



Conference of the States Parties to the United Nations Convention against Corruption

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**Review of the implementation of the United Nations
Convention against Corruption: criminalization and
law enforcement and international cooperation**

Implementation of chapter IV (International cooperation) of the United Nations Convention against Corruption¹

Thematic report prepared by the Secretariat

I. Introduction

1. In its resolution 3/1, the Conference of the States Parties to the United Nations Convention against Corruption adopted the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (contained in the annex to that resolution), as well as the draft guidelines for governmental experts and the secretariat in the conduct of country reviews and the draft blueprint for country review reports. The guidelines, together with the blueprint, were finalized by the Implementation Review Group at its first session, held in Vienna from 28 June to 2 July 2010.

2. In accordance with paragraphs 35 and 44 of the terms of reference of the Implementation Review Mechanism, the present report has been prepared in order to compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the country review reports, organized by theme, for submission to the Implementation Review Group, to serve as the basis for its analytical work.

3. The present report contains information on the implementation of chapter IV (International cooperation) of the Convention by States parties under review in the first year of the first cycle of the Implementation Review Mechanism. It is based on

* CAC/COSP/2011/1.

¹ Late submission owing to late availability of information.



information included in the review reports of nine State parties that had been completed, or were close to completion, on 15 August 2011.

II. Implementation of chapter IV (International cooperation) of the Convention

A. Extradition

4. All States parties under review regulated extradition in their domestic legal systems, most of them in their code of criminal procedure or special laws on international cooperation. In one case, no domestic regulation existed, apart from limited extradition-related provisions in the country's Constitution. In another case, national legislation on extradition was in place, but only with respect to money-laundering offences, thus indicating a compartmentalized approach to extradition. This approach is likely to be confirmed with the adoption, by the same State party, of an anti-corruption bill which will contain extradition-related provisions limited to the area of corruption. Not all States parties, however, regulated extradition with the same level of detail. Some relied more heavily than others on provisions contained in extradition treaties.

5. A significant difference among the States parties stemmed from their belonging to different legal systems: the constitution of some of the States parties allowed for the direct application of duly ratified international treaties, but other States parties could only enforce treaties by enacting implementing legislation. Accordingly, most States parties belonging to the first category did not need to adopt detailed implementing legislation, by virtue of the fact that the extradition-related provisions of the Convention had become an integral part of their domestic legislation. One State party confirmed compliance with most provisions of the Convention by referring to very similar or equivalent provisions found in a regional treaty on corruption, to which it was a party.

6. The majority of States parties considered as extraditable only those offences punishable by deprivation of liberty for a period of at least one year. As a result, whenever offences based on the Convention were punishable with a lesser penalty, extradition would not be possible. It was noted that this situation might be addressed by increasing the applicable penalties to ensure that all conduct criminalized in accordance with the Convention became extraditable. In one bilateral treaty, only offences punishable by deprivation of liberty for a period of at least two years were considered extraditable.

7. Regarding "accessory offences" (those included in the extradition request without reaching the prescribed minimum period for punishment), some States parties made such offences extraditable if the main offence for which extradition was requested satisfied the minimum penalty requirement. One State party stated that it could not grant extradition for accessory offences; another stated that the issue was not regulated under its legal system.

8. Dual criminality appeared as a standard condition for granting extradition, the only exception being the surrender of fugitives in execution of the European arrest warrant. The majority of States parties set out this condition explicitly in their

domestic legislation; the two which did not set out the conditions in their legislation applied it in practice. The principle of dual criminality was generally interpreted in a flexible manner, in accordance with article 43, paragraph 2, of the Convention, which deems the principle fulfilled regardless of the terminology used to denominate the offence in question. Only the Government of one State party expressed an interest in modifying its legislation to remove the dual criminality requirement for some or all of the offences set forth in its penal laws, thus indicating the intention to align itself with article 44, paragraph 2, of the Convention. In one case, the full criminalization of all offences based on the Convention was recommended as a way to ensure that the dual criminality requirement would no longer constitute an obstacle to the surrender of suspected offenders.

9. Almost all of the States parties under review had an exhaustive list of grounds for refusal in their legislation; the one State party that was an exception deduced the grounds for refusal from general principles of international law whenever an extradition request was not based on a treaty. Only one State party made a distinction between compulsory and optional grounds for refusal, while another took the approach of listing a few grounds for refusal in its Constitution.

10. Most States parties could not reject a request on the sole ground that the offence involved fiscal matters (see box 1). In two cases, lack of legislation or practice left a degree of uncertainty as to whether an extradition request might be refused on that ground.

Box 1

Example of good practice in the implementation of article 44, paragraph 16, of the Convention

Several States parties referred to an exhaustive list of grounds for refusal contained in their domestic legislation regulating extradition; the circumstance that the offence in question involved fiscal matters was not listed among the possible grounds for refusal. Similarly, most States parties reported that they would not refuse a request for mutual legal assistance on the sole ground that the offence involved fiscal matters.

11. Concerning the so-called “non-discrimination clause”, set forth in article 44, paragraph 15, of the Convention, the majority of States parties could refuse to grant extradition when there were grounds to believe that the request had been formulated with a view to persecuting the person sought on account of his or her gender, race, religion, nationality, ethnic origin or political opinions. A few States parties did not make any reference to that ground, and in two cases the risk of discrimination based on gender was not considered. In two cases, the legislation did not make any reference to the non-discrimination clause.

12. All of the States parties’ legislation specifically listed the commission of a political offence among the grounds for refusal. One State party mentioned that this was the most common cause of rejection of incoming requests (together with the circumstance that the prosecution of the offence was statute-barred). However, all of the States parties took the same approach of not defining the notion of “political

offence” in legislative terms. As a result, decisions on whether to reject an extradition request on those grounds are taken on an ad hoc basis. In one case, the Constitution mentioned that extradition was not allowed for “political reasons”, an expression that the reviewers found to be ambiguous as to its actual scope of application. There was no indication or record that corruption-related offences had been or would be considered political in nature in any of the States parties.

13. Five States parties reported that, as a matter of principle, they could not extradite their own nationals unless this possibility was explicitly envisaged in applicable treaties. All but one of them specified that any refusal to grant extradition based on those grounds would trigger a domestic prosecution, in accordance with article 44, paragraph 11, of the Convention. None of them appeared to allow the temporary surrender of nationals on condition that they would be returned after trial to serve the sentence imposed in the requesting State, pursuant to article 44, paragraph 12. Instead, all except one appeared to be able to enforce a foreign sentence whenever they rejected a request for extradition (sought for enforcement purposes) on the ground that the person to be extradited was one of their nationals (see box 2).

Box 2

Example of good practice in the implementation of article 44, paragraph 13, of the Convention

In most States where the extradition of a person for the purpose of enforcing a sentence could be refused on the ground that the person was a national of the requested State party, legislation allowed that a sanction imposed by a foreign court could be converted into a form of penalty recognized and enforced under domestic law.

14. Generally, with regard to the legal bases for receiving or sending extradition requests, States parties following the continental-civil-law model were in a position to extradite without a treaty, typically on the basis of reciprocity, while countries belonging to the common-law tradition required the previous existence of a treaty. However, the distinction between the two groups was not always clear cut: for example, one State party from the common-law group noted that, although in principle a treaty basis would be needed, in the absence of such basis the Government might, through official journal notification, establish extradition relations with any country and thus extend cooperation for extradition in the same manner as if there was a treaty.

15. None of the States parties highlighted any legal obstacle to the possibility of using the Convention as the basis for extradition. At the same time, it emerged that the Convention was not widely utilized in practice for this purpose. One State party argued that bilateral treaties generally provided a more comprehensive and detailed regulation of extradition matters than the Convention did. Another State party offered a different explanation, namely that domestic practitioners generally lacked knowledge about the possibility of using the Convention as a concrete legal tool for international cooperation.

16. In the field of extradition, all States parties relied to a greater or lesser extent on treaties (whether bilateral or regional). Regional treaties took the form either of fully fledged extradition conventions or conventions on corruption containing some specific provisions on extradition. In general, bilateral treaties tended to be concluded with States parties of the same region or those in which the same language was spoken. In one case, it was recommended that the Convention be extensively used as a legal basis for extradition as a way to compensate for the very limited number of bilateral treaties in place.

17. On plans to conclude new treaties to enhance the effectiveness of extradition, the majority of the States parties stated their general willingness to explore possibilities in this regard. One State party highlighted its current policy of prioritizing negotiations with those States parties in which there was a high presence of its own nationals. Overall, and despite the fact that most States parties did not require treaties as a condition of extradition, a number of recommendations were issued encouraging them to continue exploring the possibility of negotiating additional extradition treaties.

18. As to the average duration of extradition proceedings, two States parties provided information pointing to substantial differences in this regard: one State party mentioned an average length of between two and three months and the other mentioned seven months.

19. Lack of uniformity was also noted in terms of the evidentiary threshold that requesting States parties must satisfy in order to have their extradition requests accepted. The spectrum ranged from one State party not requiring any sort of evidence about the commission of the offence to others setting relatively high evidentiary standards. The latter were expressed in terms of probable cause or prima facie case. A number of recommendations were addressed to these States parties with a view to introducing a lower burden of proof in extradition cases, thus making it easier for requesting States parties to formulate an acceptable extradition request.

20. Two States parties provided for a simplified extradition proceeding on condition, among others, that the person sought consented to his or her transfer (see box 3). A third one indicated that such a procedure would become applicable in its own legal system once a regional agreement on extradition came into force.

Box 3

Example of good practice in the implementation of article 44, paragraph 9, of the Convention

In two States, the law provided that, with the consent of the sought person, a request for extradition could be executed without a judicial proceeding, thus considerably simplifying the extradition procedure. In one of those States, such practice was also foreseen in a bilateral treaty on extradition.

21. According to most States parties, the main due process guarantees for the benefit of the person sought were enshrined in their Constitution. Although those guarantees appeared to be applicable to the conduct of criminal proceedings, they were normally considered to extend to other judicial procedures, including

extradition. Only one State party explicitly mentioned the applicability of relevant human rights conventions, including the International Covenant on Civil and Political Rights, while providing a list of rights applicable in the course of extradition, which included the right to a defence counsel and to an interpreter, as well as the right to appeal the court ruling imposing preliminary detention and the court order authorizing extradition.

22. All States parties had measures in place to ensure the presence of the person sought at extradition proceedings. Custody, in particular, could invariably be ordered upon request. One State party reported that local courts were empowered to consider the legality of detention during extradition proceedings in the same way as they would do for pretrial custody.

23. There appeared to be no uniform interpretation and application of the requirement set forth in article 44, paragraph 17, of the Convention (i.e. consultation with the requesting State before refusing extradition). Some States parties considered that no implementing legislation would be needed, either because they regarded the duty of consultation as part of international comity or because they interpreted this provision of the Convention as being directly applicable and self-executing in their own legal system. One State party took a considerably different approach by arguing that the prosecutor, in his or her capacity as representative of the requesting State before the extradition authorities, was implicitly bound to keep the requesting State informed of all of his or her actions. In two cases, lack of both legislation and practice resulted in non-implementation of the requirement.

24. Some of the States parties under review provided statistics and figures about the number of extradition requests made and received over the past few years, including the percentage of granted requests. However, the data provided was of a general nature and did not provide an overview of how many extradition cases for corruption-related offences had been handled.

B. Transfer of sentenced persons

25. Most States parties could rely on the necessary legal framework to carry out the transfer of sentenced persons in accordance with article 45 of the Convention, notably through bilateral and regional agreements (see box 4).

Box 4

Example of good practice in the implementation of article 45 of the Convention

Several States parties referred to a regional agreement on the transfer of sentenced persons, which allowed a sentencing State, with the consent of the person sentenced to imprisonment, to transfer that person to the territory of another State that would administer the sentence. The competent authorities of the administering State would either continue the enforcement of the sentence immediately or convert the sentence into a domestic decision, through a judicial or administrative procedure.

26. The number of treaties concluded on this matter by the States parties varied considerably. Whereas one State was bound by 28 bilateral agreements covering the

transfer of sentenced persons, another one mentioned only two. Similarly to what was observed in relation to extradition, a tendency was detected to conclude relevant agreements with neighbouring States or States in which the same language was spoken.

27. In two cases, no agreement was in place, with one State party arguing that its national legislation barred such transfers until discharge when the person concerned was serving a sentence under any conviction within its territory. However, the same State expressed the intention to change such legislation in order to ensure compliance with the Convention.

28. Outside of any treaty framework, most States parties indicated that they were in a position to transfer sentenced persons on the basis of domestic laws. In one case, this possibility was limited to persons sentenced for money-laundering or drug-related offences. However, the same State specified that, in practice, all transfers had taken place through treaties. Another State party specifically mentioned reciprocity and dual criminality as conditions to execute transfers. Only one State party reported that it had used the diplomatic channel twice to transfer sentenced persons.

C. Mutual legal assistance

29. The extent and scope of regimes of mutual legal assistance varied in the States reviewed. Two States parties had adopted specific domestic legislation regulating mutual legal assistance. Five States parties reported that, in the absence of comprehensive domestic legislation on the matter, mutual legal assistance was provided on the basis of multilateral and bilateral treaties. In three cases, it was noted that mutual legal assistance could be afforded even in the absence of treaties, based on principles such as reciprocity.

30. The regulatory framework of mutual legal assistance, as in the case of extradition, was influenced by the nature of the legal system of States parties. In States where the direct application of treaties was permitted, the provisions of the Convention that are self-executing would apply without the need for specific implementing legislation. In States where implementing legislation was required to enact international treaties, the provisions of the Convention would not be applicable without the adoption of enabling laws.

31. Four States were able to grant mutual legal assistance in relation to offences for which legal persons may be held liable. In two of those States, the principle of criminal liability of legal persons was not established, but mutual legal assistance was possible because dual criminality was not required. One State party indicated that mutual legal assistance would not be granted with respect to offenders that were legal persons. Four States parties did not provide any information in this respect.

32. The purposes for which mutual legal assistance may be requested, according to article 46, paragraph 3, of the Convention, were to a large extent covered by domestic legislation in three of the States reviewed. Four States parties indicated that such purposes were specified in the applicable bilateral or multilateral mutual legal assistance treaties. In most States, asset recovery, in accordance with chapter V

of the Convention, was not explicitly listed among the purposes for which mutual legal assistance might be requested.

33. Spontaneous transmission of information to foreign authorities and the modalities thereof, envisaged in article 46, paragraphs 4 and 5, of the Convention, were not specifically regulated in the domestic legislation of the States parties reviewed. Four States parties noted, however, that even if not foreseen, spontaneous transmission was possible, because it was not explicitly prohibited, and one State party had even designated a specific authority empowered to transmit information without prior request (see box 5).

Box 5

Example of good practice in the implementation of article 46, paragraph 4, of the Convention

One State party reported that it had designated a specific domestic authority that was empowered to transmit information relating to criminal matters to foreign authorities without prior request.

34. The principles established in articles 46, paragraphs 6 and 7, of the Convention were generally accepted among the States parties reviewed. In States parties where the direct application of treaties was not permitted, legislation was required to ensure that the mutual legal assistance provisions of the Convention were applied in the absence of a bilateral or multilateral treaty on mutual legal assistance.

35. In most of the States reviewed, requests for mutual legal assistance could not be declined on the ground of bank secrecy, although in some cases access to bank records had to be duly authorized by prosecuting or judicial authorities.

36. The majority of States parties reviewed provided that dual criminality was not a requirement for granting mutual legal assistance. Among those, one State party noted that in the absence of dual criminality, assistance would be rendered only for non-coercive measures. It should be noted that in three cases the reviewers were not provided with a clear response on the matter, and only one State party indicated that dual criminality was required, without specifying whether assistance would be granted when involving non-coercive measures.

37. Four States parties indicated that they applied the provisions of article 46, paragraphs 10-12, of the Convention (on transfer of detainees for purposes of identification) if the matter was not regulated by specific bilateral or multilateral treaties or mutual legal assistance. That appeared to be the case in all States whose legal systems permit direct application of treaties, although the answers provided were not always precise.

38. Central authorities that were enabled to receive requests for mutual legal assistance had been designated by all but one State party, but notification to the Secretary-General was missing in two cases. In most cases, the authority designated was the Ministry of Justice, and only two States parties had designated the Ministry of Home Affairs or the Ministry of Foreign Affairs. Only in two cases was a specific department identified within the designated ministry.

39. Four States parties required requests for mutual legal assistance to be submitted through diplomatic channels. Another State indicated that such a requirement was included in a number of applicable bilateral treaties on mutual legal assistance. In one case, it was accepted that requests for mutual legal assistance be addressed directly to the competent authority from which assistance was sought (see box 6). Most States parties reported that, in urgent circumstances, requests addressed through the International Criminal Police Organization (INTERPOL) were acceptable, even though in some cases subsequent submission through official channels was required.

Box 6

Example of good practice in the implementation of article 46, paragraph 13, of the Convention

One of the States parties that did not require requests for mutual legal assistance to be submitted through diplomatic channels accepted that such requests be submitted directly to its competent authority for execution.

40. Six of the States parties reviewed provided information on the languages acceptable for incoming requests. In three cases, the official language of the State party was the only one accepted, but in two cases requests formulated in English would also be accepted. One State party accepted requests in five languages, in addition to the two official ones (see box 7). Three States parties indicated that oral requests would be acceptable, and two of them affirmed that requests submitted by electronic mail would also be accepted; in two cases, subsequent formalization in writing was explicitly required. Most States parties confirmed that their legislation did not hinder requests for additional information, subsequent to the receipt of the request for assistance.

Box 7

Example of good practice in the implementation of article 46, paragraph 14, of the Convention

In two cases, States parties had notified the Secretary-General that requests for mutual legal assistance would be accepted if submitted in the official language or in English. One of those States parties accepted such requests if submitted without a translation in any one of five foreign languages.

41. Hearing of witnesses by videoconference, as provided for by article 46, paragraph 18, of the Convention, was permissible under the domestic law of four States parties. However, only one of these States reported that it had received requests for mutual legal assistance involving a hearing through videoconference.

42. The rule of specialty of information or evidence supplied, established in article 46, paragraph 19, of the Convention, was respected in most of the States reviewed, although no information on cases of implementation were provided. Similarly, a majority of States parties indicated expressly that they ensured confidentiality of the fact and substance of the request.

43. As far as grounds for refusal of mutual legal assistance were concerned, the majority of States parties indicated that their legislation did not provide for grounds other than those listed in the Convention and that the request would not be refused on the sole ground that the offence also involved fiscal matters. Most States parties would also provide the reasons for refusal of a request for mutual legal assistance.

44. According to the information provided by States parties, the average time needed for a response to a request for mutual legal assistance ranged from one to six months. It was generally accepted that requests submitted by States with a common legal, political or cultural background would be responded to more rapidly.

45. Most States parties indicated that nothing in their domestic legislation would prohibit consultations with the requesting State party before refusing or postponing a request, but only one example of such consultation was provided. No cases of postponement of execution of requests on account of interference with ongoing investigations were reported.

46. Safe conduct of witnesses, envisaged in article 46, paragraph 27, of the Convention, was addressed in the majority of States, either in relevant multilateral or bilateral treaties or in their domestic legislation.

47. With respect to the costs associated with mutual legal assistance requests, the general rule was that these would be covered by the requested State. No arrangements contradicting this principle were recorded. Further, most States parties indicated that documents available to the general public would be provided to the State requesting mutual legal assistance, but only two States parties expressly addressed the possibility of providing documents that were not publicly available. In one of the latter States, all documents in possession of the authorities were, by virtue of the law, public, and thus potentially available to requesting States.

D. Transfer of criminal proceedings

48. Three States parties noted that their legal system did not contain any provision regulating the transfer of criminal proceedings between States parties. Such a possibility was addressed in general terms in a regional instrument signed but not yet ratified by one State party; another State party provided in its domestic legislation for such a possibility among States parties to a regional international organization, when money-laundering offences were involved. In three States parties, the possibility of transferring proceedings was foreseen in domestic legislation or bilateral or multilateral treaties in general terms for all criminal matters, but no such transfer had taken place. In one case, it was argued that the transfer of criminal proceedings was a routine practice, without concrete examples of implementation. No information was provided as to whether States parties considered the possibility of transferring proceedings to one another for the prosecution of corruption-related offences established in accordance with the Convention.

E. Law enforcement cooperation

49. Channels of communication between competent anti-corruption authorities and services were reported to be more frequent at the regional level, be it at the bilateral level, under the regulatory framework of regional organizations, or within regional networks such as the Asset Recovery Inter-Agency Network of Southern Africa and the Camden Asset Recovery Inter-Agency Network. In the context of regional cooperation, tools such as secure databases for the sharing of information among law enforcement authorities had been developed.

50. Membership to INTERPOL was generally regarded as facilitating law enforcement cooperation at the broader international level. However, it was noted by reviewers that INTERPOL could not replace direct channels of communication between law enforcement authorities, agencies and services of other States, which appeared to be rare beyond the regional level.

51. Exchange of information appeared to be a common feature among financial intelligence units: six States parties indicated actual or developing engagement between their units and foreign ones, mainly through conclusion of memorandums of understanding or membership to the Egmont Group (see box 8).

Box 8

Examples of good practices in the implementation of article 48, paragraph 1, of the Convention

The majority of States parties reviewed had established mechanisms allowing the exchange of information among their financial intelligence units. To that end, most States parties had concluded memorandums of understanding between such units and established contact through cooperation frameworks such as the Egmont Group.

Informal channels of communication, established in the framework of regional networks, were also deemed to facilitate law enforcement cooperation.

With regard to effective coordination between authorities, agencies and services, one State party, together with States in the same region, had set up a joint network of liaison officers, allowing police officers of any one of the States to act on behalf of the police of any of the other States.

52. With respect to measures of cooperation in inquiries concerning offences covered by the Convention, it was noted that most of the States parties reviewed did not provide information on their specific regulation or implementation, but rather provided an overview of the general legal framework within which such measures could be taken. Two States parties provided information on inquiries effectively conducted in cooperation with other States. Similarly, no information was provided by the States parties reviewed on specific measures regarding supply of items or substances for analytical purposes and means or methods used to commit offences covered by the Convention.

53. Regarding coordination through exchange of personnel or experts, only one State party explicitly confirmed the posting of police liaison officers to other countries or international organizations.

54. The conclusion of bilateral or multilateral agreements or arrangements on direct cooperation between law enforcement authorities appeared to be part of the practice of a majority of States, as most States indicated that they had entered or were considering entering into such agreements, predominantly with States in the same region or language community. Only three States parties mentioned explicitly that they used the Convention as a basis for mutual cooperation in respect of offences covered by the Convention.

55. Cooperation in response to offences committed with the use of modern technology was not established among the States parties reviewed. Eight States parties did not provide specific information on modalities of cooperation to respond to such offences, and only one State party mentioned the establishment of a permanently available focal point in the framework of a regional treaty addressing all forms of cybercrime as a means of cooperation.

F. Joint investigations

56. Among those reviewed, only three States parties were parties to bilateral or multilateral agreements or arrangements allowing for the establishment of joint investigative bodies. Another two States parties mentioned that their legal systems and practice allowed joint investigations to be requested and conducted on a case-by-case basis and confirmed that they had done so on a number of occasions. Four States parties had neither concluded bilateral or multilateral agreements in view of carrying out joint investigations nor undertaken such an endeavour on an ad hoc basis. None of the States parties reviewed had provided cases of joint investigations into offences established according to the Convention.

G. Special investigative techniques

57. Special investigative techniques were regulated in the legislation of five of the States parties reviewed; however, in two cases, the utilization of such techniques was authorized solely with respect to specific criminal offences, which did not include corruption-related offences. In four other States, existing domestic provisions did not cover the use of special investigative techniques, although two of those States noted that special investigative techniques would be allowed under draft legislative provisions that were under discussion at the time of the review.

58. International agreements or arrangements mentioned in article 50, paragraph 2, of the Convention had been concluded by three States, usually involving counterparts in the same region or members of the same regional organization. Among the six States parties that had not concluded such agreements, one State party reported that it would be possible to use special investigative techniques if requested by States with which a treaty on mutual legal assistance in criminal matters had been concluded.

59. The information provided by the States reviewed further suggested that special investigative techniques could be used at the international level in the absence of relevant international agreements and on a case-by-case basis in only four States. Among those, two States parties noted that they would do so only in case of reciprocity.
