

Article 28: Knowledge, intent and purpose as elements of an offence

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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.

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A. Introduction

The evidentiary standard expressed in Article 28 is a tool to support the overall anti-corruption efforts of the Convention as it enables prosecution and punishment of the corruption offences. Despite its status as a non-mandatory criminalisation provision ('may'), a very high proportion of states parties have adopted an evidentiary standard like the one contained in Article 28, as will be discussed in this chapter.

B. Evidentiary Provision

In accordance with Article 28, states parties may enable inferences regarding the mental state of the perpetrator, based on objective factual circumstances, rather than direct evidence.¹ Thus, so-called circumstantial evidence, such as the personal situation of the accused, the overall context of the act, common experience, and general knowledge, dispense with the need for direct evidence, which is rarely accessible, eg a confession. As the mental state of the accused is not directly accessible, there is often a need to reconstruct knowledge, intent, and purpose from objective factual circumstances. The evidentiary standard as laid down in Article 28 is closely connected to the maxim of free ('moral') evaluation of evidence, which gives primacy to the personal conviction of the court that the offence was proven with view to the respective burden of proof.² In Germany, this principle is framed as follows: 'The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole';³ if the evidence is ambivalent and the court doubts that the defendant has acted intentionally, it cannot

¹ UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation* (UNODC 2017) 95 (hereafter UNODC, *State of Implementation*).

² Most typically, criminal cases must be proven beyond reasonable doubt. However, the State of Implementation Report points out that in two states parties from the Group of Asia-Pacific States that the burden of proof was shifted to that of a party to a civil case with regard to corruptly intent to the offered, given, accepted or received gratification: UNODC, *State of Implementation* (n 1) 97.

³ German Code of Criminal Procedure, s 261 (translated by Brian Duffett and Monika Ebinger).

convict the defendant for an intentional act. This applies a fortiori to common law jurisdiction, in which a criminal conviction requires evidence beyond a reasonable doubt. The article does not affect these standards, but merely indicates a way in which intent and other 'internal facts' can be established in court.

C. Implementation and Enforcement of Article 28

According to UNCAC's State of Implementation Report, Article 28 'appears to be one of the least problematic provisions of the Convention in terms of implementation',⁴ as most states parties acknowledge the evidentiary standard as a general principle of national criminal law and procedure.

For example, the United Kingdom requires the following general evidentiary standard, which was deemed satisfactory by the reviewers: 'A court or jury, in determining whether a person has committed an offence, (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable result of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inferences from the evidence as appear proper in the circumstances'.⁵ A similar approach is taken, where the standard jury instruction points out that the fact finder is '[...] permitted to draw reasonable inferences from the evidence which are justified in light of common experience'.⁶ In other words, judgments might be legally and rationally deduced by matters of common knowledge and general experience, based on objective circumstances and acts, to verify the criminal intent, motivation, and purpose of an accused person. Again, this is a general rule which applies to all criminal cases, including the commission of offences established in accordance with this Convention. The State of Implementation Report notes that in one state party, courts determine the *mens rea* of knowledge, intent, or purpose from the proof of *actus reus*.⁷ This approach was commended by the reviewers as good practice.

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⁴ UNODC, *State of Implementation* (n 1) 95.

⁵ Criminal Justice Act 1967, s 8; Country Review Report UK, 97.

⁶ Country Review Report USA, 83.

⁷ UNODC, *State of Implementation* (n 1) 97.