

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.

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A. Introduction

This provision on participation and attempt aims at supporting the criminalisation of the offences established in accordance with the Convention. Article 27 does not establish additional offences but complements the provisions contained in chapter III of UNCAC by addressing participation (paragraph 1), attempt (paragraph 2), and preparation (paragraph 3).

Article 27 has a 'catch-all' status which stems from its capacity to cover a wide range of conduct, including participation in any capacity in an offence, any attempt to commit an offence, as well as the preparation for an offence established in accordance with UNCAC. However, only Article 27(1) is a mandatory provision, as will be discussed.

This provision on participation and attempt, as formulated in UNCAC, closely resembles parallel provisions in earlier treaties: the 1996 Inter-American Convention against Corruption, the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the 1999 Council of Europe Criminal Law Convention on Corruption (CoE Convention).¹ The early

¹ Inter-American Convention against Corruption (adopted on 29 March 1996, entered into force 6 March 1997) (1996) 35 ILM 724, art VI(1)(e); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted 21 November 1997, entered into force 15 February 1999), art 1(2); Council of Europe Criminal Law Convention on Corruption, ETS No. 173 (adopted 27 January 1999, entered into force 1 July 2002), art 15.

Inter-American Convention also includes all kinds of participatory acts ('Participation as a principal, coprincipal, instigator, accomplice or accessory after the fact, or in any other manner'). The Inter-American Convention provision does not include the preparation for an offence, whereas the UNCAC does. However, in contrast to the Inter-American Convention, the UNCAC covers neither the commission nor the attempted commission as mandatory provisions. Prima facie, the OECD Anti-Bribery Convention also appears to take the broader approach of the Inter-American Convention as it seems to contain mandatory clauses concerning participatory acts *and attempt*.² However, its commentaries state that the 'offences set out in paragraph 2 [of Article 1] are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official'.³ It follows that, just as under UNCAC, the criminalisation of the participation in a corruption offence is mandatory for the states parties, but not the attempt to commit such an offence. This approach differs from the one taken by the CoE Convention. This convention only requires its states parties to establish as criminal offences under its domestic law aiding and abetting the commission of the corruption offences.⁴ Thus, the CoE Convention does not cover attempt and preparation.

The Legislative Guide to UNCAC points out that the states parties may wish to pay attention to the provisions in Articles 26 (liability of legal persons), 27 (participation and attempt), 28 (knowledge, intent, and purpose), 29 (statute of limitations), 30 (prosecution, adjudication, and sanctioning) and 42 (jurisdiction) of the Convention as they contain closely related requirements concerning the offences established under UNCAC.⁵ Especially the connection to Article 28 will be pointed out below.

B. Participation in Any Capacity

According to Article 27(1) ('shall adopt'), it is mandatory for state parties to establish as a criminal offence, in accordance with the respective domestic law, participation in any capacity such as an accomplice, assistant, or instigator in an offence established in accordance with this Convention. Although the requirement of intention is not specifically expressed with regard to UNCAC, it must be met as it is, indeed, a central tenet of criminal law. The Explanatory Report to the CoE Convention states: 'Though it is not indicated specifically, it flows from the general principles of criminal law that any form of participation (aiding and abetting) needs to be committed intentionally'.⁶ The *travaux*

² OECD Convention, art 1(2): 'Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party'.

³ OECD, *Commentaries on the OECD Convention on Combating Bribery* (OECD 2011) No. 11.

⁴ CoE Convention, art 15.

⁵ UNODC, *Legislative Guide for the implementation of the United Nations Convention against Corruption* (UN 2006) 115 (hereafter UNODC, *Legislative Guide*).

⁶ Council of Europe, *Explanatory Report to the Criminal Law Convention on Corruption*, ETS 173 (CoE 1999) No. 76.

préparatoires to UNCAC indicate that the formulation of Article 27(1) 'was intended to capture different degrees of participation, but was not intended to create an obligation for states parties to include all of those degrees in their domestic legislation'.⁷

C. Attempt and Preparation

Article 27(2) and (3) belong to the veritably non-mandatory provisions in the Convention, as evidenced by the opening phrase: 'Each State Party may adopt'. Thus, states parties do not even bear an obligation to consider the criminalisation of attempts to commit an offence. Despite its status as a non-mandatory criminalisation provision, the vast majority of states parties have criminalised the attempt to commit an offence established in accordance with UNCAC, as will be discussed. However, about one third of states parties have not criminalised the preparation of a corruption offence.

D. Implementation and Enforcement of Article 27

A majority of states parties have adopted adequate measures to criminalise participation and attempt to commit the corruption offences of UNCAC, typically not through special provisions added to the offences, but through universal rules used in the general section of their criminal codes.⁸

1. Joint Commission, Participation *Sensu Stricto*, Instigation, and Special Forms of Participation

Most states parties punish persons who have jointly committed an intentional corruption offence in furtherance of a common intention (so-called accomplices, co-perpetrators, or co-principals) just the same as perpetrators acting alone. Thus, usually, it does not make a difference with respect to the liability whether a person acts by him- or herself or jointly with others.

Also regarding the participation in a more limited sense (such as cooperation, collaboration, aiding, provision of assistance), almost all states parties complied with Article 27(1). However, a few countries distinguish strongly between the different types of participation. Nepal, for example, criminalises accomplices but neither assistants nor instigators.⁹ This is not the case, eg for the South African Prevention and Combating of Corrupt Activities Act, which states that any person who 'aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act, is guilty of an offence'.¹⁰ In theory, the sanction for principal and participator

⁷ UNODC, *Travaux Préparatoires on the Negotiations for the Elaboration of the United Nations Convention against Corruption* (UN 2010) 242 (with reference to A/58/422/Add.1 para. 33); see also UNODC, *Legislative Guide* (n 5) 114.

⁸ UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation* (UNODC 2017) 92 (hereafter UNODC, *State of Implementation*).

⁹ Implementation Review Group UNCAC, *Executive Summary: Nepal* (Review Cycle 1, CAC/COSP/IRG/I/4/1/Add.42) 4.

¹⁰ See, for example, South African Prevention and Combating of Corrupt Activities Act of 2004, s 21(c); Country Review Report South Africa (Review Cycle 1: 2010–2015) 49.

are generally the same. However, mitigating factors (such as the seriousness of the offence, the interests of the community, and the circumstances of the convicted person) might reduce the penalty imposed.¹¹

Some national penal codes know specific forms of participators such as a concealer or an accessory after the fact. Whenever instigation (or organisation) are distinguished from other forms of participatory acts, this mostly leads to same punishments for perpetrators and instigators.¹²

2. Attempt

Regarding the criminalisation of an attempted commission of Convention offences, even more differences exist among the national penal codes. Given the optional character of the provision on attempt, the various approaches are all in line with UNCAC.

According to the State of Implementation Report, an attempt is most commonly defined as 'the conduct of a person who commences the commission of a crime (i.e. proceeds with an act that is more than merely preparatory and enables the realization of the offence) but who ultimately fails owing to circumstances beyond his or her control'.¹³ In most countries, an attempt statute is included in the general section of the penal code¹⁴ and usually, the attempted commission is punished as severely as the completed crime.¹⁵ In some countries, for example Germany, the court may reduce the sanction at its discretion,¹⁶ especially if the perpetrator, due to marked lack of understanding, fails to recognise that the crime was never to be completed owing to the nature of its object or the means by which it was to be committed,¹⁷ in other words external conditions or objective circumstances independent of the offender's will.

Wherever the penal code punishes the attempt not as a general rule but (1) depending on a certain threshold of sanction or (2) only regarding certain offences,¹⁸ states parties may wish to ensure that the criminalisation of attempt is included in the Convention offences. The State of Implementation Report highlights that this also applies to those countries that broadly criminalise active and passive bribery, which already consider the promising and offering of an undue advantage as a completed commission.¹⁹ For example, a bribe offer that never reaches its intended recipient may be covered as an attempted active bribery by national legislation.

3. Preparation of an Offence

In about two thirds of states parties, the preparation of a Convention offence is criminalised.²⁰ For example, the Malaysian Anti-Corruption Commission Act covers 'any act

¹¹ Country Review Report South Africa (Review Cycle 1: 2010–2015) 50.

¹² UNODC, *State of Implementation* (n 8) 93. ¹³ Ibid.

¹⁴ However, exceptions exist, such as in the US where no US federal attempt statute exists, see Country Review Report United States of America (Review Cycle 1: 2010–2015) 81.

¹⁵ Botswana, eg, included a threshold of a maximum penalty for attempted commission: Botswana Penal Code, s 390; Country Review Report Botswana (Review Cycle 1: 2010–2015) 95.

¹⁶ German Penal Code, §23(2) in connection with §49(1): More lenient punishment.

¹⁷ German Penal Code, §23(3) in connection with §49(2): The court may order a discharge, or mitigate the sentence as it sees fit.

¹⁸ German Penal Code, §23(1): The attempted commission of offences with a minimum sanction of one year imprisonment are always criminalized, others only on special order in the respective offence.

¹⁹ UNODC, *State of Implementation* (n 8) 94. ²⁰ Ibid. 92.

preparatory to or in furtherance of the commission of any offence'.²¹ In contrast, South African criminal law prescribes that the conduct must pass beyond the stage of mere preparation to be criminalised.²² In Switzerland, only preparatory acts for certain serious crimes or offences like murder, taking of hostages, and genocide (but not the Convention offences) are criminalised.²³ According to the State of Implementation Report, this lack of criminalisation in many countries was due to the purpose of criminal law as an *ultima ratio* measure.²⁴ It was deemed disproportionate to criminalise mere preparatory acts of less serious crimes. However, some states parties with roots in the group of Eastern European states defined 'preparation' rather narrowly.²⁵ For example, the Slovak Penal Code states: 'Preparation for committing a felony means willful organization of a criminal act, procurement or adaptation of means or instruments for its commission, associating, grouping, instigating, contracting, abetting or aiding in such crime, or other deliberate actions designed to create conditions for its commission, where a felony has been neither attempted nor completed'.²⁶ The country review report on Slovakia even states that there exists no statistical data on the application of the law as both the punishment and the data kept does not distinguish between the preparation and the completed felony.

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²¹ Malaysian Anti-Corruption Commission Act of 2009, s 28; Country Review Report Malaysia (Review Cycle 1: 2012–2013) 6. A comprehensive criminalisation can also be found in UK, see Country Review Report of the United Kingdom (Review Cycle 1: 2011–2012) 6.

²² See *S v Rosenthal* 1980 (1) SA 65 (A); Country Review Report South Africa (Review Cycle 1: 2010–2015) 51.

²³ Country Review Report Switzerland (Review Cycle 1: 2010–2015) 46.

²⁴ UNODC, *State of Implementation* (n 8) 94.

²⁵ Ibid, 95.

²⁶ Slovak Penal Code, s 13(1); Country Review Report Slovak Republic (Review Cycle 1: 2010–2015) 58.