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Review of implementation of the United Nations Convention against Corruption

Implementation of chapter III (Criminalization and law enforcement) of the United Nations Convention against Corruption (review of articles 15-29)

Thematic report prepared by the Secretariat

Summary

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

* CAC/COSP/2013/1.

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I. Introduction, scope and structure of the report

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

2. In accordance with paragraphs 35 and 44 of the terms of reference of the Review Mechanism, thematic reports have been prepared in order to compile the most common and relevant information on successes, good practices, challenges and observations contained in the country review reports, organized by theme, for submission to the Implementation Review Group, to serve as the basis for its analytical work. An analysis of related technical assistance needs is included in a separate report (CAC/COSP/2013/5).

3. The thematic report contains information on the implementation of chapter III (Criminalization and law enforcement) of the Convention by States parties under review in the first, second and third years of the first cycle of the Review Mechanism. It is based on information included in the review reports of 44 States parties that had been completed, or were close to completion, at the time of drafting.[1]

4. The thematic report is contained in three documents. The present document covers issues related to articles 15 to 29 of the Convention, including general observations on challenges and good practices in the implementation of chapter III. The second document (CAC/COSP/2013/7) covers measures to enhance criminal justice (arts. 30-35 of the Convention) as well as the implementation of the law enforcement provisions of chapter III (arts. 36-39). The third (CAC/COSP/2013/8) covers the provisions of chapter III relating to bank secrecy, criminal record and jurisdiction. Examples of implementation of the articles of the Convention are given in boxes 1-11.

II. General observations on challenges and good practices in the implementation of chapter III of the Convention

5. As had been previously requested by the Group, this report contains an analysis of the most prevalent challenges and good practices in the implementation of chapter III, organized by article of the Convention. For article 30 (Prosecution, adjudication and sanctions), which covers a range of topics and for which a number of challenges and good practices were identified in the country review reports, a further breakdown according to paragraphs of the article is provided (see figures I and II).

[1] The present data are based on country reviews as on 1 September 2013.

Figure I
Challenges identified in the implementation of chapter III of the Convention

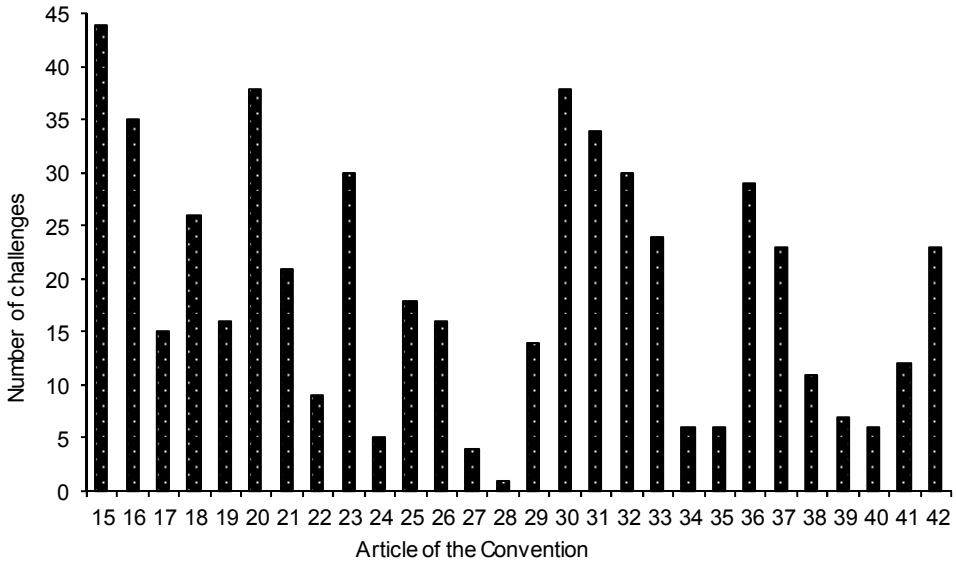


Table 1
Most prevalent challenges in the implementation of chapter III of the Convention

Article of the Convention	*Most prevalent challenges in implementation (in order of prevalence of identified challenge, organized by article of the Convention)*
Bribery of national public officials (art. 15)	1. Application of the bribery offence to benefits extended to third persons and entities. 2. The scope of the undue advantage, in particular as regards non-material benefits and "facilitation payments."[a] 3. Coverage of indirect bribery, in accordance with article 15. 4. The scope of public officials covered by the bribery offence, in particular the application to members of Parliament. 5. Coverage of the promise, in addition to the offer or exchange, of an undue advantage. 6. Applicable distinctions between acts within and outside the scope of official duties of public officials.
Illicit enrichment (art. 20)	1. Domestic decisions not to establish a criminal offence of illicit enrichment. 2. Constitutional limitations, in particular relating to the principle of the presumption of innocence. 3. Issues relating to asset and income disclosure systems. 4. Reported specificities in the legal system, in particular regarding the criminal burden of proof. 5. Particularities of domestic legislation not foreseen by article 20. 6. Application (and potential overlap) of existing laws, such as tax and anti-money-laundering legislation, to cases of illicit enrichment.

Article of the Convention	*Most prevalent challenges in implementation (in order of prevalence of identified challenge, organized by article of the Convention)*
Prosecution, adjudication and sanctions (art. 30)	
Sanctions for offences under the Convention (para. 1)	1. Enhancing the levels of monetary and other sanctions, especially against legal persons, and considering a more coherent approach and the harmonization of existing penalties for corruption-related offences, in particular bribery and embezzlement, in order to ensure the efficiency, proportionality and dissuasive effect of such sanctions.
Immunities and jurisdictional privileges (para. 2)	1. Establishing a greater balance between privileges and jurisdictional immunities afforded to public officials to perform their official functions and the possibility of effectively investigating, prosecuting and adjudicating offences under the Convention, as well as assessing whether immunities go beyond the protections necessary for public officials to perform their official functions. 2. Revisiting the procedures for lifting immunities, in particular to avoid potential delays and the loss of evidence in criminal cases.
Disqualification of convicted persons (para. 7)	1. Considering the adoption of measures for the disqualification of convicted persons from holding office in enterprises owned in whole or in part by the State, in addition to a disqualification from holding public office.
Bribery of foreign public officials and officials of public international organizations (art. 16)	1. Absence of a criminal offence addressing the bribery of foreign public officials and officials of public international organizations. 2. Insufficiency or lack of provisions concerning the non-mandatory offence of passive bribery of foreign public officials and officials of public international organizations. 3. The scope of foreign public officials and officials of public international organizations covered by the offence. 4. Application of the offence to benefits extended to third persons and entities.
Freezing, seizure and confiscation (art. 31)	1. Measures to facilitate confiscation are absent or inadequate, in particular for identifying, freezing and seizing assets, as well as excessively burdensome formal requirements for freezing financial accounts, and identified challenges in establishing non-mandatory measures to provide that an offender must demonstrate the lawful origin of alleged proceeds of crime. 2. Definition of criminal proceeds, property and, in particular, instrumentalities that are subject to the measures in article 31. 3. Challenges in the administration of frozen, seized or confiscated property. 4. Application of existing measures to transformed, converted and intermingled criminal proceeds, as well as income and benefits derived from them. 5. An identified need to overhaul, enhance and ensure greater coherence of existing measures, frameworks and capacity to conduct asset confiscation, freezing and seizure.
Laundering of proceeds of crime (art. 23)	1. Scope of predicate offences committed within and outside the jurisdiction and application to offences under the Convention. 2. Furnishing copies of legislation to the United Nations. 3. Application to specific acts of laundering (subparas. (1)(a)-(b)(i) of art. 23), in particular the acquisition, possession or use of criminal proceeds. 4. Coverage of acts participatory to money-laundering, including association and conspiracy. 5. “Self-laundering” not addressed.

Article of the Convention	*Most prevalent challenges in implementation (in order of prevalence of identified challenge, organized by article of the Convention)*
Protection of witnesses, experts and victims (art. 32)	1. Establishing comprehensive legislation on the protection of witnesses, experts and victims and ensuring effective implementation of relevant measures. 2. Establishing evidentiary rules that ensure adequate protection. 3. Considering cooperation arrangements with foreign authorities.
Specialized authorities (art. 36)	1. Strengthening law enforcement and prosecutorial bodies, in particular the mandate to conduct investigations without prior external approval, enhancing the efficiency, expertise and capabilities of staff, and ensuring the existence of specialized law enforcement capacity for offences under the Convention. 2. Strengthening the independence and resources of law enforcement and prosecutorial bodies. 3. Increasing inter-agency coordination among relevant institutions, considering reconstituting their functions, and assessing how to make existing systems and operations more effective.

[a] The term "facilitation payment" is not included in the Convention and the concept to which the term refers is not recognized by it.

Figure II
Good practices identified in the implementation of chapter III of the Convention

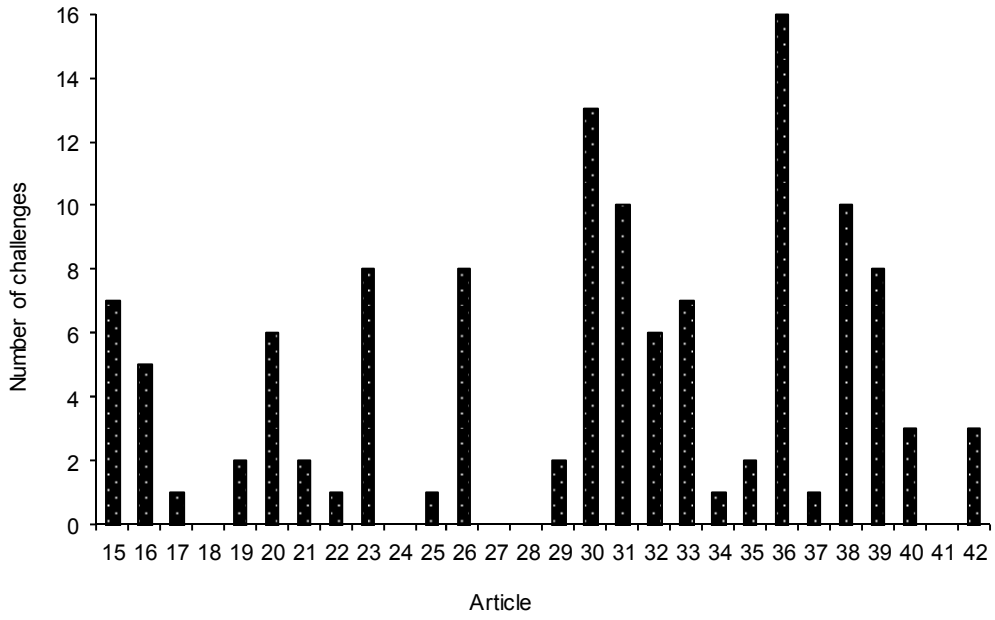


Table 2
Most prevalent good practices in the implementation of chapter III of the Convention

Article of the Convention	*Most prevalent good practices in implementation (in order of prevalence of identified good practice, organized by article of the Convention)*
Specialized authorities (art. 36)	1. Specialization of relevant authorities and their staff, also for complex cases. 2. Specific mandate, oversight mechanisms and operational measures, including the use of strategy documents and statistical indicators. 3. Measures to ensure independence. 4. Adequate capacity and positive results. 5. Existence of specialized anti-corruption courts.
Prosecution, adjudication and sanctions (art. 30)	
Discretionary legal powers (para. 3)	1. Effective enforcement of anti-corruption laws and appropriate operational oversight of institutions within the framework of prosecutorial discretion.
Sanctions for offences under the Convention (para. 1)	1. Determination of sanctions taking into account the gravity of offences and measures to pursue penal law revisions in line with the Convention.
Immunities and jurisdictional privileges (para. 2)	1. Absence of immunities for public officials and parliamentarians and effective procedures for lifting immunities of such persons, where established.
Removal, suspension or reassignment of accused public officials (para. 6)	1. Consequences for public officials who engage in corruption, including the possibility of their suspension, removal reappointment.
Freezing, seizure and confiscation (art. 31)	1. Comprehensive conviction-based and non-conviction-based forfeiture mechanisms. 2. Evidentiary standards facilitating confiscation and the lifting of bank secrecy. 3. Institutional arrangements conducive to the effective confiscation and administration of frozen, seized or confiscated assets.
Cooperation between national authorities (art. 38)	1. Specific examples of effective inter-agency coordination, including Government partnerships, operational synergies, training and staff secondments. 2. Establishment of a centralized agency to facilitate coordination. 3. Inter-agency agreements and arrangements.
Laundering of proceeds of crime (art. 23)	1. Mens rea of the offence goes beyond the minimum standards in article 23. 2. Comprehensive legal framework and “all crimes approach”. 3. Specific anti-money-laundering regulations in place and enforced.
Liability of legal persons (art. 26)	1. Criminal liability of legal persons for corruption-related offences, notwithstanding the release of natural persons from criminal liability. 2. Dissuasive penalties for legal persons who engage in corruption. 3. Strict liability for failure to prevent corruption in relevant entities.
Cooperation with the private sector (art. 39)	1. Extent and quality of overall cooperation between public authorities and the private sector. 2. Institutional arrangements (e.g. working groups or independent organizations) to bring together Government and the private sector. 3. Operational measures, including outreach, awareness-raising and oversight, coupled with relevant enabling regulations. 4. Participation and action by civil society and the private sector.

III. Implementation of the criminalization provisions of chapter III of the Convention

A. General observations

Definition of "public official"

6. In the review of the implementation of chapter III, it was observed that a cross-cutting issue related to implementation was the scope of coverage of the term "public official". For example, in the case of one State party, members of Parliament were not considered public officials, thus limiting the application of several corruption offences to parliamentarians, including domestic and foreign bribery and abuse of functions. Recommendations were made by the reviewing States parties to extend the scope of the relevant offences and provide for appropriate sanctions for parliamentarians. In that same State party, the definition of "foreign official" did not explicitly include persons exercising public functions for a public enterprise. In four jurisdictions, the relevant laws did not cover the main categories of persons enumerated in the Convention or used inconsistent terms to define the class of officials covered. In three States parties, unpaid persons performing a public function or providing a public service were not specifically covered. In another State party, the anti-corruption legislation did not contain an explicit definition of the term "public official", which was defined only indirectly by reference to other concepts. In one case, the term "public officer" was broadly defined but specifically excluded legislators, judicial officers and prosecutors, who were separately covered by the anti-corruption law. Recommendations were issued for several States parties to consider adopting a more consolidated or simplified terminology.

B. Bribery offences

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

7. All of the States parties had adopted measures to criminalize both active and passive bribery of domestic public officials. In addition, many had taken steps towards establishing as criminal offences the bribery of foreign public officials and officials of public international organizations. Nonetheless, a number of common issues were observed concerning the implementation of those offences. In several States parties, the "promise" of an undue advantage was not explicitly covered or was indirectly covered under related concepts. Several States had additionally adopted a "conduct-based" approach whereby only the actual exchange was the subject of the offence, while an offer of bribery was not explicitly covered, although in some cases the offer could be prosecuted as an attempted or incomplete crime. Further, in one of those States parties, an "omission" to act was not criminalized, while in two States parties, passive bribery was only partly criminalized. Recommendations were issued by the reviewing States parties accordingly, including, for one jurisdiction, to monitor the punishment of offers of bribes. In two cases, issues were raised concerning the concept of "official duty", and in a number of jurisdictions, there were gaps with respect to third parties, such as the coverage of indirect bribery involving intermediaries or the accrual of benefits to third parties.

Specifically, in one jurisdiction provisions criminalizing bribery aimed at obtaining the performance of acts not contrary to the duties of national public officials did not cover all instances of undue advantages for third parties. In a few cases the legislation contained specific exemptions or limitations, for example regarding bribery below certain threshold amounts, a defence of "reasonable excuse", or in several cases immunity from prosecution for persons who reported the act of bribery (including in one case the possibility of having all or part of the property, which might have been seized or confiscated, returned). In one case, the domestic bribery provision required the involvement of at least two people in the criminal conduct and further required an element of "economic benefit", which was interpreted as covering only pecuniary benefits and not any other undue advantage. A recommendation to broaden the scope of the law was issued accordingly. A similar issue regarding the undue advantage was noted in five States parties: in three cases where a "value-based" approach was taken, which punished bribery only when it involved material advantages, and in two others where there were doubts whether the terms "any valuable thing" and "illegal profit" in the national law adequately covered undue advantages. In three States parties, a distinction was drawn between a gratuity (expediting an otherwise lawful administrative procedure) and a bribe, with the acceptance of the latter punishable by a more severe penalty if the official acted in breach of an obligation. Similarly, in another case where the law extended also to acts of bribery designed to induce officials to perform acts outside the scope of their official duties, an inconsistency in the applicable sanctions was noted. One State party's legislation was directed at the bribery of "agents", defined as including public officers, parliamentarians, judges and anyone in the private sector, thus limiting the scope of the offence to acts "in relation to the affairs of a principal". A recommendation to consolidate the anti-corruption laws was issued in two jurisdictions to clarify whether the offence was affected by its value and the results of having promised, offered or given it. Legislation had been drafted or introduced in several States parties to more fully implement the bribery provisions of the Convention, though progress was sometimes observed to be slow.

Box 1
Example of the implementation of article 15

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

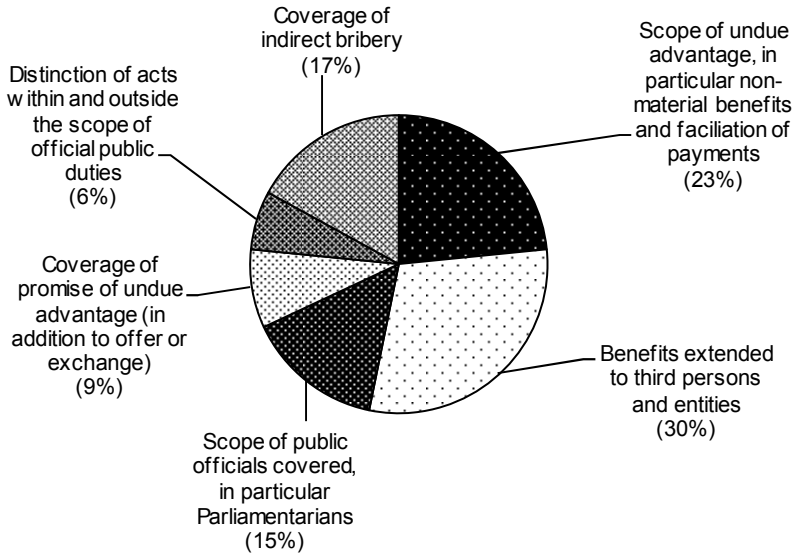
One State party's law established a rebuttable presumption that a gratification had been corruptly received, unless the contrary was proven. Furthermore, evidence was not admissible to show that a gratification was customary in a profession, social occasion or similar context.

Challenges related to article 15

8. The most common challenges in the implementation of article 15 related to the application of the bribery offence to benefits extended to third persons and entities

(30 per cent of cases), the scope of the undue advantage, in particular as regards non-material benefits and "facilitation payments" (23 per cent of cases), the coverage of indirect bribery in accordance with article 15 (17 per cent of cases), the scope of public officials covered by the bribery offence, in particular the application to members of Parliament (15 per cent of cases), the coverage of the promise, in addition to the offer or exchange, of an undue advantage (9 per cent of cases), and applicable distinctions between acts within and outside the scope of official duties of public officials (6 per cent of cases) (see figure III).

Figure III
Challenges related to article 15 (Bribery of national public officials)



9. A number of States parties had not adopted specific measures to criminalize both active and passive bribery of foreign public officials and officials of public international organizations. In particular, the relevant conduct had not been criminalized in 14 cases, although legislation was pending in 7 cases, and criminalized only with respect to active bribery in 6 other cases. One of those States had, however, prosecuted foreign officials on money-laundering charges, with corruption being the predicate offence under related laws. Common challenges related to the inadequacy of normative measures and limited capacity. Recommendations were issued, as required, to adopt specific measures to explicitly cover foreign public officials and officials of public international organizations. In two cases, the foreign bribery statute contained an exception for facilitation payments made to expedite or secure the performance of routine Government action by foreign officials, political parties or party officials, and recommendations were issued accordingly. Gaps were also identified with respect to the scope of officials covered by the offence. In one case, the definition was limited to foreign officials and the international organizations or assemblies of which the State party was a member, while in another jurisdiction the pending legislation would cover only officials who did not enjoy diplomatic immunities. In one State party, the legislation did not explicitly criminalize undue advantages granted to foreign public officials for conduct that was not contrary to their duties. In one State, the legislation did not

extend to officials of public international organizations and, in four jurisdictions, to benefits to third-party entities. It was also noted that in States that had relevant legislation in place there were few reported cases.

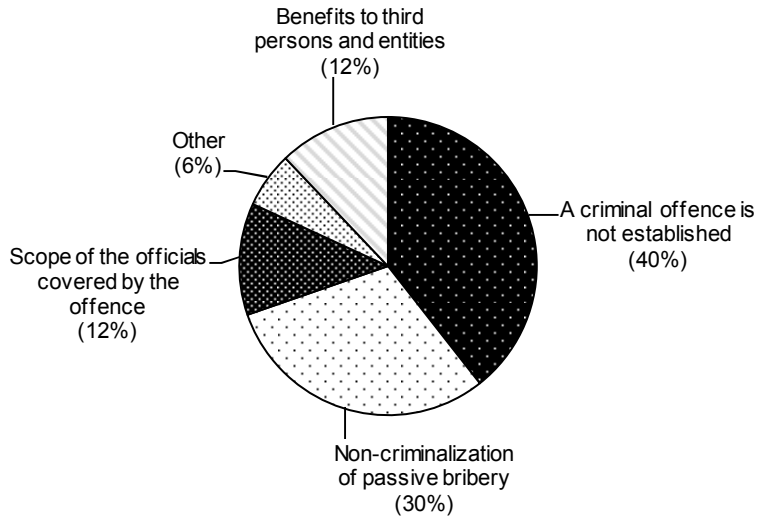
Box 2
Examples of the implementation of article 16

In six States parties, the foreign bribery law went beyond the requirements of the Convention and also covered cases where the bribe was not intended to "obtain or retain business or other undue advantage in relation to the conduct of international business". In one case, the definition of "foreign public official" extended to officials designated by foreign law or custom, in particular any individual who held or performed the duties of an appointment, office or position created by custom or convention of a foreign country or part of a foreign country.

Challenges related to article 16

10. The most common challenges in the implementation of article 16 related to the absence of a criminal offence addressing the bribery of foreign public officials and officials of public international organizations (40 per cent of cases), insufficient or no provisions concerning the non-mandatory offence of passive bribery of foreign public officials and officials of public international organizations (30 per cent of cases), the application of the offence to benefits extended to third persons and entities (12 per cent of cases), and the scope of foreign public officials and officials of public international organizations covered by the offence (12 per cent of cases). (see figure IV).

Figure IV
Challenges related to article 16 (Bribery of foreign public officials and officials of public international organizations)



C. Abuse of power or office and related conduct

Embezzlement, trading in influence, abuse of functions and illicit enrichment

11. While all of the States parties had established measures to criminalize the embezzlement of public funds, common issues encountered related to the scope of the property that was the subject of the offence. In three cases, immovable assets were outside the scope of the offence, as a person could embezzle only property that was in his or her possession. In another case the national legislation covered only property, monies or securities belonging to the State, to an independent agency or to an individual, thus limiting the scope of coverage to private funds entrusted to an individual public official but not to an organization. A recommendation was issued to extend the law to such cases. In nine cases there were limitations or discrepancies concerning the accrual of benefits to third parties. One of those jurisdictions further criminalized only misappropriation and conversion, not embezzlement and diversion. In one case, as with the bribery provisions, serious consequences must accrue for the offence of embezzlement to be completed in respect of property valued below a certain threshold. In several jurisdictions, the relevant legislation applied not just to public officials but to all persons who were entrusted with property, including company directors, members and officers. While in some cases the embezzlement of public funds could constitute an aggravating circumstance, the legislation did not always apply to all public officials. In one case, the offence could be committed negligently or with gross negligence, with a penalty up to life imprisonment.

12. Trading in influence, a non-mandatory provision, had been established as a criminal offence in the majority of States parties, and in some further jurisdictions legislation had been drafted or introduced to criminalize trading in influence. In one case, the adoption of implementing legislation had been considered, but ultimately the concept of trading in influence was considered too vague and not in keeping with the level of clarity and predictability required in criminal law. Recommendations were issued to consider the possibility of introducing appropriate legislation. Where relevant legislation was in place, there were certain deviations from the scope of the Convention. For example, in several cases the offence required that the conduct be carried out for the purpose of economic benefit and contained limitations as to the recipient of the undue advantage or the person being influenced. In three cases, only the passive version of the offence had been fully or partially established, with legislation pending to fully implement the offence in one of them. In some cases, the abuse of "supposed" influence did not appear to be covered. In one State, the relevant law also covered trading in influence with respect to foreign public officials, though there was no specific reference to third-party beneficiaries, while in another case the offence did not apply to decision-making by foreign public officials or members of foreign public assemblies. One State party had established higher penalties for trading in influence to obtain a lawful decision than for an unlawful decision. In some State parties, the offence was partially addressed through provisions against bribery.

Box 3
Example of the implementation of article 18

In one State party, the applicable legislation on trading in influence was observed to cover all material elements of the offence and, additionally, neither the influence

peddler nor the person whose influence was sought had to be public officials. It was understood that the influence could be real or merely supposed, and the undue advantage could be for the perpetrator or for another person. The offence appeared to be completed whether or not the intended result was achieved, and additionally a separate offence was fulfilled if the person whose influence was sought actually carried out the requested act as a result of the improper influence. While no case examples on trading in influence were available, relevant actions had been brought under the anti-corruption law.

13. Most States parties had adopted measures to criminalize the abuse of functions by public officials, a non-mandatory provision, though a separate offence was not always explicitly recognized and there were some deviations. In one case, only the abuse of powers had been criminalized, and legislation to more fully implement the offence was pending. In another case, the relevant legislation criminalized only the illegal act, subject to a minimum threshold amount and not an omission in the discharge of functions, though related offences existed and relevant legislation had been drafted. In two cases, the legislation was limited to abuses causing losses to the State and did not appear to cover non-material benefits, while in three other cases some degree of damage had to accrue to the rights or legal interests of a person or the State. In one jurisdiction, the abuse of functions was prohibited under public service regulations, and only disciplinary sanctions were available. As noted above regarding the definition of "public officials", in another jurisdiction parliamentarians were exempted from the scope of coverage. In two cases, the accrual of benefits to third persons was considered to have been only indirectly or not explicitly addressed. In one State party, as with the offence of bribery, the offence required the involvement of at least two people in the criminal conduct and also did not fully meet the requirements of the Convention, and a recommendation was issued accordingly. In one State party, a recommendation was issued to consider enacting more specific legislation addressing the abuse of functions by public officials, as only certain conduct relating to intimidation or assault was prohibited under the common law. In three cases, legislation had been drafted or introduced to implement the article.

Box 4
Example of the implementation of article 19

In one State party, the criminal code prohibited a wide array of activity, including where an official acted unlawfully with the intention of dishonestly obtaining a benefit for himself or another person or dishonestly causing a detriment to another person.

The broad scope of the domestic provision was noted in one State party where an "undue advantage" was not required as an element of the offence.

In another case, the abuse of official authority by public officials to the detriment of the public interest extended also to intentional, reckless and negligent behaviour.

14. Illicit enrichment, a non-mandatory provision, had not been established as a criminal offence in the majority of States parties, but legislation was pending in several jurisdictions. Objections to enacting relevant legislation commonly related to constitutionality. Where illicit enrichment had not been criminalized, a similar effect was achieved by way of asset and income declaration requirements, as

described in box 6 below. In one State party, provisions in the criminal code on concealment and non-justification of resources, as well as the tax code, pursued the same objective. In another jurisdiction where the concept of unjustified wealth and sanctions for a failure to declare assets were provided for, the law did not contain the required element that a public official could be obliged to explain an increase in assets. In another State party, unexplained wealth could be restrained and confiscated outside the criminal justice system under laws on proceeds of crime, and the court could compel a person to prove in court that his or her wealth was not derived from a criminal offence where there were reasonable grounds to suspect that the person's total wealth exceeded the value of lawfully acquired assets. Similarly, in two States without illicit enrichment laws in place, the unlawful or unexplained assets could be confiscated under certain circumstances, in one case following a conviction of more than three years. Some countries required a prior investigation into another offence to be undertaken to inquire into disproportionate wealth.

Box 5
Examples of the implementation of article 20

In one State party, a comprehensive provision on illicit enrichment had been enacted, and two cases were pending in court. In another State party with limited asset and interest disclosure requirements, the offence had been established.

In one State party, the director of public prosecutions could apply to a judge for an investigation direction based on evidence that a person: (a) maintained a standard of living above that which was commensurate with his or her present or past known sources of income or assets or (b) was in control or possession of pecuniary resources or property disproportionate to his or her present or past known sources of income or assets, and (c) maintained such a standard of living through the commission of corrupt activities or unlawful activities, and (d) that such investigation was likely to reveal relevant information of unlawful activity. The director could thereafter summon the suspect or any other person specified in the investigation direction to answer questions and/or produce evidence. That information could be used to seize and confiscate property or lead to further criminal investigation. Guidelines were under development to facilitate the proper application of these measures.

Box 6
Using asset and income declarations in lieu of illicit enrichment

In one jurisdiction where illicit enrichment had not been criminalized, a similar effect was achieved by way of a legal requirement that all public officials submit asset and income declarations and could be asked to explain any asset increases described in their disclosures. A reporting rate of 99.5 per cent was noted, and a recommendation was issued to include stricter sanctions in the declaration requirements, such as forfeiture of undeclared property.

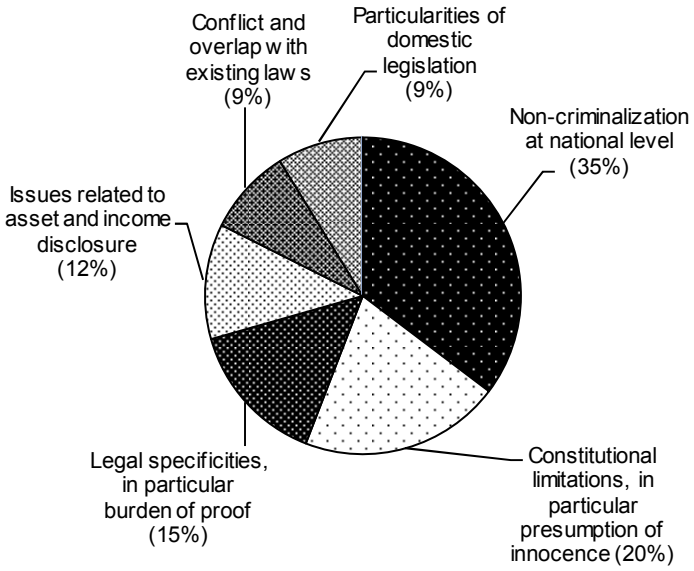
Similarly, in another case, evidence of unexplained wealth could be introduced in court as circumstantial evidence supporting charges of corruption, and senior officials were additionally obligated to file truthful financial disclosure statements, subject to criminal penalties.

One State party was piloting the submission of such declarations before considering it a legal requirement. In the same case there were issues with respect to the property that was the subject of the illicit enrichment laws, and a recommendation was issued to consider streamlining the process of income and asset declarations.

Challenges related to article 20

15. The most common challenges in the implementation of article 20 related to the non-criminalization of illicit enrichment at the national level (35 per cent of cases), identified constitutional limitations, in particular concerning the principle of the presumption of innocence (20 per cent of cases), reported specificities in the legal system, in particular regarding the criminal burden of proof (15 per cent of cases), identified issues relating to asset and income disclosure systems (12 per cent of cases), particularities of the domestic legislation not foreseen by article 20 (9 per cent of cases), and the application and potential overlap of existing laws, such as tax laws and legislation to counter money-laundering, to illicit enrichment cases (9 per cent of cases) (see figure V).

Figure V
Challenges related to article 20 (Illicit enrichment)



D. Private sector offences

Bribery and embezzlement in the private sector

16. Less than half of the States parties had adopted measures to fully criminalize bribery in the private sector (a non-mandatory provision) and, in eight cases, had introduced relevant legislation. In one case, the law limited bribery in the private sector to a breach of obligations "in the purchase or sale of goods or contracting of

professional services," although it was noted that other cases of bribery in the private sector would be covered under other provisions of the penal code. In another case, the relevant conduct was criminalized notwithstanding that the act, favour or disfavour was not done or given in relation of the business or affairs of an employer. In a third case, the relevant provisions did not cover the indirect commission of the offence, although non-governmental organizations and foundations were covered to the extent that they engaged in "economic, financial or commercial activities". The indirect commission of the offence was covered in one State party, while it was notably absent in the corresponding bribery offence involving public officials. In three States parties, there were issues concerning the scope of private individuals covered, although legislation to address the matter was pending, and in a further case the relevant offence required damage or detriment to be caused to the represented entity, in variation from the provisions of the Convention. In one State party, notwithstanding the lack of a federal commercial bribery law, commercial bribery had been effectively prosecuted under related laws and was further criminalized at the state level. In another case, the conduct was pursued under the fraud provisions of the penal code. In one State party where the offence was contained in the law against unfair competition, a prior complaint from competitors or State authorities was required for proceedings to be initiated, though this element was under consideration. A need to enact relevant legislation criminalizing bribery in the private sector was noted as a priority in one State.

17. All of the States parties had adopted measures to criminalize embezzlement in the private sector, a non-mandatory provision. However, in four cases the provision only indirectly covered various elements of such criminal conduct or certain categories of persons, and recommendations were issued to more precisely incorporate the offence established in the Convention. In four cases, immovable assets were excluded from the scope of the national law, and appropriate recommendations were issued, while in another case only property received by loan, borrowing, hiring or contract was covered. In one State party very low penalties were observed. In another case, measures to more fully implement the article were still under discussion at the time of the country review.

Box 7
Examples of the implementation of articles 21 and 22

In one jurisdiction, the bribery offence applied to any person who directed or worked, in any capacity, for a private sector entity, even if the person's function or activity had no connection with, or was performed outside, the country.

In one State party, the relevant law went further than the Convention in that a breach of duty was not required to establish bribery in the private sector.

In two States parties, the offence of embezzlement in the private sector was broader than in the Convention, as it did not contain the condition for the offence to be committed "in the course of economic, financial and commercial activities".

In another State party, the penalty for the offence of private sector embezzlement was aggravated according to value of the embezzled asset and further aggravated if the offender "received the asset upon deposit imposed by law, by reasons of occupation, employment or profession, or as a tutor, trustee or court custodian".

E. Other offences

Money-laundering, concealment and obstruction of justice

18. There was some variation among the States parties with regard to the criminalization of money-laundering. While most States parties had taken measures towards establishing money-laundering as a criminal offence, in several cases there were significant gaps in the implementing law, which covered only part of the conduct described in subparagraphs 1 (a)(ii) and 1 (b)(i) of article 23, and only minor parts of subparagraphs 2 (a)-(c). As a result, while it was noted that legislation to fully implement the article had been introduced, an urgent recommendation was issued to enact appropriate legislation. There were similar issues with regard to the partial implementation of subparagraph 1 (a)(ii) of article 23 in another State party, which, in addition, had not criminalized accessory conduct such as counselling for the purpose of committing money-laundering and supporting a person in the commission of the predicate offence to evade the consequences of his or her actions. Here, also a recommendation was issued to broaden the list of predicate offences to include embezzlement in the private sector. In another case, attempted money-laundering was not punishable, though this would have been covered in a pending amendment of the law. Similarly, in five other jurisdictions, the participation in acts of money-laundering was not fully criminalized so as to cover conspiracy, assistance and attempt, specifically in one case because conspiracy to commit money-laundering was deemed to be incompatible with the basic concepts of the legal system. Issues were also encountered concerning the objects of money-laundering: in one State party the law appeared to be limited to certain objects of money-laundering, though it was explained that all types of property were covered. In another case the penal code did not contain a definition of property, though legislation to address the issue was pending. Gaps in implementation also existed in other States parties. For example, six States parties did not have a provision to criminalize “self-laundering”, and in one other State party the money-laundering offence was limited to only criminal predicate offences and did not include conduct such as tax evasion. In one State party, pending a legislative amendment, the scope of the money-laundering offence was limited to banking, financial and other economic operations which, though interpreted broadly, were observed not to cover all potential areas of laundering of proceeds. Appropriate recommendations were issued by the reviewing experts. A number of States parties had adopted an “all crime approach” that did not restrict application of the money-laundering offence to specific predicate offences or categories of predicate offences, while others applied the law to “serious offences”, though the applicable thresholds differed. The limited scope of the money-laundering offence was noted in several cases, because not all offences established under the Convention had been criminalized or constituted predicate offences. In addition, in a number of cases, issues were encountered with respect to the coverage of predicate offences committed outside the State party. For example, in one case, the extension was implicit; in three cases, offences committed outside the territory of the State party were not considered predicate offences or were considered as such only in certain cases; and in several cases, dual criminality was required for prosecution involving predicate offences committed abroad. Legislation was pending to strengthen anti-money-laundering legislation in some States. A lack of relevant statistics was also noted.

Box 8
Example of the implementation of article 23

In one State party, money-laundering was defined broadly to include giving "a legal form" to illegal or undocumented property to conceal its illegal or undocumented origin. The inclusion of "undocumented property" extended liability to property suspected of being derived from criminal activity.

In another case, the money-laundering offences incorporated the mental state elements of intent, recklessness and negligence, which went beyond the minimum requirements of article 23 of the Convention. Statistics and case examples were provided, including one case involving a syndicate that laundered cash derived from commercial narcotics trafficking by depositing cash into the bank accounts of innocent third parties. This released the equivalent legitimate funds from overseas money remitters, which could then be forwarded as payment for the drugs. The defendant, a low- to middle-level operator of the syndicate, was sentenced to seven years imprisonment with a non-parole period of four and a half years for recklessly dealing in the proceeds of crime of a value of $1 million or more. The judge declared that if the defendant had not pleaded guilty, a sentence of eight years imprisonment with a non-parole period of five and a half years would have been imposed.

19. In several States parties that had established concealment (a non-mandatory provision) as a criminal offence, there were issues with respect to the continued retention of property. Legislation had been drafted or introduced in some jurisdictions to fully implement the article. The offence was not recognized in all States parties and was qualified by an exemption for "close relationships" in another. One State party's law covered also the mere suspicion that property constituted or represented a person's benefit from criminal conduct.

20. Obstruction of justice had been established as a criminal offence in most States parties. In three cases, issues related to the scope of coverage of conduct intended to interfere not just with the giving of testimony but with the production of non-oral evidence in a relevant proceeding. Additionally, in one of those cases, the relevant law covered only conduct to interfere with the true testimony of witnesses, but not that of experts. In 11 cases, the specific means (use of physical force, threats or intimidation and the offering or giving of an undue advantage) to induce false testimony or the production of evidence were not fully covered. In one case, interference with the exercise of official duties by a justice or law enforcement official was limited to acts committed by public officials and not other persons, while in another the offence was limited to interference in investigations and not judicial proceedings. Issues related to penalties were raised in some cases.

Box 9
Example of the implementation of article 25

Legal provisions in one State party that prohibited the use of physical force, threats or intimidation to interfere with the official duties of judicial officers and law enforcement officials were also expressly extended to jurors and defence attorneys. Enhanced penalties applied if the offence was committed by public officials in the exercise of official duties. Further, legal persons could be held criminally

responsible for the offence of influencing or coercing witnesses in criminal cases, with penalties including suspension of licences, fines or liquidation.

One State party criminalized passive forms of obstruction of justice by punishing any person who requested or accepted an unlawful advantage or a promise thereof in return for refraining from exercising his or her lawful rights or neglecting official duties in court proceedings.

F. Substantive and procedural provisions supporting criminalization

Liability of legal persons; participation and attempt; knowledge, intent and purpose; and statute of limitations

21. All except three of the States parties had adopted measures to establish liability of legal persons for offences covered by the Convention, though a general liability provision did not always exist and there was considerable variation concerning the type and scope of such liability. Common challenges related to the inadequacy of existing normative measures and specificities in national legal systems. Thus, more than half of the States parties had established some form of criminal liability of legal persons for corruption offences, with certain exceptions or limitations in some cases. For example, in one jurisdiction the scope of the criminal liability was narrowed by an exception for public entities, including publicly owned companies, and in another, liability was tied to the liability of a natural person. In five cases, the liability was limited to certain offences or conduct, such as money-laundering (in three cases) and to money-laundering and bribery (in the fourth case), with a further restriction that the offences in question must have been committed directly and immediately in the interest of the corporate body. In the fifth case, misappropriation or embezzlement were not covered. In another State party, certain offences were excluded from the scope of coverage, such as embezzlement in the public and private sectors, abuse of functions and obstruction of justice. There was a lack of clarity in two cases as to whether legal persons were included in the scope of the relevant law, as an interpretation had not been given by the courts, and a recommendation was issued to clarify the situation. In a third case, the threshold for liability was unclear and it was noted that there was a need to ensure that companies could be prosecuted independently of their natural persons. In one State party, the criminal code prohibited establishing the criminal liability of legal persons. A similar prohibition existed in another jurisdiction, where only administrative liability was established. In a third case, where civil and administrative measures were established, pending legislation would introduce the criminal liability of legal persons. Sanctions generally varied, ranging from administrative penalties, including blacklisting for certain violations (in one case), to monetary penalties (in other cases), and a combination of sanctions including confiscation and dissolution (in two others). Sanctions for legal persons were generally higher than for natural persons. In 10 cases, specific recommendations were issued to consider increasing, clarifying or adding non-monetary sanctions to the list of possible penalties, and legislation to address the issue was pending in another case. Multiple forms of liability were possible in several jurisdictions. In one case, only civil liability had been established, pending amendments to the penal code that would, if adopted, address the criminal liability of both legal and natural persons.

Box 10
Example of the implementation of article 26

Some form of criminal liability of legal persons for corruption offences had been established in a number of States parties. In one case, legal persons could be found criminally liable even if the individual offender could not be identified or was otherwise not punished. In another case, the primary criminal responsibility of companies was provided for in connection with certain serious offences, including bribery and money-laundering, regardless of the criminal liability of natural persons, if the company failed to take all reasonable and necessary organizational measures to prevent the offence. Further, the subsidiary criminal liability of companies for all felonies and misdemeanours was established when an offence could not be attributed to a particular individual due to a lack of business organization of the commercial undertaking.

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

22. All of the States parties had adopted measures to criminalize the participation in, and attempt to commit, the offences enumerated in the Convention, though the scope and coverage of the provisions varied and in one case further specification was sought. In 13 States parties, the preparation of an offence (art. 27, para. 3) was not specifically criminalized or applied only to serious crimes (which did not include all offences under the Convention), in some cases because it did not accord with basic principles of the national legal system. Similarly, in another case the preparation of a crime (i.e. conspiracy, abetting or the proposal of the crime) was punishable only for money-laundering offences and not for corruption. One State party further required an element of social damage to pursue acts of attempt or preparation. In several States parties, legislation was pending or had been drafted to more fully implement the article.

23. There was considerable variation among the States parties with regard to the length and application of the statute of limitations for offences established under the Convention. One State party had established a statute of limitations for offences under the Convention of 10 years (for offences punishable with imprisonment for more than 3 years) and 5 years (for offences punishable with imprisonment between 1 and 3 years). Similarly, another jurisdiction had established a minimum period for such offences of 5 years, which extended in some cases to 10 years. The reviewing experts were of the view that 10 years was a sufficiently long time but that the appropriateness of a five-year statute depended on the possibility of prolongation or suspension of the statute and its application in practice. In that regard, it was noted that several States parties did not provide for a suspension or interruption of the statute of limitations. The rules on interruption or suspension of the statute,

including for evasion of justice, were repealed in one State because they were deemed too complex, while the periods of limitation had been extended to 15 and 7 years, and a recommendation was issued to consider providing for suspension of the statute. Another State party had established a general statute of limitations period of five years, which was disrupted when the defendant committed a new offence, and suspended by the formalization of the inquiry, which normally took up to two years. The statute of limitations period was also extended when the culprit fled the country but not when the culprit evaded the administration of justice within the borders. A recommendation was issued to introduce a longer statute of limitations that covered every case of evasion of justice, irrespective of whether the culprit was within or outside the country. Recommendations on extension of the statute were also issued in other cases: in one jurisdiction, a recommendation was issued to consider extending the limitation period of five years (which was routinely increased by up to three years upon the request of a prosecutor and a relevant court finding); in a second case, there was a recommendation to consider extending the three-year limitation period to seven years for offences punishable by over three years' imprisonment and to five years for those punishable by less than three years. In another State party, there was a recommendation to reconsider the three-year limitation period for offences punishable by more than one year and the two-year limitation period for offences punishable by up to one year or a fine, pending the adoption of a legislative amendment. A four-year statute of limitations for certain offences under the Convention was deemed insufficient, and in another State party there was uncertainty regarding which statute of limitations was applicable for corruption offences. A suggestion to commence the statute of limitations period at the time of discovery, not the commission of the offence, was issued in one case where a six-year statute of limitations period was established for offences punishable by fine, custody or imprisonment of not more than three years. In two cases, the statute established a period of limitations of between 10 and 20 years, and in two other jurisdictions there was a statute of limitations of 20 years.

Box 11
Example of the implementation of article 29

In one State party, when a criminal action was instituted against a civil servant, the interruption of the statute of limitations was applicable to all persons participating in the commission of the criminal offence, not just the perpetrator.

In one State party, some of the most common corruption offences committed by public officials (excess and abuse of authority, active and passive bribery, trading in influence and illegal gifts) had an extended statute of limitations if the crime was of a serious nature (15 years instead of 10); if the crime was particularly serious, a general limitation of 25 years applied.

One State party provided for a doubling of the period of limitations for offences committed by public officials where State property was affected; this was determined on a case-by-case basis.

Nine States parties had no statute of limitations in place for corruption offences, either because the applicable law did not apply to criminal cases or because there was no general statute of limitations.