

INVESTIGATING AND PROSECUTING INTERNATIONAL CORRUPTION AND MONEY LAUNDERING CASES

Training material

COUNCIL OF EUROPE



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Authors:

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For more information on the subject of the publication, please contact:
Economic Crime and Cooperation Unit
Action against Crime Department
Directorate General Human Rights
and Rule of Law
Council of Europe
Email: *contact.econcrime@coe.int*
Internet: *www.coe.int/corruption*

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Foreword

In today's increasingly globalised world, combating corruption and stemming the cross-border movement of its proceeds call for the use of modern and effective methods of international co-operation. For many years now, the Council of Europe has been in the forefront of setting standards through international conventions on corruption, money-laundering, mutual legal assistance and asset recovery. Our monitoring bodies, Group of States against Corruption (GRECO) and MONEYVAL, have supported member States in adhering to these standards through a process of mutual evaluation and specific recommendations.

In the Action against Crime Department, the Economic Crime and Cooperation Unit of the Council of Europe has implemented a number of country-specific and regional technical assistance projects on the fight against corruption and money-laundering, as well as on mutual legal assistance and asset recovery.¹ Within several of these projects, the Council of Europe produced manuals on investigating economic crimes, confiscating proceeds and cooperating internationally, none of which have however provided an all-encompassing overview of all issues associated with investigation of economic and financial crime.

The present publication strives to provide such step-by-step guidance to both policy makers and practitioners, looking at both legislative and practical aspects of criminal prosecution of economic and financial crime. The current publication is a product of a regional training "Implementing standards on detection, investigation and criminalisation of economic and financial crimes" for practitioners from the Eastern Partnership countries, which was held from 12 to 16 March 2012 at the International Institute of Higher Studies in Criminal Sciences in Syracuse, Italy. Twenty-six law enforcement and judicial officials took part in the training conducted in co-operation with the Basel Institute on Governance.

Bringing together experts from six different countries gave every participant the opportunity to reflect on their own legal and practical approach by comparing it to practices in other countries of the region. The publication brings further the comparative approach by illustrating different possible paths in criminalising economic crime available in different countries. I am confident that the comparative approach and the combined practical case scenario exercise on asset tracing make this publication of interest for practitioners beyond the Eastern Partnership region.

1. See Council of Europe: *Action against Economic Crime* website, available at www.coe.int/corruption.

The publication was contracted by the Council of Europe to the Basel Institute on Governance. I am grateful to Phyllis Atkinson, Tom Lasich and Federico Paesano who led this work on behalf of the Basel Institute, and to Tilman Hoppe, Council of Europe expert who reviewed and edited the text, and also drafted Appendix 4 "Overview of the simulated criminal case of the practical exercise".

Ivan Koedjikov
Head of Action against Crime Department

Glossary of Acronyms

ACN	OECD Anti-Corruption Network for Eastern Europe and Central Asia
Additional Protocol	Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, CoE, 1978
AML	Anti-money laundering
AML/CFT Law	Law of Ukraine on Prevention and Counteraction to Legalisation (Laundering) of the Proceeds of Crime or Terrorist Financing, No. 2258-VI, May, 18, 2010 as amended
ATM	Automated teller machine
CC	Criminal Code
CDD	Customer due diligence
CFT	Combating the financing of terrorism
Chisinau Convention	Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 2002
CIS	Commonwealth of Independent States
C.O.D's	Certificates of deposit
CoE	Council of Europe
CPC	Criminal procedure code
EAG	Eurasian Group on Combating Money Laundering and Financing of Terrorism
FATF	Financial Action Task Force
FIU	Financial intelligence unit
GRECO	Group of States against Corruption
IFI	Investigative file inventory
IMF	International Monetary Fund
IT	Information technology
LEAs	Law enforcement agencies

Minsk Convention	Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 1993
MLA	Mutual legal assistance
MLA Convention	European Convention on Mutual Assistance in Criminal Matters, Council of Europe, 1959
MLA Law	Law of the Republic of Azerbaijan on Legal Assistance in Criminal Matters, No. 163-IIQ
NCB	Non-conviction based
NPM	New payment methods
OECD	Organisation for Economic Co-operation and Development
OECD Anti-Bribery	OECD Convention on Combating Bribery of Foreign Convention Public Officials in International Business Transactions, 1997
Palermo Convention	United Nations Convention against Transnational Organised Crime, 2000
PE	Practical Exercise
Resolution No. 5	Resolution No. 5 of the Plenum of Supreme Court of Ukraine (15 April 2005)
SAR	Suspicious activity report
Second Protocol	Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Council of Europe, 2001
SFMS	State Financial Monitoring Service (Ukraine)
Supreme Court Decision No. 5	Supreme Court of Justice Explanatory Decision No. 5 (Republic of Moldova)
UAH	Ukrainian Hryvnja
UNCAC	United Nations Convention against Corruption
Vienna Convention	United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988
Strasbourg Convention	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990
Warsaw Convention	Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005

Focus of the manual

One of the main motives of serious and organised crime is financial gain. To benefit from profit-generating crime, criminals are usually forced to launder the proceeds to hide the origins thereof, hence the inevitable link between predicate offences such as corruption, and money laundering. As part of the strategy for fighting corruption and money laundering, it is essential to target the proceeds of such crime by conducting an integrated financial investigation. In order to be effective in preventing and combating all kinds of serious crime, it is necessary for the investigation to focus also on tracing, freezing, seizing and confiscating the proceeds from these crimes.

Of particular importance to law enforcement agencies is the new (mandatory) global standard, i.e. Recommendation 30 of the Financial Action Task Force (FATF) Recommendations, FATF being the global standard setter in the fight against money laundering and terrorist financing.² It emphasises the need for designated law enforcement agencies to bear responsibility for ensuring that money laundering and predicate offences are properly investigated through the conduct of a financial investigation. Countries are also required to designate one or more competent authorities to identify, trace and initiate freezing and seizing of property that is, or may become, subject to confiscation. A “financial investigation” is defined in the Interpretive Note to Recommendation 30 as an enquiry into the financial affairs related to a criminal activity with a view to, *inter alia*, identifying and tracing the proceeds of crime, terrorist funds or any other assets that are, or may become, subject to confiscation. It also includes an enquiry with a view to developing evidence which can be used in criminal proceedings. In the same Interpretive Note, “A ‘parallel financial investigation’ refers to conducting a financial investigation alongside, or in the context of, a (traditional) criminal investigation into money laundering, terrorist financing and/or predicate offence(s)”.

2. The FATF is an inter-governmental body which sets standards and develops and promotes policies to combat money laundering and terrorist financing. A *list of all members and observers* can be found on the FATF website at www.fatf-gafi.org. The FATF Recommendations have been recognised by the International Monetary Fund (IMF) and World Bank as the international standards for combating money laundering and terrorist financing, and were recently revised in February 2012. Armenia and Republic of Moldova are observers of the Eurasian Group on Combating Money Laundering and Terrorist Financing (EAG), one of 8 FATF-Style Regional Bodies, whilst Belarus is a member thereof. Azerbaijan, Georgia, Republic of Moldova and Ukraine are all members of MONEYVAL (CoE Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism), another FATF-Style Regional Body.

It is, therefore, imperative that prosecutors and investigators of such crime possess the necessary expertise and skills to conduct a thorough investigation and, ultimately, prosecute serious crimes of this nature.

The primary purpose of any criminal investigation is to obtain evidence to enable the prosecution to bring criminal charges against the perpetrator, secure a conviction if the evidence supports the charges and ensure that he/she is adequately sentenced for the crime. It is also aimed at confiscating the proceeds of crime as part of the process where relevant.

The purpose of this manual is to enable those who participated in the regional training programme held in Siracusa, Sicily from 12-16 March 2012 to assist in enhancing the capacity of investigators and prosecutors in Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine to investigate successfully and prepare for prosecution corruption and money laundering cases, and recover assets. By focusing on acquiring a thorough knowledge of the elements of corruption and money laundering offences in the domestic legislation of each of these countries, and collecting evidence to prove each of the elements in court, this will assist in developing skilled investigators and prosecutors.

The manual is primarily an investigative guide that can be used to assist in training law enforcement officers and prosecutors who are fulfilling an investigative role. The emphasis is deliberately placed upon the word "investigative" because the guidance focuses largely on that function, irrespective of whether an investigator/police officer or prosecutor exercises it. The scope of this manual is the investigation and preparation for prosecution of corruption and money laundering up to the 'door of the courtroom' as the manual does not address the legal conduct of a criminal prosecution within the courts. The conduct of a trial is the highly technical business of trained prosecutors and cannot be incorporated within the scope of this guide.

The overall objective has been to prepare a concise, practical and user-friendly manual that contains best practice principles and specific advice on the subject of corruption and money laundering investigations, inclusive of the recovery of the proceeds of such crime. These principles are furthermore illustrated through the use of a Practical Exercise which challenges practitioners to develop their skills and knowledge by putting into practice what they have learnt. The regional diversity of the legislation, procedure and investigative practice on the subjects has meant that the guidance has on many occasions had to be limited to broad principles and general points of best practice.

1. International standards and instruments

1.1 Overview

There are a number of international instruments which deal with the criminalisation of corruption and money laundering, and international co-operation in the context of corruption and money laundering investigations and prosecutions. They also focus on the growing importance of asset recovery within the international community, emphasising that the motivation for white-collar criminality is financial gain, and the goal of most criminals is to profit from their criminal activities. The best deterrent effect is achieved by obtaining a conviction and a confiscation order which inevitably involves the need for international co-operation as funds are secreted abroad in foreign jurisdictions.

An understanding of applicable international instruments such as the United Nations Convention against Corruption and the Council of Europe Criminal Law Convention on Corruption will provide prosecutors and investigators with important tools for use in corruption and complex financial investigations. Similarly, international conventions also establish best practice for dealing with money laundering, international co-operation and asset recovery.

Whilst recognising the importance of accommodating different legal traditions and varying levels of institutional development, there is also a need for consistency and a degree of harmonisation at the international level, hence the negotiation and approval of international instruments. Although various international instruments are in place, and may have been signed or endorsed by members of the Commonwealth of Independent States (CIS), including for example Armenia, Azerbaijan, Belarus, Republic of Moldova and Ukraine, they set international standards that must be implemented. However, when dealing with practical cases, practitioners should refer to their domestic legislation first and foremost: it is the domestic legislation that investigators and prosecutors will use as a tool in their investigations and prosecutions, and it is domestic legislation that judges will apply in their rulings. International instruments can be used to fill gaps which internal legislation may reflect in terms of mutual legal assistance (MLA) or even the interpretation of general principles. But it is the law of the land that will be applied to the concrete case, particularly regarding applicable offences and available asset recovery mechanisms.

International instruments also have provisions that begin with the expression “Countries should...” or “Countries shall...”. When an Article begins by stating, “Countries should...”, the following statement is a suggestion. On the contrary when an Article begins by stating “Countries shall...”, the following statement is an obligation to be undertaken by the State Party. The importance of recognising when a provision begins with “Countries shall...” lies in the fact that this provides practitioners with an instrument to persuade their government to pass legislation that has yet not been set in place, despite the international obligations undertaken by the State at the time of signature.

1.2 Money laundering

United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (Vienna Convention)

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (Vienna Convention) entered into force on 11 November 1990, and has been accepted by Armenia, Azerbaijan, Georgia and Republic of Moldova, and signed and ratified by Belarus and Ukraine. It provides comprehensive measures against drug trafficking with key articles pertaining to the detection, seizure and confiscation of proceeds of such crime. Most importantly for the purpose of this manual, it includes provisions against money laundering. Although the Vienna Convention does not use the term money laundering, the Convention defines the concept and calls upon countries to criminalise the activity, and embraces the idea of taking the profit out of crime. It is, however, limited to drug trafficking offences as predicate offences, and does not address the preventive aspects of money laundering. Implementation of the Vienna Convention involves establishing and maintaining functional co-operation against local as well as transnational drug trafficking.

The Vienna Convention and the United Nations Convention against Transnational Organised Crime (referred to below) cover the physical and material elements of money laundering, requiring countries to establish as a criminal offence the following intentional acts:

- ▶ Conversion or transfer of proceeds for the purpose of concealing or disguising the illicit origin of property or of assisting any person involved in an offence to evade the legal consequences of his/her actions;³
- ▶ Concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to proceeds;⁴
- ▶ Acquisition, possession or use of proceeds. (Criminalisation in this instance is subject to constitutional concepts and the basic concepts of a State’s legal system).⁵

3. Article 3 (1)(b)(i) Vienna Convention; Article 6 (1)(a)(i) Palermo Convention.

4. Article 3 (1)(b)(ii) Vienna Convention; Article 6 (1)(a)(ii) Palermo Convention.

5. Article 3 (1)(c)(i) Vienna Convention; Article 6 (1)(b)(i) Palermo Convention. These Conventions provide an exception to the general principle that both the predicate offender and third parties should be liable for money laundering where fundamental principles of domestic law require that it not apply to the person who committed the predicate offence. In some countries, constitutional principles prohibit the prosecution of a person both for money laundering and the predicate offence.

United Nations Convention against Transnational Organised Crime, 2000 (Palermo Convention or UNTOC)

“With the signing of the United Nations Convention against Transnational Organised Crime, 2000 (Palermo Convention or UNTOC) in Palermo, Italy in December 2000, the international community demonstrated the political will to answer a global challenge with a global response. If crime crosses borders, then so must law enforcement.”⁶ The Palermo Convention “represents a major step forward in the fight against transnational organised crime, and signifies the recognition by Member States of the seriousness of the problems posed by it, as well as the need to foster and enhance close international co-operation in order to tackle those problems.”⁷ The Palermo Convention has two goals: “to set standards for domestic laws, and to reduce and eventually eliminate differences among national legal systems, which could impede international co-operation in combating organised crime.”⁸

Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine have all signed and ratified the Palermo Convention. Ratification signifies competence to implement the prescribed obligations, which can only occur after introducing suitable domestic laws, and adopting the necessary administrative mechanisms. States that ratify this instrument commit themselves to taking a series of measures against transnational organised crime, including, *inter alia*, the creation of domestic criminal offences (participation in an organised criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, and MLA and law enforcement co-operation.

Whereas the Vienna Convention is limited to drug offences as the predicate offence, the Palermo Convention specifies that “Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences”, paragraph 1 being a reference to the criminalisation of the laundering of the proceeds of crime.⁹

The provisions of the Vienna and Palermo Conventions with regard to the criminalisation of money laundering are also reflected in the United Nations Convention against Corruption (referred to below), and consistent with the requirements of Recommendation 3 of the FATF.¹⁰

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6. *The United Nations Convention against Transnational Organized Crime and Protocols Thereto* (2004), foreword, available at www.unodc.org, accessed on 1 February 2014.
 7. See *UNTOC description*, available at www.unodc.org, accessed on 1 February 2014.
 8. Goredema, C. (2001), *Beyond Declarations of Intent – Transnational crime initiatives and legislative reform in Zimbabwe*, African Security Review, Vol 10 No 3, p1, available at www.iss.org.za, accessed on 1 February 2014.
 9. Article 6 (2)(a) Palermo Convention.
 10. Recommendation 3 specifies: “Countries should criminalise money laundering on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (Vienna Convention) and the United Nations Convention against Transnational Organised Crime, 2000 (Palermo Convention). Countries should apply the crime of money laundering to all serious offences, with a view to including the widest range of predicate offences. Predicate offences should be described by reference to all offences, or to a threshold linked either to a category of serious offences or to the penalty of imprisonment applicable to the predicate offence (threshold approach), or to a list of predicate offences, or a combination of these approaches”.

United Nations Convention against Corruption, 2003 (UNCAC)

The United Nations Convention against Corruption (UNCAC) came into force on 14 December 2005, and has 140 signatories and 178 State Parties so far,¹¹ including Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine. It is the most comprehensive international anti-corruption convention to date as it covers the broadest range of corruption offences and money laundering, and is innovative in many respects. Two of these innovations include:

- ▶ It is the first international instrument which aims to function as a multilateral MLA treaty in respect of corruption offences, and also money laundering. This means that the UNCAC can, in fact, be used as the legal basis for MLA. This, however, must be done with precaution, as for some countries ratification is not enough and they will require domestication of the Convention before it can be used for MLA.
- ▶ It is the first Convention ever to refer to the recovery of assets as a priority in the fight against corruption. This is stated throughout the instrument. In fact, Article 51 states that the return of assets is a fundamental principle of the Convention, and States Parties shall afford one another the widest measure of co-operation and assistance in this regard (to be dealt with in greater detail in “Section 9: Mechanisms of asset forfeiture”).

“The Convention requires countries to establish criminal and other offences to cover a wide range of acts of corruption and money laundering, if these are not already crimes under domestic law. In some cases, States are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Convention goes beyond previous instruments of this kind, criminalising not only basic forms of corruption such as bribery and the embezzlement of public funds but also trading in influence and the concealment and laundering of the proceeds of corruption.”¹²

Elements from the UNCAC

There are four general kinds of conduct that should be criminalised as money laundering:¹³

- ▶ Conversion or transfer of proceeds of crime: This includes “instances in which financial assets are converted from one form or type to another, for example, by using illicitly generated cash to purchase precious metals or real estate or the sale of illicitly acquired real estate, as well as instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.”¹⁴ Regarding mental elements, the conversion or

11. i.e. at the time of publication.

12. See *UNCAC Convention Highlights*, available at www.unodc.org, accessed on 1 February 2014.

13. *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems)* (2009), p11, available at www.unodc.org, accessed on 1 February 2014.

14. *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2006), paragraph 231, available at www.unodc.org, accessed on 1 February 2014.

transfer must be intentional, the accused must have knowledge at the time of conversion or transfer that the assets are criminal proceeds, and the act must be done for either one of the two purposes stated – concealing or disguising criminal origin, or helping any person (whether oneself or another) to evade criminal liability for the crime that generated the proceeds.

- ▶ Concealment or disguise of the proceeds of crime: It must be intentional, and the accused must have knowledge that the property constitutes proceeds of crime at the time of the act. “For this offence, there should not be a requirement of proof that the purpose of the concealment or disguise is to frustrate the tracing of the asset or to conceal its true origin. Although as a general matter, this will be the purpose of the concealing or disguising, the applicable UN Conventions require that there be criminalisation that is not dependent upon a showing of such purpose.”¹⁵
- ▶ Acquisition, possession or use of proceeds: “This section imposes liability on recipients who acquire, possess or use property, and contrasts with the two provisions above that deal with liability for those who provide illicit proceeds. There must be intent to acquire, possess or use, and the accused must have knowledge at the time of acquisition or receipt that the property was proceeds.”¹⁶
- ▶ Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling: “There are varying degrees of complicity or participation other than physical commission of the offence: assistance (aiding and abetting, facilitating) and encouragement (counselling). In addition, attempts are also to be criminalised. Finally this section includes conspiracy, a common law concept, or as an alternative, an association of persons working together to commit a crime.”¹⁷

1.3 Corruption

International organisations such as the Organisation for Economic Co-operation and Development (OECD), the Council of Europe (CoE) and the United Nations do not define “*corruption*” in their treaties; instead, they establish the offences for a range of corrupt behaviour. They also recognise the need to tackle corruption through a combination of preventive and punitive measures.

International standards on the criminalisation of corruption thus prescribe specific offences, avoiding a generic definition or offence of corruption:¹⁸

1. The CoE Criminal Law Convention on Corruption covers a broad range of offences in its Chapter II, which include active and passive bribery (notions

15. *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime (for common law legal systems)* (2009), p11, available at www.unodc.org, accessed on 1 February 2014.

16. *Ibid.*, p.11.

17. *Ibid.*, p.11.

18. *OECD Glossaries, Corruption: Glossary of International Standards in Criminal Law* (2008), p.30, available at www.oecd.org, accessed on 1 February 2014.

described below in footnote 27) of domestic and foreign public officials, bribery in the private sector and trading in influence;

2. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) establishes the offence of bribery of foreign public officials in international business transactions in its Article 1;

3. The UNCAC contains mandatory provisions of offences, which include embezzlement, misappropriation or other diversion of property by a public official and obstruction of justice.¹⁹

All above-mentioned Conventions prescribe that States are to include corruption-related crime as a predicate offence to money laundering. Legal persons should also bear responsibility in relation to their corruption-related practices. Their liability ranges from criminal for the OECD Anti-Bribery Convention and the CoE Corruption Convention to criminal, civil or administrative for the UNCAC.

The OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN),²⁰ through its Istanbul Anti-Corruption Action Plan, requires all its participating countries which include Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine, to reform national legislation to meet the international standards set by the Conventions mentioned above. These Conventions are not self-executing and require the enactment of domestic legislation to meet the threshold. In order to implement these Conventions, States must initially identify where and how their legislation falls short of the standards set by these Conventions.

The Council of Europe Criminal Law Convention on Corruption

The CoE Criminal Law Convention on Corruption came into force on 1 July 2002, and has been ratified by 43 countries to date,²¹ including Armenia, Azerbaijan,²² Georgia, Republic of Moldova and Ukraine, and Belarus as a Non-Member State. The CoE Criminal Law Convention on Corruption seeks to prevent and punish corruption through a broad range of offences, which include the active and passive bribery

19. Ibid, p.14.

20. The ACN, a regional outreach programme of the OECD Working Group on Bribery, aims to support the countries of Eastern Europe and Central Asia (including Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine) in their fight against corruption by providing a regional forum for the promotion of anti-corruption activities, exchange of information, elaboration of best practices and donor coordination.

21. There are 7 signatures not followed by ratifications. See *Chart of signatures and ratifications of Treaty 173*, available at conventions.coe.int, accessed on 1 February 2014.

22. Both Armenia and Azerbaijan have noted reservations with regard to this Convention. Pursuant to Article 37, paragraph 1, of the Convention, Armenia reserves its right not to establish as a criminal offence under its domestic law the conduct referred to in Article 12 (Trading in influence). In accordance with Article 37, paragraph 1, of the Convention, Azerbaijan reserves the right not to establish as a criminal offence the conduct referred to in Articles 6 (Bribery of members of foreign public assemblies), 10 (Bribery of members of international parliamentary assemblies), 12 (Trading in influence) and the passive bribery offences under Article 5 (Bribery of foreign public officials).

of domestic and foreign public officials, bribery in the private sector and trading in influence. "The Convention aims principally at developing common standards concerning certain corruption offences, though it does not provide a uniform definition of corruption. In addition, it deals with substantive and procedural law matters, which closely relate to those corruption offences and seeks to improve international co-operation."²³ The Convention also incorporates provisions concerning criteria for determining the liability of legal persons, the setting up of specialised anti-corruption bodies, protection of persons collaborating with investigating or prosecuting authorities, gathering of evidence and the confiscation of proceeds of crime.

The CoE Criminal Law Convention on Corruption implementation is monitored by the GRECO,²⁴ established by the CoE in 1999 to monitor States' compliance with the organisation's anti-corruption standards. Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine are all members of GRECO.

The Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Anti-Bribery Convention)

The OECD Anti-Bribery Convention entered into force on 15 February 1999,²⁵ and establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. By establishing an international framework to combat the bribery of foreign public officials, the Convention aims to avoid distortions in international competitive conditions.²⁶ It is the most specialised treaty as it only covers the liability of bribers (active bribery), not foreign officials who solicit or receive a bribe (passive bribery).²⁷

23. See *Explanatory Report to the Criminal Law Convention on Corruption* (1999), paragraph 21, available at conventions.coe.int, accessed on 1 February 2014.

24. See *GRECO website* at www.coe.int/greco, accessed on 1 February 2014.

25. Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine are not members of the OECD nor have they ratified the OECD Anti-Bribery Convention.

26. *Policy Statement on Bribery in International Business Transactions by the Working Group on Bribery in International Business Transactions* (2009), available at www.oecd.org, accessed on 1 February 2014.

27. As described in the *Glossary by the U4 Anti-Corruption Resource Centre* operated by the Chr. Michelsen Institute (CMI), "Active bribery refers to the offence committed by the person who promises or gives the bribe; as contrasted to 'passive bribery' which is the offence committed by the official who receives the bribe. Active bribery occurs on the supply side, passive bribery on the demand side. In legal lingo (according to the Council of Europe's Criminal Law Convention on Corruption, for instance), active bribery of public officials is defined as "the promising, offering or giving by any person, directly or indirectly, of any undue advantage ... for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions". Similarly, passive bribery is "the request or receipt..., directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions". It is important to note that 'active bribery does not always mean that the briber has taken the initiative. In fact, often the reverse is true. The individual who receives the bribe often demanded it in the first place. In a sense, then, he/she is the more 'active' party in the transaction." Available at www.u4.no, accessed on 1 February 2014.

Bribery of foreign public officials is an offence only when the bribe is paid in order to obtain or retain business or other undue advantage in relation to the conduct of international business. The international conventions do not define this element but the Legislative Guide for the Implementation of UNCAC (referred to above in footnote 14) states at page 86 that international business includes the provision of international aid.

As stated at p.12 of the OECD Glossary of International Standards in Criminal Law (referred to in footnote 18 above), the OECD Anti-Bribery Convention requires functional equivalence among its Parties. This means that while the Parties are expected to fully comply with the standards of the Convention, they do not have to adopt uniform measures, nor change fundamental principles of their legal system. Before the adoption of the OECD Anti-Bribery Convention, bribing foreign public officials in international business transactions was considered the normal way of doing business in many parts of the world. As stated in the OECD Policy Brief dated October 2009,²⁸ this Convention and related instruments were established due to serious moral and political concerns about such business practices, and their negative effect on good governance, economic development and a level playing field for international competition. To this day, the OECD Anti-Bribery Convention remains the only multilateral instrument in the world focused on the supply-side of foreign bribery.

Elements from the UNCAC

Chapter III of the UNCAC deals with the criminalisation of corruption offences. It establishes countries' obligation to create a series of criminal offences related to corruption in public office. This chapter of the Convention is of a mandatory nature as most provisions begin with the phrase "Countries shall..." However, it is important to recognise that although the criminalisation of the relevant conduct is mandatory, this chapter requires domestication in order to be effective. The lack of domestic legislation cannot be remedied by the application of this chapter in respect of the principle of legality of criminal law (*nullum crimen nulla poena sine lege poenale* - only the law can define a crime and prescribe a penalty).²⁹ Furthermore, the criminal offences listed under this chapter are models for State Parties to follow, and it is important to note that no punishment is given to each criminal conduct, which reinforces the need for this to be implemented through domestic legislation.

The following are the criminal offences listed/prescribed in this chapter of the UNCAC:

- ▶ Bribery: the promising, offering or giving of an undue advantage to a national, foreign or international public official. The mere promise of an undue advantage consummates the offence. On the other end of the spectrum, the solicitation or acceptance by the public official is also criminalised.

28. *Policy Statement on Bribery in International Business Transactions by the Working Group on Bribery in International Business Transactions* (2009), available at www.oecd.org, accessed on 1 February 2014.

29. See for example, Article 3 (3) of the Ukrainian Criminal Code which states "The criminality of any act and also its punishability and other criminal consequences shall be determined exclusively by this Code."

- ▶ Embezzlement and misappropriation: the diversion of property committed by a public official for his or her benefit or the benefit of another person.
- ▶ Trading in influence: this consists of the promise, offering or giving, and consequently the solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence in order to obtain an undue advantage from a public authority.
- ▶ Abuse of functions: the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.
- ▶ Illicit enrichment: the offence of illicit enrichment or unexplained wealth consists of the significant increase in the assets of a public official that he/she cannot reasonably explain in relation to his or her lawful income.
- ▶ Laundering of proceeds of crime: (covered above).

1.4 Confiscation and asset recovery

Palermo Convention

The Palermo Convention requires each State Party to take, to the greatest extent possible within its domestic legal system,³⁰ such measures as may be necessary to enable confiscation of:

- a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
- b) Property, equipment or other instrumentalities used or destined for use in offences established in accordance with this Convention.

This wording is replicated in the provisions of Article 31 of the UNCAC, including a reference to the need to be able to identify, trace, freeze or seize any item for the purpose of eventual confiscation. The provisions applicable to international co-operation for the purposes of confiscation are set out in Article 13 of the Palermo Convention.

Council of Europe Criminal Law Convention on Corruption

Article 19 of the Council of Europe Criminal Law Convention on Corruption deals with measures needed to enable a country to confiscate the instrumentalities and proceeds of criminal offences established in accordance with the Convention, or property the value of which corresponds to such proceeds.

Article 23 of the Convention covers the tools needed to enable a country to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds. It is linked to Article 19 and requires

30. Article 12 Palermo Convention.

the adoption of legal instruments allowing Parties to take the necessary provisional steps, before measures leading to confiscation can be imposed. Not only must an investigation be conducted with a view to quantifying the proceeds gained or the expenses saved but it is also necessary to ensure that the investigating authorities have the power to freeze located tangible and intangible property in order to prevent it disappearing before a decision on confiscation has been taken or executed.

Elements from the UNCAC

An effective anti-corruption regime must include the confiscation of the proceeds of corruption. As stated above, the UNCAC considers asset recovery to be a fundamental principle of the Convention and devotes an entire chapter to the subject. It requires each State Party to ensure that it can respond to a request by another State Party to identify, trace, freeze or confiscate the proceeds of corruption. Chapter V on asset recovery must be read in conjunction with a number of provisions contained in Chapters II to IV of the Convention such as Article 31 on the establishment of a regime for domestic freezing and confiscation of the proceeds of corruption as a prerequisite for international co-operation and the return of assets.³¹

Asset recovery “is a particularly important issue for many developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Several provisions specify how co-operation and assistance will be rendered. Effective asset-recovery provisions will support the efforts of countries to redress the worst effects of corruption while sending at the same time, a message to corrupt officials that there will be no place to hide their illicit assets. Accordingly, Article 51 provides for the return of assets to countries of origin as a fundamental principle of this Convention.³² Article 43,³³ obliges state parties to extend the widest possible co-operation to each other in the investigation and prosecution of offences defined in the Convention.”³⁴

31. Article 31(1) requires that “Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

- a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
- b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.”

32. The UNCAC itself provides guidelines and best practices regarding how to proceed once assets have been confiscated. Article 53 deals with the direct recovery of property. The Article is designed to ensure that State Parties have in place a wide range of legal remedies to recognise other State Parties as having legal standing to initiate civil actions and other direct means to recover illegally obtained and exported property.

33. With regard to asset recovery in particular, the Article provides, *inter alia*, that “In matters of international co-operation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties”.

34. See *UNCAC Convention Highlights*, available at www.unodc.org, accessed on 1 February 2014.

During the course of a financial investigation, preventive measures leading to the preservation of the assets in question are not uncommon. Article 31(2) of the UNCAC specifies that State Parties shall take measures to enable the identification, tracing, freezing or seizure of any item for the purpose of eventual confiscation (as does Article 23 of the Council of Europe Criminal Law Convention on Corruption, see above).

Whereas the UNCAC obliges State Parties to take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by the court of another State Party,³⁵ it does not specifically call upon them to introduce non-conviction based forfeiture (or civil asset forfeiture) into their legal systems.³⁶ Mechanisms for the recovery of property in the absence of a criminal conviction are dealt with in the context of international co-operation in confiscation in Article 54(1)(c). This Article states that State Parties, in order to provide MLA with respect to the proceeds of crime, are required in accordance with their domestic law, *inter alia*, “to consider taking such measures as may be necessary to allow confiscation 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”.

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 1990 (Strasbourg Convention)

The aim of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Convention) is to facilitate international co-operation and mutual assistance in investigating crime and tracking down, seizing and confiscating the proceeds thereof. The Convention is intended to assist States in attaining a similar degree of efficiency even in the absence of full legislative harmony.

Parties undertake in particular:

- ▶ to criminalise the laundering of the proceeds of crime;
- ▶ to confiscate instrumentalities and proceeds (or property the value of which corresponds to such proceeds).

For the purposes of international co-operation, the Convention provides for:

- ▶ forms of investigative assistance (for example, assistance in procuring evidence, transfer of information to another State without a request, adoption of common investigative techniques, lifting of bank secrecy etc.);
- ▶ provisional measures: freezing of bank accounts, seizure of property to prevent its removal;
- ▶ measures to confiscate the proceeds of crime: enforcement by the requested State of a confiscation order made abroad, institution by the requested State, of domestic proceedings leading to confiscation at the request of another State.

35. Article 54(1)(a) UNCAC.

36. Non-conviction based forfeiture enables States to recover illegally obtained assets from an offender via a direct action against his or her property without the requirement of a criminal conviction. The State will still have to prove on a balance of probabilities that the offender's assets are either the proceeds of crime or represent property used to commit a crime, i.e. instrumentalities.

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, 2005 (Warsaw Convention)

As stated by the CoE,³⁷ it decided to update and widen its Strasbourg Convention to take into account the fact that not only could terrorism be financed through money laundering from criminal activity, but also through legitimate activities. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention) reinforces the arrangements of the Strasbourg Convention against money laundering, and is the first binding international legal instrument covering both the prevention and the control of money laundering and the financing of terrorism. This Convention also contains a monitoring mechanism which will ensure that the Convention is properly implemented.

The text addresses the fact that quick access to financial data or information on assets held by criminal organisations, including terrorist groups, is the key to successful preventive and repressive measures, and, ultimately, the best way to stop them. This Convention has entered into force in Armenia, Republic of Moldova and Ukraine.

1.5 Mutual legal assistance

Mutual legal assistance (MLA) consists of the co-operation that countries grant to each other in the gathering of evidence or conducting procedural acts within the criminal process. Traditionally, it has been granted on the basis of reciprocity and conducted through cumbersome diplomatic procedures. Over the last decades, however, crime has increasingly transcended borders and MLA treaties have become more common. These treaties can be bilateral or multilateral. The UNCAC is a multilateral treaty for MLA.

Chapter IV of the UNCAC states that States Parties shall afford one another the widest measure of MLA in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. It may be requested for a number of purposes, including taking evidence or statements from persons, executing searches and seizures, and freezing, providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records, and identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes.

Elements from the UNCAC

Countries agreed to co-operate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the UNCAC to render specific forms of MLA in gathering and transferring evidence for use in court, and to extradite offenders. Countries are

37. See *Details of Treaty No.198*, available at conventions.coe.int, accessed on 1 February 2014.

also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

In terms of Article 43, where appropriate and consistent with their domestic legal system, State Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption. Whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the Requested State³⁸ place the offence within the same category of offence or denominate it by the same terminology as the Requesting State,³⁹ if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both State Parties.⁴⁰

The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 1993 (Minsk Convention)

CIS Member States developed the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, which was adopted in Minsk on 22 January 1993 (Minsk Convention), and amended by a Protocol of 28 March 1997. The Convention was signed, *inter alia*, by Armenia, Belarus, Republic of Moldova and Ukraine in 1992, and entered into force on 19 May 1994, and subsequently in the various countries upon ratification, e.g. Ukraine in 1994. The Protocol was signed by Azerbaijan, Armenia, Belarus, Georgia, Republic of Moldova and Ukraine.

Within the scope of the Convention, judicial and other competent authorities of the Contracting Parties communicate with each other through their Central Authorities (Ministries of Justice) which undertake to receive requests for legal assistance in civil, family and criminal matters coming from other Contracting Parties. The range of legal assistance rendered by the CIS Member States is fixed in Article 6 of the Convention.⁴¹ This assistance is rendered by the judicial authorities of the requested Party on the basis of the letters rogatory coming from the requesting Party.

The Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, 2002 (Chisinau Convention)

On 7 October 2002 in Chisinau, a revised Convention with the same name was signed, i.e. Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Chisinau Convention). However, not all members of the Minsk Convention have ratified the latest Convention, and Azerbaijan and Ukraine have signed with reservations. The Minsk Convention is applicable to a particular case only if the

38. The country from which the assistance is requested is generally referred to as the Requested State.

39. The country requesting information from another country is generally referred to as the Requesting State.

40. Article 43(2) UNCAC.

41. It includes service and dispatch of documents, taking of evidence from litigants, witnesses and experts, making inspections, effecting prosecution, recognition and enforcement of judgments in civil matters, extradition, and affecting other proceedings.

Chisinau Convention did not come into force for all states involved.⁴² The Chisinau Convention offers a somewhat broader range of instruments for MLA in criminal matters and Section IV is the most important as it deals with legal assistance and legal relations in criminal matters.

European Convention on Mutual Legal Assistance in Criminal Matters, Council of Europe, 1959 (MLA Convention)

Under the European Convention on Mutual Legal Assistance in Criminal Matters, (MLA Convention), Parties agree to afford each other the widest measure of mutual assistance with a view to gathering evidence, hearing witnesses, experts and prosecuted persons, etc.

The Convention sets out rules for the enforcement of letters rogatory by the authorities of a Party ("Requested Party") which aim to procure evidence for (examination of witnesses, experts and prosecuted persons, service of writs and records of judicial verdicts) or to communicate the evidence (records or documents) in criminal proceedings undertaken by the judicial authorities of another Party ("Requesting Party").

The Convention also specifies the requirements that requests for mutual assistance and letters rogatory have to meet (transmitting authorities, languages, refusal of mutual assistance), indisputably of great value in corruption and money laundering investigations.

Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters, 1978 (Additional Protocol)

The Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters, 1978 (Additional Protocol) completes provisions contained in the MLA Convention. It withdraws the possibility offered by the MLA Convention to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence. It extends international co-operation to the service of documents concerning the enforcement of a sentence and similar measures (suspension of pronouncement of a sentence, conditional release, deferment of commencement of enforcement of a sentence or interruption of such enforcement). Finally, it adds provisions relating to the exchange of information on judicial records.

Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters, 2001 (Second Protocol)

The Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters, 2001 (Second Protocol) is intended to improve States' ability to react to cross-border crime in the light of political and social developments

42. Article 120 of the Chisinau Convention: according to part 3 and 4, the application of the Minsk Convention, as well as its Protocol, ceases for each participating state upon their ratification of the new Convention.

in Europe and technological developments throughout the world.⁴³ It, therefore, serves to improve and supplement the MLA Convention and the Additional Protocol to it, in particular by broadening the range of situations in which mutual assistance may be requested and making the provision of assistance easier, quicker and more flexible. It also takes account of the need to protect individual rights in the processing of personal data.

43. See *Details of Treaty No.182*, available at convention.coe.int, accessed on 1 February 2014.

2. Overview of money laundering

2.1 Common definitions

What is money laundering? This is the key question that must be answered by investigators, prosecutors and judges. The investigator must recognise the evidence to be found, the prosecutor must understand what needs to be proven and the judge must have a clear understanding of the law, the evidence and the complexity of the case.

When asked to define money laundering, most people will state that it is the process of taking illegally obtained funds and using various transactions to make the money appear to be legitimate. Many will describe the more detailed process of placement, layering and integration. These three terms have been used for many years to explain the money laundering cycle.

2.2 Placement, layer and integration – only terms

Placement refers to the initial process of moving the proceeds of crime into the financial system. For example, if the drug dealer had €1 million of profits, he/she would have to create a mechanism to have these funds deposited into a series of banks, and avoid detection by the authorities. This is not an easy task since most countries have currency reporting requirements for large cash transactions. Once the funds are in the financial institutions, the layering process begins. This is the movement of the money through a series of transactions that is designed to hide the true source of the funds. This may be accomplished by opening accounts in various countries in the names of corporate and trust entities. Integration is the final stage. This refers to the process of making the funds available to the criminal from a source that appears to be legitimate. For example, after the funds have been moved through four countries and five corporate entities, the criminal may obtain a €1 million loan from a company in a foreign jurisdiction. However, this lending institution is actually a shell company created by the criminal, and all funds from the account of this loan company are actually the original drug proceeds that have been laundered through the layering phase. The laundering process is now complete.

The description in the paragraph above can assist a person to understand a general money laundering process that may be used by some criminals. However, for law enforcement purposes, one must look to a different definition of money laundering because the terms placement, layering and integration are not found in the relevant laws of any country. They are just general terms used to describe the money laundering process and bear no relation to the law. These terms are not found in the language of the applicable legislation, and are therefore not elements of the crime.

2.3 Elements of the crime – this is the law

In the prosecution of money laundering cases, we are only concerned with the language of the law. Therefore, for every country, money laundering is simply “**what the law of the country says it is**”.

The money laundering statute of your country must be closely analysed, and the **elements of the crime** must be clearly identified. An inspection of the money laundering laws of various countries will disclose that placement, layering and integration are not elements that need to be proven in any country. Additionally, conduct criminalised as money laundering in one country may be completely legal in another country.

For example, a comparison of the criminal statutes of Ukraine and Georgia highlight this point. Article 209 of the Ukrainian Criminal Code (CC) (Legalising proceeds from crime) states: “Conducting financial transaction or concluding an agreement involving money or other property obtained as a result of committing a socially dangerous unlawful action which preceded legalisation (laundering) of profits...” This conduct is criminalised as money laundering in Ukraine. A further reading of the definitions contained in Article 209 indicates that “it is understood that a socially dangerous unlawful action which preceded legalisation (laundering) of profits is considered to be an action which is punishable, under the Criminal Code of Ukraine, with imprisonment for a term of three and more years” (although it is understood that this threshold has now been removed by the recent changes to the law i.e. any term of imprisonment suffices).⁴⁴ This definition combined with the wording of the statute clearly indicates that the transaction must involve the proceeds of a crime for which punishment in the form of imprisonment can be imposed.

However, in Georgia completely different conduct is criminalised as money laundering. Article 194 of the Georgian CC states, “Legalisation of illicit income, i.e. giving a legal form (enjoyment, purchase, possession, conversion, transfer or any other act) to unlawful or/and **unfounded property to conceal** its illicit origin...” This conduct is money laundering in Georgia. There are two important differences to be noted when comparing this law to the Ukrainian money laundering statute. First, in the

44. Article 1, paragraph 2 of the Law of the Prevention and Counteraction to Legalisation (laundering) of the Proceeds of Crime or Terrorist Financing (Law no. 2258-VI, May 18, 2010 as amended provides a definition of “socially dangerous unlawful action” which amends paragraph 1 of the Note to Article 209, eliminating the 3 year threshold. Predicate offences now cover all offences for which the CC prescribes a punishment in the form of imprisonment.

Georgian statute the transaction does not have to involve the proceeds of any crime. The funds involved can simply be “*unfounded property*”, in other words, funds whose legal origin cannot be proved. Therefore, this conduct is criminalised in Georgia as money laundering but would not be a criminal offence in Ukraine. The second difference is that the Georgian law requires an attempt to conceal the illicit origin while the Ukrainian law does not contain this requirement.⁴⁵ Again, this is an example of conduct that is required in one country (Georgia) to criminalise money laundering but is not an element of the crime in another country (Ukraine).

The above comparison is provided to illustrate that money laundering is “**what the law of the country says it is**”.

45. Article 209 of Ukrainian CC does contain a separate provision that deals with concealment, “*as well as carrying out actions aimed at concealing or masking illegal origin of such money or other property or possession thereof...*”

3. Electronic evidence organisation

3.1 Investigative file inventory (IFI)

The Investigative file inventory (IFI) is a tool that is designed to record, manage and organise evidence for quick recall and reference. It is an Excel spreadsheet that has been formatted to record each piece of evidence as it is received. Using this tool is extremely simple but the value is great. It can be used to:

- ▶ record and track all of the evidence obtained,
- ▶ quickly retrieve any piece of evidence,
- ▶ search topical areas using key word searches,
- ▶ create an investigative “leads to follow” list,
- ▶ organise evidence by violation or asset type using sort functions,
- ▶ link all evidence to the inventory using the hyperlink function which allows ease of transporting all electronic evidence on a flash drive,
- ▶ provide a system for making notes or comments for each piece of evidence in one location.

3.2. Graphic illustration of investigative file inventory

A sample IFI has been provided to participants in their training material.⁴⁶ This document has two tabs at the bottom of the spreadsheet; one is labelled “IFI” and the other is labelled “Sample”. The IFI tab contains a pre-formatted document that is ready to be used to record and organise evidence. This document has column headings as indicated below.

Doc #	Witness	Key Word Description	Hyperlink	Money Laundering	Asset Forfeiture	Evidence or Information	Comments
3	Kuznetsova	Reporter	Doc 3	Yes	Mercedes	Information	

46. It can be found in the Participants Folder training documents. This folder contains three sub folders (laws, Practical Exercise (PE), documents and presentations). The IFI is in the PE Documents sub folder.

Column headings can be added, deleted or changed to fit the needs of any investigation. The IFI is extremely simple to use. When a piece of evidence is obtained, it should be assigned a document number/reference, and then the relevant information can be inserted under each column heading as follows:

- ▶ **Doc #:** Any numbering system can be used. Documents can be numbered in the chronological order in which they are received or a more sophisticated system can be used if required by the investigating agency. All documents received during an investigation may not be evidence; some may only be information or intelligence that is not intended for use in court. It is advisable to enter all documents, whether evidence or intelligence, into the IFI because they can easily be sorted at a later date using the Evidence or Information column. It is important that each piece of evidence receives a unique document number and that the physical document is filed under this number for quick retrieval.
- ▶ **Witness:** The name of the witness who will testify or the person who supplied the information.
- ▶ **Key Word Description:** A few key words should be entered here that describe the content or importance of this piece of evidence.
- ▶ **Hyperlink:** This is an electronic function that can be utilised in the Excel Spreadsheet. If possible, first create an electronic copy of each document. For example, a report of an interview can be created as a Word document, contracts or other legal documents can be scanned as a PDF file and bank records can be summarised in Excel Spreadsheets. Each of these documents should be placed in an electronic folder and it is best to also place the IFI file in the same folder. The final step is to open the IFI, place the cursor in the Hyperlink column (where the phrase “Doc 3” is shown above) and perform a right click with the computer mouse. This will open a dialog box and the final choice will be Hyperlink. Simply click on the word Hyperlink and then select the document to link (in this example, it would be Doc 3). This will create a link in the IFI file, and it is now possible to quickly open document 3 by just clicking on the hyperlink cell. By utilising this process, all case documents can be easily organised and, if necessary, transported to different regions or offices on a flash drive. Evidence can then be easily reviewed with other investigators or prosecutors.
- ▶ **Money Laundering:** If there is information in the document that relates to a possible money laundering violation, the investigator can simply place a “yes” in this column. This will allow the investigator/prosecutor to quickly find all documents that relate to money laundering by performing a sort function.
- ▶ **Asset Forfeiture:** If the document contains information about a particular asset that may later be seized, the investigator can place the name or description of this asset in this column. The investigator/prosecutor can later gather all relevant information concerning this asset in a matter of seconds using the sort function.
- ▶ **Evidence or Information:** As previously mentioned, all documents or information obtained during the investigation should be entered on the

IFI. In this column, simply place the word "Evidence" if it is believed to be admissible or "Information" if the data is merely intelligence at this time. Again, the sort function will allow a very rapid retrieval of all data that is either evidence or merely information.

- ▶ Comments: This column should be used to note any items of interest or notations that will further assist in finding the correct document at a later date.

Depending on the needs of the investigation, the IFI can easily be modified. For example, additional columns could be added to include such information as the witness's contact information, elements of the crime or the type of evidence.

The IFI is extremely easy to use and has multiple benefits. Most large scale corruption and money laundering investigations will produce hundreds of pieces of evidence and information. Without a system of organisation, this information will be difficult and time-consuming to retrieve and analyse. Use of the IFI will allow any evidence to be quickly retrieved by simply performing a word search for the document number, witness name or key topical area. This search will instantly take the investigator to all information needed. Without the use of a computer filing system, this data could take hours or days to retrieve.

The IFI can be used to quickly sort all evidence in any manner required. For example, at the conclusion of an investigation there may be more than 200 pieces of evidence that have been gathered. If the prosecutor needs to look at all evidence that relates to money laundering, then simply perform a "sort" function on the "money laundering" column and it will produce all pieces of evidence that relate to this violation. The "asset forfeiture" column can track the evidence that relates to specific assets. For example if there was evidence relating to the potential confiscation of a house, car and boat, simply place one of these words in the "asset forfeiture" column when a piece of evidence contains information that would be used to prove the asset was proceeds of corruption. At the end of the investigation, this column can be sorted and within the matter of seconds all information relating to each asset will be grouped together for quick review.

The IFI can also be used as a mechanism to record and prioritise leads that arise during the investigative process. Leads to additional potential evidence may accumulate very quickly. An interview with the subject may produce two new leads, a third party witness contact may generate an additional lead and the tracing of an asset may create one more lead. The human tendency is to quickly follow the most interesting items, and very soon some of the other leads have been forgotten. To assure that all leads are sufficiently traced, it is recommended that a system of tracking these items be instituted. The system can be as simple as an electronic "Leads to Follow" list that may be integrated into the IFI.

This can be accomplished by adding a tab to the IFI. Simply place the cursor on the "IFI" tab at the bottom of the spreadsheet, right click and select "move or copy". This will allow the creation of an exact copy of the IFI spreadsheet. This file can now be modified to the needs of the investigator to create a "Leads to Follow" list similar to the example below.

Priority	Leads to follow	Lead Source DOC #	Lead Source Witness
1	Interview witness to property transaction	30	Jasper Macky
2	Interview Ed Smith regarding checks	30	Jasper Macky
3	Obtain bank records of shell company	31	John Ballinger
4	Contact Citibank regarding wire transfers	32	Harvey Maverick
5	Contact notary public regarding land purchase	32	Harvey Maverick
6	Surveillance of subject's brother	32	Harvey Maverick

The advantage of using an electronic “Leads to Follow” list as opposed to a paper based document is that it can be sorted, filtered and organised in a variety of ways to view the data in the most beneficial manner. The leads to follow can easily be prioritised by simply listing the priority number in the first column. This column can be sorted to obtain a prioritised list of investigative actions (this has been done in the example above).

4. Elements of the crime

Understanding the elements of any criminal offence is crucial for an efficient investigation and a strong conviction that will withstand all appeals. An understanding of the elements not only ensures that one is able to prove a criminal case but it also assists the investigator in establishing the evidence required to identify, trace, confiscate and, ultimately, recover the proceeds of crime. A thorough knowledge of the elements of the crime, furthermore, facilitates effective MLA (dealt with later in “Section 6: Mutual legal assistance”), particularly in corruption and other serious economic crime cases where the offender very often conceals the proceeds of his/her crime abroad.

It is important for investigators to come up with a hypothesis regarding the nature of the alleged offence right at the beginning of a criminal investigation. This will allow them to prepare a well-organised investigation plan that facilitates the gathering of all necessary evidence prosecutors will use to prove each of the elements in court. It is also imperative for judges to comprehend the elements of the crime so that they will be able to carefully analyse each of them in their rulings, and explain in detail the reasons why they believe the accused is guilty or not guilty of the offence charged.

When investigating and prosecuting various corruption-related offences including money laundering, it is essential that investigators and prosecutors consider, and be in a position to answer, the following questions:

1. What is the criminal offence that best suits the facts described?
2. What are the elements of that offence?
3. What evidence would one use to prove each one of those elements?

As indicated in “Section 2: Overview of money laundering”, in the prosecution of money laundering cases, we are only concerned with the language of the law. Therefore, for every country, money laundering is simply “**what the law of the country says it is**”. This same principle applies when dealing with the investigation and prosecution of all other offences, including corruption.

4.1 Model language for money laundering

Globalisation and technological advancement have allowed criminals to easily transfer, hide and launder the proceeds and instrumentalities of corruption. Hence, an effective legislative framework to fight corruption must also prohibit such activities, and not only focus on criminalising corruption itself. The international conventions address the issue of laundering the proceeds of corruption and other crime, and provide model language for use by Member States, beginning with the Vienna Convention.

Vienna Convention

The Vienna Convention requires State parties to establish as criminal offences under its domestic law when committed intentionally:⁴⁷

- ▶ The conversion or transfer of property, knowing that such property is derived from any offence(s) established in accordance with Article 3(1)(a),..., for the purpose of concealing or disguising the illicit origin of property or of assisting any person involved in such an offence(s) to evade the legal consequences of his/her actions;
- ▶ The concealment or disguise of the true nature, source, location, disposition, movement or ownership of property, knowing that such property is derived from an offence(s) established in accordance with Article 3(1)(a)....;
- ▶ The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence(s) established in accordance with Article 3(1)(a).... (Criminalisation here is subject to constitutional concepts and the basic concepts of a State's legal system).

The Vienna Convention also stipulates that knowledge, intent or purpose required as an element of an offence in terms of Article 3(1), including money laundering, may be inferred from objective factual circumstances.⁴⁸

Palermo Convention

In order to expand the effort to fight international organised crime, the United Nations adopted the Palermo Convention which contains a broad range of provisions to fight organised crime, and commits countries that ratify it to implement its provisions through passage of domestic laws. In the language of the Vienna Convention, the Palermo Convention also specifically obligates (mandatory) ratifying countries to criminalise as money laundering the conversion or transfer of property and concealment or disguise when committed intentionally.⁴⁹ However, this Convention

47. Article 3(1)(b)(i) and (ii), and 3(1)(c) Vienna Convention.

48. Article 3(3) Vienna Convention.

49. Article 6(1)(a)(i) Vienna Convention. The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.

goes further than the Vienna Convention, and emphasises the need for countries to extend money laundering to the widest range of predicate offences.

As in the case of the Vienna Convention, provision is also made for the criminalisation of a third category of money laundering,⁵⁰ i.e. acquisition, possession or use, which is subject to the basic concepts of a country's legal system. It also specifies that knowledge, intent or purpose required as an element of an offence in terms of Article 6(1), including money laundering, may be inferred from objective factual circumstances.⁵¹

Elements from the UNCAC

Article 23 of the UNCAC requires the establishment of offences related to the laundering of the proceeds of crime, in accordance with fundamental principles of domestic law. Once again, in the language of both the Vienna and Palermo Conventions, States Parties are required to establish the following offences as crimes:

- (a) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action,⁵²
- (b) The concealment or disguise of the nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime.⁵³

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

- (a) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;⁵⁴
- (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 established in accordance with Article 23.⁵⁵

States Parties must also apply these offences to proceeds generated by a wide range of predicate offences.⁵⁶

Article 23 of the UNCAC: Money laundering

The first category of money laundering offence above (Article 23(1)(a)(i)), i.e. "the conversion or transfer of property knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action", has been chosen for analysis in

50. Article 6(1)(b) Vienna Convention.

51. Article 6(2)(f) Vienna Convention.

52. Article 23(1)(a) (i) UNCAC.

53. Article 23(1)(a) (ii) UNCAC.

54. Article 23(1)(b) (i) UNCAC.

55. Article 23(1)(b) (ii) UNCAC.

56. Article 23(2)(a)-(c) UNCAC.

this manual to illustrate the importance of identifying the elements of any criminal offence, and matching the evidence collected to each such element.

The second offence which will be analysed is the bribery provision in respect of domestic public officials, i.e. taking a bribe, contained in Article 15 of the UNCAC. This is because it is one of the simplest and most basic forms of corruption offences but at the same time, includes the concept of public official, which is of significant importance.

Article 23(1)(a)(i) can be broken down into the following elements:

1. Conversion or transfer of property
2. Proceeds of crime
3. Knowledge that such property is the proceeds of crime
4. For the purpose of concealing or disguising the illicit origin of the property or helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action
5. Intention.

1. Conversion or transfer of property

The term “conversion or transfer” of property includes instances in which financial assets (money or property) are converted from one form or type to another, for example, by using illicitly generated cash to purchase precious metals or real estate or the sale of illicitly acquired real estate. It also includes instances in which the same assets are moved from one place or jurisdiction to another or from one bank account to another.⁵⁷

It is helpful at this point to have regard to the object of the conversion or transfer, and therefore the meaning of “property”. In terms of article 1 of the UNCAC, “property” is defined to mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets.

It is important to have regard to the specific language used in a country’s money laundering legislation to determine the elements of the offence which need to be proved. In Ukraine, for example, the first category of money laundering offence is defined (in Article 209.1 of its CC) as “Conducting financial transaction or concluding an agreement involving money or other property obtained as a result of committing a socially dangerous unlawful action which preceded legalisation (laundering) of profits...”. Although these terms are not specifically defined, it is intended that the “conversion or transfer” referred to in Article 23 of the UNCAC is covered by the terminology used in Ukraine.⁵⁸

57. See *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2006), paragraph 231, available at www.unodc.org, accessed on 1 February 2014.

58. MONEYVAL 2009(4), Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism, Ukraine 19 March 2009, paragraph 82. The evaluators did, however, express doubt that the various terms would cover the full ambit of situations of “conversion or transfer of property” and recommended that future legislative clarification was necessary to put the matter beyond doubt.

Resolution No. 5 of the Plenum of the Supreme Court of Ukraine (15 April 2005) interprets and further clarifies the money laundering definition, which specifies the physical and material elements of the offence, the scope of predicate offences to it, as well as relevant issues of procedural importance in conducting investigations or court proceedings on money laundering. The term “financial transaction” is defined,⁵⁹ and in this context “assets” include “funds, property, property rights and non-property rights”.⁶⁰ Resolution No. 5 has also clarified that the list of types of transactions is not exhaustive and that such transactions can also be processed through other types of economic entities, as defined in Article 55 of the Ukrainian Commercial Code.

In Ukraine, the scope of “property” encompasses assets of every kind, including intangible assets and legal documents or instruments evidencing title to, or interest in, such assets as required by international standards. “Legalisation (laundering) of the proceeds of crime”⁶¹ includes “any acts related to the proceeds (property) received (obtained) from commitment of crime, directed to conceal the origins of such proceeds (property) or assistance to the person who is the associate in crime that is the origin of such proceeds (property).” “Property” as a special object includes a separate thing,⁶² totality of things as well as property rights and obligations. “Property” is also held to be “the totality of things and other values (including non-material assets) which have valuable estimation, that are produced or used in the business entity’s activity and are represented in the balance and accounted in other forms, prescribed by laws, of record keeping of such entities”.⁶³

It is imperative that the element of “conversion or transfer” as it is reflected in the specific money laundering provisions of each country covered by this manual is correctly understood, and evidence collected accordingly.⁶⁴

59. Article 1, paragraph 4 of the Law of Ukraine on Prevention and Counteraction to Legalisation (Laundering) of the Proceeds of Crime or Terrorist Financing, No. 2258-VI, May 18, 2010 as amended (Ukrainian AML/CFT Law): “any action related to assets, which is conducted with the assistance of the reporting entity”.

60. Article 1, paragraph 17 of the Ukrainian AML/CFT Law.

61. Article 4 of the Ukrainian AML/CFT Law.

62. Article 190 of the Ukrainian Civil Code.

63. Article 139 of the Economic Code of Ukraine.

64. In **Azerbaijan**, money laundering is defined in Article 193-1 of its CC as including, *inter alia*, the conversion or transfer of funds or other property, knowing that such funds or other property is the proceeds of crime, for the purpose of helping any person who is involved in the commission of any crime to evade the legal consequences of his or her action, or the accomplishment of financial transactions or other deals for the same purposes by using funds or other property, knowing that such funds or other property is the proceeds of crime.

In the Republic of **Moldova**, the wording of the UNCAC is largely adopted in Article 243 of its CC: “a) the conversion or transfer of goods by a person who knew or should have known that such goods were illegal earnings in order to conceal or to disguise the illegal origin of goods or to help any person involved in the commission of the main crime to avoid the legal consequences of these actions”. Article 3 of the Law on Prevention and Combating Money Laundering and Terrorism Financing, Nr. 190-XVI defines property as “financial assets, assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, documents or legal instruments in every form, including electronic or digital form, certifying a title or a right, inclusively of every share (interest) regarding these assets”.

2. Proceeds of crime

It is clear that evidence is required to prove that the conversion or transfer was preceded by the commission of a crime, i.e. predicate offence or unlawful activity. Predicate offence is defined as “any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention.”⁶⁵

The predicate offence is the criminal activity that generated the proceeds which are now laundered by the accused person. The law determines which conduct will be considered a predicate offence. In some countries, laws will give detailed lists of what constitutes a predicate offence,⁶⁶ and in others it is defined subject to a defined penalty threshold.⁶⁷ A third range of countries leave it open and any offence can be a predicate offence for money laundering.⁶⁸ When asking for MLA

Article 190 of the **Armenian** CC defines the first of four money laundering offences as “the conversion or transfer of property, knowing that such property is proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property”. Therefore, the first element of the category of money laundering is in line with the provisions of UNCAC, although it does not go so far as to include as an additional element the purpose of which is assisting a person involved in the predicate offence to evade the legal consequences of his/her action).

In **Georgia**, money laundering is criminalised in Article 194 as follows: “Legalisation of illicit income, i.e. giving a legal form (enjoyment, purchase, possession, conversion, transfer or any other act) to unlawful or/and unfounded property to conceal its illicit origin...”. Therefore, it too requires evidence of, *inter alia*, transfer or conversion as the first element of money laundering although, and this should be noted that the property need not be unlawful, provision being made for, *inter alia*, the transfer or conversion of unfounded property.

Article 235.1 of the **Belarusian** CC, legalisation (“laundering”) of illegally acquired proceeds includes “Knowingly undertaking financial transactions and other dealings involving money, securities or other assets acquired by illegal means, using such assets to carry out entrepreneurial or other commercial activity for the purpose of concealing or distorting the nature, origin, location, disposal, movement or real ownership of such assets or the rights associated with them”.

65. Article 1, UNCAC.

66. The provisions of Article 190.5 of the **Armenian** CC state that the proceeds of crime shall be the property derived from a defined list of predicate offences including but not limited to the following: commercial bribe, abuse of official authority, exceeding official authorities, taking a bribe, taking illegal payment by a public servant who is not an official person, giving a bribe.

67. Note 1 to Article 209 of the **Ukrainian** CC initially provided for a threshold penalty. Under this Article, it was understood that a socially dangerous unlawful action which preceded legalisation (laundering) of profits was considered to be an action which is punishable, under the CC of Ukraine, with imprisonment for a term of three and more years (except actions punishable under Articles 207 and 212 of the CC of Ukraine), or which is a crime under criminal statute of another State, such crime being punishable under the CC of Ukraine, and as result of which illegal proceeds were obtained. Article 1, paragraph 2 of the Law of the Prevention and Counteraction to Legalisation (Laundering) of the Proceeds of Crime or Terrorist Financing (Law no. 2258-VI, May 18, 2010), provides a definition of “socially dangerous unlawful action” which amends paragraph 1 of the Note to Article 209 eliminating the 3 year threshold. Predicate offences now cover all offences for which the CC provides for a punishment in the form of imprisonment.

68. In **Azerbaijan**, Article 1 of the Law on Prevention of Legalisation of Criminally Obtained Funds or other Property and Financing of Terrorism defines “Criminally obtained funds or other property” as funds of every kind, property, whether movable or immovable, corporeal or incorporeal, tangible or intangible, legal documents evidencing the title to such property, obtained directly or indirectly through the commission of an offence provided by the CC of the Republic of Azerbaijan.

and analysing dual criminality requirements (dealt with in greater detail below in “Section 6: Mutual legal assistance”), this may become a problem. Dual criminality consists of the requirement that the offence under investigation in the requesting country should also be an offence in the requested country. If the predicate offence in the investigation carried out in Ukraine, for example, is not a predicate offence in the requested State, it may refuse assistance on the grounds of dual criminality.

As indicated above under “Section 2: Overview of money laundering”, completely different conduct is criminalised as money laundering in Article 194 of the Georgian CC. The legalisation of illicit income includes giving a legal form to “unlawful or/and unfounded property.” There are two important differences to be noted when comparing this law to, for example, the Ukrainian money laundering provisions. First, in terms of the Georgian provisions, the transaction does not have to involve the proceeds of any crime. The funds involved can simply be “unfounded property”,⁶⁹ i.e. funds the legal origin of which cannot be proved. Therefore, this conduct is criminalised in Georgia as money laundering but would not be a criminal offence in Ukraine⁷⁰ and, indeed, nor in many other countries such as the Republic of Moldova⁷¹ and Azerbaijan.⁷² The second difference is that the Georgian law requires the element of concealment, i.e. the process of giving a legal form to unlawful or/and unfounded property must take place with the purpose of concealing the illicit origin of the property, while the Ukrainian law does not contain this requirement.⁷³ Again, this

As indicated above, **Ukraine** used to determine the underlying predicate offences for money laundering by reference to a threshold linked to the penalty of imprisonment applicable to the predicate offence but this has now been amended. It is understood that, in keeping with international standards, the Ukrainian authorities are drafting amendments to the CC in order to include insider trading and market manipulation as predicate offences to money laundering. All other required predicate offences are covered in the CC.

69. Note to Article 194:

1. Unjustified property or income received from the property, shares, are considered illegal under this article, if such property is gained by violation of law by a person or a member of his/her family, close relative or anyone related to the person.

2. Unjustified property or income received from the property, shares are considered illegal under this article if the person, his family, close relative or related person does not own documents proving legal means of gaining such property.

70. Evidence is required that the property was obtained as a result of committing a socially dangerous action.

71. Article 3 of the Law on the Prevention and Combating Money Laundering and Terrorism Financing, Nr. 190 – XVI: Illicit proceeds–property, designed, used or resulted directly or indirectly, from the perpetration of a crime, every benefits from these property as well as every property converted or transformed, partially or integrally from property designed, used or resulted from the perpetration of a crime and benefits from these property.

72. Article 1.0.1 of the Law of the Republic of Azerbaijan on Prevention of Legalisation of Criminally Obtained Funds or Other Property or Financing of Terrorism, № 767–IIIQ: Criminally obtained funds or other property – funds of every kind, property, whether movable or immovable, corporeal or incorporeal, tangible or intangible, legal documents evidencing the title to such property, obtained directly or indirectly through the commission of an offence provided by the Criminal Code of the Republic of Azerbaijan.

73. Article 209 of the Ukrainian CC does contain a separate provision that deals with concealment, “as well as carrying out actions aimed at concealing or masking illegal origin of such money or other property or possession thereof.”

is an example of conduct that is required in one country (Georgia) to criminalise money laundering but is not an element of the crime in another country (Ukraine).

The extent of the evidence required to establish the predicate offence is often debated in many jurisdictions and is not always a well settled issue. In a number of countries, it is argued that practice requires a conviction on the predicate offence before proceeding with the money laundering prosecution although this is not required by law or supported by international instruments.⁷⁴ In some instances, it is argued that the predicate offence should be specifically identified (for example theft, as opposed to robbery). In several countries, it has also been held that specificity with regard to the predicate offence is not required, and that the mere reference to some underlying criminal conduct suffices. In those instances where the predicate offence is required to be specifically identified, it would be preferable to identify and prove the elements of that crime. For example, if the predicate offence was Article 368 of the Ukrainian CC (acceptance of a bribe),⁷⁵ the elements would be: 1) the acceptance of a bribe; 2) by an official and; 3) the performance or non-performance in the interests of the bribe-giver of any action with the use of authority or official position. The question is: to what degree does each of these elements need to be proven?

As previously mentioned, this is not a well settled issue in law – either domestically or internationally. Although a conviction on the predicate offence is not required, it is recommended that the following evidence should be established to prove, for example, the violation of Article 368 of the Ukrainian CC: the first element, acceptance of a bribe, should be proven by evidence that shows either that the official directly received benefits to which he/she was not legally entitled, or that his/her acquisition of assets and expenditures far exceeded his/her legitimate income during the time period in question. The second element would be proven by the fact that his/her official position met the definition of an official as defined by the law of Ukraine. Proof of the third element would be established by first identifying the bribe-giver, and thereafter demonstrating that this person or entity received something of value as a result of actions that were within the authority of the public official. For example, it may be established that the entity was a company that received a contract that was awarded by the official, and that other companies with lower bids were systematically eliminated on the basis of false justifications.

74. An interpretative note for the UNCAC states that “money laundering offences established in accordance with this article are understood to be independent and autonomous offences and that a prior conviction for the predicate offence is not necessary to establish the illicit nature or origins of the assets laundered. The illicit nature of origin of the assets and in accordance with Article 28, any knowledge or intent or purpose may be established during the course of the money-laundering prosecution and may be inferred from objective factual circumstances.” (A/58/422/Add.1, para. 32 referred to in the Legislative Guide on pg. 81).

75. “Acceptance by an officer, in any form, of a bribe for the performance or non-performance in the interests of the bribe-giver, or in the interests of a third party, of any action with the use of authority or official position entrusted to him/her, shall be punishable by fine in the amount five hundred to seven hundred and fifty tax-exempt minimum incomes of citizens, or by corrective labour for a term of up to one year, or by detention for a term of up to six months, concurrently with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years”

This second element, i.e. proving the predicate offence, is directly linked to the first element, which is proving that the suspect was involved in the conversion or transfer **of the proceeds** of the predicate offence. What type of evidence would be required to link the predicate offence to the money laundering crime? Using the Ukrainian bribery example above, it must first be proven that the official received something of value. For example, the official may have received a payment from Company A, which was awarded a large contract as a result of this bribe, and this payment was made directly into the bank account of a shell company that was created and owned by the official. Is this payment from Company A into the bank account of the shell company money laundering? The answer is no. This payment is the bribe: it is the predicate offence. At this point, these funds in the shell company bank account are the proceeds of crime (“property obtained as a result of committing a socially dangerous unlawful action”). Now, any financial transactions conducted with these funds in the shell company account will be a money laundering violation. For example, if the official makes a bank transfer from this account to purchase a vacation home, this would be a money laundering transaction because it would be a “financial transaction involving money obtained as a result of committing a socially dangerous unlawful action”. The important point is that first, the predicate offence must be completed so that the person has proceeds of the unlawful activity. Thereafter, any financial transactions with these proceeds such as the purchase of an asset or the transfer of the funds to another bank account are money laundering violations.

A further example can be drawn from the PE: when the payment of UAH 200,470 was made to the bank account of Indian Ocean Factors-CH on 2 October 2005 by Kryviy Rih Ore, this amounted to the bribe, i.e. the predicate offence. Mr Rostislav Dmytrenko, the Vice President of Kryviy Rih Ore, confirmed that the payment was one of many which were paid in order to retain their mining permit. The above-mentioned payment was made to Indian Ocean Factors-CH, a shell company owned by Mr Boris Maistrenko, the suspect, who thereafter used the funds for his own benefit. Once further payments were made out of the Indian Ocean Factors-CH bank account to Almo Limited, another shell corporation indirectly owned by Mr Maistrenko to pay for various items, these transactions would constitute “financial transactions involving money obtained as a result of committing a socially dangerous unlawful action”, and therefore money laundering.

3. Knowledge that such property is the proceeds of crime

It is important to adduce evidence which proves that the perpetrator knew that he/she was dealing with the proceeds of crime or, for example, in Ukraine a socially dangerous unlawful action. It is important that evidence be adduced which prove that the proceeds originated from criminal activity, and that the perpetrator knew that this was the case (with the exception of Georgia as stated above where it is also possible to secure a conviction if it is proved that the legalisation involved giving a legal form to unfounded property). If the perpetrator, for example, acted in the mistaken belief that the money or property emanated from a crime this would not constitute evidence of criminal conduct. Similarly, if the State was unable to prove, objectively-speaking, that the money or property emanated from an offence, this element of the crime would not be proved.

4. For the purpose of concealing or disguising the illicit origin of the property or helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action

The act or acts must be done for the purpose of either concealing or disguising their criminal origin, e.g. by helping to prevent their discovery, or helping a person evade criminal liability for the crime that generated the proceeds. Once again, one would have to refer to the specific wording of the country's money laundering statute to determine whether this was an element of the offence of money laundering.

However, as stated above, the Georgian law requires the element of concealment, i.e. the process of giving a legal form to unlawful or/and unfounded property must take place with the purpose of concealing the illicit origin of the property, whilst the Ukrainian law does not contain this requirement with regard to the first category of money laundering offence. Once again, this emphasises the importance of paying careful attention to the specific provisions of the domestic legislation of each country in determining the elements of the crime.

5. Intention

With respect to the mental or subjective elements required, the conversion or transfer must be intentional, and – at the time of conversion or transfer – the accused must have the above mentioned knowledge that the assets are criminal proceeds.

Corruption and money laundering are offences that occur behind closed doors. During the course of an investigation, it is very unlikely that direct evidence will be found to prove the wrongful conduct or activity required by these offences. This is why all international instruments, guidelines and best practices insist that knowledge and intent as elements of the offence may be inferred from the factual circumstances surrounding the case.⁷⁶ The FATF has recommended that the intent and knowledge required to prove the offence of money laundering are consistent with the standards set forth in the Vienna and Palermo Conventions, namely, that such mental state may be inferred from objective factual circumstances.⁷⁷

Various types of evidence arising from objective factual circumstances may be used to infer the intentional element of money laundering. For example, in accordance with Article 124 of the Azerbaijan Criminal Procedure Code (CPC),⁷⁸ reliable evidence

76. Article 28, UNCAC.

77. As stated above, the FATF is an inter-governmental body which sets standards and develops and promotes policies to combat money laundering and terrorist financing.

78. Article 124 CPC. Concept and types of evidence

124.1. Reliable evidence (information, documents, other items) obtained by the court or the parties to criminal proceedings shall be considered as prosecution evidence. Such evidence:

124.1.1. shall be obtained in accordance with the requirements of the Code of Criminal Procedure, without restriction of constitutional human and civil rights and liberties or with restrictions on the grounds of a court decision (on the basis of the investigator's decision in the urgent cases described in this Code);

(information, documents, other items) obtained by the court or the parties to the criminal proceedings shall be considered as prosecution evidence. Such evidence shall be obtained in accordance with the requirements of the CPC, and shall be produced in order to show whether or not the act was a criminal one, whether or not the act contained the features of an offence and other circumstances essential to determining the charge correctly. If there is no doubt as to the accuracy and source of the information, documents and other items, and as to the circumstances in which they were obtained, they may be accepted as reliable evidence.

In the Republic of Moldova, it may be assumed that intention can be inferred from objective circumstances. Not only is this conclusion in line with Article 27 of its CPC on the free appreciation of evidence by the judges,⁷⁹ it is also standard court practice in other criminal cases. The level of proof required in money laundering cases on the predicate offence is less clear in the absence of firm jurisprudence.

The Note to Article 9 of the Georgian CC clarifies that intent can be inferred from objective factual circumstances.

In Armenia, reliance is placed on the principle of free evaluation of evidence by the judiciary which allows the judge to infer the intentional element of any crime from the objective factual circumstances as stated in Article 25 of its CPC.⁸⁰

It is therefore clear that intention may be inferred from objective factual circumstances in a number of the countries covered by this manual. For example, if the official accepted bribes from a company, he/she may have set up an elaborate scheme to hide the proceeds and the subsequent transactions. The official may have arranged for the bribes to be paid not directly by the company that received the non-competitive contract but rather by a subsidiary of that company. The official may have then set up a shell company with nominee owners but which he/she, in fact, controlled. The bribes are then paid into the bank account of this shell company. From these proceeds, in

124.1.2. shall be produced in order to show whether or not the act was a criminal one, whether or not the act committed had the ingredients of an offence, whether or not the act was committed by the accused, whether or not he/she is guilty, and other circumstances essential to determining the charge correctly.

124.2. The following shall be accepted as evidence in criminal proceedings:

124.2.1. statements by the suspect, the accused, the victim and witnesses;

124.2.2. the expert's opinion;

124.2.3. material evidence;

124.2.4. records of investigative and court procedures;

124.2.5. other documents.

79. Article 27 CPC. Free Appreciation of the Evidence

1. The judge and the representative of the criminal prosecution bodies appreciate the evidence according to their own conviction formed after the examination of all administered evidence.

2. No evidence has a substantiation power established in advance.

80. Article 25 CPC. Independent Assessment of Evidence

1. The judge, as well as the agency for inquest, the investigator, or the prosecutor shall assess the evidence independently, relying on their own belief.

2. No evidence shall have a pre-determined force in criminal proceedings. The judge, as well as the agency for inquest, the investigator or the prosecutor shall not deal with the evidence in a biased way or give more or less significance to ones in comparison with others, before the examination of all the available evidence in accordance with a due process of law."

the shell company account, the official purchases a remote vacation home which is placed in the name of a second shell company which was also formed by the official, and used additional nominees to hide his/her true interest. The objective factual circumstances in this case will prove that the transaction to purchase the vacation home was not an accident or an uninformed transfer of funds. In fact, it will show that the transaction was intentional and well planned by the official.

Another example may be found in the PE: Global Mining Incorporated, a precious stone mining company operating in Ukraine, was owned by Global Mining Holding Company in South Africa. It received a permit to begin exploration shortly before it made a series of payments to RG Horman Brokerage, an investment brokerage company specialising in the provision of personal wealth management in Ukraine, allegedly for investment purposes. However, according to the accounting manager of Global Mining Incorporated, no such investments were recorded in the company records of Global Mining, and each payment was authorised by the corporate office in South Africa. The money which was received into an account at RG Horman Brokerage in the name of Mr Maistrenko's brother-in-law, Mr Sergey Petrenko, was ultimately used to buy property for Mr Maistrenko's benefit. Once again, this was not an accident but well planned and executed by Mr Maistrenko. He opened the account, having lied about his brother-in-law's mental health in order to justify opening an account in his (Mr Petrenko's) name which the Minister controlled and from which he benefitted. Furthermore, with the unwitting assistance of Mr Petrenko, Mr Maistrenko secured payment for a piece of a land from Mr Pavel Ivanenko.

4.2 Model language for corruption crimes

OECD Anti-Bribery Convention, 1999

As stated above, the OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions, and provides for a host of related measures that make this effective.⁸¹ Bribery of foreign public officials is an offence only when the bribe is paid in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

Neither the OECD nor the CoE and United Nations Conventions define "corruption". Instead they establish the offences for a range of corrupt behaviour. Hence, the OECD Anti-Bribery Convention establishes the offence of bribery of foreign officials. Under Article 1(1) of this Convention, "Each party shall take such measures as may be necessary to establish that it is a criminal offence under its laws for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to

81. *Convention on Combating Bribery of Foreign Public Officials in International Business Transaction* (2011), available at www.oecd.org, accessed on 1 February 2014.

the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."⁸²

A foreign official is defined in Article 1(4) of the Convention.⁸³ The international conventions describe a bribe as an undue advantage. Thus, not all advantages are prohibited; only those that are undue. For instance, under the OECD Anti-Bribery Convention, it is not an offence if the advantage was permitted or required by the written law or regulation of the country of that foreign public official, including case law.⁸⁴ In addition, this Convention confirms that an offence is committed irrespective of, amongst other things, the value of the advantage, its results, perception of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.⁸⁵

All conventions do not, however, require that the official's act or omission be illegal or in breach of duties. In other words, it may be an offence if an official accepts a bribe to perform an act or omission that does not contravene the law *per se*. For example, under the OECD Anti-Bribery Convention, an offence is committed whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.⁸⁶ However, small facilitation payments, i.e. payments to speed up procedures, are legal under the OECD Anti-Bribery Convention,⁸⁷ but are illegal under all other conventions. Inclusion of legal acts is important because tolerance of this kind of corruption would undermine the integrity of and public confidence in the civil service. In particular, a bribe for the purpose of obtaining an impartial exercise of judgement or discretion by a public official must be covered, regardless of whether this is considered an illegal act or in breach of duties.⁸⁸

Council of Europe Criminal Law Convention on Corruption, 2002

As stated above, the Council of Europe Criminal Law Convention on Corruption seeks to prevent and punish corruption through a broad range of offences, which include

82. As stated at p. 37 in OECD Glossaries, Corruption: A Glossary of International Standards in Criminal Law, "The Conventions also require that the bribe must be paid in order that the official acts or refrains from acting in the exercise of his/her duties. In other words, there must be a link between the bribe and the official's actions or omissions. This implies that an offer or request of a bribe must take place before the official acts or refrains from acting in the exercise of his/her duties. The actual acceptance or receipt of the bribe, however, could take place after." See also the Explanatory Report, CoE Criminal Law Convention on Corruption, paragraphs 34 and 43.

83. For the purpose of this Convention: "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.

84. *Convention on Combating Bribery of Foreign Public Officials in International Business Transaction* (2011), Commentary 8, available at www.oecd.org, accessed on 1 February 2014.

85. *Ibid*, Commentary 7.

86. *Ibid*, Commentary 4.

87. *Ibid*, Commentary 9.

88. *OECD Glossaries, Corruption: Glossary of International Standards in Criminal Law* (2008), p.37, available at www.oecd.org, accessed on 1 February 2014.

the active and passive bribery of domestic and foreign public officials, bribery in the private sector and trading in influence.

Article 3 of the Council of Europe Criminal Law Convention on Corruption covers the situation where the public official requests or receives such an undue advantage (soliciting or accepting a bribe by a national public official): “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions.”

In terms of Article 2 of the Council of Europe Criminal Law Convention on Corruption, “Each party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally, the promising, offering or giving by any person, directly or indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions”.

Requesting or soliciting a bribe occurs when an official indicates to another person that the latter must pay a bribe in order that the official act or refrain from acting.⁸⁹ As with “offering” and “promising” where the offence is complete once the official is offered or promised a bribe the offence is complete once the official requests or solicits the bribe; there need not be an agreement between the briber and the official. Moreover, the person solicited need not be aware of nor have received the solicitations (e.g. the solicitation is intercepted by the law enforcement agencies before it is delivered). By contrast, receiving or accepting a bribe occurs only when the official actually takes the bribe.⁹⁰

“If there is a unilateral request or a corrupt pact, it is essential that the act or the omission of acting by the public official takes place after the request or the pact, whereas it is immaterial in such a case at what point in time the undue advantage is actually received. Thus, it is not a criminal offence under the Convention to receive a benefit after the act has been performed by the public official, without prior offer, request or acceptance.”⁹¹

Elements from the UNCAC

Chapter III of the UNCAC deals with the criminalisation of corruption offences. It establishes countries’ obligation to create a series of criminal offences related to corruption in public office. This section of the Convention is again of a mandatory nature as most provisions begin with the phrase “Countries shall...”. However, it is important to recognise that although the criminalisation of the relevant conduct is mandatory, this section still requires domestication in order to be effective.

89. This is the word used in Article 15(b), UNCAC.

90. Council of Europe (1999), *Explanatory Report to the Criminal Law Convention on Corruption*, paragraphs 41-42, available at rm.coe.int, accessed on 1 February 2014.

91. *Ibid*, Paragraph 43.

Furthermore, the criminal offences listed under this chapter are models for State Parties to follow, and it is important to note that no punishment is given to each criminal conduct, which reinforces the need for it to be implemented through domestic legislation.

Article 15 of the UNCAC: Bribery of national public officials

The second offence which has been chosen for analysis in this manual to illustrate the importance of identifying the elements of any criminal offence, and matching the evidence collected to each such element is Article 15(b) of the UNCAC. It provides as follows:

“When committed intentionally... the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”

Therefore, Article 15(b) can be broken down into the following elements:

1. The solicitation or acceptance directly or indirectly of an undue advantage for himself or herself or another person or entity (prohibited conduct)
2. By a public official
3. In order that the official act or refrain from acting in the exercise of his or her official duties
4. Intention.

1. Solicitation or acceptance of an undue advantage

The conduct which is forbidden in this instance includes the object of the acceptance or solicitation, i.e. the undue advantage. It is important to emphasise that the forbidden conduct does not exist in a vacuum but extends to the solicitation or acceptance of an undue advantage specifically.⁹²

As indicated above, soliciting or requesting a bribe occurs when an official indicates to another person that the latter must pay a bribe in order that the official act or refrain from acting. The offence is complete once the official requests or solicits the bribe; there need not be an agreement between the briber and the official.

“Soliciting” or “requesting may, for example, refer to a unilateral act whereby the public official lets another person know, explicitly or implicitly, that he/she will have to “pay” to have some official act done or abstained from. It is immaterial whether the request was actually acted upon, the request itself being the core of

92. It is important to have regard to the rules of each country covered by this manual in relation to gifts to public officials. In some instances, there may be a policy disallowing gifts apart from symbolic souvenirs at official events. In other instances, gifts may be allowed up to a certain amount provided the gift is not linked to an act of an official, or are permitted for a legal act that has been performed by an official if there was no prior agreement for the gift and the gift is of lesser value than a prescribed amount.

the offence. Likewise, it does not matter whether the public official requested the undue advantage for himself/herself or for anyone else”.⁹³

“Accepting” or “receiving may, for example, mean the actual taking the benefit, whether by the public official himself/herself or by someone else (spouse, colleague, organisation, political party, etc) for himself/herself or for someone else. The latter case supposes at least some kind of acceptance by the public official”.⁹⁴ Again, intermediaries can be involved which occurs when an official solicits or accepts a bribe through a third party: the fact that an intermediary is involved, which would extend the scope of passive bribery to include indirect action by the official,⁹⁵ necessarily entails identifying the criminal nature of the official’s conduct, irrespective of the good or bad faith of the intermediary involved. As stated at p. 38 in OECD Glossary of International Standards in Criminal Law (referred to in footnote 19 above), it is also important to distinguish the liability of the intermediary from that of the official who uses the intermediary: for example, the intermediary could be an innocent, unwitting delivery person or a culpable accomplice. However, the UNCAC requires the official to be liable regardless of the culpability of the accomplice as the focus is on the official.

Article 324 of the Moldovan CC, for example, defines passive bribery as “the act of an official of claiming or receiving offers, money, securities, other goods or material advantages or of accepting services, privileges or other advantages not due to him/her in order to undertake or not to undertake or to delay or to speed up an action related to his/her professional duties or to undertake an action contrary to such duties or to obtain distinctions, positions, access to markets or any other favourable decision from authorities.” It is therefore clear that the first element of the offence is the claiming (or demanding) or receiving of offers, money, securities, other goods or material advantages, or of accepting services, privileges or other advantages not due. It does not refer to the involvement of intermediaries but this is specifically dealt with in Supreme Court of Justice Explanatory Decision No. 5 (Supreme Court Decision No. 5).⁹⁶

In paragraph 2.2 of the Supreme Court Decision No. 5, it is stated that “By to receiver it must be understood as taking, entering into possession of money or undue advantages given [provided] by the briber (or by another person acting on his/her behalf). To receive should not be understood as meaning that the bribed person has to take into its own hand the money or the undue advantages obtained for his services. The assets or the money can be deposited in an indicated place where it can

93. Ibid, Paragraph 41.

94. Ibid, Paragraph 42.

95. In accordance with Article 15 of the UNCAC, State Parties must establish as criminal offences both active and passive bribery which is understood to be a reference to the conduct reflected in Article 15(a), i.e. the promise, offering or giving of an undue advantage, and 15(b), i.e. solicitation or acceptance of an undue advantage, respectively. See further footnote 23.

96. See Supreme Court of Justice Explanatory Decision No. 5 of 30 March 2009 (Supreme Court Decision No. 5), on the application of the legislation on criminal liability for active and passive bribery, published in Official Gazette of the Supreme Court of Justice, No. 2, 2010. Such explanations do not involve any interpretation of laws and are not binding on judges. They ensure standardisation of judicial practice, analyse judicial statistics and provide of their motion explanations concerning issues relating to legal practice.

be recovered at any time. (He can receive them before or after granting the services solicited on the condition that he has first agreed them.

If the undue advantages in the form of money, other valuables (assets), services were offered to the close relatives of the person holding a position of responsibility or received by them [close relatives] with the agreement of the bribee or if the person has not refused the offers and has used his position for giving a favour to the briber, the acts of the person holding position of responsibility will be qualified as passive corruption, externalised by the action of “receiving”.

According to the authorities, the word “demand” corresponds to “request”, and “acceptance of a promise” is also covered by these provisions, in accordance with Supreme Court Decision No. 5 (paragraph 3.6) which states “in order for the offence of passive bribery to be deemed to have been committed, it is sufficient that the person concerned has accepted the promise of these advantages in order to act or refrain from acting in the exercise of his or her duties, even if the concrete value of these advantages was not determined.”

Article 368 of the Ukrainian CC has criminalised the acceptance of a bribe but has not established the offer and promise of a bribe as a separate offence in the current provisions. Instead, it relies on the notion of criminal attempt and preparing to commit (unconsummated criminal offence) passive bribery to cover such acts.⁹⁷

By including the word “advantage” in the wording of Article 15(b) of the UNCAC, the legislator wanted to expand the idea of property and not limit the law to the concept of financial benefit or tangible property.⁹⁸ Anything can be considered to be an advantage. As stated in the Explanatory Report to the Council of Europe Criminal Law Convention on Corruption (paragraph 37) “the undue advantages received are usually of an economic nature but may also be of a non-material nature. What is important is that the offender (or any other person, for instance, a relative) is placed in a better position than he was in before the commission of the offence and that he was not entitled to the advantage or benefit. Such advantages may consist of, for instance, money, holidays, loans, food and drink, a case handled or licence awarded within a swifter time, better career prospects, sexual favours, etc.”

Furthermore, “the undue advantage need not necessarily be given to the public official himself: it can be given also to a third party, such as a relative, an organisation

97. The notions of requesting and soliciting bribes are, however, covered as aggravating factors (“demanding a bribe”) in Article 368 paragraph 3 with Note 4 to the Article providing a definition of the act of demanding which covers requesting and solicitation.

98. See also paragraph 3.6 of the Moldovan Supreme Court Decision No. 5 which states “By the word **advantage**, it must be understood a profit (benefit), a favour, a privilege that someone enjoys. The advantage may not be patrimonial. These undue advantages can be unjustified bonuses given to the close relatives of the person holding positions of responsibility, holidays, interest-free loans, food and beverage, favoured treatment of a sick person, creating better opportunities in career.” Furthermore, in paragraph 5 it is stated that “the alleged money and advantages received or accepted by the accused in order to act or refrain from acting must be **undue**. If the perpetrator claims or receives without recording an amount of money that constitutes a legal payment or if this sum is greater than the legal one established, these acts do not constitute an offence of passive corruption, but rather according to the case, an abuse of authority or fraud.”

to which the official belongs, the political party of which he is a member. When the offer, promise or gift is addressed to a third party, the public official must at least have knowledge thereof at some point. Irrespective of whether the recipient or the beneficiary of the undue advantage is the public official himself or a third party, the transaction may be performed through intermediaries.”⁹⁹

2. By a public official

Article 15 specifies that the solicitation or acceptance of the undue advantage must be by a public official. The “perpetrator” in Article 15 can only be a public official, within the meaning of Article 2 of the UNCAC.

“Public official” shall mean:¹⁰⁰

1. Any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority
2. Any other person who performs a public function, including a public agency or public enterprise, or provides a public function, as defined in the domestic law of the State Party, and as applied in the pertinent area of law of that State Party
3. Any other person defined as ‘public official’ in the domestic law of the State Party.”

The definition is very broad. As stated on p. 32 in OECD Glossary of International Standards in Criminal Law (referred to in footnote 19 above), “Istanbul Action Plan countries need to ensure that their anti-corruption legislation covers all persons holding a legislative, administrative or judicial office at **all levels of government**, whether national/central, state/provincial or local/municipal. The legislation should also include local self-governments. It would also be beneficial to cover officials of **political parties** and **candidates for political office** as well as **any person in anticipation of his or her becoming an official** even though the international conventions do not expressly deal with them”.

The problem often lies in the fact that instead of ensuring that the bribery offence contains the definition of public official, one has to look at various definitions in various different pieces of legislation.

It is thus of paramount importance that investigators and prosecutors understand the significance of identifying correctly the individual mentioned in the relevant legislation as a failure to do so can result in an acquittal on the basis that the prosecution failed to prove an element of the crime.¹⁰¹

99. Council of Europe (1999), *Explanatory Report to the Criminal Law Convention on Corruption*, paragraph 36, available at rm.coe.int, accessed on 1 February 2014.

100. Article 2, UNCAC.

101. For example, Article 123 of the **Moldovan CC** defines an official as follows:

1) An official is a person who in an enterprise, institution, state, or local public administration organization or a subdivision thereof is granted, either permanently or temporarily, by law appointment,

3. In order that the official act or refrain from acting in the exercise of his or her official duties

In return for the bribe or undue advantage, the public official must perform or fail to perform an action within the ambit of his or her official duties. However, although the UNCAC provisions state that the public official must have solicited or accepted the bribe in order to act or refrain from acting, proof is not required that the public official did, in fact, act or refrain from acting in the exercise of his/her official duties. Since the conduct covers a case where a bribe is merely solicited, that is including the case where the bribe is not actually given and therefore did not result in affected conduct, some link must be established between the offer or advantage and the official acting or refraining from acting in the course of his or her official duties.¹⁰² However, proof that this actually took place is not required although it would be important to lead evidence that the promised conduct fell within the scope of the public official's official duties. As in the case of Moldova (referred to below), if the conduct does not fall within the scope of the suspect's official duties but he/she pretended or gave out that it did, this would not amount to bribery but, in all probability, a different criminal offence such as trading in influence.

As indicated above, "soliciting", or "accepting", may, for example, mean the actual taking of the benefit, whether by the public official himself/herself or by someone else for himself/herself or for someone else. The latter case supposes at least some kind of acceptance by the public official.

According to the Moldovan CC, for example, the third element of the offence of passive bribery is "in order to undertake or not to undertake or to delay or to speed up an action related to his/her professional duties or to undertake an action contrary to such duties or to obtain distinctions, positions, access to markets or any other favourable decision from authorities."¹⁰³

election, or assignment certain rights and obligations related to exercising the functions of a public authority or to administrative management or to economic/organizational actions.

2) A high-ranking official is an official person whose appointment or election is regulated by the Constitution of the Republic of Moldova and by organic laws, as well as the persons to whom the high-ranking official delegates his/her duties."

In **Azerbaijan**, Article 311 of the CC refers to the receipt of a bribe by an "official" within the meaning of Note 1 of chapter 34 of the Azerbaijani CC (Crimes against State, Interest of Public Service and Institutions of Local Government Service and also in other Commercial and Non-Commercial Organisations (includes bribe-taking)) which provides relevant definitions: "Officials (in present chapter), shall be persons constantly, temporarily or on special power carrying out functions of authority representative either carrying out organizational, administrative or administrative functions in state bodies, institutions of local government, state and municipal establishments, enterprises or organisations, and also in other commercial and non-commercial organisations. Civil servants and employees of institutions of local government who are not admitted as officials, and also employees of other commercial and non-commercial organisations carry criminal liability under articles of the present chapter in cases, which are specially provided by appropriate articles."

102. *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2006), paragraph 198-200, available at www.unodc.org, accessed on 1 February 2014.

103. Articles 324, Moldovan CC.

Moldovan Law explicitly covers both positive acts and omissions provided that they are within the scope of public official's authority or contrary to his/ her duties. In this respect, the Supreme Court Decision No. 5 states in paragraph 6 that "the court must have regard to the fact that the offence of passive corruption is deemed to have been committed if the actions or omissions for which the accused claims, receives, accepts the money or the undue advantages are within the scope of his or her official powers or are contrary to his or her official responsibilities. The court must establish what the person's powers are, and include them in the sentence, with a mandatory reference to the relevant laws and/or administrative acts".

It should be noted that the Supreme Court goes on to state in paragraph 23 of its decision that "If the accused claims, receives or accepts assets, undue advantages but the services to be provided for the briber do not fall within the scope of his/her duties (and he or she cannot perform them), but asserts that he or her is entitled to perform or not the services solicited, these acts should be considered as a fraud (art. 190 CC). If this person insists or makes think he or she has an influence on the public official or he or she can influence through an intermediary, the acts are to be qualified as the trading in influence (art. 326 CC)".

4. Intention

This element is specifically stated in Article 15 of the UNCAC. Therefore, it is clear that the required mental element (or subjective element) for this offence is that the conduct must be intentional. The mental or subjective element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties.

It is important to consider what facilitates proof of a guilty mind, and what is required to show that the offender's mental state coincides with the mental state required by the law for the offence in question. In addition, some link must be established between the offer or advantage and the official being induced to act or refrain from acting in the course of his or her official duties. Since the conduct covers cases of merely offering a bribe, that is, including cases where it was not accepted and could therefore not have affected conduct, the link must be that the accused intended not only to offer the bribe, but also to influence the conduct of the recipient, regardless of whether or not this actually took place.¹⁰⁴

There are, in broad, four distinct states of mind which may require consideration within the context of any given criminal offence, i.e. purposefulness (direct intent), knowledge, recklessness or negligence.

Although not specifically stated in the relevant Article itself, the required mental element (or subjective element) for the offence created, for example, by Article 368 of the Ukrainian CC, is that the conduct must be intentional. The guilt, intent and its forms, and recklessness and its types are defined in other articles of the CC.¹⁰⁵

104. *Legislative Guide for the Implementation of the United Nations Convention against Corruption* (2006), paragraph 198, available at www.unodc.org, accessed on 1 February 2014.

105. Articles 23, 24 and 25 respectively, Georgian CC.

The same can be found other CCs e.g. Armenian CC states “a wilful crime can be manifested in direct or indirect wilfulness.¹⁰⁶ If the law does not link the criminal liability for the accomplished criminal act to the emergence of certain consequences, the crime is considered wilfully committed if the person who committed it understood the dangers of his actions for society and was willing to commit it.”

The Georgian CC refers to Crime of Aforethought as follows:¹⁰⁷

1. “Crime of aforethought shall be the action that is perpetrated with direct or indirect intention.
2. The action shall be perpetrated with direct intention if the wrongdoer was aware of the illegitimacy of his/her action, foresaw the possibility for the arrival of the illegal consequence and wished to have this consequence, or foresaw the inevitability of the realization of such consequence.
3. The action shall be perpetrated with indirect intention if the wrongdoer was aware of the illegitimacy of his/her action, foresaw the possibility for the arrival of the illegal consequence, did not wish to have this consequence but deliberately allowed for or was negligent to deal with the arrival of such consequence”.

It should be possible to infer the “mental element” of the offence from the surrounding factual circumstances.¹⁰⁸ To illustrate the point, the OECD has stated that “proving the requisite intention is not always an easy task since direct evidence (e.g. a confession) is often unavailable.¹⁰⁹ Indeed, bribery and trading in influence offences can be difficult to detect and prove due to their covert nature, and because both parties to the transaction do not want the offence exposed. Therefore, the offender’s mental state may have to be inferred from objective factual circumstances. For example, a supplier tenders a bid for a contract. Soon after, he provides an expensive trip abroad as a gift to the public official who will choose the winning bid. It may then be inferred that the supplier intended to influence the official’s decision in the choice of the bid.” It is vital that the rules of evidence in criminal procedural codes permit this form of proof.

Various types of evidence arising from objective factual circumstances may be used to infer the intentional element of corruption. For example, Article 65 of the Ukrainian CPC (as it now reads and which may be subject to change given that amendments to the CPC are currently being considered) states that such circumstances as the presence or absence of physical elements of an offence, the guilt of the offender and other circumstances of importance can be established by testimony given by a witness, victim and suspect/accused, expert’s opinion, exhibits, records of investigative

106. Article 29, Georgian CC.

107. Article 9, Georgian CC.

108. “State parties must ensure that the knowledge, intent or purpose element of offences, established in accordance with UNCAC can be established through inference from objective factual circumstances” (Article 28).

109. *OECD Glossaries, Corruption: Glossary of International Standards in Criminal Law* (2008), p.30, available at www.oecd.org, accessed on 1 February 2014.

and judicial actions, records with appropriate attachments drawn up by competent authorities as a result of operational-detective activities, and other documents. These types of evidence may prove the intentional element of corruption based on factual circumstances such as time, place, the way in which and circumstances under which the corruption has been committed.

5. Elements of the crime workshop

To emphasise the relevance and importance of identifying the elements of a specific criminal offence, a workshop approach is used, taking a set of facts which are described below, in the case scenario, and asking the following three questions:

- ▶ What is the criminal offence that best suits the action described?
- ▶ What are the elements of that offence?
- ▶ What evidence would one use to prove each one of those elements?

Case Scenario

1. The European Bank for Reconstruction and Development decided to grant a development loan to Ukraine for the rehabilitation of the M06 Kiev-Chop Highway. The total amount for the loan was for €100 million with a fixed interest rate of 5% to be paid over a period of 10 years.

2. On 20 July 2010, the call for bids was published. On 13 August 2010, the call for bids closed, with 4 bids having been received from RoadTech Europe Ltd, WM Road Contractors, Owen Pugh Holdings Ltd. and Martin Cowman Ltd.

3. On 15 August 2010, RoadTech Europe Ltd. appealed the bid document based on the fact that the technical specifications were too narrow, and appeared to be copied from those advertised by WM Road Contractors. RoadTech Europe Ltd. argued that no other company could possibly participate in the process. The appeal was ruled out.

4. RoadTech Europe Ltd. was ruled out after a careful analysis that determined that their equipment lacked many of the characteristics advertised in the bid. Owen Pugh Holdings Ltd. and Martin Cowman Ltd. provided identical bids. Both companies presented guarantees as requested by the bid documents for the amount of €1.000.000.00 issued by Credit Suisse Bank in Zurich with consecutive numbering on the same day, and signed by the same bank representative. This made the Ukravtodor, State Road Administration of Ukraine, suspicious of collusion between the companies, and it decided to rule them out of the process.

■ 5. On 20 August 2010, the Ukravtodor decided to award the totality of the contract to WM Road Contractors based on the fact that they were the only company capable of offering the equipment. The cost of their services was of €125 million.

■ 6. Mikhail Volkov, Director of Ukravtodor, received a total of €3.5 million in certificates of deposit (C.O.D.'s) made to the bearer. These C.O.D.'s were purchased through a cashier's cheque paid for by a shell corporation (Seashells Inc.) located in the Bahamas, which is, in turn, owned by another shell corporation (Starfish Inc.) located in Antigua. Starfish Inc. is owned by WM Road Contractors.

■ 7. Olga Mironova, Head of Procurement at Ukravtodor, received a total of €1 million in C.O.D.'s made to the bearer. These C.O.D.'s were purchased through another cashier's cheque paid for by Seashells Inc.

■ 8. Maria Petrenko, the Technical Specialist at Ukravtodor who drafted the Terms of Reference for the bid, received a total of € 5 million in C.O.D.'s made to the bearer. These C.O.D.'s were purchased through another cashier's cheque paid for by Seashells Inc.

■ Answer the following questions:

- a) With which offence would you charge Mr Volkov, Mrs Mironova and Mrs Petrenko with? Choose only one.
- b) What are the elements of that offence?
- c) What evidence could be used to prove each element of that offence?

If one were to apply the Ukrainian criminal provisions, for example, due consideration could be given to the use of Article 368.1 of the Ukrainian CC which provides as follows:

"Acceptance by an officer, in any form, of a bribe for the performance or non-performance in the interests of the bribe-giver, or in the interests of a third party, of any action with the use of authority or official position entrusted to him/her, shall be punishable by fine in the amount five hundred to seven hundred and fifty tax-exempt minimum incomes of citizens, or by corrective labour for a term of up to one year, or by detention for a term of up to six months, concurrently with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years."¹¹⁰

1. An officer:

The acceptance of the bribe must be by an officer, and therefore due regard must be given to the definition contained in Ukrainian legislation. The CC provides for its

¹¹⁰ The acceptance of a bribe in a substantial amount, large amount and especially large amount are also dealt with in Article 368.

own definition of an “official” and “public official”. In accordance with Articles 364 and 368 of the Criminal CC respectively, “officials shall mean persons who permanently or temporary represent public authorities, and also permanently or temporary occupy positions in businesses, institutions or organisations of any type of ownership, which are related to organisational, managerial, administrative and executive functions, or are specifically authorised to perform such functions”, and “officials who occupy responsible positions” shall mean persons referred to in paragraph 1 of the Note to Article 364, whose positions pursuant to Article 25 of the Law of Ukraine “On Civil Service” are referred to “the third, fourth, fifth and sixth categories, and also judges, prosecutors and investigators, heads and deputy heads of government and public agencies, local government organs, their divisions and units. Officials occupying particularly responsible positions are persons stipulated by Article 9 § 1 of the Law of Ukraine on Public Service, and persons whose positions are referred by Article 25 of this Law to the first and second categories”.

Mr Volkov, Mrs Mironova and Mrs Petrenko are, in fact, public servants. They are the Director, Head of Procurement and Technical Specialist at Ukravtodor respectively which is the State Road Administration of Ukraine. To prove this element, any of the following may be used:

- ▶ Letter of appointment as Director of Ukravtodor;
- ▶ Appointment letters as Head of Procurement and Technical Specialist;
- ▶ Personnel files at Ukravtodor;
- ▶ Job description outlining functions, responsibilities and authority of the officials concerned.

2. To accept:

This element can be proven with direct evidence that will show that the public officials received C.O.D.'s paid by shell companies owned by WM Road Contractors. Some useful evidence may be:

- ▶ All bank documents pertaining to the transfer of monies between Seashells, Starfish, WM Road Contractors and the purchase of the C.O.D.'s;
- ▶ Original C.O.D.'s with particular attention to the accounts where they were deposited or the names of the people who cashed them;
- ▶ Articles of incorporation and interviews of the Board of Directors of the Seashells and Starfish, which will prove that these are shell companies and that they belong to WM Road Contractors.

3. A bribe in any form:

The bribe or advantage consists of the C.O.D.'s received by the 3 public officials which, in this instance, amounts to evidence of a circumstantial nature given that the court must be persuaded that the C.O.D.'s were accepted as a bribe and were not due. Some useful evidence of this would be:

- ▶ Original C.O.D.'s with particular attention to the accounts where they were deposited or the names of the people who cashed them.

4. For the performance or non-performance in the interests of the bribe-giver, or in the interests of a third party, of any action with the use of authority or official position entrusted to him/her.

The investigation must prove that the contract was awarded to WM Road Contractors, and that the procedure to award the contract was irregular. This allows one to infer a link between the receipt of bribes or undue advantages, and the performance of the officials in favour of WM Road Contractors. There are already several red flags to be detected, such as the following:

- ▶ The technical specifications were too narrow and appeared to be copied from those advertised by WM Road Contractors;
- ▶ Identical bids presented by two other bidders lead to suspicion that the bid process was rigged;
- ▶ Other bidders were disqualified based on minor details.

Evidence to prove this element could be:

- ▶ Procurement file. This will show all glitches in the process, and make all red flags evident thus enabling the investigator/prosecutor to follow all pertinent leads thereafter;
- ▶ Interviews with officials involved in the process. They may recall visits, telephone calls, e-mails, conversations and instructions from Mr Volkov, Mrs Mironova and Mrs Petrenko;
- ▶ Interviews with other bidders may prove the allegation that technical specifications appeared to be copied from the ones advertised by WM Road Contractors.

From the facts it should be easy to infer that Mr Volkov, Mrs Mironova and Mrs Petrenko influenced the decision of awarding the contract to WM Road Contractors. Particularly, because they were all placed at key positions where they could oversee and guide the procurement process. Some useful evidence to prove this could be:

- ▶ Procurement file. This will show if the process was followed;
- ▶ Interviews with officials involved in the process.

5. Intention

Although this element is not specifically stated in Article 368, the provisions of Articles 23, 24 and 25 of the Ukrainian CC make it clear that the offence of accepting a bribe requires proof of either direct or indirect intent for a conviction, i.e. the element of intent or mental element.

It is possible to infer the mental element of the offence from the surrounding factual circumstances. These circumstances could include the following (to be proved in relation to the elements above):

- ▶ Receipt of the C.O.D's via shell companies in the Bahamas and Antigua which were owned by WM Road Contractors;
- ▶ The flawed/irregular process which resulted in the exclusion of all other tenderers;
- ▶ The positions held by the 3 public officials which enabled them to influence the award of the contract.

6. Mutual legal assistance

6.1 Applicable international and regional Conventions

The international community has seen the cross-border movement of persons, goods and capital intensify greatly throughout the second half of the twentieth century. Whilst this global integration has brought greater wealth to countries, it has also brought with it growth in transnational, cross-border crime. Globalisation has clearly affected the way criminals conduct their businesses, and the way law enforcers and jurists must conduct their investigations. Organised crime has transcended traditional borders with the aid of technology, posing an important challenge for prosecutors and investigators. The development and rise of the Internet and electronic commerce, international markets and the ongoing desire and necessity to exchange commodities have clearly brought a cross-border dimension to crime.

The last decades have seen law enforcement struggle to meet the challenges posed by the elimination of international and national borders. Traditionally, letters rogatory were the customary method for obtaining legal assistance from abroad in criminal matters. These constituted formal communications from the judiciary of one country to the judiciary of another country requesting the performance of an act typical of a criminal investigation. However, letters rogatory are time-consuming and extremely formal, and must be transmitted via the diplomatic pouch from the Ministry of Foreign Affairs of the requesting country to its embassy or consulate in the requested country for onward transmission to the relevant national authorities. Clearly, in modern day investigations, when money can be wire-transferred at the click of a mouse, this system is becoming obsolete.

MLA treaties have addressed the issue of international co-operation to a large extent. They are either bilateral or multilateral treaties.¹¹¹ They are more expeditious and require less formality than letters rogatory, always bearing in mind due respect for the other country's sovereignty and for the chain of custody.¹¹² Each country designates a Central Authority,¹¹³ for direct communication.¹¹⁴ By eliminating the middleman (the Ministry of Foreign Affairs), requests can be transmitted more swiftly and the communication become clearer.

But what happens when two countries do not have in place an MLA treaty? In such instances, one has various Conventions which function as a multilateral treaty for MLA. As indicated above under "Section 1: International instruments and standards", there are seven major multilateral treaties in place in the region which encourage countries to co-operate in the fight against corruption and money laundering by providing each other MLA in criminal matters:

- ▶ UNCAC
- ▶ Council of Europe Criminal Law Convention on Corruption
- ▶ MLA Convention, and Additional and Second Protocols
- ▶ Strasbourg Convention
- ▶ Warsaw Convention
- ▶ Minsk Convention
- ▶ Chisinau Convention.¹¹⁵

Although these instruments are in place and have been signed and ratified by a number of the countries covered by this manual, they set international standards that should serve as a guide. However, as emphasised above, when dealing with practical cases, practitioners should refer to their domestic legislation first and foremost because it is the law of the land that will be applied to the concrete case at hand, particularly regarding applicable offences.

111. For example, in Ukraine, the way in which courts, prosecutors, investigators, and inquiry agencies interact with appropriate foreign authorities and in which their mutual requests are executed, is prescribed in Ukrainian laws and international treaties of Ukraine (See Article 31 of the Criminal Procedure Code, as amended by virtue of the Decrees of the Presidium of the Verkhovna Rada # 6834-X (6834-10) of 16.04.1984, in accordance with Law # 2857-XII (2857-12) of 15.12.1992)). In addition to the international Conventions such as the UNCAC which operate as a basis for co-operation between member states, the legal basis for filing such requests is contained within international treaties on MLA which are concluded between Ukraine and the country in question (bilateral treaties). Currently Ukraine's relationships in this area are regulated by international treaties with over 65 States. More specifically, Ukraine has regulated relationships with regards to all or selected types of MLA with the majority of European States, Member States of the CIS, United States of America, Canada and Australia, as well as with some Asian, African and South American countries. The same applies to the other countries covered by this manual where numerous bilateral treaties have been signed.

112. See Article 4 of the Council of Europe Criminal Law Convention on Corruption.

113. See Article 46(13) of the UNCAC; and Article 29 of the Council of Europe Criminal Law Convention on Corruption.

114. See Article 30 of the Council of Europe Criminal Law Convention on Corruption.

115. In terms of Article 120(3) of the Chisinau Convention, the implementation of the Minsk Convention ceases for states that are the members of the Chisinau Convention. The Minsk Convention is applicable to a particular case only if the Chisinau Convention did not come into force for all the states involved (Article 120(4)).

It is worthwhile reviewing the provisions established by the UNCAC as it functions as a multilateral treaty for MLA.¹¹⁶ This is the key instrument as parties to the UNCAC (including Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine) need not send letter rogatories through diplomatic channels to the relevant authorities in a foreign jurisdiction. It is sufficient to send a MLA request to the Central Authority in accordance with the formal requirements listed within this instrument provided the requested country is also a party to the UNCAC.

The UNCAC constitutes a groundbreaking landmark in seeking to overcome legal differences, and provides a set of common principles for providing MLA in corruption matters. The UNCAC addresses a wide range of issues that are relevant to MLA and money laundering, including provisions on international co-operation, bank secrecy, law enforcement co-operation and joint investigations. In principle, all MLA requests in international corruption cases can be based on the UNCAC, making MLA possible with all other parties to the Convention. This can be considered a major step forward in combating international corruption, especially between countries where there is no bilateral treaty.

In addition, although the UNCAC deals with the same basic field of co-operation as some previous instruments, it seeks to overcome the obstacles associated with the principle of dual criminality (to be dealt with later). As stated on p. 6 of the U4 Expert Answer: mutual legal assistance treaties and money laundering,¹¹⁷ "As some countries could not criminalise certain forms of corruption for constitutional or jurisprudential reasons, a compromise was negotiated with a view to ensuring that those countries would still be obliged to provide legal assistance to the others. Dual criminality is considered fulfilled if the offence constitutes a criminal offence in both countries, even if the wording of the offence is not identical".

The UNCAC has also established that MLA can be used, apart from traditional purposes, for the recovery of assets. The MLA request is however subject to some formality,¹¹⁸ and if any of these requirements are lacking, this can provide reason enough to refuse assistance.

The Council of Europe Criminal Law Convention on Corruption also states that countries shall afford one another the widest measure of mutual assistance by promptly processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute criminal offences established in accordance with this Convention.¹¹⁹ This Convention has been ratified by Armenia, Azerbaijan, Belarus, Georgia, Republic of Moldova and Ukraine. It also deals with spontaneous information which can often provide the trigger to an investigation abroad: "Without

116. Article 46, UNCAC

117. See *U4 Expert Answer*, available at www.u4.no, accessed on 1 February 2014.

118. Article 46 (15), UNCAC: The request must clearly establish the identity of the authority making the request, and the subject matter, and nature of the investigation. It should also contain a summary of the relevant facts and a description of the assistance sought. It must also mention the identity of the people involved, and, finally, it should establish the purpose for which the information will be used. The letter of request must be sent in a language acceptable to the authorities of the requested party.

119. Article 26; see also Article 1 of the MLA Convention.

prejudice to its own investigations or proceedings, a Party may without prior request forward to another Party information on facts when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in accordance with this Convention or might lead to a request by that Party under this chapter”.¹²⁰

In terms of the Warsaw Convention which has been signed and ratified by, *inter alia*, Armenia, Republic of Moldova and Ukraine, Parties are required to adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.¹²¹

The Chisinau Convention is an important regional Convention, and, as stated above, largely replaces the Minsk Convention. In terms of Article 120(3), the Minsk Convention and its protocol shall be terminated for members of the Chisinau Convention. However, the Minsk Convention and its protocol shall be applied to relations between the States which are members of the Chisinau Convention and acceded States in which the Chisinau Convention has not yet come into force (Article 120(4)). Where Contracting Parties are also members of any of the CoE Conventions on criminal matters which cover the subject matter of the Chisinau Convention, they will only apply those provisions of the Chisinau Convention which supplement the CoE Conventions or support the implementation of their concepts (Article 118).

Within the scope of the Convention,¹²² judicial authorities of the Contracting Parties communicate with each other through their Central Authorities (Ministries of Justice) which undertake to receive requests for legal assistance in civil, family and criminal matters coming from other Contracting Parties.¹²³

6.2 General principles of international co-operation in criminal investigations and prosecutions

Corruption and sophisticated money laundering schemes which are often utilised to hide the origin of bribe payments, frequently involve complex webs of transactions across the globe. Such crime often has an international dimension of considerable proportions which requires the assistance and co-operation of a number of foreign authorities with differing legal systems and requirements to solve.

The gathering of evidence overseas is often a key element of modern money laundering and grand corruption investigations. Additionally, when the investigation ends in successful asset recovery, international co-operation will be essential. Prevention, investigation, prosecution, punishment, recovery and return of illicit gains cannot be achieved without effective international co-operation.

120. Article 28, Criminal Law Convention on Corruption.

121. Article 3(1). Warsaw Convention

122. Article 1.2 of the Chisinau Convention refers to “judicial authority” as including courts, prosecution authorities, institutions of internal affairs and other authorities of the other Contracting Party, whose competence includes civil, family and criminal matters.

123. See Articles 4 (Provision of legal assistance) and 5 (Liaison procedure).

Cross border criminal activities demand effective international co-operation during the criminal investigation and prosecution, and proceedings aimed ultimately at the confiscation of the proceeds of crime. International co-operation should facilitate the provision of investigative assistance in identifying and tracing property, obtaining documents and enforcing provisional measures aimed at freezing or seizing the proceeds of crime. Knowing how to approach an investigation with a transnational component, and utilise available international instruments, is a vital tool in the toolkit of any investigator tasked with tracing assets.

The Council of Europe Criminal Law Convention on Corruption deals with general principles and measures for international co-operation: "Parties shall co-operate with each other, in accordance with the provisions of relevant international instruments on international co-operation in criminal matters, or arrangements agreed on the basis of uniform or reciprocal legislation, and in accordance with their national law, to the widest extent possible for the purposes of investigations and proceedings concerning criminal offences established in accordance with this Convention"¹²⁴ Where there is no such international instrument or arrangement in force between Parties, Articles 26 to 31 shall apply, and also where these Articles are more favourable than those of the international instruments or arrangements referred to in Article 25.1.¹²⁵

When dealing with MLA, there are several aspects that require emphasis (to be dealt with in greater detail below). The first is the goal of the request. If the goal is to gather evidence that will later be incorporated into a criminal process and admitted in court, this evidence must be protected at all costs. This means that it should be gathered in accordance with the general principles of criminal law, and with due respect for the chain of evidence. Countries can, and should, include in their requests any special procedures needed for the gathering of evidence. This is especially challenging when it comes to interviewing witnesses where the principle of cross-examination should not be forgotten. The UNCAC is innovative in the sense that it suggests the use of technology to overcome this problem, and video conferencing is presented as an option.¹²⁶

The second aspect to be considered is dual criminality.¹²⁷ Requesting countries must ensure that they qualify the conduct or activity being investigated in terms of

124. Article 25(1), Criminal Law Convention on Corruption.

125. Article 26:

"1. The Parties shall afford one another the widest measure of mutual assistance by promptly processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute criminal offences established in accordance with this Convention.

2. Mutual legal assistance under paragraph 1 of this article may be refused if the requested Party believes that compliance with the request would undermine its fundamental interests, national sovereignty, national security or *ordre public* (public order).

3. Parties shall not invoke bank secrecy as a ground to refuse any co-operation under this chapter. Where its domestic law so requires, a Party may require that a request for co-operation which would involve the lifting of bank secrecy be authorised by either a judge or another judicial authority, including public prosecutors, any of these authorities acting in relation to criminal offences."

126. Article 32, UNCAC.

127. Article 43(2), UNCAC.

conduct or activity that is considered a criminal offence in the requested country. Requested countries should also remember that if the fact pattern fits conduct or activity considered by it as a criminal offence, the nomenclature should not matter. Precious time is wasted when this is overlooked.

Thirdly, the principle of speciality must be respected.¹²⁸ This means that the evidence gathered can only be used for the purposes described in the request for assistance.

Requests can also be sent based on the principle of reciprocity (to be dealt with later), and in this case they are called letters of request. Finally, it is also possible to use executive agreements, which are put in place by the Executive Branch while the treaties are signed and ratified by the Legislative Branch.

The most important aspect of effective MLA is the need to conduct an investigation. If the Requesting State expects the foreign authority to carry out their request, it must establish a factual basis as MLA requests cannot be carried out on the basis of suppositions or rumours: they must be done on the basis of facts, and facts must be established through a thorough investigation. Causality is the link: if assets must be seized, there must be a correlation between the assets and the criminal activity. The same goes for the evidence. The investigation is imperative.

6.3 Meaning of MLA

MLA consists of the co-operation that countries grant to each other in the gathering of evidence or conducting procedural acts within the criminal process. MLA is the international co-operation process by which a law enforcement or judicial authority in one State seeks from or provides to a law enforcement or judicial authority in another State a broad and ever-expanding range of assistance. It may include assistance in gathering evidence for use in the criminal investigation and prosecution, and tracing, freezing, seizing and ultimately confiscating criminally derived wealth.¹²⁹ It may also cover search and seizure, production of documents, taking of witness statements by video-conference, and the temporary transfer of prisoners or other witnesses to give evidence. This international co-operation process allows the requesting country to carry out procedural acts overseas without violating the sovereignty of the requested country.

It differs from traditional co-operation between law enforcement agencies which involves an informal means of communication and sharing of information. Law enforcement co-operation enables a wide range of intelligence and information sharing, including that of witnesses provided that they agree to give information, documents or other evidentiary materials voluntarily. However, if a witness is unwilling, coercive measures will be needed, usually in the form of a court order from a judicial officer, thus involving formal MLA.

Throughout the process, a country's sovereignty must be treated with the utmost respect. In order to respect a country's sovereignty but, at the same time, obtain

128. Article 46(19), UNCAC.

129. *United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators* (2004), chapter 14, available at www.unodc.org, accessed on 1 February 2014.

the necessary evidence to prove a case, a special procedure was created under international public law, which is the essence of international co-operation. As a State has no right to pursue its own investigations or to engage in unorthodox enforcement practices in the territory of a foreign country, it must request and obtain authorisation and assistance.

Some jurisdictions have in place very harsh measures to ensure respect for their sovereignty. Coming into a country's territory and gathering evidence without the support of an MLA request can lead to consequences as serious as arrest or even a breach of diplomatic relations between countries.

6.4 Types of MLA

MLA [in criminal matters] is generally any assistance rendered by the Requested State in respect of investigations, prosecutions or proceedings in the Requesting State in a criminal matter. It is incumbent on a person dealing with a request to ensure that domestic law provides a basis for rendering a given kind of assistance.

Traditionally, the following types of legal assistance can be obtained from foreign States in criminal matters:¹³⁰

- ▶ Taking evidence or statements from persons;
- ▶ Effecting service of judicial documents;
- ▶ Executing searches and seizures, and freezing;
- ▶ Examining objects and sites;
- ▶ Providing information, evidentiary items and expert evaluations;
- ▶ Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
- ▶ Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- ▶ Facilitating the voluntary appearance of persons in the requesting State Party;
- ▶ Any other type of assistance that is not contrary to the domestic law of the requested State Party;
- ▶ Identifying, freezing and tracing assets;
- ▶ Recovering the instrumentalities or proceeds of crime.

130. For example, Article 247 of CPC of Georgia (Law of 25.07.2006, N3531) specifies the type of legal assistance which may be sought:

1. Pursuant to this Code and international legal assistance agreements of Georgia, a court (judge), prosecutor and investigator, through the Ministry of Justice or the Office of the General Prosecutor of Georgia, may:

- a) request the performance of investigative and judicial acts on the territory of a foreign state; perform the same acts on the territory of Georgia based on the petition of the competent authorities of a foreign state;
- b) request extradition of a person wanted by the law-enforcement authorities of Georgia for prosecuting such person or/and for execution of a sentence on the territory of Georgia; for the same purpose extradite to a foreign state the person wanted by its competent authorities;
- c) request extradition of a Georgian citizen having been convicted in a foreign state for serving the sentence in Georgia; extradite a foreign citizen having been convicted in Georgia for serving the sentence in his country.

From a regional perspective, the range of legal assistance rendered by the CIS Member States is fixed in Article 6 of the Chisinau Convention. It includes, *inter alia*, performing investigative activities within a criminal case under investigation, organising criminal prosecution, extradition for the purpose of criminal prosecution or enforcement of sentence, and searching for and seizing illegally obtained money and property as well as illegal proceeds.. This assistance is rendered by the judicial authorities of the Requested Party on the basis of letters rogatory and other types of request coming from the Requesting Party.¹³¹

In executing the request for legal assistance, the requested authority applies its national legislation. However, upon request of the requesting authority, it may apply procedural rules of the requesting authority as far as they do not contradict the legislation of the requested Contracting Party (Article 8).

Under the Convention the recognition of documents issued or certified in prescribed form and officially sealed by the competent authority or competent person in the territory of one Contracting Party do not require any form of authentication in the territories of the other Contracting Parties. The documents considered as official in the territory of one Contracting Party have the evidentiary force of official documents in the territories of the other Contracting Parties (Article 12).

6.5 Informal versus formal

Prosecutors and investigators often have recourse to the use of formal MLA without exploring whether informal mutual assistance would, in fact, meet their needs. Very often the formal method is the most suitable, acceptable and safest but it is sometimes overlooked that the country receiving the request might welcome an informal approach that can be dealt with efficiently and expeditiously.¹³² Prosecutors and investigators must, therefore, ask themselves whether they really need a formal letter of request to obtain a particular piece of evidence.

International Legal Assistance thus can be formal or informal, depending on the objective. If the information gathered will be used for evidentiary purposes, all evidence should be gathered through a formal MLA request. If the purpose is to obtain information in order to discard or to follow leads, informal methods can be utilised.

The following serves as a practical example from the PE:

Articles of incorporation or information that can be found in public registries

Q: During the investigation, you have found several corporations that were registered overseas, such as Island Fleets or Indian Ocean Factors-CH. How would you obtain the articles of incorporation?

131. Article 5 prescribes the liaison procedure: "For the purposes of mutual legal assistance, competent Judicial Authorities of the Contracting Parties shall liaise with each other through their central, territorial and other bodies, unless a different liaison procedure is established *herein*. The Contracting Parties shall define a list of their central, territorial and other bodies authorized for the purposes of direct liaison and communicate the list to the Depositary when depositing their instruments of ratification or accession."

132. If it is merely for information purposes and to determine whether to follow leads, a FIU contact could be useful but keep in mind that this information can never be considered to be evidence. Similarly, information could be pursued on a police-to-police basis or via Interpol.

A: There are ways in which this information can be obtained informally in order to follow leads. Many sources can be used:

1. **Public databases** – This information can be easily obtained in public databases established by governments. In many countries, these databases are found on the Internet (e.g. Panama. *www.registro-publico.gob.pa*) and are easily accessible. In other cases (e.g. the British Virgin Islands. *comreg@vigilate.com*), these databases are not available online. However, it is possible to request this information by post by sending forms that can be downloaded from the Internet and paying a small fee.

2. **Through Interpol**¹³³ – It aims to facilitate international police co-operation even where diplomatic relations do not exist between particular countries. Its strategic priorities include:¹³⁴ (i) maintaining a secure global police communication services; (ii) 24/7 support to policing and law enforcement; (iii) capacity building; (iv) assisting member countries in the identification of crimes and criminals.

Verify the commercial activity of Island Fleets

Q: During the investigation you have found documents that prove that a company called Island Fleets owns several assets. It is necessary to verify whether this company engages in commercial activity to determine whether it is a real company or nothing more than a shell company. To do this, you decide to verify its address in the British Virgin Islands.

A: This can also be done informally, for information purposes. You may want to consider asking a colleague (police to police). By simply placing a phone call and asking a colleague in the British Virgin Islands to drive past the given address and check whether there are, in fact, offices open to the public, you can save a substantial amount of time. If the company checks out, you may not want to continue following this lead. Even if you do decide to continue the lead and send a formal MLA letter, you will be able to provide the requested country with much more information that can be useful for them in aiding with your investigation.

Although no definitive list can be made of the type of enquiries that may be dealt with informally (and one must always bear in mind the variations that exist from State to State), some general observations are useful:

- ▶ If the enquiry is a routine one and does not require the requested country to seek coercive powers, it may well be possible for the request to be made and complied with without a formal letter of request.
- ▶ The obtaining of public records, such as land registry documents and papers relating to the registration of companies, may often be obtained informally.
- ▶ Potential witnesses may be contacted to see if they are willing to assist the authorities of the requesting country voluntarily.
- ▶ A witness statement may be taken from a voluntary witness, particularly in circumstances where that witness's evidence is not likely to be contentious or disputed.

133. Interpol is the world's largest international police organisation, with 190 member countries. Created in 1923, it facilitates cross-border police co-operation, and supports and assists all organisations, authorities and services whose mission is to prevent or combat international crime.

134. See *INTERPOL Priorities*, available at www.interpol.int, accessed on 1 February 2014.

- ▶ The obtaining of lists of previous convictions.

Many States have no objection to an investigator of the Requesting State telephoning the witness, obtaining relevant information and sending an appropriately drafted statement by post thereafter for signature and return. Of course, such a method may only be used as long as the witness is willing to assist the requesting authority, and in circumstances where no objections arise from the authorities in the foreign State concerned (from whom, it is suggested, prior permission must be sought as a matter of courtesy in any event).

There are certain key considerations which a prosecutor and investigator must take into account when deciding whether evidence from abroad is to be sought by informal means:

- ▶ It must be evidence that can be lawfully gathered under the Requesting State's law, and there should be no reason to believe that it would be excluded as evidence when sought to be introduced at trial within the Requesting State.
- ▶ It should be evidence that may be lawfully gathered under the laws of the foreign State.
- ▶ The foreign State should have no objection.
- ▶ The potential difficulty in failing to heed these elements might be that (in states with an exclusionary principle in relation to evidence) such evidence will be excluded, potentially in addition to all leads derived from such evidence.
- ▶ In addition, but of no less importance, inappropriate actions by way of an informal request may well irritate the authorities of the foreign State who might therefore be less inclined to assist with any future request.

The golden rule must be: Ensure that any informal request is made and executed lawfully. It is also very important to note the conditions in terms of which the information is provided – in many instances when information is provided informally, the giver will impose the condition that the information may only be used for intelligence purposes and not as evidence in court. Any consideration of informal MLA should not overlook the use to which the material can be put in order to pave the way for a later formal request. It might, for instance, be possible to narrow down an enquiry in a formal letter of request by first seeking informal assistance. For example, if a statement is to be taken from an employee of a telephone company in a foreign company, informal measures should be taken to identify the company in question, its address and any other details that will assist and expedite the formal process. It is sometimes overlooked, but should not be, that an expectation always exists among those working in the field of MLA that as much preparation work as possible will be undertaken by informal means.

An investigator/prosecutor may not always have a choice between informal and formal methods if the foreign jurisdiction requires formality or if the use of a compulsive power is necessary (e.g. in the case of banking institutions which do not release information unless compelled to do so).

6.6 Basic contents of MLA request

The summary of the relevant facts will explain to the foreign authorities that a criminal offence was probably committed in the Requesting State by the person under

investigation, and that in order to continue with the investigation certain evidence must be gathered in the Requested State. The summary of relevant facts should tell the story as it happened, and stay away from investigative acts undertaken. It should be an account of the events highlighting the elements of the crime, in order to establish the reason why the person under investigation most likely committed the investigated crimes. If there are assets to be seized, causality should be established: why are these assets the proceeds or instrumentalities of crime? The language should be kept simple: the purpose is to communicate.

The MLA request should basically answer three questions:

1. Why do the facts described constitute an offence?
2. Why is the person under investigation probably guilty of that offence?
3. How are the assets in the requested country connected to that offence?

The Requested State will only provide assistance aimed at securing evidence if it is persuaded that a criminal investigation is being conducted in the Requesting State. Furthermore, there must be sufficient grounds for suspecting that the assets in question are linked to an unlawful activity or offence which, in turn, is linked to the suspect under investigation. In the absence of such grounds, the risk of going on a “fishing expedition” may be incurred. Filing requests for procedural activities to be conducted in the territory of another State in regard to physical or legal persons, whose details are only partially available (for instance, only a first name or a surname, name of the company) has proven to be ineffective in practice. In such cases, it is advisable for the investigative bodies to try and collect all possible information about such person (physical or legal) in the course of the domestic investigation, and simultaneously take measures to receive more in-depth information about such person/entity through alternative mechanisms of international operational co-operation (bilaterally or via Interpol channels).

An example of the type of information which should be reflected in the request for legal assistance submitted to the relevant executive authority in Azerbaijan (Ministry of Justice) is to be found in Article 490 of the Azerbaijan CPC and Article 4 of its Law on Legal Assistance in Criminal Matters (MLA Law),¹³⁵ (and indeed in the domestic legislation of other countries):

- ▶ name (or title) of the competent authority of the requesting foreign state;
- ▶ name (or title) of the relevant competent authority which conducts examination, investigation or court examination in accordance with the request;
- ▶ subject of the request and its nature;
- ▶ elements of *corpus delicti*, description of facts and qualification of deed, text of relevant law of the requesting foreign state;
- ▶ information on name, surname, patronymic name and place of residence of person in respect of whom request is issued;
- ▶ other information necessary for considering the request on legal aid;
- ▶ information on identity and place of residence of person in respect of whom information or material evidences are requested;

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- ▶ identity and presupposed place of residence of person in respect of whom place of residence is requested;
- ▶ description of place or person subject to search, as well as exhibitions subject to seizure;
- ▶ list of questions which should be addressed to the person;
- ▶ information on amount and expenses which should be paid to the person invited to testify abroad.

According to the provisions of the international instruments on MLA, evidence and documents which have been collated and transmitted by the competent authorities of one State to another, do not require any additional procedures for proving their authenticity.¹³⁶ Documents which are recognised as official documents in any Contracting Party to the Chisinau Convention shall have the evidentiary force of an official document in all other Contracting Parties.¹³⁷

6.7 Additional considerations

Dual criminality

The UNCAC has established that in matters of international co-operation, whenever dual criminality is considered a requirement,¹³⁸ it shall be deemed fulfilled irrespective of whether the laws of the requested country place the offence within the same category of offence or denominate the offence by the same terminology as the requesting country if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties. This provision of the UNCAC is extremely useful when facing the great diversity of legal systems and languages that challenge international co-operation.¹³⁹

Specialty

The principle of specialty guarantees that information received through a MLA request will only be used for the investigation and the purposes stated in the request.¹⁴⁰

136. Article 17, MLA Convention, and respective provisions of other treaties.

137. Article 13, Chisinau Convention.

138. Article 43(2), UNCAC.

139. See for e.g. the Azerbaijan MLA Law. The Article 3 specifies the reasons for the rejection of legal assistance, one such reason being if the request is issued "in respect of a deed which is not recognised as a crime according to the legislation of the Republic of Azerbaijan" (article 3.1.4)

140. Article 46(19), UNCAC: "The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay."

Principle of reciprocity

The principle of reciprocity involves permitting the application of the legal effects of specific relationships in law when these same effects are accepted equally by foreign countries.¹⁴¹

In international law, reciprocity means the right to equality and mutual respect between states. This principle has served as a basis for attenuating the application of the principle of territoriality of laws. “For some authors, it is more than a moral duty; it is a real international obligation arising from membership in a community of states and is based on international co-operation, mutual assistance and solidarity.”¹⁴²

As a rule, countries require the requesting State to provide reciprocal assistance as a precondition for granting mutual assistance. Reciprocity exists where a country has a treaty relationship or ad hoc arrangements with a Requesting State. Where the latter does not exist, a country may still provide mutual assistance in criminal matters on the basis of the domestic legislation upon a guarantee of reciprocity assured by the requesting State.

Confidentiality

Confidentiality is an important reminder when requesting MLA. Particularly, in the early stages of an investigation, it is advisable not to take actions that will alert the target. The letter of request can – and should – expressly refer to this issue when needed.¹⁴³

Urgency

The UNCAC specifically refers to the issue of urgency, including the possibility of setting deadlines.¹⁴⁴ The Council of Europe Criminal Law Convention on Corruption does not specifically mention the possibility of providing deadlines. However, it

141. In **Azerbaijan** for example, authorities indicate that even in the absence of a treaty or convention relationship, assistance may be provided based upon reciprocity. The procedures and limitations regarding when such assistance may be provided are set forth in its MLA Law. Article 2.2 of the MLA Law specifies that “in case of inexistence of relevant agreement on legal assistance between the Republic of Azerbaijan and requesting foreign state, provisions of this law shall be applied”.

142. Organisation of American States (OAS) 2007, *Information Exchange Network, Mutual Assistance in Criminal Matters and Extradition*, available at www.oas.org, accessed on 1 February 2014.

143. Article 46(20), UNCAC: “The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party”.

144. Article 46(24): “The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required”.

does provide the option of bypassing Central Authorities in the case of urgency, and sending requests for MLA or related communications directly to the judicial authorities, including public prosecutors, of the requested Party. A copy has to be sent to the Central Authority of the requested Party at the same time through the Central Authority of the requesting Party.¹⁴⁵ Similar provisions are contained in Article 15(2) of the MLA Convention.

145. Article 30, UNCAC.

7. EXCEL – an analytical tool

7.1 Description of the benefits

Investigating financial crimes such as corruption and money laundering often requires an extensive research and analysis of data. Great assistance in these investigations will often come from computer technology. Several software and hardware products allow investigators to sort, analyse and produce reports to trace the history of the events. Very often complex crime schemes involving many people and multiple companies can be simplified in a diagram, and effectively displayed before a jury or a judge. When trying to establish the evidence of bribery or an attempt to use banks or other financial institutions to launder the proceeds of a crime, the analysis of bank account statements is crucial. The aim for the investigator is to locate the dirty money and link it to the illegal activity in order to justify its seizure and confiscation: the analysis of bank accounts used by criminals can provide proof of unlawful activities such as corruption and money laundering and help recover the unlawful assets.

The analysis of a bank account is the analysis of the flow of the money moving in and out of the account, the origin and destination of the transactions, their value and scope. An accurate study of the records can provide not only the value of transactions but even the location where they took place and can identify other potential suspects and parties involved in the crime. A bank account statement displays fundamental information such as date, description and value of transactions and, sometimes, the balance in the account after each transaction.¹⁴⁶ In the sample account analysis below, each line represents a single transaction. The debit column displays when money is withdrawn or moved out of the account and the credit column displays when money is deposited or moved into the account.

146. This very useful information is not always present in the statement an investigator receives from banks: in this case it can be simply added in a separate column being the amount in the account before a transaction *plus* the transaction (in case of credits) or *minus* the transaction (in case of debits).

Figure 1 - Example of bank statement

Account Analysis Boris Maistrenko						
Year	Date	Debits	Credits	Description	Comments	Balance 31/12/08
						34,950
2009	2-Jan-09	0	84,950	Government	Salary - Government	119,900
2009	4-Jan-09	2,196	0	"da Mario"	restaurant	117,704
2009	12-Jan-09	4,078	0	Bank	Toyota payment	113,625
2009	14-Jan-09	1,961	0	Enercom	electricity	111,665
2009	17-Jan-09	1,882	0	ATM withdrawal	ATM nr. 635387-12	109,782
2009	21-Jan-09	863	0	Telecom	telephone	108,920
2009	17-Jan-09	2,667	0	"da Mario"	restaurant	106,253
2009	26-Jan-09	3,583	0	Le grand Apparel	clothing	102,670
2009	28-Jan-09	12,706	0	Bank - mortgage	House mortgage	89,964
2009	1-Feb-09	0	84,950	Government	Salary - Government	174,914
2009	4-Feb-09	2,510	0	"da Mario"	restaurant	172,404
2009	8-Feb-09	1,490	0	Elisir SPA	massage	170,914
2009	12-Feb-09	4,078	0	Bank	Toyota payment	166,836
2009	14-Feb-09	1,725	0	Enercom	electricity	165,110
2009	17-Feb-09	2,118	0	ATM withdrawal	ATM nr. 635387-12	162,992
2009	17-Feb-09	863	0	Telecom	telephone	162,130
2009	21-Feb-09	2,431	0	"da Mario"	restaurant	159,698
2009	28-Feb-09	12,706	0	Bank - mortgage	House mortgage	146,992
2009	1-Mar-09	0	84,950	Government	Salary - Government	231,942
2009	4-Mar-09	2,275	0	"da Mario"	restaurant	229,668

7.2 Commands and spreadsheet design

A person's bank statement can have hundreds of records per year while a company's account might have thousands. It is difficult to look through every single row and identify potential evidence of a crime. A computerised process is needed to facilitate this daunting task although in many jurisdictions the investigator may be assisted in this task by experts whose job is analysing bank records. Law enforcement personnel should not rely totally on financial experts to perform all analysis tasks. The investigator can review the results and identify and follow leads arising from the account while awaiting a response from the expert. Microsoft Excel (and other spreadsheet software, often available free online)¹⁴⁷ contains many valuable features which allow the investigator to give "sense" or "meaning" to raw data and, starting from the 2007 version, can analyse more than one million rows of data (equivalent to one million individual bank transactions). Banks usually provide Law Enforcement Agencies (LEAs) with account records in an Excel or .csv file format (both readable with Excel). Some banks still provide paper copies but even these can be computerised by using software that reads the data and imports it into an electronic spreadsheet.¹⁴⁸

147. E.g. *Open Office*, available at www.openoffice.org, accessed on 1 February 2014.

148. Ullman L. (2014), *Electronic Bank Statement and Lockbox in SAP ERP*, Espresso Tutoriais GmbH, sample available at books.google.com, accessed on 1 February 2014.

The first Excel tool an investigator may want to use is called the **sort function**. This tool will arrange text in alphabetical order (A to Z or Z to A), financial data in numerical order (smallest to largest or largest to smallest), and dates in chronological order (oldest to newest and newest to oldest). The investigator will usually receive the records from the bank in chronological order. While this is helpful to understand when credits and debits happened, the sort function can analyse the data in any order desired. For example, the data can be arranged alphabetically from A to Z, thus grouping together records having the same description as in the example below.

Figure 2 - Bank records sorted in alphabetical order (A to Z)

Account Analysis Boris Maistrenko					
Year	Date	Debits	Credits	Description	Comments
2011	1-May-11	0	84,950	Government	Salary - Government
2011	1-Jun-11	0	84,950	Government	Salary - Government
2011	1-Jul-11	0	84,950	Government	Salary - Government
2009	26-Jan-09	3,583	0	Le grand Apparel	clothing
2009	26-May-09	4,370	0	Le grand Apparel	clothing
2009	26-Nov-09	4,680	0	Le grand Apparel	clothing
2010	26-Jan-10	2,980	0	Le grand Apparel	clothing
2010	26-Nov-10	5,278	0	Le grand Apparel	clothing
2011	26-Mar-11	5,120	0	Le grand Apparel	clothing
2010	4-Sep-10	0	643	RG Horman Brokerage	Dividend disbursement
2009	11-Apr-09	49,412	0	Tax Office	taxes
2010	23-May-10	53,333	0	Tax Office	taxes

This sort command is available in the *Home* tab by clicking on the specific button. The descending window will show different options available such as sorting data in increasing and decreasing order or opening a menu (Custom Sort) where many different options are available.

Another approach to the analysis of raw data is provided by the **filter** command. Filtering is a completely different way to view the data since it allows hiding records that one does not want to see. When using a filter, all the information is still in the spreadsheet, but Excel shows only the data which matches the filter criteria.

If one wants to see all the cash deposits reflected in the bank statement in a particular year, one can sort the data by the description column but ones still sees all the other data that may not be pertinent. By applying a filter, one will see only the information needed as in Figure 3.

Figure 3 - Example of a filtered bank statement

Year	Date	Debits	Credits	Description	Comments
2011	22-Feb-11	0	27,227	cash deposit	
2011	7-Mar-11	0	32,773	cash deposit	
2011	20-Apr-11	0	32,773	cash deposit	
2011	20-Jun-11	0	27,227	cash deposit	

Going back to the sorted spreadsheet seen in Figure 2, one will notice that the records are now shown in a more useful order but would it not be helpful to see, after each category of records, the total amount of money involved? This feature is provided by the command **subtotals**, available from the *Data* tab. Once clicked, this command will open a menu in which it is possible to select different options: here the investigator will tell Excel that, at each change in the *Description* column, he/she wants to have a *sum* or subtotal of the amount reflected in the *Debits* and *Credits* columns, obtaining the subtotals shown in Figure 4.

Figure 4 - Example of a filtered bank statement

Year	Date	Debits	Credits	Description	Comments
2010	26-Nov-10	5,278	0	Le grand Apparel	clothing
2011	26-Mar-11	5,120	0	Le grand Apparel	clothing
		26,011	0	Le grand Apparel Total	
2010	4-Sep-10	0	643	RG Horman Brokerage	Dividend disbursement
		0	643	RG Horman Brokerage Total	
2009	11-Apr-09	49,412	0	Tax Office	taxes
2010	23-May-10	53,333	0	Tax Office	taxes
2011	19-Apr-11	54,902	0	Tax Office	taxes
		157,647	0	Tax Office Total	

Many financial investigators use these simple and useful features every day. Excel's tremendous calculation power reduces to seconds the hours or days that one would spend analysing a bank statement without it. This calculation capacity is even more evident when creating the so-called **pivot tables**. A pivot table is a summarisation tool which, amongst other functions, can automatically sort, count, total or give the average of the bank records (data) present in the spreadsheet. This function will display the results in a separate table (the "pivot table"), and is particularly useful when dealing with large amounts of data. The pivot table can transform thousands of rows of data retrieved from a bank account into a single and understandable page.

From figure 5 one can have an idea of how extremely helpful it is to extract such information from a bank account. At a glance the investigator can see summarised data divided per year, description, debit, credit and grand total. This tool is available from the *Insert* tab and the investigator is guided by a menu in the selection of the data needed. Once the table is created, he/she simply drags and drops the information he/she needs into the table.

Figure 5 - Example of Pivot Table

		Year			
Description	Data	2009	2010	2011	Grand Total
"da Mario"	Debit	64,863	63,216	39,686	167,765
	Credit	0	0	0	0
ATM withdrawal	Debit	11,059			11,059
	Credit	0			0
cash deposit	Debit	0	0	0	0
	Credit	131,151	147,059	120,000	398,210
Elisir SPA	Debit	9,020	8,784	4,471	22,275
	Credit	0	0	0	0
Enercom	Debit	23,373	23,216	13,412	60,000
	Credit	0	0	0	0
Government	Debit	0	0	0	0
	Credit	1,019,400	1,019,400	594,650	2,633,450
Le grand Apparel	Debit	12,633	8,258	5,120	26,011
	Credit	0	0	0	0
Telecom	Debit	10,471	11,765	7,451	29,686
	Credit	0	0	0	0
Total Debit		131,417	115,238	70,140	316,795
Total Credit		1,150,551	1,166,459	714,650	3,031,660

7.3. Bank account analysis

By using these simple but powerful features, the investigator can easily analyse the suspect's bank account. This analysis can be divided into three relatively easy tasks. These tasks are the **analysis of the deposits**, the **analysis of the disbursements** and the **identification of balances** on certain dates.

The deposit analysis will include reviewing each item deposited to the account and determining its source – legal, illegal or unknown. The deposits and their source can be quickly identified by using the sort or filter functions in Excel. For some deposits such as salary payments, their type (legal, illegal or unknown) may be easily determined by simply reviewing the bank documents. However, if the source is unknown, the investigator will have to contact third parties to inquire about the purpose of the payment that was made to the subject. Using the Excel functions, the computer can now provide a list that summarises and totals for each type of deposit. From this list, the investigator can focus on leads that are the most important to follow.

The analysis of the disbursements can be accomplished in the same manner, namely by using the electronic spreadsheet, which contains the summarised transactions, and then sort or filter the disbursements in order to group the payments made to each person or entity together. This will allow the investigator to print a list of all payments made to any person and the total of these disbursements. The investigator can now quickly identify which items require additional follow up or detective work. This disbursement analysis will assist in identifying assets purchased, business associates, transfers to other bank accounts, international money movements and spending that exceeds the suspect's legal income.

This analysis of the cheques deposited to or written from the suspect's account may prove beneficial in identifying many leads. The investigator can find a direct link to assets such as a payment for a house, rental of a boat slip or a storage space (where the asset might be located). Other useful leads may be found such as payments to companies which appear legitimate and are later discovered to be mere shell companies. When a cheque appears suspicious, it may be advisable to obtain a physical copy of it for further analysis. The bank stamps on the front and back of the cheque may indicate the branch number of the bank, the teller's number or the date on which a cheque is cashed and even the type of identification used by the payee. Handwritten leads can also be found on the cheque. For example, when a cheque is used to purchase a bank certified/guaranteed cheque, some tellers will mark the back of the cheque with the number of the cashier's cheque into which it was converted.

In some cases it may be important to identify the balance that is in the bank account on a particular date or a series of dates. This can also quickly be accomplished by adding, if not already present, a column in the Excel spreadsheet that automatically calculates the balance following every transaction.

8. Financial investigative approaches

8.1 Overview

It is often difficult to obtain a conviction for corruption and money laundering crimes. Direct evidence of these crimes is only available in rare cases. Corrupt officials and money launderers often use the services of skilled accountants and lawyers to assist them in forming complex financial structures, consisting of numerous shell companies and trusts in offshore jurisdictions. Even if bank records show that a person received a sudden increase of cash into his/her account, the *onus* remains on the prosecution to find a link that connects that cash to the unlawful activity.

Therefore the question is: how can one best obtain evidence regarding these financial aspects of the investigation? The answer to the question is: **Follow the money**, and this must be done by tracing all financial flows. If corporate and trust entities have been formed to hide the true ownership of the funds, the financial tracing will often penetrate the web of confusion by identifying the beneficial owner of the money. The person, who is enjoying the fruits of the crime, driving the expensive cars and living in the luxury vacation properties, is the beneficial owner. The financial portion of the investigation involves tracing the purchase of each asset and the source of each identified income.

Three basic methods can be used to prove the financial aspects of the case. The type of evidence available will dictate which method is the most appropriate for a particular case. These methods are as follows:

- ▶ Specific item (using direct evidence)
- ▶ Direct proof of a bribe (using video and audio recordings)
- ▶ Indirect method of proving illegal income (circumstantial evidence).

The specific item method is used when there is evidence that can directly trace the flow of money from the corrupt activity to the official. For example, if Company A paid a bribe to a public official by sending a wire transfer from the company's bank account directly to the bank account of the official, this is direct evidence of a specific payment by the company to the official. Of course, additional evidence would be needed to establish that the official performed a particular action as a result of having received the money. But are criminals so naïve as to perform their illegal activities in such a way that can be easily identified by LEAs? Unfortunately very rarely!

Proof of a bribe is also sometimes obtained by using video and audio equipment to document the illegal action. This would be another method of using direct evidence to prove the crime. This kind of evidence, though very strong when brought before the court, is becoming harder and harder to find. Development of information technology (IT) and new payment methods (See “Section 10 - New payment methods”) allows criminals to transfer funds and pay bribes without moving from their desk and sometimes without ever meeting each other.

The third technique that may be used to prove the amount of illegal income is an indirect method of proof. Indirect methods can be used when the suspect receives currency or other payments that cannot be directly traced, and are based on the assumption that the proceeds of crime in any significant amount will eventually show up, directly or indirectly, in the perpetrator’s accounts, assets or expenditures. In fact, proceeds of criminal activity have four basic ways in which they can be used: kept in cash or in a bank account, used to buy assets, used to pay off debts or spent on personal expenditures. The following method takes all these ways into account. The method, which is the most common and easiest way of proving illegal income using an indirect method, is the “**Source and Application of Funds**” also known as “expenditure”, “fund flow” or “application of funds” method.

Before explaining this method in details, a brief overview of direct versus indirect (or circumstantial) evidence is needed.

8.2 Direct versus indirect methods of proof

Direct evidence can be defined as evidence that “supports the truth of an assertion (in criminal law, an assertion of guilt or of innocence) directly, i.e., without an intervening inference”;¹⁴⁹ it directly proves a fact, without the need for an inference or presumption to be made and, if true, establishes that fact. **Circumstantial evidence** is the analysis of the total facts, and requires an inference to be drawn to reach a conclusion of fact. Examples of circumstantial evidence are fingerprints, blood and DNA analysis, ballistic analysis, etc. This type of evidence often points strongly to a specific conclusion if combined with other facts but is still considered to be circumstantial.

Many investigators and prosecutors believe that circumstantial evidence is less valid or less important than direct evidence but Article 67 of the CPC of Ukraine (as it now provides pending possible amendment as stated above), for example, states that the “court, prosecutor, investigator, and inquirer evaluate evidence... based on thorough, complete and objective examination of the totality of circumstances in the case, being guided by law”. The court must examine all available evidence in its entirety, fully and objectively. Many successful criminal prosecutions rely largely or entirely on circumstantial evidence.

The following is a classic example of circumstantial evidence:¹⁵⁰ in a case, a witness testified that he observed, during a fight, a man “biting off” the other fighter’s ear and

149. Law J., Martin, E. A. (2009), *A Dictionary of Law*, Oxford University Press, available at oxfordreference.com, accessed on 1 February 2014.

150. Ingram, J. L. (2011), *Criminal evidence*, Routledge, p.99, sample available at books.google.com, accessed on 1 February 2014.

that he was present when it happened and saw the fight. When cross-examined, the witness was asked whether he had observed the accused person actually biting the other fighter. He then said that he did not see the defendant biting the opponent but saw him spitting out the ear from his mouth. Even if the witness did not see the bite, circumstantial evidence convinced him, and the court, that the defendant must have bitten off the ear because there was no other logical explanation concerning how the other fighter's ear got into his mouth. In this classical example, it is very hard to say that the testimony would not have the same force of direct evidence although an inference is required.

Here lies the power of circumstantial evidence: a skilful investigator will be able to identify, analyse and disprove all the other possible explanations of the fact, thus proving that his/her reconstruction of facts is the only logical and possible conclusion. Furthermore, circumstantial evidence can have an advantage versus direct evidence because it can come from different sources which check and reinforce each other, meaning that all the pieces of evidence, even if indirect, are consistent with one another and all lead to the same conclusion and that one only.

8.3 Source and application analysis to prove amount of illegal income

Proving corrupt income will often require the use of circumstantial evidence and an indirect method to establish the amount of such income. It will not always be possible to trace the specific corruption income from the illegal activity directly to the receiver of the bribe or the one who benefited from the misappropriation of government funds. The Source and Applications of Funds method of proving the amount of illegal income would be used when direct evidence is not available, and the investigation discloses that the subject spent far more money during a set period of time than he/she had legally available to him/her. This concept expressed in a formula would appear as follows:

For the set period January 1, 2011 to December 31, 2011 the defendant had:	
Total expenditures and other applications of money	50,000,000 UAH
Total of known and legal sources of income	2,000,000 UAH
Equals illegal or unexplained income	48,000,000 UAH

The Source and Application method analyses all financial transactions of the subject during a set period of time. For example, the set period may be a calendar year such as 1 January 2011 to 31 December 2011 or any other timeframe such as 14 March 2009 to 21 April 2012. This set period can be any time that will demonstrate an increase in spending or wealth far above the legal means of the subject. When dealing with a public corruption case which, by nature, involves a public official, a good starting point for setting this timeframe could be the date on which the allegedly bribed official filed a "wealth declaration": by using the data specifically provided by the official, the investigator will avoid a possible denial by the defendant regarding the information used because it comes from a document compiled or presented by the defendant himself/herself.

This method compares the money spent, saved and used in any manner (application) to the known and legal income that the person earned during the set time period. “Known and legal” means that each and every source of money which will be included in this method must have a legal and documented origin. What about cash? Apart from cash declared in an official document, cash deposits into the defendant’s bank account will not be considered as a “legal and known” source of money on the basis that the source thereof is unknown.

The chart below is a simple example of a completed Source and Application analysis.

Sources of Funds		Amount 2008	Applications of Funds		Amount 2008
Inheritance		250,000	Plumbing - cash		223,800
Bank #2 - beginning balance		0	Lumber - check		889,000
Bank #3 - beginning balance		159,900	Labor - cash		425,000
Bank #3 - interest earned		21,780	Bank #2 - ending balance		789,500
Mercedes - proceeds of sale		390,000	Condo - down payment		1,900,000
Government salary		575,000	Condo - monthly payments		200,000
Rental income		96,000	Bank #3 - ending balance		342,900
			Mercedes - monthly payments		25,500
			Mercedes - loan payoff		356,000
			SeaRay boat		293,400
			Mastercard payments - cash		410,000
			Mastercard payments - check		405,200
			Personal living expenses - by check		592,900
			Personal living expenses - by cash		195,400
			Taxes paid		122,000
			Social Security taxes paid		38,000
			Ski trip to Switzerland		184,000
			Total Applications		7,392,600
Total Sources		1,492,680	Minus: Total Sources		1,492,680
			Unknown Sources		5,899,920

Typical sources of funds are: salary, gifts (the investigator will identify the real nature of this gifts by interviewing people who allegedly made them), rental income, dividends, cash on hand legally declared (for example, in a wealth declaration), sale of properties occurring within the period, inheritances (if documented), insurance proceeds, disability payments, gamble winnings and the opening balance (at the date chosen as starting point of the period under consideration) of any bank account owned or controlled by the suspect. What about the revaluation of a piece of land, a house, a precious picture or anything with an appreciating (or depreciating) value? A change in the fair market value of an asset does not indicate a source or application of funds because the increase or decrease in the value of the property would not represent a receipt or expenditure of cash or a cash equivalent.

Typical expenditures are: rental of properties, payments for mortgages, cars, real estate properties, boats and airplanes (including their maintenance), credit card payments, clothes, food, utilities, travels, shares, insurance and the closing balance at the date chosen as the end of the period of each bank account mentioned before.¹⁵¹ Is there a way in which cash can be considered as an application? If during a search at the suspect’s house (or in any other place under his/her control) cash is found and

151. This represents another way of “doing” something with the money: it could have been spent by the criminal who instead decided to leave it in the bank account. Spent or not, it is a sum of money and its origin, proven that is not coming from a known and legal source, must be illegal or unknown.

seized because there are grounds to believe it is the proceeds of a crime, such cash can be considered in the Source and Application of funds method as an application.

It is important to understand that this method standing alone does not prove illegal income. It simply demonstrates that the person was spending money far above his/her legal means. The investigation must also develop evidence that indicates that the subject committed some criminal offence such as bribery or abuse of office. This evidence combined with the financial analysis will prove the amount of the illegal income. The Source and Application analysis is circumstantial evidence that will help in corroborating evidence of the criminal conduct.

9. Mechanisms of asset forfeiture

9.1 Need for establishing a basis for asset forfeiture – a complete investigation

For the purpose of this section, the terms “asset forfeiture or confiscation” will be used synonymously, meaning a final order by the court which changes ownership of an asset from the individual to the State. The terms “seizing” and “freezing” will be used as provisional measures used to temporarily restrain assets prior to the court making a final decision on forfeiture. “Seizing” generally refers to restraining vehicles or other physical properties while “freezing” refers to accounts or monetary instruments held in financial institutions.

Asset forfeiture is generally the last action that is taken in a case. This action must be preceded by a thorough financial investigation that establishes the basis for the forfeiture. This usually requires gathering evidence against an individual that proves a criminal violation was committed, which produced a substantial amount of illegal proceeds. In many jurisdictions, this will require either a conviction of the person on the predicate offence or a money laundering violation. The investigation must also include the tracing of the proceeds of the crime to the purchase of the asset. This will establish a linkage between the criminal conduct and the property which will serve as a basis for the confiscation.

During the investigative process, most jurisdictions authorise provisional measures to seize and freeze assets that have been identified as proceeds or instrumentalities of crime. This raises an important point: asset tracing, seizing and confiscation should be considered an integral part of the investigative process. Each large scale corruption or money laundering investigation should have two goals, first, to convict the corrupt official or money launderer, and, second, to confiscate all assets that were acquired with the fruits of the crime. It is not sufficient to only focus on the criminal case during the investigation. This would allow the subject of the investigation to hide and dispose of assets once he/she becomes aware that a criminal trial is imminent. The asset tracing must be a major focus of the investigation for a variety of reasons. The tracing will often develop proof of one or more of the elements required to prove the criminal case such as “obtaining an undue advantage” in a bribery case, acquiring “unjustified wealth” in a money laundering case or accumulating excessive assets in an illicit enrichment case. Often the tracing will identify co-conspirators involved in the predicate offence or aiders and abettors in a money laundering case. This may lead to more convictions and possibly additional assets that were secreted in foreign jurisdictions.

Making the asset tracing function an integral part of the investigation will allow for the use of provisional measures to take control of assets and prevent the subject from disposing of them. Once assets have been identified, the investigator/prosecutor should consider using these preventative measures to seize or freeze the property. However, this is often a strategic decision. If the case is still in a covert stage, the seizing of an asset will alert the subject to the investigation and may cause him/her to flee or hide the remaining assets. Even when the investigation is overt, caution should be exercised when considering instituting preventative measures. The seizure of property may give the subject the right to file a civil suit to recover the property. The ensuing court procedure may expose some of the evidence that the investigation has gathered which may compromise informants, witnesses or undercover operations.

Asset forfeiture should be a critical part of every large scale money laundering or corruption investigation. However, this process is usually the last activity in the legal process and should be preceded by a thorough financial investigation, asset tracing and the judicious use of preventative measures to place temporary restraints on the proceeds of crime.

9.2 International conventions calling for co-operation in forfeiture cases

Many international and regional conventions contain strong provisions relating to asset forfeiture, and provisional measures to prevent the transfer or movement of assets suspected to be proceeds of crime. A review of three of these conventions will illustrate the importance that the international community places on this issue.

As mentioned above, the UNCAC states in Article 31 (Freezing, seizure and confiscation) that:

“1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

- (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
- (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.”

It is interesting to note that this provision calls not only for the confiscation of proceeds of crime but also for substitute assets if the direct proceeds cannot be located. However, this does not eliminate the need for a thorough investigation that involves the complete tracing of the “undue advantages” that were obtained by the corrupt official. A financial investigation will still need to trace the flows of the illegal proceeds and establish the amount of the corrupt income. If these proceeds, which have been proven through the investigation, are now hidden or are out of reach, possibly in a foreign jurisdiction, the UNCAC provision above calls on State Parties to allow for the confiscation of any other assets, the value of which does not exceed the proven amounts.

Paragraph 2 of Article 31 calls for provisional measures to be instituted:

“2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.”

Article 2 of the UNCAC provides guidance on the meaning of these terms:

“(f) “Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.”

Similar provisions regarding confiscation and temporary restraining measures are found in the Strasbourg Convention. Concerning the issues of confiscation and the use of substitute assets, Article 2 states:

“Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds.”

The institution of temporary restraining legislation is found in Article 3: “Investigative and provisional measures”, which states:

“Each Party shall adopt such legislative and other measures as may be necessary to enable it to identify and trace property which is liable to confiscation pursuant to Article 2, paragraph 1, and to prevent any dealing in, transfer or disposal of such property.”

The CoE again encouraged the use of provisional measures relating to the proceeds of crime in the Council of Europe Criminal Law Convention on Corruption, which, as stated above, came into force in July 2002 and has been ratified by approximately 43 countries. Specifically, Article 23 (1) (Measures to facilitate the gathering of evidence and the confiscation of proceeds) states:

“Each Party shall adopt such legislative and other measures as may be necessary... in accordance with national law, to enable it to facilitate the gathering of evidence related to criminal offences established in accordance with Article 2 to 14 of this Convention and to identify, trace, freeze and seize instrumentalities and proceeds of corruption, or property the value of which corresponds to such proceeds...”

9.3 Types of confiscation processes

Confiscation can be effected through four different types of legal process. However, each jurisdiction may not have legislation that authorises all of these mechanisms. These four processes can be summarised as follows:

- ▶ Conviction based asset forfeiture
- ▶ Non-conviction based asset forfeiture (civil asset forfeiture)
- ▶ Civil action
- ▶ Civil law suit.

An explanation of each of these follows.

Conviction based asset forfeiture

Most countries have forfeiture laws that allow for the confiscation of proceeds of crime following the conviction of the defendant. This type of forfeiture is viewed as a criminal sanction or an *in personam* action (meaning “against the person”). For example, this concept is clearly stated in the CC of Ukraine in Article 51 which includes “forfeiture of property” in the list of “Types of Punishment”. General confiscation provisions can be found in either the CC or the CPC of a country, and may authorise the forfeiture of proceeds of crime for various types of violations but this can vary from country to country. Additionally, many criminal statutes will contain forfeiture provisions in the penalty section for the specific crime. Money laundering criminal statutes often include as a punishment the forfeiture of all proceeds and instrumentalities of the crime.

These punishment provisions provide a government with the tools to recover the assets of the State that have been stolen or misappropriated. However, conviction based forfeiture laws do not guarantee the return of illegal proceeds and, in fact, contain some serious hurdles that must be overcome.

First, the person must be convicted of the criminal offence and this requires a very high standard of proof – beyond a reasonable doubt. Only after a conviction has been secured may the penalty phase of the statute be applied. This brings to light the second major hurdle; the accused party must be available. If the defendant has fled the country or has died, there is no possibility of obtaining a conviction and therefore no possibility of recovering the assets under the conviction based forfeiture laws (except in countries that allow trials *in absentia*).

In most cases, it is essential to trace the proceeds of the crime directly to the purchase of the asset that is the object of the forfeiture action. However, conviction based forfeiture laws often include a substitute asset provision which means that if the asset purchased with proceeds of crime cannot be located the judge can order the confiscation of any property up to the value of the stolen or misappropriated funds. The financial investigation still needs to establish the amount of illegal income in order to demonstrate to the judge the amount of substitute assets that should be forfeited. For example, assume a corrupt official stole €1 million and used the funds to purchase shares in a successful company but the share certificates cannot be located. Further assume that this same official had inherited a house five years ago valued at €1 million. The judge could order the confiscation of the legally acquired house up to the value of the stolen funds.¹⁵²

152. Although in some jurisdictions, it may not be possible to confiscate legally acquired property, the Explanatory Note to the Strasbourg Convention specifies as follows in Article 26: “The expression “property the value of which corresponds to such proceeds” refers to the obligation to introduce measures which enable Parties to execute value confiscation orders by satisfying the claims on any property, including such property which is legally acquired. Value confiscation is, of course, still based on an assessment of the value of illegally acquired proceeds. The expression is also found in the United Nations Convention.”

Non-conviction based asset forfeiture (also known as civil asset forfeiture)

Non-conviction based (NCB) forfeiture laws generally allow for the seizure and forfeiture of property prior to the completion of the investigation. In legal theory, it is an *in rem* process which means that it is “against the thing”. Once a connection has been made between the funds used to purchase an asset and the illegal conduct, the law allows for the forfeiture of this asset to the State. It is not viewed as a punishment of the person who owns the asset because the action is not against the person but against the “thing”. Therefore, there is no conviction required of any person, and there is no *in personam* action.

NCB forfeiture laws can be divided into two broad categories – restricted and unrestricted. A restricted NCB law would only allow the use of an *in rem* process when certain conditions exist. The most common restrictive conditions are the requirements that the subject is either dead or a fugitive before NCB forfeiture proceedings may be initiated. Even with these narrow restrictions, this type of forfeiture law is extremely effective. There are many cases in which leaders of a country or other officials have stolen huge amounts of money, moved the funds to numerous offshore locations in bank accounts under corporate names and then died prior to a conviction or even the initiation of an investigation. For countries that only have conviction based forfeiture laws, this would make it very difficult to recover these funds. These countries would generally have to consider filing multiple civil law suits in various jurisdictions. This process may consume millions of Euros in legal fees and would take years to gather the evidence and litigate the ownership of the property.

Unrestricted NCB forfeiture laws, which are generally found in common law countries, allow for the seizure and forfeiture at any time during the investigative process. There is no requirement that the owner of the property be unavailable (deceased or a fugitive). In fact, following the seizure of the asset, all persons or entities believed to have an ownership interest in the property will be notified and given an opportunity to demonstrate that they had acquired the property with legal funds. A court will review the evidence and determine if the property represented proceeds of crime or was legally acquired. If the court finds that the property was purchased with criminal proceeds, a final judgement of forfeiture will be ordered in favour of the State. This deprivation of property is not viewed as a punishment of the owner. This is an important legal concept since the owner of the property can subsequently face a criminal trial relating to the underlying criminal activity, and this will not be double jeopardy.

What is the standard of proof necessary to prevail in a NCB forfeiture action? The standard at the time of seizure is generally probable cause to believe that the property has been acquired with illegal funds. The standard required for the forfeiture judgement – in countries in the Common Law tradition – is preponderance of evidence (also referred to as “balance of probability”); however, in many Continental Law countries the same standard of proof applies to civil as to criminal procedures.

Civil action

For the purpose of this manual, the term “civil action” applies to a civil claim that may be filed alongside of the criminal process and is specifically authorised by the

CPC of the country. This type of provision is particular to civil law countries and is generally not found in common law jurisdictions.

Any party that has been damaged as a result of the criminal offence may be a party to the civil action including the State. For example, in a corruption case, the State could conduct the investigation and prosecute the individual. Throughout the investigative process and during the trial phase, the State and any other damaged parties could be a party to the civil action that is running parallel to the criminal process. If at any point in time the criminal process fails, for any reason, the civil action can utilise all of the same evidence that has been gathered and proceed with the civil process to recoup damages.

It should be noted that the civil action is different from a civil law suit because the civil action is specifically authorised by the CPC, runs parallel to the criminal process and can automatically use the same evidence that was collected in the criminal investigation. The civil action also differs from a civil law suit because it can be decided by the same criminal judge at the same time that he/she decides on the criminal case, but also the judge may decide to refer the civil party after conviction to the regular civil proceedings in relation to damages.

Civil law suit (private litigation)

Private law suits in a civil court may be initiated by any injured or damaged party including the State. A government may be a plaintiff in a civil law suit filed in a foreign jurisdiction where corruptly acquired assets have been located. This type of action is not a government to government process but rather a private litigation that does not depend on a government investigation. In fact, some or all of the records gathered through an official government investigation may not be available to the private litigants.

What are the positive and negative aspects of choosing this option, and when should a government resort to the filing of a civil law suit to recover its stolen assets?

Usually a thorough financial investigation conducted by the criminal authorities of a country whose public official has stolen government funds will be the most efficient and economical manner in which to proceed. This investigation should include the gathering of evidence for the criminal case (which serves as the basis for the later confiscation), the tracing of the proceeds of crime and MLA requests to place temporary restraints on assets. Following the investigative process, the criminal trial may result in the conviction of the corrupt official and a confiscation order covering all assets that are proceeds of the illegal activity. Additional MLA requests may be necessary to request the foreign jurisdictions to enforce the forfeiture orders. These assets may now be confiscated by the foreign country, and eventually returned to the victim country. However, if at any point this process fails, then it may be necessary to consider the use of a civil law suit in the foreign jurisdiction to recover the assets. The above described process may fail because the investigation was inadequate, the MLA requests were not acted upon or the official was not convicted at trial.

There are benefits to using the civil law suit process and some of these are summarised as follows:

- ▶ The civil proceedings have a lower standard of proof – at least in countries in the Common Law tradition. It is only necessary to prove the plaintiff's case by a preponderance of evidence.
- ▶ The defendant need not be present and his/her absence is not a bar to a successful action.
- ▶ The suits can be filed in foreign jurisdictions.

The negative aspects should also be carefully considered and may outweigh the positives:

- ▶ The suit will require the hiring of a private attorney, and this could result in millions of Euros of expense with no guarantee of a successful recovery.
- ▶ Legal actions may be required in multiple jurisdictions to trace assets with no ability to use the MLA process.
- ▶ The civil law suit may take years to litigate.
- ▶ The government plaintiff is not fully utilising its vast array of resources such as investigators, accountants and prosecutors, and their attendant investigative and other powers.

10. New payment methods (NPMs)

10.1 Overview

Until a few years ago, a financial investigation, though complex and time-consuming, was about seeking and following the money in a way that was familiar to every experienced investigator: there was cash, bank accounts, funds and shares. Today, new and innovative methods for electronic cross-border funds transfer are emerging globally. These new payment tools include the development of pre-existing payment systems, as well as methods that are completely different from traditional transactions. Nowadays, payments can be settled through the Internet, wireless devices and pre-funded cards. While a few of them are restricted to specific markets and geographical areas, the great majority operate globally, allowing cross-border fund transfers among users.

Since the main goal of a financial crime is the possibility for the perpetrator to profit from his/her illegal activity, cash is often the ideal solution. It provides criminals with anonymity, making transactions almost untraceable (except for marked bills or controlled payments), can be used everywhere and does not involve intermediaries. The risk that money launderers exploit NPMs for their purposes becomes higher in proportion to how closely these methods match the characteristics of cash. But there is an aspect which allows those methods to win against cash: it is difficult to move the currency across borders. Criminals, by using cash alternatives, avoid the use of large quantities of currency, and can transfer unlimited amounts of money without moving from their desk.

In 2006, the FATF published a “Report on New Payment Methods” addressing the emerging issue.¹⁵³ Thereafter, the growing use of NPMs and an increased awareness of associated money laundering and terrorist financing risks have resulted in the detection of a number of money laundering cases involving these methods. In fact, just four years after its first report, in 2010, FATF published a new report on “Money Laundering using New Payment Methods”¹⁵⁴

153. *FATF Report: New Payment Methods* (2006), available at www.fatf-gafi.com, accessed on 1 February 2014.

154. *FATF Report: Money Laundering Using New Payment Methods* (2010), available at www.fatf-gafi.com, accessed on 1 February 2014.

One can divide NPMs into three major categories: mobile payments, stored value cards and Internet payment systems, each with its own characteristics, vulnerabilities and potential risk factors. The Prepaid Card is currently the most widely used of the available NPMs.

10.2 Mobile payments

Mobile payments refer generally to the use of mobile phones and other wireless communication devices to pay for goods and services, and have become more and more popular. Transactions are performed quickly and cheaply from anywhere in the world and their security is assured through encryption.

It is estimated that there are more than 5 billion mobile subscriptions worldwide while only 2 to 3 billion people hold a bank account.¹⁵⁵ The first major step in the mobile payments expansion lies in migrant workers, people who need to send money back to their families in developing countries where 2.7 billion people do not have access to any sort of financial service. M-Pesa in Kenya is perhaps the most famous of these, and has attracted more than 10 million Kenyans in just a few years. Born to be nothing more than a money-transfer system and an evolution of the Hawala system, SafariCom M-Pesa has developed into a payment method that is possible to use even at supermarkets.¹⁵⁶

Apart from the provider, the technology behind the system is almost the same: payments are settled using a mobile communications device through the Internet. Many mobile payment services use these devices to perform transactions funded by existing bank accounts. Phones are simply used as an access point to traditional payment methods. The risk becomes higher when the transactions are funded by an account held by the telecom provider which becomes a payment intermediary and, depending on the legislation of the country where it is based, may not be subject to anti-money laundering/counter terrorist financing (AML/CFT) measures.

Risk factors

The key aspects that can attract criminals are the speed of transactions and the apparent absence of borders: the money can be moved in a matter of seconds through different accounts and jurisdictions, wherever they are located. Despite the fact that money can often only be transferred between subscribers of the same national provider, the telephone SIM card can travel across borders and operate from any country. Another risk factor is that several jurisdictions allow simplified or reduced Customer Due Diligence (CDD) measures to mobile phone providers and even when CDD is applied, counterfeited ID or the corruption (or intimidation) of the provider's agent is still possible. Moreover the verification of the customer's identity may be difficult in jurisdictions that have no national identity card scheme

155. See *Gartner's Press Release of August 4, 2011*, available at www.gartner.com, accessed on 1 February 2014.

156. Berman M. S. (2011), *The Development, Use and Cultural Context of MPESA in Coastal Kenya*, available at digitalcollections.sit.edu, accessed on 1 February 2014.

or other forms of identification. After the first identification when subscribing to the service, funding the account in many countries does not require an ID card and is done mainly with cash.

Recent technological developments in mobile payment systems have added the possibility to combine them with other payment methods, including traditional payment methods as well as other NPMs: some providers offer open-loop prepaid cards that are connected to the accounts of their customers and may offer cross-border services; some providers even allow for automated teller machines (ATM) withdrawals without the need for a card. Customers can initiate transactions by passing on a certain code to third parties, who can enter the code into an ATM in order to receive the amount of money linked to that specific code.¹⁵⁷

Many factors can mitigate the risk of the abuse of this NPM by money launderers. Value limits for single transaction and daily and monthly thresholds for every account can make it difficult to launder large amounts of money through this system. Contrary to cash, the fact that NPMs transactions occur through electronic means, can provide additional investigative leads for law enforcement agencies. Transactions carried out through an NPM will always generate an electronic record, whereas cash does not, and can, in some cases, still provide law enforcement with at least minimal information to locate or identify a user suspected of money laundering.

10.3. Stored value cards and prepaid cards

A stored value card is an electronic purse where the money is stored electronically. The card has an integrated circuit chip and this chip is where funds are stored; therefore one can consider this card as cash since the card's owner is literally carrying his/her funds with him/her on the card (usually if the card is lost, the value stored is lost as well). Since these stored value chip card programmes are not linked to a bank account, customer identification may not be required and no transaction record will be generated, increasing the potential risk of money laundering. However this risk may be minimised since most chip cards are not accepted everywhere and often have low limits of stored value.

“Prepaid cards” are potentially more desirable for illicit transactions. These cards provide access to money which is paid in advance by the cardholder. There are many different types of prepaid cards that may be used in a variety of ways, and may or may not rely on access to a bank account. The key issue is that anyone can buy these cards and no identification is required.

These prepaid cards can be divided into two groups – closed system and open system, each with different purposes, rules and risks. Limited purposes prepaid cards can be used only in well-defined circuits (shops, petrol stations, online gaming websites, etc.). These cards may either be limited to their initial value (non-reloadable) or may allow the card holder to add value (reloadable). However, even these prepaid cards

¹⁵⁷. FATF Report: *Money Laundering Using New Payment Methods* (2010), paragraph 54, available at www.fatf-gafi.com, accessed on 1 February 2014.

can be used internationally in criminal activities. For example a criminal organisation from country A conducting a criminal activity in country B, can purchase hundreds of closed-loop prepaid cards using the proceeds of crimes, bring them to country A (to date there is no obligation to declare prepaid cards at the borders of any country) and sell them on the market at a discounted price.

Multi-purpose or open-system prepaid cards can be used almost everywhere in the world and for a wider range of purposes both nationally and internationally. Open-system prepaid cards usually rely on card payment networks, typically Visa or MasterCard, and can be used to make purchases or withdraw cash from an ATM basically in every country of the world. The ones which can be easily exploited for criminal purposes are those which do not require the cardholder to have a depository account.

Risk factors

Open-system prepaid cards utilise payment systems (Visa, MasterCard) that are accepted worldwide,¹⁵⁸ allowing one to purchase them in a country and spend or withdraw them in another. Identification of the customer is not required and they are sold completely anonymously at shops. Although the cards have a unique number and create an electronic transaction record when the money is spent or withdrawn at ATMs, without the previous cardholder identification, the transaction trail alone may be insufficient to help law enforcement trace the cardholder. Furthermore, there are hundreds of websites (many of which are located in offshore countries) where prepaid cards can be purchased anonymously, some of which accept payment with virtual currencies (see below). It is often publicised that additional “twin cards” or “partner cards” can be issued and are specifically designed and advertised for use by a third party. In this case, the beneficial owner is not identified. These partner cards will further facilitate cross border transactions. Due to recent developments and the increasing habit of shopping online, even the physical shipment of cards may become obsolete. It is now possible to buy online “virtual credit cards” where the buyer only receives an email from the seller containing the credit card number, the date of expiration and the CCV.¹⁵⁹ This is all that is needed to purchase goods and services online.

10.4 Internet payment services

Internet payment services are generally identified with the use of the Internet to access existing bank accounts to move funds or check the account’s balance. But payment services can be also provided by non-bank institutions which operate exclusively on the Internet: a pre-funded account can be used to transfer funds or shop online without the same AML/CFT measures that apply to banks. The service provider will usually not have a face-to-face relationship with its customers and,

158. In 2001, a suspicious activity report (SAR) filed in the United States of America detailed the acquisition of more than 300 prepaid cards by a single individual who used them to transfer almost \$2 million to Colombia. No further information is available to the public. See FATF, Report on New Payment Methods, 13 October 2006 at p. 12.

159. See *5 Things You Should Know About Virtual Credit Cards*, available at www.pcmag.com, accessed on 1 December 2014.

accordingly with the cross-border nature of the Internet, these activities can involve payments or funds transfers between different countries.

Internet payment methods fall into one of three categories:

- ▶ Online banking, merely an extension of an already existing payment method;
- ▶ Prepaid Internet payment products, where non-financial institutions allow customers to send and receive funds through a virtual, prepaid account, accessed via the Internet;
- ▶ Digital currencies, where people purchase units of digital currencies which can be transferred among account holders or exchanged against real currencies and withdrawn.

This manual will focus on the third one, the digital currencies, since these payment mechanisms pose a higher risk with regard to corruption and money laundering schemes, and are only exchanged electronically. Typically, this involves the use of computer networks, the Internet and digitally stored value systems. They can be further divided into two different categories, depending on the structure adopted: centralised or decentralised. In the first case there is a centralised provider which sells the electronic currency directly to the end user: a well-known and widespread example is WebMoney.¹⁶⁰ Decentralised systems do not have a provider but are based on shared software running a peer-to-peer electronic monetary system based on cryptography, like Bitcoins.¹⁶¹

WebMoney is an e-money and online payment system. WM Transfer Ltd, the owner and administrator of WebMoney Transfer Online Payment System is a legal corporate entity of Belize, Central America. This means that all the transactions between different customers are processed by a central entity and not directly among users, thus allowing “anonymity” between the sender and the receiver of the money transfer but not with regard to the system. In fact, the central system will store the transaction and, at least, the IP address. The question is if an IP address is enough to identify a customer and, of course, the answer is no.

In order to identify people using the service, WebMoney releases a so-called “passport” to every user. There are different passports with different degrees of identification. Upon registration, a customer receives an “alias passport” which does not need any ID verification, and provides basic features. With an alias passport one is able to receive and make payments (thresholds apply) but cannot cash out the money. Registering to the service is free, as well as any transfer of value among users; payments to any kind of external account (typically bank accounts) incurs a fee of 0.8%. A WebMoney account can be funded by money order, wire transfer or by cash transactions at authorised exchange offices.

WebMoney – risk factors

Like every Internet-based solution, WebMoney knows no borders and transactions can be performed from anywhere, any time. The anonymity one can have with an initial

160. See *WebMoney Transfer website* www.webmoney.ru, accessed on 1 February 2014.

161. See *Bitcoin website* bitcoin.org, accessed on 1 February 2014.

unverified passport, even though limited in the features available and by thresholds, can be used to open hundreds of accounts which, together, can move a considerable amount of money. It is not uncommon to use straw men as a cashing-out point in money laundering schemes, where people in need sell their accounts to criminals.

Unlike WebMoney, **Bitcoins** is a digital currency that enables instant payments to anyone, anywhere in the world, using a peer-to-peer technology operating with no central authority. Functions including the management of transactions and issuing money are carried out collectively by a network of people running open source software which enables the use of this currency. Participants begin using Bitcoins by first acquiring a wallet and one or more Bitcoins addresses which are used for receiving Bitcoins which are stored in the wallet.¹⁶²

Due to the fact that Bitcoins is a decentralised system and all the transactions are peer-to-peer, apart from the IP address used while accessing the network,¹⁶³ the system is completely anonymous. But how are Bitcoins created? This is the most complex part of Bitcoins and more information can be found by visiting the Bitcoins website. Simply-stated, coins are created through the operation of an extraordinarily complex mathematical formula which is so involved that an average computer would take years to solve just one computation resulting in merely one single Bitcoin. There are people on the network who allow the system to use the calculation power of their computers (and the electricity needed to let them work) to solve these mathematical problems, and are rewarded with some Bitcoins.

Bitcoins – risk factors

The decentralised nature of the system makes it impossible for LEAs to obtain information about customers and transactions from a central authority. Customers are anonymous since there is no registration needed and no face-to-face identification. Bitcoins can be purchased and spent in different ways, including cash. Some websites specialise in activities that include:

- ▶ Cash: one can buy Bitcoins from providers who accept payment in cash via mail, or locate a person near his/her address and vice-versa;¹⁶⁴
- ▶ Via other NPMs: specialised websites accept the sale of Bitcoins and receive payments through prepaid cards, WebMoney and other digital currencies.

A system that uses cash or other NPMs to fund an account which is not held by a financial institution can, of course, be easily exploited by criminals and money launderers. Anonymous cross-border payments made in a matter of seconds without leaving a trace, not linked to a specific person and cashed out or changed into another NPM, create a dangerous money laundering risk. Does it mean that there is no possibility for an investigator to find any lead to follow when criminals are using these NPMs? Fortunately, not completely!

162. A user can download the Bitcoins software, which stores the coins on the user's hard drive in a wallet file. The software can be used to manage the coins and send them to other addresses. Or the user can sign up with an exchange or website that permits the storage of Bitcoins.

163. The problem of IP address identification is easy to avoid by connecting from an internet café or using a proxy server which anonymises the location of the user.

164. See *Tradebitcoin website* www.tradebitcoin.com, accessed on 1 February 2014.

10.5 Forensic investigations and NPMs

Based on what has been said above, one could easily think that criminals have now found the perfect tool to remain anonymous and be able to launder the proceeds of their crimes undisturbed and undetected. It is obvious that they can profit by these methods but the use of IT devices can also help the investigator. Unlike cash, online transactions leaves a trail; it may be difficult and time consuming to find a link to the perpetrator but the lead is stored somewhere, made of bits and bytes, but it can be found and followed. Evidence of the crime may reside on electronic devices in several jurisdictions, and sources of information needed to investigate the case may be located anywhere in the world and may not be immediately available. Once obtained, the evidence may identify the computers of victims and suspects, data on servers, databases and Internet Service Provider records.

Digital evidence is fragile and can easily be lost and destroyed. For example, it can easily be deleted with usage or altered due to improper handling and storage. For these reasons, evidence should be immediately retrieved and preserved. Not all investigators are computer experts, and the forensic examination of an IT device requires specialised training. Investigators must be aware of the possible existence of these new methods, and understand the need for expert advice to detect them. When a forensic examination of devices is needed, the investigator should be aware that any action taken on the system might affect the integrity of the evidence. Only in urgent circumstances should an investigator attempt to gain information directly from a computer on the scene.

11. Trial preparation

The simulated case (PE) part of the training programme has three distinctive phases:

- a. The first phase is the **investigative stage** in which the participants will seek evidence, analyse information and follow leads attempting to gather all necessary evidence to prove the criminal case and trace and confiscate assets.
- b. The second phase is the **trial preparation** in which the participants are assigned three separate tasks:
 - to prepare a detailed overview of the case;
 - to select a criminal offence, identify the elements of the crime and explain the evidence that will be used to prove each such element;
 - to demonstrate with evidence the link between the criminal activity and the purchase of certain assets.
- c. The last phase of the simulated case is the **presentations by the participants** which are essentially an opening statement (overview of the case), the presentation of evidence to prove each element and the confiscation process following the conviction.

The following is a detailed explanation of the three tasks assigned to the participants during the trial preparation phase.

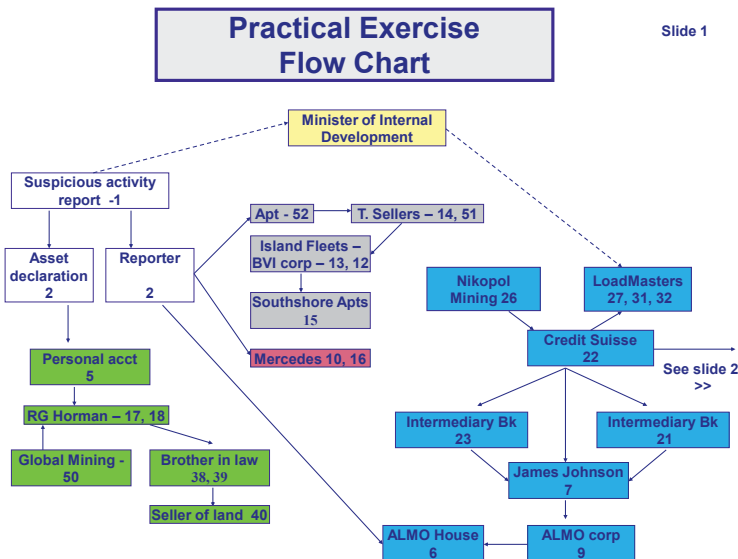
11.1 The purpose and value of preparing an overview or summary of the case

Most jurisdictions grant the prosecution and the defence the right to give an opening statement at the beginning of the trial. This is an excellent opportunity to explain the theory of the case, provide a summary of the criminal activity, bring to light egregious conduct by the defendant and highlight the key pieces of evidence. However, prosecutors often do not take full advantage of this opportunity, or use the opening statement merely as a time to list the evidence that will be presented. It is extremely important that the judge thoroughly understands the prosecution's case. A well prepared opening statement will allow the judge to note the importance of each piece of evidence rather than wondering how this piece of the puzzle will fit into the overall case. The opening statement will provide a roadmap for the judge to follow the relevance of complex documentary and oral evidence.

The simulated case has four separate criminal bribery/misappropriation schemes, and each has a separate source of illegal income, some of which are very complex. During the training, the participants are divided into five person task force groups to investigate the case. At the conclusion of the investigation, each group is assigned various tasks as explained above. At least four of the groups will be assigned to present an overview of one of the bribery or misappropriation schemes. The participants are expected to review the evidence that has been collected and thoroughly understand each piece thereof. The evidence should paint a complete picture of the corrupt activity, including the scheme to obtain illegal proceeds and the method used to hide or launder the funds. The financial flows and entity relationships may be depicted in chart or graph form to clearly illustrate the various schemes. It is critical that a prosecutor understands all of the evidence and what story the evidence will tell. It is equally important that the prosecutor is able to take this evidence and explain it in the courtroom in clear terms as if telling the story to a person who is completely unfamiliar with the case.

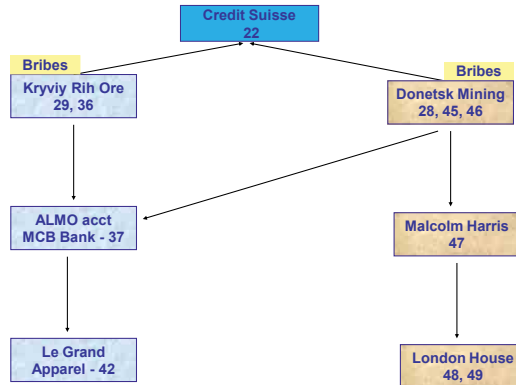
This concept of understanding the evidence and having the ability to clearly explain the facts is important to all persons involved in the criminal process. This would include FIU personnel, investigators, prosecutors and judges.

The graphs below are flow charts that summarise the complete criminal activity conducted by the subject of the investigation, the Minister of Internal Development. They are far more than just a link chart of relationships or a timeline. They are designed to paint the complete picture of the case and have multiple uses. The creation of the chart will assist the investigator and prosecutor in organising the evidence and visualising the criminal conduct. It will aid the investigators in briefing the case to their superiors. At trial stage, it can be used to prepare the opening arguments and at the end of the trial, after all evidence has been admitted, it may be used as a summary chart to clearly explain the evidence to the judge. Utilising a graph similar to the ones below will make it very easy to provide a detailed explanation of the theory of the case, the financial flows and the evidence that will prove one or more of the elements.



Practical Exercise Flow Chart

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11.2 Organising the evidence to prove each element of the crime

The second task assigned to the participants is a three phase process. First, based on the evidence that has been gathered, they are to select one specific money laundering or corruption-related criminal violation from their domestic legislation for which it would be appropriate to charge the Minister of Internal Development.

The second step is to identify the elements of crime that must be proven to successfully obtain a conviction on that (selected) charge. As an example, using the model language suggested for money laundering criminal violation contained in Article 23 of the UNCAC, the statute would read:

“The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action.”

If this were enacted into domestic law, what would be the elements of the crime? A close reading of the statute will disclose that the following are the key elements that must be proven:

- ▶ There must be a conversion or transfer of property.
- ▶ The property involved in the conversion or transfer was the proceeds of crime.
- ▶ The person must know that the property involved in the conversion or transfer was the proceeds of crime.
- ▶ The purpose of the conversion or transfer was one of the following:
 - To conceal or disguise the illicit origin of the property, or
 - To help any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action.

The third phase of this assignment is to identify and explain the evidence that will prove each element. For example (referring to the documents in the simulated case), assume that a country has a money laundering statute that uses the same language as suggested by the UNCAC above, what evidence would be needed to

prove each of the elements? The simulated case contains four different schemes. The RG Horman scheme (shown in graphical form in chart 1 above highlighted in green), will be used to demonstrate how the evidence should be matched with the elements to prove the case.

The first element is a conversion or transfer of property. This will be proved by choosing the transaction in which the investment company, RG Horman, disbursed UAH 345,000 on 11 July 2007 in the form of a cheque to Sergey Petrenko, the brother in law of Boris Maistrenko, the Minister of Internal Development. This is proved through document 17 which shows the disbursement from the RG Horman account; document 18, which indicates that the cheque was made payable to Sergey Petrenko, and document 38 which is Petrenko's statement that he received the cheque.

The second element is the requirement to prove that the property involved in the conversion or transfer was the proceeds of crime. The evidence will show that Maistrenko opened an investment account in the name of Sergey Petrenko, his brother-in-law, in May 2006 (document 17). Maistrenko gained control of all transactions in this account by claiming that his brother-in-law was incompetent, a statement that was false. During the period from June 2006 to June 2007, a total of UAH 1,701,000 was deposited into this account, the source of which was a company known as Global Mining (documents 17 and 18). Global Mining needed a permit from the Ministry of Internal Development to conduct mining operations.

The Accounting Manager at Global Mining stated that the company records indicated that the payments were for investment purposes but he could not find any investments in the company records that corresponded to these payments. He believed that these payments could have been payoffs to obtain the mining permits (document 50). From the money deposited into the RG Horman account from Global Mining, Maistrenko directed that a distribution be made in the amount of UAH 345,000 on 11 July 2007 (documents 17, 18 and 38). Therefore, this transaction involved the proceeds of crime.

The third element requires proof that the person conducting the conversion or transfer knew that the property involved the proceeds of crime. This will be proved by the fact that Maistrenko was the person who opened the account at RG Horman, using the name of his brother-in-law, Sergey Petrenko, and gaining control of the account by falsely claiming that Petrenko was incompetent (document 17). Maistrenko also directed the distribution from the account and provided false information to Petrenko regarding the purpose of the transaction (document 38). Maistrenko was the Minister of Internal Development, the department which issued the mining permit to Global Mining, and he controlled all aspects of the RG Horman account (document 17).

The fourth element requires proof that the purpose of the conversion or transfer was to conceal the illicit origin of the property. This attempt to conceal is proved by the fact that Maistrenko opened an investment account in a nominee name (Sergey Petrenko), provided false information to RG Horman regarding the competency of Petrenko (document 17) and did not disclose this account on his Declaration of Wealth (document 2). Maistrenko also lied to Petrenko regarding the purpose of the opening of the account and the distribution of the 345,000 UAH on 11 July 2007 (document 38).

In summary, this second task (organising the evidence to prove each element of the crime) has three phases:

- ▶ First, the statement of the relevant CC article;
- ▶ Second, the listing of the elements of the crime as demonstrated above for Article 23 of the UNCAC;
- ▶ Third, the explanation of all evidence that proves each element of the selected offence. This should be performed as described in the RG Horman example above.

11.3 Trace the flow of funds to connect the assets to the criminal conduct

The object of this section is to organise the evidence necessary to seize and forfeit an asset that has been acquired from the proceeds of corruption. Using specific evidence referenced by its document number, the participants are directed to trace the flow of funds from the predicate offence to the acquisition of the asset.

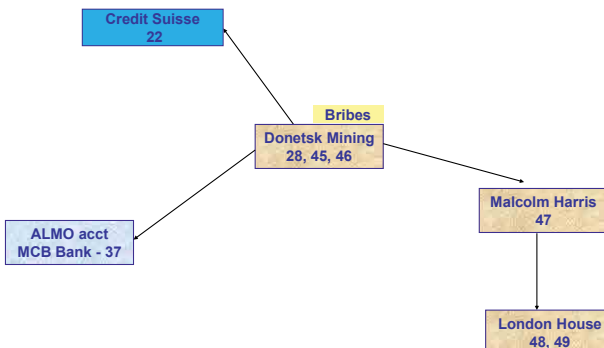
Again, using an example from the simulated case, the process of tracing the proceeds of crime to their ultimate disposition can be demonstrated. This example will begin with the bribes that were paid by Donetsk Mining, and the object will be to trace the purchase of the land outside of London. A chart of the flow of the funds, as shown below, can greatly assist in tracing this purchase.

The evidence (documents 28, 45 and 46) will show that Maistrenko's associate, Oleg Ivanenko, demanded Donetsk Mining make bribe payments in order for the company to maintain mining permits. Donetsk Mining was directed to make payments to three different entities: the Credit Suisse account, the ALMO account and a UAH 3,423,000 disbursement to Malcolm Harris (documents 46 and 47).

Continuing with the tracing of the cheque paid to Harris will disclose that these funds were, after being converted to British pounds, used to purchase a parcel of property near London from Adam Welsley (document 49) for the sole benefit of Maistrenko.

Practical Exercise Flow Chart

Slide 3



This tracing exercise will help develop and organise the evidence necessary to obtain a forfeiture order against the property.

USB memory stick

The USB memory stick enclosed with this Manual contains the following information:

- ▶ International and regional instruments relevant for this course;
- ▶ Overview of the roll-out of “Practical Exercise” (simulated criminal case);
- ▶ Practical Exercise consisting of 51 evidentiary items;
- ▶ Overview of the simulated criminal case of the Practical Exercise;
- ▶ Investigative File Inventory (IFI).

This publication presents legislative and practical aspects of criminal prosecution of economic crime, including financial investigations, asset recovery, and mutual legal assistance. It provides step-by-step guidance to both policy makers and practitioners tasked with fighting corruption, money laundering/terrorist financing, fraud, and other types of economic crime.

The Economic Crime and Cooperation Unit (ECCU)

at the Directorate General Human Rights and Rule of Law of the Council of Europe is responsible for designing and implementing technical assistance and co-operation programmes aimed at facilitating and supporting anti-corruption, good governance and anti-money laundering reforms in the Council of Europe member states, as well as in some non-member states.

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

