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the governance-access-learning network

Cases and Materials Relating to Corruption
Volume 2 – Issue 2 – June 2004
(Including the United Nations Convention Against Corruption)

Editor John Hatchard

A joint project of the Commonwealth Legal Education Association, The Commonwealth Magistrates' and Judges' Association, The Commonwealth Secretariat and TIRI

Funded by the BMZ Trust Fund for United Nations Development Programme for Accountability and Transparency in support of the Independent Corrupt Practices and Other Related Offences Commission of Nigeria

Editorial Contact: TIRI, 42 Madrid Road
London SW13 9PG
United Kingdom
Tel. +44 (0)77 98 915 659
Fax +44-(0)20 8241 1919
http://www.tiri.org

tiri
2004

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ISSUE 2: EDITORIAL REVIEW

Following the completion of the UN Convention on Transnational Organised Crime in 2000, the United Nations recognised that there was still need for a more effective legal instrument aimed specifically at combating corruption. This concern was echoed by the international community. As a result, negotiations for the landmark United Nations Convention Against Corruption took only two years and in December 2003 in Merida, Mexico, 100 states signed the new Convention. In view of its importance, this Issue contains a copy of the Convention as well as a short background note.

The three cases in this Issue cover diverse matters. The need for flexibility in dealing with mutual assistance requests is the theme in *Pokidyshev* and *Rodionov*. The case involved a mutual assistance request to Canada from Russia relating to a corruption investigation. The case is particularly useful as it deals with the procedure for making a mutual assistance request to a common law country from a non-common law country. In practice, such requests are often more challenging due to the very different criminal justice systems involved. The case also provides a useful illustration of how, in the absence of a formal mutual assistance treaty, states can agree on "administrative arrangements" to enable the requested state to provide effective mutual assistance. It also contains a helpful analysis of the judicial role in mutual assistance matters.

The South African National Prosecuting Authority Act 1998 provides for a single national prosecuting authority. Within it there are three Investigating Directorates, two of which deal with the investigation of serious economic offences and corruption respectively. The case of *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others* provided the Constitutional Court of South Africa with an opportunity of examining the constitutionality of the new search and seizure powers for the purposes of a "preparatory investigation" contained in the Act.

The key issue in the case centred on whether such powers contravened the right to privacy enshrined in the South African Constitution. The Court takes the well-trodden path in terms of the approach to the interpretation of statutory provisions under the Constitution. On this basis, it finds that the impugned section of the Act is capable of an interpretation that is consistent with the Constitution (see para 51). In reaching this conclusion, the court recognises the importance of effective search and seizure provisions in tackling corruption and other serious economic crime and the need to support the new institutional structures introduced to utilise them. As the court notes (at para 53):-

> “It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of fraudulent activity. This has a seriously adverse effect not only on the security of citizens and the morale of the community but also on the country’s economy. This ultimately affects the government’s ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society, and the setting up of special Investigating Directorates should be seen in that light. The legislature has sought to

> prioritise the investigation of certain serious offences detrimentally affecting our communities and has set up a specialised structure, the Investigating Directorate, to deal with them. For purposes of conducting its investigatory functions, the Investigating Directorates have been granted the powers of search and seizure…."

The Queen v Nua concerns a case where a senior public official embarked "on a systematic course of corruption netting substantial sums over a lengthy period". In an appeal against sentence, the Court of New Zealand notes with alarm the growing number of cases of corruption in the country and considers that the "time would now seem to have arrived for unmistakable deterrence" (para 19). The Court then examines the appropriate principles of sentencing in such cases including when a reconsideration of sentencing levels in corruption cases is warranted. In passing, it is also worth noting that the court undertook its own research to identify relevant earlier Court of Appeal decisions in the face of a failure by counsel to locate them.

John Hatchard
June 2004

UNITED NATIONS CONVENTION AGAINST CORRUPTION

In recent years, a number of international and regional instruments have sought to address the issue of corruption. For example, the Inter-American Convention against Corruption, adopted by the Organisation of American States on 29 March 1996, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union on 26 May 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997, the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999 and the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999.

In July 2003 the African Union Convention on Preventing and Combating Corruption was adopted by the Heads of State and Government of the African Union.

In resolution 55/61 of 4 December 2000, the UN General Assembly recognised that it was desirable to have an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organised Crime. As a result, the Ad Hoc Committee for the Negotiation of the Convention against Corruption was established for the negotiation of such an instrument.

It completed its work swiftly. The text of the United Nations Convention against Corruption was negotiated during seven sessions of the Ad Hoc Committee between January 2002 and October 2003 and the Convention itself approved was adopted by the UN General Assembly by resolution 58/4 of 31 October 2003.

The Convention was opened for signature at a December 2003 conference held in Merida, Mexico. Here it was signed by 100 states and also ratified by Kenya. The Convention will come into force ninety days after the thirtieth ratification.

The Convention covers four main areas:

1. Prevention
Measures include the establishment of anti-corruption bodies as well as enhanced transparency in the financing of election campaigns and political parties. Requirements are also established for the prevention of corruption in the judiciary and in public procurement. The Convention calls on countries to actively promote the involvement of non-governmental and community-based organisations, as well as other elements of civil society, to raise public awareness of corruption.

2. Criminalisation
Countries are required to establish criminal offences to cover a wide range of acts of corruption. This includes 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.

3. International cooperation
Chapter IV of the Convention contains very detailed provisions on international cooperation. Countries agree to cooperate in the fight against corruption, including prevention and investigation activities, and the prosecution of offenders. The Convention also requires countries to provide specific forms of mutual assistance in gathering and transferring evidence for use in court and to extradite offenders.

4. Asset recovery
This is an 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.

Measures include the prevention and detection of transfers of illicitly acquired assets, the recovery of property, and the return and disposition of assets.

The full text of the Convention is set out below.

United Nations Convention against Corruption

Preamble

The States Parties to this Convention,

Concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,

Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,

Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,

Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential,

Convinced *also* that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively,

Convinced further that the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption effectively,

Convinced that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law,

Determined to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery,

Acknowledging the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights,

Bearing in mind that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, if their efforts in this area are to be effective,

Bearing also in mind the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption,

Commending the work of the Commission on Crime Prevention and Criminal Justice and the United Nations Office on Drugs and Crime in preventing and combating corruption,

Recalling the work carried out by other international and regional organizations in this field, including the activities of the African Union, the Council of Europe, the Customs Cooperation Council (also known as the World Customs Organization), the European Union, the League of Arab States, the Organisation for Economic Cooperation and Development and the Organization of American States,

Taking note with appreciation of multilateral instruments to prevent and combat corruption, including, inter alia, the Inter-American Convention against Corruption, adopted by the Organization of American States on 29 March 1996, the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union on 26 May 1997, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997, the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999, the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999, and the African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union on 12 July 2003,

Welcoming the entry into force on 29 September 2003 of the United Nations Convention against Transnational Organized Crime,

Have *agreed* as follows:

Chapter I
General provisions
Article 1 Statement of purpose
The purposes of this Convention are:
(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
(c) To promote integrity, accountability and proper management of public affairs and public property.

Article 2 Use of terms

For the purposes of this Convention:
(a) "**Public official**" shall mean: (i) 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; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;
(b) "**Foreign public official**" shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise;
(c) "**Official of a public international organization**" shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization;
(d) "**Property**" shall 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;
(e) "**Proceeds of crime**" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence;
(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;
(g) "**Confiscation**", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;
(h) "**Predicate offence**" shall mean 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;
(i) "**Controlled delivery**" shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

Article 3 Scope of application
1. This Convention shall apply**,** in accordance with its terms, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention.
2. For the purposes of implementing this Convention, it shall not be necessary**,** except as otherwise stated herein, for the offences set forth in it to result in damage or harm to state property.

Article 4 Protection of sovereignty
1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

Chapter II
Preventive measures

Article 5 Preventive anti-corruption policies and practices

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.
3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.
4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

Article 6 Preventive anti-corruption body or bodies

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:
(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;
(b) Increasing and disseminating knowledge about the prevention of corruption.
2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.
3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

Article 7 Public sector

1. Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:
(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;
(b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;
(c) That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;
(d) That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.
2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.
3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.
4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

Article 8 Codes of conduct for public officials

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.
2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.
3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.
4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.
5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.
6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

Article 9 Public procurement and management of public finances

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:
(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;
(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;
(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;
(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;
(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.
2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:
(a) Procedures for the adoption of the national budget;
(b) Timely reporting on revenue and expenditure;
(c) A system of accounting and auditing standards and related oversight;
(d) Effective and efficient systems of risk management and internal control; and
(e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.
3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

Article 10 Public reporting

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;
(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and
(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

Article 11 Measures relating to the judiciary and prosecution services
1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.
2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

Article 12 Private sector
1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.
2. Measures to achieve these ends may include, inter alia:
(a) Promoting cooperation between law enforcement agencies and relevant private entities;
(b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;
(c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;
(d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;
(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;
(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.
3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:
(a) The establishment of off-the-books accounts;
(b) The making of off-the-books or inadequately identified transactions;
(c) The recording of non-existent expenditure;
(d) The entry of liabilities with incorrect identification of their objects;
(e) The use of false documents; and
(f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.
4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

Article 13 Participation of society
1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector,

such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:
(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;
(b) Ensuring that the public has effective access to information;
(c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;
(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
(i) For respect of the rights or reputations of others;
(ii) For the protection of national security or *ordre public* or of public health or morals.
2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

Article 14 Measures to prevent money-laundering
1. Each State Party shall:
(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;
(b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.
2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.
3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:
(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;
(b) To maintain such information throughout the payment chain; and
(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.
4. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.
5. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

Chapter III
Criminalization and law enforcement
Article 15 Bribery of national public officials
Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 16 Bribery of foreign public officials and officials of public international organizations
1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 17 Embezzlement, misappropriation or other diversion of property by a public official
Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

Article 18 Trading in influence
Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
(a) The promise, offering or giving to a public official 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 with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;
(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

Article 19 Abuse of functions
Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

Article 20 Illicit enrichment
Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

Article 21 Bribery in the private sector
Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:
(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

Article 22 Embezzlement of property in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.

Article 23 Laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a)

(i) 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;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) 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 this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

Article 24 Concealment

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

Article 25 Obstruction of justice

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

Article 26 Liability of legal persons
1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention. 2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

Article 27 Participation and attempt
1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.
2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.
3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

Article 28 Knowledge, intent and purpose as elements of an offence
Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

Article 29 Statute of limitations
Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

Article 30 Prosecution, adjudication and sanctions
1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.
2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.
3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.
4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.
5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.
6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.
7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(a) Holding public office; and
(b) Holding office in an enterprise owned in whole or in part by the State.
8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.
9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.
10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

Article 31 Freezing, seizure and confiscation
1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.
2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.
4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.
5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.
7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.
8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.
9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.
10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article 32 Protection of witnesses, experts and victims
1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.
2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:
(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;
(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.
4. The provisions of this article shall also apply to victims insofar as they are witnesses.
5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Article 33 Protection of reporting persons
Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention

Article 34 Consequences of acts of corruption
With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

Article 35 Compensation for damage
Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

Article 36 Specialized authorities
Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

Article 37 Cooperation with law enforcement authorities
1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.
2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.
3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.
4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.
5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

Article 38 Cooperation between national authorities
Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:
(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or
(b) Providing, upon request, to the latter authorities all necessary information

Article 39 Cooperation between national authorities and the private sector

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.
2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

Article 40 Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

Article 41 Criminal record

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

Article 42 Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:
(a) The offence is committed in the territory of that State Party; or
(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.
2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:
(a) The offence is committed against a national of that State Party; or
(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or
(d) The offence is committed against the State Party.
3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.
4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.
5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.
6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Chapter IV
International cooperation

Article 43 International cooperation
1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.
2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

Article 44 Extradition
1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.
2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.
3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.
4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.
5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.
6. A State Party that makes extradition conditional on the existence of a treaty shall:
(a) At the time of deposit of its instrument of ratification, acceptance or
approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and
(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.
7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.
8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.
9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.
10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.
11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State

Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.
12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.
13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.
14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.
15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.
16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.
17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.
18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Article 45 Transfer of sentenced persons
States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

Article 46 Mutual legal assistance
1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.
2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.
3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:
(a) Taking evidence or statements from persons;
(b) Effecting service of judicial documents;
(c) Executing searches and seizures, and freezing;
(d) Examining objects and sites;
(e) Providing information, evidentiary items and expert evaluations;
(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
(h) Facilitating the voluntary appearance of persons in the requesting State Party;
(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;
(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.
5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.
6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.
7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.
8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.
9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;
(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;
(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.
10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:
(a) The person freely gives his or her informed consent;
(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.
11. For the purposes of paragraph 10 of this article:
(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;
(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;
(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;
(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.
12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.
13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance,

it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. 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.

20. 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.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.
23. Reasons shall be given for any refusal of mutual legal assistance.
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.
25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.
26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.
27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.
28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.
29. The requested State Party:
(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;
(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public. 30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

Article 47 Transfer of criminal proceedings
States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

Article 48 Law enforcement cooperation
1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:
(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;
(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;
(ii) The movement of proceeds of crime or property derived from the commission of such offences;
(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;
(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;
(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;
(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;
(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.
2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.
3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

Article 49 Joint investigations
States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

Article 50 Special investigative techniques
1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.
2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.
3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.
4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

Chapter V
Asset recovery
Article 51 General provision
The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

Article 52 Prevention and detection of transfers of proceeds of crime
1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.
2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:
(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and
(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.
3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.
4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.
5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.
6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

Article 53 Measures for direct recovery of property
Each State Party shall, in accordance with its domestic law:
(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;
(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

Article 54 Mechanisms for recovery of property through international cooperation in confiscation

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and

(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention**,** shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;

(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Article 55 International cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 46 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures

taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;
(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.
4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.
5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.
6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.
7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a *de minimis* value.
8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.
9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

Article 56 Special cooperation
Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.

Article 57 Return and disposal of assets
1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.
2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.
3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:
(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;
(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;
(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.
4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.
5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

Article 58 Financial intelligence unit
States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

Article 59 Bilateral and multilateral agreements and arrangements
States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.

Chapter VI
Technical assistance and information exchange
Article 60 Training and technical assistance
1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption. Such training programmes could deal, inter alia, with the following areas:
(a) Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;
(b) Building capacity in the development and planning of strategic anticorruption policy;
(c) Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;
(d) Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;
(e) Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;
(f) Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;
(g) Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;
(h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;
(i) Methods used in protecting victims and witnesses who cooperate with judicial authorities; and
(j) Training in national and international regulations and in languages.
2. States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including material support and training in the areas referred to in paragraph 1 of this article, and training and assistance and the mutual exchange of relevant experience and specialized knowledge, which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.
3. States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities in international and regional organizations and in the framework of relevant bilateral and multilateral agreements or arrangements.
4. States Parties shall consider assisting one another, upon request, in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption.
5. In order to facilitate the recovery of proceeds of offences established in accordance with this Convention, States Parties may cooperate in providing each other with the names of experts who could assist in achieving that objective.
6. States Parties shall consider using subregional, regional and international conferences and seminars to promote cooperation and technical assistance and to stimulate discussion on problems of mutual concern, including the special problems and needs of developing countries and countries with economies in transition.
7. States Parties shall consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply this Convention through technical assistance programmes and projects.
8. Each State Party shall consider making voluntary contributions to the United Nations Office on Drugs and Crime for the purpose of fostering, through the Office, programmes and projects in developing countries with a view to implementing this Convention.

Article 61 Collection, exchange and analysis of information on corruption

1. Each State Party shall consider analysing, in consultation with experts, trends in corruption in its territory, as well as the circumstances in which corruption offences are committed.

2. States Parties shall consider developing and sharing with each other and through international and regional organizations statistics, analytical expertise concerning corruption and information with a view to developing, insofar as possible, common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption. 3. Each State Party shall consider monitoring its policies and actual measures to combat corruption and making assessments of their effectiveness and efficiency.

Article 62 Other measures: implementation of the Convention through economic development and technical assistance

1. States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of corruption on society in general, in particular on sustainable development.

2. States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organizations:

(a) To enhance their cooperation at various levels with developing countries, with a view to strengthening the capacity of the latter to prevent and combat corruption;

(b) To enhance financial and material assistance to support the efforts of developing countries to prevent and fight corruption effectively and to help them implement this Convention successfully;

(c) To provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism. States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to that account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention;

(d) To encourage and persuade other States and financial institutions as appropriate to join them in efforts in accordance with this article, in particular by providing more training programmes and modern equipment to developing countries in order to assist them in achieving the objectives of this Convention.

3. To the extent possible, these measures shall be without prejudice to existing foreign assistance commitments or to other financial cooperation arrangements at the bilateral, regional or international level.

4. States Parties may conclude bilateral or multilateral agreements or arrangements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by this Convention to be effective and for the prevention, detection and control of corruption.

Chapter VII

Mechanisms for implementation

Article 63 Conference of the States Parties to the Convention

1. A Conference of the States Parties to the Convention is hereby established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.

2. The Secretary-General of the United Nations shall convene the Conference of the States Parties not later than one year following the entry into force of this Convention. Thereafter, regular meetings of the Conference of the States Parties shall be held in accordance with the rules of procedure adopted by the Conference.

3. The Conference of the States Parties shall adopt rules of procedure and rules governing the functioning of the activities set forth in this article, including rules concerning the admission and participation of observers, and the payment of expenses incurred in carrying out those activities.

4. The Conference of the States Parties shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of this article, including:

(a) Facilitating activities by States Parties under articles 60 and 62 and chapters II to V of this Convention, including by encouraging the mobilization of voluntary contributions;

(b) Facilitating the exchange of information among States Parties on patterns and trends in corruption and on successful practices for preventing and combating it and for the return of proceeds of crime, through, inter alia, the publication of relevant information as mentioned in this article;
(c) Cooperating with relevant international and regional organizations and mechanisms and non-governmental organizations;
(d) Making appropriate use of relevant information produced by other international and regional mechanisms for combating and preventing corruption in order to avoid unnecessary duplication of work; (e) Reviewing periodically the implementation of this Convention by its
States Parties;
(f) Making recommendations to improve this Convention and its implementation;
(g) Taking note of the technical assistance requirements of States Parties with regard to the implementation of this Convention and recommending any action it may deem necessary in that respect.
5. For the purpose of paragraph 4 of this article, the Conference of the States Parties shall acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the States Parties.
6. Each State Party shall provide the Conference of the States Parties with information on its programmes, plans and practices, as well as on legislative and administrative measures to implement this Convention, as required by the Conference of the States Parties. The Conference of the States Parties shall examine the most effective way of receiving and acting upon information, including, inter alia, information received from States Parties and from competent international organizations. Inputs received from relevant non-governmental organizations duly accredited in accordance with procedures to be decided upon by the Conference of the States Parties may also be considered.
7. Pursuant to paragraphs 4 to 6 of this article, the Conference of the States Parties shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.

Article 64 Secretariat
1. The Secretary-General of the United Nations shall provide the necessary secretariat services to the Conference of the States Parties to the Convention.
2. The secretariat shall:
(a) Assist the Conference of the States Parties in carrying out the activities set forth in article 63 of this Convention and make arrangements and provide the necessary services for the sessions of the Conference of the States Parties;
(b) Upon request, assist States Parties in providing information to the Conference of the States Parties as envisaged in article 63, paragraphs 5 and 6, of this Convention; and
(c) Ensure the necessary coordination with the secretariats of relevant international and regional organizations.

Chapter VIII
Final provisions
Article 65 Implementation of the Convention
1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.
2. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.

Article 66 Settlement of disputes
l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.
4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 67 Signature, ratification, acceptance, approval and accession
1. This Convention shall be open to all States for signature from 9 to 11 December 2003 in Merida, Mexico, and thereafter at United Nations Headquarters in New York until 9 December 2005.
2. This Convention shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Convention in accordance with paragraph 1 of this article.
3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.
4. This Convention is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary- General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Convention. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 68 Entry into force
1. This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.
2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Convention after the deposit of the thirtieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument or on the date this Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

Article 69 Amendment
1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and transmit it to the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the States Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the States Parties.
2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Convention. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.
3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.
4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.
5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Convention and any earlier amendments that they have ratified, accepted or approved.

Article 70 Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary- General.
2. A regional economic integration organization shall cease to be a Party to this Convention when all of its member States have denounced it.

Article 71 Depositary and languages
1. The Secretary-General of the United Nations is designated depositary of this Convention.
2. The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

Mutual assistance - request to Canada from Russia to obtain documents in pursuance of a corruption investigation - effect of failure by requesting country to specify type of legal assistance required

Whether documents could be sent in the following circumstances: (a) where they were not specifically referred to in the request; (b) where the documents might relate to offences that were the subject of an amnesty order in the requesting state; (c) where some documents were or may not be not relevant to the investigation

In the Matter of an application, Pursuant to section 17(2) of the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c.30 (4th Supp.), for an order to gather evidence for use by authorities in the Russian Federation in the case of Alexandre Mikailovich Pokidyshev and Alexandre Yakovlevich Rodionov;

And in The Matter of an application, Pursuant to section 20(1) of the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c.30 (4th Supp.), for an order to send evidence for use by authorities in the Russian Federation in the case of Alexandre Mikailovich Pokidyshev and Alexandre Yakovlevich Rodionov;

AND IN THE MATTER of an appeal, Pursuant to section 35 of the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c.30 (4th Supp.), from the said orders.)

Court of Appeal for Ontario
McMurtry CJO, Carthy and Doherty JJ.A

September 13, 1999

On appeal from the orders of Ferguson J. dated October 16, 1996 and German J. dated April 2, 1997.

The facts are set out in paragraphs 7-13

Cases referred to in the judgment
R. v Gladue (1999) 133 C.C.C. (3d) 385
Republic of Argentina v Mellino (1987) 33 C.C.C. (3d) 334
United Kingdom v Hrynyk (1996) 107 C.C.C. (3d) 104
United Kingdom v Ramsden (1996) 108 C.C.C. (3d) 289
United States of America v. Ross (1994), 44 B.C.A.C. 228
United States of America v. Ross (1995) 100 C.C.C. (3d) 320

For the appellant Mark Sandler
For the respondent Michael Bernstein

DOHERTY, JA

Overview

[1] Authorities in the Russian Federation are investigating allegations of theft and corruption involving Russian citizens, one of whom was a government official. The investigative trail led them to Canada where they requested the assistance of the Canadian authorities in pursuing the investigation. That request eventually resulted in the two orders which are the subject of this appeal. The appeal is taken pursuant to leave granted by Weiler J.A.

[2] The appellant, Xeme Inc., appeals from the order of Ferguson J. made under s. 18 of the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c.30 (4th Supp.) (the Act). That ex parte order, referred to as the "gathering" order, directed that copies of documents in the possession of the R.C.M.P. be turned over to Corporal James Hillyard of the R.C.M.P. The documents had been seized from the appellant's business premises and three banks. They were seized and detained by the R.C.M.P. under the authority of search warrants issued in connection with a criminal investigation they were conducting. The Canadian investigation arose as a result of information provided by the Russian investigators and concerned with some of the same events as the Russian investigation.

[3] The appellant also appeals from the order of German J. made under section 20 of the Act. She directed that the documents turned over to Corporal Hillyard be sent to the Russian Federation. This order is referred to as a "sending" order. The proceedings before German J. were taken on notice to the appellant (and other interested parties who are not parties to this appeal) and following a hearing in which counsel for the appellant cross-examined Corporal Hillyard and made extensive submissions.

[4] The appellant raises five issues:

> (1) Is the administrative arrangement between Canada and the Russian Federation ineffective by virtue of its failure to specify the type of legal assistance requested?
>
> (2) Could German J. order certain documents produced under the authority of the gathering order be sent to the Russian Federation even though those documents were not specifically referred to in the request made by the Russian Federation?
>
> (3) Could German J. make a sending order affecting documents that may have related to offences which were the subject of an amnesty order made by a competent authority in the Russian Federation?
>
> (4) Could German J. make a sending order even though Corporal Hillyard conceded on cross-examination that an unspecified number of the documents were not relevant to his investigation?
>
> (5) Could German J. make a sending order even though Corporal Hillyard conceded on cross-examination that an unspecified number of

the documents had not been examined or translated and that he could not, therefore, say they were relevant?

[5] Some of the grounds of appeal are directed at both orders. Others attack only the sending order. It is the appellant's contention that if any of them succeed, the sending order must be quashed.

[6] Before considering the grounds of appeal, I will summarize the factual background giving rise to the orders, the statutory scheme established by the Act, the diplomatic steps leading to this application and the orders made by Ferguson J. and German J.

The Factual Background

[7] The facts revealed by the lengthy investigations conducted by Canadian and Russian investigators are complicated. For present purposes, a simplified version of those events will suffice. Stable nuclear isotopes are used in various scientific, medical and commercial endeavours. These isotopes are very valuable as the technology needed to produce them is sophisticated and expensive. One gram of an isotope is worth anywhere from $1,000 to $15,000 on the world market. They are produced in only two locations in the world, one in Russia and one in the United States. Isotopes produced in Russia are designated either for the domestic or the world market. The price established on the domestic market is fixed by the government and is substantially below prices for the same isotopes on the world market.

[8] In 1990 and 1991, Alexandre Pokidyshev was the General Director of the government agency controlling the production and sale of stable nuclear isotopes by Russia. The investigation in Russia revealed that Pokidyshev conspired with one Alexandre Rodionov and others to illegally export approximately 800 isotopes from Russia. These isotopes were obtained at domestic prices under the pretence that they were to be sold in the domestic market. In fact, it was intended that the isotopes would be removed from Russia and sold on the world market at much higher prices.

[9] Rodionov, with the cooperation of Pokidyshev, transferred some 800 isotopes from Russia to Canada using various corporate entities under Rodionov's control. Pokidyshev received various bribes, some of which were transferred in and out of bank accounts in Canada. About $150,000 was traced through Pokidyshev's accounts in Canada.

[10] The appellant is one of the several corporate vehicles used by Rodionov to effect the removal of the isotopes from Russia, the transfer of the isotopes to Canada, the subsequent transfer of money to corporate entities in the United States controlled by Rodionov and the bribery of Pokidyshev. The investigation revealed that the appellant and the other corporate entities conducted no business apart from that related to the isotopes and that they were effectively controlled by Rodionov.

[11] In June 1994, the Russian Federation obtained Letters Rogatory in Canada to assist in their investigation. According to the material filed in

support of the application, the stable nuclear isotopes which had been stolen from Russia were illegally exported to Canada and were being sold on the world market through corporate entities in Canada. This information led the R.C.M.P. to commence a criminal investigation in August 1994. That investigation paralleled the Russian investigation but, of course, sought evidence in relation to the commission of offences in Canada. The R.C.M.P. executed several search warrants, including warrants on the business premises of the appellant. Material seized under those warrants was ordered detained for the purposes of the domestic investigation under the relevant provisions of the Criminal Code. The Russian authorities initially sought access to the documents under the provisions of the Criminal Code, but eventually abandoned that effort in favour of the applications which resulted in the orders under appeal.

[12] The R.C.M.P. have charged Rodionov with paying secret commissions contrary to s. 426 of the Criminal Code. Rodionov, who resided in Canada at one time, has since taken up residence in a country which does not have an extradition treaty with Canada. There is a warrant outstanding for his arrest.

[13] Some of the isotopes which are the subject matter of this investigation are currently being held by customs officials in the United States. They were seized from companies controlled by Rodionov. According to the U.S. authorities, these isotopes have a value of over $95 million on the world market.

The Statutory Scheme
[14] The arguments advanced on appeal turn largely on the interpretation of various sections of the Act. The process of statutory interpretation requires that the court look to the words of the statute, the scheme of the statute as a whole and the purpose and intention of Parliament when it passed the Act:
R. v. Gladue (1999), 133 C.C.C. (3d) 385 at 397-98 (S.C.C.).

[15] The purpose of this Act is clear. By 1988, when the Act was proclaimed, international crime had become a major problem. Criminals, especially sophisticated ones, used the limits imposed on police and prosecutors by national borders to facilitate their criminal schemes and avoid detection: *United Kingdom v. Ramsden* (1996), 108 C.C.C. (3d) 289 at 294-95 (Ont. C.A.), leave to appeal to S.C.C. refused May 1, 1997. In 1988, Canada had international obligations under various treaties and conventions to assist other states in the investigation and detection of crime, but had no domestic legislation in place to provide the necessary assistance and co-operation. The Act filled that void and must be read with that purpose in mind.

[16] The Act addresses various kinds of help that Canada and foreign states can provide to each other in their efforts to combat international crime. This appeal is concerned with Part I of the Act which provides various means by which a foreign state can obtain information from sources in Canada to assist that foreign state in its investigation of criminal activity.

[17] The overall scheme of Part I of the Act may be described in these terms. The foreign state seeking Canada's assistance must have a treaty with Canada as defined in the Act (s.2). Alternatively, the Minister of Foreign Affairs for Canada must have entered into an administrative arrangement with the foreign state providing for assistance in the particular investigation being conducted by the foreign state (s.6). If a treaty or administrative arrangement is in place, the foreign state may request the assistance of the Canadian authorities. Requests for assistance made by foreign states under the Act must be approved by the Minister of Justice (s.11(1), s.17(1)). If the Minister approves the request, a competent Canadian authority (in this case the Attorney General for Ontario) shall, where the request requires a court order for its implementation, make the necessary application to a superior court (s.11(2), s.17(2)). If the court grants the order and further orders the material sent to the foreign state, the material can only be sent if the Minister of Justice is satisfied that the foreign state will comply with the terms of the order (s.16, s.21).

[18] Under the Act, the Minister of Justice serves as the guardian of Canadian sovereignty interests. She effectively controls both ends of the process. No request goes forward without her approval and no sending order is implemented without her approval. The central role of the Minister of Justice in the process reflects the essentially political nature of decisions involving international relations. These decisions properly rest with the executive arm of the federal government which is responsible for the conduct of Canada's foreign relations: *Republic of Argentina v. Mellino* (1987), 33 C.C.C. (3d) 334 at 349 (S.C.C.).

[19] The judiciary also plays a role under Part I of the Act. In the request for assistance, the competent authority may seek the issuance of a search warrant (s.11, s.12), the examination of persons under oath in Canada (s.17, s.18), or the production of documents located in Canada (s.17, s.18). These compulsory measures can be invoked only where a judge of the Superior Court of the province so orders (s.12, s.18). In making the order, the judge must be satisfied that the statutory conditions precedent to the order have been met. Any information obtained under these orders can be sent to the foreign jurisdiction only if the court so orders (s.15, s.20). In exercising its jurisdiction to order information sent to the foreign jurisdiction, the court may place terms and conditions on the sending order (s.15(1)(b), s.20(2)). In deciding what terms, if any, to impose, the court must consider both the interests of parties affected by the order and the need to give effect to the request made by the foreign state.

[20] The judicial role under Part I of the Act is twofold. The judge must ensure compliance with the statutory conditions precedent to the making of the order requested and the judge must craft an order which balances the legitimate state and individual interests at stake: *United Kingdom v. Hrynyk* (1996), 107 C.C.C. (3d) 104 at 117 (Ont. Ct. Gen. Div.). The terms of the order will depend, to a large extent, on the nature of the order made and the individual interests affected by the order. For example, where the order involves the

taking of evidence from a person, it may well be necessary to impose terms which will protect that person's right not to incriminate herself: e.g. see *United States of America v. Ross* (1995), 100 C.C.C. (3d) 320 (Que. C.A.), leave to appeal to S.C.C. refused February 8, 1996; *United Kingdom v. Hrynyk, supra*.

The Diplomatic Steps

[21] On January 19, 1996, the Russian ambassador to Canada wrote to the Minister of Foreign Affairs requesting Canada's assistance in respect of an ongoing investigation by the Russian authorities in conjunction with the R.C.M.P. The investigation was said to relate to the offences of bribery, the payment and acceptance of secret commissions and the theft of stable nuclear isotopes from the Russian Federation. The details of that investigation were set out in Letters Rogatory which were incorporated by reference in the ambassador's letter and attached to that letter. The Letters Rogatory made it clear that the Russian authorities were investigating the possible misappropriation of the isotopes, the payment of bribes to a Russian official and the abuse of power by that official. The Letters Rogatory requested information concerning certain bank accounts and also asked that certain persons be questioned by the Canadian authorities.

[22] The ambassador's request concluded in these words:

> My Government should be grateful if Canadian authorities would provide this legal assistance through any means available under Canadian Law and proposes that this note, together with your reply, constitute an administrative arrangement providing for legal assistance which will enter into effect on the date of receipt of your reply and will remain in effect for six months from that date.

[23] The ambassador's reference to "administrative arrangement" takes one to section 6(1) of the Act which provides that the Minister of Foreign Affairs may, where there is no treaty between Canada and another state, "…enter into an administrative arrangement with that other state providing for legal assistance with respect to an investigation specified therein. …"

[24] By letter dated February 7, 1996, the Minister of Foreign Affairs for Canada acknowledged the ambassador's request and wrote:

> Under section 6 of the Mutual Legal Assistance in Criminal Matters Act of Canada, the Minister of Foreign Affairs may enter into an administrative arrangement with another state to provide legal assistance in a specific case. Your letter and this response will constitute such an administrative arrangement under the Act in order to provide legal assistance to the Russian Federation in the case of Mr. Alexandre Mikhailovich Pokidyshev, Mr. Alexandre Yakovlevich Rodionov, the Centre for Stable Isotopes and XEME Inc. as set out in the Russian letter rogatory of June 4, 1994, and supplementary letters rogatory of November 14, 1995 and November 20, 1995. This arrangement has been approved by the Minister of Justice of Canada and will remain in effect for six months from the date of this letter.

[25] On April 5, 1996, the Russian authorities made a formal request for assistance under s. 17 of the Act. That request set out the offences being investigated by the Russian authorities (bribery, theft, misuse of official position), detailed the facts which had been revealed by the Russian and R.C.M.P. investigations to that point and sought orders requiring production to the Russian authorities of copies of documents seized from the appellant's place of business and from various financial institutions.

[26] In July 1996, the Russian ambassador requested a renewal of the administrative arrangement. As with the initial request, the ambassador asked the Canadian authorities to provide "legal assistance through any means available under Canadian law." The Minister of Foreign Affairs renewed the administrative arrangement as of August 7, 1996.

[27] On September 17, 1996, the Canadian authorities, pursuant to section 17 of the Act, formally approved the Russian request dated April 5, 1996. That approval specifically referred to providing copies of documents seized by Canadian law enforcement agencies.

[28] On October 16, 1996, the Attorney General of Ontario, a "competent authority" under the Act, applied for a gathering order under section 17(2) of the Act. The application was supported by the affidavit of Corporal Hillyard. In that affidavit he summarized the diplomatic steps leading to the application, the Russian investigation and the Canadian investigation. Based on his investigation and the documents provided by the Russian authorities, he concluded that the seized documents would provide evidence to the Russian authorities in respect of offences over which the Russian court had jurisdiction. He listed these offences as theft (misappropriation of entrusted property), abuse of authority or power of office, giving and receiving a bribe, and intermediation in bribery. Corporal Hillyard also indicated that he had been made aware of an amnesty decree declared by the Russian Federation and had sought advice from the Russian authorities as to the relevance of that decree to this case. He stated that the authorities had advised him in writing that the decree would have no effect on the offences or persons being investigated in this matter. The letter was attached to his affidavit.

[29] The application led to the gathering order made by Ferguson J. and eventually to the sending order made by German J.

The Orders Under Appeal

[30] The gathering order made by Ferguson J. was made under section 18(2)(b) which provides that a judge may:

> …order a person named therein to make a copy of a record or to make a record from data and to produce the copy or record to the person designated under paragraph (c) ….

[31] Before Ferguson J. could make the order, he had to be satisfied that there were reasonable grounds to believe:

- that an offence had been committed with respect to which the foreign state had jurisdiction (s.18(1)(a)); and
- that evidence of the commission of the offence will be found in Canada (s.18(1)(b)).

[32] The affidavit of Corporal Hillyard filed before Ferguson J. provided ample grounds for both findings.

[33] In making his order, Ferguson J. was also required to consider whether the order should "include any terms or conditions that the judge considers desirable, including those relating to the protection of the interests of the person named therein and of third parties" (s.18(5)). Ferguson J. imposed such a term by requiring that notice be given to various parties, including the appellant, of any application to send the gathered material to the Russian Federation. That notice was given.

[34] Following compliance with the order of Ferguson J., Corporal Hillyard, the person designated to take possession of the documents by Ferguson J., made the report required by section 19 of the Act.

[35] The order of German J. was made under section 20(1), the relevant parts of which read:

> A judge to whom a report is made under subsection 19(1) may order that there be sent to the foreign state the report and any record or thing produced, as well as a copy of the order ….

[36] In making that order, German J. was required to consider whether any terms or conditions should be included in the sending order. Section 18(2) provides:

> An order made under subsection (1) may include any terms or conditions that the judge considers desirable, after having considered any representations of the Minister, the competent authority, the person who produced any record or thing to the person designated under paragraph 18(2)(c) and any person who claims to have an interest in any record or thing so produced, including terms and conditions
> (a) necessary to give effect to the request mentioned in subsection 17(1);
> (b) with respect to the preservation and return to Canada of any record or thing so produced; and
> (c) with respect to the protection of the interests of third parties.

[37] German J. imposed no such terms and, as I understand the submissions, no terms were sought before her or in this court.

The Grounds of Appeal

[38] Before turning to the specific grounds of appeal, I will address in more general terms the function of the judge under section 20 of the Act. Section

20(1) provides that a judge "may order the produced material sent to the foreign jurisdiction" and section 20(2) states that a judge "may impose terms and conditions on that order." Both subsections give the judge a discretion. Neither require, as section 15 does when the material gathered was seized by a search warrant, that the judge satisfy herself that the material was gathered in accordance with the gathering order. Nor must the judge acting under section 20 be satisfied that the material will afford evidence of the commission of an offence in a foreign jurisdiction. I do not regard section 20 as providing either an appeal from or a review of the gathering order under section18.

[39] The discretion vested in a judge by section 20(1) and section 20(2) is framed broadly so that the judge may consider the specific issues raised in a particular application made for an order to send material to the foreign jurisdiction. Those issues will involve a consideration of a number of factors, including the nature of the material which the applicant seeks to have sent to the foreign jurisdiction and the representations made by the applicant or any other party appearing on the application for the sending order. For example, where a party with an interest in the material contends that it has no connection to the investigation of any crime within the foreign state's jurisdiction, the judge will consider that submission and any evidence relevant thereto in deciding what order, if any, to make under section 20. Similarly, if an interested party contends that the section 18 order was based on false or inaccurate information or offers additional information which is relevant to the basis upon which the gathering order was obtained, the section 20 judge can hear evidence and any factual findings she makes can be factored into both her decision to make the order and her decision as to the terms, if any, to be included in the order. The factors to be considered by the section 20 judge will depend on the circumstances of each application.

[40] There are, however, limits on the discretion vested in the section 20 judge. These limits flow from the nature of the judicial role in the process contemplated by the Act. In my view, a judge under section 20 is not concerned with the advisability of assisting the foreign jurisdiction or whether the foreign jurisdiction will comply with any order the judge might make. Those matters must be addressed by the Minister of Justice. Similarly, I do not think that a judge on a section 20 application can be concerned with either the ultimate evidentiary value of the requested material to the foreign jurisdiction or with the conduct of any proceedings in the foreign jurisdiction: *United States of America v. Ross* (1994), 44 B.C.A.C. 228 (B.C.C.A.), per Southin J.A. (In Chambers).

> Issue 1: Is the administrative arrangement between Canada and the Russian Federation ineffective by virtue of its failure to specify the type of legal assistance requested?

[41] Counsel for the appellant submits that the exchange of letters between the Russian ambassador and the Minister of Foreign Affairs did not specify the type of legal assistance requested by the Russian Federation and could not, therefore, constitute an administrative arrangement, within the meaning of

section 6 of the Act. He submits that as there was no proper administrative arrangement the court had no jurisdiction to make any order under the Act.

[42] The respondent submits that when the documentation is considered in its entirety, the nature of the legal assistance requested is clearly set out.

[43] Section 6(1) permits the Minister of Foreign Affairs (Secretary of State), with the approval of the Minister of Justice, to enter into administrative arrangements with foreign states that do not have a treaty with Canada for the purpose of providing assistance in the investigation of crime. Section 6(4) of the Act directs that the arrangement will be effective "…with respect to the type of legal assistance that is specified therein."

[44] The administrative arrangement does not trigger any application under the Act or necessarily result in any judicial proceeding. It creates the necessary diplomatic channels for a subsequent request by a foreign state for assistance. If a request is made and if the Minister of Justice approves it, an application for assistance will be made to the court by a "competent authority." The judicial phase of the process contemplated by the Act begins with the application triggered by the foreign state's request and the Minister's approval under section 17.

[45] I doubt that a judge acting under section 18 or section 20 of the Act can review the terms of an administrative arrangement to determine whether these terms conform with the Act. Nothing in either section suggests that a judge should look behind the application and the request to satisfy herself that the Canadian and foreign authorities have properly established the necessary diplomatic channels for the making of the request.

[46] In any event, I need not come to any final conclusion as to whether a judge acting under section 18 or section 20 can consider the validity of the administrative arrangement. I am satisfied that the letters exchanged between the ambassador and the Secretary of State considered along with the appended documents made the nature of the requested assistance clear. The letter from the Russian ambassador referred to Letters Rogatory which set out the nature of the investigation in some detail. That same letter requested assistance "through any means available under Canadian law." The reply from the Secretary of State acknowledged that the letter and his response would "constitute such an administrative arrangement under the Act in order to provide legal assistance…." I think on any sensible reading of the ambassador's letter and the response, the administrative arrangement contemplated legal assistance by any or all of the means set out in Part I of the Act. In my view, section 6 does not require more specificity in the description of the type of legal assistance to be provided under an administrative arrangement. Certainly, the Minister of Justice could require more specificity, but that is a matter for the Minister.

[47] Furthermore, in this case, the Letters Rogatory made it clear that the Russian authorities wanted access to material in the possession of the R.C.M.P. When the exchange of letters is read in conjunction with the

description of the investigation in the attached Letters Rogatory, it is obvious that the Russians were seeking help in gaining access to materials seized by the R.C.M.P. in the course of their parallel investigation.

> Issue 2: Could German J. order certain documents which were the subject of the gathering order be sent to the Russian Federation when those documents were not specifically the subject of the request made by the Russian Federation?

[48] Copies of documents relating to an account of Alexandre Pokidyshev seized from a branch of the Canadian Imperial Bank of Commerce were included in the gathering order made by Ferguson J. These documents contained evidence of the bribes allegedly paid by Rodionov to Pokidyshev. The documents had been seized by the R.C.M.P. under the authority of a warrant issued after the Russian authorities had made their request for assistance in April 1996. Consequently, the Russian request did not refer to these documents. The affidavit sworn by Corporal Hillyard in support of the application for the gathering order did, however, describe these documents and set out reasonable grounds to believe that the documents could afford evidence of the commission of one of the enumerated offences in Russia.

[49] The appellant acknowledges that the documents were relevant to the investigation, but submits that as they were not specifically identified in the request for assistance, they could not be included in the gathering order. It follows, the appellant contends, that if they were not properly the subject of a gathering order, German J. should not have ordered them sent to the Russian Federation. This submission relates to five of the hundreds of documents that are subject to the gathering and sending orders.

[50] This submission is without merit. Nothing in the Act suggests that the request from the foreign state must comply with the statutory prerequisites to a gathering order set out in section 18(1). The section refers by incorporation to the application being made by the "competent authority." In this case, the application contains the affidavit of Corporal Hillyard and the attachments to that affidavit including the request. Ferguson J. was entitled to look at all of the information filed on the application in determining what documents should be included in the gathering order. Corporal Hillyard's affidavit clearly establishes the basis for including the copies of the documents related to Pokidyshev's bank account.

[51] Not only does the language of the Act not support this submission, but there is also considerable merit to the respondent's contention that this interpretation would render the Act useless in some situations. In some cases, although not this one, the foreign state will not be able to identify specific documents, or the exact location of the documents. In such situations, if the appellant is correct, a foreign state could not make an effective request even though the "competent authority" could provide an affidavit with the necessary information. The suggestion that in those cases the "competent authority" should first give the information to the foreign authority who can then include it in the request would create a needless formality.

[52] There is a second reason why this submission must be rejected. It relates to copies of documents that had been seized from Pokidyshev's bank account. The appellant has no connection to or interests in those documents. There is nothing in the material which provides any basis upon which the appellant could have standing to challenge the application for an order sending these documents to the Russian Federation: *United Kingdom v. Ramsden, supra*, at pp. 303-306.

> Issue 3: Could German J. make a sending order when the documents related to offences which were the subject of an amnesty order made by a competent authority in the Russian Federation?

[53] In his factum, counsel for the appellant submits:

> The order to gather and send extend to documents which, on the uncontested evidence, may relate solely to offences which are no longer within the jurisdiction of the Russian Federation to prosecute.

[54] In making this submission, the appellant relies on the evidence that some of the offences may have been the subject of an amnesty order. On the material contained in the application for the gathering order and on the evidence heard before German J., there appears to be some controversy as to the effect of the amnesty order. There is direct evidence that the order would have no effect on any of the charges being investigated. It is also acknowledged by the appellant that at least two of the offences are not affected by the amnesty order. In my view, it would have been inappropriate for either Ferguson J. or German J. to come to any conclusion as to the scope of the amnesty order or its effect on the jurisdiction of the Russian court. The possibility of an amnesty in Russia was no reason to refuse to make the orders requested.

[55] In any event, the offences referred to in the material all arise out of the same chain of events. All of the documents sought were relevant to the investigation of all of the offences. It could not realistically be said that a particular document was relevant to one offence but not to the others. Consequently, whatever the scope and effect of the amnesty order, it had no bearing on the exercise of the authority granted under both section 18 and section 20.

> Issue 4: Could German J. make a sending order even though Corporal Hillyard conceded on cross-examination that an unspecified number of the documents were not relevant to his investigation?

[56] Counsel for the appellant submits that German J. had no jurisdiction to send documents to the Russian Federation because Corporal Hillyard conceded on cross-examination that some of the documents were irrelevant to his investigation. As I understand the submission, counsel argues that this concession required that German J. refuse to order that any of the documents be sent to Russia.

[57] Counsel acknowledges that at the investigative stage of a criminal proceeding, the court must take a generous view of relevance. This is particularly so in complex commercial investigations. Counsel also accepts that the judge acting under section 20 is not concerned with the ultimate admissibility of any of the documents in a Russian court. He contends, however, that no matter how generous a view of relevance one takes, it cannot extend to documents that the officer in charge of the investigation has deemed to be irrelevant.

[58] The gathering and sending orders cover a voluminous number of documents. Most of the material which had been seized pursuant to the search warrant issued under the Criminal Code were included in the gathering and sending orders. On the evidence adduced before German J., the appellant's business related exclusively to the isotopes which were the subject matter of the Russian investigation. The bulk of the documents which were the subject of the sending order were copies of documents seized from the appellant's place of business or from its accounts at various banks. A small number of the documents were seized from banks and related to accounts of other individuals or corporations. The appellant, of course, had no standing to object to any order with respect to these documents.

[59] It is important to recognize the nature of the appellant's submission before German J. She was not asked to examine specific documents and to exclude those documents from the sending order because they were not relevant. Rather, she was asked to refuse to make any order on the basis that the cross-examination of Corporal Hillyard demonstrated that the Russian authorities were on a "fishing expedition."

[60] German J. was entitled to approach the question of relevance on a broad basis. In my view, relevance in this context means helpful to the authorities in discovering, understanding and proving the complex events underlying the allegations which were the subject matter of the Russian investigation.

[61] In cross-examination, Corporal Hillyard acknowledged that he had decided that some of the documents were not relevant to his investigation and that copies of those documents were included among those which were to be sent to the Russian Federation. Corporal Hillyard was not asked how many documents came within this category or the basis upon which he had concluded that the documents were not relevant to his investigation.

[62] I think the appellant incorrectly equates Corporal Hillyard's determination that certain documents were not relevant to the domestic investigation with a conclusion that they could have no relevance to the ongoing Russian investigation. The two investigations were joint, but not the same. The Canadian investigation related to specific offences over which the Canadian courts had jurisdiction and not to potential offences which were within the Russian jurisdiction. Corporal Hillyard's determination of relevance was also no doubt based in part on his knowledge of the documents and the information available to the Canadian authorities as a result of the seizure and

examination of the documents. The Russian authorities had not had the opportunity to see all of the documents to assess their relevance in the context of their investigation. Corporal Hillyard's assessment of relevance in the context of the specific Canadian allegations and informed by the Canadian rules of evidence and the knowledge gained by the examination of the documents is not determinative of the relevance of the documents to the Russian authorities. German J. was entitled to consider all of the circumstances.

[63] Given that the appellant had no business other than that related to the isotopes, it seems an obvious conclusion that all of the business and financial records of the company were relevant in the broad sense of the word to a criminal investigation involving those isotopes.

[64] It would be inconsistent with the spirit of international co-operation underlying the Act to foreclose access to all of the documents, many of which have undoubted relevance to the Russian investigation, simply because an officer had conceded that some were not relevant to the domestic investigation. The so-called admission made by Corporal Hillyard did not deprive German J. of the jurisdiction to make the sending order. Nor did it support a finding that the Russian request was a "fishing expedition" or provide a reason for refusing to make the sending order.

> Issue 5: Could German J. make a sending order even though Corporal Hillyard conceded that an unspecified number of the documents had not been examined or translated and he could not, therefore, say that they were relevant?

[65] The argument in support of this ground of appeal is essentially the same as that advanced on the fourth ground of appeal. If anything, it is weaker because it is premised on an inability to positively say that certain documents were relevant as opposed to an admission that certain documents were not relevant in the officer's opinion. My analysis and conclusion with respect to the fourth ground of appeal apply to this argument as well and I need not repeat them.

Conclusion
[66] I would dismiss the appeal.

MCMURTRY C.J.O.
I agree

CARTHY J.A.
I agree

Constitutional law – search and seizure powers – power to authorise search and seizure warrants for purposes of a "preparatory investigation" – whether power contravened constitutional right to privacy - principles of constitutional interpretation
Constitution of South Africa – National Prosecuting Authority Act 1998

INVESTIGATING DIRECTORATE: SERIOUS ECONOMIC OFFENCES AND OTHERS v HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS

Constitutional Court of South Africa
Chaskalson P, Goldstone J, Langa DP, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Cameron AJ
16 March, 25 August 2000

The facts appear in paragraphs 2-3

Cases referred to in the judgment
Bernstein and Others v Bester and Others NNO 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC).
De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC).
National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC)
Park-Ross and Another v Director: Office for Serious Economic Offences 1995 (2) BCLR 198 (C); 1995 (2) SA 148 (C)

For the applicants: G Marcus SC, L Bekker and M Chaskalson
For the respondents: D H Soggot SC and K Moroka

LANGA DP
Introduction
[1] The National Prosecuting Authority Act[1] (the Act) makes provision for the search and seizure of property by an Investigating Director in the office of the National Director of Public Prosecutions, to facilitate the investigation of certain specified offences. The power to search and seize property may be exercised on the authority of a warrant issued by a judicial officer. This case is concerned with the constitutionality of the provisions that authorise the issuing of warrants of search and seizure for purposes of a "preparatory investigation", one of two investigatory procedures provided for in Chapter 5 of the Act.

The facts of the case
[2] On 17 November 1999, search warrants were authorised by the first respondent, a judge of the Transvaal High Court (the High Court), pursuant to an application made to him in chambers by the Investigating Directorate for Serious Economic Offences and its Investigating Director, respectively the second and third respondents. The warrants

empowered the second and third respondents to conduct a search and seizure operation, for purposes of a preparatory investigation, at the premises of the "Wheels of Africa Group of Companies" and at the home of the ninth applicant, Mr Muller Conrad Rautenbach. The search was carried out on 18 and 19 November 1999 and a large quantity of documents, records and data - three lorry-loads in fact - were seized.

[3] Applicants immediately approached the High Court challenging the legal and constitutional validity of the operation. The relief they sought was wide-ranging. In his judgment delivered on 23 December 1999,[2] Southwood J, before whom the matter was argued, declared certain provisions of the Act to be unconstitutional. This application, brought under sections 167(5)[3] and 172(2)(a)[4] of the Constitution, is for the confirmation of that declaration of invalidity, which is contained in paragraph 1 of the order of Southwood J and reads:

> "The provisions of ss 29(5), 28(13) and 28(14) of the National Prosecuting Authority Act 32 of 1998 are declared to be inconsistent with the Constitution and invalid, to the extent only that they permit the issue of a warrant to authorise the search and seizure of property and accordingly the invasion of privacy of persons where there are no reasonable grounds to suspect that a specified offence has been committed."[5]

The rest of the order is not relevant for purposes of this judgment. Confirmation of the order is opposed by the second, third, fourth, fifth and sixth respondents, who have also filed an appeal contending that the provisions in question are consistent with the Constitution. The dispute before us concerns the constitutionality of the relevant provisions only in so far as they apply to a preparatory investigation. For the sake of convenience, the parties will be referred to in this judgment in the manner in which they were cited in the application before the High Court.

The scheme of the Act

[4] The Act came into force on 16 October 1998. It provides for the establishment of a single national prosecuting authority in the Republic pursuant to section 179 of the Constitution.[6] The national prosecuting authority consists of a national director, deputy national directors, directors, deputy directors and prosecutors.[7] In terms of the Act, the President may establish up to three Investigating Directorates within the office of the National Director of Public Prosecutions[8] in respect of specific offences or specified categories of offences. Three Investigating Directorates have, as a consequence, been established; the first is for the investigation of organised crime and public safety offences,[9] the second for serious economic offences[10] and the last for the investigation of corruption.[11] The powers and duties of the Investigating Directorates are set out in Chapter 5 of the Act.

[5] This matter is concerned with the activities of the Investigating Directorate for Serious Economic Offences. It is necessary to draw attention to section 26(1) of the Act which defines a "specified offence" as:

> "any offence which in the opinion of the *Investigating Director* falls within the category of offences set out in the proclamation referred to in section 7(1) in respect of the *Investigating Directorate* concerned."

The specified offences that the second respondent is required to investigate are set out in the Schedule to Proclamation R123 of 1998. They are:

> "(a) Any offence of —
>
> (i) fraud;
>
> (ii) theft;
>
> (iii) forgery and uttering; or
>
> (iv) corruption in terms of the Corruption Act, 1992 (Act No. 94 of 1992); or
>
> (b) any other —
>
> (i) economic common law offence; or
>
> (ii) economic offence in contravention of any statutory provision, which involves patrimonial prejudice or potential patrimonial prejudice to the State, any body corporate, trust, institution or person,
>
> which is of a serious and complicated nature."

[6] Central to Chapter 5 are the provisions of sections 28 and 29, which deal respectively with investigations and searches. Section 28 makes provision for two forms of investigatory procedure. The first is an "inquiry"[12] which may be held if the Investigating Director:

> "has reason to suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence. . ."

The second procedure is a "preparatory investigation"[13] which may be held if the Investigating Director considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an inquiry.

[7] Section 28 has fourteen subsections. Subsections (1) to (12) are concerned with matters pertaining to the conduct of an inquiry. Subsections (13) and (14) deal specifically with a preparatory investigation. The latter two provisions read as follows:

> "(13) If the *Investigating Director* considers it necessary to hear evidence in order to enable him or her to determine if there are reasonable grounds to conduct an investigation in terms of subsection (1) (a), the *Investigating Director* may hold a preparatory investigation.
>
> (14) The provisions of subsections (2) to (10), inclusive, and of sections 27 and 29 shall, with the necessary changes, apply to a preparatory investigation referred to in subsection (13)."

A preparatory investigation is thus held if the Investigating Director is uncertain whether there are reasonable grounds to conduct an inquiry. At least two kinds of doubt may give rise to the decision to conduct a preparatory investigation rather than an inquiry: doubt whether there is reason to believe that an offence has been committed, on the

one hand, and doubt whether an offence, suspected to have been committed, is in fact a specified offence.

[8] The effect of the reference to section 29 in section 28(14) is to permit an Investigating Director to invoke the powers of search and seizure for purposes of a preparatory investigation. Section 29 provides for the issuing of search warrants for purposes of the inquiry referred to in section 28(1), and of the preparatory investigation held under section 28(13). It also provides for the manner in which the warrants may be executed. Armed with a warrant, an Investigating Director has extensive powers. The warrant authorizes the examination and seizure of any object, the copying of, or the taking of portions from any document or book located on or in the premises, that has or may have a bearing on the inquiry or preparatory investigation, as the case may be.[14]

[9] It was common cause, and rightly so in my view, that when the officials of the state exercise the section 29 powers of search and seizure, the right to privacy which is guaranteed under section 14 of the Constitution is implicated. Section 14 of the Constitution provides that:

> "Everyone has the right to privacy, which includes the right not to have —
>
> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[10] The Act places certain constraints on the exercise of the powers of search and seizure. Section 29(4) requires that there be prior judicial authorisation before a search and seizure is conducted by an Investigating Directorate. The nature of the judicial officer's function in an application for a warrant is governed by the provisions of section 29(5). The two subsections read as follows:

> "(4) Subject to subsection (10), the premises referred to in subsection (1) may only be entered, and the acts referred to in subsection (1) may only be performed, by virtue of a warrant issued in chambers by a magistrate, regional magistrate or judge of the area of jurisdiction within which the premises is situated . . . .
>
> (5) A warrant contemplated in subsection (4) may only be issued if it appears to the magistrate, regional magistrate or judge from information on oath or affirmation, stating —
>
> (a) the nature of the inquiry in terms of section 28;
> (b) the suspicion which gave rise to the inquiry; and
> (c) the need, in regard to the inquiry, for a search and seizure in terms of this section,

that there are reasonable grounds for believing that anything referred to in subsection (1) is on or in such premises or suspected to be on or in such premises."

The issues

[11] In this Court, the applicants argued in support of the High Court's finding that section 29(5), read with sections 28(13) and 28(14), was unconstitutional. Mr Marcus, who presented argument on their behalf, contended that the impugned provisions, properly interpreted, do not require that there should be a reasonable suspicion that a specified offence has been committed before a judicial officer may authorise a search warrant for purposes of a preparatory investigation. He argued that the purpose of a preparatory investigation is to determine whether there are grounds for such a reasonable suspicion so that an inquiry may be held. To read section 29(5) so as to include the requirement of a reasonable suspicion before a search warrant may be issued, in the context of a preparatory investigation, would be self-defeating. The provisions are accordingly in violation of the Constitution since they permit the granting of a search warrant in the absence of a reasonable suspicion that a specified offence has been committed.

[12] Mr Marcus further drew attention to section 29(1) which refers to "any object . . . which has a bearing or might have a bearing on the inquiry in question". He submitted that the language, which he described as wide, strengthens the view that the provisions, as they stand, permit premises to be searched for purposes of a preparatory investigation in the absence of a reasonable suspicion that a specified offence has been committed. I pause here to comment that, in my view, this last proposition is somewhat overstated. I do not think that the use of the phrase "might have a bearing" is anything more than a recognition by the legislature that, in order to determine whether a particular object has a bearing on a particular investigation, it may be necessary to examine it, make copies of or take extracts from it or even seize such object. Mr Marcus submitted further that the order by Southwood J did not go far enough and that appropriate relief would be an order that the words "and 29" be severed from section 28(14). The effect of the suggested severance would be that the search and seizure provisions in section 29 would not be applicable to preparatory investigations.

[13] In his submissions for the respondents, Mr Soggot agreed with the applicants' contention that a provision which authorized the issue of a warrant of search and seizure for purposes of a preparatory investigation in the absence of reasonable grounds for the suspicion that an offence has been committed would be constitutionally impermissible. He argued, however, that properly construed, the provisions do not permit a judicial officer to authorise such a warrant for purposes of a preparatory investigation, unless there are reasonable grounds to suspect that an offence has been committed. He advanced two reasons for his contention. First, he submitted that section 29(5) explicitly provides that prior to issuing a search warrant, a judicial officer must be satisfied that there are reasonable grounds to believe that some object which is connected to the preparatory investigation, or that might have a bearing on such investigation, is on the premises sought to be searched. This necessarily involves, in the first place, an assessment by the judicial officer of the reasonableness or otherwise of the suspicion that an offence has been committed, and thereafter, a determination whether or not there are reasonable grounds to

suspect that the article which is the object of the search has a bearing, or might have a bearing on the investigation of that crime. Secondly, Mr Soggot relied on the fact that section 29(4) prescribes prior judicial authorisation before a search and seizure operation can be undertaken. It could be accepted that a judicial officer, because of his or her training, qualifications, experience and the nature of judicial office, would not act without applying his or her mind to the issue at hand. A judicial mind would thus be brought to bear on the reasonableness of the belief that an offence had been committed. Mr Soggot argued that to hold otherwise would render the requirement of prior judicial authorisation pointless. He accordingly submitted that although the impugned provisions constituted a limitation of the privacy right, they were not constitutionally objectionable.

[14] The arguments presented by counsel in the High Court did not distinguish between a reasonable suspicion that a specified offence has been committed and a reasonable suspicion that an offence, which might be a specified offence, has been committed. The judgment by Southwood J, likewise, did not make that distinction which, as appears later in this judgment, is crucial to a proper interpretation of the relevant provisions.

The right to privacy

[15] The right to privacy has previously been discussed in judgments of this Court.[15] In *Bernstein and Others v Bester and Others NNO*,[16] Ackermann J characterises the right to privacy as lying along a continuum,[17] where the more a person inter-relates with the world, the more the right to privacy becomes attenuated. He stated:

> "A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation."[18] (Footnotes omitted)

[16] The right, however, does not relate solely to the individual within his or her intimate space. Ackermann J did not state in the above passage that when we move beyond this established "intimate core", we no longer retain a right to privacy in the social capacities in which we act. Thus, when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied. Wherever a person has the ability to decide what he or she wishes to disclose to the public and the expectation that such a decision will be respected is reasonable, the right to privacy will come into play.

[17] The protection of the right to privacy may be claimed by any person. The present matter is concerned with the right to privacy of Mr Rautenbach, a natural person, and nine business entities, which are juristic persons. Neither counsel addressed argument on the question of whether there was any difference between the privacy rights of natural persons and juristic persons. But what is clear is that the right to privacy is applicable, where appropriate, to a juristic person. The applicability

of the Bill of Rights to a juristic person is set out in section 8(4) of the Constitution which states:

> "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

[18] As we have seen, privacy is a right which becomes more intense the closer it moves to the intimate personal sphere of the life of human beings, and less intense as it moves away from that core. This understanding of the right flows, as was said in *Bernstein*,[19] from the value placed on human dignity by the Constitution. Juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can never be as intense as those of human beings. However, this does not mean that juristic persons are not protected by the right to privacy.[20] Exclusion of juristic persons would lead to the possibility of grave violations of privacy in our society, with serious implications for the conduct of affairs. The state might, for instance, have free licence to search and seize material from any non-profit organisation or corporate entity at will. This would obviously lead to grave disruptions and would undermine the very fabric of our democratic state. Juristic persons therefore do enjoy the right to privacy, although not to the same extent as natural persons. The level of justification for any particular limitation of the right will have to be judged in the light of the circumstances of each case. Relevant circumstances would include whether the subject of the limitation is a natural person or a juristic person as well as the nature and effect of the invasion of privacy.

[19] The Act itself recognises the serious implications which the search and seizure provisions have on the rights of those who are subjected to them. Section 29(2) provides:

> "Any entry upon or search of any premises in terms of this section shall be conducted with strict regard to decency and order, including:
>
> (a) a person's right to, respect for and the protection of his or her dignity;
> (b) the right of a person to freedom and security; and
> (c) the right of a person to his or her personal privacy."

[20] As it is clear that the search and seizure provisions of section 29 constitute a limitation to the right of privacy, it must be determined whether the limitation is constitutionally justifiable in terms of the provisions of section 36(1) of the Constitution.[21] It is necessary, for the purpose of this inquiry, to ascertain the proper meaning of the relevant provisions in the Act, in particular that of section 29(5). I start with a consideration of the principles which are applicable to such an interpretation.

Interpreting statutory provisions under the Constitution

[21] Section 39(2) of the Constitution provides a guide to statutory interpretation under this constitutional order. It states:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

[22] The purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.

[23] In *De Lange v Smuts NO and Others*,[22] Ackermann J stated that the principle of reading in conformity does:

> "no more than give expression to a sound principle of constitutional interpretation recognised by other open and democratic societies based on human dignity, equality and freedom such as, for example, the United States of America, Canada and Germany, whose constitutions, like our 1996 Constitution, contain no express provision to such effect. In my view, the same interpretative approach should be adopted under the 1996 Constitution."[23]

Accordingly, judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section.

[24] Limits must, however, be placed on the application of this principle.[24] On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them.[25] A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained.

[25] In National *Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[26] it was said that

> "[t]here is a clear distinction between interpreting legislation in a way which 'promote[s] the spirit, purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172(1)(b), following upon a declaration of constitutional invalidity under s 172(1)(a) . . . . The

first process, being an interpretative one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretative aids, is found to be constitutionally invalid."[27]

[26] It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance. I now turn to consider the proper interpretation to be given to section 29(5).

The meaning of section 29(5)

[27] The real issue between the parties was whether all searches under section 29, in respect of preparatory investigations, are inconsistent with the Constitution. Mr Marcus, relying on his interpretation of the impugned provisions,[28] argued for unconstitutionality because, in the case of a preparatory investigation, there could never be a reasonable suspicion that a specified offence had been committed. In defending their constitutionality, Mr Soggot maintained that properly interpreted, the provisions require the judicial officer to authorise a warrant only if such reasonable grounds exist.

[28] The submissions of both parties proceeded from the view, which was common cause, that a search and seizure under section 29, for purposes of a preparatory investigation, would not be constitutionally justifiable in the absence of a reasonable suspicion that an offence has been committed. For reasons which appear later, I agree with this conclusion. I should emphasize at this stage, however, that this judgment is concerned only with the constitutionality of search warrants issued for purposes of a preparatory investigation under section 29. It should not be understood as stating that all searches, in whatever circumstances, are subject to the requirement of a reasonable suspicion that an offence has been committed.

[29] In his judgment, Southwood J adopted the interpretation proposed by Mr Marcus, and held accordingly that the impugned provisions were an unjustifiable violation of the right to privacy. Having reached this conclusion he made an order of notional severance declaring the relevant provisions of the Act to be inconsistent with the Constitution to the extent only that they permit searches where there are no reasonable grounds to suspect that a specified offence has been committed. The practical effect of this order was no different to that which would have followed had the interpretation which was advanced by the respondents in their argument in the High Court been adopted.

[30] The Act is not explicit regarding the circumstances under which a search warrant may be authorised for purposes of a preparatory investigation. More specifically, it is not immediately obvious whether or not a warrant may be authorised by a judicial officer in the absence of a reasonable suspicion that an offence has been committed. The answer to this depends on a proper interpretation of section 29(5). In this respect, it is necessary firstly to spell out the different functions of the two investigatory procedures.

[31] Section 28(1)(a) relates to the institution of an inquiry. Its provisions are not applicable to a preparatory investigation. The section is concerned with the jurisdictional facts which must exist before the Investigating Director may conduct an inquiry. He or she must, among other things, have "reason to suspect that a

specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence." Section 28(13), on the other hand, is concerned only with a preparatory investigation. There is no corresponding requirement, as in the case of an inquiry, that the Investigating Director must have "reason to suspect" before a preparatory investigation may be held. This form of procedure is instituted in order to enable the Investigating Director to determine if there are reasonable grounds to conduct an inquiry. It is therefore a preliminary step and is not an end in itself. It is a procedure that is available to an Investigating Director who has insufficient grounds or information to form a reasonable suspicion that a specified offence has been committed. A mere suspicion may therefore trigger a preparatory investigation, provided the purpose is to enable the Investigating Director to decide whether or not there are in fact reasonable grounds for a suspicion that a specified offence has been or is being committed.

[32] Section 28(14) provides that the provisions of sections 28(2) to 28(10) inclusive, and of sections 27 and 29 shall, "with the necessary changes",[29] apply to a preparatory investigation. In the context of the Act, the phrase "with the necessary changes" means that, where applicable, the words "preparatory investigation" should be substituted for the term "inquiry". The construction of the relevant sections "with the necessary changes" must also be undertaken in the light of the provisions of section 39(2) of the Constitution.

[33] Section 27 makes provision for persons who suspect that a specified offence has been or is being committed or that an attempt has been or is being made to commit such an offence, to lay the matter before the Investigating Director who may then decide to conduct an inquiry or preparatory investigation. It should be noted that section 27 requires that such person should have reasonable grounds to suspect that a specified offence has been or is being committed. This does not mean that the Investigating Director should be satisfied on the basis of such evidence alone that an inquiry in terms of section 28(1)(a) is warranted. Section 28(1)(a) requires that the Investigating Director should have "reason to suspect" that a specified offence has been committed. Depending on the information received, he or she may proceed either in terms of section 28(1)(a) or section 28(13). The choice depends on whether there is reason to suspect that a specified offence has been committed. Section 28(13) caters for those instances where the Investigating Director does not have sufficient information to institute an inquiry in terms of section 28(1)(a).

[34] Subsections (2) to (10) of section 28 deal with the manner in which inquiries and preparatory investigations are to be conducted, and make provision for the taking of evidence and the summoning of witnesses to appear before the person designated to conduct the inquiry. Section 29 makes provision for the search and seizure of property in connection with inquiries. Applying section 29 "with the necessary changes" to a preparatory investigation, section 29(5) would have to be read as follows:

> "A warrant . . . may only be issued if it appears to the [judicial officer] from information on oath or affirmation, stating —
>
> (a) the nature of the preparatory investigation…;
> (b) the suspicion which gave rise to the preparatory investigation; and

(c) the need, in regard to the preparatory investigation, for a search and seizure in terms of this section,

that there are reasonable grounds for believing that [anything connected with the preparatory investigation is . . . or is suspected to be on such premises]."

[35] Subsections (4) and (5) of section 29 are concerned with authorisation by a judicial officer before a search and seizure of property takes place. The section is an important mechanism designed to protect those whose privacy might be in danger of being assailed through searches and seizures of property by officials of the state. The provisions mean that an Investigating Director may not search and seize property, in the context of a preparatory investigation, without prior judicial authorisation.

[36] Section 29(5) prescribes what information must be considered by the judicial officer before a warrant for search and seizure may be issued. It must appear to the judicial officer, from information on oath or affirmation, that there are reasonable grounds for believing that anything connected with the preparatory investigation is, or is suspected to be on such premises. That information must relate to (a) the nature of the preparatory investigation; (b) the suspicion that gave rise to the preparatory investigation; and (c) the need for a warrant in regard to the preparatory investigation. On the face of it, the judicial officer is required, among other things, to be satisfied that there are grounds for a preparatory investigation; in other words, that the Investigating Director is not acting arbitrarily. Further, the judicial officer must evaluate the suspicion that gave rise to the preparatory investigation as well as the need for a search for purposes of a preparatory investigation.

[37] It is implicit in the section that the judicial officer will apply his or her mind to the question whether the suspicion which led to the preparatory investigation, and the need for the search and seizure to be sanctioned, are sufficient to justify the invasion of privacy that is to take place. On the basis of that information, the judicial officer has to make an independent evaluation and determine whether or not there are reasonable grounds to suspect that an object that might have a bearing on a preparatory investigation is on the targeted premises.

[38] It is also implicit in the legislation that the judicial officer should have regard to the provisions of the Constitution in making the decision. The Act quite clearly exhibits a concern for the constitutional rights of persons subjected to the search and seizure provisions. That is the apparent reason for the requirement in sections 29(4) and (5) that a search and seizure may only be carried out if sanctioned by a warrant issued by a judicial officer. The Act repeals and takes the place of the Investigation of Serious Economic Offences Act,[30] which was the subject of the litigation in *Park-Ross and Another v Director: Office for Serious Economic Offences*.[31] In that case, a provision authorising searches to be carried out without the sanction of a judicial officer was declared to be unconstitutional by Tebbutt J who, during the course of his judgment, stated:

"It would, I feel, accord with the spirit and purport of the Constitution if it was provided that, before any search or seizure pursuant to s 6 of the Act, prior authorisation be obtained from a magistrate or from a Judge of the Supreme Court in Chambers for such search and seizure. Any application for such

authorisation should set out, at the very least, under oath or affirmed declaration, information as to the nature of the inquiry in terms of s 5, the suspicion having given rise to that inquiry, and the need, in regard to that inquiry, for a search and seizure in terms of s 6."[32]

[39] In enacting section 29(5), the legislature clearly intended to give effect to the *Park-Ross* judgment, and to ensure that the search and seizure of property will be carried out in accordance with the provisions of the Constitution. The Act uses the very language which Tebbutt J suggested was necessary to give effect to the "spirit and purport" of the Constitution.

[40] The concern for the constitutional rights of those affected by the invasion of privacy as a result of the execution of a search warrant is also apparent, as stated earlier,[33] from the provisions of section 29(2) which require the execution of a search warrant to be conducted with strict regard to decency and order, including respect for a person's right to dignity, to personal freedom and security and to personal privacy. Persons carrying out searches are thus obliged by the legislation to comply with the requirements of the Constitution. Unless that intention is clear from the language of the statute, such legislation should not be construed as contemplating that judicial officers will authorise the search without regard to the constitutional rights of the persons likely to be affected.

[41] The Constitution also prescribes that all conduct of the state must accord with the provisions of the Bill of Rights. This is evident from section 8(1) of the Constitution which provides that:

"[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

In *De Lange v Smuts*,[34] Ackermann J, in dealing with a provision authorising a magistrate at an administrative inquiry to commit a witness to prison for failing to answer questions satisfactorily, said:

"Section 66(3) does not in express terms prescribe the procedures to be followed before an examinee may be committed to prison. More importantly, it contains no explicit provision which obliges a presiding officer to conduct the proceedings antecedent to committal in any manner inconsistent with any norm of procedural fairness required by the Constitution or the common law. The inescapable conclusion, in my view, is that, whosoever is constitutionally permitted to issue a committal warrant under s 66(3), it is implicit in the provisions of the subsection that the relevant proceedings must be conducted by such presiding officer in a manner which is not inconsistent with any norms of procedural fairness required by the Constitution or the common law."[35]

[42] Sections 20 and 21[36] of the Criminal Procedure Act[37] require that searches be undertaken in connection with criminal investigations only if there is reasonable suspicion that an offence has been committed, and that the search is designed to secure evidence of such an offence.

[43] In the light of our criminal procedure, the legislative history and the specific provisions of section 29(2) of the Act, the legislature must be taken to have

contemplated that a judicial officer would not exercise a discretion to issue a warrant if that would result in an impermissible violation of the right to privacy of the persons to be searched.

[44] The Investigating Directorate is a special unit established under the Act to conduct investigations into serious and complex offences. If it were unable to commence investigations until it had a reasonable suspicion that a specified offence had been committed, initial investigations which may be sensitive and crucial would have been beyond its jurisdiction. The provisions of the Act authorising the Investigating Directorate to engage in preparatory investigations serve the purpose of enabling the Investigating Directorate to be involved in sensitive investigations from an early stage. The purpose therefore is to assist the Investigating Director to cross the threshold from a mere suspicion that a specified offence has been committed to a reasonable suspicion, which is a pre-requisite for the holding of an inquiry.

[45] As outlined at paragraph 7 above, a suspicion, short of a reasonable suspicion that a specified offence has been committed could arise either because there is uncertainty whether an offence has been committed, or because there is uncertainty that an offence in respect of which there is reasonable suspicion, is in fact a specified offence.

[46] In the present case, for instance, the specified offences in the listed schedule are fraud, theft, forgery and uttering, corruption in terms of the Corruption Act,[38] and any other economic common law offence, or economic offence in contravention of any statutory provision which involves patrimonial loss.[39] In order for these offences to fall within the jurisdiction of the Investigating Directorate, they must, however, be of a serious and complicated nature. As we have seen, Investigating Directorates have been established for two other categories of specified offences.[40] In one of the directorates, the requirement is that the offence in question be committed in an organised fashion or that it is one which may endanger the safety or security of the public;[41] in the other, the requirement is that the offence in question must relate to corruption.

[47] There may well be circumstances in which investigations commence and reach the stage of a reasonable suspicion that an offence has been committed, but further investigation is necessary in order to determine whether the matter is one that should be investigated by the Investigating Directorate under section 28(1), or which should be left to the police to deal with. That would be the case, for instance, where there is a reasonable suspicion that the offence of fraud has been committed, yet the information in the Investigating Director's possession is insufficient to constitute a reasonable suspicion that the offence is one of a serious and complicated nature and is therefore one that falls within his or her jurisdiction.

[48] In the context of a preparatory investigation, the search and seizure of property can perform a number of functions. In view of the complexities of organised crime and the difficulty of identifying criminal conduct which may or may not constitute a specified offence, there is a clear need for the Investigating Directorate to have search and seizure powers in the context of preparatory investigations. It is therefore important that such Investigating Directors be able to obtain search warrants in appropriate circumstances, provided that in the context of a preparatory

investigation, the use of search warrants is limited to those instances where there is a reasonable suspicion that an offence, which might be a specified offence, has been committed.

[49] Under those circumstances, a search warrant may properly be obtained, on the basis of a reasonable suspicion that an offence has been committed, provided that it is considered that further evidence might establish that such an offence is a specified offence. Before authorising the warrant, the judicial officer would have to apply his or her mind to the matters set out in section 29(5) in evaluating the information put before him or her. A warrant would be issued only if it appears to the judicial officer that there are reasonable grounds for the suspicion that an object connected with the commission of an offence, which might be a specified offence, is on the targeted premises.

[50] I am accordingly of the view that the meaning of section 29(5) suggested by Mr Marcus and which was adopted by the High Court is not correct. It fails to appreciate that section 29(5) is capable of an interpretation that is consistent with the Constitution. I should mention that this interpretation was neither raised before Southwood J, nor considered in his judgment.

[51] For the reasons given in this judgment, I conclude that the impugned provisions are reasonably capable of a meaning that requires a reasonable suspicion of the commission of an offence, which might be a specified offence, as a pre-condition for the issue of a search warrant for purposes of a preparatory investigation. That is a proper interpretation of section 29(5). In particular, as I have already mentioned, the legislature has expressly sought to draw the attention of officials to the requirements of the Constitution in section 29(2) which obliges officials, in executing a warrant, to do so with strict regard to decency and order, respect for a person's dignity, freedom and security, and personal privacy. Furthermore, the comments of Tebbutt J in *Park-Ross*[42] have clearly been taken to heart by the legislature. Section 29(5) was enacted with these comments in mind and this reinforces the view that the legislature set out to regulate the search and seizure of property in accordance with the provisions of the Constitution as they were interpreted in the judgment of Tebbutt J.

[52] The proper interpretation of section 29(5) therefore permits a judicial officer to issue a search warrant in respect of a preparatory investigation only when he or she is satisfied that there exists a reasonable suspicion that an offence which might be a specified offence has been committed. The warrant may only be issued where the judicial officer has concluded that there is a reasonable suspicion that such an offence has been committed, that there are reasonable grounds to believe that objects connected with an investigation into that suspected offence may be found on the relevant premises, and in the exercise of his or her discretion, the judicial officer considers it appropriate to issue a search warrant. These are considerable safeguards protecting the right to privacy of individuals. In my view, the scope of the limitation of the right to privacy is therefore narrow. It is now necessary to consider briefly the purpose and importance of section 29(5).

Purpose and importance of the search and seizure provisions

[53] It is a notorious fact that the rate of crime in South Africa is unacceptably high. There are frequent reports of violent crime and incessant disclosures of fraudulent activity. This has a seriously adverse effect not only on the security of citizens and the morale of the community but also on the country's economy. This ultimately affects the government's ability to address the pressing social welfare problems in South Africa. The need to fight crime is thus an important objective in our society, and the setting up of special Investigating Directorates should be seen in that light. The legislature has sought to prioritise the investigation of certain serious offences detrimentally affecting our communities and has set up a specialised structure, the Investigating Directorate, to deal with them. For purposes of conducting its investigatory functions, the Investigating Directorates have been granted the powers of search and seizure. The importance of these powers for the purposes of a preparatory investigation has been canvassed above.[43]

Proportionality analysis

[54] I now turn to weigh the extent of the limitation of the right against the purpose for which the legislation was enacted. There is no doubt that search and seizure provisions, in the context of a preparatory investigation, serve an important purpose in the fight against crime. That the state has a pressing interest which involves the security and freedom of the community as a whole is beyond question. It is an objective which is sufficiently important to justify the limitation of the right to privacy of an individual in certain circumstances. The right is not meant to shield criminal activity or to conceal evidence of crime from the criminal justice process.[44] On the other hand, state officials are not entitled without good cause to invade the premises of persons for purposes of searching and seizing property; there would otherwise be little content left to the right to privacy. A balance must therefore be struck between the interests of the individual and that of the state, a task that lies at the heart of the inquiry into the limitation of rights.

[55] On the proper interpretation of the sections concerned, the Investigating Directorate is required to place before a judicial officer an adequate and objective basis to justify the infringement of the important right to privacy.[45] The legislation sets up an objective standard that must be met prior to the violation of the right, thus ensuring that search and seizure powers will only be exercised where there are sufficient reasons for doing so. These provisions thus strike a balance between the need for search and seizure powers and the right to privacy of individuals. Thus construed, section 29(5) provides sufficient safeguards against an unwarranted invasion of the right to privacy. It follows, in my view, that the limitation of the privacy right in these circumstances is reasonable and justifiable.

Conclusion

[56] The conclusion I have reached is that the impugned provisions are reasonably capable of a meaning that is consistent with the requirements of the Constitution. In terms of that interpretation, a search warrant would be granted for purposes of a preparatory investigation only if there is a reasonable suspicion that an offence, which might be a specified offence, has been or is being committed, or that an attempt was or had been made to commit such an offence. It follows from this that no warrant may be applied for or issued in the absence of a reasonable suspicion that an offence has been committed.

[57] The decision of this Court is binding on all judicial officers called upon to issue search warrants. Such warrants can only be issued at the instance of the Investigating Director who will clearly be under a duty to bring this judgment to the attention of the judicial officer before whom the application for a warrant is made. That, and the duty that the judicial officer has to give effect to the terms of this judgment, provides adequate protection against unreasonable searches.

[58] In the result, the order of constitutional invalidity by Southwood J must be set aside.

Costs

[59] In the view I take of this matter, there should be no order for costs in this appeal. In the first place, the matter arose in the context of criminal investigations; in this Court, costs orders are not generally made in criminal proceedings.[46] Secondly, the issues involved the constitutionality of an important provision in the Act. There is no doubt that the correct interpretation of the impugned provisions is a matter of great public interest.[47] With regard to the proceedings in the High Court, however, Southwood J awarded costs to the applicants, consequent upon the multiple orders which were made in that court. Only one of the orders, the declaration of unconstitutionality, was the subject of the proceedings in this Court. The respondents have been successful on appeal to this Court on that issue. The other orders made in the High Court were not before us and must accordingly remain undisturbed. No argument has been addressed to us regarding the possible implications of this Court's finding, on the constitutionality issue, for the costs order made in the High Court. We do not know to what extent the costs involved in the High Court proceedings were affected by the canvassing of the constitutionality issue which has now been dealt with by this Court. I am therefore not in a position, in this judgment, to address the issue of the High Court's order for costs. Should the respondents wish to pursue the matter of the costs awarded in the High Court, they must notify the Registrar in writing of their intention to do so, within 14 days of the order in this matter and upon notice to all other parties, whereupon further directions will be given.

Order

[60] The following order is accordingly made:

(a) the appeal is allowed;

(b) the Court declines to confirm the order of unconstitutionality made by Southwood J on 23 December 1999 and, accordingly, the order of constitutional invalidity by the Transvaal High Court is set aside;

(c) there is no order for the costs of this appeal.

Chaskalson P, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Cameron AJ concurred in the judgment of Langa DP.

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[1] Act 32 of 1998.

[2] Reported as *Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (2) SA 934 (T).

[3] It reads: "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must

confirm an order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."
[4] This section reads: "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."
[5] At 973I - 974A. Some of the other relief given by Southwood J reads as follows:
"(2) The decision of the first respondent to issue the search warrants . . . in terms of s29(4) and (5) of the National Prosecuting Authority Act 1998 is reviewed and set aside.
(3) The second and third respondents are ordered to return to the applicants forthwith all the documents, records, data and other property of the applicants seized by the second and third respondents under search warrants, as well as all photographic or electronic copies thereof, and insofar as the records consist of electronic data of the applicants which were copied by the second and third respondents the second and third respondents are ordered to destroy such data forthwith….
…
(10) The Registrar of this Court is directed to comply with Rule 15 of the Rules of the Constitutional Court in respect of the order declaring the provisions of ss 29(5), 28(13) and 28(14) unconstitutional."
[6] See the Preamble of the Act. The relevant provisions of section 179 of the Constitution read:
"(1) There is a single national prosecuting authority in the Republic, structured in terms of an Act of Parliament, and consisting of —
(a) a National Director of Public Prosecutions, who is the head of the prosecuting authority, and is appointed by the President, as head of the national executive; and
(b) Directors of Public Prosecutions and prosecutors as determined by an Act of Parliament.
(2) The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.
(3) National legislation must ensure that the Directors of Public Prosecutions —
(a) are appropriately qualified; and
(b) are responsible for prosecutions in specific jurisdictions, subject to subsection (5).
(4) National legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice.
. . . .
(7) All other matters concerning the prosecuting authority must be determined by national legislation."
[7] Section 4 of the Act.
[8] Section 7(1)(a) of the Act.
[9] Proclamation R 102, 1998 (GG 19372, 16 October 1998).
[10] Proclamation R 123, 1998 (GG 19579, 4 December 1998).

[11] Proclamation R 14, 2000 (GG 20997, 24 March 2000).
[12] In section 28(1) of the Act.
[13] In section 28(13) of the Act.
[14] The full text of section 29(1) is as follows:
"The *Investigating Director* or any person authorised thereto by him or her in writing may, subject to this section, for the purposes of an inquiry at any reasonable time and

without prior notice or with such notice as he or she may deem appropriate, enter any premises on or in which anything connected with that inquiry is or is suspected to be, and may:

(a) inspect and search those premises, and there make such enquiries as he or she may deem necessary;
(b) examine any object found on or in the premises which has a bearing or might have a bearing on the inquiry in question, and request from the owner or person in charge of the premises or from any person in whose possession or charge that object is, information regarding that object;
(c) make copies of or take extracts from any book or document found on or in the premises which has a bearing or might have a bearing on the inquiry in question, and request from any person suspected of having the necessary information, an explanation of any entry therein;
(d) seize, against the issue of a receipt, anything on or in the premises which has a bearing or might have a bearing on the inquiry in question, or if he or she wishes to retain it for further examination or for safe custody."

[15] See *National Coalition For Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC) at paras 29 - 32; *Mistry v Interim Medical and Dental Council of South Africa and Others* 1998 (7) BCLR 880 (CC); 1998 (4) SA 1127 (CC) at paras 22 - 23, 25, 27 -30; *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* 1996 (5) BCLR 609 (CC); 1996 (3) SA 617 (CC) at para 91.

[16] 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC).

[17] See *Mistry* (above n 15) at para 27.

[18] Above n 16 at para 77.

[19] Id.

[20] See *Financial Mail (Pty) Ltd and Others v Sage Holdings Ltd and Another* 1993 (2) SA 451 (A).

[21] Section 36(1) provides: "The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

[22] 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC).

[23] Id at para 85.

[24] See *S v Bhulwana; S v Gwadiso* 1995 (12) BCLR 1579 (CC); 1996 (1) SA 388 (CC) at para 28; *Mistry v Interim Medical and Dental Council of South Africa and Others* (above n 15) at para 32; and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) at paras 23 - 24.

[25] See *Dawood and Another v Minister of Home Affairs and Others, Shalabi and Another v Minister of Home Affairs and Others, Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) at paras 47 - 48.

[26] Above n 24.

[27] Id at para 24.

[28] See above paras 11 - 12.
[29] In *Touriel v Minister of Internal Affairs, Southern Rhodesia* 1946 AD 535 at 544 -545, it was held that the test for *mutatis mutandis,* the Latin equivalent of the phrase "with the necessary changes", should be necessity rather than fitness, and that the phrase should be construed narrowly. According to that court, a broad interpretation would render it difficult to ascertain, with certainty, the meaning of legislation that contained this phrase. This decision has been adopted without challenge in subsequent Appellate Division cases (*Big Ben Soap Industries Ltd v Commissioner For Inland Revenue* 1949 (1) SA 740 (A) at 75; *R v Adams and Others* 1959 (3) SA 753 (A) at 751; *South African Master Dental Technicians Association v Dental Association of South Africa and Others* 1970 (3) SA 733 (A) at 745; *South African Fabrics Ltd v Millman NO and Another* 1972 (4) SA 592 (A) at 600). Furthermore, in *Smith v Mann* 1984 (1) SA 719 (W) at 722, the court cautioned that in alteration exercises, a court should ensure that its changes are guided by legislative intent, rather than moving against it.
[30] Act 117 of 1991.
[31] 1995 (2) BCLR 198 (C); 1995 (2) SA 148 (C).
[32] Id at 172G - H.
[33] See above para 19.
[34] Above n 22.
[35] Id at para 85. See also *Bernstein and Others v Bester NO and Others* above n 16 at para 59 and the authorities cited there in footnotes 85 and 87.
[36] Section 20 reads as follows:
"The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article):
(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
(b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or
(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."
Section 21 reads:
"(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued —
(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
(b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence of such proceedings.
(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorize such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.
(3) (a) A search warrant shall be executed by day, unless the person issuing the warrant in writing authorizes the execution thereof by night.

(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.
(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant."
[37] Act 51 of 1977.
[38] Act 94 of 1992.
[39] Above n 10.
[40] See above para 4.
[41] The definition of a specified offence in terms of the Directorate concerning organized offences and public safety is as follows: it is any offence referred to in the schedule "committed in an organized fashion or which may endanger the safety or security of the public, or any conspiracy, incitement or attempt to commit any of the above-mentioned offences." See above n 9.
[42] Above n 31.
[43] See above paras 47 - 49.
[44] See *California v Ciraolo* 476 US 207 (1985) at 213-4, where Chief Justice Warren Burger held that a person who was using a garden to grow illicit drugs could not expect it not to be searched by the state. The following has been said in Colb "Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence" (1996) 96 *Columbia Law Review* 1456, 1460: "[I]f a government official knows that an individual is using her privacy to commit crimes and to hide evidence of those crimes, the official is legally entitled to a warrant authorizing a search of the individual's premises. By committing a crime, the individual in effect creates the circumstances that may ultimately relieve the government of its obligation to respect her privacy."
[45] There may be circumstances, in the context of other legislation, in which a warrant may be authorised without the requirement of a reasonable suspicion, or where a search may be permitted without a warrant. This judgment is not concerned with such instances. It is confined to matters which arise in the narrow context of the facts, and the legislation implicated in this case. See, for example, the remarks in *Mistry* (above n 15) at para 29.
[46] See *Harksen v President of the Republic of South Africa and Others* 2000(5) BCLR 478 (CC); 2000 (2) SA 837 (CC) at para 30.
[47] See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) at para 155.

Sentencing - senior customs official pleading guilty to corruption - need for deterrent sentence -whether custodial sentence appropriate - high level of trust and systematic course of corruption as aggravating factors - effect of failure of trial judge to address expressly the mitigating factors

THE QUEEN v NUA

Court of Appeal of New Zealand
Blanchard J, Fisher J, Potter J

28 June 2001

The facts appear in paragraph 2-7

Cases referred to in the judgment:
Attorney General for Hong Kong v Reid [1994] 1 NLZR 1
Police v Robinson (Auckland District Court, unreported, 2000)
R v Brown, Mahoney and King [1999] Cr App R (S.) 284
R v Chapman (1997) 14 CRNZ 664 (CA)
R v Clark (High Court Auckland, unreported, 1990)
R v Clayton (Court of Appeal, unreported, 1998)
R v Donald [1997] 2 Cr App R (S.) 272
R v Dyer (High Court, Palmerston North, unreported, 1991)
R v Foxley (1995) 16 Cr App R (S.) 879
R v Malyon (Court of Appeal, unreported, 1997)
R v Monteith (District Court, Hamilton unreported, 1998)
R v Prasad (Hamilton District Court, unreported, 1998)
R v Ram (Court of Appeal, unreported, 1994)
R v Telea (Auckland District Court, unreported, 2000)
R v Vergis (Court of Appeal, unreported, 1992)

For the appellant: R A Harrison
For the Crown*:* K Raftery

FISHER J gave the judgment of the court
Introduction
[1] Phillip Nua appeals against concurrent sentences of four years' imprisonment imposed in the District Court following his pleas of guilty to one charge of corruption (Crimes Act 1961, section 105(1)) and 30 of fraudulently using documents (section 229A).

Factual background
[2] Mr Nua was a senior customs officer who had been with the New Zealand Customs Service for 12 years. His work included the unsupervised inspection of imported used vehicles. It was his job to ensure that odometers were unaltered, that the vehicles did not contain uncustomed or prohibited goods, and that the correct tax or duty was paid.

[3] In April 1999 Mr Nua was approached by a Mr Loh, an importer of used vehicles. Mr Loh was concerned that on earlier occasions Customs had impounded a number of his vehicles for odometer tampering. The two came to an arrangement that for an appropriate consideration Mr Nua would allow Mr Loh's future vehicles into the country without inspection or goods and services tax.

[4] Over the next 15 months Mr Nua allowed the importation of 154 of Mr Loh's vehicles in 30 shipments without inspection or GST. Mr Loh entered false details in the official computer records to which he had full access. He also created 30 false hand-written records. By this means commercially imported vehicles of high value were officially shown as personal imports of low value.

[5] The result was the loss of $293,000 in unpaid GST and the release of 154 unchecked vehicles into the New Zealand community. The released vehicles potentially contained fraudulent odometers and uncustomed or prohibited contents. Although inspections were normally limited to spot checks, the indications are that without Mr Nua's intervention Mr Loh's vehicles would have received special attention in view of his history of odometer tampering.

[6] In return for Mr Nua's services Mr Loh made electronic transfers to various bank accounts nominated by Mr Nua. In addition he gave Mr Nua seven to ten envelopes of cash of up to $10,000 at meetings arranged for that purpose in quiet locations around Auckland. Well in excess of $100,000 was paid in total. Mr Loh also provided Mr Nua with two of the imported vehicles at a combined value of about $50,000, and a number of paid overseas trips. The exact combined monetary value of all payments and benefits received over the 15 months is unknown but we accept the Crown's submission that it lay somewhere between $150,000 and $200,000.

[7] The offending stopped only when Mr Nua learned that Mr Loh had been apprehended and that questions were being asked. To his credit, he went promptly to his superiors, made a full confession, resigned from his position, co-operated fully with authorities, and pleaded guilty at the first opportunity. He had sold one of the vehicles received from Mr Loh but the other and more valuable one was recovered by Customs. There is no further prospect of reparation.

Sentencing in the District Court

[8] The sentencing Judge referred to the greater level of trust now placed on senior Customs officers by the introduction of a spot check system; the extreme seriousness of corruption among public servants; the way in which bribery and corruption cases had been unknown in New Zealand until recently but were now growing; the lengthy period of offending; its complex nature; the magnitude of the bribes; the gross breach of trust; the damage to the reputation of the Customs Service; and the lack of any prospect of reparation. In mitigation he noted the early plea of guilty; the fact that Mr Nua was a 31

old achiever; and his lack of previous convictions. Reference to other cases led the Judge to the concurrent sentences of four years.

The appeal
[9] Three grounds were advanced in support of the appeal: (1) that four years was inconsistent with sentencing precedents; (2) that the Judge failed to take mitigating factors into account; and (3) that he paid inadequate regard to section 7 of the Criminal Justice Act.

(1) Sentence inconsistent with precedents
[10] Two distinct lines of precedent were cited to us. They appropriately reflected the two types of charge which Mr Nua faced - fraud (section 229A) and corrupt acceptance of bribes (section 105).

[11] As to the former, imprisonment has usually been imposed where public servants have systematically stolen, or fraudulently diverted to themselves, substantial sums in breach of the trust. Typical are *R v Chapman* (1997) 14 CRNZ 664 (CA) (six months' imprisonment increased to 18 months on appeal where senior civil servant misappropriated about $55,000 in a series of small frauds spread over three and a half years) and *R v Clayton* (CA 324/98, 10 December 1998) (two years' imprisonment upheld where Inland Revenue clerk misapplied cheques totalling $40,000 over 16 months). While recognising that the high level of trust reposed in public servants can be an aggravating feature, the Courts in such cases have usually taken conventional sentences for theft as a servant or its equivalent as their starting point. Imprisonment has usually been imposed for repetitive theft as a servant involving large sums over a lengthy period. While emphasising that each case is to be determined on its own facts, the Court in *Clayton* pointed out that imprisonment for two and a half to four years was likely in such cases.

[12] As to bribery and corruption precedents, three Court of Appeal cases of actual or attempted bribery were cited. In *R v Vergis* (CA 165/92, 17 July 1992) a sentence of two years' imprisonment was reduced on appeal to eight months where the appellant had been found guilty of being party to forgery. On five occasions he had paid a 17 year-old immigration office clerk modest sums to forge residence and work permits. Two years later in *R v Ram* (CA 23/94, 16 March 1994), a sentence of 18 months' imprisonment was reduced on appeal to nine months where an appellant of good character had been found guilty on one charge of offering a bribe to an immigration officer. It was an isolated act intended to benefit his own family. After noting various mitigating and special factors, which included a suspended sentence for the young co-offender, the Court went on to say:

The factors to which we have referred, combined with the disparity of the present sentence when compared with that imposed in *Vergis,* in our judgment justify a conclusion, which we reach with some reluctance, that the sentence of 18 months imprisonment was excessive. We state, however, that *further examples of this kind of offending may well require for deterrent purposes a reconsideration of the sentencing level* evidenced by *Vergis.* (emphasis added).

[13] Ram was followed by an ex parte decision in *R v Malyon* (CA 435/97, 18 December 1997). In that case a sentence of two years' imprisonment was upheld where the appellant had been found guilty of the attempted bribery of a law enforcement officer, having offered a police officer $5,000 to suppress impending charges. The Court had no difficulty in upholding the sentence of two years notwithstanding that the bribery attempt had failed and that the two years was cumulative upon other terms of imprisonment. Again, the Court pointed to the warning in *Ram* that "further examples of this kind of offending may well require for deterrent purposes a reconsideration of the sentencing levels evidenced by *R v Vergis* (CA 165/92, 17 July 1992)."

[14] We do not think that those decisions attempt to establish any real guidance for corruption cases like the present one. This appellant was a mature and experienced civil servant. He had been trusted to carry out field operations without supervision. He was also entrusted with the power to enter and alter official computer records. He took advantage of his powers to embark on a systematic course of corruption netting substantial sums over a lengthy period. The case is much more serious than those in which bribes have been offered or received on one or more isolated occasions, where modest sums were involved, and/or where there was a family rather than commercial motivation. We do not consider that the sentence should be interfered with on the ground that it was inconsistent with earlier decisions, particularly given recent warnings that a reappraisal of sentences for bribery and corruption was likely.

(2) Failure to have regard to mitigating factors

[15] At an early point in his reasoning the Judge referred to the entry of a plea of guilty at the first available opportunity. Mr Harrison pointed out that he did not return to that topic later, perhaps because he did not adopt a starting point from which there was a deduction for mitigating factors. Nor did he expressly include the early confession and full co-operation with authorities among the mitigating factors.

[16] We agree that in an ideal world those matters would have been expressly dealt with. On the other hand we do not think that it should be lightly assumed that this experienced Judge would have overlooked them as factors to be taken into account in the process of arriving at his ultimate figure of four years.

(3) Inadequate regard to section 7 of the Criminal Justice Act

[17] Section 7 of the Criminal Justice Act 1985 requires that when sentencing for an offence punishable by imprisonment the Court should have regard to the desirability of keeping offenders in the community so far as that is practicable and consonant with the safety of the community. Where imprisonment is required, the term should be kept as short as possible in that light. Mr Harrison accepted that a term of imprisonment was inevitable in the present case but submitted that inadequate regard had been paid to the statutory requirement that the term should be kept as short as possible consonant with the safety of the public.

[18] It is well established that where substantial thefts have been committed by persons in positions of trust, or circumstances analogous thereto, substantial terms of imprisonment will usually be regarded as consistent with the requirements of section 7 - see, for example, *R v Clayton*, above, at p 3. The present case combined the systematic obtaining of substantial sums by fraudulent means with the acceptance of bribes by a public official. We are left in no doubt that a substantial term of imprisonment was required notwithstanding the requirements of section 7.

Appropriate sentence
[19] The sentencing Judge remarked upon the danger that New Zealand's traditional freedom from corruption may now be coming under threat. We agree. While counsel were unable to locate any earlier Court of Appeal cases, there were three in the last 10 years (*Vergis, Ram* and *Malyon above*) to which we would add two in the High Court - *R v Clark* (High Court Auckland T168/89), Tompkins J, 26 April 1990) and *R v Dyer* (High Court, Palmerston North S3/91, Neazor J, 21 February 1991). In the District Court there have been at least five in the last three years - *R v Monteith* (District Court, Hamilton S982133, Judge Spear, 18 November 1998), *Police v Robinson* (Auckland District Court CRN 9004074605 and others, Judge Rushton, 3 March 2000), *R v Telea* (Auckland District Court, T 992227, Judge Unwin, 21 July 2000); *R v Prasad* (Hamilton District Court DCT 64/907, Judge Rea, 6 March 1998) and the present one. The majority of these cases have centred on immigration or importation procedures, perhaps reflecting a growing influence from those less used to the corruption-free environment which New Zealanders have traditionally enjoyed. The time would now seem to have arrived for unmistakable deterrence.

[20] Theft of public funds by a public official is plainly serious enough, but it at least involves no more than an aberrant individual. The successful bribing of a public official draws others into the web of corruption. As the circle widens so does the insidiousness of the corruption and the encouragement for others to participate or copy. The opportunities are unlimited and the temptations great. As was said by Lord Templeman in delivering the judgment of the Privy Council in *Attorney General for Hong Kong v Reid* [1994] 1 NLZR 1 at p 3:

> Bribery is an evil practice which threatens the foundations of any civilised society.

[21] In the United Kingdom heavy sentences have been passed in corruption cases with aggravating features, examples being *R v Donald* [1997] 2 Cr App R (S.) 272 (11 years' imprisonment where appellant detective constable agreed to accept £50,000, and had actually received about £18,500, in return for disclosing information about an inquiry and destroying surveillance logs) and *R v Brown, Mahoney and King* [1999] Cr App R (S.) 284 (six years for plea of guilty to conspiracy to bribe detective chief inspector, co-offenders receiving sentences of five and three years respectively). More leniency was shown in *R v Foxley* (1995) 16 Cr App R (S.) 879 (starting point six years reduced to four for mitigating factors where, over eight years, Ministry of

Defence employee accepted over £2m in benefits, of which £1.5m recovered, in return for showing favour to potential suppliers) but it may be noted that *Foxley* was an unsuccessful offender's appeal, as distinct from an appellate exercise in appropriate minimums.

[22] In the present case the aggravating features included the breach of trust by a senior official; the lengthy period of offending; the elaborate nature of the deceptions; the number of separate deceptions; the magnitude of the personal gain; the commercial element; the magnitude of the irrecoverable loss to public revenues; the corrupt combination with another; and at least the potential (we have no way of knowing whether it was realised) for drawing others into a position of complicity. In mitigation there were the early confession, full co-operation with authorities, and early guilty pleas from a first offender showing genuine remorse.

[23] A substantial reduction was plainly appropriate for matters in mitigation. Equally, however, a deterrent sentence in excess of five years could have been justified as the starting point. While a net sentence of four years' imprisonment was at the upper end of the range we do not regard it as manifestly excessive.

Result
[24] The appeal is dismissed.