

THE BASICS AND THE ESSENCE OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION (UNCAC): STATUS AND STRUCTURE, SPECIFIC PROVISIONS OF THE UNCAC REGARDING PREVENTIVE MEASURES, CRIMINALIZATION, LAW ENFORCEMENT AND ASSET RECOVERY

*Dimitri Vlassis**



I. INTRODUCTION: STATUS AND SIGNIFICANCE OF THE UNCAC

Adopted by the United Nations General Assembly in its resolution 58/4 of 31 October 2003 and having entered into force on 14 December 2005, the United Nations Convention against Corruption (UNCAC) is the first global legally binding anti-corruption instrument. It provides a comprehensive and multidisciplinary framework for the prevention of and fight against corruption at the national level, as well as for effective regional and international cooperation. With 162 States Parties¹, it has nearly reached universal adherence.

What follows is a summary of the substantive content and structure of the Convention, as well as an overview of the institutional framework which was put in place in order to support Member States in strengthening their legal, institutional, and operational capacities to implement the provisions of UNCAC at the domestic level, and to cooperate internationally towards effectively combating the transnational dimensions of corruption.

II. THE “SUBSTANTIVE CORPUS” OF THE CONVENTION: A BRIEF OVERVIEW OF THE UNCAC PROVISIONS

A. Chapter II (Preventive measures)

The UNCAC devotes an entire chapter to the prevention of corruption, thus demonstrating the significance of preventive action against this scourge. The Convention requires States Parties to introduce effective anti-corruption policies and practices (art. 5). It calls for the introduction of a variety of measures concerning both the public and the private sectors. Such measures include institutional arrangements, such as the establishment of specific anti-corruption bodies with a mandate to implement preventive anti-corruption policies and practices (art. 6); codes of conduct and measures requiring public officials to make declarations regarding financial or other aspects that may cause conflicts of interests (art. 8); and policies promoting good governance, the rule of law, transparency and accountability (art. 7), including promoting transparency in the financing of election campaigns and political parties (art. 7 para. 3). The Convention pays special attention to the issue of public procurement, as a sector particularly prone to corruption. It further contains measures to promote transparency and accountability in the management of public finances (art. 9).

The Convention also enjoins States Parties to take measures for the prevention of corruption in the judiciary (art. 11). In addition, concrete measures are specified for the prevention of money-laundering practices related to corruption (art. 14).

Apart from the development or reinforcement of preventive policies in the public sector, States Parties to the UNCAC are also required to take appropriate preventive measures and establish regulatory regimes in order to prevent corruption in the private sector as well (art. 12).

The Convention further calls on States Parties to promote actively the involvement of non-governmental

* Chief, Corruption and Economic Crime Branch, Division for Treaty Affairs, United Nations Office on Drugs and Crime, Vienna. The opinions expressed in this article are those of the author and do not reflect the views of the United Nations. I would like to express my gratitude to Mr. Dimosthenis Chrysikos whose assistance was indispensable to this article.

¹ Status as of 28 September 2012.

and community-based organizations, as well as other elements of civil society, and to undertake public information activities and education programmes for the purpose of raising public awareness of the threats posed by corruption and the most suitable methods to combat it (art. 13).

B. Chapter III (Criminalization and Law Enforcement)

The UNCAC includes a comprehensive set of criminalization provisions, both mandatory and optional, covering a wide range of conduct related to corruption. Going beyond the existing regional instruments which are designed to operate in a more limited environment, the UNCAC intends to serve as a vehicle to facilitate, among others, effective action against corruption from a criminal law perspective.

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

- Active and passive bribery of national public officials (art. 15);²
- Active bribery of foreign public officials and officials of public international organizations (art. 16, para. 1);³
- Embezzlement, misappropriation or other diversion by a public official (art. 17);⁴
- Laundering of proceeds of crime (art. 23);⁵
- Obstruction of justice (art. 25);⁶ and
- Participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention (art. 27, para. 1).⁷

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

- Passive bribery of foreign public officials and officials of public international organizations (art. 16, para. 2);⁸

² In accordance with art. 15, States Parties must establish as criminal offences the following conduct:

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

³ According to art. 16, para. 1, States Parties must establish as a criminal offence the promise, offering or giving of an undue advantage to a foreign public official or official of an international organization, in order:

- (a) To obtain or retain business or other undue advantage in international business;
- (b) That the official take action or refrain from acting in a manner that breaches an official duty.

⁴ In accordance with art. 17, States Parties are required to establish as a criminal offence the embezzlement, misappropriation or diversion of property, funds, securities or any other item of value entrusted to a public official in his or her official capacity, for the official's benefit or the benefit of others.

⁵ In line with art. 23, States Parties must establish the following offences as crimes:

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

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

- (a) Acquisition, possession or use of proceeds of crime (para. 1 (b) (i));
- (b) Participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of any of the offences mandated by article 23 (para. 1 (b) (ii)).

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

⁶ In accordance with art. 25, States Parties must establish the following two criminal offences:

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

⁷ Art. 27, para. 1, requires that States Parties establish as a criminal offence, in accordance with their domestic law, the participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with the Convention. An interpretative note indicates that the formulation of paragraph 1 of article 27 was intended to capture different degrees of participation, but was not intended to create an obligation for States Parties to include all of those degrees in their domestic legislation (A/58/422/Add.1, para. 33).

⁸ Art. 16, para. 2, requires that States Parties consider establishing as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

- Active and passive trading in influence (art. 18);⁹
- Abuse of functions (art. 19);¹⁰
- Illicit enrichment (art. 20);¹¹
- Active and passive bribery in the private sector (art. 21);¹²
- Embezzlement of property in the private sector (art. 22);¹³
- Concealment (art. 24);¹⁴ and
- Any attempt to commit, or preparation for, an offence established in accordance with the Convention (art. 27, paras. 2 and 3).

The inclusion of optional criminalization provisions was deemed necessary because of constitutional impediments or other fundamental legal principles in some countries which prevent them from establishing the relevant criminal offences in their domestic law.¹⁵

Several articles in the “criminalization part” of the UNCAC contain safeguard clauses which operate as

⁹ Under art. 18, States Parties must consider establishing as criminal offences:

- (a) Promising, offering, or giving a public official an undue advantage in exchange for that person abusing his or her influence with an administration, public authority or State authority in order to gain an advantage for the instigator;
- (b) Solicitation or acceptance by a public official, of an undue advantage in exchange for that official abusing his or her influence in order to obtain an undue advantage from an administration, public authority, or State authority.

¹⁰ In accordance with art. 19, States Parties must consider establishing as a criminal offence the abuse of function or position, that is the performance of, or failure to perform, an act in violation of the law by a public official in order to obtain an undue advantage.

¹¹ Pursuant to art. 20, States Parties must consider establishing as a criminal offence illicit enrichment, that is a significant increase in assets of a public official that cannot reasonably be explained as being the result of his or her lawful income.

¹² In accordance with art. 21, States Parties must consider establishing as a criminal offence:

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

¹³ Pursuant to art. 22, States Parties must consider establishing as a criminal offence the intentional embezzlement by a person who directs or works in a private sector entity, of property, private funds, or other thing of value entrusted to him or her by virtue of his or her position.

¹⁴ According to art. 24, States Parties must consider establishing as a criminal offence concealment or continued retention of property in other situations besides those set forth in art. 23, where the person knows that the property is the result of any of the offences established in the Convention.

¹⁵ An interesting example is that of illicit enrichment. The obligation for States Parties to consider creating such an offence is subject to their constitution and the fundamental principles of their legal system. This effectively recognizes that the illicit enrichment offence, in which the defendant has to provide a reasonable explanation for the significant increase in his or her assets, may in some jurisdictions be considered as contrary to the right to be presumed innocent until proven guilty under the law. The presumption of innocence is invoked because the crime of illicit enrichment hinges upon presuming that the accumulated wealth is corruptly acquired, unless the contrary is proved.

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

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

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

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

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

filters regarding the obligations of States Parties in case of conflicting constitutional or fundamental rules, by providing, for example, that States must adopt certain measures “subject to [their] constitution and the fundamental principles of [their] legal system” (art. 20), or “subject to the basic concepts of [their] legal system” (art. 23, para. 1(b)).

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

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

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

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

- Establishment of jurisdiction over offences falling within its scope of application (art. 42);¹⁶
- Liability of legal persons (art. 26);¹⁷
- Prosecution, adjudication and sanctions in corruption-related cases (art. 30);¹⁸

¹⁶ The UNCAC requires that States Parties establish jurisdiction when the offences are committed in their territory or on board aircraft and vessels registered under their laws. States Parties are also required to establish jurisdiction in cases where they cannot extradite a person on grounds of nationality. In these cases, the general principle *aut dedere aut judicare* (extradite or prosecute) would apply (see arts. 42, para. 3, and 44, para.11). In addition, States Parties are invited to consider the establishment of jurisdiction in cases where their nationals are victimized, where the offence is committed by a national or stateless person residing in their territory, where the offence is linked to money-laundering planned to be committed in their territory, or the offence is committed against the State (art. 42, para. 2). Finally, States Parties are required to consult with other interested States in appropriate circumstances in order to avoid, as much as possible, the risk of improper overlapping of exercised jurisdictions (art. 42, para. 5). States Parties may also wish to consider the option of establishing their jurisdiction over offences established in accordance with the Convention against Corruption when extradition is refused for reasons other than nationality (art. 42, para. 4).

¹⁷ Art. 26 requires that States Parties adopt such measures as may be necessary to establish the liability of legal persons for participation in offences covered by the UNCAC. The obligation to provide for the liability of legal entities is mandatory, to the extent that this is consistent with each State’s legal principles. There is no obligation, however, to establish criminal liability in view of the divergent approaches followed in different legal traditions. Civil or administrative forms of liability for legal entities are sufficient to meet the requirement set forth in art. 26. Nevertheless, whatever form it takes, the liability of legal persons shall not affect the criminal liability of the natural persons who have committed the offences. In addition, States Parties have an obligation to provide for effective, proportionate and dissuasive sanctions, which may be criminal or non-criminal and may also include monetary sanctions.

¹⁸ Art. 30 encompasses provisions with regard to the investigation and prosecution of corruption-related offences and the important complex issue of immunities. The article devotes significant attention to sanctions – both criminal sanctions strictu sensu and “ancillary” sanctions – as well as provisions on disciplinary measures and sanctions relating to the gravity of the offence or linked to the nature of the offence, such as disqualification. Finally, the article deals with the rehabilitation of offenders. Art. 30 requires that:

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

- Long statute of limitations for offences covered by the Convention (art. 29);¹⁹
- The freezing, seizure and confiscation of proceeds of crime derived from offences established in accordance with the Convention (art. 31);²⁰
- The protection of witnesses, experts and victims (art. 32);²¹
- The protection of reporting persons (art. 33);²²
- The establishment of independent authorities specialized in combating corruption through law enforcement (art. 36);²³

release or parole of persons convicted of such offences (para. 5).

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

- States Parties consider establishing procedures through which a public official accused of an offence established in accordance with the Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority (para. 6).
- States Parties consider establishing procedures for the disqualification for a period of time determined by domestic law, of persons convicted of offences established in accordance with the Convention from: (a) holding public office; and (b) holding office in an enterprise owned in whole or in part by the State (para. 7).
- States Parties endeavour to promote the reintegration into society of persons convicted for offences established pursuant to the Convention (para. 10).

¹⁹ Art. 29 lays down the obligation of States Parties to establish, where appropriate, under their domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with the Convention, as well as to establish a longer period or provide for the suspension of the statute of limitations in cases where the alleged offender has evaded the administration of justice.

²⁰ Article 31 deals with confiscation — the permanent deprivation of property by order of a court or other competent authority, as defined by art. 2(g) of the Convention — as the most important legal tool to deprive offenders of their ill-gotten gains. The regime promoted by the Convention revolves around the concept of the confiscation of “*proceeds of crime*”, defined by art. 2(e) of the Convention as “*any property derived from or obtained, directly or indirectly, through the commission of an offence.*” Art. 31 also establishes the minimum scope of the confiscation of the proceeds of crime in paras. 4, 5 and 6. As a complementary measure, para. 8 recommends that States Parties consider reversing the burden of proof in order to facilitate the determination of the origin of such proceeds, a concept already applied in several jurisdictions which needs, however, to be distinguished from a reversal of the burden of proof regarding the elements of the offence which is directly linked with the presumption of innocence.

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

²¹ Art. 32 includes both mandatory and non-mandatory provisions. As a mandatory provision, art. 32, para. 1, requires that each State Party must take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with the Convention and, as appropriate, for their relatives and other persons close to them. Paragraph 2 specifies certain measures that State parties may envisage in order to provide for the necessary protection of witnesses and experts as required by para.1. While para. 2(a) includes a provision on procedures for the physical protection against intimidation and retaliation, para. 2 (b) focuses on evidentiary rules ensuring the safety of witnesses and experts with regard to their testimony.

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

²² Art. 33 is a non-mandatory provision. However, States Parties may wish to keep in mind that the provision complements the article dealing with the protection of witnesses and experts. Art. 33 is intended to cover those individuals who may possess information which is not of such detail to constitute evidence in the legal sense of the word. Such information is likely to be available at a rather early stage of a case and is also likely to constitute an indication of wrongdoing. In corruption cases, because of their complexity, such indications have proved to be useful to alert competent authorities and permit them to make key decisions about whether to launch an investigation. The UNCAC uses the term “reporting persons”. This was deemed to be sufficient to reflect the essence of the intended meaning: while making clear that there is a distinction between the persons referred to with this term and witnesses. It was also deemed preferable to the term “whistle-blowers” which is a colloquialism that cannot be accurately and precisely translated into many languages.

²³ Art. 36 mandates States Parties to have in place a body or bodies or persons specialized in combating corruption through law enforcement, performing investigative and possibly prosecutorial functions.

- The cooperation with law enforcement authorities (art. 37);²⁴
- The cooperation between national authorities (art. 38);²⁵
- The cooperation between national authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of corruption-related offences (art. 39);²⁶
- The curtailment of bank secrecy in the case of domestic criminal investigations of relevant offences (art. 40).²⁷

C. Chapter IV (International Cooperation)

Although beyond the scope of the present article, it should be noted that the UNCAC incorporates detailed and extensive provisions on international cooperation, covering all its forms, namely extradition (art. 44), mutual legal assistance (art. 46), transfer of sentenced persons (art. 45), transfer of criminal proceedings (art. 47), law enforcement cooperation (art. 48), joint investigations (art. 49) and cooperation for using special investigative techniques (art. 50). These provisions are generally based on the precedent of the United Nations Convention against Transnational Organized Crime (UNTOC), sometimes going beyond it, and provide a much more comprehensive legal framework on relevant matters than that of the existing regional instruments.

D. Chapter V (Asset Recovery)

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

Chapter V also provides for mechanisms for direct recovery of property (art. 53) and a comprehensive framework for international cooperation (arts. 54-55), which incorporates, *mutatis mutandis*, the more general mutual legal assistance requirements and sets forth procedures for international cooperation in confiscation matters. These are important powers, as criminals frequently seek to hide proceeds, instrumentalities and evidence of crime in more than one jurisdiction, in order to thwart efforts to locate and seize them.^{28, 29}

²⁴ As a mandatory provision, art. 37 obliges States Parties to take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with the Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering the proceeds. Moreover, art. 37 obliges States Parties to protect such persons, *mutatis mutandis*, as provided for in art. 32, para. 4.

²⁵ Art. 38 requires States Parties to take all necessary measures to encourage cooperation between public authorities or public officials and authorities responsible for investigating and prosecuting criminal offences established in arts. 15, 21 and 23 of the Convention (bribery of national public officials, bribery in the private sector and laundering of the proceeds of crime respectively). This provision is particularly relevant to cases of early notification of potential offences to agencies with the powers and expertise to investigate and prosecute them. Such notification is essential to ensure that perpetrators do not flee the jurisdiction or tamper with evidence and the movement of assets can be prevented or monitored.

²⁶ Art. 39 complements art. 38 in that it encourages cooperation between public authorities and private sector entities. Many corruption cases are complex and covert, and will not come to the attention of the relevant authorities or their investigation would be frustrated without the cooperation of private sector entities, especially financial institutions, as well as private citizens. Early notification by relevant private sector bodies or early cooperation with investigative agencies is important to the identification and safeguarding of potential evidence and the initiation of inquiries. In particular, the role of the financial institutions – or those institutions involved in high-value commercial activity - is central to the effective prevention, investigation and prosecution of offences established in accordance with the UNCAC. While financial institutions have obligations to report suspicious activity or transactions, this should not be seen as the limit to cooperation where an institution has suspicions about other activities, such as opening of accounts or other activity.

²⁷ States Parties are required in art. 40 to remove any obstacle that may arise from protective laws and regulations to domestic criminal investigations relating to offences established under the UNCAC.

²⁸ Art. 55, para. 1, in particular, mandates a State Party to provide assistance “to the greatest extent possible” in accordance with domestic law, when receiving a request from another State Party having jurisdiction over an offence established in accordance with the UNCAC for confiscation of proceeds of crime, property, equipment or other instrumentalities, either by recognizing and enforcing a foreign confiscation order, or by bringing an application for a domestic order before the competent authorities on the basis of information provided by the other State Party.

²⁹ Under art. 54, para. 1 (c), of the UNCAC, States Parties, in order to provide mutual legal assistance pursuant to art. 55

With regard to the return and disposition of assets, chapter V of the Convention incorporates a series of provisions that favour return to the requesting State Party, depending on how closely the assets are linked to it in the first place. Thus, the Convention imposes the obligation for States Parties to adopt such legislative and other measures that would enable their competent authorities, when acting on a request made by another State Party, to return confiscated property, taking into account the rights of bona fide third parties and in accordance with the fundamental principles of their domestic law (art. 57, para. 2).

In particular, the Convention requires States Parties that receive a relevant request in the case of embezzlement of public funds or of laundering of embezzled public funds to return the confiscated property to the requesting State on the condition of a final judgment in the latter State (although this condition can be waived) (art. 57, para. 3 (a)). In the case of any other offences covered by the Convention, two additional conditions for the return are recognized alternatively, i.e. that the requesting State reasonably establishes its prior ownership of such confiscated property or that the requested State recognizes damage to the requesting State as a basis for returning the confiscated property (art. 57, para. 3 (b)). In all other cases, the requested State shall give priority consideration to returning confiscated property to the requesting State, returning such property to its prior legitimate owners or compensating the victims (art. 57, para. 3 (c)).

III. THE “INSTITUTIONAL ARCHITECTURE” OF THE CONVENTION: THE CONFERENCE OF THE STATES PARTIES TO THE UNCAC AND ITS SUPPORTIVE INTERGOVERNMENTAL BODIES/PROCESSES

A. The Conference of the States Parties to the UNCAC

The Conference of the States Parties to UNCAC was established, pursuant to article 63 of the Convention, to improve the capacity of, and cooperation between, States Parties to achieve the objectives of the Convention, and to promote and review its implementation. The Conference of the States Parties to the UNCAC is tasked with supporting States Parties and signatories in their implementation of the Convention, and provides policy guidance to UNODC for the development and execution of anti-corruption related activities.

The Conference now meets every two years. Its first session was held in Amman, Jordan in December 2006; the second in Nusa Dua, Indonesia, in January 2008; the third in Doha, Qatar, in November 2009; and the fourth session in Marrakech, Morocco, in October 2011. The fifth and the sixth sessions of the Conference are scheduled to take place in Panama in 2013 and in the Russian Federation in 2015 respectively.

The Conference has adopted far-reaching resolutions at each of its sessions and has mandated UNODC to implement them, including through the development of technical assistance projects. At its third session, it adopted landmark resolution 3/1 on the review of the implementation of the Convention. In that resolution,

with respect to property acquired through or involved in the commission of an offence established in accordance with the Convention, must, in accordance with their domestic law, consider taking such measures as may be necessary to allow confiscation of such property *without a criminal conviction* in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

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

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

the Conference established a review mechanism aimed at assisting countries to meet the objectives of the Convention through a peer review process.

In its capacity as the guardian of the implementation of the UNCAC and Secretariat of the Conference of the States Parties to the Convention, UNODC is mandated to support the newly established mechanism for the review of implementation of the Convention and assist the Conference in identifying technical assistance priorities and developing appropriate responses to corruption.

An overview of the mechanism and the main findings of the reviews completed within the first two years of the review cycle of the mechanism are presented in a separate paper.

B. Implementation Review Group (IRG)

As mentioned above, at its third session in Doha in November 2009, the Conference adopted landmark resolution 3/1 on the review of the implementation of the Convention. In that resolution, the Conference recalled article 63 of the UNCAC, especially its paragraph 7, according to which the Conference should establish, if it deemed it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention. In the same resolution — annexed to it — the Conference adopted the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption.

In accordance with the terms of reference for the Review Mechanism, a specific body was established within its framework (Implementation Review Group – IRG) entrusted with the task to have an overview of the review process in order to identify challenges and good practices, and to consider technical assistance requirements in order to ensure effective implementation of the Convention.

In resolution 3/1, the Conference decided that the Implementation Review Group shall be in charge of following up and continuing the work undertaken previously by the Open-ended Intergovernmental Working Group on Technical Assistance.

C. The Working Group on Prevention

At its third session, the Conference of the States Parties to the Convention decided, in its resolution 3/2, to establish an open-ended intergovernmental working group to advise and assist it in the implementation of its mandate on the prevention of corruption. The Conference also decided that the working group should perform the following functions: (a) Assist the Conference in developing and accumulating knowledge in the area of prevention of corruption; (b) facilitate the exchange of information and experience among States on preventive measures and practices; (c) facilitate the collection, dissemination and promotion of best practices in preventing corruption; and (d) assist the Conference in encouraging cooperation among all stakeholders and sectors of society in order to prevent corruption.

At its first session, held in Vienna from 13 to 15 December 2010, the Working Group structured its discussions along the following four themes: (a) the development and accumulation of knowledge in the area of prevention of corruption; (b) exchange of information and experience among States on preventive measures and practices; (c) collection, dissemination and promotion of best practices in the prevention of corruption; and (d) cooperation among all stakeholders and sectors of society in order to prevent corruption. A variety of issues were discussed, such as good practices in the prevention of corruption and regulation models in the public sector; good practices in the prevention of corruption in public procurement; methodologies, including evidence-based approaches, for assessing areas of special vulnerability to corruption in the public and private sector; alignment of rules and regulations of the members of the United Nations system Chief Executive Board to the principles of the Convention; and best practices for promoting responsible and professional reporting on corruption for journalists.

At its second session, held in Vienna from 22 to 24 August 2011, the Working Group discussed good practices and initiatives in the prevention of corruption, specifically: (i) awareness-raising policies and practices, with special reference to articles 5, 7, 12 and 13 of the UNCAC; and (ii) the public sector and the prevention of corruption, including codes of conduct (article 8) and public reporting (article 13).

In its resolution 4/3, entitled "Marrakech declaration on the prevention of corruption", the Conference of the States Parties decided that the Working Group should continue its work to advise and assist the Conference in the implementation of its mandate on the prevention of corruption; and should further continue to perform the functions of an international observatory gathering existing information on good practices in preventing corruption, as well as provide information on lessons learned, the adaptability of good practices and related technical assistance activities.

In the same resolution, the Conference also decided that the future meetings of the Working Group will follow a multi-year workplan for the period up to 2015, when the second cycle of the Implementation Review Mechanism begins.

As proposed at its 2011 meeting, the Working Group focused at its third session, held in Vienna from 27 to 29 August 2012, its attention on the following topics: (a) Implementation of article 12 of the Convention, including the use of public-private partnerships; and (b) Conflicts of interest, reporting acts of corruption and asset declarations, particularly in the context of articles 7-9 of the Convention.

In addition, the Working Group adopted the proposed topics in the workplan for 2013 and further adopted on an indicative basis topics for 2014 and 2015, subject to reconsideration at subsequent sessions of the Group and the Conference of the States Parties, as follows:

2013:

- Integrity in the judiciary, judicial administration and prosecution services (article 11);
- Public education, in particular the engagement of children and young people and the role of mass media and the Internet (article 13).

2014:

- Mandates of anti-corruption body or bodies in respect of prevention (article 6);
- Public sector legislative and administrative measures, including measures to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties (articles 5 and 7).

2015:

- Measures to prevent money-laundering (article 14);
- Integrity in public procurement processes and transparency and accountability in the management of public finances (article 9 and 10).

D. The Working Group on Asset Recovery

In its resolution 1/4, adopted at its first session, the Conference of the States Parties to the United Nations Convention against Corruption established the Open-ended Intergovernmental Working Group on Asset Recovery. The Conference decided that the objective of the Working Group was to advise and assist the Conference in the implementation of its mandate on the return of proceeds of corruption.

In the same resolution, the Conference defined the functions of the Working Group, including assisting the Conference in developing cumulative knowledge in the area of asset recovery, particularly on the implementation of articles 52-58 of the United Nations Convention against Corruption, such as through mechanisms for locating, freezing, seizing, confiscating and returning the instruments and proceeds of corruption; identifying capacity-building needs and encouraging cooperation among relevant existing bilateral and multilateral initiatives; facilitating the exchange of information, good practices and ideas among States; and building confidence and encouraging cooperation between requesting and requested States.

The Working Group held its first meeting in Vienna, on 27 and 28 August 2007, its second meeting on 25 and 26 September 2008, its third meeting on 14 and 15 May 2009, its fourth meeting on 16 and 17 December 2010, its fifth meeting on 25 and 26 August 2011 and its sixth meeting on 30 and 31 August 2012.

Previous meetings of the Working Group have focused on three main themes: developing cumulative

knowledge; building confidence and trust between requesting and requested States; and technical assistance, training and capacity-building.

With respect to the development of cumulative knowledge on asset recovery, the continuing need to overcome practical challenges and barriers faced by States Parties in the implementation of chapter V of the Convention, including the lack of capacity of practitioners to deal with asset recovery cases, has been noted consistently.

The importance of building confidence and trust between requesting and requested States for asset recovery has also been stressed in the discussions of the Working Group, in particular as a means of increasing political will, developing a culture of mutual legal assistance (especially for the benefit of developing countries) and paving the way for successful international cooperation.

The Working Group has further discussed types of technical assistance relevant to asset recovery, such as capacity-building and training, gap analyses, assistance in drafting new legislation and the facilitation of the mutual legal assistance process. It has recognized the urgent and constant need to provide training to personnel of authorities involved in asset recovery, with a view to enhancing their capacity in tracing, freezing, seizing and confiscating proceeds of corruption.

The Working Group has repeatedly noted the need to strengthen coordination of various initiatives in asset recovery. In this regard, the United Nations Office on Drugs and Crime (UNODC) and the World Bank established in September 2007 the Stolen Asset Recovery (StAR) Initiative, which became fully operational at the end of 2008. The goal of the StAR Initiative is to encourage and facilitate the systematic and timely return of proceeds of corruption and to improve global performance in the return of stolen assets.

In its resolution 4/4, the Conference decided that the Working Group on Asset Recovery shall continue its work to advise and assist it in the implementation of its mandate with respect to the return of the proceeds of corruption. Also in its resolution 4/4, the Conference requested the Working Group to prepare the agenda for a multi-year workplan to be implemented until 2015.

At its sixth meeting in August 2012, the Working Group focused its attention, pending the adoption of the workplan, on thematic discussions regarding article 54 (Mechanisms for recovery of property through international cooperation in confiscation) and article 55 (International cooperation for purposes of confiscation).

The Working Group further considered and adopted a proposal on the structure of the multi-year workplan until 2015, which, as far as its thematic orientation is concerned, includes the following (the workplan for the years 2014 and 2015 was indicative and subject to deliberations during the fifth session of the Conference of the States Parties in 2013):

2013

- Discussion on article 56 — Special cooperation, and article 58 — Financial intelligence unit (FIU) and other relevant articles.
- Discussion on cooperation in freezing and seizure: article 54 — Mechanisms for recovery of property through international cooperation in confiscation, and article 55 — International cooperation for purposes of confiscation and other relevant articles.

2014

- Discussion on article 52 — Prevention and detection of transfers of proceeds of crime and other relevant articles.
- Discussion on article 53 — Measures for direct recovery of property and other relevant articles.

2015

- Discussion on article 57 — Return and disposal of assets and other relevant articles.

E. Expert Meetings on International Cooperation under the UNCAC

In resolution 4/2, entitled “Convening of open-ended intergovernmental expert meetings to enhance international cooperation”, adopted by the Conference of the States Parties to the UNCAC at its fourth

session, held in Marrakech, Morocco, from 24 to 28 October 2011, the Conference decided to convene open-ended intergovernmental expert meetings on international cooperation to advise and assist it with respect to extradition and mutual legal assistance.

In the same resolution, the Conference also decided that the expert meetings shall perform the following functions: (a) assist it in developing cumulative knowledge in the area of international cooperation; (b) assist it in encouraging cooperation among relevant existing bilateral, regional and multilateral initiatives and contribute to the implementation of the related provisions of the Convention under the guidance of the Conference; (c) facilitate the exchange of experiences among States by identifying challenges and disseminating information on good practices to be followed in order to strengthen capacities at the national level; (d) build confidence and encourage cooperation between requesting and requested States by bringing together relevant competent authorities, anti-corruption bodies and practitioners involved in mutual legal assistance and extradition; and (e) assist the Conference in identifying the capacity-building needs of States.

The first open-ended intergovernmental expert meeting to enhance international cooperation under the United Nations Convention against Corruption (UNCAC) will take place in Vienna, from 22 to 23 October 2012. The experts may wish to focus their discussions on the findings and results on the implementation of articles 44 and 46 of the UNCAC by States Parties to the Convention, as emerged during the ongoing first cycle of the Mechanism for the Review of Implementation of the Convention. Furthermore, discussions will revolve around priorities and needs for technical assistance in the field of international cooperation in criminal matters.

The experts will be informed of the outcome and conclusions of the meeting of the Open-ended Working Group of Government Experts on Extradition, Mutual Legal Assistance and International Cooperation for Purposes of Confiscation of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, which will have taken place during the sixth session of the Conference, to be held in Vienna from 15 to 19 October 2012.

IV. EPILOGUE

Considerable work has been done over the last years to enhance international action against corruption. A milestone in this endeavour is the United Nations Convention against Corruption not only because of its global effect and wide-ranging content, but also due to the mechanism and subsidiary bodies and processes already in place aimed at reviewing its implementation at the domestic level, as well as promoting compliance of national laws and anti-corruption policies and practices with the international standards enshrined in its provisions.

Much work, however, remains to be done to translate the text of the Convention into reality on the ground and to achieve an effective global regime against corruption. A key factor for success in this regard is to build on progress made and fully benefit from existing “complementarities”: first, the complementarity of, and inter-linkages among, the different chapters of the Convention as a manifestation of its multi-faceted nature and the multi-disciplinary domestic policies needed for its effective implementation; second, the complementarity of the different components of the institutional framework which was established to help render the content of the Convention fully applicable in the domestic legal and administrative order of States Parties; and, third, the complementary action and synergies of the various stakeholders active in the fight against corruption. Among them, UNODC has played — and continues to play — a leading role in the efforts of the international community to support Member States in the development of robust, efficient and sustainable anti-corruption policies and institutions.