

Mechanisms of International Cooperation in the Field of Combating Corruption: An Analytical Study of the Provisions of the United Nations Convention against Corruption of 2003.

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Introduction:

Given the seriousness of corruption crimes, their alarming and rapid spread, and the need to combat them, the States Parties, pursuant to the United Nations Convention against Corruption, adopted a set of precautionary or preventive measures that States are required to implement within their national laws. Corruption constitutes fertile ground for the spread of other transnational crimes and has a close relationship with them, as it significantly contributes to the collapse of the political and legal systems of States, thereby facilitating the task of criminals in committing other crimes, such as money laundering and economic crimes. Corruption crimes are also closely linked to terrorist crimes, which has raised States' concerns about their seriousness. This may, in one way or another, affect the stability and security of societies and lead to the collapse of moral values and justice, whereby State institutions also lose their value and the rule of law and sustainable development are placed at risk.

The continued concern among States Parties has been further aggravated by the spread of corruption across the territories of States, making it one of the most serious transnational crimes that negatively affect States, particularly developing countries. This prompted the international community to consider collective mechanisms to combat it while respecting the internal sovereignty of States. These efforts culminated in the adoption of the United Nations Convention against Corruption pursuant to General Assembly Resolution 58/4, dated 31 October 2003. All these reasons prompted States to adapt their legal systems in accordance with the objectives of the Convention, including the Algerian legislator, which, under Law No. 06/01 on the Prevention of and Fight against Corruption, adopted a set of provisions ranging from

preventive measures to deterrent measures, in cooperation with the States Parties to the Convention.

According to the Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, cooperation may be formal through the conclusion of bilateral or multilateral treaties, or it may be informal, involving direct cross-border communication between one official and another or between one authority and another.

Based on the aforementioned reasons and pursuant to the United Nations Convention against Corruption, it is necessary to raise the following problem: To what extent are the provisions of the Convention effective in the field of international cooperation? And can it be considered a sufficient model for combating corruption in light of the different legal systems of the States Parties, particularly the principle of dual criminality?

To answer this problem, we will examine some of the provisions of the Convention relating to means of international cooperation throughout the stages of combating corruption, beginning with investigation, through prosecution and extradition, and ultimately the recovery of criminal proceeds in order to prevent their mixing with legitimate capital, by following an analytical approach to the provisions of these articles.

1- Judicial International Cooperation and Exchange of Information

The purpose of judicial and administrative international cooperation is to prevent criminals from escaping punishment. It is an inevitable measure imposed by the ease of movement of persons between the territories of States. Modern technology has also contributed significantly to the planning and commission of this type of crime. Therefore, it was necessary for the States Parties to consider joining efforts¹ in all fields requiring the fight against corruption in particular and organized crime in general. Cooperation among States encompasses all stages of combating corruption, including preventive measures. However, in this section, we will focus on judicial procedures and the subsequent law enforcement stage, as follows:

1-1- Mutual Legal Assistance

Mutual legal assistance refers to the assistance exchanged between States Parties in investigations, prosecutions, and judicial proceedings related to corruption offences,² under the threat of criminal, civil, or administrative liability.³ Legal assistance may be provided at the request of another State or without a request whenever necessity so requires, as a State may deem it appropriate to transmit information that it believes could assist an authority of another State in carrying out its duties without being requested to do so.⁴

Legal assistance includes the following judicial procedures:⁵

- Obtaining evidence and statements from persons.

¹ Arab League Convention on Judicial Cooperation, 1983.

² See paragraph 1 of Article 46 of the United Nations Convention against Corruption, adopted pursuant to General Assembly Resolution 58/4 dated 31 October 2003, United Nations Office on Drugs and Crime, Vienna, United Nations, New York, 2004.

³ See Article 26 of the same Convention; see also Article 10 of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, adopted pursuant to General Assembly Resolution 55/25 dated 15 November 2000, United Nations Office on Drugs and Crime, New York, 2004.

⁴ See paragraph 4 of Article 46 of the same Convention.

⁵ Paragraph 3 of Article 46 of the same Convention.

- Serving judicial documents.
- Conducting searches and seizures and implementing freezing measures.
- Examining objects and sites.
- Providing information, materials, evidence, and expert assessments.
- Providing originals of relevant documents and records, even if governmental, banking, or financial.
- Identifying, freezing, and recovering criminal proceeds used in related offences.
- Facilitating the appearance of persons involved in corruption offences before the requesting State.

According to the provision of the Article, assistance extends to any judicial procedure that facilitates the investigation of the case and does not conflict with the domestic law of the requested State Party. For the purpose of implementing these obligations, paragraph 6 of Article 46 stipulates the necessity of complying with the bilateral or multilateral treaties to which the requested State has previously committed itself.¹ As an exception, paragraph 7 provides for the possibility of the Parties agreeing to abide by the content of Article 46 of the Convention against Corruption, without depriving other treaties of their binding force and legal validity, with the aim of unifying efforts to combat corruption and facilitating cooperation among States.

Under the provisions of the Convention, the States Parties have established a set of conditions for the process of mutual legal assistance, namely:²

- States must comply with bilateral or multilateral treaties concluded for the purpose of legal assistance outside the Convention.
- Full compliance with the judicial procedures related to the offence under prosecution against persons who have been transferred for the purpose of investigation and prosecution, and the procedures may not be extended to other judicial purposes unless the State from which the person under prosecution was transferred agrees thereto.
- Each State must assign responsibility for the exchange and implementation of legal assistance to a competent central authority.
- Requests must be submitted in writing and by any means that ensures the production of a written record, in order to preserve the information from destruction
- The State requesting the information and evidence must undertake to preserve them and not transfer them without the prior consent of the requested State Party. Conversely, the requested State must maintain the confidentiality of the request and its contents at the request of the requesting State, except to the extent necessary for its execution.
- The requested State must execute the request for legal assistance as soon as possible, taking into consideration, to the greatest extent possible, the time limits proposed by the requesting State.

¹ Treaty of the Association of Southeast Asian Nations on Mutual Legal Assistance in Criminal Matters, 2004; Commonwealth Scheme on Mutual Assistance in Criminal Matters (Harare Scheme, as amended in 1990, 2002, and 2005).

² See paragraphs 6, 8, 12, 13, 19, 20, 22, 24, 25, and 27 of Article 46 of the United Nations Convention against Corruption.

- Mutual legal assistance may not be used to prosecute, detain, or punish any witness, expert, or other person who agrees to give testimony or to assist in any judicial proceeding.
- Mutual legal assistance may not be refused on the grounds of bank secrecy or merely because the offence is considered to be related to financial matters.

Despite the great importance attached by the States Parties to legal assistance procedures, they provided for the possibility of refusing or postponing such assistance, while stating the legal reasons for the refusal, where it concerns:¹

- The request was submitted in violation of the provisions of the Article, particularly paragraph 15 of Article 46.
- The execution of the request conflicts with the security, sovereignty, essential interests, or public order of the State.
- The request conflicts with the legal system of the requested State or because it conflicts with ongoing investigations, prosecutions, or judicial proceedings.

Regardless of the transfer of persons for the purpose of completing investigations or any judicial proceeding, the provisions of the Convention also include the transfer of persons after their conviction to complete their sentences in the territory of the requesting State, as the States are encouraged to conclude agreements or arrangements to that effect.² Furthermore, it is possible to transfer proceedings related to the offence under prosecution between States in order to concentrate the prosecution and prevent its fragmentation, thereby facilitating the task of the prosecuting authorities, particularly the proper administration of justice.³

The objective of concerted international efforts aimed at combating corruption has prompted the States Parties, in addition to exchanging legal assistance, to consider establishing joint investigative bodies, with full mutual respect for the sovereignty of each State whenever an investigation concerns its territory.⁴ Given the seriousness of corruption offences, which has been demonstrated by the sophistication of organized criminal groups, due to the risks and difficulties inherent in gaining access to their operations for the purpose of judicial prosecution,⁵ and with a view to further strengthening international cooperation, Article 50 of the Convention against Corruption provides for special investigative techniques that may be used individually or in cooperation with another State, such as controlled delivery,⁶ electronic surveillance, or any other form of surveillance, or the use of undercover operations. With regard to electronic surveillance, it must be subject to strict judicial control and legal safeguards to prevent its misuse.

1-1- Extradition:

¹ See paragraphs 21 and 25 of Article 46 of the same Convention.

² See Article 45 of the Convention.

³ See Article 47 of the Convention.

⁴ See Article 49 of the Convention.

⁵ See paragraph 233 of the Legislative Guide for the Implementation of the United Nations Convention against Corruption, Second Revised Edition, United Nations Office on Drugs and Crime, Treaty Affairs Section, New York, 2012.

⁶ Paragraph 4 of Article 50 provides that controlled delivery may include methods such as intercepting goods or funds and allowing them to proceed safely, or removing or replacing them in whole or in part.

The judicial cooperation provided for in the Convention encompasses all stages of judicial proceedings. Similar to the United Nations Convention against Transnational Organized Crime, the Convention against Corruption calls upon States Parties to cooperate in the field of extradition,¹ as a necessary judicial stage in combating corruption. This may only be carried out subject to a set of safeguards and conditions that States must follow.

Before addressing these safeguards, it should be noted that extradition is a formal process that is most often based on a treaty, the purpose of which is to return or surrender fugitives to the jurisdiction in which they are wanted in connection with their criminal activities.

This procedure dates back to the late nineteenth century, when bilateral extradition treaties began to be concluded as part of efforts to eliminate safe havens for dangerous offenders. The provisions of such treaties vary from one State to another.²

Given that organized crime in general, and corruption offences in particular, are affected by the circumstances surrounding them, particularly technological developments and social and economic changes, the States Parties have adopted a criterion concerning the principle of dual criminality in order to avoid the exclusive specification of offences by means of a bilateral treaty. Under this criterion, the definition of an offence is based on a basic penalty or a minimum penalty for offences subject to extradition, meaning the determination of a specific threshold for the penalty, such as deprivation of liberty for a period of one year.³

The purpose of adopting this criterion is to broaden the scope of criminal cooperation in the field of extradition, in order to avoid encountering domestic laws that may conflict with this procedure. To this end, Article 44 of the United Nations Convention against Corruption allows States Parties whose laws permit them to agree to extradite any person for offences falling within their subject-matter jurisdiction,⁴ even if such offences are not punishable under their domestic laws.⁵ Moreover, the States Parties have considered the corruption offences covered by the Convention to be extraditable offences under any existing treaty between States Parties and have required them to include such offences in every treaty subsequently concluded between them, provided that they are not considered political offences.

Accordingly, it can be said that this Convention has established the necessity of adopting a unified model among the States Parties with regard to offences subject to extradition and has emphasized the need to consider all corruption offences as offences subject to this procedure, regardless of the principle of dual criminality, in an effort to prevent offenders from escaping judicial prosecution. To the extent that it indirectly restricted States by introducing exceptions

¹ Commonwealth Scheme for the Rendition of Fugitive Offenders, as amended in 1990; Arab League Convention on Extradition, 1952.

² See paragraph 70 of the Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime, United Nations Office on Drugs and Crime, New York, 2004, p. 173.

³ See the Legislative Guide for the Implementation of the United Nations Convention against Corruption, International Cooperation Section, p. 149.

⁴ Paragraph 3 of Article 44 provides that: "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 the period of imprisonment applicable to them but are related to offences established in accordance with the Convention, the requested State Party may apply this article also in respect of those offences."

⁵ See paragraph 2 of Article 44.

to the rule that had governed treaties between them and exceptions to what is provided for in their domestic laws, on the one hand, it safeguarded the sovereignty of States over their territories, while on the other hand, it opened the possibility of extradition even to States whose domestic laws do not punish corruption offences and required them to include this type of offence in any treaty to be concluded.

Furthermore, such inclusion also applies to treaties already concluded, as stated in paragraph 4 of Article 44: “These offences shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties.” The Convention also considered itself the legal basis for extradition¹ where extradition is conditional upon the existence of a treaty.² The extradition of offenders is a judicial procedure that assists States in combating corruption among themselves. Therefore, the Convention provides for a set of safeguards that should be observed in this procedure, namely:

- Expediting and simplifying extradition procedures, subject to the domestic laws of each State.
- If the requested State refuses a request for the extradition of an offender, it shall automatically and without undue delay submit the person to prosecution under its domestic laws and in cooperation with the parties concerned.³
- Extradition procedures require the requested State to take the necessary measures to detain the person sought within its territory in order to ensure his or her presence at the time of extradition, whenever it is satisfied that the circumstances so warrant.⁴
- The refusal to extradite a person who is a national of the State requested to extradite, under domestic law that permits such refusal only on the condition that the person be returned to that State to serve the sentence imposed upon him or her, shall be sufficient to fulfil the obligation set forth in paragraph 11 of Article 44⁵ (domestic prosecution).
- The refusal of extradition for the purpose of enforcing a judicial decision on the grounds that the person belongs to the requested State requires that the decision be enforced in accordance with the domestic law of the requesting State, upon the latter’s request.⁶
- Legal and judicial safeguards must be provided by the State in whose territory the person subject to extradition is located, at all stages, and such persons must be treated humanely and fairly.⁷
- States’ obligation to extradite should not be for the purpose of prosecuting or punishing a person or causing harm to that person on discriminatory grounds, particularly on the basis of their sex, race, religion, nationality, ethnic origin, or political opinions.⁸

¹ See paragraph 7 of Article 44.

² See paragraphs 5 and 6 of Article 44.

³ See paragraph 11 of Article 44.

⁴ See paragraph 10 of Article 44.

⁵ See paragraph 12 of Article 44.

⁶ See paragraph 13 of the same Article.

⁷ See paragraph 14 of the same Article.

⁸ See paragraph 15 of Article 44.

- Any refusal of extradition must be subject to consultation with the requesting State Party in order to justify its request.¹

1- Cooperation in the Field of Law Enforcement:

In addition to the aforementioned stages, namely the stages of prosecution and the procedures that follow, and with a view to the full implementation of the Convention, the latter provides for the final stage of combating corruption, namely cooperation in the field of law enforcement, whether before a judicial decision is rendered in respect of an offence or thereafter, in terms of implementing judicial judgments and decisions. Cooperation in the field of law enforcement includes close cooperation among States, in accordance with their domestic legal and administrative systems,² in two areas:

1-1- Coordination between Competent Authorities and Agencies:

Coordination among the authorities and agencies of States concerned with combating corruption requires the exchange of information on all aspects of offences and their links to criminal activities whenever deemed appropriate, particularly the identities of persons suspected of participating in such offences, their whereabouts and activities, and the movement of capital derived from offences or any property and means used for the same purpose.³ Conversely, States Parties shall provide one another with the necessary means and resources for the purposes of analysis and investigation.⁴

The exchange of information among States must also include the methods and means used in committing offences, such as the use of false identities or forged documents, and every means intended to conceal criminal activities.⁵ Cooperation in the field of law enforcement also requires encouraging the exchange of personnel and other experts, including the designation of liaison officers.⁶ The purpose of this exchange is the continuous training of human resources in this field. For greater effectiveness, there is no objection to exchanging information and coordinating administrative measures with a view to curbing these criminal activities or detecting them at an early stage.⁷

The enforcement of law in the field of combating corruption can only be achieved through compliance with the international cooperation procedures mentioned above in accordance with the Convention. Such cooperation requires the following conditions:

- Concluding bilateral or multilateral arrangements or agreements on cooperation between enforcement agencies.
- Where agreements or arrangements exist, they must be reviewed and amended in accordance with the provisions of the Convention.
- Where no agreement exists, the Convention shall be adopted as a model for mutual cooperation in law enforcement.

¹ See paragraph 18 of the same Article.

² See paragraph 1 of Article 48 of the United Nations Convention against Corruption.

³ See subparagraph (a) of paragraph 1 of the same Article.

⁴ See subparagraph (c) of the same paragraph.

⁵ See subparagraph (d) of the same paragraph.

⁶ See subparagraph (e) of paragraph 1 of Article 48.

⁷ See subparagraph (f) of paragraph 1 of Article 48.

- In order to strengthen and facilitate cooperation in the field of law enforcement, States shall, to the greatest extent possible, seek to address offences committed through modern technology, and this can only be achieved by confronting them with more advanced technological means.
- Where States agree to adopt one of the aforementioned methods, the following conditions must be met:
- Such agreements or arrangements must be consistent with the domestic legal and administrative systems of the States.
- Facilitating the exchange of information in a secure and rapid manner, and, where necessary, through the use of secure modern technologies.

1-1- Coordination in the Field of Recovery of Proceeds of Crime

As previously indicated, law enforcement takes two forms: the first occurs prior to the commission of the offence, while the second is aimed at enforcing a judicial order or decision. Regardless of the prevention and detection of the transfer of criminal proceeds by financial institutions and the subjection of banking and financial transactions to strict supervision,¹ this section will be devoted to international cooperation in the field of confiscation of proceeds of crime,² which has serious and even devastating consequences for the State of origin due to its negative impact on its economy. It depletes foreign currency reserves, reduces the tax base, increases levels of poverty, and harms competition and the foundations of free trade.³ More broadly, corruption is a widespread scourge that may encompass all areas outside the State's economy.

The direct impact of illicit funds on the economy and foundations of the State has become a concern for States, requiring the concerted efforts of States on the broadest possible scale to return criminal proceeds to their original source, particularly those arising from offences committed by senior public officials in the State. For the purpose of international coordination and cooperation in the field of confiscation, the United Nations Convention against Corruption provides for a set of measures and safeguards that States must follow for this purpose. The general practice in such offences is to conceal and launder them by integrating them into legitimate sources of funds, which makes the task of law enforcement difficult. These special confiscation procedures include the following:⁴

- Enforcing a confiscation order issued by a court of an international State through other means.
- Confiscating property constituting criminal proceeds of foreign origin where the State has jurisdiction and where the matter concerns money laundering or any other offence falling within its jurisdiction.

¹ See in detail Article 52 of the United Nations Convention against Corruption.

² Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005.

³ See the Legislative Guide for the Implementation of the United Nations Convention against Corruption, paragraph 660, p. 143.

⁴ See Article 54 of the United Nations Convention against Corruption.

- Confiscating property even where it is impossible to prosecute the offender for a reason such as death, absence, or otherwise, that is, without a criminal conviction.
- Freezing or seizing property pursuant to an order issued by a court or competent authority of the State Party requesting the seizure or freezing, as a preliminary stage prior to its confiscation.
- Provisional seizure of property for the purpose of confiscation based on an arrest or related criminal charge.

To strengthen the implementation of the aforementioned procedures, international efforts in this field must be coordinated within the limits of their domestic systems, either by executing the orders issued to them or by issuing orders through their competent authorities on the basis of information provided by a State Party.¹

Conclusion:

Through our study of the provisions of the United Nations Convention against Corruption and the United Nations Convention against Transnational Organized Crime, which constitute the basis for criminalizing corruption, it becomes clear to us that the States Parties have resorted to all means and mechanisms capable of combating these offences. In addition to preventive measures, the Convention did not overlook deterrent measures; rather, it went further by making them a shared responsibility of the States Parties, to the extent that it imposed criminal, civil, and administrative liability on national legal entities involved in committing the offences covered by the Convention. Furthermore, the Convention indicated within its provisions the possibility of adopting the principle of dual criminality relatively, such that an exact correspondence of terminology for defining criminalization in the two cooperating States is not required, or even the possibility of excluding it for the purpose of international cooperation whenever the State permits this.

Our presentation of the most important provisions concerning judicial cooperation and international law enforcement in the field of combating corruption requires us to propose the following:

- Given the seriousness of corruption offences, expanding the scope of cooperation to the extent of excluding certain domestic legal principles of States requires the States Parties to adopt the Convention as a model treaty in all areas of cooperation.
- Unifying cooperation mechanisms among States to combat corruption offences, particularly those involving technology.
- Reconsidering some of the provisions criminalizing acts of corruption by expanding and harmonizing them among States in order to avoid difficulties in law enforcement in the field of international cooperation.
- Facilitating and expediting the procedures for recovering property derived from or used in corruption offences for the purpose of confiscation, particularly property that has been integrated into legitimate funds.

¹ See in detail Article 55 of the same Convention.