

DRAFT
UNITED NATIONS HANDBOOK ON
PRACTICAL ANTI-CORRUPTION MEASURES
FOR PROSECUTORS AND INVESTIGATORS

June 2005

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The views expressed herein are those of the authors and editors and do not necessarily reflect the views of the United Nations Secretariat.

Equip yourself

The present draft United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators is part of a larger package of materials intended to provide information and resource materials for countries developing and implementing anti-corruption strategies at all levels, as well as for other elements of civil society with an interest in combating corruption. The package also includes the publications mentioned below.

The draft United Nations manual on anti-corruption policy contains a general outline of the nature and scope of the problem of corruption and a description of the major elements of anti-corruption policies, suitable for use by political officials and senior policymakers.

The United Nations Anti-Corruption Toolkit contains a detailed set of specific tools intended for use by officials called upon to outline the elements of a national anti-corruption strategy and to assemble them into an overall strategic framework, as well as by officials called upon to develop and implement each specific element.

The Compendium of International Legal Instruments on Corruption contains all the major relevant global and regional international treaties, agreements, resolutions and other instruments, compiled for reference purposes. These include both legally binding instruments and some so-called “soft-law” (or normative) instruments intended to serve as non-binding standards.

Examples of country assessments, as well as all four of the publications mentioned above, are available on the website of the United Nations Office on Drugs and Crime (<http://www.unodc.org/corruption.html>). To assist users who do not have Internet access, individual publications are produced in hard copy and updated as necessary.

Foreword

The United Nations manual on practical measures against corruption* has proved to be of value to law enforcement personnel in many countries for more than a decade. Over the years, however, several major developments in international anti-corruption efforts have occurred as corruption issues surfaced repeatedly and became a major concern of Member States. On 30 September 2003, Member States successfully finalized the United Nations Convention against Corruption (General Assembly resolution 58/4, annex) after two years of deliberation.

The Convention marks a major step forward in international cooperation against corruption and is a demonstration of the almost universal concern over the challenges that corruption poses to countries around the world and in every stage of development. A summary of the instrument is included in the introduction to the present draft *Handbook*. References to relevant specific provisions of the Convention appear throughout the *Handbook* and a more detailed review is included in chapter XIII, which deals with international judicial cooperation.

The nature and effects of corruption are unique to each country and society. The *Handbook* takes its place as part of the toolkit that continues to be developed by the United Nations Office on Drugs and Crime. This is intended to provide a range of options that enable each country to assemble an effective integrated strategy, adapted to meet its own particular needs.

Antonio Maria Costa

Executive Director

United Nations Office on Drugs and Crime

* *International Review of Criminal Policy*, Nos. 41 and 42 (United Nations publication, Sales No. E.93.IV.4).

Preface

The United Nations Office on Drugs and Crime (UNODC) acknowledges the contribution of Petter Langseth, the editor supervising the production of the *Draft United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators*, Natalie Christelis, the subeditor also responsible for the compilation, and Oliver Stolpe.

Major contributors to the *Handbook* were Barry Hancock of the International Association of Prosecutors, Jeremy Pope and Diana Miller, both of TIRI (the governance-access-learning network), and Fiona Darroch (who prepared the case study on the Lesotho Highlands Water Supply prosecutions).

The first version of the manual on practical measures against corruption could not have been attempted without the invaluable support of the United States Department of Justice, in particular that of Michael A. DeFeo. The present second version (now entitled *Draft United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators*) would also not have been possible without the support of the United States Department of Justice, in particular of John Harris, Senior Counsel for International Policy, Kenneth Harris, Associate Director, Office of International Affairs, and Sima Serrafin, Assistant United States Attorney for the District of Columbia.

Drafts of the *Handbook* were commented on extensively by both a Government of South Africa task team and by the UNODC Regional Office for Southern Africa. Those comments, together with the draft handbook, were presented and further discussed during two working meetings organized by UNODC in Pretoria, from 16 to 18 October 2002, and Cape Town, from 21 to 23 October 2002.

The International Association of Prosecutors contributed the views of its members in some 12 countries around the world. The development of this edition of the *Handbook* has been widely welcomed. The expectation is that elements of the *Handbook* will form the basis for other publications, tailored to meet the needs of a particular developing country or region.

The *Handbook* itself will continue to be developed. Practical training and case studies will be added, setting out practical examples to enhance the usefulness of the *Handbook* as a training tool. This will provide information about the conditions under which a particular programme may be able to work and how various practical anti-corruption measures can be adapted to suit the circumstances of a particular developing country.

To achieve this, key staff from UNODC may need first to work with partners in key countries and regions who have been asked to adapt the *Handbook* to local circumstances and then to disseminate successful outcomes that may warrant replication in other, similar countries.

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Chapter I

Introduction: the United Nations Convention against Corruption

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.

One of the landmark developments in the fight against corruption around the world is the United Nations Convention against Corruption, adopted by the General Assembly in its resolution 58/4 of 31 October 2003. Negotiations among Member States were concluded in Vienna on 30 September 2003, after two years of deliberation. At the official opening ceremony in Merida, Mexico, in December 2003, nearly 100 States signed the new instrument, a number indicative of the height of concern about the problem and the general will to get the new Convention off to a very promising start.

The Convention covers a wide range of measures, both domestic and international, and by no means are all of them mandatory. Some provisions require stated actions by States parties (“Each State Party shall ...”) and others specify the legitimacy of certain actions but do not make them compulsory (“States Parties may ...”).

At first sight the second category may seem a trifle odd. States do not require “permission” from others to take constitutionally permissible steps to counter corruption. However, many of these are provisions that many negotiators wished to have as mandatory, but on which a sufficient consensus has not yet been reached. The expectation is that in future revisions of the Convention these provisions will be revisited to see whether a consensus has emerged in favour of at least some being made mandatory.

Substantive highlights of the United Nations Convention against Corruption

1. Prevention

It is a fact of life that corruption can only be prosecuted after the fact and that prosecutions are time-consuming, costly and uncertain and that they can only be brought when evidence of corrupt conduct is available. First and foremost, any anti-corruption strategy should have a strong emphasis on prevention. An entire chapter of the Convention is therefore dedicated to prevention, with measures directed at

both the public and private sectors. These include model preventive policies, such as the establishment of anti-corruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavour to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements as to financial and other disclosures and appropriate disciplinary measures.

Transparency and accountability in matters of public finance should also be promoted. Specific requirements are identified for the prevention of corruption in particularly vulnerable areas of the public sector, such as the judiciary and public procurement. Those who use public services are entitled to expect a high standard of conduct from their public servants.

Preventing public corruption also requires an effort from members of society at large. For these reasons, the Convention calls on States parties actively to promote the involvement of non-governmental and community-based organizations and to raise public awareness both of corruption and what can be done to combat it.

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.

2. Criminalization

The Convention requires States parties to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. In some instances, States are obliged to establish offences; in others they are required to “consider” doing so. The Convention goes beyond previous instruments of its kind, criminalizing not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in

support of corruption, including money-laundering and obstructing justice, are also covered. Other offences address problematic areas in the private sector.

3. International cooperation

States parties agree to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation and the prosecution of offenders. They are bound by the Convention to render specific forms of mutual legal assistance in the gathering and transfer of evidence for use in court and to extradite fugitive suspects. They are also required to take measures that will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

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.

4. Asset recovery

In a major breakthrough, States agreed on providing international assistance for asset recovery. This is described as being “a fundamental principle of the Convention”.

The issue is one of particular importance for many developing countries where high-level corruption has plundered the national wealth and where resources are sorely needed for the reconstruction and rehabilitation of failed institutions under new Governments. Reaching agreement on this chapter of the Convention involved intense negotiations, as the needs of States seeking the return of illicit assets had to be reconciled with the legal and procedural safeguards of the States whose assistance would be sought.

Several provisions specify how cooperation and assistance will be rendered. In the case of embezzlement of public funds, the confiscated property would be returned to the State requesting it. The proceeds of other offences covered by the Convention would also be returned to that State, where there was proof of ownership by, or recognition of harm done to, the requesting State. Where this is not the case, priority consideration would be given to the return of confiscated property to the requesting State to enable it to return the assets to prior legitimate owners or use it to compensate other victims of the offence.

Chapter 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.

Effective asset-recovery provisions will support the efforts of States to redress some of the worst effects of grand corruption, while sending, at the same time, a message to other officials who may be tempted to move illicit assets offshore that there is no place where they are safe.

5. Implementation mechanisms

The States that have signed the Convention are now developing the required legislative and administrative measures and ratifying the new instrument. When the Convention has 30 ratifications, it will come into force as between those State signatories. To promote and review implementation, a Conference of the States Parties has been established by the Convention. This will meet regularly and serve as a forum both for reviewing implementation by States parties and for facilitating the activities envisaged by the Convention.

6. The Convention and the Handbook

Under article 60, each State party, to the extent necessary, is required to implement training programmes for personnel responsible for preventing and combating corruption, including the use of evidence-gathering and investigative measures. This *Handbook* has been designed as a contribution by the United Nations Office on Drugs and Crime (UNODC) to those ends.

Chapter VI **Technical assistance and information exchange**

Article 60 *Training and technical assistance*

1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption. Such training programmes could deal, inter alia, with the following areas:

(a) Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;

(b) Building capacity in the development and planning of strategic anti-corruption policy;

(c) Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;

(d) Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;

(e) Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;

(f) Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;

(g) Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;

(h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;

(i) Methods used in protecting victims and witnesses who cooperate with judicial authorities; and

(j) Training in national and international regulations and in languages.

2. States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including material support and training in the areas referred to in paragraph 1 of this article, and training and assistance and the mutual exchange of relevant experience and specialized knowledge, which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.

3. States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities in international and regional organizations and in the framework of relevant bilateral and multilateral agreements or arrangements.

4. States Parties shall consider assisting one another, upon request, in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption.

5. In order to facilitate the recovery of proceeds of offences established in accordance with this Convention, States Parties may cooperate in providing each other with the names of experts who could assist in achieving that objective.

6. States Parties shall consider using subregional, regional and international conferences and seminars to promote cooperation and technical assistance and to stimulate discussion on problems of mutual concern, including the special problems and needs of developing countries and countries with economies in transition.

7. States Parties shall consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing

countries and countries with economies in transition to apply this Convention through technical assistance programmes and projects.

8. Each State Party shall consider making voluntary contributions to the United Nations Office on Drugs and Crime for the purpose of fostering, through the Office, programmes and projects in developing countries with a view to implementing this Convention.

Chapter II

The role of the prosecutor and the investigator

A. The role of the prosecutor

There is considerable diversity in prosecution/investigator arrangements both between States of the common law and the civil law traditions and within each grouping. Systems of prosecution reflect existing indigenous law to the extent that it has been recognized by the legal system and in many States systems include laws that date back, in some cases for generations, to periods of colonization or other foreign occupation. To varying degrees, too, many have embraced more recent reforms to the common law or to European law and have incorporated these into local law, to which, of course, has to be added the separate legal development of each jurisdiction.

Given the multiplicity of arrangements to which these processes have given rise, it is not possible to identify a consistent model at common law for defining the prosecutor/investigator relationship and within the civil law system there are variations as well. However, there are universally recognized basic values, and concerns for human rights, that should underpin prosecution/investigator functions, however these may be apportioned, an issue that is addressed later in this chapter.

In the civil law tradition, the prosecution of suspected offenders is undertaken by a special prosecuting authority, either a public prosecutor or an investigating judge. Where an investigation is in the hands of a judicial officer, continuing judicial oversight is guaranteed. In common law countries, where this does not occur, investigators and prosecutors must, on occasions, apply to a court for permission to conduct certain categories of coercive activity. Later chapters of this *Handbook* should be read with this particular distinction in mind.

Many common law countries have a strict divide, at least on paper, between the investigator and the prosecutor. The prosecutor is kept apart from the investigation in order to be able to assess the adequacy of evidence and so on dispassionately and objectively. This is a differentiation that is difficult to sustain in practice and the dividing line is gradually becoming blurred, in particular in specialist cases such as major corruption investigations. Investigators will frequently need the assistance of prosecutors when it comes to assistance with investigatory processes rather than with an investigation itself. However, prosecutors are increasingly being drawn into much closer relationships with investigators and it is against this background that this *Handbook* has been prepared. It is written, too, in recognition of the fact that there are many commonalities between the various procedural systems and that the fundamental values and ethics that underpin the investigation and prosecution processes are, in truth, universal.

Krone¹ has observed that:

¹ Tony Krone, "The limits of prosecution authority", paper presented at the Regulatory Institutions Network, Australian National University, Canberra, ACT, 18 November 2003.

“The prosecutor is acquiring an increasingly important role in investigations spurred on by two main factors, which of themselves reflect underlying tensions between the often competing imperatives of fairness and efficiency in common law criminal procedure. The first factor is the desire for efficiency and the need to coordinate investigation and prosecution efforts for the pursuit of crimes that are complex, or that are particularly difficult to regulate or investigate. This has already been recognised for some time in relation to environmental prosecutions which have also been managed without necessarily relying on criminal sanctions. The second is the increasing demand placed on the prosecutor to objectively provide full disclosure of the prosecution case and objectively assess the prosecution case. Increasing attention must therefore be paid by prosecutors to examine exculpatory evidence in the hands of the prosecutor and to consider the nature of the investigation. In both these respects, existing procedures have been shown to be inadequate and the prosecutor is being made responsible for maintaining the integrity of the justice system. The questions that then remain are whether the trust placed in the prosecutor is deserved, whether prosecution decision making is open and transparent and to the extent that it already is, whether it will remain so, and whether there are sufficient accountability mechanisms in place. Certainly, there is a need for guidelines for the investigative prosecutor as that office takes on an increasingly important role.”

These comments have much in common with the concerns expressed by critics of the civil law processes.

B. The lawyer as prosecutor and as defender

The role of the prosecutor is significantly different from that of a lawyer for the defence. The defence lawyer has some duties wider than that of simply defending a client, such as not knowingly misleading the court. In contrast, the prosecutor represents society and therefore has a duty to ensure that a defendant receives the fair trial that is guaranteed by the State’s constitution and that is recognized internationally as a fundamental human right by the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)) and the International Covenant on Civil and Political Rights (resolution 2200 A (XXI), annex). It is therefore for the prosecutor to defend the public interest—which is to ensure that the rule of law is respected, that an accused person receives a fair trial and that only the guilty are convicted. The prosecutor can only achieve these goals by being objective, honest, impartial and independent.

It is because of the special nature of a prosecutor’s role that he or she is obliged to make disclosure to the defence of evidence that might be helpful to the defence but that the prosecutor is not intending to use. Many prosecutors would wish that a similar obligation were imposed on the defence!

The duties and responsibilities of the public prosecutor have been described in the following terms:²

² Christmas Humphreys, Senior Prosecuting Counsel at the Old Bailey, speech delivered at the Inns of Court, 1955 (see *Criminal Law Review*, 1955, p. 739 at pp. 740-741).

“The prosecutor is at all times a minister of justice, though seldom so described. It is not the duty of prosecuting counsel to secure a conviction, nor should any prosecutor ever feel pride or satisfaction in the mere fact of success. Still less should he boast of the percentage of convictions secured over a period. The duty of the prosecutor, as I see it, is to present to the tribunal a precisely formulated case for the [State] against the accused, and to call evidence in support of it. If a defence is raised that is incompatible with his case he will cross-examine, dispassionately and with perfect fairness, the evidence so called, and then address the tribunal in reply, if he has the right, to suggest that his case is proved. It is not rebuff to his prestige if he fails to convince the tribunal of the prisoner’s guilt. His attitude should be so objective that he is, so far as is humanly possible, indifferent to the result. ... It may be argued that it is for the tribunal alone, whether magistrate or jury, to decide guilt or innocence.”

In the United Nations Guidelines on the Role of Prosecutors,³ these duties are described as follows:

“12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

“13. In the performance of their duties, prosecutors shall:

“(a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;

“(b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

“(c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;

“(d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

“14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.

“15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law

³ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990: report prepared by the Secretariat (United Nations publication, Sales No. E.91.IV.2), chap. I, sect. C.26, annex (also available at http://www.unhcr.ch/html/menu3/b/h_comp45.htm).

and, where authorized by law or consistent with local practice, the investigation of such offences.

“16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect’s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.”

The standards for prosecutors have been articulated by the International Association of Prosecutors and bear setting out in full:⁴

“1. *Professional conduct*

“Prosecutors shall:

at all times maintain the honour and dignity of their profession;

always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;

at all times exercise the highest standards of integrity and care;

keep themselves well-informed and abreast of relevant legal developments;

strive to be, and to be seen to be, consistent, independent and impartial;

always protect an accused person’s right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial;

always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights.

“2. *Independence*

“2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

“2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

⁴ Standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors on 23 April 1999 (see <http://www.iap.nl.com/stand2.htm>).

“2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

“3. *Impartiality*

“Prosecutors shall perform their duties without fear, favour or prejudice.

“In particular they shall:

carry out their functions impartially;

remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity;

have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;

in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;

always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

“4. *Role in criminal proceedings*

“4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

“4.2 Prosecutors shall perform an active role in criminal proceedings as follows:

“a) where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;

“b) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights;

“c) when giving advice, they will take care to remain impartial and objective;

“d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence;

“e) throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence;

“f) when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform

other non-prosecutorial functions, they will always act in the public interest.

“4.3 Prosecutors shall, furthermore;

preserve professional confidentiality;

in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights;

and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible;

safeguard the rights of the accused in co-operation with the court and other relevant agencies;

disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial;

examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;

refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect’s human rights and particularly methods which constitute torture or cruel treatment;

seek to ensure that appropriate action is taken against those responsible for using such methods;

in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

“5. *Co-operation*

“In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall:

co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and

render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

“6. *Empowerment*

“In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these

standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled:

to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability;

together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions;

to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished; to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases;

to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures;

to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards;

to objective evaluation and decisions in disciplinary hearings;

to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.”

C. The decision to prosecute

In common law jurisdictions, prosecutors are faced daily with decisions as to whether or not to prosecute. In some countries in the civil law tradition, however (e.g. Croatia and the Czech Republic), the decision to prosecute presents no problems: the prosecutor, under the principle of strict legality, is required to prosecute every case where there is sufficient evidence to sustain a prosecution. In others (e.g. Belgium), the prosecutor has the discretion to drop a case completely if there is no public interest in a particular prosecution continuing. In yet another group of civil law countries, prosecuting authorities not only have discretion whether or not to prosecute, but also have the ability to drop some categories of cases on conditions and without convictions, provided the suspected offender agrees (e.g. to being bound over or to paying a fine, as in Germany and the Netherlands).

The exercise of discretion whether or not to prosecute is an exceedingly onerous task, such are the consequences for the suspect, for the victim and for the community alike. A decision to prosecute should be taken only after the evidence and the surrounding factors, including those favourable to the suspect, have been carefully considered. A misguided decision to prosecute can erode public confidence

in the criminal process, as well as inflict undeserved stress on a person wrongfully charged.

A Canadian Deputy Minister of Justice once observed that carrying out the duties of a prosecutor was difficult:⁵

“It requires solid professional judgment and legal competence, a large dose of practical life experience and the capacity to work in an atmosphere of great stress ... There is no recipe that guarantees the right answer in every case, and in many cases reasonable persons may differ. A prosecutor who expects certainty and absolute truth is in the wrong business. The exercise of prosecutorial discretion is not an exact science. The more numerous and complex the issues, the greater the margin for error.”

However, it has seldom been the position in the common law world that those suspected of criminal offences must automatically face prosecution. A charge is viewed as only being appropriate if it is in the public interest (a situation that also prevails in some countries of the civil law tradition). In determining where the public interest lies, a prosecutor must examine all the factors and the circumstances. These will vary from case to case, and no two cases will be exactly the same. In countries where prosecutors have discretion, they do not act as a “rubber stamp”, as it is not considered appropriate to pursue every single case without regard to the justice of the situation. In general, however, the more serious the offence, the more likely it is that the public interest will require a prosecution if there are reasonable prospects of obtaining a conviction.

In defence of the legality principle, and of always prosecuting when there is sufficient evidence to sustain a conviction, it can be said that this helps to eliminate potential areas for corruption within the legal process by removing the discretion. If a suspect is to escape conviction, it must be after the evidence has been heard publicly, in open court. It will not be the result of a decision taken behind closed doors, in a prosecutor’s office. At the level of constitutional principle it is defended as preventing a vacuum in accountability.

As one prosecutor has noted:⁶

“The constitutional legislator had to solve a very serious problem. If public prosecutors were to be independent, they could not be subject to monitoring by other powers ... but [without] monitoring there would be a lack of accountability in the system ... so the legislators thought it would solve the problem by preventing prosecutors from having any discretion in starting up a criminal action [by providing] for mandatory criminal action. The outcome is that the legality principle makes the fundamental principles of our Constitution more effective.”

⁵ Morris Rosenberg, Deputy Minister of Justice of Canada, quoted in *The Statement of Prosecution Policy and Practice* (Department of Justice, Hong Kong Special Administrative Region of China, 2002). Reproduced from the Department of Justice website (www.doj.gov.hk) with the permission of the government of the Hong Kong Special Administrative Region.

⁶ Gherardo Colombo, “Discretionary powers of public prosecution: opportunity or legality principle; advantages and disadvantages (intervention made at the fifth session of the Conference of Prosecutors General of Europe, Celle, Germany, 23-25 May 2004).”

The writer acknowledges that the mandatory system would work more effectively if the law provided for fewer crimes than it does at present and argues that administrative sanctions can be more effective against less serious illegal behaviour.

In order to ensure consistency in decision-making and to promote public understanding of the role of the prosecutor, some States publish formal statements of their prosecution policies.

D. Uniform guidelines for investigations

The Conference of International Investigators periodically brings together the major investigative bodies attached to international and bilateral organizations that are involved in providing aid and support. Its working conferences are designed to improve cooperation among the agencies, to establish good practices in investigation and to give investigators an opportunity to meet and discuss matters of mutual interest. Some 80 representatives from about 30 organizations, including the World Bank and the United Nations, participated in the conference held in Brussels in April 2003, where the theme was cooperation in the fight against fraud and corruption.

During the conference the delegates developed Uniform Guidelines for Investigations (see europa.eu.int/comm/anti_fraud/press_room/pr/2004/guide_en.pdf), which the conference expected would be adopted by the organizations that attended. Adopting the guidelines helps the agencies involved in this type of inquiry the better to carry out their investigations in an open, transparent and accountable manner and thereby to ensure both the protection of fundamental rights and the interests of their organizations. The standards drawn up also act as an international benchmark for the investigative agencies adopting them.

The standards provide as follows:

“Principles

- “A. Investigation is a profession requiring the highest personal integrity.
- “B. Persons responsible for the conduct of an investigation should demonstrate competence.
- “C. Investigators should maintain objectivity, impartiality and fairness throughout the investigative process and disclose in a timely manner any conflicts of interest to supervisors.
- “D. Investigators should endeavour to maintain both the confidentiality and, to the extent possible, the protection of witnesses.
- “E. The conduct of the investigation should demonstrate the investigator’s commitment to ascertaining the facts of the case.
- “F. Investigative findings should be based on substantiated facts and related analysis, not suppositions or assumptions.
- “G. Recommendations should be supported by the investigative findings.

“Procedural guidelines

“A. Preparation

- “1. Complaints brought to the attention of the investigating offices should be subject to careful analysis and handling.
- “2. Complaints, which may include criminal conduct or acts contrary to the rules and regulations of the organization, should be registered, reviewed and evaluated to determine if they fall within the jurisdiction or authority of the investigative office.
- “3. Information received by the investigative office should be protected from unauthorized disclosure.
- “4. The identities of those who make complaints to the investigative office should be protected from unauthorized disclosure.
- “5. Every investigation should be documented by the investigative office.
- “6. Decisions on which investigations should be pursued and on which investigative activities are to be utilized in a particular case rest with the investigative office, and should include whether there is a legitimate basis to warrant the investigation and commit the necessary resources.
- “7. The preparation for the conduct of an investigation should include necessary research of the relevant national laws and rules and regulations of the organization; the evaluation of the risks involved in the case; the application of analytical rigour to the evidence to be obtained and the assessment of the value, relevance and weight of the evidence; the measurement of the evidence against the relevant laws, rules and regulations; and the consideration of the means and time by which the findings should be reported and to whom.
- “8. The planning and conduct of the investigation should reasonably ensure that the resources devoted to an investigation are proportionate to the allegation and the potential benefits of the outcome.
- “9. The planning should include the development of success criteria for the identification of appropriate and attainable goals for the investigation.

“B. Investigative activity

- “1. Investigative activity should include the collection and analysis of documents and other material; the review of assets and premises of the organization; interviews of witnesses; observations of the investigators; and the opportunity for the subject(s) to respond to the complaints.
- “2. Investigative activity and critical decisions should be documented regularly with the managers of the investigative offices.

- “3. Investigative activity should require the examination of all evidence, both inculpatory and exculpatory.
 - “4. Evidence should be subject to validation, including corroborative testimonial, forensic and documentary evidence.
 - “5. To the extent possible, interviews should be conducted by two investigators.
 - “6. Documentary evidence should be identified and filed with the designation of origin of the document, location and date with the name of the filing investigator.
 - “7. Evidence likely to be used for judicial or administrative hearings should be secured and custody maintained.
 - “8. Investigative activities by an investigative office should not be inconsistent with the rules and regulations of the organization and with due consideration to the applicable laws of the State where such activities occur.
 - “9. The investigative office may utilize informants and other sources of information and may assume responsibility for reasonable expenses incurred by such informants or sources.
 - “10. Interviews should be conducted in the language of the person being interviewed using independent interpreters, unless otherwise agreed.
 - “11. The investigative office may seek advice on the legal, cultural and ethical norms in connection with an investigation.
- “C. Confidentiality and the protection of witnesses
- “1. Where it has been established that a witness or other person assisting in the investigative office’s investigation has suffered retaliation because of assistance in an investigation, the investigative office should undertake, or otherwise engage management to undertake, actions so as to prevent such acts from taking effect or otherwise causing harm to the person.
 - “2. Where an individual makes a complaint on a matter subject to the authority of the investigative office, that individual’s identity should be protected from unauthorized disclosure by the investigative office.
 - “3. Where there has been an unauthorized disclosure of the identity of a witness or other person assisting in the investigative office’s investigation by a staff member of the investigative office, available disciplinary measures should be pursued.
- “D. Due process
- “1. Subjects of investigation should be advised by the investigative office of the complaints against them, with the time and manner of

disclosure to be made keeping in mind fairness to the subject, the need to protect the integrity of the investigation and the interests and rules of the organization.

- “2. Investigative methods may include the gathering of documentary, video, audio, photographic or computer forensic evidence at the election of the investigative office, provided such activities are not inconsistent with the applicable rules and regulations of the organization and with due consideration to the applicable laws of the State where the activity occurs.
- “3. Information received from witnesses and subjects should be documented in writing.

“E. Findings

- “1. Where the investigative findings substantiate the complaint, those findings should be reported to the appropriate managers along with recommendations for corrective action, where appropriate, which may include redress in courts, in disciplinary or debarment proceedings and in other sanctions available to the manager, and for the steps needed to minimize the risk of recurrence.
- “2. Where investigative findings are insufficient either to substantiate or to discredit the complaint, those findings should be reported and the affected subject cleared.
- “3. Where investigative findings adduced during an investigation tend to show that the laws of a State have been violated, consideration should be given to referring the case to the appropriate national law enforcement agency.
- “4. Where there are investigative findings tending to prove that the complaint was made in bad faith or with malicious or negligent disregard of the facts, the investigative office may recommend that appropriate action be taken against the complainant. However the mere fact that the complaint is found by the investigative office to be unsubstantiated is insufficient for such response.
- “5. The standard of proof should conform to the standards required by the organization and/or the national jurisdiction for referrals, but should generally be reasonably sufficient evidence.
- “6. The investigative office should strive to ensure that its recommendations are implemented in a timely fashion.”

It is against the background of these principles and the ethics they embody that this *Handbook* has been prepared.

E. The role of the investigator/prosecutor outside the field of enforcement

This *Handbook* has been prepared on the premise that most investigators and prosecutors will not see their role as being confined merely to performing their functions within existing rules and frameworks. They will, of course, respect the rules in their day-to-day activities, but they should be alive to the continuing and broader need for reform and contribute insights from their daily work. In particular, they will have a strong interest in preventing corruption. There can be no doubt that investigators and prosecutors are uniquely placed by their work experience to play a continuing role in shaping their country's anti-corruption agenda.

For this reason, the *Handbook* goes beyond the everyday business of investigation and prosecution. It includes material designed to stimulate investigators and prosecutors to develop the reform element of their role in an informed and effective fashion.

Chapter III

Corruption defined

There is no comprehensive, universally accepted definition of corruption. The origin of the word is the Latin *corruptus* (spoiled) and *corrumpere* (to ruin; to break into pieces). The working definitions at present in vogue are variations of “the misuse of a public or private position for direct or indirect personal gain” (see <http://www.ustreasury.hu/nc500sa/lessons/glossary.htm>).

Attempts to develop a more precise definition invariably encounter legal, criminological and, in many countries, political problems. When the negotiation of the United Nations Convention against Corruption began in 2002, one option under consideration was to avoid the problem of defining corruption by simply listing a whole series of specific types or acts of corruption. After much discussion, “corruption” was not defined at all, but repeated examples of what is covered by the expression appear throughout the text.⁷

Many specific forms of corruption are clearly understood as such and are the subject of numerous legal and academic definitions. Many are criminal offences, although in some cases Governments consider that a specific form of corruption (such as nepotism) may best be dealt with by way of regulatory or civil law controls. Some of the more commonly encountered forms of corruption are considered below.

A. “Grand” and “petty” corruption

“Grand corruption” is an expression used to describe corruption that pervades the highest levels of government, engendering major abuses of power. A broad erosion of the rule of law, economic stability and confidence in good governance quickly follow. Sometimes it is referred to as “State capture”, which is where external interests illegally distort the highest levels of a political system to private ends.

“Petty corruption”, sometimes described as “administrative corruption”, involves the exchange of very small amounts of money and the granting of small favours. These, however, can involve considerable public losses, as with the customs officer who waves through a consignment of high-duty goods having been bribed a mere \$50 or so.

The essential difference between grand corruption (“State capture”) and petty corruption (day-to-day administrative corruption) is that the former involves the distortion of central functions of government by senior public officials; the latter develops within the context of functioning governance and social frameworks.

Corruption is said to be “systemic” where it has become ingrained in an administrative system. It is no longer characterized by actions of isolated rogue elements within a public service. Where minor acts of petty corruption occur it is often thought best to leave these to be dealt with by way of administrative sanction

⁷ Issues relating to attempts to define corruption for purposes such as policy development and legislative drafting are discussed in more detail in the draft United Nations manual on anti-corruption policy, part II.

(demotion, dismissal and so on), rather than to invoke the whole weight of the criminal process.

When patterns of petty corruption are uncovered, investigators should consider whether it is possible for them to track the way in which the proceeds are dispersed. Frequently, the front-line officials are not the principal villains, but are being manipulated by their superiors.

B. “Active” and “passive” corruption

In discussions of corruption offences, the expressions “active bribery” and “passive bribery” often occur. “Active bribery” usually refers to the act of offering or paying a bribe, while “passive bribery” refers to the requesting or receiving of a bribe. A corrupt transaction may be initiated under either rubric: by a person who offers a bribe or by an official who requests one. These definitions, used in a number of legal systems, are employed in this *Handbook*.

There is a difference between a corrupt action and an attempted, or incomplete, offence. For example, “active bribery” would cover cases where the payment of a bribe has taken place, but might not cover cases where a bribe was offered but not accepted. In the formulation of comprehensive national anti-corruption strategies care should be taken to ensure that both situations are covered.

C. Bribery

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.

Bribery is the act of conferring a benefit in order improperly to influence an action or decision. It can be initiated by an official who asks for a bribe or by a person who offers to pay one. Bribery is probably the most common form of corruption. Definitions or descriptions appear in several international instruments, in the domestic laws of most States, as well as in academic publications.

Typically, the term “bribery” is used to describe a payment extracted by a public official from an unwilling member of the public before the citizen can receive the service to which he or she is entitled. Strictly speaking, such a transaction is not one of a bribe being given by an accomplice in corruption, but a

payment being extorted from an unwilling victim. However, in this *Handbook* the more common usage is adopted.

The “benefit” conferred by a “bribe” can take a variety of forms: cash, company shares, inside information, sexual or other favours, entertainment, employment or, indeed, the mere promise of a benefit in the future (such as a retirement job).

The benefit can pass directly to the person bribed, or indirectly, to a third party such as a friend, relative, associate, favourite charity, private business, political party or election campaign.

The conduct for which the bribe is paid can involve a positive act on the part of the official (the making of a particular decision) or it can be passive (with the official declining to do something that he or she is obliged to do). It can be a bribe paid “according to the rule” (to obtain something the official is withholding but is under a public duty to provide) or it can be “against the rule” (a payment to encourage an official to ignore the rules in favour of the person offering the bribe). Bribes can be paid individually, on a case-by-case basis, or as part of a continuing relationship in which officials receive regular benefits in exchange for regular favours.

Once bribery has occurred, it can lead to other forms of corruption. By accepting a bribe, an official becomes susceptible to being blackmailed and coerced into further, and more serious, derelictions of public duty.

Most international and national legal definitions seek to criminalize bribery in all its forms. However, some seek to limit criminalization to situations where the recipient is a public official or where the public interest is affected, leaving other cases of bribery to be resolved by non-criminal or non-judicial means. Some States exclude bribery in the private sector. However, article 21 of the United Nations Convention against Corruption does provide that States parties shall consider criminalizing forms of bribery in the private sector.

In some jurisdictions where only the bribing of public officials is criminalized, the definition of “public official” is defined so broadly as to extend to a private individual, for example, to a person who is not actually a public official but who is temporarily discharging public functions. Examples of such functions would be the discharge of electoral functions or, where there is a jury, the performance of jury duties.

Any public official who has the power to make decisions or take actions affecting others is at risk, although some functions are more vulnerable than others (tax collection, customs and offices that issue permits). Politicians, regulators, law enforcement officials, judges, prosecutors and inspectors are also potential targets.

Specific examples of bribery include:

(a) *Corruption against the rule*. A payment or benefit is provided to ensure that the giver or someone connected to him or her receives a benefit to which they are not entitled;

(b) *Corruption with the rule.* A payment is made to ensure that the giver or someone connected with him or her actually receives a service to which they are lawfully entitled;

(c) *Offering or receiving improper gifts, gratuities, favours or commissions.* In some countries, public officials commonly accept tips or gratuities in exchange for their services, frequently in violation of relevant codes of conduct. As links always develop between payments and results, such payments become difficult to distinguish from bribery or extortion;

(d) *Bribery to avoid liability for taxes.* Officials in revenue-collecting agencies, such as tax and customs, may be asked to reduce the amounts demanded or to overlook evidence of wrongdoing, including evasion or similar crimes. They may also be invited to ignore illegal imports or exports or to turn a blind eye on illicit transactions, such as money-laundering;

(e) *Bribery in support of fraud.* Payroll officials may be bribed to participate in abuses such as listing and paying non-existent employees (“ghost workers”);

(f) *Bribery to avoid criminal liability.* Law enforcement officers, prosecutors, judges or other officials may be bribed to ensure that criminal activities are not properly investigated or prosecuted or, if they are prosecuted, to ensure a favourable outcome;

(g) *Bribery in support of unfair competition for benefits or resources.* Public or private sector employees responsible for making contracts for goods or services (public procurement) may be bribed to ensure that contracts are made with the party that is paying the bribe, on unjustifiably favourable terms. Where the bribe is paid out of the contract proceeds themselves, it is described as a “kickback” or secret commission;

(h) *Private sector bribery.* Corrupt banking and finance officials are bribed to approve loans that do not meet basic security criteria and are certain to default, causing widespread economic damage to individuals, institutions and economies. Just as bribes can be offered to public officials conducting public procurements, so, too, can bribes pollute procurement transactions wholly within the private sector;

(i) *Bribery to obtain confidential or “inside” information.* Employees in the public and private sectors are often bribed to disclose confidential information and protected personal details for a host of commercial reasons;

(j) *Influence peddling.* Public officials or political or government insiders sell illicitly the access they have to decision makers. Influence peddling is distinct from legitimate political advocacy or lobbying (see art. 18 of the Convention). In some countries, legislators demand bribes in exchange for their votes in favour of particular pieces of legislation.

D. Embezzlement, theft and fraud

In the context of corruption, embezzlement, theft and fraud all involve stealing by an individual exploiting his or her position of employment. In the case of embezzlement, property is taken by someone to whom it has been entrusted (e.g. a payclerk).

Fraud involves the use of false or misleading information to induce the owner of property to part with it voluntarily. For example, an official who helps himself to part of a shipment of food aid, but is not responsible for its administration, would be committing theft; an official who induces an aid agency to oversupply aid by misrepresenting the number of people in need of it would be committing fraud.

“Theft”, per se, goes well beyond the scope of any definition of corruption. Using the same example of the relief shipment, an ordinary bystander who steals aid packages from a truck would be committing theft, but not of a kind that would fall within commonly accepted definitions of corruption. However, “embezzlement”—essentially the theft of property by someone to whom it was entrusted—is universally regarded as falling within definitions of corruption wherever it occurs, carrying with it, as it does, a breach of a fiduciary duty.

Examples of theft, fraud and embezzlement abound. Virtually anyone responsible for storing or handling cash, valuables or other tangible property is in a position to steal it or to assist others in stealing it, in particular if auditing or monitoring safeguards are inadequate or non-existent. Employees or officials with access to company or government operating accounts can make unauthorized withdrawals or pass on to others the information required for them to do so.

Elements of fraud can be more complex. Officials may create artificial expenses; “ghost workers” may be added to payrolls; “ghost roads” may be constructed at great cost; and false bills submitted for non-existent goods, services or travel expenses. The purchase or improvement of privately owned houses and farms may be billed against public funds—for example, government-paid workers may be used illegally to repair and paint officials’ private homes. Employment-related equipment, such as motor vehicles, may be used for private purposes without requisite permissions. The costs to the public purse may not seem great, but, in one case, the illicit use of a fleet of vehicles (funded by the World Bank) to take the children of officials to school accounted for 25 per cent of the fleet’s total running costs.

E. Extortion

Whereas bribery involves the use of payments and positive incentives, extortion relies on coercion to induce cooperation, such as threats of violence or the exposure of sensitive information. As with other forms of corruption, the loser can be the general public interest, individuals adversely affected by a corrupt act or decision, or both. In extortion cases, however, there is a very real “victim”: the person who is coerced into submitting to the will of the official.

Extortion may be committed by government officials but they can also be the victims of it. For example, a person seeking a favour can extort payment from an official by making threats. Investigators are all too often the subject of threats to themselves and their families’ safety.

In some cases, extortion may differ from bribery only in the degree of coercion involved. A doctor may solicit an illicit payment for seeing a patient more quickly than would otherwise be the case. But if the need to see the doctor is a matter of

medical urgency, and the payment must be made to gain access to the doctor, the demand can be more properly characterized as “extortion”.

Officials in a position to initiate or conduct criminal prosecution or punishment can use the threat of prosecution or punishment as a means for extortion. In many countries, people involved in minor incidents, such as traffic accidents, may be threatened with more serious charges unless they “pay up”. Alternatively, officials who have committed acts of corruption or other wrongdoings may be threatened with exposure unless they themselves pay up. Low-level extortion, such as the payment of “speed money” to ensure timely consideration and decision-making of minor matters by officials, is widespread in many countries.

In many situations it is not always clear what the position is: when a citizen makes a payment without being asked, the individual may simply be making it because of an understanding that if the payment is not made, the services to which the citizen is entitled will be withheld. Here the system itself is systemically corrupt. The position is further complicated where a society has long-standing traditions of gift-giving unconnected to expectations of special or improper treatment.

F. Abuse of discretion

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.

In many cases, corruption involves the abuse of discretion. A customs official may have to assess the value of a consignment of goods or decide which of several similar categories should be used to assess duty. An official responsible for government contracting may exercise discretion to purchase goods or services from a company in which he or she holds a personal interest. Another may propose real estate developments that will increase the value of his or her own property.

Such abuses are often associated with bureaucracies in which there are broad individual discretions and inadequate oversight and accountability structures. They also flourish where decision-making rules are so complex that they neutralize the effectiveness of any accountability mechanisms that do exist. Many anti-corruption strategies involve a reassessment of all areas of discretion and attempt to limit these to a minimum.

G. Favouritism and nepotism

By definition, favouritism, nepotism and clientelism all involve abuses of discretion, although a number of States do not criminalize the conduct (art. 7 of the

Convention covers merit selection without even mentioning nepotism). Such abuses usually involve not a direct personal benefit to an official but promote the interests of those linked to the official, be it through family, political party, tribe or religious group.

A corrupt official who hires a relative (nepotism) acts in exchange, not of a bribe, but of the less tangible benefit of advancing the interests of others connected to the official. The unlawful favouring of—or discrimination against—individuals can be based on a wide range of group characteristics: race, religion, geographical factors, political or other affiliation, as well as personal or organizational relationships, such as friendship or shared membership of clubs or associations.

This being said, there are occasions where public policy dictates that “affirmative action” programmes be implemented or that steps be taken to ensure that the public service is fully representative of the people it serves. In these examples, discrimination is likely to be lawful, or even required by law.

H. Creating or exploiting conflicting interests

As noted in the draft United Nations manual on anti-corruption policy, most forms of corruption involve the creation or exploitation of some conflict between the professional responsibilities of an individual and his or her private interests. The offering of a bribe creates such a conflict where none may have existed hitherto.

By contrast, most cases of embezzlement, theft or fraud involve an individual yielding to temptation and taking undue advantage of a conflict that already exists. In both the public and private sector, employees and officials are routinely confronted with circumstances in which their personal interests conflict with those of their responsibility to act in the best interests of the State or their employer. Well-run organizations have systems to manage these situations, usually based on clear codes of conduct.

I. Improper political contributions

It is extremely difficult to make a distinction between legitimate contributions to political organizations and payments made to influence events illicitly once the recipients are in power. A donation made because a donor supports a political party and wishes to increase its chances of being elected is usually not a corrupt act; it is an important part of the political system of many countries and in some it is considered to be a basic right of self-expression protected by the constitution. A very large donation made with the intention or expectation that the party will, once in office, unduly favour the interests of the donor is tantamount to the payment of a bribe, however.

In most democracies, regulating political party financing has proved difficult, even in those countries which opt for public funding. A common approach to combating the problem is to require the disclosure of contributions, thus ensuring that both the donor and recipient are politically accountable. Another measure is to limit the size of individual contributions to prevent the danger of some donors having too much influence.

Chapter IV

Preconditions for successful investigations

There are no universal rules for investigating corruption, but some of the following elements, if incorporated into national strategies, will assist in the development of structures that facilitate the effective carrying out of investigations. Information derived from investigations should be capable both of supporting criminal prosecutions and of assisting in the reorganization of public or private administration to make these more resistant to corruption.

The autonomy and security of investigations are both important, not only to encourage and protect those who report corruption or assist in other ways, but also to ensure that the results of investigations, whether they uncover corruption or not, are valid and credible.

A. Investigation teams

1. Independence and accountability of investigators and prosecutors

It is axiomatic that victims, witnesses and informants must receive protection against those under investigation. Equally important is the “protection” of officials responsible for investigating corruption through guarantees of independence. Functional independence ensures that investigations are effective by reducing opportunities for corrupt officials to interfere. Independence also instils confidence both in the investigators and in the bureaucracies or agencies they investigate. Where the investigation is independent, the public at large is assured that complaints will be investigated professionally and fairly and that the investigators and prosecutors can be trusted to act properly and in the public interest.

Article 36 of the Convention is mandatory on States parties. It requires each of them:

“in accordance with the fundamental principles of its legal system, [to] 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.”

The mechanics of functional independence vary from one system to another. Most incorporate elements of judicial independence to ensure the integrity of court proceedings, but the means for securing autonomy for the prosecutorial and investigative functions differ. In systems where criminal investigations are carried out by magistrates or other judicial officials, such functions fall within the ambit of judicial independence.

Where investigations and prosecutions are carried out by non-judicial personnel (e.g. in common law jurisdictions), judicial oversight may still play a role in guaranteeing their independence and their accountability. As such oversight applies only to cases that come before the courts, other ways must be found to monitor key functions, such as the conduct of investigations and the manner in

which decisions are taken to determine what is to be investigated and ultimately whether a prosecution is to be brought.

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.

The problem of *quis custodiet ipsos custodes* (who shall guard the guardians) also arises when structures are being developed to separate corruption investigations from other elements of government activity. Just as the agencies involved must be independent enough to protect their functions against improper interference, they must also be subject to sufficient oversight to prevent abuses and to identify any occurrences of corruption on the part of investigators and prosecutors themselves. Although the problem of internal corruption is common in law enforcement and prosecutorial agencies generally, it is arguably more critical in dedicated anti-corruption agencies. Where these exist there will almost certainly be attempts to bribe, coerce or otherwise influence investigators, often by sophisticated and powerful corrupt officials or organized criminal groups. For their own protection, as well as to serve the public interest, it is essential for investigators to be accountable for their actions. Such oversight should not extend, however, to interference with operational decisions, such as whether a particular individual should be investigated, what methods should be used or whether a case warrants criminal prosecution. Decisions to discontinue investigations should, however, be subject to independent scrutiny.

2. Codes of conduct

The codification of clear and unambiguous standards of conduct, in which all applicable standards are assembled into a comprehensive code for specified groups of employees, serve several purposes:

(a) They establish the standards that the leaders of the organization and all the managers are pledged to follow (and so set a clear example of “walking the talk”);

(b) They elaborate upon what is expected of a specific employee or group of employees, thus helping to instil fundamental values that curb corruption. In many cases, codes are also aspirational: they include descriptions of conduct that is expected as well as procedural rules and penalties for dealing with breaches of the code;

(c) They provide a basis for employee training and the discussion of standards of conduct;

(d) They can form the basis for disciplinary action in cases where an employee breaches or fails to meet prescribed standards and set out procedures and sanctions for non-compliance;

(e) They enable employees to know in advance (as is their right) what the standards are, making it more difficult to fabricate disciplinary action as a way of improperly intimidating or removing employees.

Codes of conduct will often include anti-corruption elements, but also common are such basic performance standards as fairness, impartiality, independence, integrity, loyalty towards the organization, diligence, propriety of personal conduct, transparency, accountability, responsible use of organizational resources and, where appropriate, standards of conduct towards the public.

Codes may be developed for the entire public service, specific sectors of the public service or, in the private sector, specific companies or professional bodies such as doctors, lawyers or public accountants. Several models have been developed to assist those developing such codes. However, it is important to bear in mind the fact that the way in which a code is created can be at least as valuable as the resulting code itself. By engaging staff across an organization in discussions as to the organization's values and the standards of conduct expected of all staff, the content of the code is internalized and a sense of ownership developed. Imposed codes of conduct have seldom had any significant effect.

In 1996, following consideration of corruption issues by the Commission for Crime Prevention and Criminal Justice at its fifth session, the General Assembly adopted the International Code of Conduct for Public Officials (resolution 51/59, annex) (see <http://www.un.org/documents/ga/res/51/a51r059.htm>). The Code (which has no legal force as such) emphasizes:

(a) The need for loyalty of officials to the public interest;

(b) The pursuit of efficiency, effectiveness and integrity;

(c) The avoidance of bias or preferential treatment and ensuring responsible administration of public funds and resources;

(d) The avoidance of conflicts of interest by disqualification or non-participation where a private interest conflicts with a public responsibility while in office and with respect to previous offices;

(e) The need for disclosures of assets, the refusal of gifts or favours and the protection of confidential information obtained in the course of public office.

The Code also discusses issues arising from conflicts between partisan political activity and the public interest, stressing the need to contain partisan political activity by public officials and outlining exceptions to the general principle. Officials should not engage in major political activity unless their office is itself a political one, that is, an elected office. Routine political activities should be limited to those which do not impair either the function of the office or public confidence in it, such that a flexible balance is struck that would vary according to

the nature of both the political activities in question and the particular public office involved.

Of particular importance is the Code of Conduct for Law Enforcement Officials developed by the Office of the United Nations High Commissioner for Human Rights and adopted by the General Assembly in its resolution 34/169 of 17 December 1979. The Code stresses that:

(a) In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons (art. 2);

(b) The use of force by law enforcement officials should be exceptional; while it implies that law enforcement officials may be authorized to use such force as is reasonably necessary under the circumstances for the prevention of crime or in effecting or assisting in the lawful arrest of offenders or suspected offenders, no force going beyond that may be used (art. 3);

(c) Matters of a confidential nature in the possession of law enforcement officials shall be kept confidential, unless the performance of duty or the needs of justice strictly require otherwise. Great care should be exercised in safeguarding and using such information, which should be disclosed only in the performance of duty or to serve the needs of justice. Any disclosure of such information for other purposes is wholly improper (art. 4);

(d) No law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment (art. 5, embodying standards from other United Nations instruments);

(e) Law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required (art. 6);

(f) Law enforcement officials shall not commit any act of corruption. They shall also rigorously oppose and combat all such acts. Any act of corruption, in the same way as any other abuse of authority, is incompatible with the profession of law enforcement officials. The law must be enforced fully with respect to any law enforcement official who commits an act of corruption, as Governments cannot expect to enforce the law among their citizens if they cannot, or will not, enforce the law against their own agents and within their agencies (art. 7).

As with the United Nations, the Council of Europe has adopted a Model Code of Conduct for Public Officials for use by countries engaged in the drafting of their own codes of conduct.⁸ Many of the standards are similar, but the Council of Europe's Model Code covers a wider range of public service conduct.

The more important elements from an anti-corruption standpoint include:

(a) Avoidance of conflicts of interest (arts. 8 and 13-16);

⁸ Recommendation No. R(2000)10 (see <http://cm.coe.int/ta/rec/2000/2000r10.htm>).

- (b) A duty to act loyally (art. 5), legally (art. 4) and impartially (art. 7);
- (c) Prohibitions concerning gifts, improper offers and other forms of undue influence (arts. 18-20);
- (d) The accountability of public officials (arts. 10, 25).

Of particular interest are articles 13-16, which deal with conflicts of interest in more detail than most other instruments. The provisions cover a range of possible conflicts of interest and place positive obligations on the official involved (who will often be the only person aware of the existence of a conflict). The official is required to identify and disclose potential conflicts, to take appropriate steps to avoid them and to comply with any legal or operational decisions taken by others to resolve any conflicts. It also requires that any conflict of interest declared by a candidate to the public service or to a new post in the public service should be resolved before appointment.

The need to strike a balance between legitimate forms of political activity and partisanship are also discussed. The provisions deal with public officials in general but not with those who serve, by reason of their election, in partisan political positions.

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.

3. Adequate training and resources for investigators

Adequate training and resources are necessary to ensure that reported cases are dealt with effectively and to encourage those aware of corruption to come forward with information. As observed above, informants are more likely to assume the risk of reporting if they are confident that effective action against corruption will be the result. Such confidence requires assurances not only that investigations will themselves be independent and free of corruption, but also that investigators are actually capable of detecting it, gathering evidence against offenders and taking whatever measures are needed to discipline the offender and to eliminate recurrences. The commitment of significant resources to those ends also sends a powerful signal that, at the highest levels of government, there is a strong commitment to the prevention and elimination of corruption. Such a commitment can serve both to deter potential offenders and to encourage informants to come forward.

The wide range of types of corruption requires an equally wide range of specific skills and knowledge on the part of investigation teams. Most will find frequent need for legal and accounting skills to identify, preserve and present evidence in criminal proceedings and disciplinary proceedings. The number of investigators with the necessary skills and training to work effectively generally depends on the extent of the resources available. As well as personnel and funding, other resources, such as systems for the creation, retention and analysis of records, are also important. The strongest evidence of high-level corruption will often be a long-term pattern of complaints about lesser abuses.

B. Case selection strategies

Not every suspected case can be fully investigated and prosecuted. Given the extent of corruption, the range of cases likely to exist, the variety of possible outcomes and the limits imposed by human and financial resource constraints, most national anti-corruption programmes will find it necessary to make priority choices as to the cases to pursue and the outcomes to seek.

Prioritizing involves the exercise of considerable discretion. This must be managed carefully to ensure consistency, transparency and the credibility of both the decision-making process and its outcomes. A major element of the process is the setting and, where appropriate, the publication of criteria for case selection (sometimes referred to as a prosecution policy paper).⁹ This can help to ensure that like cases are dealt with alike and to reassure those who make complaints, as well as members of the general public, that a decision not to pursue a particular reported case is based on objective criteria and not on improper or corrupt motives.

Criteria generally to be considered are described below.

⁹ The Code for Crown Prosecutors in the United Kingdom of Great Britain and Northern Ireland, issued under section 10 of the Prosecution of Offences Act, gives guidance on the general principles to be applied when making decisions about prosecutions (see <http://www.cps.gov.uk/publications/prosecution/>).

1. Seriousness and prevalence of the type of corruption

Assuming that the fundamental objective of a national anti-corruption strategy is to reduce overall corruption as quickly as possible, priority may be given to cases that involve the most common forms of corruption. Where large numbers of individuals are involved, the cases will often lead to proactive outcomes such as the setting of new ethical standards and training of officials, rather than criminal prosecutions and punishments. Where there are patterns of widespread and longstanding misdemeanours, forms of amnesty may be appropriate so that a new page is turned, where officials are made aware that their working environment has changed and that the rules will henceforth be enforced.¹⁰

2. Legal nature of the alleged type of corruption

Broadly speaking, corruption offences can be characterized as either criminal or administrative misconduct. Conduct that is not a crime cannot be punished as such. The nature of the offence will also often determine which agency deals with it and how it is prioritized.

3. Cases that are needed to set precedents

Priority can be given to cases that raise social, political or legal issues, which, once an initial test case has been resolved, will be applicable to many future cases. Examples include dealing publicly with common conduct not hitherto perceived as being corrupt in order to change public perceptions and cases that test the extent of criminal corruption offences and so either set a useful legal precedent or establish the need for legislation to close a legal gap. In the case of legal precedents, time-consuming appeals may be required, which is another reason for starting court proceedings as soon as possible after a case that raises the relevant issues has been identified.

4. Viability or probability of a satisfactory outcome

Cases may be downgraded or deferred if an initial review establishes that no satisfactory outcome can be achieved. Examples include cases in which the only desirable outcome is a criminal prosecution, but a suspect has died or disappeared or essential evidence has been lost. A suspect may also already be in prison serving a lengthy term or be extremely old or critically ill. In the last two instances it may not be in the public interest to prosecute as this could be seen to be excessively oppressive conduct. Part of the assessment of such cases should also include a review of possible outcomes to see if other appropriate remedies may be available.

¹⁰ For a discussion, see United Nations Office on Drugs and Crime, *Anti-Corruption Toolkit*, 2nd ed., February 2004 (available at http://www.unodc.org:80/pdf/crime/corruption/toolkit/AC_Toolkit_Edition2.pdf), case study 27 (“Dealing with the past; amnesty, reconciliation and other alternatives”).

5. Availability of financial, human and technical resources

The overall availability of resources is always a concern in determining how many cases can be dealt with at the same time or within a given period. The tendency for the burden of particular cases to fluctuate as investigations proceed requires a periodic reassessment of caseloads. Generally such factors will not be related to the setting of priorities with respect to the type of case taken up or the priority of individual cases, but there are exceptions. A single major case, if pursued, may result in the effective deferral of large numbers of more minor cases and the unavailability of specialist expertise may make specific cases temporarily impossible to pursue. An assessment of costs and benefits before decisions are made is thus important. In the case of grand corruption and transnational cases there can be substantial costs in areas such as travel and foreign legal services, but the public interest may demand that examples are made of corrupt senior officials for reasons of deterrence and credibility, to recover large proceeds hidden either at home or abroad and to restore faith in government.

6. Criminal intelligence criteria

As overall expertise and knowledge are gained and greater numbers of individual cases are dealt with, intelligence information can be gathered and assessed. Such an evaluation will usually include research and the detection of overall corruption patterns, with conclusions being drawn about which the most prevalent offences are and which are causing the most social or economic harm. It will also include the gathering of confidential information about patterns of corruption and links between specific offenders or organized criminal groups. Such procedures will assist in identifying cases with high priority and those which merit the allocation of significant resources.

C. Case management

Some corruption cases are simple and straightforward, with witnesses and evidence readily available. In some, a simple integrity test may have established the corrupt tendencies of an official, meaning that no further investigation is necessary. Where corruption is systemic, the challenge is one of volume. It is all too easy for an enforcement agency to devote itself almost entirely to addressing minor infractions, to the neglect of more serious and much more damaging conduct on the part of more senior officials. This may call for processes that are essentially administrative in nature, rather than invoking the full force and weight of the criminal law. It is rather a matter of engineering fundamental changes in expectations of long standing, rather than invoking a multitude of criminal procedures.

More serious corruption investigations (in particular those involving high-level or grand corruption) can be time-consuming, complex and expensive. To ensure the efficient use of resources and successful outcomes, the elements and personnel involved must be managed effectively. Teams working on specific cases will often require expertise in the use of investigative techniques ranging from financial audits to intrusive techniques.

If, from the outset, legal proceedings are not excluded as a possible outcome, there may also be a need for legal expertise in areas such as the law of evidence and

the human rights constraints on search and seizure. In complex investigations, teams may be assigned to target specific individuals or to focus exclusively on individual aspects of the case. One group might be engaged in the tracing of proceeds, for example, while others interview witnesses or maintain surveillance of suspects. These functions should be conducted in accordance with an agreed strategy and coordinated under the supervision of an investigative manager or lead investigator who should receive information about the progress of investigators on a regular and frequent basis.

The sequencing of actions can be of the greatest importance. The interviewing of witnesses and the conducting of search and seizure operations run the risk of disclosing to outsiders the existence of an investigation and, to some degree, its purpose. Thus, they should not be undertaken until after other measures have been taken that will only be effective if the target has not been alerted. On the other hand, such procedures may become urgent if it appears that evidence could be destroyed or illicit proceeds moved outside the jurisdiction. Coordinating such fluctuating factors to maximum effect requires competent and well-informed senior investigators.

Investigative management must be flexible and take account of information as it accumulates. Investigators develop theories about what an individual item of information may mean and how the various pieces may fit together, but such theories may require refinement as an investigation proceeds. Investigators must always be open to other possibilities when new evidence appears that is inconsistent with the particular theory that is being pursued. Investigations of particular incidents of corruption will often turn up evidence of other, hitherto unsuspected, corruption or other forms of criminal activity.

D. Selection of the investigation team

The selection of an effective team is crucial to the success of an investigation. Members should possess the specific investigative skills likely to be needed, should have proven integrity and should be willing to undertake the work. The team must be made aware of the personal implications of the investigation, in particular when undercover work is to be conducted. Skills needed to conduct large-scale corruption investigations typically include financial investigation, undercover and surveillance, information technology, interviewing and witness preparation, report writing and the ability to analyse intelligence. The backgrounds of investigators should be thoroughly checked from time to time, including social and family ties and lifestyles.

E. Management of information

1. Internal information

As an investigation proceeds, information should be made available promptly to those who may require it. It should be retained in a format that is cross-referenced and is quickly accessible so that it can be reviewed as needed and so that links to other relevant information can be made.

Each piece of information should be assessed for its relative reliability, sensitivity and confidentiality. The assessment should be linked to the information itself as the degree of sensitivity may not be apparent to those unfamiliar with the information. For example, disclosure of facts that may seem insignificant in the context of a continuing investigation may inadvertently identify a source who had been promised anonymity, thus possibly endangering the source and certainly undermining the ability of investigators to obtain similar information in the future.

2. Media relations

Another critical element is media relations. Ensuring that accurate, timely and appropriate information is passed to the media is important for ensuring the transparency and the credibility of investigations. More fundamentally, media scrutiny and publicity are essential for gaining cooperation from the public, as well as for raising public awareness of the corruption phenomenon and for generating political will.

Ensuring that the media have access to accurate and authoritative information may also help to reduce any tendency to report information that is incorrect or harmful to the investigation. On the other hand, it is essential that information is not made available that might jeopardize a fair trial being given to a suspect. If an investigator has behaved abusively in this or in other respects, a court may discharge an accused on the grounds of prejudice without even hearing the case.

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.

Information intended for publication must be reviewed carefully, both to ensure accuracy and to eliminate disclosures that could be harmful to the investigation. Only authorized individuals should be permitted to release information or participate in press briefings. Those in contact with the media should be competent both in media relations and in the subject matter under discussion. They should not comment on matters that are beyond their expertise and they should ensure that the information that is given to the media is consistent.

3. Checks and balances (“guarding the guards”)

In an ideal world, the media has integrity. In reality, in many countries the media is effectively “for sale” to the highest bidder. Corrupt individuals can manipulate the media to enhance their image or suppress or confuse information about their activities. This can be done to build public support in their favour, however misguided, that can, of itself, create problems for investigators. Media manipulation can also obstruct more general programmes to raise public awareness and to build cooperation with the law enforcement agencies.

The aim of an awareness-raising programme should be to win the active cooperation of the media to achieve the broad public dissemination of the standards of conduct expected of individual public officials and of the existence of complaints mechanisms where those standards are not met. Such public awareness should lead to greater accountability of officials in the delivery of government services. The importance of public trust in their Government and its anti-corruption institutions is often underestimated. Without a basic level of public trust, public complaints mechanisms (see below) will not work and witnesses will not come forward to facilitate the investigation and the prosecution of anti-corruption cases in the courts.

It is beyond the scope of this *Handbook* to discuss how the media as an institution can be strengthened and how journalists can be held accountable for their compliance with rules of professional ethics. However, in some countries, professional journalists’ associations and media councils have been established to monitor the integrity of newspapers and journalists.

4. Public complaints mechanisms

Public complaints mechanisms enable those confronted by corrupt practices or maladministration to report such practices in the expectation that appropriate action will follow. Complaints mechanisms should be permanent institutions and more may be needed. Different institutions can ensure that both citizens and public servants are able to report corrupt behaviour such as disloyalty, breach of trust, conflict of interest, waste or bad judgement without the risk of suffering any personal or financial advantages. The protection of whistle-blowers is discussed in a separate chapter.

(a) *External mechanisms*

Various types of external complaint mechanism can be provided for members of the public. A leading example, found in many countries around the world, is the office of the ombudsman.¹¹ In some countries, too, public servants are considered free to raise their concerns with members of the legislature or, in serious cases, directly with law enforcement agencies. However, it is usually considered desirable for institutions to be able to sort out internally all but the most serious of their problems.

(b) *Internal reporting procedures*

Government departments with effective integrity regimes generally have well-developed procedures to deal with complaints about potential dishonesty and problems of supervisory and personal relationships. Such procedures should establish clearly what it is that constitutes a reportable incident or allegation and to whom and how a report should be made.

Each organization is generally in a position to develop rules appropriate to its own culture and to that of the organizations with which it interacts. A supervisor would normally be the first point of contact of any allegation, but an ethics officer for the entire organization may be designated as the primary referral point as allegations frequently concern the supervisor or others in positions of authority above the level of the complainant. Some government agencies go so far as to provide an external organization to handle complaints in the first instance to overcome this problem. The chain of referral to the appropriate investigating authority should be clear, with time limits and explicit standards governing the categories of allegation that must be referred for review by a criminal justice authority.

(c) *Comparison*

A computerized programme can generate reporting comparisons concerning the making of complaints as between service delivery in differing geographical areas at the subnational level.

F. Managing the security of investigations and investigators

The maintenance of security is also a critical function. As noted previously, protecting the confidentiality of informants and other sources is often the only way to ensure cooperation; the leaking of sensitive information may endanger informants and warn targets, allowing them to modify their behaviour, conceal or destroy evidence or make other attempts to corrupt or disrupt the investigative process. Maintaining effective security requires an assessment of the full range of possible attempts to penetrate or disrupt anti-corruption investigators, both in general and in the context of specific investigations. Attempts may also be directed at obtaining information or denying information to investigators by disrupting, doctoring or

¹¹ For a discussion of the role of the ombudsman, see <http://www.transparency.org/sourcebook/10.html>.

destroying it; there may be intimidation or even murder of the investigators themselves.

The areas mentioned below should be assessed.

1. Physical premises

The premises where investigators base their work and store information should be chosen with a view to being able to control entry, exit and access so that unauthorized persons may be kept out. Premises should also be resistant to attempts by anyone trying to gain entry when they are unoccupied. Where premises are part of a larger law enforcement or other government institution, they should also be separated physically from the rest of the establishment in which they are located.

Threats to destroy evidence by demolishing the premises themselves employing such methods as arson or explosives may also require consideration. Important, too, can be security against various forms of electronic surveillance, such as concealed microphones and transmitters. Thus premises should be chosen that are resilient to surveillance techniques and there should be regular sweeps to detect devices that may have been installed since the most recent inspection. Where particularly critical information is at risk, it may be necessary to store copies offshore.

2. Personnel security

The physical security of personnel must be guaranteed to ensure that competent investigators can be employed. A particular risk is posed where corrupt individuals succeed in gaining employment with the agency. Generally, employees should be carefully screened and their past history, lifestyles, family ties and their other relationships examined in order to identify any factors that might suggest a vulnerability to corruption. Such screening should be a continuous process, not a one-off exercise before personnel are engaged. The very fact that they are working in the anti-corruption area can render them logical targets for the corrupt.

Potential threats to physical safety should be assessed regularly and, when identified, vigorously pursued. Other protective measures include advice with respect to security precautions, maintaining anonymity and providing weapons for use in self-defence.

3. Information, documents and communications

A constant concern is that critical information does not fall into the hands of investigative targets and so frustrate attempts to obtain evidence against them. Addressing such concerns requires that steps that attract public attention are not taken prematurely; that documents are used, stored and transported in secure conditions; that access to copying equipment is limited and monitored; and that channels of electronic communication, including wireless telephones, fax machines, radios, electronic mail (e-mail) and other media, are resistant to unauthorized interception or monitoring. Where the physical security of channels cannot be ensured, the use of encryption or similar technologies should be undertaken to ensure that unauthorized persons who access the data cannot decipher it. As noted,

in extreme cases it may be necessary to store vital documents and recordings in bank vaults in foreign countries.

4. Relationships with other agencies

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.

Anti-corruption agencies must ultimately account for their activities. This requires a degree of timely reporting of information to the political or judicial bodies responsible for the agencies' oversight. The precise timing of a particular disclosure may vary, and can be a difficult issue. As a general principle, investigations should be reviewed externally only after they have been concluded. If abuses occur before investigations are over, some harm will occur and, in some cases, this will be irreversible. In such a case, it is appropriate for an investigator to be permitted to consult a more senior official for advice and guidance. Many systems make provision for such an eventuality.

5. Threat assessment

Threats to the security of investigators and investigations should be assessed both in general terms and in the context of each specific case. Relevant factors will include the number of individuals suspected, the extent to which they are organized and the sophistication of the corruption under investigation. Also relevant are the determination of the individuals or group targeted, the magnitude and scope of the corruption and its proceeds, whether the targets are involved in crimes other than corruption and whether there is any specific history of violence or attempts to obstruct investigations or prosecutions.

G. Investigative techniques

Financial investigations into the lifestyles, bank accounts and personal dealings of suspected corrupt individuals have been shown to be a successful method of proving criminal acts. Mentioned below are some of the other approaches that have proved to be highly effective in the investigation of widespread large-scale corruption.

1. Focus investigations

If the results of a corruption investigation suggest that corruption and bribery in a certain public service is widespread, one can concentrate on the systematic checking of the assets of as many suspected bribe takers as is feasible (see chapter IX, "Financial investigations").

Such an exercise may, however, not yield enough information to warrant further investigation. Some official activities almost “invite” widespread corruption as they create opportunities for large numbers of low-paid officials to receive small-scale bribes.

The issuing of licences and permits provides good examples. Many people from whom bribes can be extracted visit the agencies on a daily basis. Quite often, the frustrations of applying for a driving licence, obtaining permission to construct a new home, requesting copies of documents or seeking just about any other service to the public involves an endless tangle of government red tape and delay. Such an environment breeds frustration and encourages the making of small payments to resolve it. Indeed, some posit that some systems are deliberately designed to create opportunities for those who work in them to levy their “customers”. Others go so far as to suggest that historically this has been a way for a State to avoid having to pay its employees adequately. In such cases, an investigation into the working files and practices of an agency will be much more effective and efficient than trying to investigate the financial records of its employees.

Before devoting efforts to any investigation, it is important to evaluate the most cost-effective means of deploying staff. It may prove most effective simply to have senior managers replaced and new working practices introduced that eliminate—or at least reduce—opportunities for bribe-taking, coupled with an unambiguous warning to officials that the rules have changed and will henceforth be enforced.

2. Terms of reference

Before starting a major investigation, clear and comprehensive terms of reference should be drafted. These should contain a comprehensive list of all the resources expected to be needed, be they human, financial or material. Particular consideration should be given to any need for additional resources to maintain the secrecy of the investigation. The suspect public servant may have connections to other public servants who could alert him or her to the investigation; he or she may even be a member of the criminal justice system and thus have access to restricted information. It is therefore essential, from the outset, to evaluate methods for ensuring the confidentiality of the investigation.

Steps taken to protect the security of the investigations could include:

- (a) Renting non-police or undercover locations and making them secure;
- (b) Using fictitious names to purchase or rent equipment;
- (c) Using stand-alone computer systems not linked to any other governmental operation.

3. Policy document

In addition to the terms of reference, a policy and procedures document should be maintained. This should include a clear description of the facts giving rise to the investigation; all decisions taken during the investigation, along with their justifications; and the reasons for the involvement or non-involvement of the senior management of the institution for which the suspect works. There can be hidden

costs in an investigation, such as loss of morale within the institution where the suspect works and a potential loss of public trust. Every major investigation must be evaluated on a case-by-case basis with regard to its cost and the benefits to the Government and the public.

H. Disposing corruption cases

Cases where corruption on the part of individuals is identified can be dealt with in several ways:

(a) By criminal or administrative prosecutions, leading to possible imprisonment, fines, restitution orders or other punishment;

(b) By disciplinary actions of an administrative nature, leading to possible employment-related measures such as dismissal or demotion;

(c) By bringing or encouraging civil proceedings in which those directly affected (or the State) seek to recover the proceeds of corruption or ask for civil damages;

(d) Through remedial actions, such as the retraining of individuals or restructuring of operations in ways that reduce or eliminate opportunities for corruption (but without necessarily seeking to discipline those involved).

Generally, the same detection techniques, investigative procedures and evidentiary requirements will apply, regardless of the process chosen. However, because of the serious penal consequences facing convicted offenders, the evidence for criminal prosecutions will usually have to meet higher standards of reliability and probative value than is the case for administrative action. The decision as to whether to apply criminal sanctions or to seek less drastic remedies can be an exceedingly difficult one. It must balance moral and ethical considerations against pragmatic costs and benefits and is itself susceptible to corruption in systems where there are relatively broad areas of prosecutorial discretion.

Criminal prosecutions may be either not possible or undesirable in a number of circumstances.

1. The conduct may not be a crime

In some cases, behaviour may be considered corrupt for the purposes of a national anti-corruption programme or the internal codes of a company or government agency. But however unethical it may be, the conduct will not necessarily constitute a criminal offence. It may be a type of conduct that has been overlooked in the development of the criminal law or be conduct (such as purely private-sector malfeasance) that is seen as corrupt but has been judged by the State's legislators as not being sufficiently harmful to the public interest as to warrant criminalization.

2. Available evidence may not support prosecution

The burden of proof in criminal prosecutions demands relatively high standards because of the penal consequences involved. In some cases, there may be sufficient evidence to justify lesser corrective measures but not to support a criminal

prosecution. (Administrative sanctions do not usually require proof beyond reasonable doubt but only on the balance of probabilities.)

Where the evidence in a particular case is insufficient, the authorities must generally decide whether the circumstances warrant the additional delay and expense needed to gather sufficient additional evidence so that criminal proceedings can be brought or whether disciplinary or other remedial actions should be pursued instead. One cost factor in such cases is the cost of leaving a corrupt official in place long enough to complete a full criminal investigation where, for tactical reasons, he or she cannot be suspended while the investigation is taking place.

3. Prosecution may not be in the public interest

In some cases, the conduct under examination may amount to a crime, but the public interest is better served by some course of action other than prosecution being followed. For instance, where large numbers of officials are involved, the costs of prosecution include not only litigation costs but also the overloading of the court system to the detriment of other litigants.

Discretionary decisions not to proceed to prosecution can be problematic. On the one hand, it may be very expensive to prosecute offenders on a case-by-case basis, but if a decision is made not to prosecute, it may create the impression that the justice system itself is corrupt, thus encouraging corruption in other sectors and seriously eroding any deterrent value of criminal justice measures. Where such a decision is made, it must be well documented and made in the most transparent way possible so that any public perception of corruption in the investigation and prosecution processes is dispelled.

Criminal prosecutions and punishments can effectively remove corrupt officials from positions where they can commit further offences and can deter the individuals involved and others in similar positions. Since much corruption is economic in nature and is pre-planned rather than spontaneous, general deterrence is likely to form a significant part of the criminal justice component of anti-corruption strategies.

High financial and human costs impose practical limits on the extent of such prosecutions, however, and attempting large numbers of prosecutions as part of an anti-corruption drive can have the consequence of creating pressures on investigators or prosecutors that lead them to bend the rules and so distort or corrupt the criminal justice system itself. In dealing with corruption, it is always important to avoid creating any perverse incentives.

In formulating anti-corruption strategies, criminal prosecution and punishment should be seen as only one of a series of options. Consideration should always be given to other possibilities, ranging from preventive measures (such as education and training) to administrative or disciplinary sanctions that remove offenders more expeditiously and at a lesser cost to the organization and society as a whole.

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.

Chapter V

Detecting corruption

It is a sobering thought that every corruption offence represents a failure of some sort in a system designed to prevent corruption from occurring in the first place. Investigators and prosecutors are well placed to determine where the weak points are in the administrative systems of their own countries and to take steps to see if these can be strengthened. They also have to live with the fact that human nature is such that corruption can never be entirely eradicated.

A key problem faced by those investigating corruption is detecting the fact that corruption has taken place. Unlike many traditional crimes, such as assault or theft, corruption frequently does not have an obvious victim. There are no victims likely to complain. Furthermore, secrecy frequently surrounds corrupt activities so that there are few overt occurrences likely to be reported by witnesses, unless they are insiders.

However, corruption is decidedly not a victimless crime; the victim in many cases is the public interest. In the absence of an awareness of this, individuals are unlikely to risk the personal consequences, both professional and social, of reporting the misdemeanours of their colleagues and, still less, those of their superiors. These present acute problems for the investigator and prosecutor, which are examined throughout this *Handbook*.

A. Proactive and reactive detection

Detection can be broadly divided between proactive and reactive detection.

1. Proactive detection

Proactive detection takes place where a law enforcement agency initiates an undercover investigation in order to pursue intelligence it may have received possibly from an anonymous source, another agency or perhaps from a telephone interception. The principal feature is that this form of detection is intelligence-based as opposed to being complaint-based. A prime example of the proactive approach is integrity testing, discussed in chapter XII below.

2. Reactive detection

Reactive detection takes place where a formal complaint is received by the law enforcement agency. These may come from the community, from government agencies, local councils or private companies. They have as their core feature an official complaint (sometimes anonymous) which can form the basis for investigation by an anti-corruption organization. Where the complaint comes from a government agency, it may be based on information derived from disclosure and reporting requirements as well as audits and inspections.

B. Improving reactive detection

Although proactive investigations can lead to highly successful outcomes, they can also result in expensive failures, and in extreme cases can endanger the lives of undercover operatives and civilian informants. Proactive detections will usually represent only a small proportion of the operational work of an anti-corruption agency as experience suggests that the great bulk of investigations are complaint-based.

Increased reporting of instances of corruption can be fostered in a variety of ways. Strategies for public servants can include:

(a) Imposing obligations (backed up by disciplinary sanctions) on public servants to report all the instances of corruption that they observe. (Unfortunately, success with this approach has generally been elusive.);

(b) Providing regular ethics training to public servants to improve standards of integrity and decision-making in the workplace. (This can include corruption sensitivity training to render public servants more sensitive to corruption and more aware of situations and behaviour that can lead to corruption.);

(c) Providing whistle-blower protection to complainants (discussed in chapter VIII below).

Strategies for the general public can cover:

(a) Public awareness campaigns that convey anti-corruption messages and a belief that the Government is serious in its wish to combat corruption;

(b) Educational programmes that incorporate anti-corruption awareness into the school syllabus;

(c) Engendering a high level of public confidence in the integrity and professionalism of anti-corruption law enforcement agencies in their handling of complaints.

One way in which to measure the level of public confidence in anti-corruption agencies is to compare the overall number of complaints received with the proportion that are not anonymous.

1. Disclosure and reporting requirements

Requiring public officials to make periodic disclosures of their assets can increase both the risks for corrupt officials and at the same time provide investigators with an instrument with which to detect corruption. It is, of course, naive to expect corrupt officials to place their ill-gotten gains on the public record. However, they have to overcome hazards in concealing their illicit wealth and where reporting failures do come to light these failures, by themselves, can be used to discipline officials without the need to find evidence of their corrupt acts. Comparisons of declared wealth with lifestyles give added teeth to this process.

Where an official is not honest in complying with reporting requirements, more thorough investigations may be triggered, including an examination of possible conflict-of-interest situations. The official may ultimately be held to be

liable not only for non-compliance with a reporting obligation, but for corruption itself.

Disclosure and reporting requirements can also provide a valuable check for conflicts-of-interest situations.

To deter corrupt officials from trying to avoid liability for corruption by committing less serious disclosure and reporting offences, sanctions for non-disclosure or false reporting should be severe. They should always give rise to the prospect of dismissal. Thus a corrupt pattern of behaviour can be brought to an end even where inadequate disclosure has been successful in concealing the underlying corruption.

Regular periodic disclosure is essential (rather than simply requiring disclosure on taking up and leaving office) as this may allow a pattern of corruption to be detected and terminated while it is still taking place.

The categories of officials required to make disclosures can be limited to those in positions of higher risk, rather than have a blanket requirement imposed on the whole public service and create needless administrative burdens.

2. Public audits and inspections

Public audits and inspections include audits of records, physical inspections of premises and assets, as well as interviews with members of the public and others who might have relevant information. This process can be used proactively by managers and investigators as a means of monitoring the quality and integrity of public administration and identifying possible abuse. Inspections and audits can also be used reactively, as a means of investigating those already suspected of corruption or other malfeasance.

Audits may be conducted on an internal or local basis, but overall anti-corruption strategies should provide for a central, national audit agency with adequate resources and expertise. In order to audit senior levels of government, the agency must enjoy a substantial degree of autonomy, approaching or even equal to that of judicial independence. This independence should extend to decisions about which officials, sectors or functions should be audited, how audits should be carried out, the formulation of conclusions about the results of audits and, to some degree, the publication or release of such conclusions.

The agency should be required to report to the legislature rather than to the executive whose affairs it inspects.

Auditors should have the power to conduct regular or random audits to provide overall deterrence and surveillance. They should also specifically target individuals or agencies suspected of malfeasance. In many countries, their mandate goes beyond suspected malfeasance, as auditors are also responsible for identifying and addressing cases of waste or inefficiency deriving from problems other than crime or corruption. Where problems are identified, auditors generally have the power to recommend administrative or legal reforms to address institutional or structural problems and can refer cases to law enforcement agencies if criminal wrongdoing is suspected.

Auditors should be supported by legal powers that require individuals or agencies being audited to cooperate and they should have rights of access to bank records. They should not themselves become law enforcement agencies. In most countries, once criminal offences are suspected, higher standards of procedural safeguards are applied to protect the human rights of those involved and criminal investigations can involve the use of more coercive powers to gather evidence and to detain suspects. Auditors, too, have a broader mandate, in that they are often concerned with addressing wider concerns, such as value for money and government efficiency.

3. Integrity testing

Acts of petty corruption, in particular, can be extremely difficult to prove. Integrity testing is a way of overcoming this problem, but it does have to be conducted carefully.

The object is to test the integrity of an official, not to try to render an honest one corrupt through a process of entrapment. Most countries have agent provocateur rules in their criminal codes, which act as a judicial check on what is permissible and what is not. These rules vary from jurisdiction to jurisdiction, but they obviously have to be borne in mind. It is important to ensure that the degree of temptation is not extreme and that the test is one that an objective bystander would assess as being basically fair and reasonable. The technique of integrity testing is discussed in detail in chapter XII below.

4. Opportunities to report corruption

Before corruption can be reported, it must first be identified. Thus, the general population and specific target groups may need to be educated as to what constitutes corruption. This should cover the full range of types of corruption, the true costs and consequences of corruption and, more generally, the wider benefits to all of high standards of integrity in public administration and private business alike.

Many people have a very narrow appreciation of corruption and do not always understand that certain types of behaviour are not acceptable and can indeed be harmful. Others may understand the harm but lack either the motivation or the confidence to report it. This can be because they see the problem as pervasive and resistant to change or because they view the complaints mechanisms as being unreliable or even dangerous to use. More usually, there is a fear of the social consequences of reporting the illicit activities of colleagues. In environments where corruption has become institutionalized and accepted, considerable educational efforts will be needed if the popular perception that corruption is a natural or inevitable phenomenon is to be changed. It must be recognized as being socially harmful, morally wrong and, in most cases, a crime.

Managers in the public service must be required to assume responsibility for dealing with corruption in the activities for which they are responsible. They must know what they should do when cases arise and be visible so that those likely to report corruption are aware of their existence and can readily contact them with information. Although minor incidents can often be handled by responsible managers internally, there should be clear procedures to be followed when serious instances of corruption arise. In particular, managers should be discouraged from

trying to conduct major investigations themselves. Professional investigators are trained in interviewing witnesses and in the recording and preservation of evidence; public service managers are not.

5. Security against retribution

Victims and witnesses cannot be expected to come forward if they have reason to fear possible retribution. Precautions against retribution are commonly incorporated into instruments dealing with corruption and organized crime, especially where the problem is acute. This is particularly true in cases of official corruption. Those who have information are often subordinates of a corrupt official and the status of the corrupt official can provide opportunities to retaliate. To facilitate complaints against superior line managers, some countries enable government agencies to appoint an outside organization to serve as the first recipient of complaints made by their staff.

Measures are usually formulated to protect not only the informant but also the integrity and confidentiality of the investigation. In order to prevent intimidation and any tampering with an investigation, common precautions include guarantees of anonymity for an informant; measures to prevent officials under investigation for corruption from having any access to investigative personnel, files or records; and the power to suspend or transfer a suspected official during the course of an investigation.

In these cases, where the informant is an insider, additional precautions may be needed. Many States have adopted “whistle-blower” laws and procedures to protect insiders in both the public and private sectors who come forward with information. Additional protection may include shielding an informant from civil litigation in areas such as defamation and possible breaches of confidentiality agreements. There may also be a need to safeguard public officials from criminal liability for the disclosure of official secrets (e.g. where corruption in defence procurements is reported).

Protection should also extend to cases where the information is ultimately proved to be wrong, provided the informants have acted in good faith. It has to be said, however, that even those whistle-blowers regarded by the public as heroes tend to pay a high price for their courage. Non-governmental organizations can sometimes assist by ensuring that potential whistle-blowers are aware of the risks they are assuming and that they present their complaints in the most effective way.¹²

On the other hand, safeguards may also be needed where informants act in bad faith, in particular in cases where they are permitted to retain their anonymity or are shielded from legal liability. To balance the interests involved, some States limit legal protection to cases of disclosures made in good faith or create civil or criminal liability for cases where the informant has acted in bad faith or where the belief that malfeasance had occurred was not based on reasonable grounds.

¹² An example in the United Kingdom is Public Concern at Work (<http://www.pcaw.co.uk/>), an independent authority on whistle-blowing that provides free help to prospective whistle-blowers, advises on whistle-blowing laws and helps organizations to create a culture where it is safe and accepted for staff to “blow the whistle”.

In cases where the information proves to be valid and triggers official action, the anonymity of the informant cannot always be maintained, making retribution a possibility. Legislation may provide for compensation or for transfer of the informant to another agency. If an informant is in serious danger, relocation and a new identity unknown to the offenders may be needed under a witness protection scheme (these are discussed in chapter VII below). However, legislation has its limits and it is not always as effective in providing protection for whistle-blowers as many would like it to be.

6. Exchanging information with other investigative agencies

Given the need for autonomy and independence on the part of investigators and taking into account the extreme sensitivity of many corruption cases, care must be taken when establishing relationships between anti-corruption (criminal) bodies and other government agencies (e.g. internal inspection and audit within government agencies). In environments where corruption is believed to be widespread, complete autonomy is advisable. Nonetheless, it will always be important for anti-corruption investigators to interact effectively with other official entities. For example, information from tax authorities or agencies investigating money-laundering or other economic crimes may uncover evidence of corruption or of unexplained wealth that may have been derived from corruption. Audits of government agencies may disclose inefficiencies or malfeasance that is not tantamount to corruption but warrants the attention of other agencies. Criminal investigators should be able to pass these matters on to them.

Chapter VI

Legal provisions to facilitate the gathering and use of evidence in corruption cases

Where legal provisions are designed to facilitate the collection of evidence there is a need to strike a balance between ensuring effective investigations, in particular of high-level corruption cases, on the one hand, and basic principles of presumption of innocence and the expectation of a right to privacy of the ordinary citizen on the other.

Perhaps the most difficult issue facing prosecutors in large-scale corruption cases—and in particular when seeking to recover illicit proceeds—is meeting the basic requirements of the burden of proof. The human rights guarantees contained in the constitutions of most States reflect international standards and rightly require that persons accused of a crime be presumed innocent until their guilt is established beyond reasonable doubt, by a competent, independent and impartial tribunal.¹³

However, more so than in any other area of offending, proof of an actual corrupt act can be difficult to establish. This can result in what amounts to de facto immunity, in particular for major offenders. Not only can material evidence be all but impossible to obtain, but senior officials can also bring pressure to bear on investigators, can ensure that agencies are under-resourced, and are often in a position to obstruct investigations by destroying or concealing evidence. Pervasive corruption can so weaken investigative and prosecutorial agencies that gathering any evidence of real probative value becomes highly problematic. In developing anti-corruption measures, legislatures face the difficult task of finding approaches that strike a proper balance between the need to take effective measures to protect the public interest (through fighting corruption effectively and retrieving its proceeds) and to respect the basic rights of those implicated in investigations.

The basic presumption of innocence is a fundamental and universal human right. However, apart from human rights considerations, practical concerns frequently arise. Societies emerging from periods of widespread systemic corruption and whose people are the victims of looting by their political elites are commonly faced with the task of re-establishing the rule of law and basic human rights standards. Some States must rebuild their entire criminal justice system. There is always the danger that, if basic standards are compromised, effective anti-corruption measures may be achieved and criminal justice institutions rehabilitated, but at the cost of an erosion of human rights and a consequent loss of confidence on the part of the public in their system of governance.

This having been said, there are a number of measures available to address the problem of providing proof in corruption cases that do not compromise basic human

¹³ Universal Declaration of Human Rights (General Assembly resolution 217 A (III)), art. 11, para. 1; the International Covenant on Civil and Political Rights (Assembly resolution 2200 A (XXII), annex), art. 14, para. 2; the Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, *Treaty Series*, vol. 213, No. 2889), art. 6, para. 2; the American Convention on Human Rights (United Nations, *Treaty Series*, vol. 1144, No. 123), art. 8, para. 2; and the African Charter of Human and Peoples' Rights (United Nations, *Treaty Series*, vol. 1520, No. 26363), art. 7, para. 1.

rights standards. The feasibility of each measure, and the extent to which it can be enacted, will vary between different jurisdictions. However, there are legislative approaches that have been found to be effective in facilitating the gathering of evidence and that, at the same time, comply with international and domestic human rights standards. The superior courts of States with highly respected human rights legal traditions have examined these provisions carefully and found that they neither derogate from the presumption of innocence nor erode the right to a fair trial. At the end of the day, however, it is for each State to find its own solutions, taking into account international and regional human rights conventions, as well as national legal principles.

Examples of measures that have been held to meet the highest standards are described below.

1. Measures that expedite the gathering and production of evidence

The burden of proof beyond reasonable doubt rests on the prosecution throughout all criminal trials. Without detracting from this principle, there are ways in which to expedite the gathering and production of the evidence needed for prosecutors to discharge that burden. Legislation may increase the scope of coercive investigative powers or simplify the formal requirements for evidence to be admissible in court proceedings. Increasingly, the law must deal with evidence stored or transmitted using electronic information and communication technologies. Access to bank records and to the files of lawyers who have facilitated criminal activity must also be provided.

Generally, the use of powers in support of an invasive criminal investigation or based on a reasonable belief that a crime may have taken place are the subject of additional safeguards. However, more routine powers of audit or personal disclosure are commonly applied to all public servants, regardless of whether or not there are any suspicions. These may be supplemented by criminal offences for conduct such as making false disclosures of personal assets and liabilities or obstructing inspections or audits. In this way, corrupt officials who fail to comply with transparency requirements that would otherwise risk exposing their corrupt conduct do not escape prosecution, but are convicted of false disclosure offences.

2. The use of non-criminal proceedings

The basic presumption of innocence and the burden of proving guilt beyond a reasonable doubt is limited to criminal cases. The International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI)) and other international and regional human rights instruments as well as national human rights protections apply only to cases where a person is charged with a criminal offence.

A narrow interpretation would not apply the presumption to instances where there were no prosecutions, even if criminal or quasi-criminal measures such as the confiscation of property (civil forfeiture) were applied. A broader interpretation would extend the presumption to all procedures or proceedings, regardless of whether or not they might lead to criminal or quasi-criminal sanctions. Thus, in some States, it is open to investigators to use forms of non-criminal proceedings where the lower burden of “proof on the balance of probabilities” applies.

Such non-criminal proceedings might include all or any of those described below.

(a) *Civil or preventive forfeiture of corruption proceeds*

The lower, balance-of-probabilities standard of proof may be used where allowed by domestic law in any case where remedies are being sought but where no one has been actually charged with the commission of a crime. This approach may also be used for the recovery of assets if the remedy is fashioned, not as a form of criminal confiscation and punishment, but in such a way that it amounts to the civil recovery of wrongfully obtained assets and the return of such assets to their rightful owners. In this way it is enough to establish that a person is in possession of assets that do not belong to him or her, without having to prove that they have acquired them illegally. A huge and unexplained sum of money in the bank account of a junior customs official would be an example of this. There will be every reason to believe that the official has acquired the funds corruptly, but there may be no actual proof that this is the case.

Precisely how the distinction is made will depend on the formulation of domestic human rights and procedural principles and how officials and the courts apply them in practice. The use of civil or preventive proceedings is also a significant issue in international cooperation, as some States allow the broad use of such proceedings and remedies, while others limit their use in order to ensure that they are not used to circumvent or to undermine the human rights safeguards that apply to criminal proceedings.

Some States, including Ireland,¹⁴ Italy¹⁵ and the United States,¹⁶ provide, under varying conditions, for the civil (or “preventive”) confiscation of assets suspected of being derived from certain criminal activities. Unlike confiscation in criminal proceedings, such forfeiture laws do not require proof of illicit origin beyond reasonable doubt. Instead, they consider proof on a balance of probabilities or demand a high probability of illicit origin combined with the inability of the owner to prove the contrary.

The European Court of Human Rights has reviewed the compatibility of this provision with the principle of the presumption of innocence.¹⁷ Based on three criteria for determining the criminal nature of a provision—the classification of the proceedings under national law, their essential nature and the type and severity of

¹⁴ Article 2 ter of Italian Law No. 575/1965 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.

¹⁵ According to the Proceeds of Crime Act of 1996, the High Court of Ireland 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.

¹⁶ The forfeiture laws of the United States introduced the concept of “civil action” against the property itself, which allows for proving the illicit origin on a balance of probabilities.

¹⁷ European Human Rights Commission, Application No. 12386/186 (1991), 70 DR 59.

the penalty—the Court concluded that a confiscation classified as a preventive measure does not have the same degree of severity as a criminal sanction.

The Commission assigned particular relevance to the fact that: (a) the confiscation did not imply a judgement of guilt, but rather that of the social danger of the respondent, based on the well-founded suspicion of his or her participation in a mafia-type organization; and (b) it was applied only to such properties that, on a balance of probabilities, were found to be derived from illicit sources.¹⁸

Article 31

*Freezing, seizure and confiscation*¹⁹

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

¹⁸ With regard to the property right, as provided for in art. 1 of the first Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Human Rights Court affirmed the proportionality of the preventive confiscation as an instrument in the fight against the mafia.

¹⁹ For further discussion, see United Nations Office on Drugs and Crime, *Anti-Corruption Toolkit ...*, case studies 33 (“Criminal Confiscation”) and 34 (“Property Penalty”).

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.

(b) *The use of regulatory, administrative or disciplinary proceedings*

The presumption of innocence and a high standard of proof apply to cases involving a strictly criminal offence, but many States have administrative or regulatory provisions that are similar to criminal ones, but that do not lead to criminal punishments. These are often limited in their application to specific categories of natural or legal persons. Where private-sector bribery is not made a crime, administrative offences and punishments established for the purpose of regulating companies or financial markets might still be applied to sanction the conduct—and on the basis of proof on the balance of probabilities.

Regulations and codes of conduct for public servants can also adopt this approach. So, too, can codes for regulated professions, such as medicine and the law, with sanctions for corrupt conduct leading to professional discipline, suspension or the removal of practising privileges, again when proved on the balance of probabilities.

3. The use of a reduced burden of proof in specific elements of criminal proceedings

In some legal systems, after the basic legal burden of proof has been discharged, certain facts may be presumed to the advantage of the State until the contrary is proved.²⁰

(a) *Criminal forfeiture of assets on a reduced burden of proof*

One example that commonly arises allows the proceeds of crime to be traced, seized and forfeited based on a reduced standard of proof, once someone has been convicted of a crime.

²⁰ For a further discussion, see United Nations Office on Drugs and Crime, *Anti-Corruption Toolkit ...*, case study 37 (“Meeting the burden of proof in corruption-related legal proceedings”).

The formulation of such provisions differ,²¹ but most are based on the concept that the assets of a person convicted of certain crimes should be presumed to be derived from criminal activities, unless he or she is willing to produce a satisfactory explanation of their lawful origin. The burden of providing a satisfactory explanation only becomes effective once the prosecution has established that the offender is in direct or indirect control of assets that appear to be out of all proportion to his or her personal circumstances. Only once this stage has been reached is the offender required to provide an explanation, which, if credible, discharges the presumption.²²

Courts that have reviewed these provisions have found them to be fully consistent with the presumption of innocence.²³ For example, the European Court for Human Rights examined the consistency with the European Convention on Human Rights (art. 6, para. 2) of a confiscation order made in accordance with the national drug control legislation of the United Kingdom.²⁴ The key question was whether the prosecutor's application for a confiscation order following the conviction of the accused amounted to the bringing of a new charge within the meaning of the article.

²¹ For example, art. 12, para. 7, of the United Nations Convention against Transnational Organized Crime calls upon States parties to consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

²² Examples of such provisions in national laws include art. 12 sexies of Law No. 356/1992 of Italy; section 4 of the Confiscation of Benefits Act of Singapore; section 12 A of the Prevention of Bribery Ordinance of the Hong Kong Special Administrative Region of China; art. 34a of the General Civil Penal Code of Norway; art. 78d of the Criminal Code of Germany; arts. 36 and 40 of the Narcotic Drugs and Psychotropic Substances Act. No. 4/1994 of Kenya; art. 8 of the Anti-Drug Special Law of Japan; and art. 72 AA of the Criminal Justice Act of 1988 of the United Kingdom, as amended by the Drug Trafficking Act of 1994.

²³ The Italian Constitutional Court and Court of Cassation had to consider whether art. 12 sexies of Law No. 356/1992 did comply with the presumption of innocence as provided by the Italian Constitution. Article 12 sexies establishes, in case of conviction for certain serious criminal offences, mandatory confiscation of all monies, property and other pecuniary resources, which are under the direct or indirect control of the offender, when their value appears to be out of all proportion to his income and he is unwilling or unable to provide a satisfactory explanation. Both courts concluded that the presumption of innocence was not applicable to article 12 sexies of Law No. 356/1992. According to the courts, the purpose of the provision was not to sanction the offender, but rather to prevent the financing future criminal activities (Cassazione Penale, Sezione VI, 15 April 1996, and Corte Costituzionale, Ordinanza No. 18/1996). The House of Lords in *Regina v. Rezvi* had to consider whether the various assumptions contained in article 72 AA of the Criminal Justice Act of 1988, were compatible with the presumption of innocence. Article 72 AA provided for the assumption that any property appearing to the court to be held by or transferred to the defendant at the date of the conviction was received by him as a result of or in connection with the commission of offences to which the act applied. The key issue to be examined by the Lords was whether the confiscation order based on article 72 AA implied that the offender had committed other crimes besides the one he had been found guilty of. The Lords concluded that confiscation was a "financial penalty" imposed for the offence of which the offender had been convicted and involved no accusation of any other offence (see also *McIntosh v. Lord Advocate*, 2001, and *Regina v. Benjafield*, 2000).

²⁴ European Court of Human Rights, case of *Phillips v. the United Kingdom of Great Britain and Northern Ireland*, No. 41087/1998.

The Court recognized that the legislation required the British court to assume that the defendant had been involved in other unlawful drug-related activity prior to the offence for which he was convicted. However, it affirmed that a confiscation under the Drug Trafficking Act of 1994 of the United Kingdom did not involve any new charge, since the purpose of the procedure was not to obtain the conviction or acquittal of the defendant. Hence it could not be concluded that the applicant was being charged with a criminal offence beyond the one for which he had already been found guilty.

(b) *Criminal offences in which some elements are presumed against the accused*

A second common example is the establishment of criminal offences in which, once some elements are proved, others may be presumed against the accused in the absence of evidence to the contrary. The most common use of such measures in anti-corruption legislation is the creation of the offence of “illicit enrichment”, where significant unexplained wealth is presumed to have been illicitly acquired once the basic acquisition of the wealth is proved and is shown to be disproportionate in relation to the known means of the accused.

The burden of proof beyond reasonable doubt remains on the prosecution throughout, but if the accused is unable to produce an explanation as to the lawful origin of the wealth (either an explanation that is simply “credible” or else established on the balance of probabilities), the illicit origins of the wealth will be presumed. The approach involves no element of unfairness. The accused person is uniquely placed to provide an explanation of the assets where they have been obtained lawfully. Indeed, he or she may be the only person in a position to do so. It is this unusual situation that warrants the adoption of such an approach. Again, the constitutionality of this type of provision has passed judicial examination in superior courts.

In systems where asset disclosure is mandatory, proof that a public servant had more wealth than he or she had declared would result in conviction for illicit enrichment unless the accused public servant could show a legitimate source for the wealth. Such provisions are unquestionably effective and are based on the policy that a person in possession of wealth is in the best possible position to produce evidence as to how it was acquired. In some countries these provisions are regarded as valid. In others the provisions are thought to infringe the right to remain silent, despite the fact that the accused is not formally compelled to give an explanation and that it is always open for an accused to provide the necessary proof without personally giving evidence. The difference depends to a large degree on how the presumption of innocence and the right of silence are interpreted in each country.²⁵

One interpretation holds that the presumption of innocence includes the right to be presumed innocent on each essential element of an offence. In support of this thesis it is argued that safeguards are needed to ensure that the innocent are not convicted and that legislatures must be prevented from rendering trials unfair

²⁵ Pursuant to article IX (Illicit enrichment) of the Inter-American Convention against Corruption, most States of the Americas have established the (mere) possession of unexplained wealth as a criminal offence, while Canada and the United States did not comply on the grounds that the offence of illicit enrichment would place the burden of proof on the defendant and, therefore, be contrary to the presumption of innocence.

through converting difficult investigative or evidentiary problems into offence elements that are then presumed against the accused.²⁶ The contrary thesis holds that, once the core elements of an offence have been proved beyond reasonable doubt, an evidentiary burden is raised whereby the defence must rebut prosecution evidence by proving additional facts against the prosecution's case. In this approach, once it is proved that an accused public official has wealth that exceeds all legitimate known sources, an evidentiary burden may be imposed for the accused to show that the wealth was probably obtained legitimately.²⁷

If there is some factual link so that, once the prosecution's case is established, there is little or no rational explanation in the absence of further evidence being provided other than the guilt of the accused, the presumption is more than likely to be upheld as being constitutional.²⁸

There can be no doubt that the offence of "illicit enrichment" can be a valuable tool in fighting corruption. Low-level customs officers may be driving late-

²⁶ For example, *R. v. Vaillancourt* [1987] 2 SCR p. 636 at p. 656, and *R. v. Whyte* [1988] 2 SCR 3. In both, the Canadian Supreme Court holds that the right to the presumption of innocence under article 11 (d) of that country's Charter of Rights and Freedoms extends to each essential element of the offence and that this rule must be applied in such a way that a person accused of a crime cannot be convicted if there remains any reasonable doubt about innocence or guilt.

²⁷ This approach was followed by the Judicial Committee of the Privy Council of the United Kingdom in a 1993 appeal from Hong Kong (*Attorney General of Hong Kong v. Lee Kwong-kut*, 1993, AC 951). The Privy Council examined whether Section 10 of the Hong Kong Bill of Rights Ordinance of 1991 had infringed the presumption of innocence by providing that any present or former public servant who maintained a standard of living above that which was commensurate with his present or past official emoluments; or was in control of pecuniary resources or property disproportionate to his present or past official emoluments, should be guilty, unless he gave a "satisfactory explanation" to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property had come under his control. The Court held that section 10 cast a burden of proving the absence of corruption upon a defendant. However, before that, the prosecution has to prove beyond reasonable doubt the accused's public servant status, his standard of living during the charge period, his total official emoluments during that period and that his standard of living could not reasonably, in all the circumstances, have been afforded out of his total official emoluments. The Court observed that, where corruption was concerned, there was a need—within reason—for special powers of investigation and an explanation requirement. Specific corrupt acts were inherently difficult to detect, let alone prove in the normal way. Accordingly, section 10 was found consistent with the constitutional guarantee of the presumption of innocence. It was dictated by necessity and went no further than necessary (*Attorney General v. Lee Kwong-kut*, 1993, AC 951).

²⁸ In the *Salabiuka* case, the European Court of Human Rights examined whether the French Customs Code (arts. 414, 417 and 392) infringed the presumption of innocence as provided by article 6, paragraph 2, of the European Convention on Human Rights (*Salabiuka v. France* (1987) ECHR, Case No. 14/1987). As applied by the French courts, these norms provide that any person in possession of goods that he or she has brought into France without declaring them to customs, is presumed to be legally liable unless he or she can prove a specific event of force majeure exculpating him and shall, therefore, be guilty of the offence of smuggling. The Court affirmed that, in principle, States parties to the European Convention on Human Rights might, under certain conditions, penalize a simple objective fact as such. The Convention clearly does not prohibit presumptions of law or fact in principle. It does, however, require the contracting States to remain within certain limits as regards criminal law. Article 6, paragraph 2, of the Convention does not regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits, which take into account the importance of what is at stake and maintain the rights of defence.

model Mercedes that could not conceivably have been acquired through earned income; given that the officials are in positions where they could be offered bribes, the assumption would be that the officers have enriched themselves illicitly, unless they can show that they have won the lottery or perhaps inherited wealth from a rich relation. This sort of situation is far easier to investigate and prove than is a pattern of consistently corrupt conduct over a significant period of time.

Article 20
*Illicit enrichment*²⁹

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.

²⁹ For further discussion, see United Nations Office on Drugs and Crime, *Anti-Corruption Toolkit ...*, case study 32 (“Illicit enrichment”).

Chapter VII

Informants, witnesses and their protection

Corruption investigations require the identification of individuals who are in a position to assist in an investigation by providing information about a corrupt official and his or her activities. Successful law enforcement investigators must be experienced in the identification and handling of witnesses (who may have reported a single instance of corrupt conduct) and sources (able to provide information on a continuing basis). This places a heavy onus on investigators to exercise good judgement in managing the activities of sources and witnesses and to have appropriate procedures for processing the information that they provide and, if necessary, for protecting their identity.

Given the consensual and secretive nature of many corruption offences, in the majority of cases persons who have information about them fail to report it to the police, because they fear the consequences and because they might incriminate themselves. This is as true of the public sector as it is of the world of private business.

Some States are introducing compulsory reporting obligations for corruption offences directed at categories of persons such as auditors, public officials and supervisory authorities. Where there is such a duty to report, it is most likely to be effective if there are rules providing protection from adverse consequences for those who fulfil their obligations.

Information sources represent an extraordinarily powerful investigative tool for investigators facing the challenge of major corruption cases. Investigative responsibilities when using sources require that law enforcement agencies establish internal protocols and procedures to minimize the possibilities for misunderstanding.

A comprehensive interviewing strategy should be designed. This should include measures to cope with obstructive lawyers, to provide witness protection, to protect the credibility of the witness and to reduce any opportunities there may be for defence lawyers to attack the propriety of the management of a witness. The best way to avoid allegations of illegal inquiry methods or promises made to witnesses by the investigating team is to record all interviews electronically.

Witnesses may themselves have a criminal background that renders them less credible. If investigators are to be able to counter this, witnesses need to be open with them about their involvement in prior criminal acts, in particular if these include acts of corruption for which suspects are being investigated. Nothing is more damaging to a prosecutor's case than to have an important witness exposed as a criminal for the first time in cross-examination before a trial judge or jury. The criminal background of any such witness should be disclosed to the court at an early stage in the proceedings and certainly before the witness is submitted to cross-examination.

Witnesses must be protected from threats. The level of protection provided will vary depending on the nature and extent of the individuals' cooperation with law enforcement and the degree of risk to which they are exposed. Many may

require little or no protection after reporting acts of petty corruption; others, unfortunately, may need considerable protection.

The most cost-effective means of providing protection is to keep the identity of witnesses confidential for as long as possible. However, at the extreme end of the scale, witness protection programmes may be needed. These can include temporary financial assistance to witnesses and the establishment of new identities for them. Formal witness protection programmes often include the temporary or permanent relocation of a witness or victim. These relocations may need to include family members and usually require direct financial assistance to the witness during an initial, and often prolonged, period of relocation. New identities are sometimes created for a witness, who is then expected to sever all ties with his or her former community.

The great stress and personal costs of a formal relocation are such that a psychological assessment of a witness (and, if relevant, members of his or her immediate family) should be made to determine whether they are capable of withstanding the pressures of a relocation programme. It is not uncommon for witnesses, in spite of personal danger, to return to their familiar haunts because of an inability to cope with the change. On the other hand, some witnesses are able to adapt easily to a new life and identity and can be successful participants in witness protection programmes.

Effective witness protection does not always require relocation. Some witness assistance may be short-term and in the form of a temporary hotel stay. Assistance may be limited to police escorts to and from judicial proceedings or a guard being placed on a home. Where it is necessary for a witness to move to another location, but where he or she can safely retain his or her identity, law enforcement agency representatives can help witnesses to contact available government or private social services to help find temporary housing and to secure employment. Witnesses who are in prison may need to be separated securely from the general prison population.

Any necessary protection methods should be in place during all stages of a criminal proceeding. However, the critical periods for witnesses are usually at the time of an arrest and during the court hearing. Once a conviction has been obtained, the threat usually, but not always, diminishes. By then, any harm to a witness would be a matter of straightforward revenge, rather than an attempt to prevent the witness from giving evidence at the trial.

Maintaining the confidence of a witness is of the highest importance. The mere willingness of an investigator to keep witnesses informed of the progress of a criminal prosecution can help allay fears and apprehension. This not only serves to instil confidence in the witness that he or she has not been abandoned, but can also help the witness the better to adapt to the protective measures being taken on his or her behalf.

Working with witnesses requires special skills and the law enforcement investigator should expect to encounter difficulties. Some cooperating witnesses attempt to disrupt the overall investigative strategy of a case to further their own personal goals—as frequently a witness will have a personal “agenda” that their complaint is intended to promote. Efforts to conceal the identity of confidential informants may not be successful, resulting in a serious breach of the informant’s expectations of the law enforcement agency. It can also be that some witnesses

provide false information, or exaggerate facts, after an investigator has become reliant on their truthfulness.

A. Informants and other sources

Information sources can be classified by the nature and extent of the cooperation they provide to investigators. Generally, they divide into three categories: confidential informants, confidential sources and cooperating witnesses. Distinguishing between the types of source can facilitate the internal administration of an investigative agency.

1. Confidential informants

Confidential informants are likely to be persons who are themselves engaged in criminal activities or associated with persons who are. Confidential informants are often paid by law enforcement agencies and their relationship with investigators is expected to be a continuing one. Their status as an informant and the information they provide are kept absolutely confidential and thus (unlike a cooperating witness) they are not expected to testify in court or otherwise participate publicly in any prosecution.

The various motivations for someone to act as a confidential informant include revenge, financial gain or the desire to further a beneficial relationship with the investigator. Some confidential informants may see their cooperation with law enforcement agencies as a type of informal “insurance policy” that could merit leniency should they be arrested for criminal acts in the future. Use of this class of source requires a high level of administrative control in addition to well-developed protocols for the handling of the source and the protection of his or her identity. Exceptional levels of skill are demanded of investigators who work with confidential informants and they should receive specialized training.

2. Confidential sources

Confidential sources are those who provide information obtained by virtue of their lawful employment. For example, a hotel employee with access to registration records or a travel agent with knowledge of travel plans would usually be classified as confidential sources. The motivation for a confidential source’s cooperation with law enforcement may stem from a sense of public duty, a friendship with a law enforcement officer or the sheer excitement derived from assisting the police clandestinely. Confidential sources are normally not paid for their assistance and they require a lower level of management by investigators. For their protection, such sources will often ask that the information they provide be used discreetly or that a formal and open request for the information they have given be made by the agency if the information is to become part of judicial proceedings or a matter of public record. Special care must be taken where a State has privacy or data protection laws and attention paid to the fact that the employment of the source will probably be at risk.

3. Cooperating witnesses

Cooperating witnesses are sources that assist law enforcement officials in a confidential manner but who are expected eventually to be witnesses in public judicial proceedings. Cooperating witnesses may be involved in the corrupt dealings under investigation or be closely associated with the activities. A cooperating witness sometimes acts as an operative of the police in an undercover investigation and may need to know aspects of the investigative plan. Motivation to act as a cooperating witness can include the same factors that influence a confidential informant, namely, revenge, financial gain and leniency in punishment or non-prosecution for prior criminal acts. The distinguishing characteristic of cooperating witnesses is the fact that their identity and cooperation with law enforcement will ultimately be publicly disclosed. Accordingly, these types of source can require relocation or other special protection by law enforcement when their role becomes public.

B. Administrative procedures

Law enforcement agencies that use sources successfully as an investigative technique usually have established internal procedures and protocols. Failure to impose a regime of investigative protocols can have disastrous consequences for sources and investigators alike.

Administrative protocols usually include the following:

- (a) Use of written agreements clearly defining the separate responsibilities of both the source and the law enforcement agency;
- (b) Establishment of a system of code words or numerical sequences to replace source names in general investigative files to prevent disclosure of a source's identity;
- (c) Information received from sources held separately from general investigative files;
- (d) Limitation of access to source files within the investigative agency;
- (e) Routine audit of financial records associated with source operations;
- (f) Use of a third party in making any payments to a source.

Hotel rooms or specialized vehicles may be used for debriefing meetings with a source to prevent inadvertent disclosure of a source's association with law enforcement officials. As noted, specialized reporting formats can be used to document source information and to conceal the identity of the source.

Any administrative system for the utilization of sources should include the periodic review of source files at the managerial or executive level of the investigative agency. This is of the highest importance where sources are participating in criminal activities under law enforcement authorization. Cooperating witnesses, for example, may be acting as operatives in an undercover investigation of a money-laundering scheme. Close monitoring and supervisory review of the activities of these sources may prevent a complex investigation from failing because of misconduct on the part of the source.

Some law enforcement protocols include prohibitions against utilizing individuals as sources who occupy certain professions or positions. Prohibited professions can include lawyers, clergymen and physicians, all of whom normally receive information under legally recognized principles of professional confidentiality. Elected or appointed public officials can often be utilized as sources, but only with special authorization from the highest level of the law enforcement agency.

The use of cooperating witnesses often necessitates prosecutorial participation early on in the investigative process in common law jurisdictions. This is essential if the source's motivation to cooperate is the prospect of receiving leniency for prior criminal activity. The plea negotiation process can serve to further an investigation by facilitating the cooperation of one criminally implicated person, as a confidential witness, against others of greater culpability in a criminal organization. Prosecutorial assistance and cooperation is thus essential when defining and authorizing the quid pro quo of the source's cooperation. Investigators may also have to obtain judicial approval of any resulting agreement as well as the cooperation of a source's lawyer.

C. Protection of cooperating witnesses

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.

A corrupt official can use intimidation and the threat of personal injury to witnesses or their families as a means to protect a criminal gang and its members from prosecution. More violent corrupt officials may move beyond mere threats to committing aggravated assault or even murder to prevent witnesses from testifying against their criminal enterprise. Such means can subvert the entire legally constituted judicial process. Accordingly, protection of witnesses is one of the most crucial of law enforcement functions.

The handling of a corrupt official's capability to threaten, intimidate and commit acts of violence against witnesses requires both reactive and proactive measures by law enforcement agencies.

1. Reactive measures

A reactive approach is exemplified by aggressive and relentless investigation of any threats or acts of violence directed at victims and witnesses in criminal cases. Corrupt officials must be made to recognize that law enforcement agencies will not tolerate the intimidation of witnesses and that they can expect a swift and effective response from police authorities.

2. Proactive measures

The proactive approach to the protection of victims and witnesses in criminal prosecutions by law enforcement involves making routine witness threat assessments from early on in the investigation and having witness assistance and protection programmes available. The threat assessment should be conducted by investigators on behalf of all the witnesses or victims who are expected to give evidence against the corrupt official. Highly structured groups with a known propensity for violence usually pose a greater risk than does a loosely organized group with a fluid leadership structure. However, a structured group may be willing to suffer the temporary loss of some of its members through prosecution whereas a small, loosely structured group may react violently to any perceived prosecutorial threat. Investigators should clearly establish the profile of any criminal group in relation to its likely response to witnesses.

Even where there are no expectations of threats to a witness, the witness should still be asked whether he or she has been the subject of any approaches and care should still be taken during a court hearing to ensure that the witness waits in a suitably safe location. Only where it is necessary should witnesses be required to attend at court. Where their appearance will be required, vulnerable witnesses can benefit from visiting the courtroom in advance when the court is not sitting in order to familiarize themselves with the surroundings and the formalities.

Except where it is required to prove a case, a witness's address should not appear on copies of his or her statements or on other documents submitted to the defence. Some States permit written statements—where the presiding judge so

allows—to be presented to the court in lieu of a witness appearing in person, where the witness has been the subject of intimidation or has disappeared.

Throughout, special care should be taken to ensure that witnesses are treated with care and respect. Injustices should not be done to members of the public simply by virtue of their having become unwittingly caught up in a criminal trial.

Chapter VIII

Whistle-blower protection

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.

Recent public inquiries into major disasters and scandals have shown that a workplace culture of silence in the face of malpractices can cost hundreds of lives, damage thousands of livelihoods, cause tens of thousands of jobs to be lost and undermine public confidence in major institutions. In some cases, victims may be compensated but no one is held accountable for what has happened. Even anonymous telephone hotlines may have little impact, especially in a country emerging from a totalitarian regime, whose contemporary culture frequently regards anonymous denunciations as being abhorrent aberrations from the past.

A culture of inertia, secrecy and silence breeds corruption. People are often aware of forms of misconduct but are either too tolerant of their work colleagues or too frightened to report them. Non-reporting persists not only because of misplaced loyalties, but also principally because a person who “blows the whistle” is almost certain to be victimized. To overcome this, and to promote a culture of transparency and accountability, a clear and simple framework must be established that encourages “whistle-blowing” and protects “whistle-blowers” from victimization.³⁰

The purpose of whistle-blower protection is to encourage people to come forward to report crime, civil offences (including negligence and breaches of administrative law), miscarriages of justice and health and environmental threats by safeguarding them against reprisal.

A. Laws to protect whistle-blowers

The main purpose of whistle-blower laws is to provide legal protection for those who, in good faith, report cases of maladministration, corruption and other illicit behaviour inside their organization.

Some whistle-blower laws are only applicable to public officials, while others provide protection for a wider field, including private sector organizations and companies. Experience shows that the existence of a law alone is not sufficient to instil trust in potential whistle-blowers. The law must provide for a mechanism that allows the institution to deal with the content of the message and not “shoot the messenger”, as is often the case. In other words, the disclosure must be treated objectively and, even if it proves to be false, the law must apply as long as a

³⁰ See United Nations Office on Drugs and Crime, *Anti-Corruption Toolkit ...*, tool 36 (“Whistleblowers: Protection of Persons Who Report Corruption”); see also <http://www.transparency.org/sourcebook/25.html>.

whistle-blower acted in good faith. It must also apply irrespective of whether or not the information disclosed was confidential and even if the whistle-blower may have technically breached the law by blowing the whistle. Nor should it be for the whistle-blower to have to “prove” that he or she acted in good faith.

The first aim of any whistle-blower act is to provide the person making the disclosure with legal remedies should he or she be victimized, dismissed or treated unfairly in any other way for having revealed the information. The best way to protect a whistle-blower is to keep his or her identity, as well as the content of the disclosure, confidential for as long as possible and perhaps never to reveal it at all.

The part of the whistle-blower law that seeks to protect whistle-blowers from unfair dismissal must be compatible with the labour laws of the State concerned. In particular, where the “employment-at-will” doctrine or similar legal principles allow employers to dismiss employees without reason, the law must create exceptions from that over-arching principle. At the same time, an employer also needs protection to ensure that “blowing the whistle” does not become an easy way for an employee to avoid dismissal or to avoid some other form of disciplinary action. However, it is a fact of life that those who do “blow the whistle”, more often than not, wind up leaving their employment of their own free will.

B. Implementation

Generally, the law should provide for at least two levels at which whistle-blowers can report their concerns. The first level should include entities within the organization for which the whistle-blower works, such as supervisors, heads of the organization or internal or external oversight bodies created specifically to deal with maladministration within the agency where he or she works.

Whistle-blowers should also be able to turn to a second level of institution if their disclosures to a first-level institution have not produced appropriate results and, in particular, if the person or institution to which the information was disclosed:

- (a) Decided not to investigate;
- (b) Failed to complete the investigation within a reasonable period of time;
- (c) Took no action regardless of the positive results of the investigation; or
- (d) Failed to report back to the whistle-blower within a given period of time.

Whistle-blowers should also be given the option to address second-level institutions directly if they:

- (a) Have reasonable cause to believe that they would be victimized if they raised the matter internally or with the prescribed first-level external body; or
- (b) Have reason to fear a cover-up.

Second-level institutions could be an ombudsman, an anti-corruption agency, an auditor general or a member of the legislature.

Experience shows that whistle-blower laws alone do not encourage people to come forward. In a survey carried out among public officials in New South Wales,

Australia, regarding the effectiveness of the Whistleblower Act of 1992, 85 per cent of the interviewees were unsure about the readiness of their employers to protect them. Some 50 per cent of those interviewed stated that they would refuse to make a disclosure for fear of reprisal. The Independent Commission against Corruption of New South Wales concluded that, in order to help the Whistleblower Act work:

(a) There must be a real commitment within an organization to act upon disclosures and to protect those making them;

(b) An effective internal reporting system should be established and be widely publicized throughout the organization.

In order to ensure effective implementation of whistle-blower legislation, those who receive disclosures must be trained in dealing with them. Whistle-blowers often invest much of their time and energy on the allegations they make. They suffer from a high level of stress. If their expectations are not managed properly, it might prove fatal for the investigation and damage trust in the investigating body. In particular, the investigation process and the expected outcome (criminal charges, disciplinary action) must be explained to the whistle-blowers, as well as the likelihood of producing sufficient evidence to take action and the duration and difficulties of investigation. Whistle-blowers should also be informed that the further the investigation proceeds, the more likely it will become for their identity to be revealed and for them to be subjected to various forms of reprisal. During an investigation, whistle-blowers should be kept updated about progress made. Any concerns about the effectiveness of their protection must be acknowledged.

The law will never be able to provide full protection, and whistle-blowers must always be made aware of this simple fact. It is therefore essential that the investigating body make every effort to ensure that whistle-blowers will “last the distance” by keeping them informed about the steps being taken. They should, if necessary, be given legal advice and counselling.

The most effective way of protecting whistle-blowers is to maintain confidentiality regarding their identity and the content of their disclosures. Some country experiences, however, show that the recipients of disclosures do not pay enough attention to this. Information is leaked quietly, rumours are spread and whistle-blowers suffer a variety of reprisals. It is not enough to prohibit the leakage of information. Instead, it may be more effective to train the recipients of disclosures on how to conduct investigations while protecting the identity of the whistle-blower for as long as possible.

The provision relating to whistle-blowers in the United Nations Convention against Corruption is non-mandatory, but anti-corruption experts advise that such laws are essential to the success of any national effort to combat corruption.

Chapter IX

Financial investigations

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.³¹

In addition to assessments of directly or indirectly owned assets and the cost of maintaining extravagant lifestyles, financial investigations can be an extremely effective tool for unearthing corruption. Particularly valuable in this context are: (a) any national requirement that senior officials and public decision makers regularly declare their assets and liabilities; and (b) provisions against money-laundering that require the reporting of significant financial transactions.

In-depth investigations into the origins of property held in the name of third parties should be made only when there are reasonable grounds to suppose that third parties may be holding assets on behalf of suspected officials. Ideally, national laws should provide for the comprehensive registration of significant assets (such as land, company share ownership and motor vehicles) and for the identification of their beneficial owners. Particular forms of abuse that have been targeted by the Financial Action Task Force against Money Laundering of the Organization for Economic Cooperation and Development (OECD) include “bearer bank savings books” and “bearer shares”, ownership of which passes through a simple change in possession, leaving no paper trail.

Investigative agencies must have a right of access to official registers, to company and bank documentation and to credit card records.

Anonymity of ownership is the natural ally of the criminally corrupt. If the legislation of a State does not provide for transparency, financial monitoring will probably not produce the meaningful results that it might do otherwise.

A. Targeting

Once grounds for suspicion have been established and a particular suspect has been identified, the screening should also include persons with whom the suspect has strong ties, such as family members and close business associates. The proceeds of corruption are commonly deposited in bank accounts held in the name of a spouse

³¹ See, for example, United Nations Office on Drugs and Crime, *Anti-Corruption Toolkit ...*, case studies 28 (“The Australian Transaction Report and Analysis Centre (AUSTRAC)”), 29 (“Financial Intelligence Processing Unit, Belgium”), 30 (“Croatian Anti-Money-Laundering Department”) and 31 (“Dutch office for the disclosure of unusual transactions (MOT)”).

and, less frequently, children, brothers or parents. Land and shares are also frequently registered in the names of others.

When financial investigations are used reactively, after a suspect has been caught and the crime has been identified, the parameters of the financial investigation will already be more narrowly defined. The finances of the suspect can be investigated to identify assets for subsequent forfeiture or simply to uncover additional evidence of the crime. Forensic accountants can unravel even the most complex and confusing financial crimes, especially where there are specific targets on which to focus their efforts.

In cases where an anti-corruption agency intends to use the financial assets and purchasing power of a suspect to uncover potential corruption and there is no particular offence to provide a starting point, the task is much more difficult. Proactive monitoring, examining possible indicators of corruption such as “living beyond one’s means”, requires clever use of available resources and careful consideration as to who will be investigated and why. In most jurisdictions a selective allocation of resources will be necessary.

The careful selection of a target group should include the likelihood of uncovering corruption. For example, if available data suggest that employees of an office issuing driving licences have solicited bribes, it may be tempting to launch a review of financial disclosures and tax returns filed by employees of that office. Such an exercise, however, will most likely be fruitless. The bribes paid are likely to be small and used as “pocket money” rather than deposited in bank accounts or used to make large purchases. A more fruitful target may well be their immediate superiors, who may be taking a significant cut of the illicit earnings.

Investigators should focus on reviewing the financial positions of those whose public duties expose them to a higher level of potential bribes. It may be that there is a larger percentage of employees soliciting bribes in an office issuing driving licences than in a public procurement office, but there is a greater likelihood of uncovering indicators of corruption when reviewing the financial positions of procurement officials where pay-offs can be extremely large.

B. Indicators

Initial screening may be restricted to a few significant assets that are given priority over others, such as homes, second houses or holiday homes, means of transport and other items of significant value.

The instruments used to investigate disproportionate living standards include public registers, credit card accounts (including credit card accounts held offshore), expensive parties and wedding celebrations, children’s school fees and private foreign travel. Bank and company documentation may contain further information. Requiring the verification of expenses incurred by the public officials or persons close to them may also prove to be extremely effective.

Illicit funds are frequently hidden in foreign bank accounts registered under false names or in foreign bank accounts of corporations. Illegally acquired property can be registered in foreign jurisdictions using false identities while the corrupt official enjoys the use of the property in his or her home country. If the jurisdiction

where the assets are held has signed a treaty on mutual legal assistance (discussed in chapter XV below), it may be possible to obtain help from the authorities there in identifying those assets.

Chapter X

Electronic surveillance

Electronic surveillance encompasses the use of electronic means to gather information and intelligence. It may include covert activities, such as video recording, wiretapping or eavesdropping; or it may include the use of audio and video recorders and transmitters hidden on, or used by, cooperating witnesses and informants.

Covert surveillance, discussed in the present chapter, is undertaken where none of the parties whose activities are being observed is aware that law enforcement is secretly listening and/or watching. By contrast, consensual recordings always involve the knowledge and consent of at least one of the parties to a conversation or activity.

Electronic surveillance, as an investigative tool, is often the only method available to investigators that can penetrate the veil of secrecy that habitually surrounds corrupt activities. The most commonly used form of electronic surveillance is consensual and can involve the assistance of collaborating witnesses, whistle-blowers, victims of extortion and other recipients of corrupt proposals.

The lack of tolerance for covert activities on the part of a Government stems from public distrust of government in general. In many countries, past abuses of governmental authority arising from political interests, personal vendettas and other nefarious motives have all served to instil public distrust to the point where society is unwilling to entrust the Government with the unbridled authority to “spy” on the activities of the citizenry. In most democratic societies, members of the public enjoy a right to privacy from government intrusion and to the expectation that their words and actions will not be subject to interception by the police. Where one of the parties to a corrupt or criminal conspiracy decides to expose the enterprise using electronic means to secure evidence, however, society usually tolerates the invasion of an otherwise private affair. Societies do not readily tolerate government “spying” on the conversations and activities of citizens without the consent or knowledge of any of the parties. This gives consensual surveillance decided advantages over completely covert operations.

A. Covert interceptions and recording

The covert category of electronic surveillance includes wiretapping, eavesdropping and video surveillance operations. However, in many countries wiretaps and eavesdropping are illegal in the absence of judicial authorization, and usually very strict guidelines must be observed before a judge will grant a court order authorizing them. Guidelines can help ensure the protection of individual rights to privacy and, at the same time, allow for the use of wiretaps during investigations of serious criminal activity and for security intelligence.

Covert interceptions of the private words and activities of citizens are arguably the most invasive and aggressive sort of governmental intrusion into individual privacy. Notwithstanding, it is sometimes the only method available to law enforcement officers to collect sufficient evidence to prosecute criminal enterprises.

The extreme sensitivity with which the public views such law enforcement effort demands that strict guidelines and oversight of covert operations should be firmly in place. Covert interceptions should be used as a last resort, and then only after all other efforts at evidence collection have failed or are unlikely to be effective.

B. Application for court order

Government wiretaps and eavesdropping, if permitted at all, generally require court orders based on a detailed showing of probable cause. To obtain a court order in a common law country, a three-step process is generally involved:

(a) The law enforcement officer responsible for the investigation draws up a detailed affidavit showing that there is probable cause to believe that the target telephone or other communication device is being used, or will be used, to facilitate a specific, serious, indictable crime;

(b) A lawyer for the Government works with the law enforcement officer to prepare an application for a court order, based upon an affidavit drawn up by the officer;

(c) The lawyer presents the application *ex parte* (i.e. without an adversary hearing) to a judge authorized to issue court orders for electronic surveillance. (A junior law enforcement agent should generally not be allowed to make applications for court orders directly to a judge.)

A request for court orders should generally contain the following information:

(a) The identity of the law enforcement officer making the application and of the high-level government lawyer authorizing the application;

(b) The facts and circumstances of the case justifying the application, including details of the particular offence under investigation, the identity of the person allegedly committing it, the type of communications sought and the nature and location of the communication facilities;

(c) Whether other investigative procedures have been tried and have failed, or why they would be likely to fail or be too dangerous to employ;

(d) The period of time involved in the interception;

(e) The facts concerning all previous applications involving any of the same suspects or locations.

C. Issuance of a court order

In order to keep intrusions into personal privacy to a minimum, before a judge can approve an application for electronic surveillance and issue a court order, the judge should be required first to determine that:

(a) There is probable cause for belief that an offence covered by the law is being committed or is about to be committed;

(b) There is probable cause for belief that particular communications concerning that offence will be obtained through such an interception;

(c) Normal investigative procedures have been tried and have failed or appear on reasonable grounds to be unlikely to succeed or to be too dangerous to employ;

(d) There is probable cause for belief that the place where the communications are to be intercepted are being used or are about to be used in connection with the commission of such an offence or are leased to, are listed in the name of or are commonly used by the person under suspicion.

In addition to showing probable cause, one of the main criteria for determining whether a court order should be issued is whether normal investigative techniques have been, or are likely to be, unsuccessful. Electronic surveillance is a tool of last resort and should not be used where other less intrusive methods of investigation could reasonably be employed. Normal investigative methods usually include visual surveillance, interviewing subjects, the use of informers and telephone record analysis. Such techniques, however, often have limited value. Continuous surveillance by police may create suspicion and may therefore be hazardous. Surveillance alone will not disclose the contents of a personal meeting or of a telephone conversation and questioning suspects or executing search warrants may jeopardize an investigation.

Whereas informants are useful and should be sought out by police, the information they provide does not always reveal all of the players or the extent of an operation and great care must be taken to ensure that the informants are protected. Moreover, because informants are often criminals themselves, they may not be believed in court. Telephone record analysis is helpful but does not reveal the content of conversations, nor do records always reveal the identities of parties to the conversations. Other methods of investigation that may be tried include undercover operations and “stings” (see chapter XI below). Although effective in some cases, undercover operations are difficult and dangerous, and “sting” operations are costly and not always successful.

If a judge approves an application, a court order may be issued specifying:

(a) The identity (if known) of the person whose communications are to be intercepted;

(b) The nature and location of the communication facilities;

(c) The type of communications authorized to be intercepted and the offence to which they relate;

(d) The agency authorized to perform the interception and the person authorizing the application;

(e) The period of time for which the interception is authorized.

A court order may also require that interim status reports are filed with the issuing judge for as long as the wiretap or eavesdropping is in progress.

Once covert electronic recordings commence, law enforcement officers should limit interception of communications to those relating to the offences specified in the court order. Before the surveillance actually begins, a government lawyer should convene a meeting with the officers who will participate in the case to ensure that recorded material conforms to the crimes alleged in the enabling affidavit. Turning

off the recording equipment and then performing a spot check every few minutes to determine if the conversation has turned to the subject of the court order usually accomplishes minimization and avoids picking up unrelated gossip. Nevertheless, special problems may arise where criminals communicate in codes that are designed to conceal criminal activity in what sounds like an uninteresting or unrelated discussion. If an intercepted communication is in a code or foreign language and someone is not simultaneously interpreting the code or foreign language, the conversation should be recorded and minimization deferred until an expert in that code or language is available to interpret the communication. Should a wiretap or eavesdropping effort fail to meet the minimization parameters, then there is the risk that all of the evidence obtained from the wiretap might be ruled inadmissible.

D. Recording

All intercepted communications should be recorded whenever possible. As a practical matter, law enforcement officers should make working copies of the original tapes. The case officer should screen conversations that tend to prove that a crime has been, is being or will be committed. A compilation of relevant conversations, together with the corroborating surveillance reports, can often provide probable cause for search warrants and/or arrest warrants.

E. Termination of covert electronic surveillance

In order to continue an interception beyond the time limit set by the original court order, the responsible law enforcement officer, through a government lawyer, should be required to apply for an extension based on a new application. When the period of a court order expires, the original tapes should be made available to the issuing judge and sealed under court supervision. The tapes should be maintained in such a fashion for a period of years.

F. Consensual recording operations

Unlike covert electronic surveillance operations, consensual operations involve the cooperation of at least one party who is trusted by the criminal target. The cooperating witness could be a person who is suffering extortion or being victimized in some manner or an ostracized member of a criminal enterprise with a personal vendetta. Again, the witness may be a criminal trading information in exchange for leniency from the court. The vast majority of electronic surveillance operations involve such witnesses.

In corruption investigations and other so-called “victimless crimes”, the time needed to complete a corrupt transaction is not usually critical; it frequently involves the payment of cash by one party to another. That fact is important for anti-corruption investigators. In the case of a government inspector demanding a bribe from a citizen or where a citizen offers a bribe, there is often sufficient time for an honest citizen or government employee to notify the appropriate authorities before any transaction takes place and thus ensure that the transaction can be recorded.

The criminal seeking leniency is usually able to control to some extent the timing of meetings with targeted criminals. Such flexibility presents an opportunity for law enforcement officials to prepare the cooperating person to respond in such a way that electronic surveillance methods can be employed.

Chapter XI

Undercover operations

The use of the undercover investigator or cooperating witness acting on behalf of law enforcement provides a path towards investigative success when addressing criminal activity where secrecy and conspiracies are the distinguishing characteristics.

Not only the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I) but also the United Nations Convention against Corruption recognizes the special place of special investigative techniques. Article 50 of the Convention against Corruption states that 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 to allow for the appropriate use by its competent authorities of controlled delivery and special investigative techniques, such as electronic or other forms of surveillance and undercover operations and to allow for the admissibility in court of evidence derived therefrom.

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.

The undercover technique is essential in cases where corrupt individuals conspire together in secret to achieve criminal goals. A corrupt judge, police officer or other public official generally engages in contact only with other corrupt parties, so that there are few, if any, persons who are able to witness and expose their corrupt practices. As many crimes of corruption occur with little evidence of criminal activity, without the testimony of an insider or conspirator a successful prosecution of such crimes is unlikely. In countries where the use of the undercover technique is allowed, the use of an undercover investigator posing as a purchaser of a judicial or political favour, coupled with demonstrative evidence such as surreptitious audio and video recordings, can provide conclusive evidence of corrupt activity.

The credibility of a professional, well-trained law enforcement investigator who has personally observed, heard or spoken with the defendant in the course of the criminal activity is generally unimpeachable. Such evidence can be especially powerful when the undercover agent has played the role of a victimized businessman or the target of an organized criminal activity. The effect of overwhelming evidence gathered through use of undercover techniques can bring offers of cooperation and pleas of guilty from defendants, thereby eliminating the need for long and expensive trial processes.

A. Definition of “undercover operations”

The word “undercover” implies engaging in a secret investigation. The identity of the law enforcement agent is disguised in order to detect, prevent or secure evidence of criminal activity. Undercover operations can be classified as simple or complex. Simple undercover operations usually last less than six months, have a limited budget and have no sensitive issues that would elevate the operations to a higher level of review within the investigating agency.

A simple undercover operation might involve the undercover officer buying drugs from a local drug seller on two or more occasions with the investigative goal of identifying and successfully searching and seizing the dealer’s drug supply or that of the supplier. Some simple undercover operations require the use of a storefront rented for a brief period or the use of vehicles or vessels registered under fictitious identities. Simple undercover operations are sometimes used to gather predicate evidence for a more complex undercover operation.

A complex undercover investigation is usually long-term and more sophisticated in both the use of specialized techniques and the creativity of the investigation itself. Complex investigations can include investigations of public officials, even if the investigation is of short duration. The sensitivity of the investigation can elevate such cases to a “complex” status. A complex undercover operation sometimes includes the operation of a business and the utilization of business proceeds to finance the continuation of the undercover investigation. A complex investigation is usually subject to periodic review by an undercover review committee, especially if the investigation is expected to be lengthy or highly expensive.

B. Oversight of the undercover operation

Law enforcement agencies should establish guidelines or protocols for the use of undercover techniques. Operations should always be carefully reviewed prior to implementation. They should be monitored closely by the agency leadership and prosecutors not only to ensure that they take place within the law but also to minimize the risk of personal injury to undercover agents or innocent parties. Similarly, risks to property, financial loss and irreparable damage to third parties must be kept to an absolute minimum. The propriety of government agents engaging in any kind of criminal activity, even as a possible facilitator, must be kept under review. Guidelines should be in place to protect privileged or confidential relationships from interference. Such guidelines should address any legal or ethical issues that might otherwise prevent the successful prosecution of offenders at the conclusion of the undercover operation. A defendant's customary argument is that the particular crime with which he or she is charged would not have taken place if action by the Government had not encouraged or facilitated it. Such a defence is not usually successful where high professional standards have been observed by the investigators. Only through the use of published guidelines and close monitoring of an undercover operation can the legality and ethical nature of the undercover law enforcement investigation be ensured.³²

Authorization to use undercover techniques should only be granted to the higher levels of an investigative agency. An undercover review committee can be used as a screening and monitoring device to ensure that all safeguards and legal considerations are in place. The committee might include representatives from legal, financial and investigative departments within the investigative agency who are neutral in their involvement in a particular investigation and experienced in identifying the strengths and weaknesses of an undercover proposal. Simple undercover operations might be approved by the head of the local investigative agency in conjunction with the approval of a local chief prosecutor.

C. Prohibited conduct in undercover operations

To place matters beyond doubt, certain types of conduct on the part of undercover agents and operatives, such as participating in acts of violence, should be expressly prohibited by law. In practice, significant complex undercover operations have been terminated to prevent an undercover agent from having to participate in acts of violence or to forestall acts of violence planned by the subjects of the investigation. Innovative investigative planning and enforcement action, however, can often prevent acts of violence from taking place while allowing an undercover operation to continue without serious disruption of its investigative goals. An undercover agent unexpectedly placed in a situation where threat of serious bodily harm or death to the agent or third party is imminent should be expected to act in accordance with his or her legal duties, even if this would effectively end the undercover operation.

³² For guidelines of the United States Government, see <http://www.usdoj.gov/olp/fbiundercover.pdf>.

Undercover agents or their operatives should also be prohibited from instigating or initiating any plan to commit a crime. This prohibition is closely linked to the legal prohibition found in the criminal law of many States to the effect that persons cannot be prosecuted for a crime that has been induced by government agents. This presumption should be negated where a person charged with such an offence is shown to have demonstrated a predisposition to commit the offence. The fact that the Government, through its agents, participated or in some manner facilitated the criminal offence should not be a bar to prosecution if evidence of predisposition on the part of the accused is present. For example, a person who is seeking a means to launder proceeds from criminal activities should not be regarded as having been entrapped by government agents who operate an undercover money-laundering business and accept the proceeds for transmittal to third parties.

High moral and ethical standards must be valued in the selection of undercover agents. Any immoral activity by an undercover agent known to the accused may be used to undermine the agent's credibility at trial or even to blackmail him or her. To prevent such activity from detracting from the professionalism of the undercover agent, proper instructions on techniques to avoid compromising situations should be provided.

D. Authorized activities for undercover agents

Prior to the implementation of an undercover operation, prosecutorial support and guidance are generally required. In addition to a prosecutor's office agreeing to support the operation on a continuing basis, a commitment to prosecute those charged as a result of the undercover operation should be obtained in jurisdictions where the investigative and prosecutorial functions are separate. Prosecutorial assistance should also include permission for an undercover agent to engage in certain activities that might otherwise be illegal. Generally, participation in minor crimes and petty offences can be authorized if circumstances require such acts in furtherance of the investigation.

Certain levels of criminal activity (such as giving false testimony in judicial proceedings) should require authorization at the highest level of a law enforcement agency and in serious cases might require notification to, and approval by, a higher supervising court. Any serious criminal offence that the undercover agent or operative may be required to commit in the course of undercover activities must be closely reviewed and wherever possible approved by prosecuting officials in advance of the act. Emergency circumstances may require the undercover agent to act independently and without prior approval, but proper training and professional judgement can minimize the risks that this entails.

E. Preparing the undercover agent

Undercover agents should be carefully selected and properly trained in the use of undercover techniques. In addition to being knowledgeable about the guidelines for undercover operations, the agent should be well versed in the relevant laws, especially those relating to entrapment and illegal government actions. Undercover agents should be capable of operating with limited supervision and minimal

assistance from fellow officers. That implies that the undercover agent must be mature in judgement and extremely skilled in the specialized field of undercover activity. Psychological testing is recommended for undercover agents to ensure that they are able to cope with the stress and demands placed on them. Poor selection of an undercover agent can lead to poor results in individual investigations and, ultimately, to reduced credibility of the law enforcement agency itself.

Sophisticated undercover investigative programmes include the identification of law enforcement agents who have skills or prior experience in the target area of a particular investigation. For example, an investigator with experience in the banking industry may be a suitable candidate for an undercover operation involving financial services. Once a potential undercover agent has been identified, psychological testing will identify other personal traits indicating both the ability to manage stress and to be assertive and self-reliant. The undercover agent should be as closely matched as possible to the role he or she is expected to play. Accent, dress and cultural awareness should be taken into account. Wherever possible, the creation of elaborate false histories for an agent should be avoided, especially where these involve false claims of prior imprisonment. However, scenarios establishing the background of the agent as bona fide and “trustworthy” to the subjects must be contrived, including by using such items as fictitious identity cards, credit histories, vehicle registries and other manifestations of normal living activity.

If a cooperating witness or other non-law enforcement operative is being used in an undercover operation, proper instructions should be provided. These should be reduced to a written agreement and signed by all interested parties. Guidelines for the handling of cooperating witnesses should be provided by the law enforcement agency. Any business relationship the operative has had with the undercover operation must be clearly reviewed and recorded to minimize the possibility of future claims for damages being made against the law enforcement agency. The prosecutor should meet with the operative and clearly define what is expected of the cooperating witness and the nature and extent of any assurances that he or she can be given.

F. Extraordinary investigative techniques to complement the undercover investigation

Most undercover operations utilize other investigative techniques to enhance the collection of evidence. The use of body transmitters or concealed recording devices is a standard procedure in many undercover investigations. Where undercover businesses are operated, audio and video recording devices should be used to supplement the observations and activities of undercover agents.

Chapter XII

Integrity testing

Unless a corrupt act is exposed, how does one know whether a particular official is corrupt? How can one ensure that corrupt officials are not promoted to positions where they can cause even more harm to the public interest than they are causing already? Allegations of corruption are easily made, and when they are not based on fact they can be morally damaging. In handling allegations of corruption made against police officers, for example, how does one ensure that morale is not adversely affected while those police officers are being investigated or that complainants—and innocent parties—are protected when they are acting in good faith? Even more importantly, how can evidence be obtained quickly and cheaply when the suspicion has arisen that corrupt patterns of behaviour have developed in certain areas of public sector activity?

Acute difficulties arise when complainants have a history of criminal involvement (especially where their complaints are made against the police). This gives a complainant a low level of personal credibility, so how can reliable evidence (either of integrity or of corrupt tendencies) be produced and presented to a court, if need be, in ways consistent with the constitutional rights of police officers as citizens and in ways in which neither the complainant nor the person complained about is unduly “threatened”?

The answer to each of these questions would seem to lie in integrity testing.

There are classic examples of the use of integrity testing in the area of countering corruption in police forces. In various developed countries, police corruption scandals have come in cycles. Rampant corruption has been exposed; clean-up measures have been implemented; and corrupt police have been prosecuted or dismissed. Within a few years, however, fresh scandals have emerged. This, it is now realized, is because reform strategies have failed. They have been based on the mistaken assumption that simply getting rid of “rotten apples” would be sufficient to contain the problem. It is now clear that it is not enough to clean up an area of corruption when problems begin to surface. Instead, systems must be developed that ensure that there will be no sliding back into systemic corruption. It is in the essential areas of follow-up and monitoring that integrity testing really comes into its own. It has emerged as a particularly useful tool for cleaning up corrupt police forces—and for keeping them clean.

So it is that integrity testing is now considered to be an effective instrument that embraces both the prevention and the prosecution of corruption. The objectives of integrity testing are:

- (a) To determine whether or not a particular public civil servant or branch of government is likely to engage in corrupt practices;
- (b) To increase the actual and perceived risk to corrupt officials that they may be detected, thereby deterring corrupt behaviour and encouraging officials to report instances when they are offered bribes (officials will take many genuine offers of bribes to be tests of integrity and will report those offers to protect their jobs);

(c) To identify officials working in areas exposed to corruption, such as police officers, as being honest and trustworthy and therefore suitable for promotion. (For this reason, it is essential that any regime of integrity testing include random elements and not rest solely on suspicion; passing an integrity test should be considered a credit to an official's record—and it should not be stated that there has been an allegation of corruption against the official and that an integrity test has failed to confirm that allegation.)

Integrity testing has been used effectively to test whether public officials of all description resist offers of bribes and refrain from soliciting them. As such, the integrity test is proving to be an extremely effective and cost-efficient deterrent to corruption.

A. Targeted and random integrity testing

In an integrity test, a scenario is created in which, say, a public civil servant in an everyday situation is either offered a modest bribe by the person conducting the test or is presented with a situation in which he or she has an opportunity to ask for a bribe. The bribe offered must be modest so that the test will be seen by a court as being fair and not creating a situation in which a bribe is offered that is so large that even an honest person might be tempted to take it.

Integrity testing can also be used as a “targeted test”, to help verify the genuineness of an allegation or a suspicion of corrupt behaviour. Members of the public, criminals or other officials may have provided information to law enforcement authorities alleging that a certain person or group of persons in a particular government agency are taking or demanding bribes. Quite frequently, a complainant alleges that a specific official has solicited a bribe. Without the independent evidence provided by an integrity test, a case would simply rest on the word of the complainant against that of the official and that is a situation that prosecutors would prefer to avoid.

In countries where courts are hostile towards evidence obtained through integrity testing, the technique still has considerable value. Reliable data can be collected that can assist in gauging the extent of corrupt practices within a particular group and be used to determine whether these should be the focus of other forms of investigation.

B. Fairness

In democratic societies, it is generally considered to be unacceptable for a Government to engage in activities that encourage individuals to perpetrate crimes that they might not otherwise commit. It is, however, usually quite acceptable for a Government to observe whether or not someone is willing to commit a crime under ordinary, everyday circumstances. For that reason, integrity testing must be carried out with the strictest discipline. Integrity testing, like other forms of intrusive technique, is an “aggressive” exercise of state power. To avoid the criticism of abuse of power, audio or video recordings of the actual event should be made to verify that the accused person was not acting other than of his or her own free will and that government agents have not behaved unfairly or coercively. Such recordings also

help to ensure that a Government has sufficient evidence to pursue a successful prosecution.

As an additional safeguard for all concerned, witnesses should be placed in the vicinity of the test to corroborate what is seen and heard on recording devices. Both random and targeted tests must be as realistic as possible in order not to expose the subject of the test to a temptation greater than that to which he or she is normally exposed. In order to ensure the fairness of the test and for it to be accepted by both those subjected to it and the general public, the methods and scenarios used should be evaluated and approved by competent authorities.

C. Random repetition

Experience in police forces where integrity tests are carried out show that it is not enough to “clean up”, once and for all, a specific area where problems have surfaced. Systems must be developed that help ensure that follow-up testing is undertaken. The most desirable situation possible includes widespread publication of the fact that random integrity testing of officials is taking place. The actual number of tests need not be large. The very fact that officials know that the tests are taking place will encourage them to report approaches, as they will not know which are genuine and which are tests.

D. Integrity testing and constitutional concerns

Although integrity tests can be extremely effective as an investigative tool as well as being an excellent deterrent, not all courts readily accept them as a valid method of collecting evidence.

Notwithstanding, there are substantial reasons for the use of integrity testing. It is one of the most effective tools for identifying and eradicating corrupt practices in government services within a short period of time. Where corruption is rampant and levels of public trust are low, it is one of the few tools that can promise immediate results and help restore trust in public administration. It cannot be stressed enough that legal systems that provide for agent provocateur scenarios should try to ensure that they are never designed to instigate conduct that makes criminals out of those who might otherwise have reacted honestly. It is therefore important to ensure that the degree of temptation is not extreme and is not unreasonable.

Many criminal law systems exclude evidence of an agent provocateur when the provocation is considered to be excessive. However, in the United States (arguably a country in which constitutional protections are invoked more frequently than elsewhere), integrity testing is widely used in the private sector, both in screening applicants for jobs and in the workplace, without any serious constitutional impediments being experienced.

E. Integrity testing in New York: theory put into practice

Since 1994, the New York City Police Department (NYPD) has been carrying out an intensive programme of integrity testing. Simply stated, this means that the Internal Affairs Bureau creates scenarios based upon known acts of police corruption, such as the theft of drugs and/or cash from a street-level drug dealer, to test the integrity of NYPD officers. The tests are carefully monitored and recorded using audio and video electronic surveillance and numerous “witnesses” are placed at or near the scene.

The NYPD strives to make the scenarios as realistic as possible. The scenarios are based on extensive intelligence collection and analysis. All officers are aware that such a programme exists and that their own conduct may be subjected, from time to time, to such tests; however, they are not told about the frequency of such tests, which has left the impression that they are far more frequent than they actually are.

Integrity tests are administered on both a targeted basis and a random basis. That is, certain tests are directed at or “target” specific officers who are suspected of having committed corrupt acts, usually based on one or more allegations from members of the public, criminal informants or even other officers.

In addition, some of the tests are directed at officers selected at random, based on the knowledge that they are engaged in work that is susceptible to certain acts of theft or corruption. All the tests are carefully planned to avoid entrapment, and no officer is enticed into committing an act of corruption. The scenario merely creates realistic circumstances in which an officer might choose to engage in a corrupt act.

More than 1,500 integrity tests are administered each year among a force of 40,000 officers. The data produced by those tests provide reliable, empirical evidence of the rate of corruption among NYPD officers. The results have been both useful and instructive.

The rate of failure (that is, when the subject engages in a corrupt act) in the “targeted” tests is significant. About 20 per cent of the officers tested on that basis fail the test, whereupon they are prosecuted and removed from the force. That would seem to validate both the reliability of carefully analysed public complaints and allegations of police corruption and the efficiency of the specific integrity tests employed.

In contrast with the comparatively high percentage of officers who fail the targeted tests, only about 1 per cent of the officers who are subjected to random tests fail. That would seem to support the long-held view of NYPD senior managers that the vast majority of the officers are not corrupt.

In addition to providing valuable empirical evidence about the rate of corruption among police officers, integrity testing has produced very useful lessons about the strengths and weaknesses of the supervision and control of police officers in the field. Such lessons are used to develop better training and more effective policies to ensure that police services are provided effectively and honestly.

The NYPD has also seen a dramatic rise in the number of reports by police officers themselves of offers of bribes since the integrity-testing programme was

initiated. Part of that increase can undoubtedly be attributed to the fact that NYPD officers are concerned that their actions are now subject to monitoring and that even a single failure to report a corrupt offer could subject them to disciplinary action.

Building on the success in New York, the Metropolitan Police Service of London has initiated a similar programme of integrity testing, administered by specialist internal anti-corruption units, and early reports indicate that they are obtaining similar benefits.

In tandem with integrity testing, there should be independent police complaint boards (so that the police are not left in the position of investigating complaints against themselves) in which civil society is represented so as to assure the public that the procedures adopted are thorough and appropriate.

F. Investigative techniques: use of integrity testing on a wider scale

The concept need not be confined to police activities. In some countries, hidden television cameras have been used in the ordinary process of criminal investigations to monitor illicit activities being conducted in the chambers (or private offices) of judges, capturing corrupt transactions between judges and members of the legal profession. The integrity-testing technique might therefore be developed in the context of judicial integrity testing. It might also be used in other areas where the public sector is engaged in direct transactions with members of the public, in particular in customs.

It would be interesting, too, to see the effect of this same approach in the area of international government procurement contracts. There could be a situation where major international corporations bidding on government contracts in a developing country had to contend with an integrity-testing programme, knowing that the payment of any bribe (or even failure to report the solicitation of a bribe) would subject them to instant exposure as a corrupt company and to public blacklisting. It would seem to be a simple matter to use integrity testing to cull out junior staff who are taking a large number of small bribes. Yet junior officials do not lie at the heart of the corruption problem. It will be more difficult to adapt the methodology to counter those senior officials who are involved in a small number of highly lucrative transactions.

The possibilities the technique presents for the developing world have yet to be thoroughly explored. However, at face value there would seem to be considerable merit in establishing a system that is known to all officials (whether they be police, customs or other officials), at the very least as a means for tackling and reducing levels of petty corruption.

Chapter XIII

The framework for international judicial cooperation

It is now widely accepted that measures to address corruption must go beyond domestic criminal justice systems. In the modern world, no country is an island, able to isolate itself from the impact of developments elsewhere. Corruption is no exception, and its links to international organized crime, drug trafficking and terrorism is plainly recognized.

The growth in understanding of both the scope and seriousness of the problem of corruption is reflected in the evolution of international action against it. This has progressed from general consideration and declarative statements³³ to the formulation of practical advice,³⁴ the development of binding legal obligations and, more recently, the emergence of numerous cases in which one country has sought the assistance of another, not only in the investigation and prosecution of corruption cases but also in the pursuit of their illicit proceeds.

This understanding has also progressed from narrowly focused measures, directed at specific crimes involving corruption (such as bribery), to more broadly focused measures, targeting corruption in general, and from regional instruments developed by groups of relatively like-minded States (such as the Organization of American States (OAS),³⁵ the African Union,³⁶ OECD³⁷ and the Council of Europe)³⁸ to the United Nations Convention against Corruption.³⁹ Actions on specific issues within specific regions have become more general in order to deal with the problem more effectively.

A. United Nations Convention against Corruption

Concern about corruption as an international problem has increased greatly in recent years. The most dramatic development has been the signing in December 2003 of

³³ See, for example, General Assembly resolutions 51/59, annex, and 51/191, annex, and the discussion during the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Cairo from 29 April to 8 May 1995 (A/CONF.169/16/Rev.1, paras. 245-261).

³⁴ See, for example, the manual on practical measures against corruption (*International Review of Criminal Policy*, Nos. 41 and 42 (United Nations publication, Sales No. E.93.IV.4)).

³⁵ Inter-American Convention against Corruption (E/1996/99).

³⁶ African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union on 12 July 2003 (http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Treaties_Conventions_&_Protocols.htm).

³⁷ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (*Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18)).

³⁸ Criminal Law Convention on Corruption (Council of Europe, *European Treaty Series*, No. 173).

³⁹ For a summary of other international legal instruments dealing with corruption, see *United Nations Manual on Anti-Corruption Policy* (<http://www.unodc.org/pdf/crime/gpacpublications/manual.pdf>), chap. V.

the United Nations Convention against Corruption in Merida, Mexico. The Convention will enter into force when it has been ratified by 30 countries.

The Convention represents a major step forward in the global fight against corruption, and in particular in the efforts of Member States to develop a common approach to both domestic efforts and international cooperation. The Convention can be seen as the product of a series of both procedural and substantive developments.

At its meeting held in Vienna from 30 July to 3 August 2001, the Intergovernmental Open-Ended Expert Group to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption concluded that the new convention should be “comprehensive” (in the sense that it should deal with as many different forms of corruption as possible) and “multidisciplinary” (in the sense that it should contain the broadest possible range of measures for countering corruption).⁴⁰ The Expert Group began the development of a broad inventory of specific forms of corruption, including areas such as trading in official influence, general abuses of power and various acts of corruption within the private sector that had not been dealt with in many of the earlier international instruments (A/AC.260/2 and Corr.1, para. 27).

Building on the broad range of measures included in the Organized Crime Convention, the Expert Group called for the creation of specific criminal offences and for the provision of fresh investigative and prosecutorial powers. All of those basic elements appear in some form in the United Nations Convention against Corruption, with criminal offences specifically tailored to corruption.⁴¹ To go beyond the scope of the Organized Crime Convention, a series of specific preventive anti-corruption measures were added, both to promote transparency and high standards of conduct (in particular in the public service) and to provide approaches for preventing corruption from taking place.⁴² A further significant development was the inclusion of a specific chapter dealing with the recovery of assets, a major concern for countries pursuing the assets hidden abroad by former leaders and senior officials found to have engaged in corruption.

The various chapters of the United Nations Convention against Corruption cover a number of major areas that are described below.

Chapter I. General provisions

The opening articles of the Convention include a statement of purpose (article 1), which covers both the promotion of integrity and accountability within each State

⁴⁰ Subsequently, the General Assembly, in its resolution 56/260, decided that the Ad Hoc Committee for the Negotiation of a Convention against Corruption should negotiate a broad and effective instrument and requested the Ad Hoc Committee to adopt a comprehensive and multidisciplinary approach in developing the instrument.

⁴¹ For a complete review of the history of the negotiations and consideration of specific issues, see the official records of the Ad Hoc Committee on the UNODC website (http://www.unodc.org/unodc/crime_cicp_convention_corruption_docs.html); in particular, see the successive texts of the revised draft convention and the footnotes to specific provisions.

⁴² For example, article 8 of the Convention deals with codes of conduct and other measures specifically directed at public servants and public service situations, whereas article 13 deals with the more general participation of society in preventing corruption.

and the support of international cooperation and technical assistance between States parties. They also include definitions of critical terms used in the instrument. Some of these are similar to those used in other instruments (in particular the Organized Crime Convention), but those defining “public official”, “foreign public official”, and “official of a public international organization” are new. These definitions are important for determining the scope of application of the Convention in those areas.

Chapter II. Preventive measures

The Convention contains an inventory of preventive measures that go far beyond those of previous instruments in both scope and detail, reflecting the importance of prevention and the wide range of specific measures that have been identified by experts in recent years. Particular requirements include:

- (a) The establishment of specialized procedures and bodies to develop domestic prevention measures;
- (b) Money-laundering and other provisions similar to those in other crime prevention instruments;
- (c) Preventive measures specific to corruption, such as general requirements dealing with transparency in public administration;
- (d) Specific measures dealing with particularly critical areas such as public sector staffing, public procurement and judicial institutions;
- (e) The disclosure of assets, income and other important personal information by public officials.

Specific articles dealing with the prevention of private-sector corruption and the participation of society in anti-corruption efforts are also included.

Chapter III. Criminalization and law enforcement

The development of the Convention reflects the recognition that although efforts to control corruption must go beyond the criminal law, criminal justice measures are still a major element in the package. The Convention calls on States parties to establish or maintain a series of specific criminal offences, including not only long-established crimes such as various forms of bribery and embezzlement, but also conduct that may not yet be criminalized in many States, such as trading in official influence and other abuses of official functions. The manner in which corruption has manifested itself in different countries and the apparent novelty of some of the offences pose significant legislative and constitutional challenges. To accommodate those factors, some of the requirements of the Convention are either optional on the part of States parties (“shall consider adopting”) or subject to domestic constitutional or other fundamental requirements (“subject to its constitution and the fundamental principles of its legal system”). One example of this is the offence of illicit enrichment, in which the onus of proving that a significant increase in the assets of a public official was not illicit is placed on the official concerned. This has been shown to be a powerful anti-corruption instrument in many States, but it is a matter of controversy in others.

Other criminal justice measures are similar to those of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of

1988⁴³ and the Organized Crime Convention. These include offences relating to obstruction of justice and money-laundering, jurisdiction, the seizing, freezing and confiscation of proceeds, protection of witnesses and other matters relating to investigations and prosecutions. The subject of the sharing or return of corruption proceeds is also dealt with, but in a separate part of the Convention.

Chapter IV. International cooperation

The Convention deals with the same basic areas of cooperation in the course of investigations and other law enforcement activities as previous instruments, including the extradition of offenders, mutual legal assistance and less formal forms of cooperation. One key issue goes beyond previous treaties. Many delegations were willing to accept that some States, for constitutional or other jurisprudential reasons, could not criminalize specific types of corruption, but they wanted to ensure that those States would still be obliged to cooperate with others that had done so. The result was a compromise in which dual criminality requirements are deemed fulfilled if the “conduct underlying” the offence for which assistance is sought constitutes a criminal offence (however described) in both of the States involved, even if the definition of the offences is not identical. In addition to cooperating in criminal cases, States parties are called upon to consider assisting one another in civil or administrative proceedings as well.

Chapter V. Asset recovery

As noted above, the development of a legal basis for cooperation in the tracing, seizing, freezing and return of assets derived from, or associated in some way with, corruption was a matter of major concern to developing countries. A number of those countries were then actively seeking the return of assets alleged to have been corruptly obtained by former senior officials.⁴⁴ To assist delegations, a technical workshop featuring expert presentations on asset recovery was held during the negotiations and the subject was discussed extensively (see A/AC.261/6/Add.1 and A/AC.261/7, annex I).

Generally, States seeking assets sought to establish presumptions that would establish their right to ownership of the assets and give priority to their return over other means of disposal. States from which return was likely to be sought, on the other hand, had concerns about the incorporation of language that might compromise basic human rights and procedural protections associated with criminal liability. From a practical standpoint, there was also an effort to make the process of asset recovery as straightforward as possible, provided that basic safeguards were not compromised.

The provisions of the Convention dealing with asset recovery begin with the statement that the return of assets is a fundamental principle of the Convention. The substantive provisions then set out a series of mechanisms, including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned. In cases of embezzled public funds, the funds are returnable directly

⁴³ United Nations, *Treaty Series*, vol. 1582, No. 27627.

⁴⁴ This was the subject of extensive research and discussion for some time prior to the establishment of the Ad Hoc Committee. See, for example, the relevant reports of the Secretary-General (A/55/405, A/56/403 and Add.1 and A/57/158 and Add.1 and 2).

to the requesting State party. Funds derived from other corruption offences are returnable directly to the requesting State party where it has established its ownership. Where that has not been achieved, consideration must be given to returning the funds either to the requesting State or to a prior legitimate owner. Alternatively, they can be used to compensate the victims of the crime (article 57, para. 3).

Chapter VI. Technical assistance and information exchange

The provisions for technical assistance (including research, analysis and training) are similar to those developed with respect to transnational organized crime. However, the broader and more extensive nature of corruption is expected to generate significant differences when those provisions are implemented. Cases involving transnationality are likely to overlap with the Organized Crime Convention.

Chapter VII. Mechanisms for implementation

The concluding provisions of the Convention against Corruption establish a Conference of the States Parties to the Convention to assist States in carrying out their obligations under the Convention, reviewing the implementation of the Convention and developing recommendations to improve the Convention and its implementation. In its resolution 58/4 of 31 October 2003, the General Assembly adopted the Convention and opened it for signature. Article 68 states that the Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. In its resolution 58/4, the Assembly urged all States and competent regional economic integration organizations to sign and ratify the Convention as soon as possible; and requested the Secretary-General to provide UNODC with the resources necessary to enable it to promote the rapid entry into force of the Convention.

B. United Nations Convention against Transnational Organized Crime

The Organized Crime Convention, adopted by the General Assembly in its resolution 55/25 of 15 November 2000, focuses on the activities of organized criminal groups. It recognizes that, in many cases, corruption is both an instrument and an effect of organized criminal activity and that a significant portion of the corruption associated with organized crime is transnational in nature. The Convention is a binding international legal instrument, although the degree to which each individual provision is binding depends on the particular wording used. It entered into force on 29 September 2003.

The Organized Crime Convention establishes four specific crimes to combat activities commonly used in support of transnational organized criminal activities: participation in organized criminal groups, money-laundering, corruption and obstruction of justice. States parties are required to criminalize those activities, as well as to adopt legislation and administrative systems to provide for extradition, mutual legal assistance, investigative cooperation, preventive and other measures, as necessary, to bring existing powers and provisions up to the standards set by the

Convention. In addition to requiring that corruption be established as an offence (article 8), the Convention also requires the adoption of measures to prevent and combat corruption (article 9).

The criminalization requirements include central provisions that are binding on States parties and supplementary provisions that are discretionary. The mandatory offences capture both active and passive corruption: the promise, offering or giving, as well as the solicitation or acceptance of any undue advantage. In both types of offence, there must be: (a) A public official; (b) The advantage conferred must be linked in some way to the person's acting corruptly, or refraining from acting, in the course of official duties; and (c) The advantage corruptly conferred may be conferred directly or indirectly. States parties are also required to criminalize participation as an accomplice in such offences.

In addition to the mandatory offences, States parties are also required to consider criminalizing the same conduct where the person promising, offering or giving the benefit is in one country and the public official who requests or accepts it is in another. States parties are also required to consider criminalizing other forms of corruption. In cases where the public official involved was working in a criminal justice system and the act of corruption was directed at distorting legal proceedings, the offence relating to the obstruction of justice would also usually apply.

In addition to criminalization requirements, the Organized Crime Convention also requires the adoption of additional measures against corruption. It calls for legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials. It does not specify details of the measures to be adopted but requires steps to ensure that officials take effective action, including granting appropriate authorities sufficient independence to protect them against inappropriate influences.

Other provisions of the Organized Crime Convention may also prove useful in specific corruption cases, notably the articles on establishing money-laundering as an offence and providing for the tracing, seizure and forfeiture of the proceeds of crime. The Convention requires States parties to adopt, to the greatest extent possible within their domestic legal systems, provisions to enable the confiscation of any proceeds derived from offences under the Convention and any other property used, or destined for use, in an offence established in accordance with the Convention. Courts or other competent authorities must have powers to order disclosure or seizure of bank, financial or commercial records to assist in asset tracing. Bank secrecy cannot be regarded as an obstacle to either the tracing of the proceeds of crime or the provision of mutual legal assistance in general. Once proceeds or other property have been confiscated, they can be disposed of in accordance with the domestic law of the confiscating State, but that State is required to give priority consideration to returning them to a requesting State party in order to facilitate the compensation of victims or the return of property to its legitimate owner.

The application of the Organized Crime Convention is generally limited to cases that involve an organized criminal group or events that are transnational in nature. The requirements of transnationality and the involvement of an organized criminal group have to be met if the various international cooperation requirements are to be invoked in corruption cases. Where those requirements are met, a wide

range of assistance and cooperation provisions are to be applied by States parties to the Convention to assist in investigations and, ultimately, to help secure the extradition or prosecution of offenders.

C. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions⁴⁵ on 21 November 1997. The Convention entered into force on 15 February 1999. By early 2004, some 35 States had ratified the Convention. Given the role of the private sector in international corruption and its impact on development, the Convention is of considerable significance.

As its name implies, the OECD Convention is relatively narrow in scope: its sole focus is to use domestic law in exporting countries to criminalize the bribery of foreign public officials. It applies both to active and passive bribery but does not apply to forms of corruption other than bribery—to bribery that is purely domestic or to bribery in which the direct, indirect or intended recipient of the benefit is not a public official. Nor does it apply to illicit political donations (arguably the largest loophole in the framework of the Convention). Excluded, too, are cases where a bribe was paid for purposes unrelated to the conduct of international business and the gaining or retaining of some undue advantage in such business.

The obligation to criminalize includes any case where the offender offers, promises or gives any undue pecuniary or other advantage to a foreign public official in order to induce the recipient or another person to act or refrain from acting in relation to a public duty, if the purpose was to obtain or retain some business or improper advantage in the conduct of international business. States parties are required to ensure that incitement, aiding and abetting or authorizing bribery is also criminalized, which means that lawyers and accountants who knowingly provide professional services in support of such bribery are also liable to prosecution. The offences established pursuant to the OECD Convention must also apply to corporations and other legal persons, in addition to individuals. Attempts at bribery and conspiracies to bribe, which pose a problem for some legal systems, must be criminalized if the equivalent conduct of bribing a domestic public official is criminalized. Prosecutorial discretion is recognized, but the Convention requires that it should be exercised on the basis of professional rather than political criteria.

Punishments must be effective, proportionate and dissuasive and of sufficient seriousness to trigger the application of domestic laws governing mutual legal assistance and extradition. Any proceeds, or property of equivalent value, must be either the subject of powers of seizure and forfeiture or the imposition of equivalent monetary sanctions. The bribing of a foreign public official must also “trigger” national laws against money-laundering to the same extent as the bribing of a domestic public official. In addition to criminal, civil and administrative penalties to ensure compliance, the OECD Convention also requires measures to be taken to

⁴⁵ *Corruption and Integrity Improvement Initiatives in Developing Countries* (United Nations publication, Sales No. E.98.III.B.18).

deter and detect bribery in the form of accounting practices, in order to prevent domestic companies from concealing bribes paid to foreign officials.

Since the Convention came into force, the OECD Working Group on Bribery in International Business Transactions has adopted a rigorous process of assessing the status of implementation and compliance with its terms. States assess not only their own progress, but also that of other States parties. Since 1999, peer review has taken place in over half of the 34 States parties. For each of those States, the Working Group conducted an evaluation that was then made available to the public.

D. Criminal Law Convention on Corruption

The Committee of Ministers of the Council of Europe adopted the text of the Criminal Law Convention on Corruption⁴⁶ on 4 November 1998. The Convention is open for signature and ratification by member States of the Council of Europe and by non-member States that participated in its negotiation. Other States can also join by accession, provided that certain preconditions are met, including the consent of all the contracting States that are represented sit in the Committee of Ministers.

The Criminal Law Convention on Corruption entered into force on 1 July 2002, after it had been ratified by 14 States. By July 2004, some 30 States had signed the Convention and deposited instruments of ratification or accession and 16 States had signed but had not yet ratified the Convention.⁴⁷

The Convention applies to a broad range of occupations and circumstances, but the scope of the action or conduct that States parties are required to criminalize is relatively narrow. It contains provisions criminalizing a list of specific forms of corruption; and it applies to active and passive forms of corruption as well as to both private and public sector cases.

The Convention also deals with a range of transnational cases. Bribery of foreign public officials and members of foreign public assemblies is expressly included; offences established pursuant to the provisions on private sector criminalization would generally apply in transnational cases in any State party where a portion of the offence had taken place sufficient to trigger domestic jurisdictional rules. Most of the offences established are limited to bribery, which the instrument does not define. Trading in influence and laundering the proceeds of corruption must also be criminalized, but the instrument does not deal with such forms of corruption as extortion, embezzlement, nepotism or insider trading. As with other international instruments, it does not seek to define or criminalize corruption in general terms.

States parties to the Convention are required to ensure that they have specialized persons or entities dedicated to the fight against corruption. These must be given sufficient independence, training and resources to enable them to operate effectively. It also provides for the protection of informants and witnesses who cooperate with investigators, the extradition of offenders, mutual legal assistance and other forms of cooperation. The tracing, seizing and freezing of property used in corruption and the proceeds of corruption are also provided for, but the text is

⁴⁶ Council of Europe, *European Treaty Series*, No. 173.

⁴⁷ Council of Europe Treaty Office (<http://conventions.coe.int>).

framed in terms of international cooperation and does not deal with the return or other disposal of recovered proceeds. Mutual legal assistance may be refused if acceding to a request would undermine the fundamental interests, national sovereignty, national security or *ordre public* (public interest) of the requested party. Most importantly, it may not be refused on the grounds of infringing bank secrecy.

E. Civil Law Convention on Corruption

The Civil Law Convention on Corruption,⁴⁸ adopted by the Committee of Ministers of the Council of Europe on 9 September 1999, was the first attempt to define common international rules for civil litigation in corruption cases. The Convention requires States parties to cooperate effectively in civil cases, to take steps to protect those who report corruption and to ensure the validity of private sector accounts and audits.

Whereas the Criminal Law Convention seeks to control corruption by ensuring that offences and punishments are in place, the Civil Law Convention requires States parties to ensure that those affected by corruption can sue the perpetrators under civil law, effectively drawing the victims of corruption into the anti-corruption strategy of the Council of Europe.

On the one hand, this has the advantage of making corruption controls partly self-enforcing by empowering victims to take action on their own initiative. On the other hand, it entails some loss of control on the part of government agencies. Some potential litigants may effectively be excluded by their lack of resources, but in some jurisdictions such a right can give rise to class actions, brought on behalf of a large number of victims. Corporate civil litigants have the financial means to bring a civil action; however, they are likely to settle proceedings purely on business or economic grounds, and this may not be in accordance with the overall anti-corruption strategy of the Government.

Some argue that creating a civil action may also give rise to conflicting or parallel civil and criminal proceedings and a need for rules to resolve such problems. That argument overlooks the fact that many criminal offences (for example, assault) carry with them the right to sue for compensation in civil court. There is much to be said for the procedure in civil law countries whereby both criminal and civil proceedings are combined into a single court action.

As with the Criminal Law Convention, the Civil Law Convention was drafted as a binding legal instrument. Civil law provisions must be enacted that ensure that anyone who has suffered damage resulting from corruption can recover material damage, loss of profits and non-pecuniary loss. Damages can be recovered against anyone who has committed a corrupt act, authorized someone else to do so or failed to take reasonable steps to prevent the act (including the State itself), provided that a causal link between the act and the damages claimed can be proved. This provision is well suited to the European context. For developing countries, however, there would be the possibility that civil claims could be mounted against the State on the grounds of public officials being involved in acts of corruption that have caused losses to third parties, for example, in the tender processes of an exercise in

⁴⁸ Council of Europe, *European Treaty Series*, No. 174.

public procurement. That could mean that the public interest could be damaged twice: first, as victims of the corrupt actors and then as having to pay damages as compensation for what they have done. These would be losses that a developed country might be expected to absorb, but those losses could be catastrophic for a very poor country.

Courts are also given the power to declare contractual obligations to be null and void where the consent of any party to the contract has been “undermined” by corruption.

Considering the types of corruption to which it applies, the Civil Law Convention is narrower in scope than the Criminal Law Convention, as it covers only bribery and similar acts; however, it applies to such acts in both the private sector and the public sector.

The Civil Law Convention on Corruption entered into force on 1 November 2003 after it had been ratified by 14 States. By July, 2004, the total number of ratifications or accessions stood at 21 and a total of 17 States had signed but not ratified the Convention.⁴⁹

F. Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests and Protocols thereto of 1995

The Convention on the protection of the European Communities’ financial interests⁵⁰ and its two protocols represent an early attempt on the part of the European Union to address forms of malfeasance that are harmful to the financial interests of the Union itself. They are legally binding on European Union member States and address corruption and other financial or economic crimes, as well as related conduct, but only insofar as the conduct involved affects the interests of the European Union itself. The Convention deals with a list of conduct designated as fraud affecting the European Communities’ financial interests.

The First Protocol to the Convention on the Protection of the European Communities’ financial interest⁵¹ deals with active and passive corruption. The Second Protocol⁵² deals with money-laundering and the confiscation of the proceeds of fraud and corruption. The forms of active and passive corruption dealt with in the first protocol generally consist of bribery and similar conduct in which some promise, benefit or advantage is solicited, offered or exchanged in return for undue influence on the exercise of a public duty.

The forms of fraud set out in the Convention itself cover other areas of corruption, such as the submission of false information to a public authority to induce it to pay funds or transfer property that it would not otherwise have done. The first protocol distinguishes between the criminal conduct of officials, who commit passive corruption by requesting or receiving bribes or similar

⁴⁹ Council of Europe Treaty Office (<http://conventions.coe.int>).

⁵⁰ *Official Journal of the European Communities*, C 316, 27 November 1995.

⁵¹ *Ibid.*, C 313, 23 October 1996.

⁵² *Ibid.*, C 221, 19 July 1997.

considerations, and others, who commit active corruption by promising or giving such considerations for improper purposes.

The other instruments require States parties to incorporate (“transpose”) the principles set out into their national criminal law, which would generally result in offences being applicable to everyone who engages in the prohibited conduct. Generally, the question of the liability of legal persons, such as corporations, would be covered by the same principle. Article 3 of the Convention calls for the head of a business or those exercising control within a business to be held criminally liable in cases where the business commits a fraud offence.

G. Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union

The Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union⁵³ incorporates essentially the same terms as the Convention on the Protection of Financial Interests, but the coverage has been broadened to include conduct on the part of officials of the European Community and its member States. The conduct to which it applies is essentially bribery and similar offences that States parties are required to criminalize. It does not deal with fraud, money-laundering or other corruption-related offences.

H. Inter-American Convention against Corruption

The principal focus of the anti-corruption strategy of OAS has been the Inter-American Convention against Corruption (E/1996/99). The Inter-American Convention was drafted as a binding legal instrument, although some specific provisions contain language that limits or provides some element of discretion with respect to its application. Perhaps its most imaginative contribution to the fight against corruption was to provide that the fact that an act of corruption involved political motives or purposes did not necessarily make the act a political offence. This closed off an escape route for fugitive officials who might otherwise claim exemption from legal assistance and extradition procedures.

Generally, the obligations to criminalize acts of corruption are mandatory. States parties need only consider taking other steps, such as certain preventive measures. The Inter-American Convention entered into force on 6 March 1997, after having been ratified by 20 OAS member States. States that are not members of OAS may become parties to the Convention by acceding to it.

It is open to States parties to apply the Inter-American Convention to other forms of corruption if other States agree. The instrument also applies to attempted offences and to various categories of participant, such as conspirators and those who instigate, aid or abet offenders. States parties are required to adopt transnational bribery and illicit enrichment as domestic offences and to ensure that adequate

⁵³ *Official Journal of the European Communities*, C 195, 25 June 1997.

provision is made to facilitate the required forms of cooperation, such as mutual legal assistance and extradition.

Questions of transnational bribery and illicit enrichment are dealt with separately. Faced with constitutional difficulties on the part of some States, those offences are made subject to the constitution and fundamental principles of the legal system of each State party. It is acknowledged that constitutional constraints may preclude or limit full implementation. Where that is the case and a State party does not establish offences for those reasons, it is still obliged to assist, and cooperate with, other States parties in such cases, insofar as its laws permit. Transnational bribery and illicit enrichment are designated as acts of corruption, making them subject to the other provisions of the Convention.

The provision on transnational bribery requires States parties to prohibit and punish the offering or granting of a bribe to a foreign government official by anyone who is a national, habitual resident or a business domiciled in their territory. The language is broader than that of the equivalent provisions of the OECD Convention, covering not only bribery where the purpose relates to a contract or business transaction but also any other case where the bribe is connected to any act or omission in the performance of that official's public functions. The provision on illicit enrichment simply requires the establishment of an offence for the accumulation of a significant increase in assets by any public official if that official cannot reasonably explain the increase in relation to his or her lawful functions and earnings.

The foregoing criminalization requirements are essentially mandatory. In addition, States parties are also asked to consider a series of further offences that, if adopted, would become acts of corruption and trigger the cooperation requirements of the Inter-American Convention even among States that have not adopted them:

- (a) The improper use of confidential information by an official;
- (b) The improper use of government property by an official;
- (c) The seeking of any decision from a public authority for illicit gain;
- (d) The improper diversion of any state property, monies or securities.

The Convention creates a series of preventive measures although, as noted above, they are not mandatory:

- (a) Standards of conduct for public functions and mechanisms to enforce them;
- (b) The instruction of public personnel on ethical rules and their responsibilities;
- (c) Systems for registering the incomes, assets and liabilities of those who perform public functions;
- (d) Government revenue and control systems that deter corruption;
- (e) Tax laws that deny favourable treatment for corruption-related expenditures;
- (f) Protection for those who report corruption;

- (g) Oversight bodies to prevent, detect, punish and eradicate corruption;
- (h) The study of further preventive measures.

With the Inter-American Convention, as with several other instruments, bank secrecy cannot be invoked as a reason for not cooperating; however, where information protected by bank secrecy is disclosed, it cannot be used for purposes outside the scope of the initial request without authorization from the State that provided it. The fact that an alleged act of corruption was committed before the Convention entered into force does not preclude procedural cooperation in criminal matters between States parties. That provision in no case affects the principle of non-retroactivity in criminal law.

I. Southern African Development Community Protocol against Corruption

In addition to defining and describing corruption as a problem, the purposes of the Southern African Development Community (SADC) Protocol against Corruption are threefold: to promote the development of anti-corruption mechanisms at the national level, to promote cooperation in the fight against corruption by States parties and to harmonize the national anti-corruption legislation of States in the region.

The Protocol provides a broad set of preventive mechanisms that includes the development of codes of conduct for public officials, transparency in the public procurement of goods and services, access to public information, protection of whistle-blowers, establishment of anti-corruption agencies, the development of systems of accountability and control, participation of the media and civil society and the use of public education and awareness as ways to introduce zero tolerance of corruption.

J. Economic Community of the West African States Protocol on the Fight against Corruption

The member States of the Economic Community of the West African States signed the Protocol on the Fight against Corruption in Dakar in December 2001. The aims and objectives of the Protocol are:

- (a) To promote and strengthen the development in each of the States parties effective mechanisms to prevent, suppress and eradicate corruption;
- (b) To intensify and revitalize cooperation between States parties, with a view to making anti-corruption measures more effective;
- (c) To promote the harmonization and coordination of national anti-corruption laws and policies.

Chapter XIV

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.

“Extradition”⁵⁴ is the surrender by one State, at the request of another, of a person who is accused or has been convicted of a crime committed within the jurisdiction of the requesting State. Although new forms of judicial cooperation in criminal matters have been developed, such as transfer of proceedings, “extradition for trial” has maintained its importance because the place where the offence was committed is considered to be the most convenient place to try an offender.

When a suspect or convicted person is located in a foreign State (the “requested State”), a prosecutor or investigating judge of the requesting State may decide to have that person extradited from the requested State to face trial or the enforcement of the sentence pronounced in the requesting State.

A. Legal basis for extradition

1. From bilateral treaties to regional agreements and multilateral schemes for extradition

A State has neither a legal duty nor a moral duty to extradite in the absence of a specific agreement binding it to do so. Because of this principle, many States, in particular those of the common law tradition, will not extradite in the absence of a treaty or an ad hoc agreement such as an exchange of letters. Those States, as well as many other States, have traditionally based their extradition relationships on bilateral treaties. Many States do not permit extradition for the purpose of questioning or investigating a fugitive.⁵⁵

With the inherent difficulties of separately negotiating a large number of bilateral instruments, States have increasingly resorted to regional agreements and multilateral schemes for extradition. (The 50-odd States of the Commonwealth, formerly the “British Commonwealth”, have had their own collective arrangements for extradition since 1966.) In the face of crimes with effects of international proportion, more general multilateral conventions have been developed, directed at

⁵⁴ For a further discussion, see United Nations Office on Drugs and Crime, *Anti-Corruption Toolkit ...*, tool 42 (“Extradition”).

⁵⁵ Chile, for example, has twice refused to extradite former President Carlos Menem of Argentina on the grounds that he has not been charged with any criminal offence (http://support.casals.com/aaaf1ash1/new_busca.asp?ID_AAACControl=10450).

particular crimes such as terrorist acts, drug trafficking and organized crime. Those conventions commonly include articles relating to extradition, such as the following:

(a) Convention offences are deemed to be included as extraditable offences in any treaty existing between contracting parties;

(b) A convention is considered to be a treaty for extradition purposes, where extradition is conditional on a treaty and no treaty exists between two contracting parties;

(c) The convention offences are considered extraditable if extradition is not conditional on a treaty;

(d) States parties are obliged either to extradite alleged offenders or to bring them before their own courts with jurisdiction based on, for example, the nationality of the offender (the principle of *aut dedere aut judicare*).

2. Extradition without a treaty

Some States allow extradition without a treaty, on the basis of national legislation, which imposes in principle a condition of reciprocity. This is the basis for the Commonwealth Scheme, referred to above, which is not treaty-based.

In their replies to a questionnaire prepared by the Secretary-General on the United Nations Declaration on Crime and Public Security (General Assembly resolution 51/60, annex), over one half (16 out of 26) of the responding States indicated that extradition for offences not covered by a treaty or to States where no treaty existed might be permitted on a discretionary basis, subject to applicable domestic constitutional or legal constraints (E/CN.15/2002/11, para. 32).

B. Extraditable offences

1. From the “list” approach to the “eliminative” approach

Most extradition treaties developed between the late 1800s and the early or mid-1900s defined extradition crimes by referring to a list of offences. Such lists are generally stagnant and Governments fail to bring them up to date to cover new crimes and changing terminologies. To make matters worse, on occasions certain serious offences were omitted from the list from the outset. Where it is not possible to supplement a particular treaty by means of a declaration of reciprocity, a fugitive is likely to escape extradition.

In more recent treaties, this approach has generally given way to an “elimination” test: any offence punishable in both the requesting State and the requested State, by a minimum penalty defined by the two States (such as two years’ imprisonment), is considered to be sufficiently serious as to warrant being an extraditable offence.

2. Relaxed application of the dual criminality principle

For extradition to be “available” as an option, the act or acts in question must constitute a crime in both the requesting State and the requested State. This rule

serves two different purposes: firstly, to ensure the lawfulness of any form of deprivation of liberty according to the law of the requested State on the grounds that no individual may be arrested or detained on account of facts that are not punishable under the laws of that State; and, secondly, to respect the rule of reciprocity in international proceedings.

Many extradition cases fail because of a technical approach to dual criminality that stresses even very slight differences between the ways in which particular States have defined, named or proved criminal offences. For example, what may be called “theft” in one State may be named “larceny” in another. Although the conduct of the alleged offence may include all of the elements of fraud, as defined in both States, the definitions of the offences created to counter them may differ. Therefore, States have been looking for a more modern test for dual criminality, one that focuses not on technical terms or definitions but on the substantive underlying conduct. This new test, which has greatly simplified and improved extradition practices where it has been introduced, examines whether the conduct alleged against the fugitive would constitute a criminal offence in the requested State, regardless of whether the offences in the two States carry different names or have different constituent elements.

Not all problems have been solved. In relation to the corruption of public officials, the problem may arise where States punish corruption of only their own public officials, not that of public officials of other States. (If State A requests State B to extradite X, charged with corruption of a public official in State A, State B may not be able to extradite X because the facts, had they been committed on State B’s territory, would not constitute an offence.) This has proved an obstacle to extradition in a number of cases.

A flexible solution is the “transformative” interpretation, which is followed in such countries as Austria, Germany and the Netherlands. In this approach, the requested State substitutes its own national elements for foreign national elements in the definition of the crime in an extradition request. Accordingly, for the purpose of extradition, bribery of national and foreign public officials is treated as being the same.

C. Bars and limits to extradition

1. The “political offence” and the “fiscal offence” exceptions

There is no internationally accepted criteria or definition of the term “political offence” or the rule that bars extradition for such an offence.

A distinction is often made between a “purely political offence” (an offence of opinion, political expression or one that otherwise does not involve the use of violence such as treason and espionage) and a “relative political offence” (which involves violence as an incidence of the political motivation and goal of the actor, but which does not constitute wanton or indiscriminate violence directed against an internationally protected person, such as a civilian—that is, it does not constitute an act of “terrorism”).

In article XII of the Inter-American Convention against Corruption, it is stated that, for the purposes of application of the Convention, the fact that the property derived from an act of corruption was intended for political purposes or that it is

alleged that an act of corruption was committed for political motives or purposes shall not suffice in and of itself to qualify the act as a political offence or as an offence related to a political offence. This is seen as an important provision in a region where corrupt senior public officials had previously been known to flee to neighbouring countries with vast sums of money and to be given political asylum there.

There is a general trend towards restricting, if not excluding altogether, the applicability of the political offence exception in respect to violent criminal acts. Traditionally, fiscal offences have been omitted from the scope of extraditable crimes, either through an explicit provision or by omission from the lists of extraditable offences.

The traditional reluctance of States to refuse to include tax offences within the scope of extradition (for the most part because States have no mutual interest in enforcing law peculiar to another State's politico-economic system) is now breaking down owing to increased concerns about organized crime, drug trafficking, money-laundering, massive tax evasion and violations of currency laws. The United Nations Convention against Transnational Organized Crime explicitly prohibits States parties from refusing a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

2. Non-extradition of nationals

In many States, in particular those of the civil law tradition, the extradition of a State's own nationals is prohibited, whether by constitutional law or practice. In their replies to the questionnaire prepared by the Secretary-General on the United Nations Declaration on Crime and Public Security, only 14 of the 28 responding States indicated that their law allowed for the extradition of their nationals. The position differed greatly among the States that allowed for this, the matter being governed by treaties or agreements (E/CN.15/2002/11, para. 33). Attitudes to extradition appear to be softening, particularly in Western Europe, where the rights of extradited persons are protected by a regional human rights convention.

In most instances, States that do not extradite nationals have domestic jurisdiction to prosecute their own nationals for offences committed in the territory of another State (*judicare* instead of *dedere*). In their replies to the questionnaire prepared by the Secretary-General on the United Nations Declaration on Crime and Public Security, 16 of the States that responded to the survey indicated that their laws provided for obligatory or discretionary jurisdiction in such cases. Preconditions for such jurisdiction varied in accordance with general factors, such as national criminal legislation, applicable treaties and case-specific factors, such as the nature of the crime and the admissibility of evidence (E/CN.15/2002/11, para. 34).

Notwithstanding, practical problems continue to impede significantly the effectiveness of this alternative to extradition. It often seems to be the case that, despite the best efforts to complete investigations and bring a case to trial, an adequate case cannot be assembled. Foreign witnesses may not be available or other evidence may be insufficient or inadmissible. Ten out of the 18 responding States reported that between 1996 and 1998, having refused extradition, they had subsequently prosecuted their own nationals on the grounds of *aut dedere aut*

judicare (E/CN.15/2002/11, para. 33). One solution is for legislation to provide for the conditional extradition of a national, subject to the requirement that he or she be returned promptly after trial to the extraditing State to serve any sentence there.

3. Other bars

Where the defence of “double jeopardy” is contained in a treaty, its success will depend largely on the similarity of the charges for which the fugitive has been requested and for which he has been already prosecuted, acquitted or convicted. Most treaties contain a defence to extradition where the prosecution at issue is barred by a statute of limitations of the requested or requesting State. The treaties vary as to which State’s statute is to be relied upon, or whether it is the longer of the two. In recent years, the member States of the European Union initiated a process in which many such barriers have been reconsidered. Among other things, this has led to a lessening of the severity of the rule prohibiting extradition where, under the law of the requested State, the individual is immune from prosecution or punishment by reason of lapse of time.

Other, more recent, barriers focus on the situation of a fugitive after extradition, such as the “non-discrimination” rule. In instances in which the ambit of the political offence exception is either limited or eliminated, the rule relating to discrimination has to be relied upon more heavily than usual. Other concerns highlight the possible application of the death penalty or likely violations of basic human rights.

4. Specialty rule

It is an established principle in extradition law that a person who has been extradited may not be proceeded against, sentenced or detained for any offence committed prior to his surrender other than that for which he was surrendered. Nor can he or she be restricted in his or her personal freedom for any other reason, other than with the consent of the requested State or of the extradited person. This so-called principle of “specialty” not only protects the fugitive’s rights to the extent that it prevents the fugitive from being requested for one offence and tried for another, but it also upholds the contractual nature of the agreement between the two States, in that the requesting State has to accept that the requested State has granted extradition for the offences specified and not for others.

D. Procedural issues

1. A slow and cumbersome system

International conventions and treaties usually include very few provisions on procedural issues. These are left to be governed largely by the national laws of the States involved.

The traditional system for applying for mutual legal assistance is somewhat complex:

(a) *A two-stage system in the requesting State.* The authorities of the requesting State forward a request for a fugitive’s extradition to the authorities of the requested State. The request usually originates with the prosecuting authority

with jurisdiction in the criminal case in question (public prosecutor or court) and is formalized and prepared for transmission by the responsible administrative authority of the requesting State;

(b) *This is followed by the use of diplomatic channels.* The administrative authority of the requesting State generally transmits the request to its embassy in the requested State, which forwards the request to the ministry of foreign affairs of the requested State. That ministry then forwards it to the ministry of justice, which then sends it on to the appropriate prosecuting office or court, depending upon that State's legal system;

(c) *This is followed by a two-stage-system in the requested State.* In the requested State, the procedure can be divided into two stages. Firstly, there is a judicial stage, in which a court decides on whether the domestic legal requirements for the extradition of the person have been met. Then there is an administrative stage. Where the court has decided in favour of the request, the responsible administrative authority (for example, the minister of justice) has to decide whether or not the extradition will be granted. The judiciary examines whether the legal requirements in the treaty or in domestic legislation have been met, but extradition itself remains a prerogative of the Government, as an act of State. The administrative authority of the requested State takes the final decision and informs the authorities of the requested State of its decision through diplomatic channels.

2. Extradition proceedings are not themselves deemed to be criminal proceedings

The rules of procedure applicable to criminal cases are usually not applicable to extradition cases, other than “due process” and “fundamental fairness” requirements.

A long-standing “rule of non-inquiry” requires that it is not for the court to take into account the likely treatment of a fugitive if he or she is extradited to the requesting State. The assessment of such grounds is usually left to the discretion of the administrative authority. That authority also has the power to require the requesting State to provide any necessary assurances before extraditing the fugitive. These might include an undertaking that that person will be returned upon completion of the legal proceedings, that the fugitive will not be tried before a special or military tribunal or that the death penalty will not be imposed in the event of a conviction for a capital offence.

The issue of the evidence to be provided by the foreign State in support of an extradition request remains contentious, in particular as between civil and common law countries.

For civil law countries, the issuing of a warrant of arrest within a requesting State constitutes evidence that a judicial authority within that State has determined that there is sufficient evidence for the person to stand trial. On that basis, they expect the authorities in the requested State to be able to accept and rely on that determination and not to look behind it to reassess the underlying basis for the finding.

By contrast, however, common law countries have traditionally required not only that the warrant be provided, but also that a submission of evidence by the foreign State be made that is sufficient to meet a prescribed domestic standard.

Many such States also demand that, before extradition can be granted, the evidence be in a form that complies with their own domestic law. To meet this burden, the authorities of the requesting State can be required to generate an entirely new package of evidence that they would not normally put together and that might not be used (or perhaps even be usable) in any ultimate domestic trial process against the fugitive. The same problem can also arise between countries with the same general traditions but with differing rules of evidence and differing approaches to extradition.

Considerable reform has been achieved in this area. Several common law countries (such as Australia and the United Kingdom) have eliminated the requirement for evidence in prescribed circumstances. Others (such as the United States) have adopted a lower threshold of proof and will accept evidence adduced in a summary form, without requiring that the evidence meet their own normal evidentiary standards. To the extent that there continue to be States that require the submission of evidence in a form admissible under domestic law, there is still a need to develop ways and means of reducing the burden of needlessly demanding evidentiary requirements. Enhanced communication between the relevant authorities in the different States in order to increase understanding can help to ameliorate this.

3. Modernization and simplification of the procedure

(a) Provisional arrest

More recent international instruments provide that, prior to the filing of a formal extradition request, a requesting State may request the provisional arrest of a fugitive. Provisional arrest can be necessary to avoid the risk of the fugitive disappearing while the extradition request and accompanying documentation is being prepared by the requesting State. Existing treaties provide for periods of up to 60 days of provisional arrest, after which a fugitive must be released if no formal extradition request is presented.

The mechanics of provisional arrest are essentially informal. The liaison office of the International Criminal Police Organization (Interpol), usually located within the principal or central law enforcement agency of each Interpol member State, sends a message to the Interpol liaison office in the State where the person is believed to be located. If the whereabouts of the person sought are unknown, Interpol headquarters (in Lyon, France) then issues an “international warrant” (a so-called “red notice”) or an “alert” or both to some or all of its liaison stations. A study carried out by the Interpol General Secretariat in 1997 showed that a majority of the Interpol member States consider that an Interpol “red notice” should be regarded as a valid request for provisional arrest. Immigration and customs agencies are also advised of the request.

The rapidly growing computerization of law enforcement agencies means that these notifications are generally recorded promptly in the databases of the different law enforcement agencies, leading to greater effectiveness in tracking and apprehending fugitives.

Reasons for not executing requests for provisional arrests include:

- (a) Inability to locate the subject;

- (b) Failure of the request to satisfy legislative or constitutional requirements in the requested State;
- (c) Lack of information sufficient to determine whether the request meets applicable requirements;
- (d) The withdrawal of the request;
- (e) The absence of dual criminality;
- (f) The lack of a treaty or relevant national law applicable to the requesting State.

Where States permit direct requests for provisional arrest, additional conditions are usually applied.

(b) *Direct contact between ministries of justice or through designated central authorities*

At the regional level, the reliance on the diplomatic channel for the communication of extradition requests has given rise to unnecessary delays whereas direct contact between ministries of justice or through designated central authorities have offered more satisfactory alternatives. As with mutual legal assistance, central authorities are usually established to receive and consider requests for extradition. Such authorities serve as a point of contact between Governments, assessing incoming requests in order to refer them to the appropriate domestic agencies for follow-up or drawing the attention of a requesting State to any problems or insufficiencies.

Although changes in many of these areas can only be brought about by legislation and appropriate treaty revision, other significant improvements can be facilitated more simply. In the course of its presidency of the European Communities in 1992, the United Kingdom initiated discussions with other member States that resulted in agreement on several practical steps that could be taken to remove avoidable delays. A number of improvements resulted, including the publication of a guide to the extradition procedures of the States concerned. These contain flow charts, a list of contact points and other information of a practical nature. In 1994, the secretariat of the Council of Europe was given the task of extending this text to include all parties to the European Convention on Extradition.⁵⁶

Such initiatives do not necessarily require a regional or subregional setting. For example, the preparation of a practical guide to domestic extradition law and practice can be undertaken unilaterally and distributed by the central authority to States with which there are existing extradition agreements or to all parties to the 1988 Convention. The availability of such a practical explanatory note is also of value in the preliminary stages of extradition treaty negotiations with States that have little or no experience of local requirements.

(c) *Use of modern means of communication*

A concern with administrative efficiency is evident in the many precedents that authorize the use of electronic means of communication.

⁵⁶ United Nations, *Treaty Series*, vol. 359, No. 5146.

(d) *Simplified extradition procedures*

In recent years, a development that has also attracted attention is the provision for summary or simplified procedures to expedite the extradition process when the fugitive contests extradition. Where the fugitive consents to extradition, surrender may be enforced without any other formalities provided that consent has been freely given. This approach has been adopted in a number of regional arrangements including the 1962 Treaty concerning Extradition and Mutual Assistance in Criminal Matters,⁵⁷ the 1990 Schengen Convention and the 1995 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.⁵⁸ It is also found in article 6 of the Model Treaty on Extradition (General Assembly resolutions 45/116, annex, and 52/88, annex).

⁵⁷ *Ibid.*, vol. 616, No. 8893.

⁵⁸ *Official Journal of the European Communities*, C 078, 30 March 1995.

Chapter XV

Mutual legal assistance

Mutual legal assistance⁵⁹ is an international cooperation process by which States seek and provide assistance in gathering evidence for use in the investigation and prosecution of criminal cases and in tracing, freezing, seizing and ultimately confiscating criminally derived wealth. It covers a wide and ever-expanding range of assistance. It may include search and seizure, production of documents, taking of witness statements by video-conference and temporary transfer of prisoners or other witnesses to give evidence.

Mutual legal assistance differs from traditional cooperation between law enforcement agencies. Law enforcement cooperation enables a wide range of intelligence- and information-sharing, including by witnesses, provided that they agree to give information, documents or other evidentiary materials voluntarily. If a witness is unwilling, coercive measures, usually in the form of a court order from a judicial officer, will be required.

Mutual legal assistance also differs from extradition, although many of the legal principles underlying mutual legal assistance are derived from extradition law and practice. Extradition involves the surrender of a person from one sovereign jurisdiction to another and fundamentally affects the liberty and possibly the life of that person. Accordingly, extradition law, practice and procedure typically enable less flexibility and room for discretion in granting a request than mutual legal assistance.

The Informal Expert Working Group on Mutual Legal Assistance Casework Best Practice, at a meeting held in Vienna from 3 to 7 December 2001, recommended that States take the actions described below in order to facilitate the providing of effective mutual legal assistance. For the purpose of this *Handbook*, only a few relevant points are mentioned.

A. Strengthening effectiveness of central authorities

1. Establishment of effective central authorities

The United Nations conventions on illicit drugs and crime all contain extensive and broadly similar provisions relating to the provision of mutual legal assistance. Included in their provisions are requirements for each party to notify the Secretary-General of the central authority designated by it to receive, transmit and execute letters of request for mutual legal assistance. This information is critical to requesting States in planning and drawing up such requests. It must be accurate, up-to-date and widely available to all those who frame or transmit requests for mutual legal assistance. States that have not already done so should establish a central authority for the purpose of facilitating the execution of requests for mutual legal assistance made pursuant to article 7 of the 1988 Convention. Central authorities should be staffed with practitioners who are legally trained and who have

⁵⁹ For a further discussion, see United Nations Office on Drugs and Crime, *Anti-Corruption Toolkit ...*, tool 43 (“Mutual Legal Assistance”).

developed institutional expertise in the area of mutual legal assistance. The designation of authorities with important national drug control capability in other fields (such as ministries of health), but little if any in international mutual legal assistance, should be avoided.

2. Ensuring the dissemination of up-to-date contact information

Each of the States parties to the 1988 Convention should ensure that contact information contained in the directory of competent national authorities under article 7 of the Convention is kept up to date and, to the extent possible, provide information for contacting its central authority via telephone, telefax and the Internet.

3. Ensuring round-the-clock availability

Both with respect to the 1988 Convention and generally, the central authority of a State should, to the greatest extent possible, provide a means for contacting an official of the central authority for the purposes of executing an emergency request for mutual legal assistance if necessary after working hours. If no other reliable means is available, States may consider ensuring that their Interpol national central bureau or other existing channel is able to reach such an official after working hours.

4. Consistency of central authorities

The Expert Working Group noted the wide and growing range of international conventions, each requiring parties to afford one another the widest measure of mutual legal assistance in relation to the offences covered by the particular convention and each requiring for that purpose the designation of a central authority. The Expert Working Group also noted the potential for the fragmentation of effort and for inconsistencies of approach if different central authorities are designated for different groups of offences. States are therefore urged to ensure that their central authorities under the 1988 Convention and the Organized Crime Convention are a single entity of the kind described in this section. This will make it easier for other States to contact the appropriate component for all kinds of mutual legal assistance in criminal matters and will facilitate greater consistency of mutual legal assistance practice for different kinds of criminal offences.

5. Reducing delay

The Expert Working Group also noted that significant delay in the execution of a request was often caused by delays in consideration of the request by the receiving central authority and the transmission of the request by the central authority to the appropriate executing authority. States should take appropriate action to ensure that requests are examined and prioritized by central authorities promptly upon receipt and are transmitted to executing authorities without delay. States should also consider placing time limits on the processing of requests by central authorities. States are encouraged to afford requests from foreign authorities the same priority as similar domestic investigations or proceedings. They should also ensure that executing agencies do not unreasonably delay the processing of requests. Appropriate coordination arrangements should be in place in federal jurisdictions

where constituent states have execution responsibilities to minimize the risk of delayed responses.

B. Ensuring awareness of national legal requirements and best practice

There is a need to increase the availability of practical guides regarding the national mutual legal assistance legal framework and practice (both domestic manuals and guides for foreign central authorities). It is important that domestic authorities are aware of the availability of mutual legal assistance and know the procedures to follow to obtain that assistance in relation to an investigation or prosecution. It is also useful, in particular in larger jurisdictions where there may be several authorities involved in the making or execution of such requests, to provide for the sharing of information between those authorities.

States should adopt mechanisms to allow for the dissemination to domestic authorities of information regarding the law, practice and procedures for mutual legal assistance and on making requests to other States. One possible approach is to develop a procedural manual or guide for distribution to relevant law enforcement, prosecutorial and judicial authorities. Other useful mechanisms include the distribution of a regular newsletter and the convening of meetings of domestic practitioners to provide updates on cases, legislation and other developments.

The provision of information to foreign authorities was also highlighted as an important measure to facilitate effective cooperation. States should develop guidelines on domestic law and procedures relating to mutual legal assistance to inform foreign authorities on the requirements that must be met to obtain assistance. Any such guidelines should be made available to foreign central authorities through a variety of methods, such as, for example, publication on a website, direct transmission to law enforcement partners in other States and distribution through the United Nations Office on Drugs and Crime or other international organizations.

1. Increasing training of personnel involved in the mutual legal assistance process

Effective implementation of mutual legal assistance instruments and legislation is not possible without personnel well trained in the applicable laws, principles and practices. States should use a broad range of methods to provide such training, in a manner that will allow for the expertise to be sustained, for example:

(a) Lectures and presentations by central authorities as part of regular training courses or workshops for law enforcement, prosecutors, magistrates or other judicial authorities;

(b) Special workshops or seminars on a domestic, regional or multi-jurisdictional basis;

(c) Introducing programmes on mutual legal assistance as part of the curriculum for law schools or continuing legal education programmes;

(d) Exchanges of personnel between central authorities of various jurisdictions.

C. Expediting cooperation through the use of alternatives when appropriate

1. Using police channels where formal coercive measures are not required

The Expert Working Group emphasized that, except for coercive measures normally requiring judicial authorization, formal mutual legal assistance will not always be necessary to obtain assistance from other States. Whenever possible, information or intelligence should initially be sought through police-to-police contact, which is faster, cheaper and more flexible than the more formal route of mutual legal assistance. Such contact can be carried out through Interpol, or the European Police Office (Europol) or through local crime liaison officers, under any applicable memorandum of understanding, or through any regional arrangements that are available.

2. Where evidence is voluntarily given or is publicly available

While, as a general rule, police-to-police contact cannot be used to obtain coercive measures for the sole benefit of the requesting State, it may be used to obtain evidence given voluntarily, and evidence from public records or other publicly available sources. Again, this method has the advantage of being faster and more reactive than formal requests. Certain categories of evidence or information may also be obtained directly from abroad without the need for police channels, for example, publicly available information stored on the Internet or in other repositories of public records.

3. Accelerating an effective response to urgent formal requests

Many States will permit urgent requests to be made orally or by telefax between law enforcement officers so that advance preparations can be made or urgent non-coercive assistance can be given, at the same time that a formal request is being routed between the two central authorities.

4. Informing the central authority of prior informal contacts

The formal request should state that a copy has been sent by an informal route to avoid duplication of work. Similarly, where there has been prior police-to-police contact, the letter of request should state this and give brief details.

5. Using of joint investigative teams

States should use joint investigative teams involving officers of two or more States where there is a transnational aspect to the offence, for example, in facilitating controlled deliveries of drug consignments or in cross-border surveillance operations. States should make full use of the benefits of the exchange of financial intelligence (in accordance with appropriate safeguards) between agencies responsible for the collating of financial transaction data and, where necessary, develop or enact the appropriate enabling legislation.

D. Maximizing effectiveness through direct personal contact between central authorities of requesting and requested States

1. Maintaining direct contact throughout all stages of the request

An earlier review had stressed the importance of personal contacts to achieve open communication channels and to develop the familiarity and trust necessary to achieve the best results in mutual legal assistance casework. The Expert Working Group reaffirmed that personal contact between members of central authorities, prosecutors and investigators from the requesting and requested States remains crucially important at every stage of the mutual assistance process. To facilitate this, contact details, including telephone, telefax and, where available, e-mail addresses, of the responsible officials, should be clearly stated in the letter of request. Sometimes it may be desirable to establish contact with the official in the requested State before sending the request in order to clarify legal requirements or simplify procedures. Such contact can be initiated through the police-to-police means listed above, including through existing police attaché networks, or between prosecutors or staff of central authorities, through the UNODC list of competent national authorities, through networks such as the European Judicial Network of the European Union, or through less formal structures such as the International Association of Prosecutors or simply personal contacts.

2. Benefits of liaison magistrates, prosecutors and police officers

The Expert Working Group also encouraged States to take initiatives such as exchanges of liaison police officers, magistrates or prosecutors with States with which there is significant mutual legal assistance traffic. This can be done either by posting a permanent member of staff to the central authority of that country or by arranging short-term exchanges of staff. Experience shows that such “on-site” initiatives produce faster and more useful mutual legal assistance than is usually possible when dealing from a “distance”.

E. Preparing requests for mutual legal assistance

Mutual legal assistance is one of the most important weapons the justice system has against serious international crime. Requests often need to be generated at short notice and in ways that avoid the legal pitfalls and obstacles that exist when different legal systems are trying to lend each other their criminal justice powers. In response to this need, the UNODC Legal Advisory Programme is developing a computer-based drafting tool to help practitioners streamline the process of making requests for mutual legal assistance.

The new drafting tool will guide casework practitioners through the preparation of letters of requests with a series of templates. Caseworkers will fill in the various data fields and make selections from drop-down menus in each template in order to prepare requests. The programme will not allow users to move from one section to the next until all of the information is fully and correctly entered. This will ensure that requests are not rejected as a result of errors or omissions. When completed, the programme will automatically generate a correct, complete and effective request. The programme will also give access to relevant multilateral,

bilateral and regional treaties and agreements and national laws and will include a case management tracking system for incoming and outgoing requests.

The preparation of a request for mutual legal assistance involves the consideration of a number of requirements, including treaty provisions (where applicable), domestic law and the requirements of the requested State. Too meticulous attention to detail, however, could result in a request that was unduly long or so prescriptive that it prevented the requested State from using alternative methods to securing the desired end result. Those preparing requests should apply the following basic principles:

- (a) Be very specific in presentation;
- (b) Link the existing investigation or proceedings to the assistance required;
- (c) Specify the precise assistance sought;
- (d) Focus, where possible, on the end result and not on the method of securing that end result (for example, it may be possible for the requested State to obtain the evidence by means of a production or other court order, rather than by means of a search warrant: if a search warrant is requested and the local law does not allow for it, the request will probably not be granted).

To assist in the application of the above-mentioned principle, the Expert Working Group developed checklists and tools for use in preparing requests. The checklists set out both the requirements generally expected of requests and additional specific requirements for certain areas of assistance.

F. Eliminating or reducing impediments to execution of requests in the requested State

1. Interpreting legal requirements flexibly

In general, States should strive to provide extensive cooperation so as to ensure that national law enforcement authorities are not impeded in pursuing criminals who seek to shield their actions by spreading the evidence and the proceeds of their crimes across different jurisdictions. As described below, States should examine whether their current framework for providing assistance gives rise to any unnecessary impediments to cooperation and, to the extent possible, reduce or eliminate such impediments. In addition, those preconditions to the provision of cooperation which are retained should be interpreted liberally in favour of cooperation; the terms of applicable laws and treaties should not be applied in an unduly rigid way that impedes, rather than facilitates, the granting of assistance.

2. Minimizing grounds for refusal and exercising them sparingly

If assistance is to be rendered as extensively as possible between States, the grounds upon which a request may be refused should be minimal, limited to protections that are fundamental to the requested State. Many of the existing grounds of refusal in mutual legal assistance are a carry-over from extradition law and practice, where the life or liberty of the target may be more directly and immediately at stake. States should carefully examine such existing grounds of refusal to determine if it is necessary to retain them for mutual legal assistance.

One area of particular concern is dual criminality. Opinions are divided, with some States requiring dual criminality for all requests, some for compulsory measures only, some having discretion to refuse on that basis where it is absent and some with neither the requirement nor the discretion to refuse. Because of the problems that may arise from the application of the concept of dual criminality to mutual legal assistance, the Expert Working Group recommended that States consider restricting or eliminating the application of the principle, in particular where it is at present a mandatory precondition. Problems can also arise from the application of the *ne bis in idem* principle. Article 14, paragraph 7, of the International Covenant on Civil and Political Rights, like the constitutions of numerous countries, states that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted. *Ne bis in idem* frequently features as grounds for refusal of assistance.

States applying this ground for refusal should use a flexible and creative approach so as to minimize the circumstances where assistance is likely to be refused. For example, they should be prepared to accept an undertaking that a requesting State will not prosecute a person who has already been prosecuted in respect of the same conduct in the requested State, where assistance is being sought for a person to aid investigations in the requesting State. Some States do not apply this ground for refusal at all and other States may wish to consider whether it is possible for them to adopt such a course of action. Grounds for refusal should only be invoked when it is absolutely unavoidable to do so.

3. Reducing use limitations

Traditionally, evidence transmitted in response to a request for mutual legal assistance cannot be used for purposes not described in the request unless the requesting State has contacted the requested State and asked for express consent to other uses. In order to avoid cumbersome requirements that are often not really necessary, many States provide for a more streamlined approach in their mutual legal assistance practices. For example, many modern mutual legal assistance treaties require a requested State to advise if it wishes to impose a specific limitation on use; if the advisory is not stated as being necessary, there will be no limitation of use. Such methods provide adequate control for the requested State in important cases and at the same time facilitate efficiency in the many cases that are not sensitive.

4. Ensuring confidentiality in appropriate cases

Some States are not in a position to maintain the confidentiality of requests, and the contents of requests have on occasions been disclosed to the subjects of the foreign investigations or proceedings, thereby potentially prejudicing the investigations or proceedings. Confidentiality of requests is often a critical factor in the execution of requests. Accordingly, the Expert Working Group recommended that, where a specific request is made, the requested State should take appropriate measures to ensure that the confidentiality of the request is maintained. In circumstances where it is not possible to maintain confidentiality under the law of the requested State, the requested State should notify the requesting State at the earliest possible opportunity and, in any case, prior to the execution of the request, to allow the requesting State to decide if it wishes to continue with the request in the absence of confidentiality.

5. Execution of requests in accordance with procedures specified by the requesting State

It is important to comply with all of the formal evidentiary or admissibility requirements stipulated by the requesting State to ensure that a request achieves its purpose. It has been noted that failure to comply with such requirements often makes it impossible to use the evidence in the proceedings in the requesting State or, at the very least, causes delay (for example, where the requested material has to be returned to the requested State for certification or authentication in accordance with the request). The requested State should make every effort to achieve compliance with specified procedures and formalities to the extent that such procedures and formalities are not contrary to its domestic law. States are also encouraged to consider whether domestic laws relating to the reception of evidence can be made more flexible so as to overcome problems with the use of evidence gathered in a foreign State.

6. Coordination in multi-jurisdictional cases

Increasingly, there are cases in which more than one State has jurisdiction over some or all of the participants in a crime. In some cases, it will be most effective for the States concerned to choose a single venue for prosecution; in others, it may be best for one State to prosecute some participants while one or more other States pursue the remainder. In general, coordination in such multi-jurisdictional cases may avoid a multiplicity of requests for mutual legal assistance from each State with jurisdiction. Where there are multiple requests for assistance in the same case, States are encouraged to closely consult in order to avoid needless confusion and duplication of effort.

7. Reducing the complexity of mutual legal assistance through reform of extradition processes

Traditionally, some States have refused to extradite their nationals for trial abroad. A number of States have provisions in their constitutions prohibiting this practice. In the past, it was defensible as a general rule; today, however, with an increasing number of States subjected to the human rights jurisdictions of regional and other courts, the claim that a fair trial can only be guaranteed in the country of nationality has lost much of its force.

On occasions, however, such States are prepared to prosecute their nationals in their own courts, resulting in lengthy and complex requests for mutual legal assistance to obtain the necessary evidence from the country where the crime took place. The number of States that will either extradite their own nationals or that will temporarily extradite them on the basis that any sentence can be served in the State of nationality has recently increased; thus, there is less of a need for requests for mutual legal assistance than in the past. The remaining States that do not extradite their nationals should consider whether this impediment can be reduced or eliminated. If this is not possible, the States concerned should seek to coordinate their efforts, with a view to ensuring an effective domestic prosecution in lieu of extradition.

8. Cooperation with respect to confiscation (enforcement of civil forfeiture, asset-sharing)

There are particular impediments to assistance with respect to the freezing, seizure and confiscation of proceeds of crime. As noted in the report of the Expert Working Group in relation to freezing and seizure, it can be difficult to obtain assistance on the urgent basis required because of delays inherent in the mutual legal assistance process. Problems also arise because of the differing approaches to the execution of requests for mutual legal assistance and the varying systems for confiscation. The 1988 Convention permits a State to comply with a request for freezing or seizure or confiscation by directly enforcing the foreign order or by initiating proceedings in order to obtain a domestic order.

As a result, the policies adopted can differ between States. Furthermore, the States that obtain domestic orders do so on the basis of varying regimes for domestic asset confiscation. In some States, there is a requirement to provide evidence of a connection between the particular property sought to be confiscated and a criminal offence. Other States employ a “value” or “benefit” concept, whereby there need only be evidence that the property is linked to a person who has been accused or convicted of a crime, and then the order is enforced directly. Experience in this area clearly demonstrates that the direct enforcement approach is much less resource-intensive, avoids duplication of evidence provision and court findings and is significantly more effective in affording the assistance sought on a timely basis. The Expert Working Group strongly recommended that States that have not done so already should adopt legislation to permit the direct enforcement of foreign orders for freezing and seizure and confiscation. In the interim, where a State is seeking assistance by way of freezing and seizing or confiscation of assets, prior consultation will be required to determine which system is employed in the requested State in order that requests can be properly formulated.

The Expert Working Group noted that several jurisdictions had adopted—or were in the process of adopting—regimes for civil forfeiture (that is, without the need to obtain a criminal conviction as a prerequisite for final confiscation). The Expert Working Group supported the use of civil forfeiture as an effective tool for restraint and confiscation. It recognized, however, that this created new challenges because most current mutual legal assistance regimes were limited only to crime and were not yet applicable to civil forfeiture. The Expert Working Group recommended that States ensure that their mutual assistance regimes apply to requests for evidentiary assistance or confiscation order enforcement in civil forfeiture cases.

Problems also arise with requests relating to freezing and seizure and confiscation because of insufficient communication about applications for discharges of an order or other legal challenges brought in the requested State. It is critically important that the requesting State be informed of any such application in advance so that it can provide additional evidence or information that may be of relevance to the proceedings. Once again, the importance of communication is emphasized. The Expert Working Group noted the importance of an equitable sharing of confiscated assets between the requesting State and the requested State as a means of encouraging cooperation, in particular in the case of States with limited resources to execute requests effectively.

9. Reducing impediments to mutual legal assistance brought about by third parties

Accused or other persons may seek to thwart criminal investigations or proceedings by legal actions aimed at delaying or disrupting the mutual legal assistance process. For example, one suspect sued his own Government for damages for defamation when news of its application to the Swiss authorities were leaked to the public; eventually, the Government was forced to withdraw the request.

It may well be a matter of fundamental rights to provide an opportunity for third-party participation in certain proceedings arising from the execution of a request for mutual legal assistance. However, States should ensure that, wherever possible, their legal frameworks do not provide opportunities for third parties to unduly delay the provision of assistance or to block execution on technical grounds. In addition, the modern trend in taking witness evidence in a requested State is to defer objections based on the law of the requesting State until after the testimony has been transmitted to the requesting State, so that its courts may decide on the validity of the objection. That avoids the possibility of an erroneous ruling in the requested State and allows the requesting State to decide matters pertaining to its own laws.

10. Consulting before refusing, postponing or conditioning cooperation to determine, if necessary

Where a requested State considers that it is unable to execute a request, formal refusal should not be made before consulting with the requesting State to see if the problems can be overcome or the request modified to enable assistance to be given. For example, where assistance cannot be given because of an ongoing investigation or prosecution in the requested State, it may be possible to agree to the postponement of the execution of the request until after the domestic proceedings are concluded. In another example, consultation may lead to the modification of a request for search and seizure that could not be fulfilled under the law of a requested State to a request for a production order that could. Where it is not possible to resolve the issue, however, reasons should be given for refusal.

Cost may be another factor. In an age in which law enforcement agencies are under extreme pressure to deliver services to their own communities, the demands of a particular request for assistance may be such as to impose an unrealistically heavy burden on the requested State. In an ideal situation the burden of meeting requests received more or less balances out that of the requests made.

11. Making use of the most modern mechanisms for providing mutual legal assistance

The Expert Working Group noted the opportunities presented by modern technology to expedite the provision of assistance in criminal matters and to maximize the effectiveness of mutual assistance processes. The Expert Working Group also noted developments in international forums such as the European Union (Council of the European Union Act 2000/C 197/01 establishing, in accordance with Article 34 of the Treaty on European Union, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union)⁶⁰ and the Council of

⁶⁰ *Official Journal of the European Communities*, C 197, 12 July 2000.

Europe (Convention on Cybercrime)⁶¹ in relation to the taking of evidence via video-link and the interception of electronic communications.

It has been recommended that States give consideration to acceding to such conventions where possible and appropriate and to developing the ability through their domestic legislation or otherwise to facilitate transnational cooperation in the following areas:

- (a) The taking of evidence via video link;
- (b) The exchange of financial intelligence between agencies responsible for collating data or financial transactions;
- (c) The exchange of material containing deoxyribonucleic acid (DNA) to assist in criminal investigation;
- (d) Interception of communications;
- (e) The provision of assistance in computer crime investigations, including:
 - (i) Expeditious preservation of electronic data;
 - (ii) Expeditious disclosure of preserved traffic data;
 - (iii) Allowing interception where telecommunication gateways are located in the territory of the requested State but are accessible from the territory of the requesting State;
 - (iv) Monitoring electronic communications on a real-time basis.

⁶¹ Council of Europe, *European Treaty Series*, No. 185.

Chapter XVI

International repatriation of illicit assets

“Crime does not pay”, it is said, and over the years many States have rightly enacted legislation that provides for the seizure and forfeiture of the proceeds and instrumentalities of crime.⁶² At the domestic level, these have worked to varying degrees of effectiveness. However, in the recent past there have been a number of instances where corrupt leaders in some countries have systematically looted the state treasury. They have sold State-owned resources illegally, diverted loans from international lending institutions, embezzled project funding contributed by donor agencies and then often spirited the proceeds abroad.

In some cases, the amounts involved have run into many billions of dollars, giving rise to the belief that there are astronomical sums stashed away in safe banking havens around the world. Although the amounts that have been hidden offshore are undoubtedly considerable, in all likelihood the bulk of the looted funds have long gone, having been used by the corrupt leaders in the past to cement their hold on power through generous patronage.

Because of such occurrences and the prodigious sums that can be involved, repatriation of assets stolen by high-level public officials through corrupt practices has become a pressing issue for a number of countries. To date, it must be said, successes in repatriation have been few. Most cases take years to conclude and all are extremely costly. It is rare, too, for more than a fraction of the illicit funds to be repatriated to the country from which they were stolen. This is one of the major challenges of the United Nations Convention against Corruption.

The problems hindering repatriation vary depending on the particular countries involved. Nevertheless, current and past cases seem to have some similar elements. Some of the factors that have hindered the recovery of assets are described below.

A. Lack of an appropriate legal framework

Recent recovery efforts have demonstrated that existing legal frameworks fail to provide a sufficiently practical basis for the recovery of assets diverted through corrupt practices. Multilateral and bilateral mutual legal assistance treaties are generally too limited in their scope and are often not applicable other than in the context of the specific cases for which they were originally designed. As a consequence, no standard procedures have been developed.

Recovery strategies range from civil recovery (as damages) to criminal recovery (as a punitive measure) and to a mixture of both. Each method has its particular strengths and weaknesses, and the final choice adopted by a particular country depends on whatever will work best in that jurisdiction. Selection of the appropriate strategy requires specialized legal expertise. The Organized Crime Convention provides possible responses to some of the problems, but, because of its limited scope, these are only applicable in certain specific categories of case.

⁶² For further discussion, see United Nations Office on Drugs and Crime, *Anti-Corruption Toolkit ...*, tool 44 (“Recovery of illegal funds”).

B. Legal problems encountered

In the initial phase of recovery, assets must be traced, the various players involved and the roles they have played must be identified and their potential criminal or civil liabilities must be determined. However, exchanges of information between various jurisdictions, as well as between the public and the private sphere, are frequently extremely cumbersome and at times impossible. In such an environment, efforts can fail in this initial phase because of the difficulties envisaged by the investigators.

The central legal problems relate to jurisdiction and territoriality. Where legal systems are incompatible, in particular when cases involve cooperation between civil law and common law systems, cooperation is intrinsically difficult. Mutual legal assistance treaties have often proved to be ineffective when the objective has been to trace and freeze assets as a matter of urgency. Overcoming jurisdictional problems can slow down investigations, often fatally. By the time investigators get access to documents in one jurisdiction, the illicit assets may have been moved to another.

Legal problems differ significantly depending on the legal traditions of the jurisdiction in which the recovery effort is pursued and the particular approach chosen (civil or criminal recovery). Civil (that is, non-criminal) law, allowing for confiscation and recovery based on the balance of probabilities, has a clear advantage, as the evidentiary threshold is not as demanding as it is with criminal actions. On the other hand, access to information is not as easy to gain. Coercive investigative powers in civil proceedings are limited and, except in some common law countries, the freezing of the assets can be difficult.

Civil recovery also opens alternative approaches as far as civil actions against third parties are concerned. For example, in some common law countries (where compensation goes beyond simple economic damage and where moral and punitive damages are possible), actions against the facilitators of the looting may be available. Another advantage of civil recovery consists of a free choice as to the jurisdiction in which the recovery of the proceeds of corruption is to be pursued.

In the case of criminal recovery, prosecution must follow preset jurisdictional conditions. By contrast, civil recovery can be pursued almost anywhere in the world and, what is more, in several jurisdictions at once. This can be particularly important where there is the risk that the offender might transfer his or her loot to a “friendly” (non-freezing) jurisdiction.

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.

However, the criminal law approach does have some advantages. It provides investigators with privileged access to information at the national and international levels, and the investigative powers of a prosecutorial office make it easier to

overcome bank secrecy, as well as to obtain freezing orders. At the same time, however, the final step of securing confiscation and refunding to a victim can prove more complex, as most legal systems still require that the illicit origin of the proceeds be established beyond any reasonable doubt. In civil proceedings, the link between the assets and the criminal acts at their origin must be established only on the grounds of the balance of probabilities, also known as a “preponderance of the evidence”.

Criminal recovery requires fewer investigative resources on the part of a requesting State when most of the investigative work is undertaken by law enforcement agencies of the requested State. However, where private law firms need to be engaged, the costs can be considerable.

A clear disadvantage of criminal recovery arises where strict requirements have to be met under the national law of a requested State before the collaboration of its authorities can be obtained. Courts in requested States often set preconditions prior to their agreeing to freeze assets or to keep them frozen (for example, an undertaking that the requesting State will file criminal charges or commence forfeiture proceedings).

Repatriation in most cases, too, can be granted only after a final decision has been made in criminal or forfeiture proceedings. Those proceedings must comply with the procedural requirements of due process of the requested State. The courts may also want to establish that the proceedings in the requesting State satisfy fundamental human rights principles. Many requesting States have found some or all of these requirements difficult to meet.

A clear advantage within many civil law jurisdictions is the possibility for a victim to participate in the criminal proceeding as a *parte civile* (civil party). Such status enables the victim to have access to all the data available to the prosecution and enables the criminal court to decide on the (civil) compensation due to the victim without his or her having to commence a separate civil action.

In common law systems, the wide discretionary powers of the prosecutor to engage in plea-bargaining has proved to be effective in recovering assets. In particular, where the main objective is not so much to obtain convictions for criminal acts as to recover assets for the benefit of the public, offenders may be offered immunity from prosecution (in part or in full) in exchange for their fullest collaboration in the location of the diverted assets.

The impediments mentioned above, however, touch upon only a few of the more obvious problems involved.

C. United Nations Convention against Transnational Organized Crime

The Organized Crime Convention, though designed primarily to combat offences that are transnational in nature and involve organized criminal groups, will help to provide some solutions. The Organized Crime Convention entered into force on 29 September 2003; since then, it has been applicable to a number of corruption offences, such as the embezzlement of state resources, fraud, theft, extortion and

other forms of abuse of public power for private gain. Each of these is likely to be considered a serious crime under the national law of a State party.

The transnational nature of transfers of stolen property will always be present in repatriation cases. Meeting the second requirement of the test—the involvement of an organized criminal group in the activity—might, however, be problematic. Fortunately, the Organized Crime Convention provides a wide definition of “organized criminal group” (article 2): “a structured group of three or more persons existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.

Thus the Organized Crime Convention may be applicable in a large number of circumstances, in particular as it includes liability on the part of lawyers, bankers and accountants (who are likely to provide some of the “three or more persons” in the “organized criminal group”). In any event, in many recent cases, the principal perpetrators have relied on a network of close associates who have participated in and benefited from the process.

The Organized Crime Convention obliges each State party to provide mutual legal assistance for investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. The requesting party must, however, have reasonable grounds to suspect that such offences are transnational in nature and involve an organized criminal group. Mutual legal assistance may include such measures as the identification, tracing, freezing or seizing and confiscating of the proceeds of crime. A request, however, can only be executed in accordance with the domestic law of the requested State.

The Organized Crime Convention also requires each State party, when it receives a request for mutual legal assistance in relation to the confiscation of proceeds, to submit it to its competent authorities for the purpose of obtaining an order of confiscation and, if granted, to give effect to it.

Successful application of the Organized Crime Convention will mean that prosecutors handling cases of large-scale corruption will be able in future to operate within a new and functional legal framework. In particular, they will be able to obtain the cooperation of other States parties to identify, trace, freeze or seize assets deriving from a wide variety of corrupt practices.

The ultimate destination of the assets, however, remains problematic. According to article 14 of the Organized Crime Convention, each State party is required to give priority consideration to returning the confiscated proceeds of crime or property to the requesting State party. The provision insofar as return is concerned, however, is not mandatory and only becomes applicable where a requesting State party intends to compensate the victims or to return the proceeds to their legitimate owners.

It may be comparatively easy to claim repatriation where assets have been directly diverted from state resources, but the situation is less clear with regard to the proceeds of corruption when they are derived from other sources. In such cases, the interests at stake for the requesting State are less clear unless it can demonstrate that its public interest has suffered damage as a result of the criminal activity. Where the requesting State cannot show that it is the true owner of the funds in

question, it is open to the requested State to confiscate the funds as criminal proceeds and simply to keep the funds for itself. In such an event, the primary objective will still have been met. The criminals will be stripped of the benefits and both they and the public at large will see that, at least on some occasions, crime indeed does not pay.