



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

Distr.: General
12 March 2013

Original: English

Implementation Review Group

Fourth session

Vienna, 27-31 May 2013

Item 2 of the provisional agenda*

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

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

Report prepared by the Secretariat

Summary

The present report contains supplemental information, organized by region, to the thematic reports on the implementation of chapter III (Criminalization and law enforcement) and IV (International cooperation) of the United Nations Convention against Corruption (CAC/COSP/IRG/2013/6-9).

* CAC/COSP/IRG/2013/1.



I. Introduction, scope and structure of the report

1. In its resolution 3/1, the Conference of the States Parties to the United Nations Convention against Corruption adopted the terms of reference of the Review Mechanism (contained in the annex to that resolution), as well as the draft guidelines for governmental experts and the secretariat in the conduct of country reviews and the draft blueprint for country review reports (contained in the appendix to the annex to resolution 3/1), which were finalized by the Implementation Review Group at its first session, held in Vienna from 28 June to 2 July 2010.
2. In accordance with paragraphs 35 and 44 of the terms of reference of the Review Mechanism, thematic implementation reports have been prepared in order to compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the country review reports, organized by theme, for submission to the Implementation Review Group, to serve as the basis for its analytical work.
3. The present report contains supplemental information, organized by region, to the thematic reports on the implementation of chapter III (Criminalization and law enforcement) and IV (International cooperation) the United Nations Convention against Corruption, contained in documents CAC/COSP/IRG/2013/6-9, specifically on the implementation of selected provisions of Chapter III on criminalization and law enforcement.
4. This regional report is based on information included in the review reports of 34 States parties under review in the first and second years of the first cycle of the Review Mechanism whose review reports had been completed, or were close to completion, at the time of drafting.¹

II. Implementation of select provisions of chapter III (Criminalization and law enforcement) by region

5. Two topics were initially selected from the thematic implementation report for further analysis on a regional basis: immunities and jurisdictional privileges of public officials (article 30, paragraph 2 of the Convention) and illicit enrichment (article 20 of the Convention). The topics covered are ones where regional nuances, good practices and challenges in implementation were prevalent and where sufficient data was available from the country review reports to analyse regional trends. Further topics will be included in the regional reports as more reviews are concluded and additional data becomes available. Moreover, the Latin American and Caribbean States will be covered in future regional reports, as only two country review reports from this region had been finalized at the time of drafting.

¹ The present data are based on country reviews as on 4 March 2013.

A. Implementation of paragraph 2 of article 30 (immunities and jurisdictional privileges accorded to public officials for the performance of their functions)

African States

6. In the six African States that were covered in the thematic implementation report, immunities accorded to public officials were relatively clearly defined and limited to certain categories of persons. For example, in one State party the Constitution granted immunity from criminal suit only to the President for acts or omissions during his or her tenure or the performance of the functions of the office. Immunity also continued after the termination from office for acts in the President's personal capacity while holding office, absent a Parliamentary resolution to the contrary. There had been one case where a former President was acquitted under the said law. Furthermore, members of Parliament and judicial officers enjoyed functional immunities for acts in the exercise of their official duties. Similarly, in another State party the Constitution only provided immunity to the President, who was immune from proceedings in any court while holding office. In two jurisdictions, the absence of immunities was noted: in one case due to recent constitutional amendments whereby parliamentarians and magistrates no longer enjoyed immunity and were criminally responsible before the courts for offences or misdemeanours committed during the exercise of their duties; and in another case where there was no immunity for any public official, including the Head of State and any minister or government employee, who could all be investigated and criminally prosecuted. In two countries, limited protections were available for prosecutors and law enforcement officials, both of whom were bound by their respective codes of conduct.

7. Regarding procedures for the suspension or lifting of immunities, only two States parties in the region had relevant mechanisms in place. In one country, members of Parliament were granted functional immunity, which could be lifted where there was concrete and sufficient evidence pointing to corruption-related offences. While immunities had been lifted in several cases of non-corruption related offences, in practice Parliament had on numerous occasions decided not to suspend the immunities of its members. In the second country, immunities had to be lifted by Parliament to prosecute parliamentarians and senators, except in cases in flagrante delicto. Prosecutions of the President and members of the Government required a majority of four fifths of the Parliament, while for magistrates the Attorney General could pursue a prosecution upon orders from the Minister of Justice.

Asia-Pacific States

8. The situation in the ten States from Asia and the Pacific was diverse. Public officials either enjoyed specific immunities that could be waived or suspended in certain circumstances or, in two cases, no immunity at all. The majority of countries in this region that afforded immunities to public officials had procedures in place for their suspension. In one State party, for example, the President, judges and high-ranking officials of the prosecutor's office, all Cabinet ministers and members of Parliament enjoyed immunity from investigation for corruption offences. The imposition and suspension of immunities was regulated by the relevant enabling

laws. Parliamentarians, for instance, could not be investigated or held liable unless their immunity was suspended, which could be done for offences committed before the protections attached. Judges could not be investigated without the permission of the President, with the exception of cases in flagrante delicto (where the person was caught in the act or at the crime scene with evidence), while prosecutors could not be investigated without the permission of the Prosecutor-General, who together with his or her deputies could not be investigated without permission of the President, unless caught red-handed. Applications to suspend immunities were frequently delayed and cases with reasonable ground to investigate parliamentarians for corruption matters had been suspended. Similarly in another State party, public employees and parliamentarians were granted some privileges and immunities in the performance of their official duties under various laws. The immunity of such officials could be lifted by a majority vote of the Parliament or if the persons were caught in flagrante delicto in the commission of a felony. Alleged cases of corruption involving public officials could result in the formation of an investigative committee, which could recommend the imposition of criminal proceedings if the act was deemed to constitute a criminal offence. No punitive measures could be taken against members of the judiciary without the permission of the Minister of Justice. In a third State party, the law also conveyed immunities to a number of high-ranking officials and members of Parliament, whose investigation required the written approval of the President in cases other than for corruption offences. In this jurisdiction the anti-corruption commission was not required, however, to seek permission before investigating specific categories of high-ranking officials. In a fourth jurisdiction, there was no general immunity for public officials. However, the Constitution and laws pertaining to the judiciary and parliament afforded immunity from prosecution to members of Parliament, the judiciary and political leaders, respectively. Persons caught in the act of committing an offence lost their immunity automatically, but immunity had to be lifted for an investigation or prosecution to proceed, upon request of the prosecutor's office to the court. Further, immunity from investigation, prosecution or lawsuit could be given to certain public employees, including members of parliament and ministers, to preclude investigative or legal procedures against them absent the agreement of parliament. This also applied to the public prosecution and judges, whose criminal accountability was only permitted upon consent of a high council of judges following a request by the public prosecutor. In several cases the immunity of parliamentarians had been removed and charges were brought against them, as well as against former ministers who were held to account before a trial of ministers. In one State party, pursuant to the criminal procedure code investigations, prosecutions or adjudications of offences by the courts involving judges and public servants for offences committed in the discharge of their official duties were only possible with the previous sanction of the Government, which could determine by whom, in which court and the manner in which such prosecution was to be conducted. In one jurisdiction, the President or members of the Government when charged with a criminal offence punishable by more than two years' imprisonment were suspended from office so that proceedings could be pursued, while such suspension from office was determined by a vote of Parliament if the offence was punishable by less than two years' imprisonment.

9. More extensive constitutional immunities were afforded in one jurisdiction to any person acting on behalf, or under the authority, of the Head of State, who was

not be liable to any proceedings in court in respect of anything done or omitted to have been done in his or her official capacity. Conversely, in two jurisdictions no immunities were granted by reason of position to public and elected officials at any level.

Eastern European States

10. In the nine countries belonging to Eastern Europe, generally the President and members of Parliament and, in most cases, judges enjoyed immunities, which could be waived or lifted by Parliament. For example, in one State party immunity from prosecution was afforded under the Constitution to the President, parliamentarians, members of the Government, the Auditor General and members of the judiciary. The consent of a simple majority of Parliament was required to lift immunities against the first four categories of persons and Supreme Court judges, while criminal charges against ordinary judges required the consent of the President. Similarly, in a second jurisdiction immunity from prosecution was accorded under the Constitution to the President, members of Parliament, the Prime Minister, ministers and judges. Immunities could be lifted with the consent of more than half of all parliamentarians, except in cases in *flagrante delicto*. The President, Prime Minister, ministers and Constitutional judges enjoyed inviolability immunity and could neither be arrested nor charged with criminal or administrative proceedings while in office. The immunity could be lifted by Parliament or the President, except that Presidential immunities could not be lifted. Investigations and prosecutions of ordinary judges required parliamentary or Presidential approval. In a third case, the President, members of Parliament and judges benefited from immunity in criminal proceedings under the Constitution. The procedure for lifting the immunity of parliamentarians and judges was established by parliamentary regulations. For example, investigations and criminal charges against them required the consent of Parliament. A similar process existed in another country, where immunity was granted under the Constitution to the President and members of Parliament, the Prime Minister and Cabinet members, judges of the Constitutional Court and the Supreme Prosecutor. The Parliament decided on immunity rights and could lift immunities to enable criminal prosecutions. Judges further enjoyed functional immunity, which was lifted upon a decision of the judicial council.

11. More limited immunities were in place in other States parties. In one country, the criminal code defined the scope of immunity from arrest of the President, members of Parliament, the Head of the supreme audit office, the public prosecutor and judges. Immunity from arrest did not apply where the person was caught during the commission of a crime, except in the case of the President. The criminal procedure code further granted immunity from prosecution, but not criminal investigation, which could be lifted by Parliament. A slightly different set of protections was afforded in another country, where the Constitution granted immunity from criminal prosecution for the performance of their official functions to the President and Vice-President, members of Parliament (except for serious criminal offences, and then only with the authorization of Parliament unless caught in *flagrante delicto*), members of the Constitutional court (unless immunity was lifted by a two-thirds vote of the Constitutional court), and candidates for parliamentary, Presidential, European Parliament and local elections (except if the person was caught red-handed for serious criminal offences). In a third country, public officials did not enjoy immunity, except for the President and members of

Parliament, whose immunities could be lifted in accordance with the Constitution and law.

12. In many countries in the region, immunities as a practical matter had not reportedly affected the prosecution of corruption cases, as such immunities were waived when requested, though there were notable exceptions. In two cases, broad immunities existed in terms of the type and scope of protections afforded to high-level officials. In one case, the range of officials enjoying protections under the Constitution included the President, members of Parliament, the Prime Minister and judges. However, parliamentarians enjoyed absolute, not functional immunity, which continued to apply after they left office for conduct that occurred while in office. Approval of the Parliament and the judicial council was needed to initiate investigations of members of Parliament and judges upon application of the Prosecutor General. Prosecutors and investigators of the prosecutor's office did not enjoy immunity, although the consent of the President of the Supreme Court was needed to arrest and investigate prosecutorial staff. There had been cases where the immunity of parliamentarians was lifted and several convictions of prosecutors had taken place in recent years. In the second case, the scope of officials afforded immunity included former Presidents and candidates for the President's office, the Chairman of the supreme audit chamber and the ombudsman, in addition to other high level officials (parliamentarians, the Prosecutor General and judges). Special procedures were in place to institute criminal cases against such persons.

Western European and other States

13. Of the seven States parties from the Western European and other States, issues related to immunities and jurisdictional privilege were more prevalent in civil law than in common law countries. Among the three common law countries, none afforded jurisdictional privileges or immunities from criminal investigation and prosecution to public officials, including members of Parliament, for offences under the Convention, although parliamentarians were accorded some form of parliamentary privilege for opinions expressed in Parliament or owing to conduct in the consideration of parliamentary matters. This was also true in one civil law country that did not afford immunities or jurisdictional privileges to public officials. Similarly, in another civil law country, no jurisdictional privileges were in place for public officials in the exercise of their official duties, although Parliament had to authorize the criminal charges and proceedings of its members, deputies and senators.

14. More extensive immunities were prevalent in two civil law countries. In one case, members of Parliament, Government officials and judges elected by Parliament enjoyed limited immunity for offences related to their duties or parliamentary activities. Authorization from the Department of Justice and police was required to open a criminal prosecution against federal employees for offences related to their activity or office, which could only be refused in less serious cases when the legal requirements for criminal prosecution were met. In the second country, ministers were granted jurisdictional privilege and were tried in special courts for offences committed in the course of their tenure. Likewise members of Government, for acts performed in the holding of their office, had to be tried by a special court, though they did not enjoy immunity for acts performed outside the exercise of their office. While parliamentarians did not enjoy immunity, their arrest

or other deprivation of liberty in a criminal or disciplinary matter (with the exception of felonies or cases in flagrante delicto and upon final conviction) required the authorization of Parliament and, for an investigation, the President of Parliament. The President enjoyed absolute immunity for acts carried out in his official capacity and could not, during his term, be the object of any charges, prosecution or investigative measures.

B. Implementation of article 20 on illicit enrichment

African States

15. The majority of countries in the group of African States faced constitutional or practical impediments preventing the criminalization of illicit enrichment. In one case, this was due to constitutional safeguards of the presumption of innocence, while in another case it was not clear whether the Constitution and the fundamental principles of the country's legal system permitted the criminalization of illicit enrichment. One State party that had established the offence cited difficulties in bringing cases due to challenges in pursuing financial profiling, net worth analysis as well as asset tracing and seizure. One jurisdiction that had not criminalized illicit enrichment had established an administrative mechanism for addressing the problem, and legislation was pending in one country to create a relevant offence.

Asia-Pacific States

16. In the majority of the nine Asian and Pacific States there were no constitutional or legal obstacles preventing the criminalization of illicit enrichment. In particular, the offence was established in five States parties in the region, with legislation pending in three others. Constitutional challenges were cited in three countries concerning the presumption of innocence, criminal burden of proof and the feasibility of establishing an illicit enrichment offence in light of constitutional principles. Asset and income disclosure regimes for elected and public officials were not in place in all countries in the region.

Eastern European States

17. Of the nine Eastern European States, only two had criminalized illicit enrichment, although in one case the provision had been recently established and was considered to be vague and imprecise. In a majority of countries in the region, constitutional limitations prevented the establishment of the offence. Specific impediments related to the burden of proof, presumption of innocence and other specificities in the legal system. Asset and income declaration systems and related legal provisions such as money-laundering legislation were used by some States to achieve a similar effect. Legislation to criminalize illicit enrichment was pending in one jurisdiction.

Western European and other States

18. All of the States parties in the group of Western European and other States reported that constitutional limitations regarding the presumption of innocence and a reversal of the burden of proof prevented the criminalization of illicit enrichment. Asset and income declaration systems did not seem to be in widespread use,

although related criminal and non-penal measures were sometimes used. For example, in one State party unexplained wealth could be restrained and confiscated outside the criminal justice system under proceeds of crime laws and, where there were reasonable grounds to suspect that a person's total wealth exceeded the value of his or her lawfully acquired wealth, the court could compel the person to prove in court that his or her wealth was not derived from a criminal offence. In another State party, provisions in the criminal code on concealment and non-justification of resources, as well as the tax code pursued the same objective. The law in one jurisdiction allowed a partial reversal of the burden of proof regarding the lawful origin of goods acquired by a criminal organization. In another jurisdiction, evidence of unexplained wealth could be introduced at trial as circumstantial evidence supporting charges of public corruption or other offences.
