

# **THE UNITED NATIONS CONVENTION AGAINST CORRUPTION: AN OVERVIEW WITH SPECIAL FOCUS ON THE PROVISIONS RELEVANT TO CRIMINAL JUSTICE AUTHORITIES**

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## **I. INTRODUCTION**

The United Nations Convention against Corruption (hereinafter: UNCAC), represents a major step forward in the global fight against corruption, and constitutes the culmination of efforts of the international community to put in place a normative instrument against corruption of a global range.

While the development of the Convention reflects the recognition that efforts to control corruption must go beyond the criminal law, criminal justice measures are still clearly a major element of the package. The Convention requires States parties to undertake appropriate action towards enhancing criminal justice responses to corruption. The relevant requirements relate to a wide range of issues, from criminalization to prosecution, adjudication and sanctions, and from jurisdiction to confiscation powers, all of which are to be considered in the context of both domestic criminal justice action and international cooperation, including asset recovery.

What follows is a brief overview of the provisions of the UNCAC with a focus on those relevant to criminal justice authorities. In this context, the presentation will highlight the content of Chapter III of the Convention on “Criminalization and law enforcement” and will further deal with selected aspects of criminal justice interest from a transnational perspective, as regulated in Chapters IV and V on “International co-operation” and “Asset recovery” respectively.

## **II. THE “DOMESTIC CONTEXT”:**

### **AN OVERVIEW OF THE CRIMINALIZATION PROVISIONS OF THE UNCAC**

Going back to the negotiation process for the elaboration of the United Nations Convention against Transnational Organized Crime (hereinafter: UNTOC),<sup>1</sup> it should be noted that the provision on the establishment of the offence of corruption was the subject of extensive debate. In view of the fact that corruption is one of the methods used by organized criminal groups to facilitate their action, it was deemed appropriate to include two provisions in the Convention targeting corruption only in the public sector.<sup>2</sup> This was done on the understanding that the UNTOC could not cover the issue of corruption in a comprehensive manner and therefore a separate international instrument would be needed for that purpose.

The subsequent negotiations for the elaboration of a broad and effective convention against corruption<sup>3</sup> led to the adoption of the UNCAC by the General Assembly in October 2003. Being the first global legally

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<sup>1</sup> General Assembly resolution 55/25 of 15 November 2000, annex I.

<sup>2</sup> Article 8 of the UNTOC criminalizes specific conducts related to corruption in the public sector, namely the active and passive bribery involving a public official (para.1) or a foreign public official or international civil servant (para. 2), as well as the participation as an accomplice in these offences (para. 3). Article 8 also incorporates a definition of “public official” as the person who provides a public service, as defined in the domestic law and as applied in the criminal law of the State Party in which this person performs that function (para. 4). In addition, States Parties are required to adopt measures designed to promote integrity and to prevent, detect and punish the corruption of public officials (article 9).

<sup>3</sup> Carried out by an open-ended intergovernmental Ad Hoc Committee for the Negotiation of a Convention against Corruption, which was established by the General Assembly in its resolution 55/61 of 4 December 2000, with terms of reference that were taken note of by the Assembly in its resolution 56/260 of 31 January 2002.

binding instrument against corruption, the UNCAC includes a comprehensive set of criminalization provisions, both mandatory and optional, covering a wide range of acts of corruption. In addition, it requires States parties to ensure a minimum level of deterrence through specific provisions on the prosecution, adjudication and sanctions in corruption-related cases.

Going beyond the existing regional instruments in the context of the Council of Europe,<sup>4</sup> the European Union,<sup>5</sup> the Organization of American States,<sup>6</sup> the Organization for Economic Cooperation and Development<sup>7</sup> and the African Union,<sup>8</sup> all of which are designed to operate in a more limited environment, the UNCAC intends to serve as a vehicle to facilitate, among others, concerted action against corruption from a criminal law perspective.

States Parties to the UNCAC are, thus, obliged to establish as criminal offences the following conducts:

<sup>4</sup> The Criminal Law Convention on Corruption (1999), already in force since 1 July 2002, aims at the coordinated criminalization among Member States of the Council of Europe of the following corruption-related practices: active and passive bribery of domestic and foreign public officials (arts. 2, 3, and 5); active and passive bribery of national and foreign parliamentarians and of members of international parliamentary assemblies (arts. 4, 6 and 10); active and passive bribery of officials of international organizations (art. 10); active and passive bribery of judges and officials of international courts (art. 11); active and passive trading in influence (art. 12); money laundering of proceeds from corruption offences (art. 13); and account offences connected with corruption offences (art. 14). In addition, following the precedent of the European Union Joint Action of 22 December 1998, adopted by the Council on the basis of article K.3 of the Treaty on the European Union, it specifically targets corruption in the private sector by criminalizing active and passive bribery in this field (arts. 7 and 8). Furthermore, States Parties are obliged to establish as criminal offences aiding or abetting the commission of any of the criminal offences laid down in the Convention (art. 15). The Additional Protocol to the Convention, opened for signature on 15 May 2003, extends the criminalization obligation to active and passive bribery of domestic and foreign arbitrators (arts. 2-4), as well as to active and passive bribery of domestic and foreign jurors (arts. 5-6).

<sup>5</sup> The Convention drawn up on the basis of Article K.3 of the Treaty on the European Union on the protection of the European Communities' financial interests, adopted by the European Union Council on 26 July 1995, provides for the criminalization of fraud affecting the financial interests of the European Communities (art. 1). The First Protocol to this Convention, adopted by the Council on 27 September 1996, criminalizes the passive and active corruption of a Community official or national official that damages or is likely to damage the financial interests of the European Communities (arts. 2 and 3), while the Second Protocol, adopted by the Council on 19 June 1997, criminalizes money-laundering (art. 2).

The Convention drawn up on the basis of Article K.3 of the Treaty on the European Union on the fight against corruption involving officials of Member States of the European Union, adopted by the Council on 26 May 1997, requires Member States to criminalize any kind of passive and active corruption of a Community official or a national official (arts. 2 and 3) and not only that related to the financial interests of the European Communities.

<sup>6</sup> The Inter-American Convention against Corruption, already in force since 6.3.1997, requires States Parties to criminalize the active and passive bribery of a government official or a person who performs public functions; any act or omission in the discharge of duties by a government official or a person who performs public functions for the purpose of illicitly obtaining benefits for himself (herself) or for a third party; the fraudulent use or concealment of property derived from any of these acts; and the participation as a principal, co-principal, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy of these acts (arts. VI and VII). In addition, subject to its Constitution and the fundamental principles of its legal system, each State Party is required to criminalize transnational bribery (art. VIII) and illicit enrichment (art. IX). See also *Manfroni*, "The Inter-American Convention against Corruption. Annotated with Commentary", Lexington Books, Oxford 2003, pp. 37-73.

<sup>7</sup> The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, already in force since 15 February 1999, requires States Parties to establish as a criminal offence the active bribery of a foreign public official so that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business (art. 1 para. 1). Measures should further be taken at the national level for criminalizing the complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official, as well as the attempt and conspiracy to bribe a foreign public official to the same extent as attempt and conspiracy to bribe a domestic public official (art. 1 para. 2). The Convention also requires that each Party that has made bribery of its own public official a predicate offence for the purpose of the application of its money-laundering legislation shall do so on the same terms for the bribery of a foreign public official (art. 7).

<sup>8</sup> The African Union Convention on Preventing and Combating Corruption, adopted in 2003, requires the criminalization of the active and passive bribery of a public official; any act or omission by a public official in the discharge of his (her) duties for the purpose of illicitly obtaining benefits for himself (herself) or for a third party; the diversion by a public official of property entrusted to him (her) by virtue of his (her) position; the active and passive bribery in the private sector; the trading in influence; the use or concealment of proceeds derived from corruption-related offences; and the participation in any manner in the commission or attempted commission of, or in any collaboration or conspiracy to commit, corruption-related offences (arts. 4 and 5 para. 1). States Parties are also required to establish as criminal offences the laundering of the proceeds of corruption (art. 6) and, subject to the provisions of their domestic law, the illicit enrichment (art. 8).

Similar, more or less, provisions are included in the Southern African Development Community (SADC) Protocol, adopted in 2001, which was the first sub-regional anti-corruption instrument in Africa, criminalizing, inter alia, the acts of corruption relating to an official of a foreign State (art. 6).

- Active and passive bribery of national public officials (art. 15);<sup>9</sup>
- Active bribery of foreign public officials and officials of public international organizations (art. 16, para. 1);<sup>10</sup>
- Embezzlement, misappropriation or other diversion by a public official (art. 17);<sup>11</sup>
- Laundering of proceeds of crime (art. 23);<sup>12</sup>
- Obstruction of justice (art. 25);<sup>13</sup> and
- Participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention (art. 27, para. 1).<sup>14</sup>

In addition, States Parties are further required to consider the criminalization of the following conducts:

- Passive bribery of foreign public officials and officials of public international organizations (art. 16, para. 2);<sup>15</sup>
- Active and passive trading in influence (art. 18);<sup>16</sup>

<sup>9</sup> In accordance with art. 15, States Parties must establish as criminal offences the following conducts:

(a) Active bribery, defined as the promise, offering or giving to a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. Legislation is required to implement this provision;

(b) Passive bribery, defined as the solicitation or acceptance by a public official of an undue advantage, in order to act or refrain from acting in matters relevant to official duties. Legislation is required to implement this provision.

<sup>10</sup> According to art. 16, para. 1, States Parties must establish as a criminal offence the promise, offering or giving of an undue advantage to a foreign public official or official of an international organization, in order:

(a) To obtain or retain business or other undue advantage in international business;

(b) That the official take action or refrain from acting in a manner that breaches an official duty.

<sup>11</sup> In accordance with art. 17, States Parties are required to establish as a criminal offence the embezzlement, misappropriation or diversion of property, funds, securities or any other item of value entrusted to a public official in his or her official capacity, for the official's benefit or the benefit of others.

<sup>12</sup> In line with art. 23, States Parties must establish the following offences as crimes:

(a) Conversion or transfer of proceeds of crime (para. 1 (a) (i));

(b) Concealment or disguise of the nature, source, location, disposition, movement or ownership of proceeds of crime (para. 1 (a) (ii)).

Subject to the basic concepts of their legal system, States must also criminalize:

(a) Acquisition, possession or use of proceeds of crime (para. 1 (b) (i));

(b) Participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences mandated by article 23 (para. 1 (b) (ii)).

Under art. 23, States Parties must also apply these offences to proceeds generated by a wide range of predicate offences (para. 2 (a)-(c)).

<sup>13</sup> In accordance with art. 25, States parties must establish the following two criminal offences:

(a) Use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage either to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to offences covered by the Convention (art. 25, subpara. (a));

(b) Use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to offences covered by the Convention (art. 25, subpara. (b)).

<sup>14</sup> Art. 27, para. 1, requires that States Parties establish as a criminal offence, in accordance with their domestic law, the participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention. An interpretative note indicates that the formulation of paragraph 1 of article 27 was intended to capture different degrees of participation, but was not intended to create an obligation for States parties to include all of those degrees in their domestic legislation (A/58/422/Add.1, para. 33).

<sup>15</sup> Art. 16, para. 2, requires that States Parties consider establishing as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

<sup>16</sup> Under art. 18, States Parties must consider establishing as criminal offences:

(a) Promising, offering, or giving a public official an undue advantage in exchange for that person abusing his or her influence with an administration, public authority or State authority in order to gain an advantage for the instigator;

(b) Solicitation or acceptance by a public official, of an undue advantage in exchange for that official abusing his or her influence in order to obtain an undue advantage from an administration, public authority, or State authority.

- Abuse of functions (art. 19);<sup>17</sup>
- Illicit enrichment (art. 20);<sup>18</sup>
- Active and passive bribery in the private sector (art. 21);<sup>19</sup>
- Embezzlement of property in the private sector (art. 22);<sup>20</sup>
- Concealment (art. 24);<sup>21</sup> and
- Any attempt to commit, or preparation for, an offence established in accordance with the Convention (art. 27, paras. 2 and 3).

The inclusion of optional criminalization provisions was deemed necessary because of constitutional impediments or other fundamental legal principles in some countries which prevent them from establishing the relevant criminal offences in their domestic law.<sup>22</sup>

Several articles in the “criminalization part” of the UNCAC contain safeguard clauses which operate as filters regarding the obligations of States parties in case of conflicting constitutional or fundamental rules, by providing, for example, that States must adopt certain measures “subject to [their] constitution and the fundamental principles of [their] legal system” (art. 20), or “subject to the basic concepts of [their] legal system” (art. 23, para. 1(b)).

<sup>17</sup> In accordance with art. 19, States Parties must consider establishing as a criminal offence the abuse of function or position, that is the performance of, or failure to perform, an act in violation of the law by a public official in order to obtain an undue advantage.

<sup>18</sup> Pursuant to art. 20, States Parties must consider establishing as a criminal offence illicit enrichment, that is a significant increase in assets of a public official that cannot reasonably be explained as being the result of his or her lawful income.

<sup>19</sup> In accordance with art. 21, States Parties must consider establishing as a criminal offence:

- (a) Promising, offering, or giving an undue advantage to a person who directs or works for a private sector entity, in order that he or she take action or refrain from acting in a manner that breaches a duty (subpara. (a));
- (b) Soliciting or accepting undue advantage by a person who directs or works for a private sector entity, for him or herself or for another person, in order that he or she take action or refrain from acting in a manner that breaches a duty (subpara. (b)).

<sup>20</sup> Pursuant to art. 22, States Parties must consider establishing as a criminal offence the intentional embezzlement by a person who directs or works in a private sector entity, of property, private funds, or other thing of value entrusted to him or her by virtue of his or her position.

<sup>21</sup> According to art. 24, States Parties must consider establishing as a criminal offence concealment or continued retention of property in other situations besides those set forth in art. 23, where the person knows that the property is the result of any of the offences established in the Convention.

<sup>22</sup> An interesting example is that of illicit enrichment. The obligation for States Parties to consider creating such an offence is subject to their constitution and the fundamental principles of their legal system. This effectively recognizes that the illicit enrichment offence, in which the defendant has to provide a reasonable explanation for the significant increase in his or her assets, may in some jurisdictions be considered as contrary to the right to be presumed innocent until proven guilty under the law. The presumption of innocence is invoked because the crime of illicit enrichment hinges upon presuming that the accumulated wealth is corruptly acquired, unless the contrary is proved.

Therefore it is important for national legislators to take into consideration when drafting relevant legislation potential conflicts with human rights law standards of fair trial and due process rights, which, particularly with regard to the presumption of innocence, may entail the following:

- that it is upon the prosecution to prove the guilt of the accused person (burden of proof);
- that it is the right of the accused not to testify against himself/herself; and
- that the accused has a right of silence.

As far as the burden of proof is concerned, it has been argued, thus raising concerns about potential infringements of the abovementioned fair trial standards, that the prosecution is relieved of the full burden of proof, since it needs not directly adduce evidence of corruption, but shifts the burden of proof to the accused requiring him to refute that the wealth is illicitly acquired.

However, the point has also been clearly made that there is no presumption of guilt and that the burden of proof remains on the prosecution, as it has to demonstrate that the enrichment is beyond one’s lawful income. The prosecution merely suspects that the wealth of the accused was illicitly acquired and places the burden of proof to the accused to adduce the contrary. This may, thus, be viewed as a rebuttable presumption. Once such a case is made, the defendant can then offer a reasonable or credible explanation.

National jurisprudence has provided examples of shifting the burden of proof so as to give way to statutory exceptions and public policy needs. In other cases, arguments were made in favour of striking a fair balance between public and individual interests. In general, there is always a need to comply with the so called “proportionality principle” when judging on the impact of such criminalization measures on human rights standards.

According to art. 65, para. 1, of the UNCAC, “each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention”. The purpose of this provision is to ensure that national legislators act to implement the provisions of the Convention in conformity with the fundamental principles of their legal system.

Implementation may be carried out through new laws or amendments of existing ones. Domestic offences established in accordance with the requirements of the UNCAC, whether based on pre-existing laws or newly established ones, will often correspond to offences under the Convention in name and terms used, but this is not essential. Close conformity is desirable, but is not required, as long as the range of acts covered by the Convention is criminalized.

Pursuant to art. 65 para. 2, of the UNCAC, “each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.”

### III. THE “DOMESTIC CONTEXT”: AN OVERVIEW OF THE LAW ENFORCEMENT PROVISIONS OF THE UNCAC

As in the case of the UNTOC, the UNCAC has included a wide array of law enforcement measures in its Chapter III, destined to support the criminalization provisions and ensure their effectiveness. Such measures include the following:

- Establishment of jurisdiction over offences falling within its scope of application (art. 42);<sup>23</sup>
- Liability of legal persons (art. 26);<sup>24</sup>
- Prosecution, adjudication and sanctions in corruption-related cases (art. 30);<sup>25</sup>

<sup>23</sup> The UNCAC requires that States Parties establish jurisdiction when the offences are committed in their territory or on board aircraft and vessels registered under their laws. States Parties are also required to establish jurisdiction in cases where they cannot extradite a person on grounds of nationality. In these cases, the general principle *aut dedere aut judicare* (extradite or prosecute) would apply (see arts. 42, para. 3, and 44, para.11). In addition, States Parties are invited to consider the establishment of jurisdiction in cases where their nationals are victimized, where the offence is committed by a national or stateless person residing in their territory, where the offence is linked to money-laundering planned to be committed in their territory, or the offence is committed against the State (art. 42, para. 2). Finally, States Parties are required to consult with other interested States in appropriate circumstances in order to avoid, as much as possible, the risk of improper overlapping of exercised jurisdictions (art. 42, para. 5). States Parties may also wish to consider the option of establishing their jurisdiction over offences established in accordance with the Convention against Corruption when extradition is refused for reasons other than nationality (art. 42, para. 4).

<sup>24</sup> Art. 26 requires that States Parties adopt such measures as may be necessary to establish the liability of legal persons for participation in offences covered by the UNCAC. The obligation to provide for the liability of legal entities is mandatory, to the extent that this is consistent with each State’s legal principles. There is no obligation, however, to establish criminal liability in view of the divergent approaches followed in different legal traditions. Civil or administrative forms of liability for legal entities are sufficient to meet the requirement set forth in art. 26. Nevertheless, whatever form it takes, the liability of legal persons shall not affect the criminal liability of the natural persons who have committed the offences. In addition, States Parties have an obligation to provide for effective, proportionate and dissuasive sanctions, which may be criminal on non-criminal and may also include monetary sanctions.

<sup>25</sup> Art. 30 encompasses provisions with regard to the investigation and prosecution of corruption-related offences and the important complex issue of immunities. The article devotes significant attention to sanctions – both criminal sanctions *strictu sensu* and “ancillary” sanctions –, as well as provisions on disciplinary measures and sanctions relating to the gravity of the offence or linked to the nature of the offence, such as disqualification. Finally, the article deals with the rehabilitation of offenders.

Art. 30 requires that:

- States parties provide for sanctions which take into account the “gravity” of that offence (para. 1).
- States parties provide for an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with the Convention (para. 2).
- Decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings (para. 4).
- The gravity of the offences concerned should be taken into account when considering the eventuality of early release or parole of persons convicted of such offences (para. 5).

Besides these mandatory provisions, art. 30 stipulates in a non-mandatory manner that:

- States parties consider establishing procedures through which a public official accused of an offence established in

- Long statute of limitations for offences covered by the Convention (art. 29);<sup>26</sup>
- The freezing, seizure and confiscation of proceeds of crime derived from offences established in accordance with the Convention (art. 31);<sup>27</sup>
- The protection of witnesses, experts and victims (art. 32);<sup>28</sup>
- The protection of reporting persons (art. 33);<sup>29</sup>
- The establishment of independent authorities specialized in combating corruption through law enforcement (art. 36);<sup>30</sup>
- The co-operation with law enforcement authorities (art. 37);<sup>31</sup>

accordance with the Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority (para. 6).

- States parties consider establishing procedures for the disqualification for a period of time determined by domestic law, of persons convicted of offences established in accordance with the Convention from: (a) holding public office; and (b) holding office in an enterprise owned in whole or in part by the State (para. 7).
- States parties endeavour to promote the reintegration into society of persons convicted for offences established pursuant to the Convention (para. 10).

<sup>26</sup> Art. 29 lays down the obligation of States Parties to establish, where appropriate, under their domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with the Convention, as well as to establish a longer period or provide for the suspension of the statute of limitations in cases where the alleged offender has evaded the administration of justice.

<sup>27</sup> Article 31 deals with confiscation — the permanent deprivation of property by order of a court or other competent authority, as defined by art. 2(g) of the Convention — as the most important legal tool to deprive offenders of their ill-gotten gains. The regime promoted by the Convention revolves around the concept of the confiscation of “*proceeds of crime*”, defined by art. 2(e) of the Convention as “*any property derived from or obtained, directly or indirectly, through the commission of an offence.*”

Art. 31 also establishes the minimum scope of the confiscation of the proceeds of crime in paras. 4, 5 and 6. As a complementary measure, para. 8 recommends that States Parties consider reversing the burden of proof in order to facilitate the determination of the origin of such proceeds, a concept already applied in several jurisdictions which needs, however, to be distinguished from a reversal of the burden of proof regarding the elements of the offence which is directly linked with the presumption of innocence.

Art. 31 further requires specific measures for two other important elements of the confiscation regime: international cooperation (para. 7) and the protection of third-party rights (para. 9).

<sup>28</sup> Art. 32 includes both mandatory and non-mandatory provisions. As a mandatory provision, art. 32, para. 1, requires that each State Party must take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with the Convention and, as appropriate, for their relatives and other persons close to them. Paragraph 2 specifies certain measures that States Parties may envisage in order to provide for the necessary protection of witnesses and experts as required by para.1. While para. 2(a) includes a provision on procedures for the physical protection against intimidation and retaliation, para. 2 (b) focuses on evidentiary rules ensuring the safety of witnesses and experts with regard to their testimony.

Para. 3 is a non-mandatory provision requiring State Parties to consider implementing cross-border witness protection through relocating victims who may be in danger in other countries. Para. 4 requires States Parties to apply the provisions of art. 32 to victims insofar as they are witnesses. Art. 32, para. 5, requires States Parties to enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders. This provision is relevant in cases in which a victim is not a witness.

<sup>29</sup> Art. 33 is a non-mandatory provision. However, States Parties may wish to keep in mind that the provision complements the article dealing with the protection of witnesses and experts. Art. 33 is intended to cover those individuals who may possess information which is not of such detail to constitute evidence in the legal sense of the word. Such information is likely to be available at a rather early stage of a case and is also likely to constitute an indication of wrongdoing. In corruption cases, because of their complexity, such indications have proved to be useful to alert competent authorities and permit them to make key decisions about whether to launch an investigation. The UNCAC uses the term “reporting persons”. This was deemed to be sufficient to reflect the essence of the intended meaning; while making clear that there is a distinction between the persons referred to with this term and witnesses. It was also deemed preferable to the term “whistle-blowers” which is a colloquialism that cannot be accurately and precisely translated into many languages.

<sup>30</sup> Art. 36 mandates States Parties to have in place a body or bodies or persons specialized in combating corruption through law enforcement, performing investigative and possibly prosecutorial functions.

<sup>31</sup> As a mandatory provision, art. 37 obliges States Parties to take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with the Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering the proceeds. Moreover, art. 37 obliges States Parties to protect such persons, *mutatis mutandis*, as provided for in art. 32, para. 4.

- The co-operation between national authorities (art. 38);<sup>32</sup>
- The co-operation between national authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of corruption-related offences (art. 39);<sup>33</sup>
- The curtailment of bank secrecy in the case of domestic criminal investigations of relevant offences (art. 40).<sup>34</sup>

#### IV. THE “TRANSNATIONAL ELEMENT”:

##### A SELECTED OVERVIEW OF UNCAC PROVISIONS ON INTERNATIONAL CO-OPERATION MEASURES AIMED AT ENHANCING CRIMINAL JUSTICE RESPONSES TO CORRUPTION

Corruption is not any more an issue confined within national boundaries, but a transnational phenomenon that affects different jurisdictions, thus rendering international co-operation to combat it essential.

The UNCAC incorporates detailed and extensive provisions on international co-operation, covering all its forms, namely extradition (art. 44), mutual legal assistance (art. 46), transfer of sentenced persons (art. 45), transfer of criminal proceedings (art. 47), law enforcement co-operation (art. 48), joint investigations (art. 49) and co-operation for using special investigative techniques (art. 50). These provisions are generally based on the precedent of the UNTOC, sometimes going beyond it,<sup>35</sup> and provide a much more comprehensive legal framework on relevant matters than that of the existing regional instrument.

What follows is a selected reference to key issues of certain international co-operation measures prescribed in the UNCAC and aimed at enhancing criminal justice responses to corruption.

##### A. Extradition

The UNCAC attempts to set a basic minimum standard for extradition and requires States Parties that make extradition conditional on the existence of a treaty to indicate whether the Convention is to be used as a legal basis for extradition matters and, if not, to conclude treaties in order to implement article 44 (art. 44, para. 6(b)), as well as bilateral and multilateral agreements or arrangements to enhance the effectiveness of extradition (art. 44, para. 18). If States Parties do not make extradition conditional on the existence of a treaty, they are required by the Convention to use extradition legislation as legal basis for the surrender of fugitives and recognize the offences falling within the scope of the Convention as extraditable offences between themselves (art. 44, para. 7).

Recent trends and developments in extradition law have focused on relaxing the strict application of certain grounds for refusal of extradition requests. Attempts have been made to ease, for example, difficulties with double criminality by inserting general provisions into treaties, either listing acts and

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<sup>32</sup> Art. 38 requires States Parties to take all necessary measures to encourage co-operation between public authorities or public officials and authorities responsible for investigating and prosecuting criminal offences established in arts. 15, 21 and 23 of the Convention (bribery of national public officials, bribery in the private sector and laundering of the proceeds of crime respectively). This provision is particularly relevant to cases of early notification of potential offences to agencies with the powers and expertise to investigate and prosecute them. Such notification is essential to ensure that perpetrators do not flee the jurisdiction or tamper with evidence and the movement of assets can be prevented or monitored.

<sup>33</sup> Art. 39 complements art. 38 in that it encourages co-operation between public authorities and private sector entities. Many corruption cases are complex and covert, and will not come to the attention of the relevant authorities or their investigation would be frustrated without the co-operation of private sector entities, especially financial institutions, as well as private citizens. Early notification by relevant private sector bodies or early co-operation with investigative agencies is important to the identification and safeguarding of potential evidence and the initiation of inquiries. In particular, the role of the financial institutions – or those institutions involved in high-value commercial activity - is central to the effective prevention, investigation and prosecution of offences established in accordance with the UNCAC. While financial institutions have obligations to report suspicious activity or transactions, this should not be seen as the limit to co-operation where an institution has suspicions about other activities, such as opening of accounts or other activity.

<sup>34</sup> States Parties are required in art. 40 to remove any obstacle that may arise from protective laws and regulations to domestic criminal investigations relating to offences established under the UNCAC.

<sup>35</sup> It should be noted that one of the innovations of the UNCAC is that it foresees the provision of mutual legal assistance even in the absence of dual criminality, where this is consistent with the basic concepts of the domestic legal systems and such assistance involves non-coercive measures (art. 46, para. 9(b)).

requiring only that they be punished as crimes or offences by the laws of both States, or simply allowing extradition for any conduct criminalized and subject to a certain level of punishment in each State.<sup>36</sup> The UNCAC also allows for the lifting of the double criminality requirement by stipulating that a State Party whose law so permits may grant the extradition of a person for any of the offences covered by the Convention which are not punishable under its own domestic legislation (see art. 44, para. 2).<sup>37</sup>

The reluctance to extradite their own nationals also appears to be lessening in many States. The UNCAC includes a provision that reflects this development: In cases where the requested State party refuses to extradite a fugitive solely on the grounds that the fugitive is its own national, the State Party has an obligation to bring the person to trial (art. 44, para. 11). This is an illustration of the principle of *aut dedere aut judicare* (*extradite or prosecute*) and further requires the establishment of the appropriate jurisdictional basis (art. 42, para. 3). Article 44, para. 12, further enables the temporary surrender of the fugitive on the condition that he or she will be returned to the requested State Party for the purpose of serving the sentence imposed. Where extradition is requested for the purpose of enforcing a sentence, the requested State Party may also enforce the sentence that has been imposed in accordance with the requirements of its domestic law (art. 44, para. 13).

Moreover, recent developments suggest that attempts are being made to restrict the scope of the political offence exception or even abolish it. The UNCAC excludes the political offence exception in cases where the Convention is used as legal basis for extradition (art. 44, para. 4).

## B. Mutual Legal Assistance

The increasingly international mobility of offenders and the use of advanced technology and international banking for the commission of offences make it more necessary than ever for law enforcement and judicial authorities to collaborate and assist each other in an effective manner in investigations, prosecutions and judicial proceedings related to such offences.

In order to achieve that goal, States have enacted laws to enable them to provide assistance to foreign jurisdiction and increasingly have resorted to treaties or agreements on mutual legal assistance in criminal

<sup>36</sup> For comparative purposes, see the relevant developments in the European Union with the adoption of the Framework Decision on the European Arrest Warrant and the surrender procedures between EU Member States, which is based on the principle of mutual recognition of judicial decisions as the cornerstone of judicial co-operation in criminal matters within the European Union. The Framework Decision defines “European Arrest Warrant” (EAW) as any judicial decision issued by a Member State with a view to the arrest or surrender of a requested person by another Member State, for the purposes of conducting a criminal prosecution or executing a custodial sentence or a detention order (art. 1, para.1). The EAW may be issued for acts punishable by the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 12 months or, where a sentence has been passed or a detention order has been made, for sentences of at least four months (art. 2 para. 1).

One of the innovations of the EAW process is that the deeply ingrained double criminality principle in traditional extradition law is no longer verified for a list of 32 offences, which, according to art. 2, para. 2, of the Framework Decision, should be punishable in the issuing Member State for a maximum period of at least three years of imprisonment and defined by the law of this Member State. These offences include, *inter alia*, corruption and laundering of the proceeds of crime. For offences which are not included in this list or do not fall within the three year threshold, the double criminality principle still applies (art. 2, para. 4).

<sup>37</sup> Whenever dual criminality is, however, necessary for international co-operation, art. 43, para. 2, of the UNCAC requires that States Parties deem this requirement fulfilled, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both co-operating States, regardless of the legal term used to describe the offence or the category within which such offence is placed. By making it clear that the underlying conduct of the criminal offence neither needs to be defined in the same terms in both States nor does it have to be placed within the same category of offence, the Convention introduces an explanatory clause to reinforce a generic double criminality standard. In doing so, it explicitly minimizes the significance of the particular legislative language used to penalize certain conduct and encourages a more pragmatic focus on whether the underlying factual conduct is punishable by both contracting States, even if under differently named statutory categories. This is an attempt to remove some of the reluctance to international co-operation where the requested State Party does not fully recognize the offence for which the request was submitted. Although some requested States Parties may seek to establish whether they have an equivalent offence in their domestic law to the offence for which international co-operation or other legal assistance is sought (punishable above a certain threshold), the Convention clearly demands that a broad approach to this issue is taken by the requested States Parties.



matters. Such treaties or agreements usually list the kind of assistance to be provided, the requirements that need to be met for affording assistance, the obligations of the co-operation States, the rights of alleged offenders and the procedures to be followed for submitting and executing the relevant requests.

The UNCAC generally seeks ways to facilitate and enhance mutual legal assistance, encouraging States Parties to engage in the conclusion of further agreements or arrangements in order to improve the efficiency of mutual legal assistance. In any case, art. 46, para. 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.

In the absence of an applicable mutual legal assistance treaty, paras. 9-29 of art. 46 shall apply in relation to requests made in accordance with the UNCAC. If a treaty is in force between the States Parties concerned, the rules of the treaty will apply instead, unless the States Parties agree to apply paragraphs 9-29. In any case, States Parties are also encouraged to apply those paragraphs if they facilitate co-operation. In some jurisdictions, this may require legislation to give full effect to the provisions.

From a practical point of view, it is also important for States Parties to ensure the proper execution of a mutual legal assistance request made under art. 46 of the UNCAC. Since the procedural laws of State Parties differ considerably, the requesting State Party may require special procedures (such as notarized affidavits) that are not recognized under the law of the requested State Party. Traditionally, the almost immutable principle has been that the requested State Party will give primacy to its own procedural law. That principle has led to difficulties, in particular when the requesting and the requested States Parties represent different legal traditions.

According to art. 46, para. 17, of the UNCAC, a request should be executed in accordance with the domestic law of the requested State Party. However, the article also provides that, to the extent not contrary to the domestic law of the requested State Party and where possible, the request should be executed in accordance with the procedures specified in the request.

Art. 46, para. 8, specifically provides that States Parties cannot refuse mutual legal assistance on the ground of bank secrecy. It is significant that this paragraph is not included among the paragraphs that only apply in the absence of a mutual legal assistance treaty. Instead, States Parties are obliged to ensure that no such ground for refusal may be invoked under their legal regime.

### **C. Joint Investigations**

Article 49 of the UNCAC encourages, but does not require, States Parties to enter into agreements or arrangements to conduct joint investigations, prosecutions and proceedings in more than one State, where a number of States Parties may have jurisdiction over the offences involved.

Practical experience has shown that joint investigations raise issues related to the legal standing and powers of officials operating in another jurisdiction, the admissibility of evidence in a State Party obtained in that jurisdiction by an official from another State Party, the giving of evidence in court by officials from another jurisdiction, and the sharing of information between State Parties before and during an investigation.

In planning joint investigations, and identifying those issues to be addressed prior to undertaking any work, consideration may need to be given to the following factors:

- the criteria for deciding on a joint investigation, with priority being given to a strong and clearly defined case of serious transnational corruption;<sup>38</sup>
- the criteria for choosing the location of a joint investigation (near the border; near the main suspects, etc.);
- the use of a co-ordination body to steer the investigation if a number of different jurisdictions are involved;

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<sup>38</sup> The challenge, in this context, is to ensure that joint investigations are handled in a proportionate manner and with due respect to the suspect's human rights.

- the designation of a lead investigator to direct and monitor the investigation;
- agreements on the collective aims and outcomes of joint working, the intended contribution of each participating agency, as well as the relationship between each participating agency and other agencies from the same State Party;
- addressing any cultural differences between jurisdictions;
- assessing the pre-conditions of the investigation as the host State Party should be responsible for organizing the infrastructure of the team;
- the liability of officers from a foreign agency who work under the auspices of a joint investigation;
- the level of control exerted by judges or investigators;
- financing and resourcing of joint investigations; and
- identifying the legal rules, regulations and procedures to determine the emerging legal and practical matters.<sup>39</sup>

#### **D. Special Investigative Techniques**

Article 50 of the UNCAC requires States Parties to take measures to allow for the appropriate use of special investigative techniques for the investigation of corruption. It first advocates in paragraph 1 the use of controlled delivery and, where appropriate, electronic or other forms of surveillance and undercover operations on the understanding that such techniques may be an effective weapon in hands of law enforcement authorities to combat sophisticated criminal activities related to corruption. However, the deployment of such techniques must always be done to the extent permitted by the basic principles of domestic legal systems and in accordance with the conditions prescribed by domestic laws. Paragraph 1 also obliges States Parties to take measures allowing for the admissibility in court of evidence derived from such techniques.

Paragraph 2 accords priority to the existence of the appropriate legal framework that authorizes the use of special investigative techniques and therefore encourages States Parties to conclude bilateral or multilateral agreements or arrangements to foster cooperation in this field, with due respect to national sovereignty concerns.

Paragraph 3 provides a pragmatic approach in that it offers the legal basis for the use of special investigative techniques on a case by case basis where relevant agreements or arrangements do not exist.

Paragraph 4 clarifies the methods of controlled delivery that may be applied at the international level and 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 method to be used may depend on the circumstances of the particular case and may also be affected by the national laws on evidence and its admissibility.

In general, the deployment of special investigative techniques requires from the competent investigative authorities to take into serious consideration the legal and policy implications of their use and therefore a careful assessment of the appropriate and proportionate checks and balances to secure human rights protection needs to be pursued.

### **V. THE PROVISIONS OF THE UNCAC ON ASSET RECOVERY**

In what has been recognized as a major breakthrough compared to existing international instruments against corruption, the UNCAC contains a comprehensive chapter (Chapter V) on asset recovery. Beginning with stating that the return of assets pursuant to that chapter is a “fundamental principle” and that States Parties shall afford one another the widest measure of co-operation and assistance in that regard (art. 51), the Convention includes substantive provisions laying down specific measures and mechanisms for co-operation with a view to facilitating the repatriation of assets derived from offences covered by the UNCAC to their country of origin.

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<sup>39</sup> Such matters may include: the pooling, storage and sharing information; confidentiality of the activities, the integrity and admissibility of evidence; disclosure issues (a particular concern in the common law jurisdictions); implications of the use of covert operations; appropriate charges and the issue of retention of traffic data for law enforcement purposes.

Chapter V also provides for mechanisms for direct recovery of property (art. 53) and a comprehensive framework for international co-operation (arts. 54-55), which incorporates, *mutatis mutandis*, the more general mutual legal assistance requirements and sets forth procedures for international co-operation in confiscation matters. These are important powers, as criminals frequently seek to hide proceeds, instrumentalities and evidence of crime in more than one jurisdiction, in order to thwart efforts to locate and seize them.<sup>40 41</sup>

With regard to the return and disposition of assets, Chapter V of the Convention incorporates a series of provisions that favour return to the requesting State party, depending on how closely the assets are linked to it in the first place. Thus, the Convention imposes the obligation for States Parties to adopt such legislative and other measures that would enable their competent authorities, when acting on a request made by another State Party, to return confiscated property, taking into account the rights of bona fide third parties and in accordance with the fundamental principles of their domestic law (art. 57, para. 2). In particular, the Convention requires States Parties that receive a relevant request in the case of embezzlement of public funds or of laundering of embezzled public funds to return the confiscated property to the requesting State on the condition of a final judgement in the latter State (although this condition can be waived) (art. 57, para. 3 (a)). In the case of any other offences covered by the Convention, two additional conditions for the return are recognized alternatively, i.e. that the requesting State reasonably establishes its prior ownership of such confiscated property or that the requested State recognizes damage to the requesting State as a basis for returning the confiscated property (art. 57, para. 3 (b)). In all other cases the requested State shall give priority consideration to returning confiscated property to the requesting State, returning such property to its prior legitimate owners or compensating the victims (art. 57, para. 3 (c)).

## VI. EPILOGUE

The UNCAC, as a powerful manifestation of the collective political will of the international community to put in place a benchmark and a source of aspiration in the fight against corruption, attaches great importance, among others, to the adoption and implementation of measures geared towards rendering criminal justice responses to corruption, both at the domestic and international levels, more efficient.

States parties' law makers, from their side, need to establish an adequate and comprehensive legal

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<sup>40</sup> Art. 55, para. 1, in particular, mandates a State Party to provide assistance "to the greatest extent possible" in accordance with domestic law, when receiving a request from another State Party having jurisdiction over an offence established in accordance with the UNCAC for confiscation of proceeds of crime, property, equipment or other instrumentalities, either by recognizing and enforcing a foreign confiscation order, or by bringing an application for a domestic order before the competent authorities on the basis of information provided by the other State Party.

<sup>41</sup> Under art. 54, para. 1 (c), of the UNCAC, States Parties, in order to provide mutual legal assistance pursuant to art. 55 with respect to property acquired through or involved in the commission of an offence established in accordance with the Convention, must, in accordance with their domestic law, consider taking such measures as may be necessary to allow confiscation of such 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.

While confiscation without a criminal conviction (NCB confiscation) should never be a substitute for criminal prosecution, in many instances, such confiscation may be the only way to recover the proceeds of corruption and to exact some measure of justice. Countries that do not have the ability to confiscate without a conviction are challenged because they lack one of the important tools available to recover stolen assets. NCB confiscation is valuable because the influence of corrupt officials and other practical realities may prevent criminal investigations entirely, or delay them until after the official has died or absconded. Alternatively, the corrupt official may have immunity from prosecution. Because an NCB confiscation regime is not dependent on a criminal conviction, it can proceed regardless of death, flight, or any immunity the corrupt official might enjoy.

Although an increasing number of jurisdictions are adopting legislation which permits confiscation without a conviction, international co-operation in NCB confiscation cases remains quite challenging for a number of reasons. First, it is a growing area of law that is not yet universal; therefore not all jurisdictions have adopted legislation permitting NCB confiscation or enforcement of foreign NCB orders or both. Secondly, even where NCB confiscation exists, the systems vary significantly. Some jurisdictions conduct NCB confiscation as a separate proceeding in civil courts (also known as civil confiscation) with a lower standard of proof than in criminal cases (balance of probabilities); others use NCB confiscation in criminal courts and require the higher criminal standard of proof. Some jurisdictions will only pursue NCB confiscation after criminal proceedings were abandoned or unsuccessful, while others pursue NCB confiscation in proceedings parallel to the related criminal proceedings.

framework to give practical effect to the relevant provisions of the UNCAC. However, the main challenge for States parties is to improve the capacities of criminal justice institutions to effectively combat corruption domestically, co-operate internationally in the investigation, prosecution, and adjudication of corruption-related offences and further enhance asset recovery mechanisms to return the proceeds of crime to the country of origin.

In this regard, UNODC provides, upon request, specialized substantive and technical expertise to competent authorities and officials of Member States with specific emphasis on international co-operation and criminalization. The recent establishment of the Implementation Review Mechanism of the UNCAC provides the opportunity for collecting, systematizing and assessing valuable information on how technical assistance needs in the abovementioned fields can be identified and on possible ways and means to meet those needs in the context of reviewing the implementation of the Convention.