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Legislative guide for the implementation of the United Nations Convention against Corruption

Second revised edition 2012



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**Legislative guide for the
implementation of the
United Nations Convention
against Corruption**

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Foreword to the second revised edition

Aim of the legislative guide

The United Nations Convention against Corruption was adopted by the General Assembly by its resolution 58/4 of 31 October 2003. The objective of the present practical legislative guide is to assist States seeking to ratify and implement the Convention by identifying legislative requirements, issues arising from those requirements and various options available to States as they develop and draft the necessary legislation.

While the guide has been drafted mainly for policymakers and legislators in States preparing for the ratification and implementation of the Convention, it also aims at providing a helpful basis for bilateral technical assistance projects and other initiatives that will be undertaken as part of international efforts to promote the broad ratification and implementation of the Convention.

The guide has been drafted to accommodate different legal traditions and varying levels of institutional development and to provide, where available, implementation options. As the guide is for use primarily by legislative drafters and other authorities in States preparing for the ratification and implementation of the Convention, not every provision is addressed. The major focus is on those provisions which will require legislative change and/or those which will require action prior to or at the time the Convention becomes applicable to the State party concerned.

The guide lays out the basic requirements of the Convention as well as the issues that each State party must address, while furnishing a range of options and examples that national drafters may wish to consider.

Parallel to the need for flexibility, there is a need for consistency and a degree of harmonization at the international level. In this spirit, the guide lists items that are mandatory or optional for States parties and relates each article, provision or chapter to other regional or international instruments and to examples of how States with different legal traditions might address provisions of the Convention. Examples of national laws and regulations were drawn from a study sponsored by the United Nations Development Programme. Given the early stage of implementation efforts in most States, these examples are presented as illustrations of approaches and not necessarily as “best practices”.

The guide is not intended to provide definitive legal interpretation of the articles of the Convention. The content is not authoritative and, in assessing each specific requirement,

the actual language of the provisions should be consulted. Caution should also be used in incorporating provisions from the Convention verbatim into national law, which generally requires higher standards of clarity and specificity so as to enhance implementation, integration with the wider legal system and tradition and enforcement. It is also recommended that drafters check for consistency with other offences and definitions in existing domestic legislation before relying on formulations or terminology used in the Convention.

The first edition of the legislative guide, published in 2006 in the six official languages of the United Nations has proved useful for policymakers, practitioners and experts. One of its main goals was to provide examples of the implementation of many key provisions of the Convention by different countries of different legal traditions. This has been further expanded through the Tools and Resources for Anti-Corruption Knowledge (TRACK), the web-based portal of the United Nations Office on Drugs and Crime, launched on 1 September 2011, which provides up-to-date information on national legislation implementing the Convention. This second revised edition takes into account the development of TRACK and thus avoids reference to national legislation implementing the Convention. The reader is encouraged to visit the TRACK website (www.track.unodc.org/LegalLibrary/Pages/home.aspx) for such information.

The United Nations Office on Drugs and Crime is available to provide assistance in implementing the Convention. The Office can be contacted at the following address: United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (Fax. (+43-1) 26060-5841 or 26060-6711). The text of the Convention and other relevant information can be obtained from the website of the United Nations Office on Drugs and Crime: www.unodc.org/unodc/en/treaties/CAC/index.html.

Aims of the Convention against Corruption

By illegally diverting State funds, corruption undercuts services, such as health, education, public transportation or local policing, that those with few resources are dependent upon. Petty corruption provides additional costs for citizens: not only is service provision inadequate, but “payment” is required for the delivery of even the most basic government activity, such as the issuing of official documentation.

In many States, applicants for driver’s licences, building permits and other routine documents have learned to expect a “surcharge” from civil servants. At a higher level, larger sums are paid for public contracts, marketing rights or to sidestep inspections and red tape. However, the consequences of corruption are more pervasive and profound than these bribes suggest. Corruption causes reduced investment or even disinvestment, with many long-term effects, including social polarization, lack of respect for human rights, undemocratic practices and diversion of funds intended for development and essential services.

The diversion of scarce resources by corrupt parties affects a Government’s ability to provide basic services to its citizens and to encourage sustainable economic, social

and political development. Moreover, it can jeopardize the health and safety of citizens through, for example, poorly designed infrastructure projects and scarce or outdated medical supplies.

Most fundamentally, corruption undermines the prospects for economic investment. Few foreign firms wish to invest in societies where there is an additional level of “taxation”. National and international companies, by offering bribes to secure business, undercut legitimate economic competition, distort economic growth and reinforce inequalities. In many societies, widespread public suspicion that judicial systems are corrupt and that criminal acts are committed by elites in both the private and public spheres undercuts government legitimacy and undermines the rule of law.

Along with the growing reluctance of international investors and donors to allocate funds to States lacking adequate rule of law, transparency and accountability in government administration, corruption has the greatest impact on the most vulnerable part of a country’s population, the poor.

Throughout the world there is a growing tide of awareness that combating corruption is integral to achieving a more effective, fair and efficient government. More and more States see that bribery and cronyism hold back development and are asking the United Nations to help them to gain the tools to curb such practices. Since the causes of corruption are many and varied, preventive, enforcement and prosecutorial measures that work in some States may not work in others.

“Article 1

“Statement of purpose

“The purposes of this Convention are:

“(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

“(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

“(c) To promote integrity, accountability and proper management of public affairs and public property.”

Acknowledgements

The present legislative guide is the product of a broad participatory process. A group of experts from all geographical regions and representing the various systems of law, as well as observers from relevant United Nations entities and other international organizations, developed a first draft. That provisional version of the legislative guide was widely disseminated among Government representatives and experts at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, held in Bangkok from 18 to 25 April 2005, and at the fourteenth session of the Commission on Crime Prevention and Criminal Justice, held in Vienna from 23 to 27 May 2005. Inputs, comments and proposals for amendments received thereafter were given thorough consideration in the drafting of the final version of the guide. Detailed observations and suggestions were provided in particular by the Anti-Corruption Unit of the United Nations Office on Drugs and Crime, by the Council of Europe and by the Organization for Economic Cooperation and Development. The Secretariat acknowledges with profound gratitude the efforts of all those involved in this process.

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Special thanks are due to the United Nations Development Programme (UNDP), more specifically to Pauline Tamesis, Practice Manager, Democratic Governance Group, Bureau for Development Policy, for their support to the development of the legislative guide. It should be noted that examples of national laws and regulations were provided by a study sponsored by UNDP, entitled "Anti-corruption programme comparative study: a report with highlights of key lessons and challenges for UNDP review", from which many of the uniform resource locators were drawn.

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Introduction

A. Structure of the legislative guide for the implementation of the United Nations Convention against Corruption

1. The present guide consists of four main parts, presenting issues related to preventive measures (chapter II of the Convention); criminalization (chapter III); international cooperation (chapter IV); and asset recovery (chapter V).

2. The sequence of chapters and the internal format are presented thematically rather than following the Convention paragraph by paragraph, in order to make the guide easier to use by national drafters and policymakers, who may need to focus on specific issues or questions. The chapters of the guide, nevertheless, do correspond to the chapters of the Convention in order to avoid any confusion. A section providing sources of further information can be found at the end of each substantive chapter. The sections of the guide that cover specific articles of the Convention start by quoting and introducing the relevant article or articles and are all organized along the same structure, as follows:

Summary of main requirements;

Mandatory requirements: obligation to take legislative or other measures;

Optional requirements: obligation to consider;

Optional measures: measures States parties may wish to consider.

3. Particular attention should be paid to the sections giving a summary of the main requirements relevant to each article, which provide information on the essential requirements of the article concerned. Under the other subheadings, information is provided concerning mandatory requirements, which if not already incorporated into domestic legislation will require amending existing or passing new legislation; optional requirements, which involve issues States parties are obliged to take under serious consideration; and measures that are purely optional but which States parties may wish to consider putting in place. It should be noted that the full set of subheadings might not be applicable in all cases, and in such cases only the relevant subheadings are included.

B. Structure of the United Nations Convention against Corruption

General provisions

4. An initial, short section outlines the aim of the Convention, defines terms employed throughout the text, states the scope of application and reiterates the principle of protection of sovereignty of State parties.

Prevention

5. The Convention requires States parties to introduce effective policies aimed at the prevention of corruption. It devotes an entire chapter to this issue, with a variety of measures concerning both the public and the private sector. The measures range from institutional arrangements, such as the establishment of a specific anti-corruption body, to codes of conduct and policies promoting good governance, the rule of law, transparency and accountability. Significantly, the Convention underscores the important role of the wider society, such as non-governmental organizations and community initiatives, by inviting each State party to actively encourage their involvement and general awareness about the problem of corruption.

Criminalization

6. The Convention goes on to require the State parties to introduce criminal and other offences to cover a wide range of acts of corruption, to the extent these are not already defined as such under domestic law. The criminalization of some acts is mandatory under the Convention, which also requires that State parties consider the establishment of additional offences. An innovation of the Convention against Corruption is that it addresses not only basic forms of corruption, such as bribery and the embezzlement of public funds, but also acts carried out in support of corruption, obstruction of justice, trading in influence and the concealment or laundering of the proceeds of corruption. Finally, this part of the Convention also deals with corruption in the private sector.

International cooperation

7. The Convention emphasizes that every aspect of anti-corruption efforts (prevention, investigation, prosecution of offenders, seizure and return of misappropriated assets) necessitates international cooperation. The Convention

requires specific forms of international cooperation, such as mutual legal assistance in the collection and transfer of evidence, extradition, and the tracing, freezing, seizing and confiscating of proceeds of corruption. In contrast to previous treaties, the Convention also provides for mutual legal assistance in the absence of dual criminality, when such assistance does not involve coercive measures. Further, the Convention puts a premium on exploring all possible ways to foster cooperation: “In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties” (art. 43, para. 2).

Asset recovery

8. A most significant innovation and a “fundamental principle of the Convention” (art. 51) is the return of assets. This part of the Convention specifies how cooperation and assistance will be rendered, how proceeds of corruption are to be returned to a requesting State and how the interests of other victims or legitimate owners are to be considered.

9. In short, the Convention:

(a) Defines and standardizes certain terms that are used with different meanings in various States or circles;

(b) Requires States to develop corruption prevention measures involving both the public and private sectors;

(c) Requires States to establish specific offences as crimes and consider doing so for others;

(d) Promotes international cooperation, for example through extradition, mutual legal assistance and joint investigations;

(e) Provides for asset recovery;

(f) Provides for training, research and information-sharing measures;

(g) Contains technical provisions, such as for signature and ratification.

10. As individuals responsible for preparing legislative drafts and other measures examine the priorities and obligations under the Convention, they should bear in mind the guidance presented in the following paragraphs.

11. In establishing their priorities, national legislative drafters and other policymakers should bear in mind that the provisions of the Convention do not all have the same level of obligation. In general, provisions can be grouped into the following three categories:

(a) Mandatory provisions, which consist of obligations to legislate (either absolutely or where specified conditions have been met);

(b) Measures that States parties must consider applying or endeavour to adopt;

(c) Measures that are optional.

12. Whenever the phrase “each State Party shall adopt” is used, the reference is to a mandatory provision. Otherwise, the language used in the guide is “shall consider adopting” or “shall endeavour to”, which means that States are urged to consider adopting a certain measure and to make a genuine effort to see whether it would be compatible with their legal system. For entirely optional provisions, the guide employs the term “may adopt”.

13. Several articles contain safeguard clauses that operate as filters regarding the obligations of States parties in case of conflicting constitutional or fundamental rules, by providing that States must adopt certain measures “subject to [their] constitution and the fundamental principles of [their] legal system” (for example, art. 20), “to the extent not contrary to the domestic law of the requested State Party” (for example art. 46, para. 17), “to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings” (for example, art. 31, para. 8) or “to the extent permitted by the basic principles of its domestic legal system ...” (art. 50, para. 1).

14. The summary of main requirements presented in each section lists both measures that are mandatory and measures that States parties must consider applying or endeavour to apply. In the text that follows, measures that are mandatory are discussed first, followed by a discussion of measures that States parties must consider or endeavour to apply and optional measures.

15. In several articles, the Convention refers to criminalization using the expression “such legislative and other measures as may be necessary”. The reference to “other” measures is not intended to require or permit criminalization without legislation. Such measures are additional to, and presuppose the existence of, legislation.

16. It is recommended that drafters check for consistency with other offences, definitions and legislative uses before relying on formulations or terminology

contained in the Convention. As an international legal text, the Convention uses general formulations and is addressed to national Governments. Drafters should therefore exercise caution if they decide to incorporate parts of the text verbatim and are encouraged in any event to adopt the spirit and meaning of the various articles. In order to assist in that process, a number of interpretative notes discussed by the Ad Hoc Committee for the Negotiation of the Convention against Corruption throughout the process of negotiation of the draft convention will be cited in this guide (see A/58/422/Add.1), providing additional context and insight into the intent and concerns of those who negotiated the Convention.

17. Many examples of national legislation are provided in each section. These are not to be considered as models for drafting legislation, as they have not been systematically reviewed for the purpose of assessing whether they adequately implement the Convention. As such examples are considered, those seeking to implement the Convention also need to pay attention to often significant differences between legal systems and other socio-economic, political, legal and cultural specificities of various jurisdictions.

I. General provisions and obligations applicable throughout the United Nations Convention against Corruption

A. Implementation of the United Nations Convention against Corruption

“Article 65

“Implementation of the Convention

“1. 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.

“2. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.”

“Article 30

“Prosecution, adjudication and sanctions

“9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.”

18. The purpose of article 65, paragraph 1, is to ensure that national legislators act to implement the provisions of the Convention in conformity with the fundamental principles of their legal system.

19. Implementation may be carried out through new laws or amendments of existing ones. Parties to other related conventions¹ may be already in partial compliance at least with respect to certain provisions of the Convention against Corruption. Domestic offences that implement the terms of the Convention, 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, for example to simplify international cooperation, extradition proceedings and asset recovery, but is not required, as long as the range of acts covered by the Convention is criminalized.

20. Article 30, paragraph 9, of the Convention reiterates the principle that the description of the offences is reserved to the domestic law of States parties (see also art. 31, para. 10 and chap. III of the present guide, on criminalization). States may have offences that are different in scope (such as two or more domestic crimes corresponding to one crime covered by the Convention), especially where this reflects pre-existing legislation or case law.²

21. It is emphasized that the mandatory provisions of the Convention serve as a threshold that States must meet for the sake of conformity. Provided that the minimum standards are met, States parties are free to exceed those standards and, in several provisions, are expressly encouraged to do so. In some specific instances, more onerous requirements can be found in other conventions to which States are or wish to become parties.³

22. It is important to note that article 62, paragraph 1, of the Convention against Corruption provides that States parties are required to “take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of corruption on society in general, in particular on sustainable development”.

¹Such as the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development (OECD); the 2003 African Union Convention on Preventing and Combating Corruption; the 2001 Southern African Development Community Protocol against Corruption; the 1996 Inter-American Convention against Corruption of the Organization of American States; the 1999 Criminal Law Convention on Corruption and the 1999 Civil Law Convention on Corruption of the Council of Europe; and the 1998 Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union.

²Article 30, paragraph 9, also states that the Convention against Corruption does not affect a State party’s legal defences. In this respect, the Convention differs from other instruments, such as the OECD Bribery Convention, under which only two defences to the offence of bribing a foreign official are allowed: (a) for small facilitation payments; and (b) where the payment in question was permitted or required by the written law or regulation of the foreign public official’s State (see “Commentaries on the OECD Convention on Combating Bribery”, paras. 7 and 8).

³Some such examples will be mentioned below with respect to the offence of bribing foreign officials.

23. Article 62, paragraph 2, of the Convention mandates that States parties must make concrete efforts to coordinate with each other and with international or regional organizations to increase the capacity of developing countries to prevent and combat corruption and to provide economic and technical assistance to developing countries seeking to implement the Convention.

B. Use of terms

“Article 2

“Use of terms

“For the purposes of this Convention:

“(a) ‘Public official’ shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;

“(b) ‘Foreign public official’ shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise;

“(c) ‘Official of a public international organization’ shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization;

“(d) ‘Property’ shall mean 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;

“(e) ‘Proceeds of crime’ shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

“(f) ‘Freezing’ or ‘seizure’ shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

“(g) ‘Confiscation’, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

“(h) ‘Predicate offence’ shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention;

“(i) ‘Controlled delivery’ shall mean 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.”

24. Article 2 defines several important terms recurring throughout the Convention. National legislation may include broader definitions but should, as a minimum, cover what is required according to the Convention. States parties are not obliged to incorporate into their national legislation the definitions as they stand in the Convention. All of the terms defined in article 2 relate to substantive provisions and legislative or other requirements under the Convention.⁴ They require therefore thorough consideration to ensure that the entire range of persons defined by article 2 as “public officials” is adequately covered under national legislation and measures.

25. For example, the provisions of the Convention regarding “public officials” cover anyone so defined by the domestic law of a State party. In the event that these are not included in domestic definitions, for the purposes of the Convention a “public official” is also anyone “holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority” (art. 2, subpara. (a) (i)) as well as “any other person who performs a public function, including for a public agency or public enterprise, or provides a public

⁴For instance, article 15 requires the criminalization of bribery of public officials.

service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party” (art. 2, subpara. (a) (ii)).⁵

26. However, for the purpose of some measures included in chapter II of the Convention,⁶ “public official” “may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party” (art. 2, subpara. (a)).

27. An interpretative note indicates that, for the purpose of defining “public official”, each State party shall determine who is a member of the categories mentioned in subparagraph (a) (i) of article 2 and how each of those categories is applied (A/58/422/Add.1, para. 4).

28. A number of additional interpretative notes indicate the following:

(a) The word “executive” is understood to encompass the military branch, where appropriate (A/58/422/Add.1, para. 2). Another interpretative note indicates that the term “office” is understood to encompass offices at all levels and subdivisions of government from national to local. In States where subnational governmental units (for example, provincial, municipal and local) of a self-governing nature exist, including States where such bodies are not deemed to form a part of the State, “office” may be understood by the States concerned to encompass those levels also (A/58/422/Add.1, para. 3);

(b) The term “foreign country” includes all levels and subdivisions of government, from national to local (A/58/422/Add.1, para. 5);

(c) The phrase “assets of every kind” is understood to include funds and legal rights to assets (A/58/422/Add.1, para. 6);

(d) The word “temporarily” in article 2, subparagraph (f), is understood to encompass the concept of renewability (A/58/422/Add.1, para. 7).

29. States parties may opt for broader or more inclusive definitions than the minimum required by article 2.

30. It should be emphasized that it is not necessary for States parties to incorporate into their legislation the Convention definitions. Given the existence of multiple regional and other instruments against corruption (as well as those

⁵Parties to the OECD Bribery Convention are required to provide an autonomous definition of “foreign public official” in their laws. This means that the definition must be self-contained in the legislation and must not refer to the definition in the foreign public official’s State.

⁶See, for example, art. 8, paras. 1 and 4-6.

against transnational organized crime and terrorism), States parties are encouraged to take these also into account and to ensure that their national legislation is compatible with them (for more details, see chapters II-V of the present guide, on preventive measures, criminalization, international cooperation and asset recovery).

C. Protection of sovereignty

“Article 4

“Protection of sovereignty

“1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

“2. Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic.”

31. The Convention against Corruption respects and protects the sovereignty of States parties. Article 4 is the primary vehicle for protection of national sovereignty in carrying out the terms of the Convention. Its provisions are self-explanatory.

32. An interpretative note indicates that the principle of non-intervention is to be understood in the light of Article 2 of the Charter of the United Nations (A/58/422/Add.1, para. 10).

33. There are also other provisions that protect national prerogatives and sovereignty set forth elsewhere in the Convention. For example, pursuant to article 30, paragraph 9, nothing in the Convention affects the principle that the domestic law of a State party governs:

(a) The description of offences established in accordance with the Convention;

(b) Applicable defences;

- (c) Legal principles controlling the lawfulness of conduct;
- (d) Prosecution and punishment.

34. Moreover, pursuant to article 30, paragraph 1, it is up to the State party concerned to determine the appropriate sanctions, while considering the gravity of the offence.

35. Finally, article 31, which covers issues of freezing, seizure and confiscation of assets, states: “Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party” (para. 10).

II. Preventive measures

A. Introduction

36. Corruption, similarly to other crime, thrives in contexts that provide opportunities to engage in illicit conduct, widespread motives to take advantage of such opportunities and weak social controls. The prevention of corruption is more effective in environments that minimize opportunities, encourage integrity, allow for transparency, enjoy strong and legitimate normative guidance and integrate the efforts of the public sector, the private sector and civil society together.

37. The provisions in this section of the guide are the first step towards the achievement of all the main objectives of the Convention against Corruption. As stated in its article 1, the purpose of the Convention is to prevent and combat this evil effectively, to enhance international cooperation and technical assistance and to promote integrity, accountability and proper management of public affairs and public property.

38. This chapter of the present guide focuses on preventive measures, standards and procedures. Article 5 lays out the main goals of prevention and the means to be employed towards their attainment, in accordance with the fundamental principles of domestic law. States parties are asked to introduce or maintain a series of coordinated and effective measures and policies against corruption aimed at the participation of civil society, supportive of the rule of law, proper management of public interests, transparency and accountability. Article 5 goes on to underline the significance of prevention (see also art. 1, subpara. (a)); the need for continuous assessments of existing anti-corruption practices; and international collaboration (see also art. 1, subpara. (b)).

39. The articles that follow illustrate how these general principles can be implemented in accordance with the fundamental legal principles of States parties. Because the preventive policies, measures and bodies may be more effective with public reporting and the participation of civil society, articles 5, 6, 10 and 13 are discussed together in one cluster.

40. Another section discusses the provisions of articles 7 to 9, which deal with measures and systems instrumental to the achievement of the specific goal of transparency in the public sector.

41. The chapter then addresses measures regarding the prevention of corruption in the judiciary and prosecution services of each country, as well as preventive measures in the private sector. The chapter concludes with a section on the prevention of money-laundering.

B. Preventive anti-corruption policies and practices

42. Article 5 requires practices rather than legislation. It provides a basis for article 6 and a preamble for chapter II of the Convention.

43. Article 6 is not intended to refer to the establishment of a specific agency at a specific level. What is needed is the capacity to perform the functions enumerated by the article.

“Article 5

“Preventive anti-corruption policies and practices

“1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

“2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.

“3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

“4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.”

“Article 6

“Preventive anti-corruption body or bodies

“1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

“(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;

“(b) Increasing and disseminating knowledge about the prevention of corruption.

“2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

“3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.”

“Article 10

“Public reporting

“Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

“(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

“(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

“(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.”

“Article 13

“Participation of society

“1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

“(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;

“(b) Ensuring that the public has effective access to information;

“(c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;

“(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

“(i) For respect of the rights or reputations of others;

“(ii) For the protection of national security or ordre public or of public health or morals.

“2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.”

Summary of main requirements

44. In accordance with article 5, States parties are required:

(a) To develop and implement or maintain effective anti-corruption policies that encourage the participation of society, reflect the rule of law and promote sound and transparent administration of public affairs (para. 1);

(b) To collaborate with each other and relevant international and regional bodies for the pursuit of the above goals (para. 4).

45. In accordance with article 6, States parties are required:

(a) To have an anti-corruption body or bodies in charge of preventive measures and policies (para. 1);

(b) To grant that body independence to ensure that it can do its job unimpeded by undue influences and provide it with adequate resources and training (para. 2).⁷

46. In accordance with article 10, States parties are required to take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate.

47. In accordance with article 13, States parties are required to take appropriate measures to promote the participation of civil society, non-governmental organizations and community-based organizations in anti-corruption activities and to make efforts to increase public awareness of the threats, causes and consequences of corruption.

Mandatory requirements: obligation to take legislative or other measures

48. Article 5 does not introduce specific legislative requirements, but rather mandates the commitment of States parties to develop and maintain a host of measures and policies preventive of corruption, in accordance with the fundamental principles of their legal system.

49. Under article 5, paragraph 1, the requirement is to develop, implement and maintain effective, coordinated measures that:

⁷See article 60 (Training and technical assistance), paragraph 1, concerning training programmes for personnel responsible for preventing and combating corruption.

(a) Promote the participation of the wider society in anti-corruption activities; and

(b) Reflect the principles of:

- (i) The rule of law;
- (ii) Proper management of public affairs and public property;
- (iii) Integrity;
- (iv) Transparency; and
- (v) Accountability.

50. These general aims are to be pursued through a range of mandatory and optional measures outlined in subsequent articles of the Convention.

51. Article 5, paragraph 4, requires that, in the pursuit of these aims, as well as of general prevention and evaluation of implemented anti-corruption measures, States parties collaborate with each other as well as with relevant international and regional organizations, as appropriate and in accordance with their fundamental principles of law.

52. Article 6 requires the establishment or maintenance of a body or bodies, in accordance with the fundamental principles of each State's legal system, charged with the prevention of corruption by:

(a) Implementing policies and measures mandated by article 5, subparagraph (a);

(b) Where appropriate, overseeing and coordinating the implementation of such policies. This oversight and coordination would be most critical in cases where more than one body has responsibilities relative to the prevention of corruption;

(c) Creating and disseminating knowledge about the prevention of corruption.⁸

53. Article 6, paragraph 2, requires that States endow the body in charge of preventive policies and measures with:

(a) The "independence" to ensure it can do its job unimpeded by "undue influence", in accordance with the fundamental principles of their legal system;

(b) Adequate material resources and specialized staff and the training necessary for them to discharge their responsibilities.

⁸Note also additional obligations, such as to render the general public aware of the existence of such anti-corruption bodies (see para. 64 of the present guide, concerning art. 13, para. 2).

54. The Convention does not mandate the creation or maintenance of more than one body or organization for the above tasks. It recognizes that, given the range of responsibilities and functions, it may be that these are already assigned to different existing agencies.

55. The establishment of an anti-corruption body may require legislation.⁹ The body or bodies referred to in article 6 may be the same as those referred to in article 36, which deals with law enforcement anti-corruption functions (see A/58/422/Add.1, para. 11). That is, these bodies may have the authority to receive allegations of corruption and in some cases may have the authority to investigate corruption-related offences.

56. Several articles of the Convention refer to the institutional framework required for an effective implementation of the Convention. Article 6 requires States parties to establish or maintain an anti-corruption body or bodies entrusted with preventive functions. Article 36 (Specialized authorities) requires States parties to “ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement”. In addition, paragraph 13 of article 46 (Mutual legal assistance) mandates the designation by States parties of a central authority competent to receive requests for mutual legal assistance (see also chap. IV, sect. C, below); and article 58 (Financial intelligence unit) obliges States parties to consider establishing a financial intelligence unit (FIU) responsible for receiving, analysing and disseminating reports of suspicious financial transactions (see also chap V, sect. E, below).¹⁰

57. While the Convention deals with preventive and law enforcement functions and corresponding bodies under different articles (arts. 6 and 36 respectively), States parties may decide to entrust one body with a combination of preventive and law enforcement functions.

⁹See art. 5, para. 3, of the African Union Convention on Preventing and Combating Corruption and art. 4, para. 1 (g) of the Southern African Development Community Protocol against Corruption.

¹⁰Note that States might have other requirements to address under other international instruments or standards. For instance, under article 11 of the OECD Bribery Convention, parties to that Convention are also required to designate an authority for making and receiving requests for extradition. See also recommendation 26 of the Forty Recommendations of the Financial Task Force on Money Laundering regarding the establishment of an FIU, which is to serve “as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination of STR [suspicious transaction reports] and other information regarding potential money-laundering or terrorist financing. The FIU should have access, directly or indirectly, on a timely basis to the financial, administrative and law enforcement information that it requires to properly undertake its functions, including the analysis of STR.” See also the United Nations Convention against Transnational Organized Crime (art. 7, para. 1 (b)).

58. Public confidence and accountability in public administration are instrumental to the prevention of corruption and greater efficiency. So, article 10 requires States parties to take measures to enhance transparency in their public administration relative to its organization, functioning, decision-making processes and/or other aspects, in accordance with the fundamental principles of their law.

59. Measures to respond to this general obligation may include the following:

(a) Introduction of rules and procedures for members of the general public to obtain information (i) on the organization, functioning and decision-making processes of their public administration, when appropriate, and (ii) on decisions and legal acts that concern members of the public, with due regard for the protection of privacy and personal data (art. 10, subpara. (a)). In this specific task of protecting personal information, national drafters may wish to draw on “principles laid down in the guidelines for the regulation of computerized personal data files adopted by the General Assembly in its resolution 45/95 of 14 December 1990” (A/58/422/Add.1, para. 14);

(b) Simplification of administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities (art. 10, subpara. (b));

(c) Publication of information, which may include periodic reports on the risks of corruption in the public administration (art. 10, subpara. (c)).

60. Depending on existing legal arrangements and tradition, new legislation may be required for the above or other measures aiming at transparency in public administration.

61. Effective anti-corruption strategies necessitate the active participation of the general public. Article 13, paragraph 1, requires that States take appropriate measures encouraging the active participation of the public within their means and in accordance with fundamental principles of their law. Individuals and groups, such as civil society, non-governmental organizations and community-based organizations or groups established or located in the country (A/58/422/Add.1, para. 16), must be encouraged to participate in three areas of anti-corruption efforts:

(a) Prevention of corruption;

(b) The fight against corruption;

(c) Increasing public awareness about the existence, causes, seriousness and threats of corruption.

62. Measures responsive to this general obligation may include the following:

(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;

(b) Ensuring that the public has effective access to information;

(c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;

(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:

(i) For respect of the rights or reputations of others;

(ii) For the protection of national security or public order or of public health or morals.

63. According to the interpretative notes, “the intention behind paragraph 1 (d), is to stress those obligations which States parties have already undertaken in various international instruments concerning human rights to which they are parties and should not in any way be taken as modifying their obligations” (A/58/422/Add.1, para. 17).

64. Article 13, paragraph 2, requires that States take practical measures to encourage communication between the wider public and the authorities relative to corrupt practices. States are required to take appropriate measures to ensure that the independent anti-corruption body or bodies referred to earlier (art. 6) are known to the public. States are further mandated to enable public access to that body or bodies for the reporting of incidents and acts constituting offences established under the Convention (see arts. 15-25). States must also allow for anonymous reporting of such incidents. It should also be noted that under article 39 of the Convention, States parties are required to consider encouraging their nationals and habitual residents to report to national investigating and prosecuting authorities the commission of an offence established under the Convention.

65. For the measures dealing with the involvement of civil society and the wider public in anti-corruption efforts, legislation may be required, depending on the existing legal arrangements and tradition. National drafters may wish to review current rules on access to information, privacy issues, restrictions and public order situations to see whether amendments or new legislation are required in order to comply with the Convention.

Optional requirements: obligation to consider

66. Beyond the mandatory provisions of this section, States parties are required to “endeavour to establish and promote effective practices aimed at the prevention of corruption” (art. 5, para. 2). This is a more general urging or encouragement to develop and introduce measures that can render the preventive policies more effective in the specific context of each State party.

67. Part of the same effort at effective anti-corruption policies is to regularly assess the consequences of existing measures to determine how well they are achieving the desired results. Technological, socio-economic and other circumstances may also change over time and adjustments may be necessary. Article 5, paragraph 3, requires States parties to “endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption”.¹¹

Optional measures: measures States parties may wish to consider

68. As seen earlier, article 5, paragraph 4, mandates international collaboration aimed at the prevention of corruption. For this purpose, States parties may wish to consider participating in international programmes and projects (see also chap. IV of the present guide, concerning international cooperation).

C. Transparency measures and systems in the public sector

69. Articles 7 to 9 address in detail questions related to transparency in the public sector. The systems and measures States are required to introduce or consider may require new legislation or amendments to existing laws, in accordance with the fundamental principles of their legal systems.

“Article 7

“Public sector

“1. Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and

¹¹This may be accomplished through specialized bodies or academic research, civil society or public sector agencies with oversight responsibilities. See also art. 61 (Collection, exchange and analysis of information on corruption), in particular, para. 3.

retirement of civil servants and, where appropriate, other non-elected public officials:

“(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;

“(b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;

“(c) That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;

“(d) That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.

“2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.

“3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

“4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.”

“Article 8

“Codes of conduct for public officials

“1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.

“2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

“3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

“4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

“5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

“6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.”

“Article 9

“Public procurement and management of public finances

“1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

“(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

“(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

“(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

“(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

“(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

“2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:

“(a) Procedures for the adoption of the national budget;

“(b) Timely reporting on revenue and expenditure;

“(c) A system of accounting and auditing standards and related oversight;

“(d) Effective and efficient systems of risk management and internal control; and

“(e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.”

Summary of main requirements

70. In accordance with article 7, States parties are required to make a strong effort:

(a) To adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and other non-elected public officials (para. 1);

(b) To adopt measures to prescribe criteria concerning candidature for and election to public office (para. 2);

(c) To take measures to enhance transparency in the funding of candidatures for elected public office and the funding of political parties (para. 3);

(d) To adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest (para. 4).

71. In accordance with article 8, States are required:

(a) To promote integrity, honesty and responsibility among their public officials (para. 1);

(b) To take note of the relevant initiatives of regional, interregional and multilateral organizations (para. 3).

72. Article 8 also requires States to endeavour:

(a) To apply codes or standards of conduct for the correct, honourable and proper performance of public functions (para. 2);

(b) To establish measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions (paragraph 4);

(c) To establish measures and systems requiring public officials to report to appropriate authorities on potential conflicts of interest (paragraph 5);

(d) To take disciplinary or other measures against public officials who violate the codes or standards established in accordance with the article (para. 6).

73. In accordance with article 9, paragraph 1, States parties are required to establish systems of procurement based on transparency, competition and objective criteria in decision-making, and which are also effective in preventing corruption, in accordance with the fundamental principles of their legal system.

74. In accordance with article 9, paragraph 2, States parties are required to take measures to promote transparency and accountability in the management of public finances, in accordance with the fundamental principles of their legal system.

Mandatory requirements: obligation to take legislative or other measures

75. Article 8 contains both mandatory provisions and obligations to consider certain measures. Mandatory is a commitment to promote integrity in public administration and to synchronize systems, measures and mechanisms intro-

duced in the course of implementing the article with the relevant initiatives of regional, interregional and multilateral organizations.

76. More specifically, paragraph 1 of article 8 requires States parties to promote, inter alia, integrity, honesty and responsibility among their public officials, in accordance with the fundamental principles of their legal system. The rest of the article provides more specific guidelines and suggestions States must seriously consider, such as the introduction of codes of conduct for the performance of public functions (see the discussion on art. 8, para. 2, below).

77. Article 8, paragraph 3, requires that, as States parties implement the provisions of the article, they take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996, where appropriate and in accordance with the fundamental principles of their legal system.

78. Article 9 focuses on proper and transparent processes relative to public procurement and public finances. Under paragraph 1 of article 9, States parties are required to take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective among other things in preventing corruption, in accordance with the fundamental principles of their legal system.

79. Such systems may take into account appropriate threshold values in their application, for example in order to avoid overly complex procedures for comparatively small amounts. Past experience suggests that excessive regulation can be counterproductive by increasing rather than diminishing vulnerability to corrupt practices.

80. The procurement systems are required to address at least the following issues:

(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to paragraph 1 of article 9 are not followed;

(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

81. The introduction of these measures may require amendments or new legislation or regulations, depending on the existing legal framework of each State party.

82. States parties are free to address additional issues. The above listing is only the minimum required by the Convention. At the same time, the interpretative notes indicate that “nothing in paragraph 1 shall be construed as preventing any State party from taking any action or not disclosing any information that it considers necessary for the protection of its essential interests related to national security” (A/58/422/Add.1, para. 13).

83. Article 9, paragraph 2, requires that States parties take appropriate measures to promote transparency and accountability in the management of public finances, in accordance with the fundamental principles of their legal system. Such measures must include the following, as a minimum:

- (a) Procedures for the adoption of the national budget;
 - (b) Timely reporting on revenue and expenditure;
 - (c) A system of accounting and auditing standards and related oversight;
 - (d) Effective and efficient systems of risk management and internal control;
- and

(e) Where appropriate, corrective action in the case of failure to comply with the requirements established in article 9, paragraph 2.

Optional requirements: obligation to consider

84. Article 7, paragraph 1, requires that States parties make a strong effort to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and other non-elected public officials, where appropriate and in accordance with the fundamental principles of their legal system. These systems must:

(a) Be based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;

(b) Include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;

(c) Promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State party;

(d) Promote education and training programmes to enable officials to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.

85. The existence or introduction of the systems referred to in paragraph 1 of article 7 “shall not prevent States parties from maintaining or adopting specific measures for disadvantaged groups” (A/58/422/Add.1, para. 12).

86. Article 7 goes on to require that States parties consider—consistent with the objectives of the Convention and in accordance with the fundamental principles of their domestic law—the adoption of appropriate legislative and administrative measures that:

(a) Prescribe criteria concerning candidature for and election to public office (para. 2); and

(b) Enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties (para. 3).

87. Past experience also shows that local authorities can be particularly vulnerable to corruption in connection with public procurement, as well as real estate, construction, town planning, political financing, etc. The requirements of the Convention against Corruption should thus be taken into account at all administrative levels.

88. The measures that States parties must consider under article 7 may require new legislation.

89. The last requirement of article 7 is that States parties endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest, in accordance with the fundamental principles of their domestic law. These measures may also require new legislation (para. 4).

Codes of conduct

90. Following the general and mandatory provision asking States parties to promote integrity in their public administration, article 8 further requires them to endeavour to apply codes or standards of conduct for the correct, honourable and proper performance of public functions within their institutional and legal systems (para. 2).

91. Previous experience shows that it is also important that the principles and ethical rules are known and accepted by officials. Some good practices include the development of rules through a process of consultation rather than a top-to-bottom approach, the attachment of ethical rules to employment contracts and the regular provision of awareness-raising initiatives.

92. Such codes enhance predictability and support the preparation and training of public officials and facilitate the resolution of any dilemmas and frequent questions that may arise in the course of their work. Codes of conduct also clarify the standards and rules to be observed, thereby rendering the task of identifying and reporting violations easier (see art. 33).¹²

93. The introduction of such codes may require legislation.

94. Article 8 goes on to require that States consider the establishment of measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions, in accordance with the fundamental principles of its domestic law (para. 4). Such measures improve detection rates, enhance accountability and support societal confidence in the effective enforcement of general anti-corruption principles (see also art. 33).¹³

95. The laws of several States already require such reporting. It should be noted, however, that this provision refers to a specific obligation, under the general provision of preventing corruption. Instead of simply requiring reports on the commission of a crime, the point here is to establish mechanisms, systems and measures facilitating such reporting.

¹²Article 33 requires States parties to consider introducing measures to protect persons who properly report facts or incidents concerning offences established under the Convention against Corruption.

¹³Experience suggests that it is important to provide for a clear written reporting duty indicating who is to be informed internally and/or externally (in case of internal reporting, an alternative may be provided in cases where a superior is the suspect), measures to protect the career of those who report in good faith (see also art. 33) and measures to inform officials about the duty and protection. A contact person who can advise in confidence within the institution is another good practice (see also Council of Europe recommendation No. R (2000) 10 on Codes of Conduct for Public Officials).

96. Conflicts of interest as well as perceptions of such conflicts undermine public confidence in the integrity and honesty of civil servants and other officials. As a further enhancement of transparency in public administration, article 8 requires States parties to endeavour, where appropriate and in accordance with the fundamental principles of their domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, as a minimum:

- (a) Their outside activities;
- (b) Employment;
- (c) Investments;
- (d) Assets; and
- (e) Substantial gifts or benefits;

from which a conflict of interest may result with respect to their functions as public officials (para. 5).

97. Finally, normative standards and processes of detection and transparency need to be accompanied by appropriate sanctions. Article 8 requires that States parties consider taking, in accordance with the fundamental principles of their domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with the article (para. 6).

D. Judiciary and prosecution

“Article 11

“Measures relating to the judiciary and prosecution services

“1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

“2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.”

Summary of main requirements

98. In accordance with article 11, paragraph 1, States parties must take measures to strengthen integrity and prevent corruption in the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary. This option may require legislation.

99. Similar measures may be introduced for the prosecution service, where it enjoys independence similar to the judiciary (para. 2).

100. The introduction of these measures may require legislation, without prejudice to the independence of the judiciary, depending on the existing legal framework of each State party.

Mandatory requirements: obligation to take legislative or other measures

101. The independence of the national authorities fighting transnational crime and corruption was recognized in the United Nations Convention against Transnational Organized Crime, which requires that States parties take measures ensuring effective action in the prevention, detection and punishment of corruption by public officials, including adequate independence to avoid undue influences (see the Organized Crime Convention, art. 9, para. 2).

102. Article 11, paragraph 1, of the Convention against Corruption builds on such provisions and emphasizes the independence of the judiciary and its crucial role in combating corruption. It more specifically requires that States parties take measures, in accordance with the fundamental principles of their legal system and without prejudice to judicial independence:

- (a) To strengthen integrity; and
- (b) To prevent opportunities for corruption among members of the judiciary.

103. Such measures may include rules with respect to the appointment and conduct of members of the judiciary. This option may require legislation depending on the tradition, laws and procedures of each State. For instance, it may necessitate revisiting the provisions of the constitution and perhaps assessing the rules and procedures under which judicial appointments are made, as well as mechanisms of accountability the judiciary has decided for itself, to ascertain if they fulfil the requirements of article 11.

104. Some States, through their constitution and/or legislation, provide members of the judiciary (and in some cases also their prosecutorial authorities) with immunity from investigation and/or prosecution. The main purpose of granting such immunity is to strengthen the independence of the judiciary by protecting its members against malicious prosecution. Such immunity usually applies to acts carried out in the performance of official duties (i.e. functional immunity) and normally only applies for the duration of the person's term in office.

105. Notwithstanding its importance for the independence of the judiciary, immunity from investigation and prosecution may hamper the effective investigation and prosecution of corruption offences for two main reasons: (a) it could affect the detection and investigation or prosecution of other persons who do not enjoy immunity and may have participated in the offence; (b) the application of immunity to members of the judiciary as well as other members of law enforcement authorities, such as prosecutors and investigating magistrates (when those magistrates are not members of the judiciary), without appropriate safeguards may undermine the credibility of the law enforcement and judicial system, thus undermining respect for the legal institutions and rule of law.

106. It is therefore advisable, if immunity is afforded to members of the judiciary, that it be restricted to functional immunity and that it not last indefinitely. An effective and transparent process for lifting immunity for corruption offences would protect against abuses and ensure accountability.

Optional measures: measures States parties may wish to consider

107. Paragraph 2 of article 11 invites States parties to consider the introduction and application of similar measures with respect to the prosecution service in States parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service. Again, such requirements are not necessarily legislative in nature and will depend on the tradition, laws and procedures of each State.

108. The objective of this provision is to cover prosecution services and ensure their accountability. To the extent that a State party places them under the executive branch of Government or the judiciary, they are already covered by other provisions of the Convention. The point of paragraph 2 is to cover instances where the other provisions do not cover prosecution services. Thus, this provision calls for measures similar to those applying to the judiciary, if the prosecution service does not form part of the judiciary but enjoys similar independence.

E. Private sector

“Article 12

“Private sector

“1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

“2. Measures to achieve these ends may include, inter alia:

“(a) Promoting cooperation between law enforcement agencies and relevant private entities;

“(b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;

“(c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;

“(d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;

“(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;

“(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required

financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

“3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

“(a) The establishment of off-the-books accounts;

“(b) The making of off-the-books or inadequately identified transactions;

“(c) The recording of non-existent expenditure;

“(d) The entry of liabilities with incorrect identification of their objects;

“(e) The use of false documents; and

“(f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

“4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.”

Summary of main requirements

109. In accordance with paragraph 1 of article 12, States parties must take measures:

(a) To prevent corruption in the private sector;

(b) To enhance accounting and auditing standards in the private sector;

(c) To provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

110. Paragraph 2 of article 12 offers examples of measures to achieve those ends:

- (a) Promoting cooperation between law enforcement and private entities;
- (b) Promoting the development of standards and procedures, such as codes of conduct and good-practice guides;
- (c) Promoting transparency among private entities;
- (d) Preventing the misuse of procedures regulating private entities;
- (e) Preventing conflicts of interest;
- (f) Ensuring that private enterprises have adequate internal auditing controls.

111. In accordance with paragraph 3 of article 12, States parties must take measures to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with the Convention against Corruption:

- (a) The establishment of off-the-books accounts;
- (b) The making of off-the-books or inadequately identified transactions;
- (c) The recording of non-existent expenditure;
- (d) The entry of liabilities with incorrect identification of their objects;
- (e) The use of false documents; and
- (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

112. In accordance with paragraph 4 of article 12, States parties must disallow the tax deductibility of expenses that constitute bribes (see also arts. 15 and 16) and other expenses that further corrupt conduct.

***Mandatory requirements: obligation to take legislative
or other measures***

113. Paragraph 1 of article 12 requires that States parties take three types of measures in accordance with the fundamental principles of their law.

114. The first is a general commitment to take measures aimed at preventing corruption involving the private sector. The provisions in the rest of paragraph 1

and indeed the remainder of article 12 are steps towards the achievement of that goal.

115. The second type of measure mandated by paragraph 1 aims at the enhancement of accounting and auditing standards. Such standards provide transparency, clarify the operations of private entities, support confidence in the annual and other statements of private entities, and help prevent as well as detect malpractices (see several concrete measures States may adopt towards the prevention of corruption in the private sector and accountability described in the discussion on para. 2 of art. 12, below).

116. The third type of measure States must take relates to the provision, where appropriate, of effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with the accounting and auditing standards mandated above.

117. Article 12, paragraph 3, requires some specific measures relative to accounting practices known to be quite susceptible to abuse. States parties are required to take any necessary measures, in accordance with their domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with the Convention against Corruption:¹⁴

- (a) The establishment of off-the-books accounts;
- (b) The making of off-the-books or inadequately identified transactions;
- (c) The recording of non-existent expenditure;
- (d) The entry of liabilities with incorrect identification of their objects;
- (e) The use of false documents; and
- (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.¹⁵

118. The implementation of this provision may require legislation.

¹⁴It is noteworthy that parties to the OECD Bribery Convention are also required under article 8 of that Convention to prohibit the acts listed in paragraph 117 (a)-(e) of the present guide when carried out for the purpose of bribing or “hiding the bribery” of foreign public officials.

¹⁵The 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, approved by the OECD Council at the ministerial level, provides that OECD member States “should consider whether requirements to submit to external audit are adequate”; “should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies”; and “should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities”.

119. Paragraph 4 of article 12 requires that States parties disallow the tax deductibility of expenses that constitute bribes and, where appropriate, other expenses incurred in furtherance of corrupt conduct. This provision aims at the elimination of legal inconsistencies and confusion, which might allow fiscal benefits from corrupt practices. This is consistent with articles 15 and 16 of the Convention against Corruption, which mandate the establishment of bribery of national and foreign public officials or officials of international organizations as a criminal offence.

Optional measures: measures States parties may wish to consider

120. Article 12, paragraph 2, outlines in its subparagraphs a number of good practices, which have been shown to be effective in the prevention of corruption in the private sector and in the enhancement of transparency and accountability.

121. The measures to achieve those ends may include, inter alia, the measures described below under the each of the subparagraphs of article 12, paragraph 2.

Promoting cooperation between law enforcement agencies and relevant private entities (para. 2 (a))

122. Very often, private enterprises are in the best position to identify and detect irregularities indicative of corrupt conduct. They frequently are also a victim of corrupt practices engaged in by competitors who may thereby gain unfair and illicit advantages. A cooperative relationship between the private sector and law enforcement agencies is, thus, instrumental to both the prevention and deterrence of corruption (see also art. 39).

Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State (para. 2 (b))

123. Codes of conduct can be formal or informal. They may be developed through private sector or even single company initiatives. They may be introduced under Government sponsorship in consultation with the private sector. An important function performed by such codes is to enhance predictability, clarify issues and procedures and provide guidelines and support relative to the correct course of action in frequently arising dilemmas for private officials.

Another function is to assist in providing training on how to avoid conflicts of interest and what to do when they arise and in establishing clear lines between acceptable and unacceptable conduct. Private initiatives are not a substitute for what Governments deem necessary and appropriate for regulation, but States parties may wish to consider giving official sanction to certain private sector initiatives.

Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities (para. 2 (c))

124. Risks of corruption and vulnerability relative to many kinds of illicit abuses are higher when transactions and the organizational structure of private entities are not transparent. Where appropriate, it is important to enhance transparency with respect to the identities of persons who play important roles in the creation and management or operations of corporate entities.

Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities (para. 2 (d))

125. The areas of subsidies and licensing for certain commercial activities, as with other areas where the State intervenes in one way or another in economic life and the private sector, have been shown to be vulnerable to corrupt practices or other abuse. States are encouraged to pay particular attention to the prevention of corrupt conduct in those areas.

Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure (para. 2 (e)) (see also the discussion on art. 8, para. 5, in sect. II.C and paras. 124 and 125 above);

Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures (para. 2 (f))

126. Corrupt and other illegal practices (as well as mismanagement) can be prevented, detected and remedied through internal audit controls, whereby a

person or group is in charge of this responsibility and reports to executives on a regular basis. Simple and small enterprises may not require such arrangements. States parties are invited to take into account the structure and size of entities that may be asked to implement such internal controls.¹⁶ Similar, but less formal, measures include the rotation of staff, periodic surveys about awareness of rules and regulations, policies ensuring the maintenance of proper documentation, etc.

F. Prevention of money-laundering

“Article 14

“Measures to prevent money-laundering

“1. Each State Party shall:

“(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

“(b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

“2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses

¹⁶It should be noted that over-regulation—or perceived over-regulation—can be counterproductive, as this may generate motives and incentives for non-compliance rather than the desired effects.

report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

“3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:

“(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;

“(b) To maintain such information throughout the payment chain; and

“(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

“4. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

“5. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.”

127. In order for corrupt officials to enjoy the benefits of their illicit activities, they must hide the origin of their funds. Notwithstanding the separate offence of concealment (see art. 24), this is money-laundering, which consists of the disguise of the illegal origin of the proceeds of crime. This is done essentially in three stages: by introducing the proceeds into the financial system (“placement”), engaging in various transactions intended to obfuscate the origin of and path taken by the money (“layering”), and thereby integrating the money into the legitimate economy through apparently legitimate transactions (“integration”).

128. A critical part of money-laundering is placing illicit funds into the financial system. Once that is done, tracing the assets becomes much harder or even impossible. Stopping criminal actors from taking that first step and developing the capacity to track the movement of assets is, therefore, crucial. International cooperation and compatibility of national measures are indispensable.

129. For these reasons, article 14 of the Convention introduces measures aimed at preventing such activities and at enlisting the assistance of financial

institutions and others in preventing the introduction of criminal funds into the financial system, in detecting transactions in the system that may be of criminal origin and in facilitating the tracing of the funds involved in such transactions.¹⁷ Articles 31, 46, 52, 57 and 58 of the Convention against Corruption, concerning the freezing, seizure, confiscation and disposal or return of proceeds from offences established under the Convention, the collection of information and international cooperation, are also relevant in this regard.

130. Article 14 sets out a number of measures—some mandatory and some strongly recommended—that are intended to ensure that States parties have in place a legal and administrative regime to deter and detect money-laundering. The overall objective is to provide a comprehensive regime that facilitates the identification of money-laundering activity and promotes information exchange among a range of authorities dedicated to combating money-laundering.

131. Financial institutions and other designated entities, including money remitters, are required to take measures to prevent the introduction of criminal funds into the financial system and to provide the means to identify and trace such funds when they are already in the financial system, as well as to link them to their owners to facilitate apprehension and prosecution.

132. States must adopt and integrate into their financial infrastructure specific measures, such as procedures for financial institutions to know their customers, record-keeping and reporting suspicious transactions to national authorities. These procedures need to be part of a comprehensive regulatory regime that facilitates the required domestic and international cooperative relationships. Many States have established FIUs to collect, analyse and exchange relevant information efficiently, as needed and in accordance with their laws. States parties are asked to consider the establishment of such units, which entails a more substantial commitment of resources.

133. The Convention builds on numerous earlier and continuing initiatives at the national, regional and international levels (for more details, see the discussion on the criminalization of money-laundering in sect. III.B of the present guide).

134. As national drafters implement the Convention against Corruption, it would be useful to pay attention to other international initiatives and instruments with related or identical requirements. To the extent States consider also becoming parties to such instruments, or to be guided by such initiatives, they may

¹⁷Such measures have been recommended by the Financial Action Task Force on Money Laundering (FATF) and similar regional bodies.

wish to consider planning their implementation in such a way as to meet the obligations simultaneously and in a coordinated fashion. In this light, drafters should be aware of the following bodies and instruments:

(a) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Convention);

(b) United Nations Convention against Transnational Organized Crime;

(c) United Nations Convention for the Suppression of the Financing of Terrorism of 1999;

(d) Security Council resolutions 1267 (1999) of 15 October 1999, 1373 (2001) of 28 September 2001 and 1377 (2001) of 12 November 2001 regarding the financing of terrorist acts;

(e) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990;

(f) The FATF, established in 1990, which has issued the Forty Recommendations regarding money-laundering and the Nine Special Recommendations on Terrorist Financing.

135. For some States, such legislative, regulatory and administrative obligations can be more time-consuming to implement than for States that already have structures to combat money-laundering. The measures required by the Convention against Corruption need to be integrated into the general financial infrastructure of each jurisdiction. Therefore, the time required for implementation of these measures will largely depend on the nature and complexity of local financial institutions, as well as the degree to which they are involved in cross-border transactions.

136. In this process, attention should be focused on the specific context and vulnerabilities of each jurisdiction. In States that do not currently have such measures in place, the process of implementation can proceed contemporaneously with ratification, as long as these measures are in place when the Convention enters into force for the State party concerned.

137. States should review the provisions they already have in place to counter money-laundering in order to ensure compliance with these articles and those dealing with the freezing, seizure and confiscation of proceeds of corrupt conduct (art. 31), international cooperation (chap. IV) and asset recovery (chap. V). States undertaking such a review may wish to use the opportunity to implement the obligations they have assumed under other regional or international instruments and initiatives currently in place.

Summary of main requirements

138. Article 14 contains two mandatory requirements:

(a) To establish a comprehensive domestic regulatory and supervisory regime to deter money-laundering (para. 1 (a));

(b) To ensure that agencies involved in combating money-laundering have the ability to cooperate and exchange information at the national and international levels (para. 1 (b)).

139. In addition, pursuant to article 14 States must consider:

(a) Establishing an FIU (para. 1 (b));

(b) Implementing measures to monitor cash movements across their borders (para. 2);

(c) Implementing measures to require financial institutions to collect information on originators of electronic fund transfers, maintain information on the entire payment chain and scrutinize fund transfers with incomplete information on the originator (para. 3);

(d) Developing and promoting global, regional and bilateral cooperation among relevant agencies to combat money-laundering (para. 5).

Mandatory requirements: obligation to take legislative or other measures

(a) Regulatory and supervisory regime

140. Article 14, paragraph 1 (a), requires that States parties establish a regulatory and supervisory regime within their competence in order to prevent and detect money-laundering activities. This regime must be comprehensive, but the precise nature and particular elements of the regime are left to States, provided that they require, at a minimum, banks and non-bank financial institutions to ensure:

(a) Effective customer identification;

(b) Accurate record-keeping;

(c) A mechanism for the reporting of suspicious transactions.

141. The requirements extend to banks, non-bank financial institutions (e.g. insurance companies and securities firms) and, where appropriate, other bodies that are especially susceptible to money-laundering (art. 14, para. 1 (a)). The interpretative notes add that other bodies may be understood to include

intermediaries, which in some jurisdictions may include stockbrokering firms, other securities dealers, currency exchange bureaux or currency brokers (A/58/422/Add.1, para. 18). An addition to the equivalent provisions in the Organized Crime Convention is that financial institutions include “natural or legal persons that provide formal or informal services for the transmission of money or value” (art. 14, para. 1 (a)). This is a reference to concerns about both formal remitters and informal value-transfer systems, such as the hawala networks that originated in South Asia and have become global in recent decades. These channels offer valuable services to expatriates and their families, but are also vulnerable to abuse by criminals, including corrupt public officials.

142. Thus, this regime should apply not only to banking institutions, but also to areas of commerce where high turnover and large volumes make money-laundering likely. Previous experience shows that money-laundering activities have taken place in the real estate sector and in the trade of commodities, such as gold, precious stones and tobacco.

143. In many forums, the list of institutions is being expanded beyond financial institutions to include businesses and professions related to real estate and commodities. For example, recommendation 12 of the FATF Forty Recommendations extends, when certain conditions are met, the requirements of customer due diligence and record-keeping to casinos, real estate agents, dealers in precious metals and stones, lawyers, notaries, other independent legal professionals and accountants and trust and company service providers. Similar requirements are set forth in article 1 of Directive 2005/60/EC adopted by the European Parliament and the Council of the European Union on 26 October 2005.

144. More recently, increased attention has been focused on money service businesses and informal value-transfer systems, such as hawala and hundi. In a growing number of jurisdictions, these are also subject to a regulatory regime for the purposes of detecting money-laundering, terrorist financing or other offences.

145. Customer identification entails requirements that holders of accounts in financial institutions and all parties to financial transactions be identified and documented. Records should contain sufficient information to identify all parties and the nature of the transaction, identify specific assets and the amounts or values involved, and permit the tracing of the source and destination of all funds or other assets.

146. The requirement for record-keeping means that client and transaction records should be kept for a specified minimum period of time. For example, under the FATF Forty Recommendations, at least five years is recommended,

while for States parties to the International Convention for the Suppression of the Financing of Terrorism, retention of records for five years is mandatory.

147. Suspicious transactions are to be notified to the FIU or other designated agency. Criteria for identifying suspicious transactions should be developed and periodically reviewed in consultation with experts knowledgeable about new methods or networks used by money launderers.

148. The interpretative notes indicate that the words “suspicious transactions” may be understood to include unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer’s business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general (A/58/422/Add.1, para. 19). The International Convention for the Suppression of the Financing of Terrorism defines suspicious transactions as all complex, unusually large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose (General Assembly resolution 54/109, annex, art. 18, para. 1 (b) (iii)).

149. The powers to be granted to regulators and staff of the FIU to inspect records and to compel the assistance of record keepers in locating the records must also be defined. As some of these records may be covered by confidentiality requirements and banking secrecy laws that prohibit their disclosure, provisions freeing financial institutions from complying with such requirements and laws may be considered. Drafters should also ensure that the inspection and disclosure requirements are written in such a way as to protect financial institutions against civil and other claims for disclosing client records to regulators and FIUs.

150. The implementation of such measures is likely to require legislation. In particular, the requirement that financial institutions must disclose suspicious transactions and the protection of those who make disclosures in good faith will require legislation to override banking secrecy laws (see also paras. 1-3 of art. 52, on the prevention and detection of transfers of proceeds of crime).

(b) Domestic and international cooperation

151. Coordination of efforts and international cooperation is as central to the problem of money-laundering as it is to the other offences covered by the Convention against Corruption. Beyond the general measures and processes such as extradition, mutual legal assistance, joint investigations and asset recovery (which are covered in detail in the sections on international cooperation in

chapter IV and asset recovery in chapter V, below), the Convention seeks to strengthen such coordination and cooperation.

152. Article 14, paragraph 1 (b), requires that administrative, regulatory, law enforcement and other domestic authorities in charge of the efforts against money-laundering are able to cooperate at both the national and international level. This includes the exchange of information within the conditions prescribed by their domestic law. This must be done without limiting or detracting from (or in the words of the Convention, “without prejudice to”) the requirements generated by article 46 (Mutual legal assistance).

153. In order for cooperation to be possible, domestic capabilities must be developed for the identification, collection and interpretation of all relevant information. Essentially, three types of entity may be part of a strategy to combat money-laundering and could, thus, be considered by States:

(a) Regulatory agencies responsible for the oversight of financial institutions, such as banks or insurance entities, with powers to inspect financial institutions and enforce regulatory requirements through the imposition of regulatory or administrative remedies or sanctions;

(b) Law enforcement agencies responsible for conducting criminal investigations, with investigative powers and powers to arrest and detain suspected offenders and that are subject to judicial or other safeguards;

(c) FIUs, which are not required under the Convention, whose powers are usually limited to receiving reports of suspicious transactions, analysing them and disseminating information to prosecution agencies, although some such units have wider powers (see more on FIUs in sect. V.E, below).

154. The authority of each entity to cooperate with national bodies and with other similar agencies in other States is usually specified in the relevant legislation. If States do have such entities, legislation may be needed to amend existing mandates and the division of labour among these entities, in accordance with each State’s constitutional or other principles and the specificities of its financial services sector.

155. Some of these measures may constitute a strong challenge for countries in which the financial sector is not heavily regulated and the necessary legislation and administrative infrastructure may have to be created. It is essential to note, however, that the relevance and utility of these arrangements are not limited to the control of money-laundering, but also to corruption. They also strengthen confidence in the financial infrastructure, which is instrumental to sustainable social and economic development.

156. The remaining provisions of this article are also closely connected to domestic and international cooperation, and are examined below, as they are not mandatory under the Convention.

Optional requirements: obligation to consider

(a) Financial intelligence units

157. Article 14, paragraph 1 *(b)*, requires States parties to consider the establishment of FIUs to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering. Since the 1990s, many States have established such units as part of their regulatory police or other authorities. There is a wide range of structure, responsibilities, functions and departmental affiliation or independence for such units. According to the interpretative notes, the call for the establishment of an FIU is intended for cases where such a mechanism does not yet exist (A/58/422/Add.1, para. 20).

158. The Egmont Group (an informal association of FIUs) has defined such units as a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information *(a)* concerning suspected proceeds of crime; or *(b)* required by national legislation or regulation; in order to counter money-laundering.¹⁸

159. The Convention does not require that an FIU be established by law, but legislation may still be required to institute the obligation to report suspicious transactions to such a unit and to protect financial institutions that disclose such information in good faith (see also art. 58, on FIUs). In practice, the vast majority of FIUs are established by law. If it is decided to draft such legislation, States may wish to consider including the following elements:

(a) Specification of the institutions that are subject to the obligation to report suspicious transactions and definition of the information to be reported to the unit;

(b) Legislation defining the powers under which the unit can compel the assistance of reporting institutions to follow up on incomplete or inadequate reports;

¹⁸The website for the Egmont group is www.egmontgroup.org, which, inter alia, provides links to FIUs on all continents.

(c) Authorization for the unit to disseminate information to law enforcement agencies when it has evidence warranting prosecution and authority for the unit to communicate financial intelligence information to foreign agencies, under certain conditions;

(d) Protection of the confidentiality of information received by the unit, establishing limits on the uses to which it may be put and shielding the unit from further disclosure;

(e) Definition of the reporting arrangements for the unit and its relationship with other Government agencies, including law enforcement agencies and financial regulators. States may already have money-laundering controls in place that can be expanded or modified to conform to the requirements of article 14 relating to money-laundering and those of article 31 relating to freezing, confiscation, seizure, disposal of proceeds, as well as provisions on asset recovery, as necessary.

160. It is worth noting that actions taken to conform to article 14 may also bring States into conformity with other conventions and initiatives, such as Security Council resolution 1373 (2001), the International Convention for the Suppression of the Financing of Terrorism, the Organized Crime Convention and the FATF Nine Special Recommendations on Terrorist Financing.

161. Further information about various options that can be included in laws, regulations and procedures to combat money-laundering can be obtained from the Anti-Money-Laundering Unit of the United Nations Office on Drugs and Crime.

(b) *Other measures*

162. As part of the effort to develop the capacity to provide effective international cooperation, States are required to consider the introduction of feasible measures aimed at monitoring the cross-border movement of cash and other monetary instruments (art. 14, para. 2). The goal of such measures would be to allow States to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments. Generally, structures based on monitoring or surveillance will require legal powers giving inspectors or investigators access to information on cross-border transactions, in particular in cases where criminal behaviour is suspected.¹⁹

¹⁹See the website of the Financial Action Task Force on Money Laundering (www.fatf-gafi.org).

163. Article 14, paragraph 3, contains provisions going beyond the Organized Crime Convention. It requires that States consider the implementation of measures obliging financial institutions, including money remitters:

(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;

(b) To maintain such information throughout the payment chain; and

(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

164. The concern is essentially about the identification of remitters and beneficiaries on the one hand and the traceability of the transaction on the other. There are no exact estimates on the extent of funds transferred across national borders, especially with respect to informal remitters, who are popular in many countries. Given that they range in the tens of billions of United States dollars, however, it is an area of regulatory concern.

165. As mentioned above, the Convention against Corruption builds on parallel international initiatives to combat money-laundering. In establishing a domestic regulatory and supervisory regime, States parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering (art. 14, para. 4). An interpretative note states that during the negotiations, the words “relevant initiatives of regional, interregional and multilateral organizations” were understood to refer in particular to the Forty Recommendations and the Eight²⁰ Special Recommendations of the FATF, as revised in 2003 and 2001, respectively, and, in addition, to other existing initiatives of regional, interregional and multilateral organizations against money-laundering, such as the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group, the European Union, the Financial Action Task Force of South America against Money Laundering and the Organization of American States” (A/58/422/Add.1, para. 21).

166. Ultimately, States are free to determine the best way to implement article 14. However, the development of a relationship with one of the organizations working to combat money-laundering would be important for effective implementation.

167. In implementing article 14, paragraph 4, States may wish to consider some specific elements relative to the measures that the comprehensive regulatory

²⁰In October 2004, the FATF adopted a ninth Special Recommendation on Terrorist Financing.

regime must include. The Forty Recommendations are useful in this regard, as are model regulations that have been prepared by the United Nations Office on Drugs and Crime and the Organization of American States (see sect. II.G (Information resources) at the end of this chapter of the guide).

168. Furthermore, paragraph 5 of article 14 requires that States endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

G. Information resources: related provisions and instruments

1. United Nations Convention against Corruption

Articles 5, 6, 10 and 13 (anti-corruption bodies, prevention and implementation)

Articles 7-9 (public sector and transparency)

2. Binding international and regional instruments

African Union

African Union Convention on Preventing and Combating Corruption (2003)

www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf

Council of Europe

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)

Council of Europe, *European Treaty Series*, No. 141

www.conventions.coe.int/Treaty/EN/Treaties/Html/141.htm

European Union

For a European political and administrative culture: three codes of conduct for the Commissioners

http://ec.europa.eu/commission_2010-2014/pdf/code_conduct_en.pdf

Commission directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of ‘politically exposed person’ and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_214/l_21420060804en00290034.pdf

Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=>

CELEX:32005L0060:EN:NOT

Organization of American States

Inter-American Convention against Corruption (1996)

www.oas.org/juridico/english/Treaties/b-58.html

Organization for Economic Co-operation and Development

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

www.oecd.org/document/20/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

Southern African Development Community

Protocol against Corruption (2001)

www.issafrica.org/cdct/mainpages/pdf/Corruption/International%20Instruments/Protocols/SADC%20Protocol%20Against%20Corruption.pdf

United Nations

United Nations Convention against Transnational Organized Crime (2000) General Assembly resolution 55/25, annex I

www.unodc.org/pdf/crime/a_res_55/res5525e.pdf

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

United Nations, *Treaty Series*, vol. 1582, No. 27627

www.unodc.org/pdf/convention_1988_en.pdf

III. Criminalization, law enforcement and jurisdiction

A. Introduction

169. States parties are required to take several legislative and administrative steps towards the implementation of the Convention against Corruption. The present chapter of the guide addresses:

- (a) The substantive criminal law requirements of the Convention;
- (b) The necessary measures and procedures aimed at effective law enforcement against corruption.

170. States parties must establish a number of offences as crimes in their domestic law, if these do not already exist. States with relevant legislation already in place must ensure that the existing provisions conform to the Convention requirements and amend their laws, if necessary.

171. Given that corrupt practices know no borders and leave no country immune to at least some of them, the international community and the wider public have been persistently demanding more openness and accountability from the holders of public office. Consequently, many national, regional and international initiatives have focused on various aspects of the problem of corruption in recent years.

172. From OECD and the World Bank to the European Union and non-governmental organizations, virtually every major body has been concerned with the problem of corruption (see also sect. III.E (Information resources) below).

173. National drafters should be aware of regional and specialized conventions, which may contain more onerous standards. States parties to other conventions and those considering the implementation of additional instruments may wish to consider meeting such more onerous standards, thereby avoiding duplication of effort and enhancing international cooperation.

174. The United Nations has played a prominent role in international efforts to fight corruption. In 1996, by its resolution 51/191 of 16 December 1996, the General Assembly adopted the Declaration against Corruption and Bribery in International Commercial Transactions. By its resolution 51/59 of 12 December 1996, the Assembly adopted the International Code of Conduct for Public Officials. More recently, by its resolution 56/261 of 31 January 2002, the Assembly has invited Governments to consider and use, as appropriate, plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century (General Assembly resolution 56/261, annex), and has published a draft manual on anti-corruption policy. Quite importantly, the Organized Crime Convention, which entered into force as of September 2003, covers many substantive and procedural issues relative to corruption.

175. While many States are part of the initiatives listed in the preceding paragraphs, some may require support to implement the measures that have been agreed. More importantly, there are many provisions introducing mandatory legislative or other measures, which were not required in earlier instruments.

176. Although many provisions of the Organized Crime Convention use identical language to describe several offences (e.g. article 8 of the Organized Crime Convention compared to article 15 of the Convention against Corruption), there are important differences. For example, the definition of “public official” is broader in the Convention against Corruption (see art. 2 (a)) than the Organized Crime Convention. In addition, the criminalization of bribery of foreign public officials and officials of public international organizations is mandatory under the Convention against Corruption, whereas it is not mandatory under the Organized Crime Convention. The Convention against Corruption also covers the private sector, which was not addressed in the Organized Crime Convention.²¹ Consequently, national drafters should pay close attention to all of the provisions of the Convention against Corruption, even if their current legal system covers some of the same ground following the implementation of the Organized Crime Convention or other conventions and instruments.

177. The section on criminalization of the Convention against Corruption is divided into two main parts. The first part focuses on mandatory criminalization, that is the offences that State parties must establish as crimes. These include bribery of national public officials, solicitation or acceptance of a bribe by national public officials, bribery of foreign public officials and officials of

²¹ The Convention against Corruption also contains an additional article regarding “concealment of property” (art. 24).

public international organizations, embezzlement, misappropriation or other diversion of property by a public official, laundering of proceeds of crime, and obstruction of justice (arts. 15, 16, para. 1, 17, 23 and 25).

178. The acts covered by these offences are instrumental to the commission of corrupt acts and the ability of offenders to protect themselves and their illicit gains from law enforcement authorities. Their criminalization constitutes, therefore, the most urgent and basic part of a global and coordinated effort to counter corrupt practices.

179. The second part of the criminalization section outlines the offences that States parties are required to consider establishing and covers articles 16, paragraph 2, 18 to 22 and 24. The Convention introduces minimum standards, but States parties are free to go beyond them. It is indeed “recognized that States may criminalize or have already criminalized conduct other than the offences listed in this chapter as corrupt conduct” (A/58/422/Add.1, para. 22).

180. The issue of the liability of legal persons is dealt with separately, because such liability may be criminal, civil or administrative in nature.

181. The last part of the section addresses the issues of participation, attempt and preparation with respect to all other offences established in accordance with the Convention.

182. This chapter of the guide then continues with a section on law enforcement, which covers the rest of the articles with the exception of article 42, addressing the issue of jurisdiction, which is discussed under a separate section.

B. Criminalization

1 Obligations to criminalize: mandatory offences

“Article 15

“Bribery of national public officials

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

“(a) The promise, offering or giving, to a public official, 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;

“(b) The solicitation or acceptance by a public official, 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.”

“Article 16

“Bribery of foreign public officials and officials of public international organizations

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to 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, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

“...”

“Article 17

“Embezzlement, misappropriation or other diversion of property by a public official

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.”

“Article 23

“Laundering of proceeds of crime

“1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
- (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- (b) Subject to the basic concepts of its legal system:
 - (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
 - (ii) 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 this article.

“2. For purposes of implementing or applying paragraph 1 of this article:

“(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

“(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the

domestic law of the State Party implementing or applying this article had it been committed there;

“(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

“(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.”

“Article 25

“Obstruction of justice

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

“(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

“(b) The 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 the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.”

Summary of main requirements

183. In accordance with article 15, States parties must establish as criminal offences the following conduct:

(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.

184. In accordance with article 16, paragraph 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.

Legislation is required to implement these provisions.

185. In accordance with article 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. Legislation is required to implement this provision.

186. In accordance with article 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)).

187. 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)).

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

189. In accordance with article 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)).

190. The criminalization of the acts under these provisions is to be done through legislative and other measures. That is, the criminal offences must be established by criminal law covering all required elements of the offences and not simply by other measures, which would be additional to the proscribing legislation.

191. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

***Mandatory requirements: obligation to take legislative
or other measures***

192. Article 15 requires the establishment of two offences: active and passive bribery of national public officials. In many States, the level of proof required for corruption offences is very high. Often, evidence must be found that a preliminary, corrupt agreement has taken place. The distinction between the active and passive sides of the offence allows to more effectively prosecute corruption attempts and introduces a stronger dissuasive effect.

(a) Active bribery of national public officials

193. States parties must establish as a criminal offence, when committed intentionally, the promise, offering or giving, to a public official, 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 (art. 15, subpara. (a)).

194. It is reiterated that for the purposes of the Convention, with the exception of some measures under chapter II, “public official” is defined in article 2, subparagraph (a) as:

(a) Any person holding a legislative, executive, administrative or judicial office of a State party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority;

(b) Any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State party;

(c) Any other person defined as a “public official” in the domestic law of a State party.

195. An interpretative note indicates that, for the purpose of defining “public official”, each State party shall determine who is a member of the categories mentioned in subparagraph (a) (i) of article 2 and how each of those categories is applied (A/58/422/Add.1, para. 4).

196. The required elements of this offence are those of promising, offering or actually giving something to a public official. The offence must cover instances where no gift or other tangible item is offered. So, an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary.

197. The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organization. Some national legislation might cover the promise and offer under provisions regarding the attempt to commit bribery. When this is not the case, it will be necessary to specifically cover promising (which implies an agreement between the bribe giver and the bribe taker) and offering (which does not imply the agreement of the prospective bribe taker). The undue advantage or bribe must be linked to the official’s duties.

198. The required mental element (or subjective element) for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties. Since the conduct covers cases of merely offering a bribe, that is, including cases where it was not accepted and could therefore not have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place (see art. 28, which provides that “Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances”).

(b) Passive bribery of national public officials

199. States parties must establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a public official, 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 (art.15, subpara. (b)).

200. This offence is the passive version of the first offence. The required elements are soliciting or accepting the bribe. The link with the influence on official conduct must also be established.

201. As with the previous offence, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly.

202. The mental or subjective element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties (see art. 28, which provides that "Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances").

203. Attention should also be paid to some other provisions (arts. 26-30 and 42) regarding closely related requirements pertaining to the offences established under the Convention.²²

204. The language used in provisions regarding passive and active bribery of national public officials is identical to that used in article 8, paragraph 1, of the Organized Crime Convention. Noteworthy, however, is the difference in the definition of "public official" under the two conventions. As stated in article 2, subparagraph (a), some provisions of the Convention against Corruption apply to persons performing certain public functions or roles, even if they are not defined as public officials by domestic law.

*(c) Active bribery of foreign public officials and officials
of public international organizations*

205. Under article 16, paragraph 1, States must establish as a criminal offence, when committed intentionally, the promise, offering or giving to 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, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.²³

206. As noted in chapter I of the Convention against Corruption, "foreign public official" is defined as "any person holding a legislative, executive,

²²Special attention is also drawn to article 27 of the Convention against Corruption, which addresses the question of participation in the offences established under the Convention. Participation was mandated as a separate offence under the Organized Crime Convention (art. 8, para. 3).

²³The OECD has found that some States do not cover all the elements of the offence of bribing a foreign public official in their implementing legislation, but instead rely on direct application of the terms of the OECD Bribery Convention. To date, no party to that Convention has produced any legal cases showing that language in a treaty or convention will be directly applied to a criminal offence. This is probably the result of constitutional guarantees that a person shall not be deprived of his or her liberty except in accordance with the law.

administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise” (art. 2, subpara. (b)). The “foreign country” can be any other country, that is, it does not have to be a State party. State parties’ domestic legislation must cover the definition of “foreign public official” given in article 2, subparagraph (b) of the Convention, as it would not be adequate to consider that foreign public officials are public officials as defined under the legislation of the foreign country concerned. Article 16 does not require that bribery of foreign public officials constitute an offence under the domestic law of the concerned foreign country.

207. An official of a public international organization is defined as “an international civil servant or any person who is authorized by such an organization to act on behalf of that organization” (art. 2, subpara. (c)).

208. This offence mirrors the active bribery offence discussed above. One difference is that it applies to foreign public officials or officials of a public international organization, instead of national public officials. The other difference is that the undue advantage or bribe must be linked to the conduct of international business, which includes the provision of international aid (see A/58/422/Add.1, para. 25). Otherwise, all required elements of the offence (promising, offering or giving), the nature of the undue advantage and the required mental or subjective element remain the same as described above.²⁴

209. Creating the offence of passive bribery by foreign public officials or officials of a public international organization is not mandatory and is discussed below.

210. The interpretative notes indicate that a statute that defines the offence in terms of payments “to induce a breach of the official’s duty” could meet the standard set forth in paragraphs 1 and 2 of article 16, provided that it is understood that every public official has a duty to exercise judgement or discretion impartially and that this is an “autonomous” definition not requiring proof of the law or regulations of the particular official’s country or international organization (A/58/422/Add.1, para. 24).

²⁴The OECD has noted that a number of parties implementing the OECD Bribery Convention have criminalized the bribery of foreign public officials by extending their existing domestic bribery offences. In such cases, the OECD recommends that parties verify that the domestic offence conforms to the standards of the OECD Convention. This means that the party must ensure that each element of the relevant offence under the Convention is covered by the domestic offence, that no additional elements are contained therein and that no applicable defences create a gap in the implementation of the Convention. Moreover, if the domestic bribery offence is to be extended to apply to foreign bribery, it must be ensured that the resulting structure of the offence is not too cumbersome (for example, because of cross references) and complicated, creating uncertainty over precisely what conduct is covered by the offence.

211. The provisions of article 16 do not affect any immunities that foreign public officials or officials of public international organizations may enjoy under international law. As the interpretative notes indicate: “The States Parties noted the relevance of immunities in this context and encourage public international organizations to waive such immunities in appropriate cases” (A/58/422/Add.1, para. 23; see also art. 30, para. 2, regarding immunities of national public officials).

212. Attention should also be paid to some other provisions (arts. 26-30 and 42) regarding closely related requirements pertaining to offences established under the Convention.

213. States with only territorial jurisdiction will have to make an exception to territorial jurisdiction in order to cover this particular offence, which will usually be committed by nationals abroad.²⁵

*(d) Embezzlement, misappropriation or other diversion
of property by a public official*

214. Article 17 of the Convention against Corruption requires the establishment of the offence of embezzlement, misappropriation or other diversion of property by a public official.

²⁵With respect to the offence of bribing a foreign public official, national drafters of States that are parties to the OECD Bribery Convention may wish to note some of the differences between the OECD Convention and the Convention against Corruption:

(a) The Convention against Corruption addresses the bribery of a foreign public official “in order that the official act or refrain from acting **in the exercise of his or her official duties**”. The OECD Convention targets acts or omissions “**in relation to the performance of the official duties**”, including **outside the official’s authorized competence**;

(b) The Convention against Corruption covers the bribery of a foreign public official where the purpose of the bribe is to obtain an “**undue advantage** in relation to the conduct of international business”. The OECD Convention requires that the advantage be “**improper**” and in the commentary clarifies that this includes instances where the company concerned was the best qualified bidder or was otherwise a company that could properly have been awarded the business;

(c) The OECD Convention provides a definition of “public function” (see Commentaries on the OECD Convention on Combating Bribery, para. 12), whereas the Convention against Corruption does not;

(d) The definition of “foreign public official” in the Convention against Corruption includes a person exercising a public function for a “**public enterprise**”, but does not define “public enterprise”. The Commentaries on the OECD Convention clarifies that all cases of direct and indirect Government control over an enterprise are covered, including the case when the Government holds the majority of the enterprise’s subscribed capital, controls the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board;

(e) The Convention against Corruption affirms the principle that the domestic law of a State party governs applicable **defences** for the offences covered by the Convention (art. 30, para. 9). By contrast, the OECD Convention allows only two defences to the offence of bribing a foreign public official: (i) for “small facilitation payments”, and (ii) where the “advantage was permitted or required by the written law or regulation of the foreign public official’s country” (Commentaries to the OECD Convention, paras. 7 and 8).

215. States parties must establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

216. The required elements of the offence are the embezzlement, misappropriation or other diversion²⁶ by public officials of items of value entrusted to them by virtue of their position. The offence must cover instances where these acts are for the benefit of the public officials or another person or entity.

217. The items of value include any property, public or private funds or securities or any other thing of value. This article does not “require the prosecution of de minimis offences” (A/58/422/Add.1, para. 29).

218. It is recalled that, for the purposes of the Convention against Corruption, “property” means “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” (art. 2, subpara. (d)).

219. Attention should also be paid to some other sections of the present guide (concerning articles 26-30, article 42 and, in particular, article 57) regarding requirements that are closely related to offences established in accordance with the Convention.

(e) *Money-laundering*

220. Article 23 requires the establishment of offences related to the laundering of proceeds of crime, in accordance with fundamental principles of domestic law. The related Convention articles addressing measures aimed at the prevention of money-laundering were discussed in the previous chapter.

221. In the context of globalization, criminals take advantage of easier capital movement, advances in technology and increases in the mobility of people and commodities, as well as the significant diversity of legal provisions in various jurisdictions. As a result, assets can be transferred instantly from place to place through both formal and informal channels. Through exploitation of existing legal asymmetries, funds may appear finally as legitimate assets available in any part of the world.

²⁶The term “diversion” is understood in some States as separate from “embezzlement” and “misappropriation”, while in others “diversion” is intended to be covered by or is synonymous with those terms (A/58/422/Add.1, para. 30).

222. Confronting corruption effectively requires measures aimed at eliminating the financial or other benefits that motivate public officials to act improperly. Beyond this, combating money-laundering also helps to preserve the integrity of financial institutions, both formal and informal, and to protect the smooth operation of the international financial system as a whole.

223. As noted in the previous chapter, this goal can only be achieved through international and cooperative efforts. It is essential that States and regions try to make their approaches, standards and legal systems related to this offence compatible, so that they can cooperate with one another in controlling the international laundering of criminal proceeds. Jurisdictions with weak or no control mechanisms render the work of money launderers easier. Thus, the Convention against Corruption seeks to provide a minimum standard for all States.²⁷

224. The Convention against Corruption specifically recognizes the link between corrupt practices and money-laundering and builds on earlier and parallel national, regional and international initiatives in that regard. Those initiatives addressed the issue through a combination of repressive and preventive measures and the Convention follows the same pattern (see also chap. II of the present guide).

225. One of the most important of the previous initiatives related to the Organized Crime Convention, which mandated the establishment of the offence of money-laundering for additional predicate offences, including corruption of public officials, and encouraged States to widen the range of predicate offences beyond the minimum requirements.

226. “Predicate offence” is defined as “any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention” (art. 2, subpara. (h)).

227. As a result of all these initiatives, many States already have money-laundering laws. Nevertheless, such laws may be limited in scope and may not cover a wide range of predicate offences. Article 23 requires that the list of predicate offences include the widest possible range and at a minimum the offences established in accordance with the Convention against Corruption.

228. The provisions of the Convention against Corruption addressing the seizure, freezing and confiscation of proceeds (see art. 31) and the recovery of

²⁷ See also art. 6 of the Organized Crime Convention.

assets (see chap. V of the Convention and, especially, art. 57) include important related measures. States should review the provisions they already have in place to counter money-laundering in order to ensure compliance with these articles and those dealing with international cooperation (chap. IV). States undertaking such a review may wish to use the opportunity to implement the obligations they assume under other regional or international instruments and initiatives currently in place.

229. Article 23 requires that States parties establish the four offences related to money-laundering described in the following paragraphs:

(f) Conversion or transfer of proceeds of crime

230. The first offence is the conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action (art. 23, para. 1 (a) (i)).

231. 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.

232. The term “proceeds of crime” means “any property derived from or obtained, directly or indirectly, through the commission of an offence” (art. 2, subpara. (e)).

233. With respect to the mental or subjective elements required, the conversion or transfer must be intentional, the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds and the act or acts must be done for the purpose of either concealing or disguising their criminal origin, for example by helping to prevent their discovery, or helping a person evade criminal liability for the crime that generated the proceeds.

234. As noted in article 28 of the Convention against Corruption, knowledge, intent or purpose may be inferred from objective factual circumstances.

(g) *Concealment or disguise of proceeds of crime*

235. The second money-laundering offence is the concealment or disguise of the nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime (art. 23, para. 1 (a) (ii)).

236. The elements of this offence are quite broad, including the concealment or disguise of almost any aspect of or information about property.

237. Here, with respect to the mental or subjective elements required, the concealment or disguise must be intentional and the accused must have knowledge that the property constitutes the proceeds of crime at the time of the act. This mental state is less stringent than for the offence set forth in article 23, subparagraph 1 (a) (i). Accordingly, drafters should not require proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin.²⁸

238. The next two offences related to money-laundering are mandatory, subject to the basic concepts of the legal system of each State party.

(h) *Acquisition, possession or use of proceeds of crime*

239. The third offence is the acquisition, possession or use of proceeds of crime knowing, at the time of receipt, that such property is the proceeds of crime (art. 23, para. 1 (b) (i)).

240. This is the mirror image of the offences under article 23, paragraph 1 (a) (i) and (ii), in that, while those provisions impose liability on the providers of illicit proceeds, this paragraph imposes liability on recipients who acquire, possess or use the property.

241. The mental or subjective elements are the same as for the offence under article 23, paragraph 1 (a) (ii): there must be intent to acquire, possess or use, and the accused must have knowledge, at the time this occurred, that the property was the proceeds of crime. No particular purpose for the acts is required.

²⁸In the equivalent article in the Organized Crime Convention, the language used was identical and an interpretative note indicated that concealment of illicit origin should be understood to be covered by art. 6, paras. 1 (a) and (b), which for the Convention against Corruption comprises art. 23, paras. 1 (a) and (b). The note added that national drafters should also consider concealment for other purposes, or in cases where no purpose has been established, to be included (see the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, p. 45).

(i) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the foregoing offences

242. The fourth set of offences involves the 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 the article (art. 23, para. 1 (b) (ii)).

243. These terms are not defined in the Convention against Corruption,²⁹ allowing for certain flexibility in domestic legislation. States parties should refer to the manner in which such ancillary offences are otherwise structured in their domestic system and ensure that they apply to the other offences established pursuant to article 23.

244. The knowledge, intent or purpose, as required for these offences, may be inferred from objective factual circumstances (art. 28). National drafters could see that their evidentiary provisions enable such inference with respect to the mental state, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven.

245. Under article 23, States parties must apply these offences to proceeds generated by “the widest range of predicate offences” (art. 23, para. 2 (a)).

246. At a minimum, these must include a “comprehensive range of criminal offences established in accordance with this Convention” (art. 23, para. 2 (b)). For this purpose, “predicate offences shall include offences committed both within and outside the jurisdiction of the State party in question. However, offences committed outside the jurisdiction of a State party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State party implementing or applying this article had it been committed there” (art. 23, para. 2 (c)). So, dual criminality is necessary for offences committed in a different national jurisdiction to be considered as predicate offences.³⁰

²⁹The terms are also left undefined in the equivalent provisions of the Organized Crime Convention (art. 6).

³⁰Dual criminality is not required under the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, in which article 6, para. 2 (a), states that “it shall not matter whether the predicate offence was subject to the criminal jurisdiction of the Party”.

247. Many States already have laws on money-laundering, but there are many variations in the definition of predicate offences. Some States limit the predicate offences to trafficking in drugs or to trafficking in drugs and a few other crimes. Other States have an exhaustive list of predicate offences set forth in their legislation. Still other States define predicate offences generically as including all crimes, or all serious crimes,³¹ or all crimes subject to a defined penalty threshold.

248. An interpretative note for the Convention against Corruption states 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” (A/58/422/Add.1, para. 32).

249. The constitutions or fundamental legal principles of some States do not permit the prosecution and punishment of an offender for both the predicate offence and the laundering of proceeds from that offence. The Convention acknowledges this issue and, only in such cases, allows for the non-application of the money-laundering offences to those who committed the predicate offence (art. 23, para. 2 (e)).³²

250. Attention should also be paid to some other provisions (arts. 26-30 and 42) regarding closely related requirements pertaining to offences established under the Convention.

251. States parties must furnish copies of their laws giving effect to article 23 and of any subsequent changes to such laws, or a description thereof, to the Secretary-General of the United Nations (art. 23, para. 2 (d)). Such materials should be provided to the United Nations Office on Drugs and Crime.

³¹For the purposes of the Organized Crime Convention, “serious crimes” are considered acts “punishable by a maximum deprivation of liberty of at least four years or a more serious penalty” (art. 2, subpara. (b)).

³²This practice is sometimes called “self-laundering”. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 is silent on this issue. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime allows States parties to provide that the money-laundering offences will not apply to persons who committed the predicate offence (art. 6, para. 2 (b)).

(j) *Obstruction of justice*

252. Both corruptors and corrupted maintain or expand their wealth, power and influence by seeking to undermine systems of justice. No justice can be expected or done if judges, jurors, witnesses or victims are intimidated, threatened or corrupted. No effective national and international cooperation can be hoped for, if such crucial participants in the investigation and law enforcement process are not sufficiently protected to perform their roles and provide their accounts unimpeded. No serious crimes can be detected and punished, if the evidence is prevented from reaching investigators, prosecutors and the court.

253. It is the legitimacy of the whole law enforcement apparatus from the local to the global level that is at stake and needs to be protected against such corruptive influences. Innocent people would be wrongfully punished and guilty ones would escape penalty, if the course of justice was subverted by skilful manipulators associated with corrupt officials or networks.

254. So, the Convention against Corruption requires measures ensuring the integrity of the justice process. Under article 25, States must criminalize the use of inducement, threats or force in order to interfere with witnesses and officials, whose role would be to produce accurate evidence and testimony. This article complements the provisions addressing the related issues of protection of witnesses, experts and victims (art. 32) and of reporting persons (art. 33) and international cooperation (chap. IV).

255. Specifically, article 25 requires the establishment of two offences, as described below.

256. The first offence relates to efforts to influence potential witnesses and others in a position to provide the authorities with relevant evidence. States parties are required to criminalize the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to the commission of offences established in accordance with the Convention (art. 25, subpara. (a)). The obligation is to criminalize the use both of corrupt means, such as bribery, and of coercive means, such as the use or threat of violence.

257. The use of force, threats and inducements for false testimony can occur at any time before the commencement of the trial, whether formal proceedings are in progress or not. According to an interpretative note for the equivalent provision in the Organized Crime Convention (art. 23), which uses identical

language, the term “proceedings” must be interpreted broadly to cover all official governmental proceedings, including pretrial processes (see A/55/383/Add.1, para. 46).

258. States are required to apply the offence to all proceedings related to offences established in accordance with the Convention against Corruption.

259. The second offence States are required to establish is the criminalization of interference with the actions of judicial or law enforcement officials: the 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 the commission of offences established in accordance with the Convention (art. 25, subpara. (b)). The bribery element is not included in this provision, because justice and law enforcement officials are considered to be public officials, the bribery of whom would already be covered by article 15.

260. While this subparagraph mandates the protection of judicial and law enforcement officials, States are free to have legislation that protects other categories of public officials (art. 25, subpara. (b)).

261. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

2. Obligations to consider criminalization: non-mandatory offences

“Article 16

“Bribery of foreign public officials and officials of public international organizations

“...

“2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish 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.”

“Article 18

“Trading in influence

“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

“(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

“(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.”

“Article 19

“Abuse of functions

“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.”

“Article 20

“Illicit enrichment

“Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.”

“Article 21

“Bribery in the private sector

“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

“(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

“(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.”

“Article 22

“Embezzlement of property in the private sector

“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.”

“Article 24

“Concealment

“Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.”

Summary of main requirements

262. In accordance with paragraph 2 of article 16, States parties must consider establishing as a criminal offence the passive bribery of foreign public officials and officials of public international organizations.

263. In accordance with article 18, States 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.

264. In accordance with article 19, States 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.

265. In accordance with article 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.

266. In accordance with article 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)).

267. In accordance with article 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.

268. In accordance with article 24, States parties must consider establishing as a criminal offence concealment or continued retention of property in other situations besides those set forth in article 23, where the person knows that the property is the result of any of the offences established in the Convention.

269. The establishment of these offences may require new legislation or amendments to existing laws.

Optional requirements: obligation to consider

270. Corruption can manifest itself in a variety of ways. In order to cover as many types of misconduct as possible, the Convention against Corruption provides for a series of additional non-mandatory offences, which States are required to consider. These are described below.

(a) Passive bribery of foreign public officials and officials of public international organizations³³

271. Article 16, paragraph 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.

272. This is the mirror provision of article 15, subparagraph (b), which mandates the criminalization of passive bribery of national public officials; the discussion above of article 15, subparagraph (b) therefore applies to article 16, paragraph 2, mutatis mutandis. In this respect, drafters of national legislation may wish to consult the OECD Bribery Convention.

273. It has also been seen above that the offence of active bribery of foreign public officials and officials of public international organizations is mandatory. As the interpretative notes indicate, article 16, paragraph 1, requires that States parties criminalize active bribery of foreign public officials and paragraph 2 requires only that States parties “consider” criminalizing solicitation or acceptance of bribes by foreign officials in such circumstances. The notes state that

³³The General Assembly, in operative paragraph 6 of its resolution 58/4, requested the Conference of the States Parties to the United Nations Convention against Corruption to address the criminalization of bribery of officials of public international organizations.

“This is not because any delegation condoned or was prepared to tolerate the solicitation or acceptance of such bribes. Rather, the difference in degree of obligation between the two paragraphs is due to the fact that the core conduct addressed by paragraph 2 is already covered by article 15, which requires that States parties criminalize the solicitation and acceptance of bribes by their own officials” (A/58/422/Add.1, para. 28).

274. Further interpretative notes clarify additional points, which are described in the following paragraphs.

275. The provisions of article 16 are not to affect “any immunities that foreign public officials or officials of public international organizations may enjoy in accordance with international law. The States Parties noted the relevance of immunities in this context and encourage public international organizations to waive such immunities in appropriate cases” (A/58/422/Add.1, para. 23).

276. National drafters should be aware that a statute that defines the offence in terms of payments “to induce a breach of the official’s duty” could meet the standard set forth in paragraphs 1 and 2 of article 16, 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 (A/58/422/Add.1, para. 24).

277. The negotiating delegations considered it quite important that any State party that has not established the offence defined in paragraph 2 of article 16 should, insofar as its laws permit, provide assistance and cooperation with respect to the investigation and prosecution of the offence by a State party that has established it in accordance with the Convention and should avoid, if at all possible, allowing technical obstacles such as lack of dual criminality to prevent the exchange of information needed to bring corrupt officials to justice (A/58/422/Add.1, para. 26).

278. The word “intentionally” was included in article 16, paragraph 2, primarily for consistency with paragraph 1 and other provisions of the Convention and was not intended to imply any weakening of the commitment contained in paragraph 2, as it was recognized that a foreign public official cannot “unintentionally” solicit or accept a bribe (A/58/422/Add.1, para. 27).

279. Finally, attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

(b) Active and passive trading in influence

280. Article 18 requires that States parties consider establishing as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State party an undue advantage for the original instigator of the act or for any other person;

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State party an undue advantage.

281. The provisions of this article mirror those of article 15, which mandates the criminalization of active and passive bribery of national public officials. There is one main difference between article 15 and article 18. The offences under article 15 involve an act or refraining to act by public officials in the course of their duties. In contrast, under article 18, the offence involves using one's real or supposed influence to obtain an undue advantage for a third person from an administration or public authority of the State.

282. Otherwise, the elements of the offences under article 18 are the same as those of article 15.

(c) Active trading in influence

283. The elements of the first offence (active trading in influence) are those of promising, offering or actually giving something to a public official. The offence must cover instances where it is not a gift or something tangible that is offered. So, an undue advantage may be something tangible or intangible.

284. The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organization. The undue advantage or bribe must be linked to the official's influence over an administration or public authority of the State.

285. The mental or subjective element for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to abuse his or her influence in order to

obtain from an administration or public authority of the State party an undue advantage for the instigator of the act or for any other person.

286. Since the conduct covers cases of merely offering a bribe, that is, even including cases where it was not accepted and could not therefore have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place.

(d) Passive trading in influence

287. In the passive version of this offence, the elements are soliciting or accepting the bribe. The link with the influence of official conduct must also be established.

288. As with the previous offence, the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly.

289. The mental or subjective element is only that of intending to solicit or accept the undue advantage for the purpose of abusing one's influence to obtain an undue advantage for a third person from an administration or public authority of the State.

290. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

(e) Abuse of functions

291. Article 19 requires that States parties consider the establishment as a criminal offence, when committed intentionally, of the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of the law, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.³⁴

292. This provision encourages the criminalization of public officials who abuse their functions by acting or failing to act in violation of laws to obtain

³⁴See art. 3, para. 1 (c), of the Southern African Development Community Protocol against Corruption for a similar provision.

an undue advantage. According to the interpretative notes, this offence may encompass various types of conduct such as improper disclosure by a public official of classified or privileged information (A/58/422/Add.1, para. 31).

293. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

(f) Illicit enrichment

294. Subject to constitutional and fundamental principles of their legal systems, States parties must consider the establishment of illicit enrichment as a criminal offence. States must consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income (art. 20).

295. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

296. The establishment of illicit enrichment as an offence has been found helpful in a number of jurisdictions. It addresses the difficulty faced by the prosecution when it must prove that a public official solicited or accepted bribes in cases where his or her enrichment is so disproportionate to his or her lawful income that a prima facie case of corruption can be made. The creation of the offence of illicit enrichment has also been found useful as a deterrent to corruption among public officials.

297. The obligation for parties to consider creating such an offence is however subject to each State party's constitution and the fundamental principles of its legal system (see also para. 13 of the present guide concerning safeguard clauses). 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. 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. It may thus be viewed as a rebuttable presumption. Once such a case is made, the defendant can then offer a reasonable or credible explanation.

(g) *Bribery in the private sector*

298. The Convention against Corruption also introduces active and passive bribery in the private sector, an important innovation compared to the Organized Crime Convention or other international instruments. Article 21 thus brings out the importance of requiring integrity and honesty in economic, financial or commercial activities.³⁵

299. Specifically, article 21 requires that States parties consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

300. As the above provisions mirror those of article 15, the discussion regarding article 15 applies here, *mutatis mutandis*.

(i) *Active bribery*

301. The required elements of this offence are those of promising, offering or giving something to a person who directs or works for a private sector entity. The offence must cover instances where it is not a gift or something tangible that is offered. So, an undue advantage may be something tangible or intangible, whether pecuniary or non-pecuniary.

302. The undue advantage does not have to be given immediately or directly to a person who directs or works for a private sector entity. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or a political organization. Some national laws may cover the promise and offer under provisions regarding the attempt to commit bribery. When this is not the case, it will be

³⁵See also Council of the European Union Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, article 2 of which makes the criminalization of active and passive corruption in the private sector mandatory.

necessary to specifically cover promising (which implies an agreement between the bribe giver and the bribe taker) and offering (which does not imply the agreement of the prospective bribe taker). The undue advantage or bribe must be linked to the person's duties.

303. The required mental or subjective element for this offence is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the person who directs or works for a private sector entity to act or refrain from acting in breach of his or her duties in the course of economic, financial or commercial activities. Since the conduct covers cases of merely offering a bribe, that is, even including cases where it was not accepted and could therefore not have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place (see art. 28, which provides that "Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances").

(ii) Passive bribery

304. This offence is the passive version of the first offence. The required elements are soliciting or accepting the bribe. The link with the influence over the conduct of the person who directs or works in any capacity for a private sector entity must also be established.

305. As with the previous offence, the undue advantage may be for the person who directs or works in any capacity for a private sector entity or some other person or entity. The solicitation or acceptance must be by that person or through an intermediary, that is, directly or indirectly.

306. The mental or subjective element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in breach of his or her duties, in the course of economic, financial or commercial activities.

307. Article 21, as well as article 22, on embezzlement of property, are intended to cover conduct confined entirely to the private sector, where there is no contact with the public sector at all.

308. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

(h) *Embezzlement of property in the private sector*

309. Beyond the active and passive bribery offences, article 22 urges States to consider criminalizing, when committed intentionally, acts of embezzlement by persons who direct or work, in any capacity, in a private sector entity of any property, private funds or securities or anything of value entrusted to them by virtue of their position.

310. This article parallels the mandatory provisions contained in article 17, which addresses the same types of misconduct when committed by public officials (see sect. III.B.1 above).

311. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

(i) *Concealment*

312. Finally, the Convention recommends the criminalization of concealment, which is an offence facilitative of or furthering all other offences established in accordance with the Convention and closely related to the money-laundering provisions of article 23.³⁶

313. Article 24 requires that, without prejudice to the provisions of article 23 of the Convention, each State party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with the Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with the Convention.

³⁶Relevant international and regional treaties and documents include the African Union Convention on Preventing and Combating Corruption; the Council of Europe Criminal Law Convention on Corruption; the Organization of American States Inter-American Convention against Corruption and model regulations concerning laundering offences connected to illicit drug trafficking and other serious offences; the United Nations Organized Crime Convention; the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the United Nations/Commonwealth Secretariat/International Monetary Fund model provisions on money-laundering, terrorist financing, preventive measures and proceeds of crime (for common law systems); the United Nations/International Monetary Fund model law on money-laundering and financing of terrorism (for civil law systems); the United Nations model legislation on laundering, confiscation and international cooperation in relation to the proceeds of crime (for civil law systems); and the United Nations model money-laundering, proceeds of crime and terrorist financing bill (for common law systems).

314. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

3. Liability of legal persons

“Article 26

“Liability of legal persons

“1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

“2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

“3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

“4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.”

315. Serious and sophisticated crime is frequently committed by, through or under the cover of legal entities, such as companies, corporations or charitable organizations. Complex corporate structures can effectively hide the true ownership, clients or specific transactions related to serious crimes, including the corrupt acts criminalized in accordance with the Convention against Corruption. In the context of globalization, international corporations play an important role. Decision-making processes have become increasingly sophisticated. Decisions leading to corruption can be hard to interpret as they may involve multiple layers of other decisions, making it difficult to say who exactly is responsible or liable. Even when such a determination may be possible, individual executives may reside outside the State where the offence was committed and the responsibility of specific individuals may be difficult to prove. Thus, the view has been gaining ground that the only way to remove this instrument and shield of serious crime is to introduce liability for legal entities.

316. Criminal liability of a legal entity may also have a deterrent effect, partly because reputational damage and monetary sanctions can be very costly and partly because it may act as a catalyst for more effective management and supervisory structures to ensure compliance with the law.

317. The principle that corporations cannot commit crimes (*societas delinquere non potest*) used to be universally accepted. This changed initially in some common law systems. Today, the age-old debate on whether legal entities can bear criminal responsibility has shifted more widely to the question of how to define and regulate such responsibility.

318. There are still concerns over the attribution of intent and guilt, the determination of the degree of collective culpability, the type of proof required for the imposition of penalties on corporate entities and the appropriate sanctions, in order to avoid the penalization of innocent parties. In some jurisdictions, it is considered artificial to treat a corporation as having a blameworthy state of mind.

319. Policymakers everywhere follow the ongoing debates on issues such as collective knowledge, the regulation of internal corporate controls, corporate accountability and social responsibility, as well as the application of negligence and other standards.

320. Nevertheless, national legislation and international instruments³⁷ increasingly complement the liability of natural persons with specific provisions on corporate liability. It is also possible to consider the liability of legal persons as separate from the liability of natural persons. For a variety of reasons, it may be impossible to proceed against the natural persons responsible for corruption offences. In increasingly large and complex structures, operations and decision-making are diffuse. For this reason, corporate entities are frequently used as vehicles for the payment of a bribe. In addition, it is often difficult to identify any particular decision maker within the management chain responsible for the

³⁷See, for example, the Organized Crime Convention; also, the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, in 1985, recommended for national, regional and international action the Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order, a recommendation that was reiterated by the General Assembly in paragraph 4 of its resolution 40/32. Paragraph 9 of the Guiding Principles states: "Due consideration should be given by Member States to making criminally responsible not only those persons who have acted on behalf of an institution, corporation or enterprise, or who are in a policy-making or executive capacity, but also the institution, corporation or enterprise itself, by devising appropriate measures that would prevent or sanction the furtherance of criminal activities." (see *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. B, annex).

corrupt transaction. Moreover, it may be unfair to apportion blame to one specific individual when a complex, diffuse decision-making structure is involved.

321. National legal regimes remain quite diverse with respect to liability of legal persons, with some States resorting to criminal penalties against the organization itself, such as fines, forfeiture of property or deprivation of legal rights, whereas others employ non-criminal or quasi-criminal measures.

322. As the main questions revolve around the modalities of accountability and the sort of penalties that can be imposed on legal entities, several attempts at harmonization prior to the Convention against Corruption acknowledged such diversity of approaches.

323. For example, in its resolution 1994/15 of 25 July 1994, the Economic and Social Council noted the recommendations concerning the role of criminal law in protecting the environment made by the Ad Hoc Expert Group on More Effective Forms of International Cooperation against Transnational Crime, including Environmental Crime, recommendation (g) of which states that support should be given to the extension of the idea of imposing criminal or non-criminal fines or other measures on corporations in jurisdictions in which corporate criminal liability is not currently recognized in the legal system. The same spirit is found in the Convention on the Protection of the Environment through Criminal Law, adopted by the Council of Europe in 1998,³⁸ article 9 of which stipulates that criminal or administrative sanctions or measures could be imposed to hold corporate entities accountable.

324. International initiatives related to money-laundering include recommendation 2, subparagraph (b), of the FATF Forty Recommendations, as revised in 2003, which states: “Criminal liability, and, where that is not possible, civil or administrative liability, should apply to legal persons. This should not preclude parallel criminal, civil or administrative proceedings with respect to legal persons in countries in which such forms of liability are available. Legal persons should be subject to effective, proportionate and dissuasive sanctions. Such measures should be without prejudice to the criminal liability of individuals.” The OAS model regulations concerning laundering offences connected to illicit drug trafficking and other serious offences contain similar provisions in article 15.

325. Corruption offences have been the subject of similar efforts, such as the OECD in its Bribery Convention, which obliges parties to “take such measures as may be necessary, in accordance with its legal principles, to establish the

³⁸Council of Europe, *European Treaty Series*, No. 172.

liability of legal persons for the bribery of a foreign public official” (art. 2). Even if a State party’s legal system does not apply criminal sanctions to legal persons, it is still required to ensure that they are “subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials” (art. 3, para. 2).

326. A green paper issued by the Commission of the European Communities on criminal-law protection of the financial interests of the Community refers to earlier European initiatives and adds that, on the basis of those initiatives, “heads of businesses or other persons with decision-making or controlling powers within a business could be held criminally liable in accordance with the principles determined by the domestic law, in the event of fraud, corruption or money-laundering the proceeds of such offences committed by a person under their authority on behalf of the business.” The paper also states that “legal persons should be liable for commission, participation (as accomplice or instigator) and attempts as regards fraud, active corruption and capital laundering, committed on their behalf by any person who exercises managerial authority within them” and that provision should be made to hold legal persons liable “where defective supervision or management by such a person made it possible for a person under his authority to commit the offences on behalf of the legal person.” As regards liability of a body corporate, such liability “does not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money-laundering.”³⁹

327. The concern is not theoretical or simply about potential risks. Legal persons have been found repeatedly to commit business and high-level corruption. Normative standards regarding their liability are indispensable. The Organized Crime Convention and the Criminal Law Convention on Corruption of the Council of Europe provide for criminal or other liability of legal persons relative to the offences of active and passive corruption and money-laundering.⁴⁰

328. Building on such initiatives, the Convention against Corruption requires that liability for offences be established both for natural or biological persons and for legal persons. Article 26 requires States parties to take the necessary steps, in accordance with their fundamental legal principles, to provide for corporate liability. This liability can be criminal, civil or administrative, thus accommodating the various legal systems and approaches.

³⁹Green Paper No. COM (2001) 715, sect. 5.4, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0715en01.pdf; see also the Organization of American States model legislation on illicit enrichment and transnational bribery.

⁴⁰See also Council of the European Union Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, arts. 5 and 6.

329. At the same time, the Convention requires that the monetary or other sanctions that will be introduced must be effective, proportionate and dissuasive.

Summary of main requirements

330. Article 26 of the Convention against Corruption requires the establishment of liability for legal entities, consistent with the State's legal principles, for the offences established in accordance with the Convention.

331. This liability may be criminal, civil or administrative and it must be without prejudice to the criminal liability of the natural persons who have committed the offence.

332. Sanctions must be effective, proportionate and dissuasive.

Mandatory requirements: obligation to take legislative or other measures

333. Article 26, paragraph 1, requires that States parties adopt such measures as may be necessary, consistent with their legal principles, to establish the liability of legal persons for participation in the offences established in accordance with the Convention.

334. 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. Subject to these legal principles, the liability of legal persons may be criminal, civil or administrative (art. 26, para. 2), which is consistent with other international initiatives that acknowledge and accommodate the diversity of approaches adopted by different legal systems. Thus, there is no obligation to establish criminal liability, if that is inconsistent with a State's legal principles.⁴¹ In those cases, a form of civil or administrative liability will be sufficient to meet the requirement.⁴²

335. Article 26, paragraph 3, provides that this liability of legal entities must be established without prejudice to the criminal liability of the natural persons who have committed the offences. The liability of natural persons who perpetrated the acts, therefore, is in addition to any corporate liability and must not

⁴¹Note, however, that parties to the OECD Bribery Convention are required to establish the criminal liability of legal persons for the offence of the active bribery of a foreign public official when a party's legal system provides for this possibility.

⁴²Examples of non-criminal measures that may be adopted are given in Council of the European Union Framework Decision 2003/568/JHA on combating corruption in the private sector, art. 6.

be affected in any way by the latter. When an individual commits crimes on behalf of a legal entity, it must be possible to prosecute and sanction them both (see also the introductory paragraphs on this issue, above).⁴³

336. The Convention requires States to ensure that legal persons held liable in accordance with article 26 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions (art. 26, para. 4).

337. This specific provision complements the more general requirement of article 30, paragraph 1, that sanctions must take into account the gravity of the offence. Given that the investigation and prosecution of crimes of corruption can be quite lengthy, States with a legal system providing for statutes of limitation must ensure that the limitation periods for the offences covered by the Convention are comparatively long (see also art. 29).

338. The most frequently used sanction is a fine, which is sometimes characterized as criminal, sometimes as non-criminal and sometimes as a hybrid. Other sanctions include exclusion from contracting with the Government (for example public procurement, aid procurement and export credit financing), forfeiture, confiscation, restitution, debarment or closing down of legal entities. In addition, States may wish to consider non-monetary sanctions available in some jurisdictions, such as withdrawal of certain advantages, suspension of certain rights, prohibition of certain activities, publication of the judgement, the appointment of a trustee, the requirement to establish an effective internal compliance programme and the direct regulation of corporate structures.

339. The obligation to ensure that legal persons are subject to appropriate sanctions requires that these be provided for by legislation and should not limit or infringe on existing judicial independence or discretion with respect to sentencing.

340. Finally, the Convention requires mutual legal assistance to be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State party, in cases where a legal entity is subject to a criminal, civil or administrative liability (see art. 46, para. 2).⁴⁴

⁴³See also para. 320 of the present guide, concerning the possibility of the liability of legal persons being separate from that of natural persons.

⁴⁴See the evaluation reports by GRECO, available on the GRECO website. Noteworthy also is that the OECD Bribery Convention requires that parties provide prompt and effective legal assistance to another party for non-criminal proceedings within the scope of that Convention brought by a party against a legal person.

4. Participation and attempt

“Article 27

“Participation and attempt

“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

“2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

“3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.”

Summary of main requirements

341. States parties must establish as a criminal offence the participation as an accomplice, assistant or instigator in the offences established in accordance with the Convention.

Mandatory requirements: obligation to take legislative or other measures

342. Article 27, paragraph 1, requires that States parties establish as a criminal offence, in accordance with their domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention.

343. 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).

344. Implementation of this provision may require legislation. States that already have laws of general application establishing liability for aiding and

abetting, participation as an accomplice and similar forms of liability may need only to ensure that these will apply to the new corruption offences.⁴⁵

Optional measures: measures States parties may wish to consider

345. In addition, States parties may wish to consider the criminalization, consistent with their domestic law, of attempts to commit an offence (art. 27, para. 2) or the preparation (art. 27, para. 3) of an offence established in accordance with the Convention.⁴⁶

346. Attention should also be paid to some other provisions (arts. 26-30 and 42) covering closely related requirements pertaining to offences established under the Convention.

C. Law enforcement

“Article 28

“Knowledge, intent and purpose as elements of an offence

“Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.”

“Article 29

“Statute of limitations

“Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.”

⁴⁵A similar requirement is contained also in the Organized Crime Convention (art. 8, para. 3).

⁴⁶See also the OECD Bribery Convention (art. 1, para. 2).

“Article 30

“Prosecution, adjudication and sanctions

“1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

“2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, 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 this Convention.

“3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

“4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

“5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

“6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

“7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

“(a) Holding public office; and

“(b) Holding office in an enterprise owned in whole or in part by the State.

“8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

“9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

“10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.”

“Article 31

“Freezing, seizure and confiscation

“1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

“(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

“(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

“2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

“3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

“4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

“5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

“6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

“7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

“8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

“9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

“10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.”

“Article 32

“Protection of witnesses, experts and victims

“1. Each State Party shall 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 this Convention and, as appropriate, for their relatives and other persons close to them.

“2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

“(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

“(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

“3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

“4. The provisions of this article shall also apply to victims insofar as they are witnesses.

“5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.”

“Article 33

“Protection of reporting persons

“Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.”

“Article 34

“Consequences of acts of corruption

“With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption 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.”

“Article 35

“Compensation for damage

“Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.”

“Article 36

“Specialized authorities

“Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons

specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.”

“*Article 37*

“*Cooperation with law enforcement authorities*

“1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this 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 such proceeds.

“2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

“3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

“4. Protection of such persons shall be, *mutatis mutandis*, as provided for in article 32 of this Convention.

“5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.”

“Article 38

“Cooperation between national authorities

“Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

“(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

“(b) Providing, upon request, to the latter authorities all necessary information.”

“Article 39

“Cooperation between national authorities and the private sector

“1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

“2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.”

“Article 40

“Bank secrecy

“Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention,

there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.”

“*Article 41*

“*Criminal record*

“Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, 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 this Convention.”

347. Prevention and criminalization of corrupt practices need to be supported by measures and mechanisms that enable the other parts of the overall anti-corruption efforts: detection, prosecution, punishment and reparation. In this respect, the Convention against Corruption provides for a series of procedural measures that support criminalization.

348. Because of the length and detail of these provisions, this section of the present guide will start with a summary of all main requirements, but then moves on to an article-by-article discussion.

349. These provisions are related to the prosecution of corruption offences and enforcement of national anti-corruption laws, such as:

- (a) Evidentiary standards, statutes of limitation and rules for adjudicating corruption offences (arts. 28-30);
- (b) Cooperation between national law enforcement authorities, specialized anti-corruption agencies and the private sector (arts. 37-39);
- (c) Use of special investigative techniques (art. 50);
- (d) Protection of witnesses, victims and whistleblowers (arts. 32 and 33);
- (e) Allowing the freezing, seizure and confiscation of proceeds and instrumentalities of corruption (art. 31);
- (f) Overcoming obstacles that may arise out of the application of bank secrecy laws (art. 40);

(g) Addressing the consequences of acts of corruption (art. 34), including through compensating for damages caused by corruption (art. 35).

Summary of main requirements

350. States parties must ensure that the knowledge, intent or purpose element of offences established in accordance with the Convention can be established through inference from objective factual circumstances (art. 28).

351. States parties must establish long statutes of limitation for offences established in accordance with the Convention and suspend them or establish longer ones for alleged offenders evading the administration of justice (art. 29).

352. In accordance with article 30, States parties must:

(a) Ensure that offences covered by the Convention are subject to adequate sanctions taking the gravity of each offence into account (para. 1);

(b) Maintain a balance between immunities provided to their public officials and their ability to effectively investigate and prosecute offences established under the Convention (para. 2);

(c) Ensure that pretrial and pre-appeal release conditions take into account the need for the defendants' presence at criminal proceedings, consistent with domestic law and the rights of the defence (para. 4);

(d) Take into account the gravity of the offences when considering early release or parole of convicted persons (para 5).

353. Article 30 also mandates that States parties consider or endeavour:

(a) To ensure that any discretionary legal powers relating to the prosecution of offences established in accordance with the Convention maximize the effectiveness of law enforcement in respect of those offences and act as a deterrent (para. 3);

(b) To establish procedures through which a public official accused of such offence may be removed, suspended or reassigned (para. 6);

(c) To establish procedures for the disqualification of a person convicted of an offence established in accordance with the Convention from:

(i) Public office; and

(ii) Office in an enterprise owned in whole or in part by the State (para. 7);

(d) To promote the reintegration of persons convicted of offences established in accordance with the Convention into society (para. 10).

354. In accordance with article 31, States parties must, to the greatest extent possible under their domestic system, have the necessary legal framework to enable:

(a) The confiscation of proceeds of crime derived from offences established in accordance with the Convention or property the value of which corresponds to that of such proceeds (para. 1 (a));

(b) The confiscation of property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention (para. 1 (b));

(c) The identification, tracing and freezing or seizure of the proceeds and instrumentalities of crime covered by the Convention, for the purpose of eventual confiscation (para. 2);

(d) The administration of frozen, seized or confiscated property (para. 3);

(e) The application of confiscation powers to transformed or converted property and proceeds intermingled with legitimately obtained property (to the value of the proceeds in question) and to benefits or income derived from the proceeds (paras. 4-6);

(f) The empowerment of courts or other competent authorities to order that bank, financial or commercial records be made available or seized. Bank secrecy shall not be a legitimate reason for failure to comply (para. 7).

355. In accordance with article 32, and bearing in mind that some victims may also be witnesses (art. 32, para. 4), States parties are required:

(a) To provide effective protection for witnesses, within available means (para. 1). This may include:

(i) Physical protection (para. 2 (a));

(ii) Domestic or foreign relocation (para. 2 (a));

(iii) Special arrangements for giving evidence (para. 2 (b));

(b) To consider entering into foreign relocation agreements (para. 3);

(c) To provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law (para. 5).

356. Article 33 requires States parties to consider providing measures to protect persons who report offences established in accordance with the Convention to competent authorities.

357. Article 34 requires States parties to address the consequences of corruption. In this context, States may wish to consider annulling or rescinding a contract, withdrawing a concession or similar instrument, or taking other remedial action.

358. Article 35 requires that States parties ensure that entities or individuals who have suffered damages as a result of corruption have the right to initiate legal proceedings to obtain damages from those responsible.

359. Article 36 requires States parties, in accordance with the fundamental principles of their legal system:

(a) To ensure they have a body or persons specializing in combating corruption through law enforcement;

(b) To grant the body or persons the necessary independence to carry out its or their functions effectively without undue influence; and

(c) To provide sufficient training and resources to such body or persons.

360. Under article 37, States parties must:

(a) Take appropriate measures to encourage persons who participate or who have participated in Convention offences:

(i) To supply information for investigative and evidentiary purposes;

(ii) To provide concrete assistance towards depriving offenders of the proceeds of crime and recovering such proceeds (para. 1);

(b) To consider allowing mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of offences established in accordance with the Convention (para. 2);

(c) To consider providing for the possibility of granting immunity from prosecution to a person who provides substantial cooperation (this may require legislation in systems not providing prosecutorial discretion) (para. 3);

(d) To provide to such persons the same protection as provided to witnesses (para. 4; see also art. 32).

361. Article 38 requires that States parties take measures to encourage cooperation between their public authorities and law enforcement. Such cooperation may include:

(a) Informing law enforcement authorities when there are reasonable grounds to believe that offences established in accordance with articles 15 (Bribery of national public officials), 21 (Bribery in the private sector) and 23 (Laundering of proceeds of crime) have been committed; or

(b) Providing such authorities all necessary information, upon request.

362. Article 39 requires States parties:

(a) To take measures consistent with its laws encouraging cooperation between its private sector authorities (financial institutions, in particular) and law enforcement authorities regarding the commission of offences established in accordance with the Convention (para. 1);

(b) To consider encouraging its nationals and habitual residents to report the commission of such offences to its law enforcement authorities (para. 2).

363. Article 40 requires States parties to ensure that, in cases of domestic criminal investigations of offences established in accordance with the Convention, their legal system has appropriate mechanisms to overcome obstacles arising out of bank secrecy laws.

364. Finally, States parties may allow the consideration of an alleged offender's convictions in another State in their own criminal proceedings (art. 41).

***Mandatory requirements: obligation to take legislative
or other measures***

365. This section of the Convention addresses a host of provisions and measures contributing to the effective identification, apprehension, prosecution, adjudication and sanctioning of those engaged in corrupt practices. For these goals, as well as those of ensuring that justice is meted out and offenders are prevented from enjoying the fruits of their misconduct, measures designed to locate and seize proceeds of crime, alongside compensation for damages, are vital. Instrumental and necessary in this respect is also the adequate protection of witnesses, victims and others who collaborate in the investigation or prosecution of offences established in accordance with the Convention. Finally, all of these goals can only be achieved through national and international cooperation not only among relevant public authorities, but also between national authorities and the private sector.

366. The provisions discussed in this section need to be seen also in conjunction with those regarding prevention of corruption (see chap. II of the present guide) and international cooperation (see chap. IV). If one of the Convention's fundamental principles, that of asset recovery (see chap. V), is to be pursued realistically, all of the above efforts must be concerted and synchronized locally and globally.

367. This must be borne in mind in the context of the following paragraphs, which examine article by article the provisions regarding law enforcement in respect of offences established in accordance with the Convention.

(a) Knowledge, intent and purpose as elements of an offence

368. Article 28 provides that knowledge, intent or purpose required as an element of an offence established in accordance with the Convention may be inferred from objective factual circumstances. National drafters should see that their evidentiary provisions enable such inference with respect to the mental state of an offender, rather than requiring direct evidence, such as a confession, before the mental state is deemed proven.

(b) Statute of limitations

369. In accordance with article 29, States parties must, where appropriate, establish in their domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with the Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

370. Generally, such statutes set time limits on the institution of proceedings against a defendant. Many States do not have such statutes, while others apply them across the board or with limited exceptions. The concern underlying this provision is to strike a balance between the interests of swift justice, closure and fairness to victims and defendants and the recognition that corruption offences often take a long time to be discovered and established.⁴⁷ In international cases, there is also a need for mutual legal assistance, which may cause additional delays. There are variations among States as to when the limitation period starts and how the time is counted. For example, in some States time limits do not run until the commission of the offence becomes known (for example, when a complaint is made or the offence is discovered or reported) or when the accused has been arrested or extradited and can be compelled to appear for trial.

371. Where such statutes exist, the purpose is mainly to discourage delays on the part of the prosecuting authorities, or on the part of plaintiffs in civil cases,

⁴⁷Many legal systems and international conventions also include clauses for trial without undue delays (see, for example, the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex) in its article 14, paragraph 3 (c)).

to take into account the rights of defendants and to preserve the public interest in closure and prompt justice. Long delays often entail loss of evidence, memory lapses and changes of law and social context, all of which may contribute to some injustice. However, a balance must be achieved between the various competing interests and the length of the period of limitation varies considerably from State to State. Nevertheless, serious offences must not go unpunished, even if it takes a longer period of time to bring offenders to justice. This is particularly important in the case of fugitives, as the delay of instituting proceedings is beyond the control of authorities. Corruption cases may take a long time to be detected and even longer for the facts to be established.

372. For this reason, the Convention requires States parties with statutes of limitation to introduce long periods for all offences established in accordance with the Convention and longer periods for alleged offenders that have evaded the administration of justice. These provisions parallel those of the Organized Crime Convention (see art. 11, para. 5). The Convention against Corruption, however, adds the option of suspending the statute of limitations in the case of those evading the administration of justice.

373. States parties may implement this provision either by reviewing the time-length of existing statutes of limitations or by reviewing the method of calculation. The first approach is sometimes a complicated exercise, because it may require altering various procedural and substantive rules, including sanctions. Sometimes, a review of the calculation mechanism (or the authoritative interpretation of the mechanism) may suffice. For instance, the clock for prosecution may start running from the time the offence is discovered, instead of the time the offence was committed.

374. Article 29 does not require States parties without statutes of limitation to introduce them.

(c) Prosecution, adjudication and sanctions

375. Harmonizing legal provisions on corruption, detecting the offences, identifying and arresting the culprits, enabling jurisdiction to be asserted and facilitating smooth coordination of national and international efforts are all indispensable components of a concerted, global strategy against serious crime. Yet they are not sufficient. After all of the above has taken place, it is also necessary to ensure that the prosecution, treatment and sanctioning of offenders around the world is also comparatively symmetric and consistent with the harm they have caused and with the benefits they have derived from their criminal activities.

376. The penalties provided for similar crimes in various jurisdictions diverge significantly, reflecting different national traditions, priorities and policies. It is essential, however, to ensure that at least a minimum level of deterrence is applied by the international community to avoid the perception that certain types of crime “pay”, even if the offenders are convicted. In other words, the sanctions must clearly outweigh the benefits of the crime. Therefore, in addition to harmonizing substantive provisions, States need to engage in a parallel effort with respect to the issues of prosecution, adjudication and punishment.

377. International initiatives have sought to do this with respect to specific offences, as for example, the Organized Crime Convention (art. 11), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (General Assembly resolution 45/110, annex).

378. Article 30 addresses this important aspect of the fight against corruption and complements the provisions relative to the liability of legal persons (art. 26), the freezing, seizure and confiscation of proceeds of crime (art. 31), and the recovery of assets (chap. V). The article requires that States parties give serious consideration to the gravity of the offences established in accordance with the Convention when they decide on the appropriate punishment and possibility of early release or parole. It also requires that States parties make an effort to ensure that any discretionary powers they have under domestic law is used to deter these offences. Article 30 also requires that States parties properly balance the immunities their public officials enjoy with their ability to investigate and prosecute corruption offences.

379. Sophisticated corrupt actors are frequently considered likely to flee the State where they face legal proceedings. For this reason, the Convention requires that States parties take measures to ensure that those charged with offences established in accordance with the Convention appear at criminal proceedings, consistent with their law and the rights of the defence. This relates to decisions on the defendants’ release before trial or appeal.

380. Further, article 30 mandates the consideration of measures to be taken against accused or convicted public officials, as appropriate and consistent with their fundamental principles of law. States are required to endeavour to promote the social reintegration of persons convicted of offences established in accordance with the Convention.

381. Article 30 contains both mandatory and non-mandatory provisions, which will be examined in turn.

(i) *Mandatory requirements*

382. The Convention against Corruption requires that States parties make the commission of an offence established in accordance with the Convention liable to sanctions that take into account the gravity of that offence (para. 1).

383. The severity of the punishment for the offences established in accordance with the Convention is left to the States parties, but they must take into account the gravity of the offence. The primacy of national law in this respect is affirmed by article 30, paragraph 9. States parties must also endeavour to ensure that the grave nature of the offence and the need to deter its commission is taken into account in prosecution, adjudication and correctional practices and decisions.⁴⁸ The Convention also clarifies that this provision will not prejudice the exercise of disciplinary powers by the competent authorities against civil servants (art. 30, para. 8).

384. This requirement is general and applies to both natural persons and legal entities. As noted above (see sect. III.B.3, concerning the liability of legal persons), there are additional and more specific provisions regarding legal entities contained in article 26, paragraph 4, which requires that States parties ensure that legal persons held liable in accordance with that article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

385. In the same spirit of fairness and deterrence, the Convention encourages a strict post-conviction regime. Article 30, paragraph 5, requires 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 offences established in accordance with the Convention.⁴⁹

386. Paragraph 2 requires States parties to establish or maintain, in accordance with their legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to their public officials for the performance of their functions and the possibility, when

⁴⁸Should national drafters in States parties to the Organized Crime Convention wish it to apply to corruption offences not specifically covered by that Convention, they need to provide for a maximum penalty of at least four years' deprivation of liberty, in order for the offence to be considered a "serious crime".

⁴⁹Many jurisdictions allow for an early release or parole of incarcerated offenders, while others completely prohibit it. The Convention against Corruption does not ask States parties to introduce such a programme if their system does not provide for it. It does, however, urge those States parties which provide for early release or parole to consider increasing the minimum eligibility period, bearing in mind the gravity of the offence, which may be done through consideration of any aggravating circumstances that may be listed in domestic laws or other conventions.

necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with the Convention.

387. It would be highly damaging to the legitimacy of the overall anti-corruption strategy, public perceptions of justice, private business functioning and international cooperation, if corrupt public officials were able to shield themselves from accountability and investigation or prosecution for serious offences. The objective of article 30, paragraph 2, is to eliminate or prevent such cases as much as possible.

388. An interpretative note indicates the understanding that the appropriate balance referred to in article 30, paragraph 2, would be established or maintained in law and in practice (A/58/422/Add.1, para. 34).

389. Under paragraph 4 of article 30, States parties must take appropriate measures—with respect to Convention offences, in accordance with their domestic law and with due regard to the rights of the defence—to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings. According to an interpretative note, the expression “pending trial” is considered to include the investigation phase (A/58/422/Add.1, para. 35).

390. The illegal transactions engaged in by some corrupt actors can generate substantial profits. Consequently, significant resources may be available to defendants, to the effect that they can post bail and avoid detention before their trial or their appeal. The dissuasive effect of bail is correspondingly diminished. National drafters, therefore, must take into account the risk that law enforcement may thus be undermined. Article 30, paragraph 4, points to the risk of imprudent use of pretrial and pre-appeal releases and requires that States take appropriate measures, consistent with their law and the rights of defendants, to ensure that they do not abscond.

(ii) Non-mandatory requirements

391. Article 30, paragraph 3, requires that States endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with the Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

392. This provision refers to discretionary prosecutorial powers available in some States. These States must make an effort to encourage the application of the law to the maximum extent possible in order to deter the commission of offences established in accordance with the Convention.

393. To the extent consistent with the fundamental principles of their legal system, States parties must consider establishing procedures through which a public official accused of an offence established in accordance with the Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence (art. 30, para. 6).

394. The next provision of article 30 addresses further consequences for convicted offenders. Where warranted by the gravity of the offence and to the extent consistent with the fundamental principles of their legal system, States parties are required to consider establishing procedures for the disqualification of persons convicted of an offence established in accordance with the Convention from public office or office in an enterprise owned in whole or in part by the State (art. 30, para. 7). Such disqualifications could be executed by court order or other appropriate means. The duration of the disqualification is also left to the discretion of the States parties, consistent with their domestic law.

395. Finally, the Convention recognizes that, just as with persons found guilty and punished for other kinds of misconduct, reintegration into the society is an important goal of control systems. Consequently, States parties must endeavour to promote the reintegration into society of persons convicted of offences established in accordance with the Convention (art. 30, para. 10).

(d) Freezing, seizure and confiscation

396. Criminalizing the conduct from which substantial illicit profits are made does not adequately punish or deter offenders. Even if arrested and convicted, some of these offenders will be able to enjoy their illegal gains for their personal use or other purposes. Despite some sanctions, the perception would still remain that crime pays in such circumstances and that Governments have been ineffective in removing the incentive for corrupt practices.

397. Practical measures to keep offenders from profiting from their crimes are necessary. One of the most important ways to do this is to ensure that States have strong confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property. Specific international cooperation mechanisms are also necessary to enable States to give

effect to foreign freezing and confiscation orders and to provide for the most appropriate use of confiscated proceeds and property.

398. Significant variation exists in the methods and approaches employed by different legal systems. Some opt for a property-based system, others for a value-based system, while still others combine the two. The first one allows confiscation of property found to be proceeds or instrumentalities of crime, that is, property used for the commission of crime.⁵⁰

399. The second system allows the determination of the value of proceeds and instrumentalities of crime and the confiscation of an equivalent value.⁵¹ Some States allow for value confiscation under certain conditions (for example, when the proceeds have been used, destroyed or hidden by the offender).⁵²

400. While these systems all require a conviction as a prerequisite, the proceedings after conviction are generally of a civil nature, employing, for example, the civil standard of proof.

401. Other variations relate to the range of offences with respect to which confiscation can take place, the requirement of a prior conviction of the offender,⁵³ the required standard of proof (to the criminal or lower civil level),⁵⁴

⁵⁰This model focuses on “tainted property”. In Canada, for example, the sentencing judge may order confiscation of property that constitutes proceeds of crime where the offence for which the conviction was obtained was committed in relation to those proceeds. Even if not satisfied that the property relates to the specific offence, the court may also order forfeiture of property if satisfied beyond reasonable doubt that the property is proceeds of crime. Because this system is specific to property, if the property cannot be located, has been transferred to a third party, is outside the country, has been substantially diminished in value or commingled with other property, the court may order a fine instead.

⁵¹The “value” based confiscation system originated in the United Kingdom of Great Britain and Northern Ireland. Under this system, the court can calculate the “benefit” to the convicted offender for a particular offence. Having determined the accrued benefit, the court may then assess the defendant’s ability to pay (i.e. the value of the amount that might be realizable from the defendant’s assets). On the basis of these calculations, the court would make a “confiscation” order, in the amount of the benefit or the realizable assets, whichever is lower.

⁵²Some countries (e.g. Australia) employ a combined system, which allows for orders relating to the “benefits” and the confiscation of tainted property.

⁵³In some States, there is limited provision for confiscation without conviction if the accused person has died or absconded. Increasingly, however, States have adopted separate regimes independent of criminal conviction-based confiscation, which allow for assets to be confiscated through civil proceedings aimed at the property itself, where no person needs to be convicted of an offence (for example, Colombia, Germany, South Africa and the United States).

⁵⁴Some jurisdictions provide for a discretionary power to reverse the burden of proof, in which case the offenders have to demonstrate the legal source of the property (for example, Hong Kong Special Administrative Region of China).

whether and the conditions under which third-party property is subject to confiscation and the power to confiscate the products or instrumentalities of crime.⁵⁵

402. The need for integration and the beginnings of a more global approach is clear. To this end, the Convention against Corruption devotes three articles to the issue. Articles 31, 55 and 57 of the Convention cover domestic and international aspects of identifying, freezing, confiscating and, very importantly, recovering the proceeds and instrumentalities of corrupt conduct.

403. It is worth pointing out that, by adopting general asset confiscation and international cooperation legislation, States parties may thereby implement many of the key provisions of other conventions, such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Organized Crime Convention and other corruption conventions.

404. The terms “property”, “proceeds of crime”, “freezing”, “seizure”, and “confiscation” are defined in article 2, subparagraphs (d)-(g), of both the Convention against Corruption and the Organized Crime Convention as follows:

(a) “Property” shall mean 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;

(b) “Proceeds of crime” shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;

(c) “Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

(d) “Confiscation”, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.

405. Article 31 requires States parties to adopt measures, to the greatest extent possible within their legal system, to enable the confiscation of proceeds, equivalent value of proceeds and instrumentalities of offences covered by the Convention, and to regulate the administration of such property.⁵⁶ The term “to the

⁵⁵See also recommendation III (Freezing and confiscating terrorist assets) of the FATF Nine Special Recommendations on Terrorist Financing and its related interpretative note and Security Council resolutions 1267 (1999), 1373 (2001) and 1377 (2001) concerning the financing of terrorism.

⁵⁶It is noted that parties to the OECD Bribery Convention are required to provide for monetary sanctions of comparable value, where seizure and confiscation are not available.

greatest extent possible within their domestic legal systems” is intended to reflect the variations in the way that different legal systems carry out the obligations imposed by this article. Nevertheless, States are expected to have a broad ability to comply with the provisions of article 31. Article 31 also obligates States parties to enable the identification, tracing, freezing and seizing of items for the purposes of confiscation and recovery. In addition, it obliges each State party to empower courts or other competent authorities to order the production of bank records and other evidence for purposes of facilitating such identification, freezing, confiscation and recovery.⁵⁷

406. Detailed provisions similar to those of the Convention against Corruption can be found in the Organized Crime Convention (arts. 12-14), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 5), the International Convention for the Suppression of the Financing of Terrorism (General Assembly resolution 54/109, annex), Security Council resolution 1373 (2001) and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of the Council of Europe. States that have enacted legislation to implement their obligations as parties to those conventions may not need major amendments to fulfil the requirements of the Convention against Corruption,⁵⁸ with the exception of the major innovation of asset recovery (see chap. V below).

407. Conversely, implementing the provisions of the Organized Crime Convention would bring States closer to conformity with the other conventions.

408. At the same time, article 31 reiterates the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State party.

(i) Mandatory requirements

409. Article 31 sets out the primary legislative obligations to create powers that enable confiscation and seizure of proceeds of crime.⁵⁹

⁵⁷In addition, States parties will have to ensure that the police, prosecutors and judicial authorities are properly trained. Lack of training has been identified as a major impediment to effective law enforcement in this complex area (see, in this regard, Convention against Corruption, art. 60 (Training and information exchange), para. 1 (e)-(g) and para. 2).

⁵⁸In addition, the FATF Forty Recommendations provide guidance to States on means of identifying, tracing, seizing and forfeiting the proceeds of crime.

⁵⁹Art. 55 of the Convention against Corruption covers international cooperation, while art. 57 provides for asset return.

410. The substantive obligations to enable confiscation and seizure are found in article 31, paragraphs 1 and 3 to 6, while procedural powers to trace, locate, gain access to and administer assets are found in the remaining paragraphs. Special mention is also made of the important issue of protection of third party rights.

a. Substantive obligations

411. Article 31, paragraph 1 (a), requires that States parties enable, to the greatest extent possible within their domestic legal systems, the confiscation of:

(a) Proceeds of crime derived from offences established in accordance with the Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with the Convention.⁶⁰

412. Given the Convention's "fundamental principle" of asset recovery, paragraph 3 of article 31 introduces an obligation for States parties to regulate the administration of frozen, seized or confiscated property covered in paragraphs 1 and 2 of the article. This is a provision not found in earlier instruments with very similar requirements, such as the Organized Crime Convention. So, even States parties to the Organized Crime Convention may need legislation or amendments to existing laws in order to meet this obligation.

413. It is important to note that effective international cooperation in asset confiscation and recovery cannot be accomplished without strong domestic provisions for restraint and confiscation. Experiences under other conventions and in the domestic context generally have demonstrated the critical importance of asset administration.

414. Paragraphs 4 and 5 of article 31 cover situations in which the source of proceeds or instrumentalities may not be immediately apparent, because the offenders have made their detection more difficult by mingling them with legitimate proceeds or by converting them into different forms. These paragraphs require States parties to enable the confiscation of property into which such proceeds have been converted, as well as intermingled proceeds of crime up to their assessed value.

⁶⁰An interpretative note to art. 12 of the Organized Crime Convention, which contains identical language, indicates that the words "used in or destined for use in" are meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a crime (A/55/383/Add.1, para. 22).

415. An interpretative note indicates that the provision contained in paragraph 5 is intended as a minimum threshold and that States parties would be free to go beyond it in their domestic legislation (A/58/422/Add.1, para. 36).

416. Paragraph 6 of article 31 further provides that income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in the article, in the same manner and to the same extent as proceeds of crime.

417. So, States parties are required to ensure that income or other benefits derived from investing proceeds of crime are also liable to confiscation.⁶¹

418. Many States already have such measures in place with respect to transnational organized crime and specific offences, including corruption, by virtue of legislation they enacted to implement the Organized Crime Convention and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. These States will need to review that legislation to determine whether it requires amendment to comply with the crimes established in accordance with the Convention against Corruption and with respect to the administration and return of confiscated crime proceeds.

b. Obligations to adopt procedural powers

419. The investigative capability needed to implement article 31 (as well as arts. 55 and 57) fully will depend to a large degree on non-legislative measures, such as ensuring that law enforcement agencies and prosecutors are properly trained and provided with adequate resources. In most cases, however, legislation will also be necessary to ensure that adequate powers exist to support the tracing and other investigative measures needed to locate and identify assets and link them to relevant crimes. Criminals who become aware that they are under investigation or charges will try to hide property and shield it from law enforcement actions. Sophisticated corrupt officials engage in such practices well before any investigation is instituted. Without the ability to trace such property as offenders move it about, law enforcement efforts will be frustrated.

420. The legislation required by article 31, paragraphs 2 and 7, involves:

(a) Such measures as may be necessary to enable the identification, tracing, freezing or seizure of proceeds or other property (art. 31, para. 2);

⁶¹ An interpretative note to the identical wording in the Organized Crime Convention indicates that the words "other benefits" are intended to encompass material benefits as well as legal rights and interests of an enforceable nature that are subject to confiscation (A/55/383/Add.1, para. 23).

(b) Powers for courts or other competent authorities to order that bank, financial or commercial records be made available or be seized (art. 31, para. 7).

421. Article 31, paragraph 7, sets forth procedural law requirements to facilitate the operation of the other provisions of article 31 and of article 55 (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 of real estate transactions, shipping lines, freight forwarders and insurers) are subject to compulsory production, for example through production orders and search and seizure or similar means that ensure their availability to law enforcement officials for purposes of carrying out the measures called for in articles 31 and 55. The same paragraph establishes the principle that bank secrecy cannot be raised by States as grounds for not implementing that paragraph. As will be seen, the Convention against Corruption applies the same rule with respect to mutual legal assistance matters (see art. 46, para. 8; see also art. 55 of the Convention and sect. IV.C, of the present guide).

422. Again, these measures are very similar to the Organized Crime Convention and to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. Thus, many States already have such measures in place, at least with respect to narcotics offences, by virtue of legislation implementing the 1988 Convention. States will need to review that legislation in order to ensure that it covers the crimes established in accordance with the Convention against Corruption.

c. Third parties

423. Article 31, paragraph 9, requires that the seizure and forfeiture requirements be interpreted as not prejudicing the rights of bona fide third parties, which would at a minimum exclude those with no knowledge of the offence or connection with the offender(s).

424. The system of confiscation intentionally constitutes an interference with the economic interests of individuals. For this reason, special care must be taken to ensure that the system developed by States parties maintains the rights of bona fide third parties who may have an interest in the property in question.⁶²

⁶²An interpretative note to the equivalent provisions of the Organized Crime Convention (art. 12) indicates that the interpretation of that article should take into account the principle in international law that property belonging to a foreign State and used for non-commercial purposes may not be confiscated except with the consent of the foreign State (A/55/383/Add.1, para. 21). The same note goes on to indicate that it is not the intention of the Organized Crime Convention to restrict the rules that apply to diplomatic or State immunity, including that of international organizations.

(ii) *Optional issues*

Burden of proof

425. In creating the judicial powers to order seizure and forfeiture, national drafters should consider issues relating to the applicable burden of proof. In some systems, confiscation is treated as a civil matter, with the attendant balance of probabilities standard. In other systems, confiscation is considered a criminal punishment, for which the higher standard of beyond a reasonable doubt should be applied and may in some cases be required by constitutional or other human rights standards.

426. To some extent, this may depend on whether there have already been one or more convictions in related criminal prosecutions. Since these entail a judicial finding that the crime was committed based on the high criminal standard of proof, the lower civil standard may then apply in subsequent confiscation proceedings on the question of whether the property involved was derived from, used in, or destined for use in the committed offence.

427. Article 31, paragraph 8, suggests that States parties may wish to consider shifting the burden of proof to the defendant to show that alleged proceeds of crime were actually from legitimate sources. Because States may have constitutional or other constraints on such shifting of the burden of proof, States parties are only required to consider implementing this measure to the extent that it is consistent with the fundamental principles of their law.

428. Similarly, legislative drafters may wish to consider adopting the related practice in some legal systems of not requiring a criminal conviction as a prerequisite to obtaining an order of confiscation, but providing for confiscation based on a lesser burden of proof to be applied in proceedings. For example, the laws of Ireland and the United Kingdom provide for such a system, with a lower burden of proof for deprivation of property than is required for deprivation of liberty.⁶³

⁶³Under the Proceeds of Crime Act of Ireland, the High Court, upon application, can seize assets that are suspected to be derived from criminal activity. Seizure can be ordered without prior conviction or proof of criminal activity on the part of the (civil) respondent, who, to defeat the claim, is required to establish the innocent origins of his suspicious and hitherto unexplained wealth. Article 2 ter of Italian Law No. 575 provides for the seizure of property, owned directly or indirectly by any person suspected of participating in a Mafia-type association, when its value appears to be out of all proportion to his or her income or economic activities, or when it can be reasonably argued, based on the available evidence, that the said property constitutes the proceeds of unlawful activities. The seized property becomes subject to confiscation if no satisfactory explanation can be provided for its lawful origin. United States forfeiture laws have introduced the concept of “civil action” against the property itself, which allows for proving the illicit origin on a balance of probabilities.

429. Finally, article 31, paragraph 10, provides that nothing contained in the article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State party. So, the Convention against Corruption recognizes that, because of wide variations in domestic legal systems, States parties are not bound to implement the provisions of article 31 by following any particular formula, but have the flexibility to carry out their obligations in ways consistent with their domestic legal framework.

(e) Protection of witnesses, experts, victims and reporting persons

430. The provisions of articles 32 and 33 (as well as art. 35) address the protection of witnesses, thereby complementing efforts regarding the prevention of public and private corruption, obstruction of justice, confiscation and recovery of criminal proceeds, as well as cooperation at the national and international levels. Unless people feel free to testify and communicate their expertise, experience or knowledge to the authorities, all objectives of the Convention could be undermined.

431. Consequently, States parties are mandated to take appropriate measures, within their means and consistent with their legal system, against potential retaliation or intimidation of witnesses, victims and experts. States are also encouraged to provide procedural and evidentiary rules strengthening those protections as well as extending some protections to persons reporting in good faith to competent authorities about corrupt acts.

432. Corruption generally victimizes the entire society and the international community. There may also be specific victims of corrupt practices. The Convention against Corruption recognizes the importance of alleviating the impact of corruption on individuals, groups or organizations and requires States parties to take measures to protect victims against retaliation or intimidation and to ensure that they introduce procedures for compensation and restitution. In addition, States parties will have to consider the perspective of victims, in accordance with domestic legal principles and consistent with the rights of defendants.

Summary of main requirements

433. Bearing in mind that some victims may also be witnesses, States are required:

(a) To provide effective protection for witnesses and experts, within available means. This may include:

- (i) Physical protection;
 - (ii) Domestic or foreign relocation;
 - (iii) Allowing non-disclosure of identity or whereabouts of witnesses;
 - (iv) Special arrangements for giving evidence;
- (b) To establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention;
- (c) To provide opportunities for victims to present views and concerns at an appropriate stage of criminal proceedings, subject to domestic law;
- (d) To consider relocation agreements with other States;
- (e) To consider measures protecting persons who report acts related to corruption offences in good faith to competent authorities.

***Mandatory requirements: obligation to take legislative
or other measures***

434. Article 32, paragraph 1, requires that States parties take appropriate measures within their means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences established in accordance with the Convention and, as appropriate, for their relatives and other persons close to them.

435. These measures may include:

(a) Establishing procedures for the physical protection of such persons, such as relocating them and permitting limitations on the disclosure of information concerning their identity and whereabouts (art. 32, para. 2 (a));

(b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness (art. 32, para. 2 (b)).

436. These provisions also apply to victims insofar as they are witnesses (art. 32, para. 4).

437. These requirements are mandatory, but only where appropriate, necessary, without prejudice to the rights of defendants and within the means of the State party concerned.

438. This means 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. The obligation to provide protection also arises only where such protection is within the means, such as available resources and the technical capabilities, of the State party concerned.

439. Worth noting are comparatively inexpensive measures that may be sufficient, such as relocation within a given organization or to another organization. Other alternatives include restraining orders, which can be quite useful and effective. The level and extent of protection granted will depend on the importance of the contribution of the witness or victim, the nature of the case, the types of persons involved and other contextual factors.

440. The term “witness” is not defined, but article 32 limits the scope of witnesses to whom the obligations apply to witnesses who give testimony concerning offences established in accordance with the Convention, and, as appropriate, for their relatives or other persons close to them.

441. Interpreted narrowly, this would only apply where testimony is actually given, or when it is apparent that testimony will be given, although the requirement to protect witnesses from potential retaliation may lead to a broader interpretation.

442. The experience of States with witness-protection schemes suggests that a broader approach to implementing this requirement will be needed to guarantee sufficient protection to ensure that witnesses are willing to cooperate with investigations and prosecutions. In addition to witnesses who have actually testified, protection schemes should generally seek to extend protection in the following cases:

(a) To persons who cooperate with or assist in investigations until it becomes apparent that they will not be called upon to testify; and

(b) To persons who provide information that is relevant but not required as testimony or not used in court because of concerns for the safety of the informant or other persons.

443. Legislators may therefore wish to make provisions applicable to any person who has or may have information that is or may be relevant to the investigation or prosecution of a corruption offence, whether this is produced as evidence or not.

444. It should be noted that this obligation also applies 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, whether or not they are witnesses (see art. 37, para. 4).

445. Depending on the constitutional or other legal requirements of States parties, two significant constraints may exist on what may be done to implement article 32. Both involve the basic rights of persons accused of crimes. Accordingly, article 32, paragraph 2, provides that the measures implemented should be without prejudice to the rights of the defendant. For example, in some States, the giving of evidence without the physical presence of witnesses or while shielding their identity from the media and the defendants may have to be reconciled with constitutional or other rules allowing defendants the right to confront the accuser. Another example would be that in some States the constitution or other basic legal rules include the requirement that either all information possessed by prosecutors, or all such information which may be exculpatory to the accused, must be disclosed in order to enable an adequate defence to the charges. This may include personal information or the identities of witnesses to permit proper cross-examination.

446. In cases where these interests conflict with measures taken to protect the identity or other information about a witness for safety reasons, the courts may be called upon to fashion solutions specific to each case that meet basic requirements regarding the rights of the accused while not disclosing enough information to identify sensitive investigative sources or endanger witnesses or informants. Legislation establishing and circumscribing judicial discretion in such cases could be considered. Some options include the following measures:

(a) Statutory limits on disclosure obligations, applicable where some basic degree of risk has been established;

(b) Judicial discretion to review and edit written materials, deciding what does not have to be disclosed and can be edited out;

(c) Closed hearings of sensitive evidence, from which the media and other observers can be excluded.

447. Some elements of witness protection may be related to the offence of obstructing justice (art. 25), which includes the application of physical force, threats and intimidation against witnesses.

448. Article 32, paragraph 5, requires States parties, subject to their domestic laws, to enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

449. In States parties where such opportunities do not already exist, amendments to laws governing trial procedures may be necessary.

450. Such legislation should take the following factors into consideration:

(a) The obligation only extends to victims of offences covered by the Convention;

(b) Whether a person who sought to make his or her views or concerns known was a victim of such an offence or not would normally be a question of fact for the court hearing the case or conducting the proceedings to decide. If a victim is to be given the opportunity to appear prior to the final determination of the court as to whether the offence actually occurred and the person accused is convicted of that offence, legislation should allow the court to permit the participation based on the claims of the victim, but without making any finding prejudicial to the eventual outcome in the case. If the victim is only permitted to appear in the event that the accused is convicted and prior to or after a sentence is imposed, this issue does not arise;

(c) Legislation should both allow for some form of expression on the part of the victim and require that it actually be considered by the court;

(d) The obligation is to allow concerns to be presented, which could include either written submissions or *viva voce* statements. The latter may be more effective in cases where the victim is able to speak effectively. The victim is not normally prepared or represented by legal counsel, however, and there is a risk that information that is not admissible as evidence will be disclosed to those deciding matters of fact. This is of particular concern in proceedings involving lay persons such as juries and where statements may be made prior to the final determination of guilt;

(e) The obligation is to allow participation at appropriate stages and in a manner not prejudicial to the rights of the defence. This may require precautions to ensure that victims do not disclose information that has been excluded as evidence because defence rights had been infringed, or which was so prejudicial as to infringe the basic right to a fair trial. Many States that allow victims to appear (other than as witnesses) consider that the only appropriate stage is following a conviction. If the victim's evidence is needed, then he or she is called as an ordinary witness. If the accused is acquitted, the victim's statements become irrelevant. If the accused is convicted, however, information relating to the impact of the crime on the victim is often highly relevant to sentencing.

Optional requirements: obligation to consider

451. Article 32, paragraph 3, requires that States parties consider entering into agreements or arrangements with other States for the relocation of persons

referred to in paragraph 1 of the article. Insofar as victims are witnesses, this provision applies to them as well (art. 32, para. 4).

452. Article 33 requires that States parties consider incorporating into their domestic legal system appropriate measures to provide protection against any unjustified treatment of any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

453. Of importance in this respect are measures such as career protection, provision of psychological support, institutional recognition of reporting, transfer within the same organization and relocation to a different organization.

454. So, the Convention against Corruption acknowledges the potential of useful contributions made by persons who observe or otherwise come into contact with corrupt practices. In such instances, protection should be considered for those making reports on acts relative to corruption offences that are made in good faith, on reasonable grounds and to appropriate authorities.

(f) Consequences of acts of corruption

455. Consistent with the objectives of the Convention against Corruption relative to prevention, law enforcement and asset return, are concerns about the economic, social or other effects of corruption. For this reason, article 34 contains a general obligation for States parties to take measures to address the consequences of corruption.

456. These measures must be adopted with due regard to the rights of third parties acquired in good faith and in accordance with the fundamental principles of the domestic law of each State party.

457. In this context, article 34 suggests that States parties may wish to consider corruption a relevant factor in legal proceedings to:

- (a) Annul or rescind a contract;
- (b) Withdraw a concession or other similar instrument; or
- (c) Take any other remedial action.

(g) Compensation for damage

458. Closely related to article 34 is the mandate to ensure access to compensation and restitution for victims of offences established in accordance with the Convention.

459. So, article 35 requires that States parties take such measures as may be necessary, in accordance with the principles of their domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

460. This does not require that victims should be guaranteed compensation or restitution, but legislative or other measures must provide procedures whereby it can be sought or claimed.

461. An interpretative note indicates that the expression “entities or persons” is deemed to include States, as well as legal and natural persons (A/58/422/Add.1, para. 37). Another note indicates that article 35 is intended to establish the principle that States parties should ensure that they have mechanisms permitting persons or entities suffering damage to initiate legal proceedings, in appropriate circumstances, against those who commit acts of corruption (for example, where the acts have a legitimate relationship to the State party where the proceedings are to be brought). The note continues by stating that, while article 35 does not restrict the right of each State party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State party in doing so (A/58/422/Add.1, para. 38).

(h) Specialized authorities

462. Article 36 requires that States parties, in accordance with the fundamental principles of their legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement.

463. States parties may either establish an entirely new independent body or designate an existing body or department within an existing organization. In some cases, an anti-corruption body may be necessary to start combating corruption with fresh and concentrated energy. In other cases, it is often useful to enlarge the competence of an existing body to specifically include anti-corruption. Corruption is often combined with economic offences or organized criminal activities. It is thus a sub-specialization of police, prosecution, judicial and other (for example, administrative) bodies. Implementers are reminded that the creation of new bodies with hyper-specialization may be counterproductive, if it leads to overlapping of competences, a need for additional coordination, etc., that would be hard to resolve.

464. Such a body or bodies or persons must be granted the necessary independence, in accordance with the fundamental principles of the legal system of

the State party, to be able to carry out their functions effectively and without any undue influence and should have the appropriate training and resources to carry out their tasks. An interpretive notes states that the body or bodies may be the same as those referred to in article 6 (A/58/422/Add.1, para. 39).

465. Important in this context is that the domestic law enforcement functions of such a body must be seen in conjunction with the overall anti-corruption efforts, such as prevention (see chap. II of the present guide) and collaboration at the domestic and international levels (see chap. IV).

(i) Cooperation with law enforcement authorities

466. Also central to the goals of prevention and international cooperation are the provisions of article 37, which mirror those of the Organized Crime Convention (art. 26).

467. The investigation of sophisticated offenders and the process of enforcing the law against them can be greatly assisted by the cooperation of participants in corrupt acts. The same applies to the prevention of serious crimes, where inside information can lead to the foiling of planned criminal operations.

468. These are special witnesses, as they are subject to prosecution themselves by means of their direct or indirect participation in corruption offences. Some States have sought to promote the cooperation of such witnesses through the granting of immunity from prosecution or comparative lenience, under certain conditions, which vary from State to State.

469. The Convention against Corruption requires that States parties take measures to encourage such cooperation in accordance with their fundamental legal principles. The specific steps to be taken are left to the discretion of States, which are asked, but not obliged, to adopt immunity or leniency provisions.

Summary of main requirements

470. In accordance with article 37, States parties must:

(a) Take appropriate measures to encourage persons who participate or who have participated in corruption offences:

- (i) To supply information for investigative and evidentiary purposes; and
- (ii) To provide factual, specific help contributing to depriving offenders of the proceeds of crime (para. 1);

- (b) Consider providing for the possibility of mitigating punishment of an accused person who provides substantial cooperation (para. 2);
- (c) Consider providing for the possibility of granting immunity from prosecution to a person who provides substantial cooperation (para. 3; this may require legislation in systems not providing prosecutorial discretion);
- (d) Protect such persons against threats and intimidation (para. 4).

***Mandatory requirements: obligation to take legislative
or other measures***

471. Under article 37, States parties are required to take appropriate measures to encourage persons who participate or who have participated in the commission of any offence established in accordance with the Convention:

- (a) To supply information useful to competent authorities for investigative and evidentiary purposes on a variety of matters;
- (b) To provide factual, specific help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime.

472. Generally, the inducements and protections needed to encourage persons to assist investigators or prosecutors can be provided without legislative authority, but some provisions will have to be enacted if they do not already exist. States parties are required to take appropriate measures, but the substance of such measures is left to the State.

473. Article 37, paragraph 4, requires that States extend the protections of article 32 (regarding witnesses, experts and victims) to persons providing substantial cooperation in the investigation or prosecution of an offence established in accordance with the Convention. This means that such protective measures must be within the means of States parties and provided when necessary, appropriate and consistent with domestic law.

Optional requirements: obligation to consider

474. States parties are required to consider the options of immunity and mitigation of sentences for those who cooperate under article 37, paragraphs 2 and 3. The experience of certain jurisdictions has highlighted the merits of such provisions in the fight against organized criminal groups involved in serious crime, including corruption. That is why the Convention against Corruption

encourages the adoption of such options, consistent with fundamental domestic legal principles.

475. Possible legislative measures include the following:

(a) Judges may require specific authority to mitigate sentences for those convicted of offences but who have cooperated and exceptions may have to be made for any otherwise applicable mandatory minimum sentences. Provisions that require judges to impose more lenient sentences should be approached with caution, as they may raise concerns about judicial independence and create potential for the corruption of prosecutors;

(b) Affording immunity from prosecution (art. 37, para. 3), if implemented, may require legislation either creating discretion not to prosecute in appropriate cases or structuring such prosecutorial discretion as already exists. Some form of judicial review and ratification may have to be provided for, in order to set out the terms of any informal arrangements and ensure that decisions to confer immunity are binding;

(c) As noted above, the physical protection and safety of persons who cooperate is the same as for witnesses under article 32 (art. 37, para. 4).

Optional measures: measures States parties may wish to consider

476. Where a person can provide important information to more than one State party for purposes of combating corruption, article 37, paragraph 5, encourages States parties to consider the possibility of reaching an agreement on mitigated punishment or immunity to the person with respect to charges that might be brought in those States.

477. In order to increase their ability to do so, States parties may wish to consider the possibility of mitigated punishment for such persons or of granting them immunity from prosecution. This is an option that States parties may or may not be able to adopt, depending on their fundamental principles. It is important to note, however, that in jurisdictions where prosecution is mandatory for all offences, such measures may need additional legislation.

(j) Cooperation between national authorities

478. Essential to the overall anti-corruption effort is collaboration of officials and agencies with authorities in charge of enforcing the relevant laws.

479. Consequently, article 38 requires States parties to take any necessary measures to encourage, in accordance with their domestic law, cooperation between:

- (a) Their public authorities and public officials; and
- (b) Their authorities responsible for investigating and prosecuting criminal offences.

480. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of the Convention has been committed; or

(b) Providing, upon request, to the latter authorities all necessary information.

(k) *Cooperation between national authorities and the private sector*

481. The role of the private sector in preventing, detecting and prosecuting actors involved in corrupt practices cannot be underestimated. It is often competitors who observe irregularities and suspicious transactions in the course of their routine financial and commercial activities. People specializing in specific contexts or operations are well placed to identify vulnerabilities or uncommon patterns that may serve as indicators of abuse. Authorities in charge of anti-corruption activities would benefit from such insights and could turn attention to areas and sectors of priority more easily. Actors in the private sector may also be in a position to play a vital role in the identification of criminal proceeds and their return to legitimate owners. A consensual relationship between the private sector and national authorities is, thus, instrumental to the effective fight against corruption and its adverse consequences.

482. The benefits of a corruption-free economic environment are clear to private industry as a whole, but its concrete collaboration with public authorities needs to be institutionalized and framed properly, in order to avoid cross-jurisdictional or other conflicts enterprises may face, related, for example, to privacy, confidentiality or bank secrecy rules.⁶⁴

483. The Convention against Corruption recognizes this need and requires States parties to foster a cooperative relationship with the private sector.

⁶⁴See also the related protection of art. 33 for persons reporting facts concerning corruption offences.

484. Article 39, paragraph 1, requires States parties to take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with the Convention.

485. Paragraph 2 of the same article requires that States parties consider encouraging their nationals and other persons with a habitual residence in their territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with the Convention.

486. A precedent and growing practice in many States that national drafters may wish to use as a model is that of placing a duty on certain private entities to report suspicious transactions to appropriate authorities. This applies to formal and informal financial institutions as well as businesses in specific sectors (e.g. precious stones).

(l) Bank secrecy

487. Bank secrecy rules have often been found to be a major hurdle in the investigation and prosecution of serious crimes with financial aspects. As a result, several initiatives have sought to establish the principle that bank secrecy cannot be used as grounds for refusing to implement certain provisions of international or bilateral agreements⁶⁵ or refusing to provide mutual legal assistance to requesting States.⁶⁶ The same applies to the Convention against Corruption, as we have seen above with respect to seizure and confiscation of proceeds of crime (art. 31, para. 7; see also para. 8 of art. 46 (Mutual legal assistance)).

488. Article 40 requires that, in cases of domestic investigations of offences established in accordance with the Convention, States parties have appropriate mechanisms available within their domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

(m) Criminal record

489. In accordance with article 41, States parties may wish to consider adopting such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of

⁶⁵For example, art. 12, para. 6, of the Organized Crime Convention.

⁶⁶See, for example, art. 18, para. 8, of the Organized Crime Convention.

using such information in criminal proceedings relating to an offence established in accordance with the Convention.

490. An interpretive note provides that the term “conviction” should be understood to refer to a conviction no longer subject to appeal (A/58/422/Add.1, para. 40).

D. Jurisdiction

“Article 42

“Jurisdiction

“1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

“(a) The offence is committed in the territory of that State Party; or

“(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

“2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

“(a) The offence is committed against a national of that State Party; or

“(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

“(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

“(d) The offence is committed against the State Party.

“3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the

alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

“4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

“5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

“6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.”

491. In the context of globalization, offenders frequently try to evade national regimes by moving between States or engaging in acts in the territories of more than one State. This is especially so in the case of serious corruption, as offenders can be very powerful, sophisticated and mobile.

492. The international community wishes to ensure that no serious crime goes unpunished and that all parts of the crime are punished wherever they took place. Jurisdictional gaps that enable fugitives to find safe havens need to be reduced or eliminated. Another concern is to ensure that in cases where a criminal group is active in several States which may have jurisdiction over the conduct of the group, there is a mechanism available for those States to facilitate coordination of their efforts.

493. The jurisdiction to prosecute and punish such crimes is addressed in article 42 of the Convention against Corruption. Chapter IV (International Cooperation) of the Convention provides a framework for cooperation among States parties that have already exercised such jurisdiction. It is anticipated that there will be cases in which many States parties will be called upon to cooperate in the investigation, but only a few of them will be in a position to prosecute the offenders.

494. The Convention requires that States parties establish jurisdiction when the offences are committed in their territory or on board aircraft and vessels

registered under their laws.⁶⁷ States 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).

495. 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 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).

496. Provisions similar to those of the Convention against Corruption can be found in other international legal instruments, such as the Organized Crime Convention (art. 15), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (art. 4), the OECD Bribery Convention (art. 4) and the Inter-American Convention against Corruption (art. V). States that have enacted implementing legislation as parties to those conventions may not need major amendments for meeting the requirements of the Convention against Corruption.

Summary of main requirements

497. In accordance with article 42, paragraph 1, each State party must be able to assert jurisdiction over the offences established in accordance with the Convention when these are committed:

- (a) In its territory;
- (b) On board a ship flying its flag;
- (c) On board an aircraft registered under its laws.

⁶⁷See also the Organized Crime Convention (art. 15) and the 1982 United Nations Convention on the Law of the Sea, in particular arts. 27, 92, para. 1, 94 and 97 (United Nations, *Treaty Series*, vol. 1833, No. 31363).

498. In accordance with article 42, paragraph 2, States parties are invited to consider the establishment of jurisdiction in cases where:

- (a) Their nationals are victimized;
- (b) The offence is committed by a national or stateless person residing in their territory;
- (c) The offence is linked to money-laundering planned to be committed in their territory; or
- (d) The offence is committed against the State.

499. Under article 42, paragraph 3, in cases where an alleged offender is in the territory of a State party and the State does not extradite him or her solely on the ground that he or she is its national (see art. 44, para. 11), that State must be able to assert jurisdiction over offences established in accordance with the Convention committed even outside of its territory.

500. States may already have jurisdiction over the specified conduct, but they must ensure that they have jurisdiction for conduct committed both inside and outside of their territory by one of their nationals. Therefore, legislation may be required.

501. Each State party must also, as appropriate, consult with other States parties that it has learned are also exercising jurisdiction over the same conduct in order to coordinate their actions (art. 42, para. 5).

Mandatory requirements: obligation to take legislative or other measures

502. States parties are required to establish jurisdiction where the offence involved is actually committed in their territory and aboard vessels flying their flag or aircraft registered in them. They must also have jurisdiction to prosecute offences committed outside their territory, if the offender is one of their nationals who cannot be extradited for prosecution elsewhere for that reason, that is, they must be able to apply the principle of *aut dedere aut judicare* (arts. 42, para. 3, and 44, para. 11).

503. Article 42, paragraph 1, requires that States parties assert jurisdiction on the basis of the territorial principle. This paragraph requires each State party to establish its jurisdiction over the offences established in accordance with the Convention, when committed:

- (a) In their territory;

- (b) On board a ship flying their flag;
- (c) On board an aircraft registered under their laws.

504. An interpretative note reflects the understanding that the offence might be committed in whole or in part in the territory of the State party (A/58/422/Add.1, para. 41).

505. States parties whose penal jurisdiction does not currently extend to all of the offences established in accordance with the Convention committed in their territory or on board the above-described ships or aircraft, will need to supplement their existing jurisdiction regime.

506. Article 42, paragraph 3, requires States parties to be able to assert jurisdiction over corruption offences committed outside their territory by their own nationals, when extradition is denied on grounds of nationality.

507. This provision requires States to assert jurisdiction over the offences established in accordance with the Convention in order to be able to meet the obligation under article 44, paragraph 11, which is that they must submit a case for domestic prosecution if extradition has been refused on grounds of the nationality of the offender. In order to understand the nature of the obligation imposed by this paragraph, a review of a number of factors is necessary.

508. Firstly, paragraph 1 already requires States parties to have jurisdiction over offences committed in their territory and on their ships and aircraft.

509. This paragraph requires States to go further, by establishing jurisdiction over offences committed abroad by their nationals. Since most extradition requests that would trigger application of this paragraph can be expected to involve conduct that took place in another country, this application is an essential component of the obligation imposed by article 44, paragraph 11.

510. Secondly, the obligation to establish jurisdiction over offences committed abroad is limited to the establishment of jurisdiction over that State party's nationals, when extradition has been refused solely on the ground of nationality. States parties are not required to establish jurisdiction over offences committed by non-nationals under the terms of this paragraph.

511. Article 42, paragraph 5, contains specific obligations with respect to the coordination of effort when more than one State party investigates a particular offence. It requires States parties that become aware that other States parties are investigating or prosecuting the same offence to consult with those States, where appropriate, to coordinate their actions.

512. In some cases, this coordination will result in one State party deferring to the investigation or prosecution of another. In other cases, the States parties concerned may be able to advance their respective interests through the sharing of information they have gathered. In yet other cases, States parties may each agree to pursue certain actors or offences, leaving other actors or related conduct to the other interested States parties. This obligation to consult is operational in nature and, in most cases, does not require any domestic implementing legislation.

Optional measures: measures States parties may wish to consider

513. Beyond the mandatory jurisdiction addressed above, the Convention against Corruption encourages States parties to consider establishing jurisdiction in additional instances, in particular when their national interests have been harmed.

514. Article 42, paragraph 2, sets forth a number of further bases for jurisdiction that States parties may assume when:

- (a) The offence is committed against one of their nationals (para. 2 (a));
- (b) The offence is committed by one of their nationals or a habitual resident in their territory (para. 2 (b));
- (c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii) of the Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of the Convention within its territory (para. 2 (c));
- (d) The offence is committed against the State party (para. 2 (d)).

515. The offences established under article 23, paragraph 1 (b) (ii) are participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of money-laundering offences (see sect. III.B.1 above and art. 23, para. 1 (a) and (b)).

516. Article 42, paragraph 4, sets forth an additional non-mandatory basis for jurisdiction that States parties may wish to consider. In contrast to the mandatory establishment of jurisdiction provided for in paragraph 3 to enable domestic prosecution in lieu of extradition of its nationals, paragraph 4 allows the establishment of jurisdiction over persons whom the requested State party does not extradite for other reasons.

517. States seeking to establish such bases for jurisdiction may refer to laws cited in sect. III.E (Information resources) below for guidance.

518. Finally, the Convention against Corruption makes clear that the listing of these bases for jurisdiction is not exhaustive. States parties can establish additional bases of jurisdiction without prejudice to norms of general international law and in accordance with the principles of their domestic law: “Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law” (art. 42, para. 6).

519. The intent is not to affect general jurisdictional rules but rather for States parties to expand their jurisdiction in order to ensure that serious transnational crimes do not go unprosecuted as a result of jurisdictional gaps.

E. Information resources: related provisions and instruments

1. United Nations Convention against Corruption

Articles 14, 15, 16, paragraph 1, 17, 23 and 25 (mandatory offences)

Articles 16, paragraph 2, 18-22 and 24 (non-mandatory offences)

Articles 28-41 (law enforcement)

Article 42 (jurisdiction)

2. Binding international and regional instruments

African Union

African Union Convention on Preventing and Combating Corruption (2003)

www.africa-union.org/root/au/Documents/Treaties/Text/Convention%20on%20Combating%20Corruption.pdf

Council of Europe

Additional Protocol to the Criminal Law Convention on Corruption (2003)

Council of Europe, *European Treaty Series*, No. 191

<http://conventions.coe.int/treaty/en/Treaties/Html/191.htm>

Criminal Law Convention on Corruption (1999)

Council of Europe, *European Treaty Series*, No. 173

<http://conventions.coe.int/treaty/en/Treaties/Html/173.htm>

Civil Law Convention on Corruption (1999)

Council of Europe, *European Treaty Series*, No. 174

<http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm>

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)

Council of Europe, *European Treaty Series*, No. 141

<http://conventions.coe.int/treaty/en/Treaties/Html/141.htm>

European Convention on the Compensation of Victims of Violent Crimes (1983)

Council of Europe, *European Treaty Series*, No. 116

<http://conventions.coe.int/treaty/en/Treaties/Word/116.doc>

Economic Community of West African States

ECOWAS Protocol on the Fight against Corruption (2001) (in French) www.afrimap.org/english/images/treaty/CEDEAO%20PROTOCOLE-SUR-LA-CORRUPTION-FR-Accra-Oct-01-Rev5.pdf

European Union

Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (1998)

Official Journal of the European Union, C 195, 25 June 1997

http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/133027_en.htm

Council of the European Union Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector

Official Journal of the European Union, L 192, 31 July 2003

http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/133308_en.htm

Organization for Economic Cooperation and Development

Asian Development Bank/OECD Anti-Corruption Action Plan for Asia and the Pacific

www.oecd.org/pages/0,2966,en_34982156_34982385_1_1_1_1_1,00.htm

Anti-Corruption Network for Transition Economies

Istanbul Action Plan

www.oecd.org/dataoecd/23/41/34625395.pdf

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

Organization of American States

Inter-American Convention against Corruption (1996)

www.oas.org/juridico/english/Treaties/b-58.html

Southern African Development Community

Protocol against Corruption (2001)

www.issafrica.org/cdct/mainpages/pdf/Corruption/International%20Instruments/Protocols/SADC%20Protocol%20Against%20Corruption.pdf

United Nations

United Nations Convention against Transnational Organized Crime (2000)

General Assembly resolution 55/25, annex I

www.unodc.org/pdf/crime/a_res_55/res5525e.pdf

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

United Nations, *Treaty Series*, vol. 1582, No. 27627

www.unodc.org/pdf/convention_1988_en.pdf

United Nations Declaration against Corruption and Bribery in International Commercial Transactions (1966)

General Assembly resolution 51/191, annex

www.un.org/documents/ga/res/51/a51r191.htm

IV. International cooperation

“Article 43

“International cooperation

“1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

“2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.”

A. Introduction

520. Ease of travel from country to country provides serious offenders with a way of escaping prosecution and justice. Processes of globalization allow offenders to more easily cross borders, physically or virtually, to break up transactions and obscure investigative trails, to seek a safe haven for their person and to shelter the proceeds of crime. Prevention, investigation, prosecution, punishment, recovery and return of illicit gains cannot be achieved without effective international cooperation.

521. Article 43, paragraph 1, requires that States parties cooperate in criminal matters in accordance with all articles in chapter IV of the Convention, that is, extradition, mutual legal assistance, the transfer of criminal proceedings and law enforcement, including joint investigations and special investigative techniques. States parties may also consider agreements or arrangements for the transfer of

sentenced persons. As will be seen, the requirement to cooperate goes beyond the provisions of chapter IV to those related to confiscation and asset recovery (see chaps. III and V of the present guide).

522. The same paragraph goes on to require that States parties consider such cooperation also in investigations of and proceedings in civil and administrative matters relating to corruption. Experience shows that there are several advantages to the option of civil litigation for claims, usually based on property or tort law. A State party could claim ownership of property improperly taken away from it or seek compensation for harm caused by corruption and mismanagement. These avenues may be pursued when criminal prosecution is impossible (e.g. in cases of death or absence of defendants). Paragraph 1 addresses the problem encountered in the past, where States could provide legal assistance and cooperation in criminal matters, but not in civil cases.⁶⁸

523. The Convention then addresses the important question of “dual criminality”, which affects international cooperation. Under this principle, for example, States parties are not required to extradite persons sought for acts they are alleged to have committed abroad, if those acts are not criminalized in their own territory. The acts need not be defined in exactly the same terms, but requested States parties establish whether they have an equivalent offence in their domestic law to the offence for which extradition or other legal assistance is sought (punishable above a certain threshold).

524. Article 43, paragraph 2, requires that, whenever dual criminality is necessary for international cooperation, States parties must deem this requirement fulfilled if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States parties. The Convention makes it clear that neither does the underlying conduct of the criminal offence need to be defined in the same terms in both States parties, nor does it have to be placed within the same category of offence.⁶⁹

⁶⁸See also art. 53, subpara. (a), which requires each State party to ensure that other States parties may make civil claims in their courts to establish ownership of property acquired through a corruption offence; subpara. (b) requires that courts have the power to order the payment of damages to another State party, and subpara. (c) requires that courts considering criminal confiscation also take into consideration the civil claims of other States parties. The existence of non-conviction based confiscation (civil confiscation) is also of importance to international cooperation. As noted in chapter III of the present guide (see sect. III.C, concerning art. 31), some States allow confiscation without conviction, if the accused person has died or absconded. Further, some States have introduced separate regimes independent of criminal conviction-based confiscation, which allow for assets to be confiscated through civil proceedings aimed at the property itself, where no person need be convicted of an offence (for example, South Africa and the United States).

⁶⁹This is consistent with article 23, para. 2 (c), of the Convention against Corruption, regarding money-laundering and predicate offences.

525. In essence, in this respect the Convention codifies extensive current practice regarding dual criminality. Bilateral agreements have been providing that there is no need for an identical description of offences in both States.⁷⁰

526. This does not mean, however, that States parties can only cooperate if dual criminality is fulfilled. For instance, article 44, paragraph 2, provides that, if their law permits it, States parties may grant the extradition of someone sought for a corruption offence that is not punishable under its own law.

527. Further, article 46, paragraph 9, allows for the extension of mutual legal assistance in the absence of dual criminality, in pursuit of the goals of the Convention, including asset recovery (see also art. 43, para. 2, on international cooperation and dual criminality, art. 31 on confiscation matters and chap. V of the present guide).

528. An important novelty is that States parties are required to render assistance if non-coercive measures are involved, even when dual criminality is absent, where consistent with the basic concepts of their legal system (art. 46, para. 9 (b)). An example of such a measure even in the absence of dual criminality is the exchange of information regarding the offence of bribery of foreign officials or officials of international organizations, when such cooperation is essential to bring corrupt officials to justice (see the interpretative note contained in document A/58/422/Add.1, para. 26, relating to art. 16, para. 2, of the Convention).

529. Further, the Convention invites States parties to consider adopting measures as necessary to enable them to provide a wider scope of assistance pursuant to article 46 even in the absence of dual criminality (art. 46, para. 9 (c); see also sect. IV.C, below).

530. Given the novelty of such provisions, which were the subject of extensive discussions during the negotiations on the Convention, States parties need to review carefully existing laws, requirements and practice regarding dual criminality in mutual assistance. In some instances, new legislation may be required.

531. As these examples make clear, chapter IV of the Convention does not exhaust all international cooperation issues covered by the Convention. Rather, its provisions need to be seen and implemented in view of the principal purposes of the Convention (art. 1) and the other chapters.

⁷⁰The OECD Bribery Convention, art. 9, para. 2, provides: "Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention".

B. Extradition

“Article 44

“Extradition

“1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

“2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

“3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

“4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

“5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

“6. A State Party that makes extradition conditional on the existence of a treaty shall:

“(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-

General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

“(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

“7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

“8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, *inter alia*, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

“9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

“10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

“11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is 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. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

“12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

“13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

“14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

“15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person’s position for any one of these reasons.

“16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

“17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

“18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.”

532. As perpetrators of corruption offences may flee a jurisdiction to avoid prosecution, extradition proceedings are necessary to bring them to justice in the prosecuting State.

533. Extradition is a formal and, most frequently, a treaty-based process, leading to the return or delivery of fugitives to the jurisdiction in which they are wanted.⁷¹ Since the late nineteenth century, States have signed bilateral extradition treaties in their efforts to eliminate safe shelters for serious offenders. Treaty provisions vary from State to State and do not always cover the same offences. In recent legislative activity, several States have provided for extradition without a requirement for a treaty.

534. Diverse national definitions of offences can give rise to serious impediments to extradition efforts and effective international cooperation. In the past, treaties commonly have contained a list of offences covered, which created difficulties every time a new type of crime emerged with the advancement of technology and other social and economic changes. For this reason, more recent treaties are based on the principle of dual criminality, which applies when the same conduct is criminalized in both the requesting and requested States and the penalties provided for it are above a defined threshold, for example, one year of deprivation of liberty.

535. In this way, authorities do not have to update their treaties constantly for the coverage of unanticipated and entirely new offences. This generated the need for a model extradition treaty, in response to which the United Nations adopted the Model Treaty on Extradition (General Assembly resolution 45/116, annex). However, in addition to action by States to amend old treaties and sign new ones, some conventions on particular offences contain provisions for extradition, as well as jurisdiction and mutual assistance. One such example is the OECD Bribery Convention (see art. 10 of that Convention). Another example is the Organized Crime Convention (see art. 16).

536. In addition, the need for a multilateral approach has led to several regional initiatives, such as the Inter-American Convention on Extradition, the European Convention on Extradition, the Economic Community of West African States Convention on Extradition and others.

537. The Convention against Corruption sets a basic minimum standard for extradition for the offences it covers and also encourages the adoption of a

⁷¹ In some instances, extradition may take place voluntarily or on the basis of reciprocity and in the absence of a treaty between the States concerned. This, however, does not occur frequently.

variety of mechanisms designed to streamline the extradition process. The Convention encourages States parties to go beyond this basic standard in bilateral or regional extradition arrangements to supplement article 44, paragraph 1 (art. 44, para. 18; see also art. 65, para. 2, related to harsher measures).

538. Significantly, the Convention also allows for the lifting of dual criminality, whereby a person may be extradited even if the conduct is not criminalized in the State party from which he or she is sought (art. 44, para. 2).

539. Some legislative changes may be required. Depending on the extent to which domestic law and existing treaties already deal with extradition, this may range from the establishment of entirely new extradition frameworks to less extensive expansions or amendments to include new offences or make substantive or procedural changes to conform to the Convention against Corruption.

540. In making legislative changes, drafters should note that the intention of the Convention is to ensure the fair treatment of those whose extradition is sought and the application of all existing rights and guarantees applicable in the State party from whom extradition is requested (see art. 44, para 14).

541. Generally, the extradition provisions are designed to ensure that the Convention supports and complements pre-existing extradition arrangements and does not detract from them.

Summary of main requirements

542. States parties must ensure that offences established in accordance with the Convention are deemed extraditable offences, provided dual criminality is fulfilled (art. 44, para. 1).

543. If their domestic law allows it, States parties may grant extradition for corruption offences even without dual criminality (art. 44, para. 2).

544. If States parties use the Convention as a basis for extradition, they will not consider corruption offences as political offences (art. 44, para. 4).

545. States parties that require a treaty basis for extradition:

(a) May consider the Convention as the legal basis for extradition to another State party regarding corruption offences (art. 44, para. 5);

(b) Must notify the Secretary-General of the United Nations on whether

they will permit the Convention to be used as a basis for extradition to other States parties (art. 44, para. 6 (a));

(c) Must seek to conclude treaties on extradition with other States parties, if they do not use the Convention as the legal basis for extradition (art. 44, para. 6 (b)).

546. States parties with a general statutory extradition scheme must ensure that the corruption offences are deemed extraditable (art. 44, para. 7).

547. A State party must endeavour to expedite extradition procedures and simplify evidentiary requirements relating to corruption offences (art. 44, para. 9).

548. Legislation may be required if current legislation is not sufficiently broad.

549. A State party that denies an extradition request on the ground that the person is its national must submit the case for domestic prosecution. In doing so, it shall ensure that the decision to prosecute and any subsequent proceedings are conducted with the same diligence as a domestic offence of a grave nature and shall cooperate with the requesting State party to ensure the efficiency of the prosecution (art. 44, para. 11). Legislation may be required if current law does not permit evidence obtained from foreign sources to be used in domestic proceedings.

550. States parties can discharge their obligation to submit a case for prosecution pursuant to article 44, paragraph 11, by temporary surrender (art. 44, para. 12).

551. If States parties deny extradition for enforcement of a sentence on grounds of nationality, they must consider enforcing the sentence imposed under the domestic law of the requesting State (art. 44, para. 13).

552. States parties must ensure fair treatment for persons facing extradition proceedings pursuant to article 44, including enjoyment of all rights and guarantees provided by their domestic law (art. 44, para. 14). Legislation may be required if no specific domestic extradition procedures are provided for.

553. States parties may not refuse extradition on the ground that the offence also involves fiscal matters (art. 44, para. 16). Legislation may be required.

554. Prior to refusing extradition, a requested State party must, where appropriate, consult with the requesting State party to provide it with the opportunity to present information and views on the matter (art. 44, para. 17).

***Mandatory requirements: obligation to take legislative
or other measures***

(a) Scope

555. Extradition must be granted with respect to the offences covered by the Convention, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting and the requested State parties (art. 44, para. 1).

556. The dual criminality requirement should automatically be fulfilled among States parties with respect to all mandatory offences established in accordance with the Convention. With respect to those offences whose establishment is optional and that some parties may have established while others have not, the dual criminality requirement may constitute an obstacle to extradition. In this context, article 44, paragraph 2, can be considered as an encouragement for parties to extradite in the absence of dual criminality, if their domestic law allows it.

(b) Extraditable offences in extradition treaties

557. Article 44, paragraph 4, requires States parties to deem the offences described in paragraph 1 as automatically included in all existing extradition treaties between them. In addition, the parties undertake to include them in all future extradition treaties between them.

558. By virtue of this paragraph, the offences are automatically incorporated by reference into extradition treaties. Accordingly, there would normally be no need to amend them. However, if treaties are considered subordinate to domestic extradition statutes under the legal system of a particular State and its current statute is not broad enough to cover all offences established in accordance with the Convention, amending legislation may be required.

559. Moreover, this paragraph requires States parties whose law so permits not to consider any of these (corruption) offences as a political offence, when they use the Convention as the basis for extradition.

*(c) Notification regarding application or non-application of
paragraph 5 (relevant to countries in which a treaty basis is
a prerequisite to extradition)*

560. Article 44, paragraph 6, does not apply to States parties that can extradite to other States pursuant to a statute. It applies only to States parties for which

a treaty is a prerequisite to extradition. Such States are required to notify the Secretary-General of the United Nations as to whether or not they will use the Convention against Corruption as a basis for extradition. The notification should be provided to the United Nations Office on Drugs and Crime. They are also, where appropriate, requested to conclude additional extradition treaties in order to expand the number of States parties to which fugitives can be extradited in accordance with article 44.

(d) Extradition on the basis of a statute (relevant to countries that provide for extradition by statute)

561. Article 44, paragraph 7, mandates States parties that do not require a treaty basis for extradition (that is, States parties that provide for extradition pursuant to a statute) to include the offences established in accordance with the Convention against Corruption as extraditable offences under their applicable statute governing international extradition in the absence of a treaty.

562. Thus, where the existing statute in a particular State party governing international extradition is not sufficiently broad in scope to cover the corruption offences, that State will be required to enact legislation to broaden the offences covered by the statute.

(e) Conditions to extradition

563. Article 44, paragraph 8, provides that grounds for refusal and other conditions to extradition (such as the minimum penalty required for an offence to be considered as extraditable) are governed by the applicable extradition treaty in force between the requesting and requested States parties or, otherwise, the law of the requested State party. The paragraph thus establishes no implementation requirements separate from the terms of domestic laws and treaties governing extradition.

(f) Prosecution where a fugitive is not extradited on grounds of nationality

564. Article 44, paragraph 11, provides that where a requested State party does not extradite a person found in its territory on grounds that the person is its national, that State 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. Those authorities are to take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State party. The States

parties concerned are to cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecutions.

565. In essence, the obligation to submit a case for domestic prosecution consists of a number of distinct elements:

(a) An extradition request concerning a corruption offence must have been denied because the fugitive is a national of the requested State;

(b) The State party seeking extradition must have requested submission for domestic prosecution in the requested State;

(c) The State party that denied extradition must thereafter:

(i) Submit the case to its authorities for prosecution without undue delay;

(ii) Take the decision and conduct the proceedings in the same way as a serious domestic crime;

(iii) Cooperate with the other State party in order to obtain the necessary evidence and otherwise ensure the efficiency of the prosecution.

566. Such domestic prosecutions are time-consuming and resource intensive, as the crime will normally have been committed in another State. It will generally be necessary to obtain most or all of the evidence from abroad and to ensure that it is in a form that can be introduced into evidence in the courts of the State party conducting the investigation and prosecution.

567. To carry out such prosecutions, the State party concerned will first need to have a legal basis to assert jurisdiction over offences committed abroad, as required by article 42, paragraph 3, of the Convention. In addition, effective implementation of paragraph 11 requires a State conducting a domestic prosecution in lieu of extradition to have mutual legal assistance laws and treaties in order to obtain evidence from abroad. At a minimum, effective implementation of article 46 should suffice for this purpose. Drafters of national legislation should also ensure that domestic laws permit such evidence obtained abroad to be validated by its courts for use in such proceedings.

568. Implementation of paragraph 11 of article 44 also requires allocation of adequate human and budgetary resources to enable domestic prosecution efforts to succeed. Thus, the Convention requires the investigation and prosecution to be given the same priority as would be given to a grave domestic offence.

569. An optional method of meeting the requirements of this paragraph is the temporary surrender of a fugitive (see art. 44, para. 12).

(g) Guarantees for persons undergoing the extradition process

570. Article 44, paragraph 14, requires a State party to provide fair treatment to the fugitive during extradition proceedings it is conducting, including by allowing enjoyment of all rights and guarantees that are provided for by that State's law with respect to such proceedings. In essence, this paragraph mandates that States parties have procedures to ensure fair treatment of fugitives and that the fugitives are given the opportunity to exercise such legal rights and guarantees.

(h) Prohibition on denial of extradition for fiscal offences

571. Article 44, paragraph 16, provides that States parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters. States parties must therefore ensure that no such grounds for refusal may be invoked under their extradition laws or treaties.

572. Thus, where a State party's laws currently permit such ground for refusal, amending legislation should be enacted to remedy this. Where such a ground for refusal is included in any of a State party's extradition treaties, normally the act of that State becoming party to the Convention against Corruption, or the enactment of domestic amending legislation, would automatically invalidate the contrary provisions of an earlier treaty. In this light, only rarely, if at all, should amendments to specific treaties be required. With respect to future extradition treaties, States parties must not include such grounds for refusal.

(i) Consultations prior to refusing

573. Article 44, paragraph 17, provides that, where appropriate, the requested State party shall consult with the requesting State party before refusing extradition. This process could enable the requesting State party to present additional information or explanations that may result in a different outcome. Since there may be some cases in which additional information could never bring about a different result, the obligation is not categorical and the requested State party retains a degree of discretion to determine when it would be appropriate to do so.

(j) Conclusion of new agreements and arrangements

574. Article 44, paragraph 18, requires States parties to seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition. States that wish to expand their network of

extradition treaties are invited to review the instruments listed in section IV.E below as examples of treaties that may be instructive. With respect to arrangements to enhance the effectiveness of extradition, States may wish to review consultation provisions provided for under some of these treaties.

Optional requirements and optional measures

(a) Scope of application

575. Article 44, paragraph 2, extends the scope of application for this article by giving States parties the option to lift the requirement of dual criminality for offences established in accordance with the Convention, if their law so allows.

576. Article 44, paragraph 3, addresses the eventuality of an extradition request for multiple offences, at least one of which is extraditable under the article and others that are non-extraditable on the grounds of their short period of imprisonment. If the latter are related to an offence established in accordance with the Convention against Corruption, requested States parties have the option to extend the application of the article to those offences too.

(b) Extradition on the basis of the Convention against Corruption

577. Article 44, paragraph 5, allows States parties to use the Convention as the legal basis for extradition, if a treaty basis is a prerequisite for extradition. Alternatively, States parties would have to seek the conclusion of treaties on extradition with other States parties to the Convention in order to implement article 44 (art. 44, para. 6 (b)).

(c) Expediting extradition procedures

578. Article 44, paragraph 9, provides that States parties shall, subject to their domestic laws, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of the offences to which article 44 applies. Modern extradition practice has been to simplify requirements with respect to the form of and channels for transmission of extradition requests, as well as evidentiary standards for extradition.

(d) Detention pending extradition proceedings

579. Article 44, paragraph 10, provides that the requested State party may take a fugitive into custody or take other appropriate measures to ensure his or her

presence for purposes of extradition. Provisions on provisional arrest and detention pending extradition are standard features of extradition treaties and statutes and States parties should have an appropriate legal basis for such custody. However, the article imposes no specific obligation to take persons into custody in specific cases.

(e) Conditional extradition as a basis for satisfying article 44, paragraph 11

580. Rather than conduct a domestic prosecution of a national in lieu of extradition (see art. 44, para. 11), article 44, paragraph 12, provides the option of temporarily surrendering the fugitive to the State party requesting extradition for the sole purpose of conducting the trial, with any sentence to be served in the State party that denied extradition.

(f) Enforcement of a foreign sentence where extradition is refused on the ground of nationality

581. Article 44, paragraph 13, calls upon a State party that has denied, on the ground of nationality, a request by another State party to extradite a fugitive to serve a sentence, to consider enforcing the sentence itself. However, the paragraph imposes no obligation on a State party to enact the legal framework to enable it to do so, or to actually do so under specific circumstances.

(g) No obligation under the Convention to extradite where there are substantial grounds for believing a fugitive will be discriminated against

582. Article 44, paragraph 15, provides that nothing in the Convention is to be interpreted as imposing an obligation to extradite, if the requested State party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of those reasons.

583. This provision preserves the ability to deny extradition on such grounds, unless such ground of refusal is not provided for in its extradition treaty in force with the requesting State party, or in its domestic law governing extradition in the absence of a treaty.

C. Mutual legal assistance

“Article 46

“Mutual legal assistance

“1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

“2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

“3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

“(a) Taking evidence or statements from persons;

“(b) Effecting service of judicial documents;

“(c) Executing searches and seizures, and freezing;

“(d) Examining objects and sites;

“(e) Providing information, evidentiary items and expert evaluations;

“(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

“(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

“(h) Facilitating the voluntary appearance of persons in the requesting State Party;

“(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

“(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

“(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

“4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

“5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

“6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

“7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

“8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

“9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

“(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal

system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

“(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

“10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

“(a) The person freely gives his or her informed consent;

“(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

“11. For the purposes of paragraph 10 of this article:

“(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

“(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

“(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

“(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

“12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person,

whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

“13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

“14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

“15. A request for mutual legal assistance shall contain:

“(a) The identity of the authority making the request;

“(b) The subject matter and nature of the investigation, prosecution

or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

“(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

“(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

“(e) Where possible, the identity, location and nationality of any person concerned; and

“(f) The purpose for which the evidence, information or action is sought.

“16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

“17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

“18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

“19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State

Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

“20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

“21. Mutual legal assistance may be refused:

“(a) If the request is not made in conformity with the provisions of this article;

“(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

“(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

“(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

“22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

“23. Reasons shall be given for any refusal of mutual legal assistance.

“24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

“25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

“26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

“27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

“28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

“29. The requested State Party:

“(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

“(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies

of any government records, documents or information in its possession that under its domestic law are not available to the general public.

“30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.”

584. In the context of globalization, national authorities increasingly need the assistance of other States for the successful investigation, prosecution and punishment of offenders, in particular those who have committed offences with transnational aspects. Corrupt practices often involve mobile actors, participants in more than one country or transactions that cross national borders. The ability of a State to assert jurisdiction and secure the presence of an accused offender in its territory accomplishes an important part of the task, but does not complete it.

585. The international mobility of offenders and the use of advanced technology, among other factors, make it more necessary than ever that law enforcement and judicial authorities collaborate and assist the State that has assumed jurisdiction over the matter.

586. In order to achieve that goal, States have enacted laws to enable them to provide such international cooperation and increasingly have resorted to treaties related to mutual legal assistance in criminal matters. Such treaties commonly list the kind of assistance to be provided, the rights of the requesting and requested States relative to the scope and manner of cooperation, the rights of alleged offenders and the procedures to be followed in making and executing requests.

587. These bilateral instruments enhance law enforcement in several ways. They enable authorities to obtain evidence abroad in a way that it is admissible domestically. For example, witnesses can be summoned, persons located, documents and other evidence produced and warrants issued. They supplement other arrangements on the exchange of information (for example, information obtained through the International Criminal Police Organization (INTERPOL), police-to-police relationships and judicial assistance and letters rogatory). They also resolve certain complications between States with different legal traditions, some of which restrict assistance to judicial authorities rather than prosecutors.

588. There have been some multilateral efforts through treaties aimed at mutual legal assistance in criminal matters with respect to particular offences, such as the Organized Crime Convention (see art. 18), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (see art. 7), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (see arts. 8-10), the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, the Council of Europe Convention on Cybercrime (title 3), the Inter-American Convention against Corruption (see art. XIV), the Inter-American Convention on Mutual Legal Assistance and optional Protocol thereto and the OECD Bribery Convention (art. 9). There have also been some related regional initiatives, such as the European Union Convention implementing the Schengen Agreement, the European Convention on Mutual Assistance in Criminal Matters, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters and the Arab League Convention on Mutual Assistance in Criminal Matters.

589. In its article 46, paragraph 1, the Convention against Corruption builds on these initiatives, calling for the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings and expanding the scope of application to all offences established in accordance with the Convention.

590. Legal assistance may be requested for obtaining evidence or taking statements, effecting service of judicial documents, executing searches and seizures, examining objects and sites, providing information, evidence and expert evaluations, documents and records, tracing proceeds of crime, facilitating the appearance of witnesses and any other kind of assistance not barred by domestic law. Quite importantly, article 46 applies also to international cooperation in the identification, tracing and seizure of proceeds of crime, property and instrumentalities for the purpose of confiscation and return of assets to legitimate owners (see art. 46, para. 3 *(j)* and *(k)*, art. 31, para. 1, as well as chap. V of the Convention, in particular arts. 54 and 55).

591. The Convention against Corruption recognizes the diversity of legal systems and allows States parties to refuse to provide mutual legal assistance under certain conditions (see art. 46, para. 21). However, it makes clear that assistance cannot be refused on the ground of bank secrecy (art. 46, para. 8) or for offences considered to involve fiscal matters (art. 46, para. 22). States parties are required to provide reasons for any refusal to assist. Otherwise, they must execute requests expeditiously and take into account possible deadlines facing the requesting authorities (for example, expiration of a statute of limitation).

592. Given that the Organized Crime Convention contains many similar provisions (see art. 18), States parties to that Convention would be compliant with much of article 46 of the Convention against Corruption. Nevertheless, two significant differences are emphasized. Firstly, mutual legal assistance now extends to the recovery of assets, a fundamental principle of the Convention against Corruption (see arts. 1 and 51). Secondly, in the absence of dual criminality, States parties are required to render assistance through non-coercive measures, provided this is consistent with their legal system and the offence is not of a trivial nature. States parties are encouraged to extend as wide a scope of assistance as possible in the pursuit of the main goals of the Convention, even in the absence of dual criminality (art. 46, para 9, and art. 1).

Summary of main requirements

593. The Convention against Corruption requires States parties:

(a) To ensure the widest measure of mutual legal assistance for the purposes listed in article 46, paragraph 3, in investigations, prosecutions, judicial proceedings and asset confiscation and recovery in relation to corruption offences (art. 46, para. 1);

(b) To provide for mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences for which a legal entity may be held liable under article 26 (art. 46, para. 2);

(c) To ensure that mutual legal assistance is not refused by it on the ground of bank secrecy (art. 46, para. 8). In this respect, legislation may be necessary if existing laws or treaties governing mutual legal assistance are in conflict;

(d) To offer assistance in the absence of dual criminality through non-coercive measures (art. 46, para 9, (b));

(e) To apply paragraphs 9 to 29 of article 46 to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State party (art. 46, paras. 7 and 9-29). In this respect, legislation may be necessary if existing domestic law governing mutual legal assistance is inconsistent with any of the terms of these paragraphs and if domestic law prevails over treaties;

(f) To notify the Secretary-General of the United Nations of their central authority designated for the purpose of article 46, as well as of the language(s) acceptable to them in this regard (art. 46, paras. 13 and 14);

(g) To consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of article 46 (art. 46, para. 30).

594. States parties may provide information on criminal matters to other States parties without prior request, where they believe that this can assist in inquiries, criminal proceedings or the formulation of a formal request from that State party (art. 46, paras. 4 and 5).

595. States parties are also invited to consider the provision of a wider scope of legal assistance in the absence of dual criminality (art. 46, para. 9 (c)).

***Mandatory requirements: obligation to take legislative
or other measures***

(a) Scope

596. Article 46, paragraph 1, establishes the scope of the obligation to provide mutual legal assistance.

597. States parties are required to provide the widest measure of mutual legal assistance in investigations, prosecutions, judicial proceedings, freezing of proceeds of crime and asset recovery in relation to the offences covered by the Convention against Corruption, as provided in article 3. Thus, each State party must ensure that its mutual legal assistance treaties and laws provide for assistance to be provided for cooperation with respect to investigations, prosecutions and judicial proceedings. The term “judicial proceedings” is separate from investigations and prosecutions and connotes a different type of proceeding. Since it is not defined in the Convention, States parties have discretion in determining the extent to which they will provide assistance for such proceedings, but assistance should at least be available with respect to portions of the criminal process that in some States may not be part of the actual trial, such as pretrial proceedings, sentencing proceedings and bail proceedings.⁷² These investigations, prosecutions or proceedings must relate to offences established in accordance with the Convention, as provided in article 3.

598. If a State party’s current mutual legal assistance laws and treaties are not broad enough to cover all of the corruption offences covered by the Convention, amending legislation may be necessary.

⁷²An interpretative note to the mirror provisions in the Organized Crime Convention (art. 18, para. 2) indicates that the term “judicial proceedings” refers to the matter for which mutual legal assistance is requested and is not intended to be perceived as in any way prejudicing the independence of the judiciary (A/55/383/Add.1, para. 36).

599. In drafting legislation to create powers to execute assistance requests, legislators should note that the criterion for the request and provision of legal assistance is slightly broader than that applying to most other obligations under the Convention against Corruption. The provisions of article 1 should also be kept in mind.

(b) Mutual legal assistance for proceedings involving legal persons

600. Article 46, paragraph 2, provides that mutual legal assistance shall be furnished to the fullest extent possible under relevant laws, treaties, agreements and arrangements with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 (see also sect. III.B.3 of the present guide).

601. Thus, a State party should have the ability to provide a measure of mutual legal assistance with respect to investigations, prosecutions and judicial proceedings into the conduct of legal persons. Here too, some discretion is granted to States parties regarding the extent to which assistance is to be provided. Where a State party presently lacks any legal authority to provide assistance with respect to investigations, prosecutions and judicial proceedings against legal persons, amending legislation should be considered.

(c) Purposes for which mutual legal assistance is to be provided

602. Article 46, paragraph 3, sets forth the following list of specific types of mutual legal assistance that a State party must be able to provide:

- (a)* Taking evidence or statements from persons;
- (b)* Effecting service of judicial documents;
- (c)* Executing searches and seizures, and freezing;
- (d)* Examining objects and sites;
- (e)* Providing information, evidentiary items and expert evaluations;
- (f)* Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- (g)* Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- (h)* Facilitating the voluntary appearance of persons in the requesting State party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State party;

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of the Convention;

(k) The recovery of assets in accordance with the provisions of chapter V of the Convention.

603. States parties should review their current mutual legal assistance treaties to ensure that these sources of legal authority are broad enough to cover each form of cooperation listed above. States parties to the Organized Crime Convention would be likely to be in compliance with all but subparagraphs (j) and (k) above.

604. Attention is drawn to the international cooperation provisions of article 54, 55 and 57 (especially paragraph 3) of the Convention against Corruption regarding additional modalities relative to the confiscation, return and disposal of assets.

605. Generally, mutual legal assistance treaties provide for similar forms of cooperation. However, in cases where a form of cooperation listed in article 46, paragraph 3, or in articles 54, 55 and 57, is not provided for (in particular in States in which treaties are considered subordinate to mutual legal assistance laws and with respect to asset recovery), then the States parties should consider such mutual legal assistance treaties as being automatically supplemented by those forms of cooperation. Alternatively, under some legal systems, amending legislation or other action may be required.

606. In some cases, domestic law already provides powers to take the measures necessary to deliver the above types of assistance. If not, such powers must be created. If they exist, amendments may be necessary to ensure that they can be used in legal assistance cases. For example, search and seizure powers limited to cases where judicial authorities are satisfied that a domestic crime has been committed and that the search for evidence is warranted, would have to be amended to allow search warrants for alleged foreign offences evidence of which is believed to be in the requested State party. More significant amendments would be required for the assistance relative to the confiscation and return of crime proceeds, property and instrumentalities.

607. In order to obtain from and provide mutual legal assistance to States parties in the absence of a mutual legal assistance treaty, a mechanism is provided pursuant to the provisions of article 46, paragraphs 7 and 9 to 29. The implementation requirements in this situation are described below.

(d) Procedure to be followed in the absence of a treaty

608. Article 46, paragraph 7, provides that where there is no mutual legal assistance treaty in force between States parties, the rules of mutual legal assistance set forth in article 46, paragraphs 9 to 29, apply for the provision of the types of cooperation listed above in paragraph 3 of the article. If a treaty is in force between the States parties concerned, the rules of the treaty will apply instead, unless the States agree to apply paragraphs 9 to 29 of article 46 of the Convention.

609. For States parties whose legal systems permit direct application of treaties, no implementing legislation will be needed. If the legal system of a State party does not permit direct application of these paragraphs, legislation will be required to ensure that in the absence of a mutual legal assistance treaty, the terms of paragraphs 9 to 29 of article 46 apply to requests made under the Convention, rather than rules that may otherwise apply. Such an enabling statute may be general in nature, consisting of a reference to the effect that in cases falling within the scope of article 46, and in the absence of a treaty with the State party concerned, the rules of paragraphs 9 to 29 of that article apply.

610. States parties are strongly urged to apply any of paragraphs 9 to 29 of article 46 if they facilitate their cooperation efforts (e.g. by going beyond existing mutual legal assistance treaties), especially with respect to innovative provisions regarding lack of dual criminality given in paragraph 9 of article 46.

(e) Prohibition of denial of mutual legal assistance on the ground of bank secrecy

611. In accordance with article 46, paragraph 8, States parties cannot decline to render mutual legal assistance pursuant to article 46 for bank secrecy reasons. 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 mutual legal assistance laws or treaties. Closely related provisions are given in article 31, paragraph 7 (on freezing, seizing and confiscating proceeds of crime), and articles 55 and 57 (on asset recovery).

612. Thus, where a State party's laws currently permit such ground for refusal, amending legislation will be required. Where such a ground for refusal is included in any State party's mutual legal assistance treaties, the act of that State becoming party to the Convention against Corruption should as a matter of treaty law automatically invalidate the contrary provisions of an earlier treaty. Should a State party's legal system provide that treaties are not applied directly, domestic legislation may be required.

(f) *Measures to be applied in the absence of a treaty*

613. The actions required in order to implement article 46, paragraphs 9 to 29, which provide for certain procedures and mechanisms that must be applied in the absence of a mutual legal assistance treaty between the States parties concerned, are discussed above in general terms in relation to article 46, paragraph 7. Some States parties will usually apply these paragraphs directly where they are relevant to a particular request for assistance, because under their legal system the Convention's terms can be directly applied. Otherwise, it may be easiest for a general legislative grant of authority to be enacted to permit direct application of paragraphs 9 to 29 of article 46 for States in which treaties are not directly applied.

614. Paragraph 9, however, needs some further examination, as it departs from earlier conventions (compare this with art. 18, para. 9, of the Organized Crime Convention, for example).

615. Paragraph 9 (a) requires States parties to take into account the overall purposes of the Convention against Corruption (art. 1) as they respond to requests for legal assistance in the absence of dual criminality (see also para. 9 (c)).

616. States parties still have the option to refuse such requests on the basis of lack of dual criminality. At the same time, to the extent this is consistent with the basic concepts of their legal system, States parties are required to render assistance involving non-coercive action (art. 46, para. 9, (b)). The interpretative notes indicate that the requested State party would define "coercive action", taking into account the purposes of the Convention (A/58/422/Add.1, para. 42).

617. Paragraph 9 (b) allows the denial of assistance in cases of a trivial nature (*de minimis*) or where the assistance can be provided under other provisions of the Convention.

618. Further, paragraph 9 (c) encourages States parties to exercise their discretion and consider the adoption of additional measures to widen the scope of assistance pursuant to article 46, even in the absence of dual criminality.

619. An interpretative note to the equivalent provisions in the Organized Crime Convention (art. 18, para 10) with respect to the transfer of detained or convicted persons to another State party (see art. 46, para. 10 (b) of the Convention against Corruption) may be helpful to consider: among the conditions to be determined by States parties for the transfer of a person, States parties may agree that the requested State party may be present at witness testimony conducted in the territory of the requesting State party (A/55/383/Add.1, para. 39).

620. The Convention against Corruption requires the designation of a central authority with the power to receive and execute or transmit mutual legal assistance requests to the competent authorities to handle it in each State party.⁷³ The competent authorities may be different at different stages of the proceedings for which mutual legal assistance is requested. Closely related measures and processes are provided for in articles 6 (Preventive anti-corruption body or bodies), 36 (Specialized authorities), 38 (Cooperation between national authorities), 39 (Cooperation between national authorities and the private sector), 56 (Special cooperation) and 58 (Financial intelligence unit). It is noted that the designation of a central authority for mutual legal assistance purposes is also required under the Organized Crime Convention; hence, States parties to that Convention may wish to consider designating the same authority for the purposes of the Convention against Corruption.

621. The central authority, as well as the acceptable language(s) to be used for requests, should be notified to the Secretary-General of the United Nations at the time of signature or deposit (art. 46, paras. 13 and 14). The notification should be provided to the United Nations Office on Drugs and Crime.

622. An interpretative note regarding paragraph 19 reflects the understanding that the requesting State party would be under an obligation not to use any information received that was 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 (A/58/422/Add.1, para. 43).

623. Finally, an interpretative note to paragraph 28 indicates that many of the costs arising in connection with compliance with requests made pursuant to article 46, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature. The note also indicates that developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article (A/58/422/Add.1, para. 44).

Optional requirements and optional measures

(a) Spontaneous transmission of information

624. Article 46, paragraphs 4 and 5, provide a legal basis for a State party to forward to another State party information or evidence it believes is important for combating the offences covered by the Convention against Corruption, where

⁷³In States with a system by which special regions or territories have a separate system of mutual legal assistance, their central authorities will perform the same functions.

the other State party has not made a request for assistance and may be completely unaware of the existence of the information or evidence. However, there is no obligation to do so in a specific case. For those States parties whose legal system permits direct application of treaties, these paragraphs empower them to transmit information spontaneously where such transmissions are not otherwise possible under domestic law and no new legislation is needed.

625. The possibility of direct contacts between authorities is not a way of circumventing the formal mutual legal assistance procedure, but constitutes also a way of enquiring about the formal conditions required by the requested State. It often helps to save time and avoid misunderstandings. Direct contacts are also critical on other occasions, when it comes to operational information or intelligence (for example, between FIUs; see arts. 56 and 58).

626. If a State party does not already have a domestic legal basis for such spontaneous transmissions and under its legal system the terms of these paragraphs cannot be directly applied, it is strongly encouraged, but not obliged, to take such steps as may be necessary to establish such a legal basis.

(b) Saving clause for mutual legal assistance treaties

627. Article 46, paragraph 6, provides that the article does not preclude or affect the independent obligations that may arise under other treaties that govern mutual legal assistance. At the same time, becoming a party to the Convention against Corruption gives rise to separate obligations that States parties must comply with among themselves.

(c) Testimony by videoconferencing

628. Provision of testimony via videoconferencing is not mandatory. Note should also be taken of article 46, paragraph 28, which provides for consultations regarding the allocation of the costs of mutual legal assistance of a substantial or extraordinary nature.

629. Article 46, paragraph 18, requires States parties to make provision wherever possible and consistent with the fundamental principles of domestic law for the use of videoconferencing as a means of providing viva voce evidence in cases where it is impossible or undesirable for a witness to travel. This may require the following legislative changes:

(a) Legislative powers allowing authorities to compel the attendance of a witness and to administer oaths and subjecting witnesses to criminal liability for non-compliance (for example, using contempt-of-court or similar offences);

(b) Amendments to evidentiary rules to allow for the basic admissibility of evidence provided by videoconferencing and setting technical standards for reliability and verification (for example, identification of the witness);

(c) Expansion of perjury offences, putting in place legislation to ensure that:

- (i) A witness physically in the country who gives false evidence in foreign legal proceedings is criminally liable;
- (ii) A witness in a foreign country who gives false evidence in a domestic court or proceeding via videoconferencing is criminally liable;
- (iii) Persons alleged to have committed perjury via videoconferencing can be extradited into and out of the jurisdiction, as applicable;
- (iv) An untruthful witness can be extradited for having committed perjury in the jurisdiction of the foreign tribunal.

(d) *Conclusion of new agreements and arrangements*

630. Article 46, paragraph 30, calls upon States parties to consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of the article.

D. Other forms of international cooperation

“Article 45

“Transfer of sentenced persons

“States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.”

“Article 47

“Transfer of criminal proceedings

“States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be

in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.”

“Article 48

“Law enforcement cooperation

“1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

“(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

“(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

“(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

“(ii) The movement of proceeds of crime or property derived from the commission of such offences;

“(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

“(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

“(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

“(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

“(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

“2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

“3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.”

“*Article 49*

“*Joint investigations*

“States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.”

“*Article 50*

“*Special investigative techniques*

“1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate

use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

“2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

“3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

“4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.”

631. The Convention provides for a number of other mandatory and non-mandatory mechanisms to further enhance international cooperation with respect to investigation and law enforcement in corruption cases.

632. Discussed in this section are the transfer of sentenced persons (art. 45), the transfer of criminal proceedings (art. 47), law enforcement cooperation (art. 48), joint investigations (art. 49) and special investigative techniques (art. 50).

633. Article 50 of the Convention against Corruption specifically endorses the investigative techniques of controlled delivery, electronic surveillance and undercover operations. These techniques are especially useful in dealing with sophisticated organized criminal groups because of the dangers and difficulties inherent in gaining access to their operations and gathering information and evidence for use in domestic prosecutions, as well as providing mutual legal assistance to other States parties. In many cases, less intrusive methods will

simply not prove effective, or cannot be carried out without unacceptable risks to those involved.

634. Controlled delivery is useful in particular in cases where contraband is identified or intercepted in transit and then delivered under surveillance to identify the intended recipients or to monitor its subsequent distribution throughout a criminal organization. Legislative provisions are often required to permit such a course of action, however, as the delivery of the contraband by a law enforcement agent or other person may itself be a crime under domestic law. Undercover operations may be used where it is possible for a law enforcement agent or other person to infiltrate a criminal organization to gather evidence. Electronic surveillance in the form of listening devices or the interception of communications performs a similar function and is often preferable where a close-knit group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators. Given its intrusiveness, electronic surveillance is generally subject to strict judicial control and numerous statutory safeguards to prevent abuse.

635. Article 50, paragraph 1, pertains to investigative methods that are to be applied at the domestic level. Article 50, paragraphs 2 to 4, provide for measures to be taken at the international level.

Summary of main requirements

636. In accordance with article 47, States parties must consider the transfer to one another of criminal proceedings when this would be in the interest of the proper administration of justice relative to corruption offences, especially those involving several jurisdictions.

637. Under article 48, States parties must:

(a) Consistent with their respective domestic legal and administrative systems, adopt effective measures for the purposes of effective investigation with respect to the offences established in accordance with the Convention, including:

- (i) Enhancing and, where necessary, establishing channels of communication between their respective law enforcement agencies;
- (ii) Cooperating with other States parties in their inquiries concerning:
 - a. The identity, whereabouts and activities of specific persons;
 - b. The movement of proceeds or property derived from the commission of offences and of property, equipment and

other instrumentalities used or intended for use in the commission of offences;

- (iii) Providing, when appropriate, items and substances for analytical or investigative purposes;

(b) Consider bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of article 48;

(c) Endeavour to cooperate in order to respond to corruption-related offences committed through the use of modern technology.

638. Under article 49, a State party must consider bilateral or multilateral agreements or arrangements regarding the establishment of joint investigative bodies, while ensuring that the sovereignty of the State party in whose territory such investigation is to take place is fully respected.

639. Under article 50, a State party must:

(a) Establish controlled delivery as an investigative technique available at the domestic and international level, if permitted by the basic principles of its domestic legal system;

(b) Have the legal ability to provide on a case-by-case basis international cooperation with respect to controlled deliveries, where not contrary to the basic principles of its domestic legal system;

(c) Where appropriate, establish electronic surveillance and undercover operations as investigative techniques available at the domestic and international level.

Mandatory requirements: obligation to take legislative or other measures

(a) Transfer of proceedings

640. Article 47 addresses an issue frequently arising in cases involving transnational crime, including those involving corrupt practices: the operation of offenders in or through several jurisdictions. In such instances, it is more practical, efficient and fairer to all parties concerned (including offenders and victims) to consolidate the case in one place.

641. Thus, taking also into account the objectives of the Convention against Corruption (art. 1), States parties are required to consider the possibility of transferring to one another proceedings for the prosecution of an offence

established in accordance with the Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution (art. 47).⁷⁴

(b) Scope of law enforcement cooperation

642. Article 48, paragraph 1, establishes the scope of the obligation to cooperate. States parties are required to work closely with one another in terms of law enforcement (police-to-police) cooperation in a number of areas set forth in subparagraphs (a) to (f) of paragraph 1.

643. This general obligation to cooperate is not absolute; rather, it is to be conducted consistent with their respective domestic legal and administrative systems. This clause gives States parties the ability to condition or refuse cooperation in specific instances in accordance with their respective requirements.

644. Subject to this general limitation, States parties are to strengthen the channels of communication among their respective law enforcement authorities (para. 1 (a)); undertake specific forms of cooperation in order to obtain information about persons and the movement of proceeds and instrumentalities of crime (para. 1 (b)); provide to each other items or quantities of substances for purposes of analysis or other investigative purposes (para. 1 (c)); exchange information on a variety of means and methods used in related offences (para. 1 (d)); promote exchanges of personnel including the posting of liaison officers (para. 1 (e)); and conduct other cooperation for purposes of facilitating early identification of offences (para. 1 (f)).

645. More specifically, States parties are required:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by the Convention, including, if the States parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States parties in conducting inquiries with respect to offences covered by the Convention concerning:

⁷⁴The equivalent provisions of the OECD Bribery Convention on this issue (art. 4, para. 3) are mandatory.

- (i) The identity,⁷⁵ whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;
- (ii) The movement of proceeds of crime or property derived from the commission of such offences;
- (iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States parties concerning specific means and methods used to commit offences covered by the Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;⁷⁶

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by the Convention.

(c) Special investigative techniques

646. Article 50, paragraph 1, requires States parties to establish the special investigative technique of controlled delivery, provided that this is not contrary to the basic principles of their respective domestic legal system.

647. According to article 2, subparagraph (i), the term “controlled delivery” means 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.

⁷⁵The interpretative notes to the Convention against Corruption indicate that the term “identity” should be understood to include such features or other pertinent information as might be necessary to establish a person’s identity (A/58/422/Add.1, para. 45).

⁷⁶An interpretative note to the Convention against Corruption indicates that this subparagraph does not imply that the type of cooperation described therein would not be available under the Organized Crime Convention (A/58/422/Add.1, para. 46).

648. Many States parties will already have this mechanism available at least with respect to certain transnational crimes such as trafficking in narcotics or organized crime, as it was provided for in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the Organized Crime Convention. The decision on whether to use this technique in a specific circumstance is left to the law, discretion and resources of the State concerned, as reflected by the phrases “within its means” and “in accordance with the conditions prescribed by its domestic law”.

649. In order to implement this provision, States parties must ensure the admissibility of evidence developed through such techniques. This may require legislation.

650. Article 50, paragraph 3, provides that in the absence of an agreement or arrangement, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis. This formulation requires a State party to have the ability to cooperate on a case-by-case basis at least with respect to controlled delivery, the establishment of which is mandatory pursuant to paragraph 1, where this is not contrary to the basic principles of the legal system of the State concerned. For a number of States, this provision will itself be a sufficient source of legal authority for case-by-case cooperation.

651. Paragraph 4 clarifies that among the methods of controlled delivery that may be applied at the international level are to intercept and allow goods to continue intact, to intercept and remove goods, or to intercept and replace goods in whole or in part. It leaves the choice of method to the State party concerned. The method applied may depend on the circumstances of the particular case.

Optional requirements and optional measures

(a) Transfer of sentenced persons

652. In accordance with article 45, States parties may wish to consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with the Convention against Corruption, in order that they may complete their sentences there.

(b) Joint investigations

653. Article 49 encourages, but does not require, States 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.

654. The second sentence of the article provides a grant of legal authority to conduct joint investigations, prosecutions and proceedings on a case-by-case basis, even without a specific agreement or arrangement. The domestic laws of most States already permit such joint activities and for those few States whose laws do not so permit, this provision will be a sufficient source of legal authority for case-by-case cooperation of this sort. Given the identical provisions of the Organized Crime Convention, which has been ratified by a large number of States, only a few States will require new legislation to take part in such (non-mandatory) activities.

(c) Establishment of bilateral or multilateral agreements or arrangements on law enforcement cooperation

655. The first sentence of article 48, paragraph 2, of the Convention against Corruption calls upon States parties to consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies, with a view to giving effect to the Convention. States parties may refer to the examples of agreements set forth in sect. IV.E (Information resources) below when doing so. The second sentence provides a grant of legal authority for such cooperation in the absence of a specific agreement or arrangement. The domestic laws of most States already permit such cooperation (indeed, virtually all States are members of Interpol, a multilateral arrangement by which such cooperation can generally be carried out). For any States parties whose laws do not so permit, this provision will be a sufficient source of legal authority for this type of cooperation on a case-by-case basis. Again, many parties to the Organized Crime Convention would already be compliant with this provision.

(d) Cooperation through use of modern technology

656. Article 48, paragraph 3, calls upon States to endeavour to conduct law enforcement cooperation in order to respond to corruption-related offences committed through the use of modern technology. Criminals may use computer technology to commit such crimes as theft, extortion and fraud and to communicate with one another, or maintain their criminal operations through the use of computer systems.

657. An interpretative note to the Convention against Corruption indicates that, in considering a proposal made by Chile for a provision on jurisdiction and cooperation with regard to offences committed through the use of computer

technology, there was general understanding that article 42, paragraph 1 (a), already covered the exercise of jurisdiction over offences established in accordance with the Convention that were committed using computers if all other elements of the offence were met, even if the effects of the offence occurred outside the territory of a State party. In that regard, States parties should also keep in mind the provisions of article 4 of the Convention. The second part of the proposal of Chile suggested that States parties should note the possible advantage of using electronic communications in exchanges arising under article 46. That proposal noted that States parties might wish to consider the use of electronic communications, when feasible, to expedite mutual legal assistance. However, the proposal also noted that such use might raise certain risks regarding interception by third parties, which should be avoided (A/58/422/Add.1, para. 47).

658. Not mandatory but encouraged by article 50, paragraph 1, is the use of electronic surveillance and undercover operations. It must be emphasized that these techniques may be the only way law enforcement can gather the necessary evidence to obstruct the activities of mostly secretive corrupt actors and networks.

659. Article 50, paragraph 2, encourages, but does not require, States parties to enter into agreements or arrangements to enable special investigative techniques, such as undercover investigations, electronic surveillance and controlled deliveries, to be conducted on behalf of another State, as a form of international cooperation.

E. Information resources: related provisions and instruments

1. United Nations Convention against Corruption

Articles 43-50 (international cooperation)

2. Binding international and regional instruments

African Union

African Union Convention on Preventing and Combating Corruption (2003)

www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf

Arab League

Arab League Convention on Mutual Assistance in Criminal Matters (1983)

Extradition Agreement of the League of Arab States (1952)

Association of Southeast Asian Nations

Treaty on Mutual Legal Assistance in Criminal Matters, 2004

<http://assetrecovery.org/kc/node/eb706c7d-a340-11dc-bf1b-335d0754ba85.0;jsessionid=3AB2BA2B4BDA5A03B989565E6CF602FA>

Commonwealth

Commonwealth Scheme for the Rendition of Fugitive Offenders (as amended in 1990)

www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B717FA6D4-0DDF-4D10-853E-D250F3AE65D0%7D_London_Amendments.pdf

Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth (the Harare Scheme, as amended in 1990, 2002 and 2005)

www.thecommonwealth.org/shared_asp_files/uploadedfiles/2C167ECF-0FDE-481B-B552-E9BA23857CE3_HARARESCHEMERELATINGTOMUTUALASSISTANCE2005.pdf

London Scheme for Extradition within the Commonwealth (2002) www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf

Council of Europe

Convention on Laundering, Search, Seizure and the Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005)

<http://conventions.coe.int/Treaty/EN/Treaties/Html/198.htm>

Convention on Cybercrime (2001)

Council of Europe, *European Treaty Series*, No. 185

<http://conventions.coe.int/Treaty/en/Treaties/Word/185.doc>

Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001)

Council of Europe, *European Treaty Series*, No. 182

<http://conventions.coe.int/Treaty/en/Treaties/Html/182.htm>

Criminal Law Convention on Corruption (1999) Council of Europe, *European Treaty Series*, No. 173

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=173&CM=8&DF=13/09/2010&CL=ENG>

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)

Council of Europe, *European Treaty Series*, No. 141

<http://conventions.coe.int/Treaty/EN/Treaties/Html/141.htm>

Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (1978)

Council of Europe, *European Treaty Series*, No. 99

<http://conventions.coe.int/Treaty/en/Treaties/Html/099.htm>

Second Additional Protocol to the European Convention on Extradition (1978) Council of Europe, *European Treaty Series*, No. 98

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=098&CM=8&DF=13/09/2010&CL=ENG>

Additional Protocol to the European Convention on Extradition (1975) Council of Europe, *European Treaty Series*, No. 86

<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=086&CM=8&DF=13/09/2010&CL=ENG>

European Convention on the Transfer of Proceedings in Criminal Matters (1972)

Council of Europe, *European Treaty Series*, No. 73

<http://conventions.coe.int/treaty/en/Treaties/Html/073.htm>

European Convention on Mutual Assistance in Criminal Matters (1959)

Council of Europe, *European Treaty Series*, No. 30.

<http://conventions.coe.int/treaty/en/Treaties/Html/030.htm>

European Convention on Extradition (1957)

Council of Europe, *European Treaty Series*, No. 24

<http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm>

Economic Community of West African States

Convention on Extradition (1994)

www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/4ConExtradition.pdf

Convention on Mutual Assistance in Criminal Matters (1992)

European Union

Convention, drawn up on the basis of article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union (1995)

Official Journal of the European Communities, C 078, 30 March 1995

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995F0330\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995F0330(01):EN:HTML)

Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000)

Official Journal of the European Communities, C 197, 12 July 2000

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:326:0001:0008:EN:PDF>

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 (2000)

Official Journal of the European Communities, L 239, 22 September 2000

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:239:0001:0473:EN:PDF>

Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2001)

Official Journal of the European Union, C 326, 21 November 2001

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:326:0001:0008:EN:PDF>

Framework decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member States (2002) *Official Journal of the European Communities* L 190, 18.7.2002. p. 1

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF>

Framework decision 2001/500/JHA on money-laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (2001) *Official Journal of the European Communities*, L 182, 5 July 2001, p. 1

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:182:0001:0002:EN:PDF>

Framework decision 2003/577/JHA on the execution in the Union of orders freezing property or evidence (2003) *Official Journal of the European Communities*, L 196, 2 August 2003, p. 45

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:EN:PDF>

Framework decision 2008/978/JHA on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in

criminal matters (2008) *Official Journal of the European Communities*, L 350, 30 December 2008, p. 72

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0072:0092:EN:PDF>

Organization for Economic Cooperation and Development

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997)

OECD, DAF/IME/BR(97)20

www.oecd.org/document/21/0,2340,en_2649_34859_2017813_1_1_1_1,00.html

Organization of American States

Inter-American Convention against Corruption (1996)

www.oas.org/juridico/english/Treaties/b-58.html

Inter-American Convention on Mutual Legal Assistance in Criminal Matters (1992)

Organization of American States, *Treaty Series*, No. 75

www.oas.org/juridico/english/Treaties/a-55.html

Optional Protocol Related to the Inter-American Convention on Mutual Legal Assistance in Criminal Matters (1993)

Organization of American States, *Treaty Series*, No. 77

www.oas.org/juridico/english/treaties/A-59.htm

Inter-American Convention on Extradition (1981)

Organization of American States, *Treaty Series*, No. 60

[www.oas.org/juridico/english/treaties/b-47\(1\).html](http://www.oas.org/juridico/english/treaties/b-47(1).html)

Southern African Development Community

Protocol on Extradition (2002)

www.sadc.int/index/browse/page/148

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South Asian Association for Regional Cooperation

Convention on Mutual Legal Assistance in Criminal Matters, 2008

www.saarc-sec.org/userfiles/Various%20Publications,%20Agreements,MOUs,%20%20Conventions.%20Charters/PUBLICATIONS/Pdf/Convention%20on%20MACM%2031%20July%202008.pdf

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www.unodc.org/pdf/convention_1988_en.pdf

United Nations Convention on Transnational Organized Crime (2000)

General Assembly resolution 55/25, annex I

www.unodc.org/pdf/crime/a_res_55/res5525e.pdf

V. Asset recovery

“Article 51

“General provision

“The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.”⁷⁷

A. Introduction

660. The exportation of assets derived from corruption or other illicit sources has serious or even devastating consequences for the State of origin. It undermines foreign aid, drains currency reserves, reduces the tax base, increases poverty levels, harms competition and undercuts free trade. All public policies, therefore, including those relative to peace and security, economic growth, education, health care and the environment, are possibly undermined. Theft from national treasuries, corruption, bribes, extortion, systematic looting and illegal sale of natural resources or cultural treasures and diversion of funds borrowed from international institutions are a small sample of what have been called “kleptocratic” practices. In such instances, the confiscation and return of stolen assets (occasionally by top-level public persons) has been a pressing concern for many States. Consequently, any effective and deterrent response must be global and address the issue of asset return to victimized States or other parties.

661. The international community and United Nations institutions have been paying attention to this problem for some time. A report of the Secretary-General (A/57/158 and Add. 1 and 2) reviewed measures taken by Member States, the United Nations system and other relevant organizations and confirmed

⁷⁷ An interpretative note to the Convention against Corruption indicates that the expression “fundamental principle” would not have legal consequences on the other provisions of chap. V of the Convention (A/58/422/Add.1, para. 48).

the high priority attached by the international community to the fight against corruption in general and to the problem of cross-border transfers of illicitly obtained funds and the return of such funds. Several General Assembly resolutions have emphasized the responsibility of Governments and encouraged them to adopt domestic and international policies aimed at preventing and combating corruption and the transfer of assets of illicit origin and at facilitating the return of such assets to the States of origin upon request and through due process.⁷⁸

662. The Secretary-General issued a report prepared by the United Nations Office on Drugs and Crime on the prevention of corrupt practices and illegal transfer of funds, which provided information on measures taken by Member States and United Nations entities for the implementation of resolution 55/188 of 20 December 2000, addressing the issue of the transfer of funds of illicit origin and the return of such funds, as well as recommendations on this issue (A/56/403 and Add.1). This was followed by another report, submitted to the General Assembly in response to resolution 56/186 of 21 December 2001, on further progress on the implementation of resolution 55/188 and additional information from Member States regarding their anti-corruption programmes (A/57/158 and Add.1 and 2).

663. Economic and Social Council resolution 2001/13 of 24 July 2001 requested the Secretary-General to prepare for the Ad Hoc Committee for the Negotiation of a Convention against Corruption a global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption.⁷⁹ The study examined problems associated, *inter alia*, with the transfer of assets of illicit origin, in particular in cases of large-scale corruption causing hardship to victim States, which were unable to recover those assets. Among the procedural, evidentiary and political obstacles to recovery efforts cited in the report were the following:

- (a) Anonymity of transactions impeding the tracing of funds and the prevention of further transfer;
- (b) Lack of technical expertise and resources;

⁷⁸See General Assembly resolutions 57/244 of 20 December 2002, entitled "Preventing and combating corrupt practices and transfer of funds of illicit origin and returning such funds to the countries of origin", 55/61 of 4 December 2000, entitled "International legal instrument against corruption", 55/188 of 20 December 2000, entitled "Preventing and combating corrupt practices and illegal transfer of funds and repatriation of such funds to the countries of origin", and 56/186 of 21 December 2001, entitled "Preventing and combating corrupt practices and transfer of funds of illicit origin and returning such funds to the countries of origin".

⁷⁹The "Global study on the transfer of funds of illicit origin, especially funds derived from acts of corruption" (A/AC.261/12), was submitted to the Ad Hoc Committee at its fourth session in accordance with Economic and Social Council resolution 2001/13. The study is available at www.unodc.org/pdf/crime/convention_corruption/session_4/12e.pdf.

- (c) Lack of harmonization and cooperation;
- (d) Problems in the prosecution and conviction of offenders as a preliminary step to recovery.

664. Other hurdles included:

- (a) Absence of institutional or legal avenues through which to pursue claims successfully, the fact that certain types of conduct are not criminalized, and the existence of immunities and third party rights;
- (b) Questions of admissibility of evidence, the type and strength of evidence required, differences regarding in rem forfeiture, and time-consuming, cumbersome and ineffective mutual legal assistance treaties, when the identification and freezing of assets must be done fast and efficiently;
- (c) Limited expertise to prepare and take timely action, lack of resources and training and other capacity constraints;
- (d) Lack of political will to take action or cooperate effectively, including lack of interest on the part of victim States in building institutional and legal frameworks against corruption;
- (e) Corruption offenders are often well connected, skilled and bright. They can afford powerful protection measures and can seek shelter in several jurisdictions. They have been able to move their assets and criminal proceeds discreetly and to invest them in ways that render discovery and recovery almost impossible.

665. Even in cases where assets had been located, frozen, seized and confiscated in the State where they were found, problems had often arisen with the return and disposal of such assets, such as concerns about the motivation behind recovery efforts and competing claims.

666. The issues for consideration included transparency and anti-money-laundering measures, ways of obtaining adequate resources for States seeking recovery, legal harmonization, international cooperation, the clarity and consistency of rules related to the allocation of recovered funds, the handling of conflicting claims, national capacity-building and an enhanced role for the United Nations.⁸⁰

667. Asset recovery can fulfil four essential functions, when implemented effectively: (a) it is a powerful deterrent measure, as it removes the incentive

⁸⁰See the report of the Secretary-General entitled "Preventing and combating corrupt practices and transfer of funds of illicit origin and returning such assets to the countries of origin" (A/58/125).

for people to engage in corrupt practices in the first place; (b) it restores justice in the domestic and international arenas by sanctioning improper, dishonest and corrupt behaviours; (c) it plays an incapacitative role by depriving serious offenders and powerful networks of their assets and instruments of misconduct; and (d) it furthers the goal of administration of justice while simultaneously repairing the damage done to (quite often, needy) victims and populations and assisting in the economic development and growth of regions, which are then viewed as more predictable, transparent, well managed, fair and competitive, and thus worthy of investment.

668. The combination of these effects would be healthier, more open, efficient, well governed and prosperous environments, which would enjoy also more security in the context of new anxieties and fears generated by extremism and terrorism.

669. Despite numerous visible corruption cases causing scandals around the globe, the history of successful prosecutions, adequate sanctions and return of looted assets to rightful owners leaves much to be desired.

670. The Convention against Corruption recognizes the above problems and shows that the international community is now prepared to take practical steps to remedy the identified weaknesses. Not only does the Convention devote a separate chapter to asset recovery, but it addresses comprehensively the impediments to effective preventive, investigative and remedial action on a global level.

671. Article 51 declares the return of assets as a “fundamental principle” of the Convention and States parties are mandated to afford one another the “widest measure of cooperation and assistance in this regard”. The lesson that so-called “grand” corruption can only be fought through international and concerted efforts based on genuine commitment on the part of Governments has been learned. States parties, thus, are required to take measures and amend domestic laws as necessary in order to meet the goals set forth in each article of chapter V of the Convention. All provisions of chapter V of the Convention should be read in the light of article 1 on purpose of the Convention:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

(c) To promote integrity, accountability and proper management of public affairs and public property.

672. As noted earlier, the nature of corruption and the possibility of co-opted or corrupt law enforcement agents in a given State render more important the preventive measures and international controls, including assistance from the private sector and financial institutions. Those issues were addressed in chapters II to IV of the Convention. Chapter V builds on such provisions (for example, see art. 14 on the prevention of money-laundering, art. 39 on cooperation between national authorities and the private sector and arts. 43 and 46 on international cooperation and mutual legal assistance) and adds more specific preventive measures regarding both States from which assets may depart and States where assets based on the proceeds of crime may transit or get invested (see art. 52, para. 1).

673. Several provisions in chapter V of the Convention set forth procedures and conditions for asset recovery, including facilitating civil and administrative actions (art. 53), recognizing and taking action on the basis of foreign confiscation orders (arts. 54 and 55) and returning property to requesting States in cases of embezzled public funds or other damaging corruption offences, returning property to legitimate owners and compensating victims (art. 57). Article 57 contains important provisions governing the disposal of assets depending on the offence, the strength of evidence provided on prior ownership, claims of legitimate owners other than a State and the existence of other corruption victims that may be compensated (para. 3), and on agreements between the States parties concerned (para. 5). This article departs from earlier treaties, such as the Organized Crime Convention, under which the confiscating State has ownership of the proceeds.⁸¹

674. Effective and efficient asset recovery on the basis of these provisions will contribute greatly to the reparation of harm and reconstruction efforts in victim States, to the cause of justice and to the prevention of grand corruption by conveying the message that dishonest officials can no longer hide their illegal gains.

675. The confiscation of crime proceeds is comparatively recent, even though it has been gaining ground internationally since the adoption of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and—most recently and for a much wider range of offences—the Organized Crime Convention.

676. Chapter V of the Convention against Corruption, however, goes beyond previous conventions, breaking new ground and containing provisions that

⁸¹Article 14, paragraph 1, of the Organized Crime Convention leaves the return or other disposal of confiscated assets to the discretion of the confiscating State.

require legislation. For many States, this entails significant changes in domestic law and institutional arrangements.

677. Technical assistance is, therefore, necessary for the development of national capacity and creation of control bodies with knowledgeable, experienced and skilful personnel. States can obtain such technical assistance from the United Nations Office on Drugs and Crime.⁸²

B. Prevention

“Article 52

“Prevention and detection of transfers of proceeds of crime

“1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

“2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

“(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

⁸²See also the Anti-corruption Toolkit, published by the United Nations Office on Drugs and Crime and available at www.unodc.org/pdf/crime/toolkit/fltof7.pdf.

“(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

“3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

“4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

“5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

“6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.”

Summary of main requirements

678. In accordance with article 52, States parties must:

- (a) Require financial institutions:
 - (i) To verify the identity of customers;
 - (ii) To take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts;
 - (iii) To scrutinize accounts sought or maintained by or on behalf of individuals entrusted with prominent public functions, their family members and close associates;
 - (iv) To report to competent authorities about suspicious transactions detected through the above-mentioned scrutiny (art. 52, para. 1);
- (b) Draw on relevant initiatives of regional, interregional and multilateral organizations against money-laundering:
 - (i) To issue advisories regarding the types of persons for whose accounts enhanced scrutiny will be expected, the types of accounts and transactions to which particular attention should be paid and account-opening, maintenance and record-keeping measures for such accounts (art. 52, para. 2 (a));
 - (ii) To notify financial institutions of the identity of particular persons for whose accounts enhanced scrutiny will be expected (art. 52, para. 2, (b));
- (c) Ensure that financial institutions maintain adequate records of accounts and transactions involving the persons mentioned in paragraph 1 of article 52, including information on the identity of the customer and the beneficial owner (art. 52, para. 3);
- (d) Prevent the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group (art. 52, para. 4).

679. The implementation of these provisions may require legislation.

680. States parties are required to consider:

- (a) Establishing financial disclosure systems for appropriate public officials and appropriate sanctions for non-compliance (art. 52, para. 5);
- (b) Permitting their competent authorities to share that information with authorities in other States parties when necessary to investigate, claim and recover proceeds of corruption offences (art. 52, para. 5);

(c) Requiring appropriate public officials with an interest in or control over a financial account in a foreign country:

- (i) To report that relationship to appropriate authorities;
- (ii) To maintain appropriate records related to such accounts;
- (iii) To provide for sanctions for non-compliance (art. 52, para. 6).

681. Finally, States parties may wish to consider requiring financial institutions:

(a) To refuse to enter into or continue a correspondent banking relationship with banks that have no physical presence and that are not affiliated with a regulated financial group; and

(b) To guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group (art. 52, para. 4).

682. The implementation of these provisions may require legislation. Provisions in this article are innovative and take many States parties into new territory with few precedents to draw on.

Mandatory requirements: obligation to take legislative or other measures

683. Article 52 builds on the prevention measures of chapter II, especially those of article 14 regarding money-laundering, and specifies a series of measures States parties must put in place in order better to prevent and detect the transfers of crime proceeds. Paragraphs 1 and 2 address the cooperation and interaction between national authorities and financial institutions.

684. Under article 52, paragraph 1, without prejudice to article 14, States parties are required to take necessary measures, in accordance with their domestic law, to oblige financial institutions within their jurisdiction:

- (a) To verify the identity of customers;
- (b) To take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts; and
- (c) To conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates.⁸³

⁸³An interpretative note to the Convention against Corruption indicates that the term “close associates” is deemed to encompass persons or companies clearly related to individuals entrusted with prominent public functions (A/58/422/Add.1, para. 50).

685. These provisions must be seen in the context of the more general regulatory and supervisory regime they must establish against money-laundering, in which customer identification, record-keeping and reporting requirements feature prominently (see also art. 14, para. 1 (a)).

686. The duty of financial institutions to know their customers is not new, but part of long-standing internationally accepted standards of due diligence and prudential management of financial institutions.⁸⁴

687. Offenders often hide their transactions and criminal proceeds behind false names or those of third parties—the duty is to make reasonable efforts to determine the beneficial owner of funds entering high-value accounts. The term “high value” needs to be approached individually in the context of each State party.

688. Such enhanced scrutiny must be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer. According to an interpretative note, the words “discourage or prohibit financial institutions from doing business with any legitimate customer” are understood to include the notion of not endangering the ability of financial institutions to do business with legitimate customers (A/58/422/Add.1, para. 51).

689. In order to facilitate implementation of these measures, States parties, in accordance with their domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, are required:

(a) To issue advisories regarding the types of natural or legal person to whose accounts financial institutions within their jurisdiction will be expected to apply enhanced scrutiny; the types of accounts and transactions to which particular attention should be paid; and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts;

(b) Where appropriate, to notify financial institutions within their jurisdiction, at the request of another State party or on their own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

⁸⁴See, for example, the FATF Forty Recommendations and the Basel Committee on Banking Supervision documents “Prevention of criminal use of the banking system for the purpose of money-laundering” and “Customer due diligence for banks”.

690. Such practices are likely to enhance the effectiveness and consistency with which financial institutions engage in their due diligence and customer identification activities. In addition, this sort of guidance from national authorities is particularly helpful to financial institutions in their efforts to comply with the regulatory requirements. As an interpretative note indicates, the obligation to issue advisories may be fulfilled by the State party or by its financial oversight bodies (A/58/422/Add.1, para. 52).

691. Another interpretative note indicates that paragraphs 1 and 2 of article 52 should be read together and that the obligations imposed on financial institutions may be applied and implemented with due regard to particular risks of money-laundering. In that regard, States parties may guide financial institutions on appropriate procedures to apply and whether relevant risks require application and implementation of these provisions to accounts of a particular value or nature, to its own citizens as well as to citizens of other States and to officials with a particular function or seniority. The relevant initiatives of regional, inter-regional and multilateral organizations against money-laundering shall be those referred to in the interpretative note to article 14 (A/58/422/Add.1, para. 49).⁸⁵

692. It is emphasized that the above measures apply both to public officials in the State where the scrutiny occurs and to public officials in other jurisdictions. This is essential not only for the purposes of prevention and transparency, but also for the facilitation of investigations, asset identification and return that may take place in the future.⁸⁶

693. In accordance with article 52, paragraph 3, States parties are required to implement measures ensuring that their financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1. At a minimum, these records should

⁸⁵The interpretative note to article 14 of the Convention against Corruption indicates that the words “relevant initiatives of regional, interregional and multilateral organizations” were understood to refer in particular to the Forty Recommendations and the Eight Special Recommendations of the Financial Action Task Force on Money Laundering, as revised in 2003 and 2001, respectively, and, in addition, to other existing initiatives of regional, interregional and multilateral organizations against money-laundering, such as the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group, the European Union, the Financial Action Task Force of South America against Money Laundering and the Organization of American States” (A/58/422/Add.1, para. 21). It should be noted that in October 2004, the FATF adopted a ninth Special Recommendation on Terrorist Financing.

⁸⁶See FATF recommendation number 6 on politically exposed persons, a term which is defined in the glossary to the FATF recommendations. That recommendation makes a distinction between foreign and domestic politically exposed persons. The Convention against Corruption makes no such distinction. The Commonwealth Working Group on Asset Repatriation has expressed concern over the FATF distinction and preference for the provision contained in the Convention against Corruption for the general application of increased scrutiny.

contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.⁸⁷

694. The definition of the period of time over which records must be maintained is left to the States parties. In this respect, it is important to bear in mind that in several significant cases, corrupt practices occurred over a very long time. The availability of financial records is essential for subsequent investigations, as well as asset identification and return.

695. The implementation of these provisions may require legislation regarding bank secrecy, confidentiality, data protection and privacy issues. Financial institutions should not be placed in the position where compliance with rules and requirements in one jurisdiction raises conflicts with duties they have in another State.

696. In accordance with article 52, paragraph 4, and with the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, States parties are required to implement appropriate and effective measures to prevent, with the help of their regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group.

697. Two interpretative notes clarify the terms of this paragraph further. The first one indicates that the term “physical presence” is understood to mean “meaningful mind and management” located within the jurisdiction. The simple existence of a local agent or low-level staff would not constitute physical presence. Management is understood to include administration, that is, books and records (A/58/422/Add.1, para. 54).

698. The second interpretative note indicates that banks that have no physical presence and are not affiliated with a regulated financial group are generally known as “shell banks”. (A/58/422/Add.1, para. 55).

699. This provision may also require legislation with respect to the conditions under which a financial institution may operate.⁸⁸ This paragraph also contains some optional provisions discussed below.

⁸⁷An interpretative note indicates that paragraph 3 of article 52 is not intended to expand the scope of paragraphs 1 and 2 of the article (A/58/422/Add.1, para. 53).

⁸⁸See FATF recommendation number 18.

Optional requirements: obligation to consider

700. Article 52, paragraphs 5 and 6, require that States parties consider additional financial disclosure obligations on the part of “appropriate public officials”, in accordance with their domestic law. Under paragraph 5, States must consider the establishment of effective financial disclosure systems and provide for appropriate sanctions in case of non-compliance. It is left to the States parties to determine which public officials would be covered under such systems and how financial disclosure would thereby become more effective. Once such systems are introduced, however, there must be appropriate sanctions against violations of reporting duties by public officials to ensure compliance.

701. Paragraph 5 further requires that States parties consider taking necessary measures to permit their competent authorities to share financial disclosure information with the competent authorities in other States parties when necessary to investigate, claim and recover proceeds of offences established in accordance with the Convention against Corruption (see also closely related arts. 43, 46, 48, 56 and 57). Legislation relative to bank secrecy and privacy issues may be required for the implementation of these provisions.

702. In the same spirit of encouraging financial disclosure and transparency, States parties must consider taking necessary measures to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts (art. 52, para. 6). As with the previous provisions, if States parties decide to introduce such measures, they must also provide for appropriate sanctions for non-compliance.

Optional measures: measures States parties may wish to consider

703. As mentioned above, article 52, paragraph 4, mandates the adoption of measures regarding the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group, that is, entities known as “shell banks”. The aim of this provision is to promote the prevention and detection of transfers of proceeds from offences established in accordance with the Convention against Corruption.

704. Under the same paragraph, States parties may wish to consider requiring their financial institutions:

(a) To refuse to enter into or continue a correspondent banking relationship with “shell banks”;

(b) To guard against establishing relations with foreign financial institutions that permit their accounts to be used by “shell banks”.

705. Legislation or amendment of existing laws may be required to implement these provisions (for example, rules specifying for their financial institutions the conditions or criteria they should use to determine whether or not they can enter into or maintain relationships with “shell banks”).

C. Direct recovery

“Article 53

“Measures for direct recovery of property

“Each State Party shall, in accordance with its domestic law:

“(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;

“(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

“(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.”

Summary of main requirements

706. Article 53 requires States parties:

(a) To permit another State party to initiate civil action in its courts to establish title to or ownership of property acquired through corruption offences (subpara. (a));

(b) To permit their courts to order corruption offenders to pay compensation or damages to another State party that has been harmed by such offences (subpara. (b));

(c) To permit their courts or competent authorities, when having to decide on confiscation, to recognize another State party's claim as a legitimate owner of property acquired through the commission of a corruption offence (subpara. (c)).

707. The implementation of these provisions may require legislation or amendments to civil procedures, or jurisdictional and administrative rules.

***Mandatory requirements: obligation to take legislative
or other measures***

708. As mentioned above (see sect. IV.C), on occasion States have been unable to provide legal assistance in civil cases, even though there are certain advantages to this approach, in particular in the event criminal prosecution is not possible owing to the death or absence of alleged offenders. Other advantages of civil prosecution include the possibility of establishing liability on the basis of civil standards without the requirement of a criminal conviction of the person possessing or owning the assets, and the pursuit of assets in cases of acquittal on criminal charges where sufficient evidence meeting civil standards shows that assets were illegally obtained. Of course, it is important not to confuse civil litigation through which a party seeks to recover assets with the use of a non-conviction based system for asset confiscation. These must be kept separate, but the Convention against Corruption recognizes the need to have a range of flexible measures available for the return of assets.

709. In the chapter IV of the present guide, we saw that article 43, paragraph 1, requires States parties to consider cooperating also in investigations of and proceedings in civil and administrative matters relating to corruption.

710. Article 53 focuses on States parties having a legal regime allowing another State party to initiate civil litigation for asset recovery or to intervene or appear in domestic proceedings to enforce their claim for compensation. While such measures might not always be feasible for economic or other reasons, the Convention aims to ensure that there are various options open to States parties in each case.

711. Article 53 contains three specific requirements with respect to the direct recovery of property, in accordance with the domestic law of States parties.

712. Under subparagraph (a), States parties must take necessary measures to permit another State party to initiate civil action in their courts to establish title

to or ownership of property acquired through the commission of an offence established in accordance with the Convention. In this instance, the State would be a plaintiff in a civil proceeding; it is thus a direct recovery. States parties may wish to review their current laws to ensure that there are no obstacles to another State launching such civil litigation.

713. Under subparagraph (b), States parties must take necessary measures to permit their courts to order those who have committed offences established in accordance with the Convention to pay compensation or damages to another State party that has been harmed by such offences. National drafters may need to review existing laws on victim compensation or restitution orders to see whether appropriate amendments are necessary in order to cover this situation.

714. This provision does not specify whether criminal or civil procedures are to be followed. The States parties involved may be able to agree on which standard applies. It would be the responsibility of the concerned State to meet the evidentiary standard. In order to implement this provision, States parties must allow other State parties to stand before their courts and claim damages; how they meet this obligation is left to the States parties.⁸⁹

715. In essence, under subparagraph (a), the victimized State is a party in a civil action it initiates. Under subparagraph (b), there is an independent proceeding at the end of which the victim State must be allowed to receive compensation for damages.

716. Under subparagraph (c), States parties must take necessary measures to permit their courts or competent authorities, when having to decide on confiscation, to recognize another State party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with the Convention. Again, national drafters may need to review existing domestic legislation concerned with proceeds of crime to see whether it accommodates such a claim by another State.

717. An interpretative note indicates that, during the consideration of this paragraph, the representative of the Office of Legal Affairs of the Secretariat drew the attention of the Ad Hoc Committee to the proposal submitted by that Office, together with the Office of Internal Oversight Services and the United Nations Office on Drugs and Crime (see A/AC.261/L.212) to include in this paragraph a reference to the recognition of the claim of a public international

⁸⁹Article 35 of the Convention against Corruption may be relevant in this respect in some States, even though the aim of article 53 is different.

organization in addition to the recognition of the claim of another State party. Following discussion of the proposal, the Ad Hoc Committee decided not to include such a reference, based upon the understanding that States parties could, in practice, recognize the claim of a public international organization of which they were members as the legitimate owner of property acquired through conduct established as an offence in accordance with the Convention (A/58/422/Add.1, para.56).

D. Mechanisms for recovery and international cooperation

“Article 54

“Mechanisms for recovery of property through international cooperation in confiscation

“1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

“(a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

“(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and

“(c) 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.

“2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

“(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that

provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;

“(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and

“(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.”

“Article 55

“*International cooperation for purposes of confiscation*

“1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

“(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

“(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.

“2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

“3. The provisions of article 46 of this Convention are applicable, *mutatis mutandis*, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:

“(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

“(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

“(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

“4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

“5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

“6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

“7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a de minimis value.

“8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

“9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.”

718. Articles 54 and 55 set forth procedures for international cooperation 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 law enforcement efforts to locate and seize them.

719. Article 55 contains obligations in support of international cooperation “to the greatest extent possible” in accordance with domestic law, 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 another State party. In either case, once an order is issued or ratified, the requested State party must take measures to “identify, trace and freeze or seize” proceeds of crime, property, equipment or other instrumentalities for purposes of confiscation (art. 55). Other provisions cover requirements regarding the contents of the various applications, conditions under which requests may be denied or temporary measures lifted and the rights of bona fide third parties.

720. Although there are parallels between these articles and provisions in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Organized Crime Convention, the Convention against Corruption introduces new requirements.

721. Article 54 recognizes the challenges that States have faced in international confiscation cases and breaks new ground by encouraging the use of creative measures to overcome some of these obstacles. One of these measures is confiscation on the basis of money-laundering as opposed to predicate offence convictions.

722. States parties are also obliged to consider allowing the confiscation of property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law without a criminal conviction, when the offender cannot be prosecuted (art. 54, para.1 (c)).

723. Finally, article 54, paragraph 2, offers detailed guidance on measures designed to enhance mutual legal assistance relative to confiscation as required under article 55.

724. As noted above, the Convention against Corruption mandates the establishment of a basic regime for domestic freezing, seizure and confiscation of assets (art. 31), which is a prerequisite for international cooperation and the return of assets. A domestic infrastructure paves the ground for cooperation in confiscation matters, but it does not cover by itself issues arising from requests for confiscation from another State party.

725. Article 54 provides for the establishment of a regime that enables (a) the enforcement of foreign freezing and confiscation orders, and (b) the issuance of freezing and seizure orders for property eventually subject to confiscation, upon a request from another State party. Paragraphs 1 and 2 of article 54, thus, provide for the mechanisms that are necessary so that the options offered in article 55 (paragraph 1 (a) and (b)) can be exercised in such requests. In essence, article 54 enables the implementation of article 55.

Summary of main requirements

726. States parties must:

(a) Permit their authorities to give effect to an order of confiscation issued by a court of another State party (art. 54, para. 1 (a));

(b) Permit their authorities to order the confiscation of such property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law (art. 54, para. 1 (b));

(c) Permit their competent authorities to freeze or seize property upon a freezing or seizure order issued by a competent authority of a requesting State party concerning property eventually subject to confiscation (art. 54, para. 2 (a));

(d) Permit their competent authorities to freeze or seize property upon request when there are sufficient grounds for taking such actions regarding property eventually subject to confiscation (art. 54, para. 2 (b)).

727. States parties that receive from another State party requests for confiscation over corruption offences must, to the greatest extent possible, submit to their competent authorities either:

(a) The request to obtain an order of confiscation and give effect to it (art. 55, para. 1 (a)); or

(b) An order of confiscation issued by a court of the requesting State party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of the Convention insofar as it relates to proceeds of crime situated in their own territory, with a view to giving effect to it to the extent requested (art. 55, para. 1 (b)).

728. Upon a request by another State party with jurisdiction over a corruption offence, States parties must take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities (see art. 31, para. 1) for confiscation by the requesting State or by themselves (art. 55, para. 2).

729. States parties must apply the provisions of article 46 of the Convention (Mutual legal assistance) to article 55, *mutatis mutandis*. In the case of a request based on paragraphs 1 or 2 of article 55, States parties must provide for the modalities set out in paragraph 3 (a)-(c) of the article in order to facilitate mutual legal assistance.

730. States parties must also consider:

(a) Allowing confiscation of property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law without a criminal conviction, when the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (art. 54, para.1 (c));

(b) Taking additional measures to permit their authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property (art. 54, para. 2 (c)).

731. Legislation may be required to implement the above provisions.

***Mandatory requirements: obligation to take legislative
or other measures***

732. The Convention against Corruption addresses the question of how to facilitate the execution of international requests for seizure and confiscation without undue delay. Experience has indicated that there are two possible approaches,

in general. Either evidence can be submitted by the requesting State party in support of an application for a domestic order or the requesting State party's order may be allowed to be executed directly as a domestic order, as long as certain conditions are met.

733. The Convention provides both for the direct enforcement of a foreign seizure order and the seeking of such an order by a State party in the requested State.⁹⁰ In this respect, it is similar to the Organized Crime Convention (see art. 12, para. 2). The Convention against Corruption, however, provides more detail on how freezing or seizure should be sought and obtained for the purposes of confiscation (art. 54, para. 2).⁹¹

(a) Domestic regime

734. Under article 54, paragraph 1, as States parties must provide legal assistance relative to property acquired through or involved in the commission of an offence established in accordance with the Convention against Corruption (see also art. 55), in accordance with their domestic law, they are required to take necessary measures to allow their competent authorities to give effect to an order of confiscation issued by a court of another State party (art. 54, para.1 (a)) and to order the confiscation of such property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law (art. 54, para.1 (b)).

735. So, the first obligation is to enable domestic authorities to recognize and act on another State party's court order of confiscation. An interpretative note indicates that the reference to an order of confiscation in this paragraph may be interpreted broadly, as including monetary confiscation judgements, but should not be read as requiring enforcement of an order issued by a court that does not have criminal jurisdiction (A/58/422/Add.1, para. 57).

⁹⁰These provisions on freezing orders parallel the confiscation provisions, which also allow for the two alternative approaches of direct enforcement of a foreign order or indirect application for a domestic order (see also (b) (International cooperation) in the present section of the guide).

⁹¹Both the Convention against Corruption and the Organized Crime Convention also provide for the confiscation of property related to other offences. The Organized Crime Convention speaks of "Proceeds of crime derived from offences covered by this Convention" and "Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention" (art. 12, para. 1 (a) and (b)). The Convention against Corruption is slightly different, extending to "property acquired through or involved in the commission of an offence established in accordance with this Convention". The major reason for the difference is that the range of criminal offences in the two instruments is different, with some of the offences in the Convention against Corruption being optional. The Convention against Corruption only obliges States to provide for domestic criminal confiscation and assistance to other States parties seeking domestic criminal confiscation, in respect of those optional offences they actually adopt in domestic law (see also chap. VIII of the United Nations *Anti-Corruption Toolkit*, available at www.unodc.org/pdf/crime/toolkit/fl1tof7.pdf).

736. The second obligation is to enable domestic authorities to order the confiscation of foreign origin property either on the basis of a money-laundering or other offence over which they have jurisdiction, or through procedures provided by domestic law. An interpretative note indicates that paragraph 1 (b) of article 54 must be interpreted as meaning that the obligation contained in this provision would be fulfilled by a criminal proceeding that could lead to confiscation orders (A/58/422/Add.1, para. 58).⁹²

737. Under article 54, paragraph 2, in order for States parties to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55, they are required, in accordance with their domestic law:

(a) To take such measures as may be necessary to permit their competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State party that provides a reasonable basis for the requested State party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of article 54;

(b) To take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of article 54.

738. An interpretative note indicates that the term “sufficient grounds” used in paragraph 2 (a) of article 54 should be construed as a reference to a prima facie case in States whose legal systems employ this term (A/58/422/Add.1, para. 60).

739. Also with respect to paragraph 2 (a) of article 54, another interpretative note indicates that a State party may choose to establish procedures either for recognizing and enforcing a foreign freezing or seizure order or for using a foreign freezing or seizure order as the basis for seeking the issuance of its own freezing or seizure order. Reference to a freezing or seizure order in paragraph 2 (a) of article 54 should not be construed as requiring enforcement or recognition of a freezing or seizure order issued by an authority that does not have criminal jurisdiction (A/58/422/Add.1, para. 61).

⁹²A non-mandatory provision applies to cases where confiscation without conviction must be considered, if prosecution is impossible owing to death, flight, absence or in other appropriate cases (see the discussion of art. 54, para. 1 (c) and (b) in the present section of the guide).

(b) *International cooperation*

740. Article 55, paragraph 1, mandates States parties to provide assistance “to the greatest extent possible” within their domestic legal system, when they receive a request from another State party having jurisdiction over an offence established in accordance with the Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities⁹³ referred to in article 31, paragraph 1, of the Convention situated in its territory. In such instances, States parties must:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of the Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State party.

741. An interpretative note indicates that references in article 55 to article 31, paragraph 1, should be understood to include reference to article 31, paragraphs 5 to 7 (A/58/422/Add.1, para. 62).

742. In accordance with article 55, paragraph 2, upon a request made by another State party having jurisdiction over an offence established in accordance with the Convention, the requested State party is required to take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of the Convention for the purpose of eventual confiscation to be ordered either by the requesting State party or, pursuant to a request under paragraph 1 of article 55, by the requested State party.

743. Under article 55, paragraph 3, the provisions of article 46 of the Convention are applicable *mutatis mutandis* to article 55.⁹⁴

⁹³An interpretative note indicates that the term “instrumentalities” should not be interpreted in an overly broad manner (A/58/422/Add.1, para. 63).

⁹⁴See sect. IV.C (Mutual legal assistance) of the present guide. It should be noted in particular that paragraph 8 of article 46 of the Convention against Corruption, which prohibits parties to refuse mutual legal assistance on the ground of bank secrecy, has special relevance to the granting of assistance under article 55.

744. Also under article 55, paragraph 3, in addition to the information specified in article 46, paragraph 15, requests made pursuant to article 55 must contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State party sufficient to enable the requested State party to seek the order under its domestic law;⁹⁵

(b) In the case of a request pertaining to paragraph 1 (b) of article 55, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

(c) In the case of a request pertaining to paragraph 2 of article 55, a statement of the facts relied upon by the requesting State party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

745. Further, the decisions or actions provided for in paragraphs 1 and 2 of article 55 must be taken by the requested State party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State party (art. 55, para. 4).⁹⁶

746. In accordance with article 55, paragraph 6, if a State party elects to make the taking of the measures referred to in paragraphs 1 and 2 of the article conditional on the existence of a relevant treaty, that State party must consider the Convention against Corruption as a necessary and sufficient treaty basis.

747. In accordance with article 55, paragraph 8, before any provisional measures taken pursuant to the article are lifted, requested State parties are required, wherever possible, to offer requesting States parties an opportunity to present reasons for continuing the measures.

⁹⁵An interpretative note indicates that the statement of facts may include a description of the illicit activity and its relationship to the assets to be confiscated (A/58/422/Add.1, para. 64).

⁹⁶Art. 55, para. 5, also requires States parties to furnish copies of their laws and regulations that give effect to the article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

748. In accordance with article 55, paragraph 9, the provisions of the article are not to be construed as prejudicing the rights of bona fide third parties.

749. Finally, it is worth noting that the direct enforcement approach is less expensive, speedier and more effective and efficient than an indirect approach. As an informal expert working group on mutual legal assistance casework best practice, convened by the United Nations Office on Drugs and Crime, reported, “experience in this area clearly demonstrates that the direct enforcement approach is much less resource intensive, avoids duplication and is significantly more effective in affording the assistance sought on a timely basis. Consistent with the conclusions of the expert working group on asset forfeiture, the expert working group on mutual legal assistance strongly recommended that States that had not done so should adopt legislation to permit the direct enforcement of foreign orders for freezing, seizure and confiscation.”⁹⁷

750. When a State party seeks assistance by way of freezing, seizing or confiscation of assets, prior consultation will assist to determine which system is employed by the requested State, in order that the request can be properly formulated.

Optional requirements: obligation to consider

751. Under article 54, paragraph 1 (c), in order to provide mutual legal assistance pursuant to article 55 with respect to property acquired through or involved in the commission of an offence established in accordance with the Convention, States parties 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.

752. An interpretative note indicates that, in this context, the term “offender” might in appropriate cases be understood to include persons who may be title holders for the purpose of concealing the identity of the true owners of the property in question (A/58/422/Add.1, para. 59).

753. Under article 54, paragraph 2 (c), in order to provide mutual legal assistance upon a request made pursuant to article 55, paragraph 2, States parties

⁹⁷See the report of the informal expert working group on mutual legal assistance casework best practice, which presented “Best practice recommendations on facilitating mutual legal assistance”, sect. 7.8 (United Nations Office on Drugs and Crime, Vienna, 2001), available at www.unodc.org/pdf/lap_mlaeg_report_final.pdf.

must, in accordance with their domestic law, consider taking additional measures to permit their competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

754. Note that paragraph 2 (c) of article 54 introduces the concept of “preservation of property” for the first time.

Optional measures: measures States parties may wish to consider

755. In accordance with article 55, paragraph 7, cooperation may be refused or provisional measures lifted if the requested State party does not receive sufficient and timely evidence or if the property is of a de minimis value. An interpretative note reflects the understanding that the requested State party will consult with the requesting State party on whether the property is of de minimis value or on ways and means of respecting any deadline for the provision of additional evidence (A/58/422/Add.1, para. 65).

E. Special cooperation and financial intelligence units

“Article 56

“Special cooperation

“Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.”

“Article 58

“Financial intelligence unit

“States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of

recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.”

Summary of main requirements

756. States parties must endeavour to enable themselves to forward information on proceeds of corruption offences to another State party without prior request, when such disclosure might assist the receiving State party in investigations, prosecutions or judicial proceedings or might lead to a request by that State under chapter V of the Convention (art. 56).

757. States parties must cooperate with one another to prevent and combat the transfer of proceeds of corruption offences and to promote the recovery of such proceeds.

758. To that end, States parties must consider establishing an FIU to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions (art. 58).

Optional requirements: obligation to consider

759. The provisions of article 56 constitute an addition to the precedents of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Organized Crime Convention. Under this article and without prejudice to their domestic law, States parties must endeavour to take measures to permit them to forward, without prejudice to their own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with the Convention against Corruption to another State party without prior request, when they consider that the disclosure of such information might assist the receiving State party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State party under chapter V of the Convention.

760. Article 56 requires States parties to endeavour to take measures that would permit the spontaneous or proactive disclosure of information about proceeds, if they consider that such information might be useful to another State party in any investigation, prosecution or judicial proceeding, or in preparing a request relating to asset recovery. The principle of spontaneous information-sharing is found in the mutual legal assistance provisions of the Organized Crime

Convention (art. 18, paras. 4 and 5), and has now been extended specifically to asset recovery.

761. In accordance with article 58 of the Convention against Corruption, States parties must cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with the Convention and of promoting ways and means of recovering such proceeds. To that end, article 58 requires States parties to consider the establishment of an FIU to serve as a national centre for the collection, analysis and dissemination of reports of suspicious financial transactions to the competent authorities. Since the 1990s, many States have established such units as part of their regulatory, police or other authorities. There is a wide range of structure, responsibilities, functions and departmental affiliation or independence for such units.

762. An interpretative note indicates that each State party may consider creating a new FIU, establishing a specialized branch of an existing FIU or simply using its existing FIU. Further, the *travaux préparatoires* to be prepared on the negotiation of the Convention against Corruption will indicate that article 58 should be interpreted in a manner consistent with paragraph 1 (b) of article 14 of the Convention (A/58/422/Add.1, para. 71).

763. The Egmont Group (the informal association of FIUs) has defined such units as a central, national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information (a) concerning suspected proceeds of crime, or (b) required by national legislation or regulation, in order to combat money-laundering.⁹⁸

764. The Convention against Corruption does not require that an FIU be established by law, but legislation may still be required to institute the obligation to report suspicious transactions to such a unit and to protect financial institutions that disclose such information in good faith. In practice, the vast majority of FIUs are established by law. If it is decided to draft such legislation, States may wish to consider including the following elements:

(a) Specification of the institutions that are subject to the obligation to report suspicious transactions and definition of the information to be reported to the unit;

(b) Legislation defining the powers under which the unit can compel the assistance of reporting institutions to follow up on incomplete or inadequate reports;

⁹⁸ See the website of the Egmont Group (www.egmontgroup.org).

(c) Authorization for the unit to disseminate information to law enforcement agencies when it has evidence warranting prosecution and authority for the unit to communicate financial intelligence information to foreign agencies, under certain conditions;

(d) Protection of the confidentiality of information received by the unit, establishing limits on the uses to which it may be put and shielding the unit from further disclosure;

(e) Definition of the reporting arrangements for the unit and its relationship with other Government agencies, including law enforcement agencies and financial regulators.

F. Return of assets: agreements and arrangements

“Article 57

“Return and disposal of assets

“1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

“2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

“3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

“(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

“(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;

“(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

“4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

“5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.”

765. Article 57 is one of the most crucial and innovative parts of the Convention against Corruption. There can be no prevention, confidence in the rule of law and criminal justice processes, proper and efficient governance, official integrity or a widespread sense of justice and faith that corrupt practices never pay, unless the fruits of the crime are taken away from the perpetrators and returned to the rightful parties. All spheres of societal life, from justice and the economy to public policy and domestic or international peace and security are interconnected with the chief purposes of the Convention, which culminates with the fundamental principle of asset recovery (arts. 1 and 51).

766. For this reason, there is little discretion left to States parties about this article: States parties are required to implement these provisions and introduce legislation or amend their law as necessary.

767. Most of the provisions of the Convention against Corruption regarding freezing, seizure and confiscation measures build on and expand on earlier initiatives, notably the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Organized Crime Convention.

Article 57 of the Convention against Corruption, however, marks a clear departure as it deals with the disposal and return of assets.

768. A key issue related to the disposal of confiscated proceeds of corruption is whether States acquire basic rights of ownership by virtue of the confiscation or whether such assets are the property of victim States seeking their repatriation. In some instances, the claim of pre-existing property ownership is very strong, such as in cases of embezzled State funds. In other instances, the claim may be one of compensation rather than ownership.

769. The Convention against Corruption generally prefers the repatriation of confiscated proceeds to the requesting State party, in accordance with the fundamental principle of article 51. Article 57, paragraph 3, specifies in greater detail the disposal of confiscated corruption-related assets, allows for compensation for damage to requesting States parties or other victims of corruption offences and recognizes claims of other prior legitimate owners. Paragraphs 4 and 5 of article 57 provide for the coverage of expenses of the confiscating State party and ad hoc agreements on asset disposal between concerned States parties.

Summary of main requirements

770. In accordance with article 57, States parties are required:

(a) To dispose of property confiscated under articles 31 or 55 as provided in paragraph 3 of the article, including by return to prior legitimate owners (para. 1);

(b) To enable their authorities to return confiscated property upon the request of another State party, in accordance with their fundamental legal principles and taking into account bona fide third party rights (para. 2);

(c) In accordance with paragraphs 1 and 2 of the article and articles 46 and 55 of the Convention, to:

- (i) Return confiscated property to a requesting State party, in cases of public fund embezzlement or laundering of embezzled funds (see arts. 17 and 23), when confiscation was properly executed (see art. 55) and on the basis of a final judgement in the requesting State (this judgement may be waived by the requested State) (para. 3 (a));
- (ii) Return confiscated property to a requesting State party, in cases of other corruption offences covered by the Convention, when confiscation was properly executed (see art. 55), on the basis of

a final judgement in the requesting State (which may be waived by the requested State) and upon reasonable establishment of prior ownership by the requesting State or recognition of damage by the requested State (para. 3 (b));

- (iii) In all other cases, give priority consideration to:
- a. Return of confiscated property to the requesting State;
 - b. Return such property to its prior legitimate owners;
 - c. Compensation of victims (para. 3 (c)).

771. States parties may also consider the conclusion of agreements or arrangements for the final disposition of assets on a case-by-case basis (art. 57, para. 5).

***Mandatory requirements: obligation to take legislative
or other measures***

772. In accordance with article 57, paragraph 1, property confiscated by a State party pursuant to article 31 (Freezing, seizure and confiscation) or article 55 (International cooperation for purposes of confiscation) of the Convention against Corruption shall be disposed of by that State party in accordance with the provisions of the Convention and its domestic law. This includes the disposal by return of property to its prior legitimate owners, pursuant to article 57, paragraph 3 (see also the discussion below).

773. An interpretative note indicates that prior legitimate ownership will mean ownership at the time of the offence (A/58/422/Add.1, para. 66).

774. Paragraph 2 of article 57 requires that State parties take the necessary measures to ensure that property they have confiscated can be returned to another State party upon request, in accordance with the Convention.

775. More specifically, paragraph 2 of article 57 requires that State parties adopt such legislative and other measures as may be necessary to enable their competent authorities to return confiscated property, when acting on the request made by another State party, in accordance with the Convention.

776. An interpretative note indicates that return of confiscated property may in some cases mean return of title or value (A/58/422/Add.1, para. 67).

777. As States parties adopt these legislative and other necessary measures, in accordance with the fundamental principles of their domestic law, they must take into account the rights of bona fide third parties.

778. An interpretative note indicates that the domestic law referred to in paragraph 1 and the legislative and other measures referred to in paragraph 2 would mean the national legislation or regulations that enable the implementation of this article by States parties (A/58/422/Add.1, para. 68).

779. Paragraph 3 of article 57 contains the main principles governing the disposal of confiscated property. As mentioned above, debates have focused on whether, when and to what extent victim States can claim ownership of such property. This paragraph retains the preference for the return to requesting State parties, in accordance with the fundamental principle of the Convention against Corruption concerning asset recovery (art. 51). At the same time, it recognizes that claims of requesting States parties are stronger in some cases than in others.

780. For example, if senior officials steal funds from the State bank or divert profits from state-owned enterprises or tax revenues to a private bank account they control, it can be argued that they have come to possess funds that belong to the State.

781. On the other hand, a requesting State party may not be able to establish prior ownership or claim to be the only party damaged by some corruption offences. Proceeds from certain offences, such as bribery and extortion, involve criminal harm caused to the State, but the proceeds are not funds to which the State was ever entitled. Consequently, claims to these proceeds would be of a compensatory nature rather than based on pre-existing property ownership. Claims of prior legitimate owners and other victims of such corruption offences need therefore to be considered alongside those of States parties.

782. Paragraph 3 of article 57 recognizes these eventualities and sets rules for disposal of proceeds according to the type of corruption offence involved, the strength of evidence and claims presented and the rights of prior legitimate owners of property and victims other than the State parties.

783. Specifically, in accordance with articles 46 and 55 of the Convention against Corruption and paragraphs 1 and 2 of article 57 of the Convention, the requested State party is required to do the following:

(a) It must return the confiscated property to the requesting State party in cases of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of the Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgment in the requesting State party—this is a requirement that can be waived by the requested State Party (art. 57, para. 3 (a));

(b) It must return the confiscated property to the requesting State party in the case of proceeds of any other Convention offences, when the confiscation was executed in accordance with article 55 of the Convention and on the basis of a final judgement in the requesting State party, when the requesting State party reasonably establishes its prior ownership of such confiscated property to the requested State party or when the requested State party recognizes damage to the requesting State party as a basis for returning the confiscated property—again, the requirement to establish prior ownership can be waived by the requested State party (art. 57, para. 3 (b));

(c) In all other cases, the requested State party must give priority consideration to returning confiscated property not only to the requesting State party, but also to its prior legitimate owners or compensating the victims of the crime (art. 57, para. 3 (c)).

784. An interpretative note indicates that subparagraphs (a) and (b) of paragraph 3 of article 57 apply only to the procedures for the return of assets and not to the procedures for confiscation, which are covered in other articles of the Convention. The requested State party should consider the waiver of the requirement for a final judgement in cases where a final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (A/58/422/Add.1, para. 69).

785. This set of rules constitutes a significant departure from earlier conventions, according to which the concept that the confiscating State party had exclusive property in the proceeds was dominant.⁹⁹

786. In order to avoid difficulties flowing from domestic Government financial management restrictions, States parties must review existing laws, including general financial management laws and regulations, to ensure that there are no obstacles to the return of funds as mandated by article 57.

Optional measures: measures States parties may wish to consider

787. As a result of this change of disposal rules and in view of the occasionally costly recovery efforts of confiscating States, the Convention against Corruption allows the deduction of reasonable costs from the proceeds or other assets before they are returned.

⁹⁹See the Organized Crime Convention, article 14, paragraph 1, where the return or other forms of disposal is a discretionary consideration.

788. In accordance with article 57, paragraph 4, unless States parties decide otherwise, where appropriate, the requested State party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to article 57.

789. An interpretative note indicates that “reasonable expenses” are to be interpreted as costs and expenses incurred and not as finders’ fees or other unspecified charges. Requested and requesting States parties are encouraged to consult on likely expenses (A/58/422/Add.1, para. 70).

790. It is emphasized that the obligation to return assets minus reasonable expenses is distinct from arrangements for asset sharing. For that reason, in many cases it will not be possible to rely on provisions allowing for asset sharing to meet this obligation, unless the legal regime for sharing is extremely open and flexible. States parties will need to review existing laws carefully and amend them as necessary to provide for a judicial or executive power to return the assets in accordance with the provisions of the Convention against Corruption.

791. In this context, it is important to take note of a provision in article 62 of the Convention against Corruption, which relates to the funding of technical assistance offered by the United Nations to developing countries and countries with economies in transition. States parties must endeavour to make voluntary contributions to an account specifically designated for that purpose. In addition to that, States parties may also give special consideration, in accordance with their domestic law and the provisions of the Convention, to contributing to that account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of the Convention (art. 62, para. 2 (c)).

792. Finally, the Convention allows for ad hoc arrangements between concerned State parties. In accordance with paragraph 5 of article 57, where appropriate, States parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

G. Information resources: related provisions and instruments

1. United Nations Convention against Corruption

Articles 51-59 (asset recovery)

2. Binding international and regional instruments

African Union

African Union Convention on Preventing and Combating Corruption (2003)

www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf

Council of Europe

Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990)

Council of Europe, *European Treaty Series*, No. 141

<http://conventions.coe.int/Treaty/EN/Treaties/Html/141.htm>

European Convention on Mutual Assistance in Criminal Matters (1959)

Council of Europe, *European Treaty Series*, No. 30.

<http://conventions.coe.int/treaty/en/Treaties/Html/030.htm>

European Union

Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0110:EN:NOT>

Council Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States, 2007/845/JHA of 6 December 2007

Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical

criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006L0070:EN:NOT>

Directive 2005/60/EC of the European Parliament and Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money-laundering and terrorist financing

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:309:0015:0036:EN:PDF>

Council Directive on prevention of the use of the financial system for the purpose of money-laundering (1991)

www.imolin.org/imolin/en/eudireng.html

United Nations

International Convention for the Suppression of the Financing of Terrorism (1999)

General Assembly resolution 54/109, annex

www.un.org/law/cod/finterr.htm

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

United Nations, *Treaty Series*, vol. 1582, No. 27627

www.unodc.org/pdf/convention_1988_en.pdf

United Nations Convention on Transnational Organized Crime (2007) and its Protocols

www.unodc.org/unodc/en/treaties/CTOC/index.html

Annex I

Requirements of States parties to notify the Secretary-General of the United Nations

The following is a list of the notifications States parties are required to make to the Secretary-General of the United Nations.

Article 6

Preventive anti-corruption body or bodies

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

Article 23

Laundering of proceeds of crime

2.

...

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

Article 44

Extradition

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention;

Article 46

Mutual legal assistance

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory.... The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention

14. ...The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention

Article 55

International cooperation for purposes of confiscation

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

Article 66

Settlement of disputes

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that this does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 67

Signature, ratification, acceptance, approval and accession

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters

governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 69

Amendment

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and transmit it to the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the States Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

Article 70

Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

Annex II

Cross references among articles of the United Nations Convention against Corruption

| <i>Convention article</i> | <i>Topic</i> | <i>Cross references</i> |
|---------------------------|---|---|
| Chapter I | | |
| Article 1 | | Art. 46, para. 9 |
| Article 2 | Definitions | |
| subpara. (a) | Public official | Chap. II and arts. 15-20 |
| subpara. (b) | Foreign public official | Art. 16 |
| subpara. (c) | Official of a public international organization | Art. 16 |
| subpara. (d) | Property | Arts. 17, 22-24, 31, 46, 48, 53-55, 57 and 62 |
| subpara. (e) | Proceeds of crime | Arts. 3, 23, 31, 37, 46-48, 52, 55, 57, 60, 62 and 63 |
| subpara. (f) | Freezing and seizure | Arts. 3, 31, 46, 54, 55 and 60 |
| subpara. (g) | Confiscation | Arts. 3, 31, 53-55 and 57 |
| subpara. (h) | Predicate offence | Art. 23 |
| subpara. (i) | Controlled delivery | Art. 50 |
| Article 3, para. 2 | Damage to State property | Arts. 35, 53 and 57 |
| Article 4 | | Arts. 42 and 49 |
| Chapter II | | |
| Article 5, para. 4 | | Arts. 60 and 13, para. 1 |
| Article 6 | | Arts. 13, 36, 46, para. 3, and 58 |
| Article 7 | | Arts. 2, subpara. (a), and 8 (codes of conduct) |
| Article 8 | | Arts. 7, 11, 12, para. 2 (b), and 13 |
| para. 4 | | Art. 33 |
| para. 5 | | Art. 7, para. 4 |

| <i>Convention article</i> | <i>Topic</i> | <i>Cross references</i> |
|---------------------------|--------------|--|
| Article 9 | | Art. 60 |
| Article 10 | | Art. 13 |
| Article 11, para. 1 | | Art. 8 (codes of conduct) |
| Article 12 | | Arts. 21 (bribery in the private sector, 22, 39 (cooperation between national authorities and the private sector) and 60 |
| para. 2 (e) | | Arts. 7 and 8 (public sector and code of conduct of public officials) |
| para. 2 (f) | | Arts. 2 and 9 |
| para. 4 | | Arts. 15 and 16 |
| Article 13 | | |
| para. 1 | | Arts. 5, 6 and 10 |
| para. 2 | | Arts. 6, 33 and 39, para. 2 |
| Article 14 | | Arts. 23, 24, 46, 52, 54 and 58 |
| Chapter III | | |
| Articles 15-20 | | Art. 2, subpara. (a) (public official) |
| Article 16 | | Art. 2, subpara. (b) (foreign public official) and (c) (official of a public international organization) |
| Article 17 | | Art. 2, subpara. (d) (property) |
| Article 21 | | Arts. 12 and 15 |
| Article 22 | | Art. 2, subpara. (d) (property), 12 and 17 |
| Article 23 | | Arts. 2, subparas. (e) (proceeds of crime) and (h) (predicate offence), 14 and 52 |
| Article 24 | | Art. 23 and its related cross references |
| Article 25 | | Arts. 11, 15 and 32 |
| Article 26 | | Arts. 14, 46, para. 2, and 52 |
| Article 27 | | Arts. 15-26 |
| Article 28 | | Arts. 15-25 |

| <i>Convention article</i> | <i>Topic</i> | <i>Cross references</i> |
|---------------------------|------------------------|--|
| Article 29 | | Art. 30 |
| Article 30 | | Arts. 8, 26, para. 2, and 37 |
| Article 31 | | Arts. 2, subpara. (f) (freezing and seizure) and (g) (confiscation), and 53-55 |
| Article 32 | | Arts. 25 and 46, para. 18 (videoconference hearing) |
| Article 33 | | Arts. 8, para. 4, 13, para. 2, 38 and 39, para. 2 |
| Article 34 | Right of third parties | Arts. 31, 55 and 57 |
| Article 35 | | Art. 53 |
| Article 36 | | Arts. 6 and 60 (training) |
| Article 37 | | Arts. 12, 14, 30, 32 and 48 |
| Article 38 | | Arts. 8, para. 4, 13, para. 2, and 33 |
| Article 39 | | Arts. 12, 14 and 33 |
| Article 40 | | Arts. 31, 46, para. 8, and 55 |
| Article 41 | | Art. 30 |
| Article 42 | | Arts. 4, 23, 30, 44, 46-48, 50, 54 and 55 |
| Chapter IV | | |
| Article 43 | | Arts. 43, para. 2, 44, para. 2, 45, 46, para. 9, and 47-50 |
| para. 2 | | Arts. 44, para. 2, and 46, para. 9 |
| Article 44 | | Arts. 42, 43, para. 2, 44, paras. 15-17, 45 and 46, paras. 9 and 21-23 |
| paras. 15-17 | | Art. 46, paras. 21-23 |
| Article 45 | | Arts. 44 and 46 |
| Article 46 | | Arts. 14 and 54-57 |
| para. 9 | | Art. 1 |
| Article 47 | | Art. 46 |
| Article 48 | | Arts. 2, 14, 37, 49, 50 and 59 |
| Article 49 | | Arts. 4 and 59 |
| Article 50 | | Arts. 2, subpara. (i), and 4 |

| <i>Convention article</i> | <i>Topic</i> | <i>Cross references</i> |
|---------------------------|--------------|--|
| Chapter V | | |
| Article 51 | | Art. 57 |
| Article 52 | | Arts. 14 and 23 |
| Article 53 | | Arts. 31, 35, 54 and 55 |
| Article 54 | | Arts. 31, 46 and 55 |
| Article 55 | | Arts. 31, 46 and 54 |
| Article 56 | | Art. 48 |
| Article 57 | | Arts. 15-25, 46, 51 and 55 |
| Article 58 | | Arts. 6, 14, 36 and 52 |
| Article 59 | | Arts. 37, 48, 49 and 50 |
| Chapter VI | | |
| Article 60 | | Arts. 5-7, 9, 12, 32, 36, 44, 46, 52-57 and 62 |
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| Article 62 | | Arts. 57, 58 and 60 |
| Chapter VII | | |
| Article 63 | | Arts. 60-62 |
| Article 64 | | Arts. 6, 23, 44, 46, 55, 63, 64, 66, 67 and 69-71 |
| Chapter VIII | | |
| Article 65 | | Arts. 62 and 63 |
| Article 66 | | Art. 67 |
| Article 67 | | Art. 66 |
| Article 68 | | Art. 67 |
| Article 69 | | Art. 63 |
| Article 70 | | Art. 67 |
| Article 71 | | Arts. 6, 23, 44, 46, 55, 63, 64, 66, 67 and 69-71 |



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