice), which will enable greater focus on practical issues of enforcement and better assessment of implementation.

Finally, States parties that have not already done so should consider developing a system to make case judgements available to the public in a timely manner, because this would improve understanding of why anti-corruption proceedings have succeeded or failed. They should also establish a body of jurisprudence which the judiciary and legal practitioners can draw upon in future corruption cases. This will improve prosecutorial outcomes and increase consistency in the judicial handling of such matters. It will also provide for greater transparency in the judicial process, which can have a positive impact on the perceived level of corruption within the judiciary and law enforcement bodies.<sup>111</sup> Furthermore, States parties may wish to follow the example of some countries and initiate consultative processes that include a holistic examination of how anti-corruption systems can become more effective, in order to develop a comprehensive national anti-corruption action plan.

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<sup>110</sup> Ibid., paras. 14 and 15.

<sup>111</sup> For the general issue of public access to judgements and other court-related information, see UNODC, *Resource Guide on Strengthening Judicial Integrity and Capacity* (Vienna, 2011), chap. V, sect. 3.

Such an action plan could include as one of its core elements the identification of ways and means to address delays in investigations and judicial proceedings that may frustrate efforts to curb corruption-related offences efficiently.

As regards chapter IV of the Convention, a somewhat different picture emerges. Given its more compact and focused nature, as well as the self-executing character of many of its relevant provisions, which the majority of States are able to apply directly, this chapter appears to be implemented to a more advanced degree, at least from a theoretical point of view. Many reviews noted robust and well-articulated legal frameworks on international cooperation, a notable array of bilateral and multilateral treaties on extradition and mutual legal assistance and wide networks aimed at facilitating inter-State law enforcement action to combat corruption-related offences. The available data suggest that the majority of States parties do not need a treaty basis for extradition or mutual legal assistance, even if in practice most countries make frequent use of bilateral or regional treaties. Equally, most States parties confirmed the possibility of relying on the Convention itself as the legal basis for the extradition of corruption offenders and the vast majority did the same with respect to mutual legal assistance. More importantly, article 46 has been invoked and has served as the legal basis for providing assistance on numerous occasions, even if progress with regard to article 44 is considerably slower. For law enforcement cooperation, States parties rely primarily on institutional agreements, treaties or informal ad hoc arrangements and, in most cases, confirmed that they could use the Convention as the basis for cooperation in respect of corruption-related offences. Most States parties also have the necessary legislative framework to carry out transfers of sentenced persons, conduct joint investigations or use special investigative techniques under certain conditions. It is only with respect to the non-mandatory provision of article 47 that the available legal instruments appear to be largely insufficient.

Nevertheless, in a number of reviews, it was noted that there was a significant gap in knowledge with regard to the practical modalities of international cooperation, and scarce resources were dedicated to that end. Additionally, difficulties arise owing to the lack of open and efficient communication between requesting and requested States, the poor quality of translations, delays in receiving responses and even the total lack of response by some national authorities. In view of this, the most significant challenges — other than the standard obligation of each State party to ensure that its laws and treaties are broad enough to fulfil the requirements of the Convention — appear to be of an operational nature and concern the adoption of measures to give practical effect to existing legal instruments.

To this end, the matter of data collection surfaces in many reviews as an important factor in achieving the goals of the Convention. States parties should systematize the collection, processing and circulation of statistics or, in the absence thereof, use case examples (e.g. indicating the length between the receipt and execution of requests for extradition and mutual legal assistance or the reasons for postponement or refusal) for the purpose of assessing the effectiveness of extradition, mutual legal assistance and cross-border law enforcement proceedings. Moreover, it is recommended that States parties should consider the allocation of additional resources and training to strengthen the efficiency and capacity of international cooperation mechanisms and improve coordination among the different institutions active in this field. In order to ensure the successful execution of high volumes of

requests for mutual legal assistance, operations may have to be carried out not only by regular law enforcement authorities, but also through the use of agencies specialized in particularly complex and serious offences, including corruption and money-laundering. The effective use of tailor-made organizational structures for this purpose has been recognized as a good practice.

Finally, recommendations were frequently made on simplifying international cooperation procedures, particularly in the area of extradition (e.g. through the direct transmission of requests between central authorities or the introduction of lower evidentiary standards), as well as on promoting a culture of open dialogue between the authorities of the requesting and requested States, both before an official request is submitted and during the course of its execution. In this respect, it would be useful for States parties to consider referring to more detailed practice manuals on international cooperation, such as the *Manual on Mutual Legal Assistance and Extradition*, the *Manual on International Cooperation for Purposes of Confiscation of Proceeds of Crime* or the guidance issued by other regional and international organizations.

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