

# INTERNATIONAL COOPERATION:

THE PACIFIC'S IMPLEMENTATION OF CHAPTER IV  
OF THE UN CONVENTION AGAINST  
CORRUPTION



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# INTRODUCTION



The United Nations Convention against Corruption (UNCAC) is the only legally binding, global anti-corruption instrument. The Convention was adopted by the General Assembly in October 2003 and entered into force in December 2005. As of 1 April 2016, 178 countries plus the European Union have become States parties<sup>1</sup> to UNCAC, representing a groundbreaking commitment to prevent and tackle corruption.

UNCAC is unique in its holistic approach, adopting prevention and enforcement measures, including mandatory requirements for criminalizing corrupt behaviours. The Convention also reflects the transnational nature of corruption, providing an international legal basis for enabling international cooperation and recovering proceeds of corruption (i.e. stolen assets). The important role of government, the private sector and civil society in fighting corruption is also emphasized. The Convention includes an implementation review mechanism (UNCAC Review Mechanism), requiring each State party to be reviewed periodically by two other States parties on its implementation of UNCAC. The Convention also calls on each State party to provide technical assistance and training, and exchange information for the purpose of strengthening implementation.

The aim of this report is to provide an overview of the implementation of UNCAC Chapter IV (International Cooperation) by the States parties under review in the Pacific region until mid-2015 — namely, the Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu. It is based on information included in the country review reports of these States parties.<sup>2</sup>

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<sup>1</sup> By becoming a State party to UNCAC (either through ratification, if the country has signed the treaty in accordance with article 67(1), or accession), the country agrees to become legally bound by the treaty at the international level. Depending on the specific legal system of the country, the Convention may need to be domesticated before it becomes legally binding at the national level.

<sup>2</sup> The information contained in the UNCAC review reports was provided before or during the country visits to the respective countries, which is the reason for why some of the information may be outdated. This report draws only on this information contained in the UNCAC review reports of the States parties in the Pacific region and contains no subsequent updates. The executive summaries are published documents and therefore country-specific details in these summaries are cited in the report. However, information in the UNCAC review reports of countries that have not published their full reports remains confidential; country names have not been used when referring to this information unless the nominated UNCAC Focal Point of the respective country has explicitly agreed.

The UNCAC Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention. The reviews were generally based on a self-assessment checklist, a country visit with all relevant stakeholders in-country and any supplementary information provided to the review team. It should be noted that the review reports are drafted by the experts of the reviewing countries (see Annex I) and facilitated by the UN Office on Drugs and Crime (UNODC). While there is a general consistency across the review reports, the varying information and level of detail contained in the reports made it difficult to easily draw comparisons across jurisdictions.

This report is prepared in order to compile the most common and relevant information on successes, good practices, challenges and observations contained in the review reports, organized by theme. It includes an analysis of related technical assistance needs and additional challenges faced by States parties in implementing the provisions of the Convention.

# CHAPTER IV: INTERNATIONAL COOPERATION



Corruption does not respect territorial boundaries. It therefore requires an international response, also because of its links to transnational organized and other crimes. Countries now recognize the need for action that goes beyond borders and acknowledge the benefits of cooperation.

Chapter IV of the Convention seeks to facilitate international cooperation and outlines States parties' obligations with respect to this. The Chapter recognizes that worldwide efforts to combat corruption are impeded by the huge variation across jurisdictions as to what conduct constitutes a corruption-related offence. Such variations represent a fundamental challenge for international cooperation. For example, the principle of 'dual criminality' may mean that inter-state legal cooperation, such as extradition or mutual legal assistance, will be refused for alleged crimes if those acts are not also recognized and defined as crimes in the State receiving the request for assistance.

As provided for in UNCAC article 43, States parties are required to put in place appropriate and effective systems and mechanisms that allow for efficient international cooperation against corruption in accordance with articles 44 – 55 of the Convention. This is in line with one of the fundamental objectives of the Convention "to promote, facilitate and support international cooperation... in the prevention of and fighting against corruption" (UNCAC article 1(b)). The scope of international cooperation in criminal matters does not only cover traditional forms of cooperation, but also extends to other options in transnational criminal justice, including the transfer of proceedings in criminal matters, assistance in establishing joint investigative bodies and cooperation for the appropriate use of special investigative techniques.<sup>3</sup>

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<sup>3</sup> UNODC and UNICRI, *Technical Guide to the United Nations Convention against Corruption* (New York, UN, 2006) p. 136.





# EXTRADITION



Extradition is the formal legal surrender by one country to another of a person who has been accused or convicted of a criminal offence in the jurisdiction of the second country for the purpose of prosecution or to enforce a sentence. Throughout this report, the first country is referred to as the “requested country” or “requested State” and the second as the “requesting country” or “requesting State” that is seeking the other country to surrender a person.

The premise of extradition is that perpetrators of crime should not be able to escape justice by leaving one country for another, and countries should assist each other in punishing criminal conduct. If a request for extradition is refused, then the person should be tried in the requested country, but whether or not this takes place in practice is another question. Extradition has become an essential international mechanism for cooperation in the suppression of crime. Traditionally, it has been seen as a matter of international comity (the favour accorded by one State to another).<sup>4</sup> This has meant that the system of extradition has been based predominantly on reciprocal treaties between States. However, more recently, the importance of direct reciprocity between countries in extradition has been somewhat diminished. Instead, States consider themselves obliged to act as good international actors.

Extradition is addressed in article 44 of the Convention. An overview of States’ implementation of article 44 is attached as Annex II.

There have been very few extradition requests either sent or received by countries in the Pacific over the past five to ten years.

- Fiji has extradited two fugitives pursuant to its Extradition Act and, at the time of the review, there was one case pending in the High Court. At the time of the review, Fiji had made three extradition requests to other countries, of which two were pending and one had been denied.
- In the last ten years, the Solomon Islands had received only two non-corruption-related extradition requests (with one granted) and none sent.

<sup>4</sup> See E.P. Aughterson, *Extradition: Australian law and procedure* (Sydney, Law Book Co, 1995) at 2; and I.A. Shearer “Extradition and human rights” (1994) 68 *ALJ* 451 at 451.

- In the Cook Islands, no extradition requests had been sent or received in the last five years.
- In the Federated States of Micronesia, over the last five years, three corruption-related extradition requests were sent (two granted and one still pending) and none were received.
- In Kiribati, in the last five years, no extradition requests had been received. One request was sent to Fiji (murder-related) and two people were then extradited to Kiribati.
- No person has ever been extradited from Nauru, but the Republic of Korea has made an extradition request relating to fraud and forgery. At the time of the review, this request had not been complied with, as there was an ongoing legal proceeding in Nauru. Cabinet noted that after this proceeding had been concluded, the request would be considered.
- Vanuatu does not have substantial experience in dealing with extradition. To date, only three extradition requests had been received and in the last two years, none had been sent.

## ■ WHAT IS THE LEGAL BASIS FOR EXTRADITION?

The Convention attempts to set a basic minimum standard for extradition. Article 44, paragraph 4, requires States parties to deem the offences described in Article 44(1) as automatically included in all existing extradition treaties between them. In addition, the parties undertake to include them in all future extradition treaties between them.

The Convention requires States parties that make extradition conditional on the existence of a treaty to indicate whether the Convention is to be used as a legal basis for extradition matters and, if not, to conclude treaties in order to implement article 44.<sup>5</sup> The Convention also requires States to conclude bilateral and multilateral agreements or arrangements to enhance the effectiveness of extradition.<sup>6</sup> If States parties do not make extradition conditional on the existence of a treaty, they are required to use extradition legislation as legal basis for the surrender of fugitives and recognize the offences falling within the scope of the Convention as extraditable offences between themselves.<sup>7</sup>

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<sup>5</sup> Article 44(6)(b).

<sup>6</sup> Article 44(18).

<sup>7</sup> Technical Guide, *op. cit.*, p.150; Article 44(7).

There are several elements worth noting in countries' current extradition arrangements, as detailed below.

### ***Treaties***

Most States parties in the Pacific do not make extradition conditional on the existence of a treaty.<sup>8</sup> Palau does not make extradition conditional on the existence of a treaty despite a number of extradition treaties in existence. Vanuatu does not make extradition conditional on the existence of a treaty with Commonwealth and South Pacific countries, but does with other States. Similarly, the Solomon Islands does not make extradition conditional on the existence of a treaty with Commonwealth, Forum or comity countries, but does with other States.

The Federated States of Micronesia and the Republic of the Marshall Islands do make extradition conditional on the existence of a treaty. The Federated States of Micronesia currently has extradition agreements with the United States of America and the Philippines, while the Republic of the Marshall Islands has two bilateral extradition agreements in place with the United States of America and Republic of China (Taiwan). Such a limited number of treaties could potentially create an obstacle to extradition.

Few States parties had additional agreements or arrangements on extradition.<sup>9</sup> One country indicated that it intended to conclude arrangements, and if necessary, treaties, pursuant to its Extradition Act. Palau indicated that it would likely want to conclude extradition treaties with as many countries as possible.

In light of the limited number of extradition treaties among countries, it was recommended that States consider adopting additional extradition agreements in order to allow for extradition with a broader range of States.<sup>10</sup> The reviewing experts also recommended that States parties ensure that any extradition treaties that may be concluded with other Member States contain references to Convention-related offences as being extraditable.<sup>11</sup>

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<sup>8</sup> Cook Islands, Fiji, Kiribati, Nauru, Palau, Papua New Guinea, Solomon Islands (to a limited extent) and Vanuatu (to a limited extent).

<sup>9</sup> Republic of the Marshall Islands has only two bilateral extradition agreements in place with the United States and the Republic of China (Taiwan). Federated States of Micronesia has extradition arrangements with the United States of America and the Philippines. Fiji has two in place with New Zealand and the Republic of China. Several treaties concluded by the United Kingdom before Fiji's independence have also been in use. Nauru has a bilateral extradition treaty with the United Kingdom. Palau has bilateral extradition treaties with the United States of America, Republic of China (Taiwan), Federated States of Micronesia, Republic of the Marshall Islands and a pending treaty with the Philippines. However, none of these treaties specifically authorize extradition on the basis of the offences included in the Convention.

<sup>10</sup> Republic of the Marshall Islands.

<sup>11</sup> Federated States of Micronesia, Palau, Papua New Guinea, the Republic of the Marshall Islands, Solomon Islands and Vanuatu.

*The Pacific Islands Forum extradition scheme operates successfully. This is a scheme that is only for countries in the Pacific Islands Forum and specified in legislation. It allows such countries to handle incoming and outgoing extradition requests with other Pacific Islands Forum countries efficiently and in a timely manner.*

### **Commonwealth countries**

Many Pacific Island countries are members of the Commonwealth and therefore could use the London Scheme for Extradition within the Commonwealth.<sup>12</sup> However, no States parties in the region have used it to date.<sup>13</sup>

### **Domestic legislation**

All States parties regulate extradition through an Extradition Act.<sup>14</sup> Generally, States define an “extradition country” as a Commonwealth country, South Pacific country, treaty country or comity country.<sup>15</sup> In the Cook Islands and Kiribati, a “backing of warrants” procedure is in place for Pacific Island countries. The backing of warrants scheme is a simplified form of surrender between States, allowing for an arrest warrant issued by a competent authority in one State to be recognized as valid by one or more other States and is to be enforced.<sup>16</sup> Nauru’s Extradition Act applies to designated countries, subject generally to reciprocity.

States parties that do not require a treaty basis for extradition (that is, States parties that provide for extradition pursuant to a statute) must ensure that the offences covered by the Convention are deemed extraditable under their applicable statute governing international extradition in the absence of a treaty.<sup>17</sup> As discussed below, many States parties do not criminalize all Convention-related offences, and therefore, by virtue of the operation of the principle of dual criminality, do not ensure that corruption-related offences are deemed extraditable.

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<sup>12</sup> The Scheme is neither provided for in such Regulations, nor had it been domesticated in, for example, Vanuatu. In relation to Papua New Guinea, section 55 of the Extradition Act provides that “An extradition treaty does not form part of the law of Papua New Guinea unless it is set out in Regulations made under Section 54”; the Scheme is currently not set out in the Regulations.

<sup>13</sup> E.g. Kiribati, Nauru, Solomon Islands and Vanuatu.

<sup>14</sup> The Cook Islands: Extradition Act 2003; Federated States of Micronesia: Chapter 14 (Criminal Extradition), Title 12, Federated States of Micronesia Code; Fiji: Extradition Act 2003; Kiribati: Extradition Act; Nauru: Extradition Act 1973; Palau: Title 18, Palau National Code and the Extradition and Transfer Act 2001; Papua New Guinea: Extradition Act 2005; Republic of the Marshall Islands: Criminal Extradition Act; Solomon Islands: Extradition Act 2010; and Vanuatu: Extradition Act 2002.

<sup>15</sup> Cook Islands, Kiribati, the Solomon Islands and Vanuatu.

<sup>16</sup> Technical Guide, op. cit., p.151.

<sup>17</sup> Article 44(7); UNODC, *Legislative Guide for the Implementation of the UN Convention against Corruption* (New York, UN, 2006) p. 153

### **Convention-based**

Most States parties do not use the Convention as a basis for extradition on its own.<sup>18</sup> While a number of countries stated that, in principle, the Convention could be used as a basis for extradition, there has been no experience in its application.<sup>19</sup>

The Republic of the Marshall Islands has not used the Convention as a legal basis for extradition in respect of any Convention-related offences, but noted that it would seek to introduce relevant amendments to domestic law in order to facilitate the use of the Convention for these purposes.

Given the few number of extradition treaties, reviewing experts recommended that State parties consider using the Convention as a legal basis for extradition.<sup>20</sup>

## ■ **COMPETENT AUTHORITY FOR EXTRADITION**

The responsible authority for extradition varies among States, but generally sits with: the Ministry of Justice;<sup>21</sup> Ministry of Foreign Affairs;<sup>22</sup> Attorney General;<sup>23</sup> or Crown Law Office.<sup>24</sup> This is detailed further in Annex II to this report.

## ■ **DUAL CRIMINALITY**

Dual criminality requires that an accused be extradited only if the alleged criminal conduct is considered criminal under the laws of both the requested and requesting countries. The emphasis is on the conduct in question. The critical issue is that the criminal conduct is criminalized in both countries and not whether the offence has the same name or is categorized in the same way.

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<sup>18</sup> Cook Islands, Palau and Vanuatu.

<sup>19</sup> Kiribati and Nauru. In Fiji, there was some uncertainty among the reviewing experts and the official consulted as to whether the Convention could be used as a sole legal basis for making and acting upon extradition requests.

<sup>20</sup> Cook Islands, Federated States of Micronesia, Palau, Republic of the Marshall Islands and Solomon Islands.

<sup>21</sup> Solomon Islands.

<sup>22</sup> Federated States of Micronesia.

<sup>23</sup> Republic of the Marshall Islands and Vanuatu.

<sup>24</sup> Cook Islands.

Most countries require dual criminality.<sup>25</sup> The Republic of the Marshall Islands is the only exception whose legislation does not impose the requirement of dual criminality in order for an extradition request to be granted. Although most States require dual criminality, many of these States have not criminalized all Convention-related offences (such as bribery of foreign officials).<sup>26</sup> Of those States that require dual criminality, most adopt a minimum penalty requirement rather than specifying a list of offences. Adopting a minimum penalty requirement means that offences do not have to be specifically listed in order for extradition to be possible in relation to them. Defining extraditable offences in this manner obviates the need to renegotiate a treaty or supplement it if both States pass laws dealing with a new type of criminal activity, or if the list inadvertently fails to cover a type of criminal activity punishable by both States.

In the majority of States, extraditable offences for the purposes of a criminal prosecution are those criminal offences punishable by deprivation of liberty for a period of at least one year<sup>27</sup> or death<sup>28</sup> or the imposition of a fine of more than \$5,000.<sup>29</sup> However, as noted above, many of these States have not criminalized all Convention-related offences<sup>30</sup> (such as bribery of foreign officials) or the penalties for some offences are too low to satisfy the dual criminality penalty threshold.<sup>31</sup>

The reviewing experts therefore recommended that these States parties criminalize all Convention-related mandatory offences and consider criminalizing the optional Convention-related offences which are not currently established as crimes in domestic legislation in order to satisfy the dual criminality requirements and ensure that extradition requests can be granted with regard to corruption-related offences.<sup>32</sup>

In comparison, Nauru adopts a list approach to extraditable offences, listed in a Schedule to its Extradition Act. Although this list includes most Convention-related offences, certain offences covered by the Convention are not covered or are only partially covered (such as bribery of foreign public officials and illicit enrichment). The reviewing experts therefore also recommended that Nauru criminalize all mandatory Convention-related offences, and consider criminalizing the optional offences, and include them as extraditable offences in the Extradition Act (including to allow for offences that satisfy the dual criminality requirement of the Extradition Act to be deemed extraditable).

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<sup>25</sup> Federated States of Micronesia, Fiji, Nauru, Palau, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>26</sup> Federated States of Micronesia, Fiji, Papua New Guinea and Vanuatu.

<sup>27</sup> Cook Islands, Fiji, Nauru, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>28</sup> Fiji.

<sup>29</sup> Cook Islands.

<sup>30</sup> Federated States of Micronesia, Fiji, Papua New Guinea and Vanuatu.

<sup>31</sup> Papua New Guinea.

<sup>32</sup> Vanuatu.

## ■ LIFTING DUAL CRIMINALITY

As discussed above, in line with the principle of dual criminality, extradition takes place if the offence in question is a crime in both the requesting and requested countries. However, this can also be a barrier for extradition. The Convention takes a flexible approach and encourages extradition in the absence of dual criminality by allowing for the dual criminality requirement to be lifted. In other words, a country may extradite a person for a Convention-related offence even if the conduct is not criminalized under its own domestic legislation.<sup>33</sup>

Some States parties allow for the dual criminality requirement to be lifted.<sup>34</sup> For example, Papua New Guinea's Extradition Act allows extradition in the absence of dual criminality when the conduct that constitutes the offence is required to be treated as an extraditable offence under an extradition treaty between the requesting country and Papua New Guinea.

In those States that do not allow for dual criminality to be lifted, the reviewing experts recommended that they either:

- Consider granting extradition of a person for any of the offences covered by the Convention that are not punishable under its own domestic law;<sup>35</sup> or
- Explore the possibility of relaxing the application of the dual criminality requirement in extradition cases—especially those involving corruption offences that are not established domestically.<sup>36</sup>

## ■ SEVERAL SEPARATE OFFENCES

Most States parties have not implemented this provision<sup>37</sup> or their laws are silent<sup>38</sup> on the matter of several separate offences. Reviewing experts therefore recommended that these States parties consider granting extradition requests that include several separate offences, one of which is extraditable.<sup>39</sup>

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<sup>33</sup> Article 44(2); Legislative Guide, op. cit., p.150.

<sup>34</sup> Cook Islands, Fiji and Palau.

<sup>35</sup> Cook Islands.

<sup>36</sup> Federated States of Micronesia.

<sup>37</sup> Cook Islands, Federated States of Micronesia, Nauru, Palau and Republic of the Marshall Islands.

<sup>38</sup> Vanuatu.

<sup>39</sup> Cook Islands, Federated States of Micronesia, Nauru, Palau, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

Article 44(3) of the Convention provides that:

*“if the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of 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.”*

## ■ **THE EXTRADITION PROCESS**

### ***Simplified and expedited procedures***

Pursuant to article 44(9), a State party must endeavour to expedite extradition procedures and simplify evidentiary requirements relating to corruption offences.

While few countries had legislated for expediting and simplifying evidentiary requirements,<sup>40</sup> in practice, States noted that they endeavoured to swiftly carry out or expedite extradition procedures.<sup>41</sup>

In several States parties, evidentiary requirements differ if the requesting State is a Commonwealth country, other Forum/South Pacific country, treaty country or comity country.<sup>42</sup> One State party had provided for simplified procedures in its Extradition Act for the execution of extradition from Pacific Island Forum Member countries; however, the procedures that apply to other (non-Forum members) are more complex.<sup>43</sup>

In the absence of such procedures, reviewing experts recommended that States parties consider further simplifying evidentiary requirements in order to allow for extradition to be dealt with efficiently and effectively.<sup>44</sup> Experts recommended the following mechanisms to do so:

- Internal guidelines and/or a request management system<sup>45</sup> that will also need to include special provisions on the assistance relevant to Convention-related offences;

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<sup>40</sup> The Federated States of Micronesia endeavours to swiftly carry out extradition procedures pursuant to section 1404 on the time commitment pending extradition. Palau has also legislated this.

<sup>41</sup> Federated States of Micronesia and Nauru.

<sup>42</sup> Solomon Islands and Vanuatu.

<sup>43</sup> Papua New Guinea.

<sup>44</sup> Cook Islands, Federated States of Micronesia, Nauru, Palau, Republic of the Marshall Islands and Solomon Islands.

<sup>45</sup> Cook Islands, Nauru, Palau and Solomon Islands.



- Streamlining the procedures of information exchange with other competent bodies by, among other things, uploading relevant information on agencies responsible for international legal cooperation as well as contact information of relevant focal points; and
- Include consultation with other States in such procedures.<sup>46</sup>

### ***Fair treatment***

States parties must ensure the fair treatment of persons facing extradition proceedings, including the enjoyment of all rights and guarantees provided by their domestic law.<sup>47</sup>

Most countries afford the general guarantees of fair treatment in line with: domestic criminal procedures;<sup>48</sup> Constitutional guarantees;<sup>49</sup> or the States' Extradition Act.<sup>50</sup> In one State, absent a Constitution at the time of the country visit, no formal arrangements or requirements were in place. However, it was noted that the Extradition Act and relevant protection granted under common law principles would still apply. In this regard, the reviewing experts strongly noted the fundamental importance of guaranteeing fair treatment in extradition cases.

### ***Provisional Arrest***

Article 44(10) of the Convention provides that the requested State party may make a provisional arrest or take other appropriate measures to ensure his or her presence for the purposes of extradition. Although this is not a mandatory requirement under the Convention, most countries are able to take the individual sought for extradition into custody prior to the extradition hearing, if it is considered necessary for the purposes of facilitating the request.<sup>51</sup>

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<sup>46</sup> Nauru.

<sup>47</sup> Article 44(14).

<sup>48</sup> Federated States of Micronesia, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>49</sup> Federated States of Micronesia (under the Constitution and the Federated States of Micronesia Code, persons sought in extradition proceedings benefit from due process and fair treatment); Papua New Guinea (General guarantees of fair treatment are contained in the Constitution), Nauru (article 10, Constitution contains due process provisions), Republic of the Marshall Islands (General guarantees of fair treatment are contained in section 212 of the Criminal Extradition Act and as provided for in the Constitution) and Vanuatu (General guarantees of fair treatment are contained in the Constitution (article 37), Penal Code (i.e. rights of the accused at trial: section 14) and Criminal Procedure Code 2003 (presumption of innocence: section 81)).

<sup>50</sup> Nauru (sections 7-10, Extradition Act) and Palau (Title 18, Palau National Code).

<sup>51</sup> See, for example, Republic of the Marshall Islands.

States parties can also provisionally arrest an individual sought for extradition:<sup>52</sup>

- In anticipation of an extradition request;<sup>53</sup>
- In urgent cases;<sup>54</sup> or
- Where there is a substantial flight risk.<sup>55</sup>

*The possibility of acceptance of urgent requests by one State party for provisional arrest warrants through the International Criminal Police Organization-INTERPOL was commended.*

## ■ **GROUNDS FOR REFUSAL**

### ***Permitted grounds for refusal***

Most States parties' Extradition Acts provide a list of the grounds for refusing extradition. For example, Vanuatu's Extradition Act contains a comprehensive list of grounds for refusing extradition, including:

- The nature of the crimes for which extradition is requested as political offences;<sup>56</sup>
- The possibility of prosecution or punishment of a person because of race, religion, nationality, political opinions, sex and status;
- The existence of an extradition offence only under the military but not ordinary criminal law;
- Immunity due to the lapse of time, amnesty or any other reason; and
- Double jeopardy.

Section 8 of Papua New Guinea's Extradition Act contains a similar list of grounds for refusing extradition.

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<sup>52</sup> Federated States of Micronesia and Nauru.

<sup>53</sup> Solomon Islands.

<sup>54</sup> Fiji.

<sup>55</sup> Palau.

<sup>56</sup> Article 44(4) provides that if States parties use the Convention as a basis for extradition, they will not consider corruption offences as political offences.

The Convention recognizes that States parties may refuse extradition on the basis of nationality. States parties may also refuse extradition on the ground that there are 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 compliance with a request would cause prejudice to that person's position for any one of these reasons.<sup>57</sup> These two grounds for refusal are considered in turn below.

### ***Extradition of Nationals***

The Convention aims to avoid safe havens on the ground of nationality and obliges States parties to prosecute or extradite their nationals (*aut dedere aut judicare*).<sup>58</sup> If a State has refused extradition on the basis of nationality, the Convention requires States parties to submit the case for domestic prosecution upon request of the requesting State. In such instances, the State is also required to ensure that the case is treated with the same gravity like other serious domestic offences and to work in collaboration with the requesting country in procedural and evidentiary matters.<sup>59</sup>

Further, if States parties deny extradition for the enforcement of a sentence on the grounds of nationality, they must consider enforcing the sentence imposed under the domestic law of the requesting State.<sup>60</sup>

Both the Federated States of Micronesia and the Republic of the Marshall Islands can extradite its own nationals, as stipulated in its agreement with the United States of America and as has also been the practice. The Republic of the Marshall Islands noted that, where possible, such individuals will first be prosecuted domestically and serve their sentence in the Republic of the Marshall Islands. Following completion of that sentence, it is still possible for extradition to the United States to be facilitated.

Nauru does not refuse extradition on the basis of nationality. Since Nauru would therefore extradite a national sought for the purpose of enforcing a sentence, Nauru's legislation does not allow for conditional extradition.

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<sup>57</sup> Article 44(15).

<sup>58</sup> Article 44(11).

<sup>59</sup> Article 44(11).

<sup>60</sup> Article 44(13).

*In Nauru, two extradition requests have been received from Australia and Japan in relation to the extradition of Nauruan nationals. Both nationals went voluntarily, and therefore the formal request did not need to be acted on. However, the national authorities confirmed that they would have extradited the nationals, subject to the Extradition Act and that there would be no impediments to the extradition of Nauruan nationals generally.*

In other countries, the decision to extradite a national is discretionary.<sup>61</sup> In the Cook Islands, Papua New Guinea, the Solomon Islands and Vanuatu, if the extradition of a national is denied, he or she may then be prosecuted domestically. Further, the Cook Islands and the Solomon Islands could consider the enforcement of a sentence (or its remainder) imposed by a requesting State.

It was recommended that Papua New Guinea introduce amendments to its Extradition Act to ensure the mandatory prosecution of the person whose extradition is refused solely on the ground of his Papua New Guinean nationality. The reviewing experts also recommended that Papua New Guinea consider introducing amendments to its Extradition Act to consider the enforcement of the sentence imposed under the domestic law of the requesting State, when extradition is refused on grounds of nationality.

The Convention provides an alternative under article 44(12), through temporary surrender. That is, to extradite the national to be prosecuted in a foreign country, on the condition that the national is returned to the requested State party to serve his sentence. Temporary surrender is possible in at least four States in the Pacific region.<sup>62</sup>

### **Discriminatory grounds**

As stated above, States parties may refuse extradition on the ground that there are 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 compliance with a request would cause prejudice to that person's position for any one of these reasons.<sup>63</sup>

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<sup>61</sup> Cook Islands, Kiribati, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>62</sup> Cook Islands, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>63</sup> Article 44(15). implemented by Cook Islands, Palau, Papua New Guinea, Republic of the Marshall Islands and Vanuatu.

While the majority of States parties had implemented article 44(15), the Federated States of Micronesia had not implemented the provision and Nauru had only implemented the provision in part.

It was therefore recommended that the Federated States of Micronesia ensure the existence of a ground for refusal of extradition where there are 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 compliance with a request would cause prejudice to that person's position for any one of these reasons. Similarly, it was recommended that Nauru amend its Extradition Act to allow for refusal on the grounds of a discriminatory purpose.

There was also some concern about the inclusion of "ethnic origin" in Vanuatu's legislation and therefore reviewing experts recommended that ethnic origin be specifically included in legislation so that this may also be used as a ground for potential discrimination in the requesting State and thus, a reason for refusing extradition.

### ***Limiting the grounds for refusal***

The Convention provides that States parties may not refuse extradition on the ground that:

- The offence also involves fiscal matters;<sup>64</sup> and
- For political offences.<sup>65</sup>

### ***Fiscal matters***

While the majority of countries would not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters,<sup>66</sup> the Federated States of Micronesia, Nauru and Kiribati have not implemented this provision. It was therefore recommended that these States ensure that extradition is not refused on the sole ground that it involves fiscal matters.

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<sup>64</sup> Article 44(16).

<sup>65</sup> Implemented by Papua New Guinea.

<sup>66</sup> Cook Islands, Fiji, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

### **Political offences**

Article 44(4) provides that if States parties use the Convention as a basis for extradition, they will not consider corruption offences as political offences.<sup>67</sup> The majority of States parties ensure that no Convention-related offences would be considered as political offences<sup>68</sup> or are exempted from extradition under the States' Extradition Acts.<sup>69</sup>

However, reviewing experts recommended that the Federated States of Micronesia ensure that any Convention-related offences not be considered political offences.

### **Consultation prior to refusal**

Article 44(17) of the Convention provides that, where appropriate, the requested State party shall consult with the requesting State before refusing extradition. Several countries confirmed that, while not legislated, as a matter of practice, consultations take place—or would take place—with requesting States before refusing extradition.<sup>70</sup> Despite most States parties not including this requirement in legislation, only one recommendation was made for Papua New Guinea to directly stipulate in its Extradition Act that Papua New Guinean authorities, where appropriate, consult with the requesting State before the decision to refuse extradition is taken.

In one instance, the reviewing experts noted that the requesting State should also be provided with ample opportunity to present its opinions and relevant information.<sup>71</sup>

## **■ CHALLENGES AND TECHNICAL ASSISTANCE**

Limited capacity and inadequacy of normative measures were the most common challenges cited by States parties in implementing article 44.

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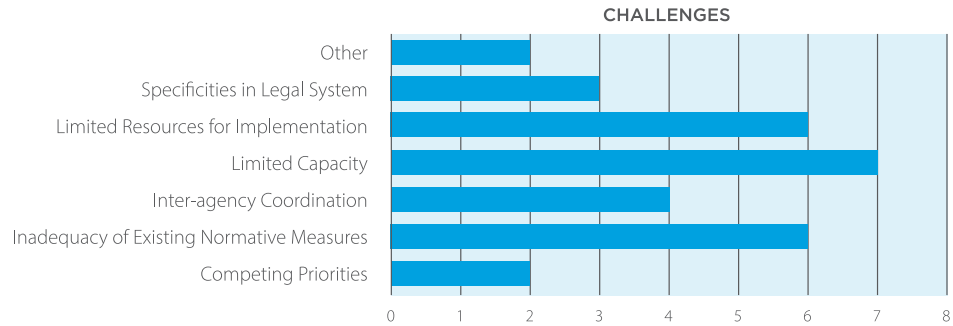
<sup>67</sup> Legislative Guide, op. cit., p.150.

<sup>68</sup> Fiji, Palau, Papua New Guinea and Vanuatu.

<sup>69</sup> Kiribati and Nauru.

<sup>70</sup> Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, Palau (legislated in the Extradition and Transfer Act 2001), Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>71</sup> Vanuatu.



Capacity building programmes for authorities responsible for international cooperation in criminal matters, and a summary of good practices/lessons learned were the most requested forms of technical assistance. Other more specific requests related to:

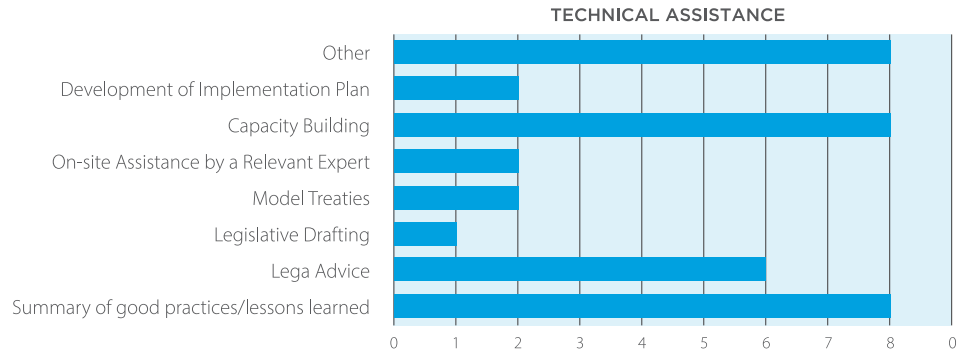
- The sharing of experiences to obtain a greater understanding about how other such States deal with international cooperation;
- Assistance in providing extradition templates/precedence that can apply to all requests, pursuant to the States parties' relevant legislation so that requesting States comply with all the necessary requirements of the State party;<sup>72</sup>
- Assistance in considering and assessing the scope and coverage of extradition in the States parties' relevant legislation and its conformity with article 44;<sup>73</sup>
- Expertise and capacity building to amend relevant legislation to better implement the provisions of the Convention;
- Advice in the collection of data;
- Streamlining procedures and evidentiary requirements such as internal guidelines and/or a request management system;
- Capacity-building programmes for magistrates and prosecutors who are to handle extradition requests;
- Training to law enforcement officials, prosecutors and the judiciary on the use of the Convention as a treaty basis for extradition;
- International cooperation record-keeping system of filing incoming/outgoing requests, legal basis, specific requirements, who is dealing with it, timeline, information provided, reasons for refusing assistance;<sup>74</sup> and
- Easy to follow guidelines on how to deal with international cooperation requests for staff internally in the Government.<sup>75</sup>

<sup>72</sup> E.g. Vanuatu.

<sup>73</sup> E.g. Fiji.

<sup>74</sup> Vanuatu.

<sup>75</sup> Vanuatu.



Two countries indicated that several forms of technical assistance had already been provided, however, they noted that an extension or expansion of such assistance would assist in implementing the provision.



# TRANSFER OF SENTENCED PERSONS



One manner in which UNCAC Chapter IV promotes, facilitates and supports international cooperation to combat corruption is through the transfer of sentenced persons. Article 45 calls on States parties to consider concluding bilateral or multilateral agreements or arrangements to allow for the transfer to their territory, offenders who have been convicted and sentenced for offences covered by the Convention in order to serve their sentence there. The aim of this article is to improve the chances for the social rehabilitation of such persons.<sup>76</sup>

This model of cooperation is based on the concept of enforcement of foreign sentences. This may also be applicable in extradition proceedings where the surrender of a fugitive is denied on the ground of nationality. In such cases, the requested State may, if its domestic law permits and in conformity with the requirements of such law, enforce the sentence that has been imposed under the domestic law of the requesting State.<sup>77</sup>

## ■ WHAT IS THE LEGAL BASIS FOR THE TRANSFER OF SENTENCED PERSONS?

The legal basis and implementation of this article varies across States.

### ***Bilateral or multilateral agreements***

The Cook Islands, Fiji, Papua New Guinea, Nauru, the Solomon Islands and Vanuatu have not entered into any bilateral or multilateral agreements with regard to the transfer of sentenced persons. The reviewing experts recommended that these States consider entering into bilateral or multilateral agreements or arrangements on the transfer of convicted persons for Convention-related offences.<sup>78</sup> The Republic of the Marshall Islands' bilateral treaty with the United States of America provides for the transfer of sentenced persons.

<sup>76</sup> Technical Guide, *op. cit.*, p.154.

<sup>77</sup> Article 44(13).

<sup>78</sup> Cook Islands, Kiribati, Nauru, Papua New Guinea and Solomon Islands.

However, it was still recommended that the Republic consider entering into additional agreements or arrangements on the transfer of sentenced persons. Palau has bilateral agreements with the United States of America, Republic of China (Taiwan) and Republic of the Marshall Islands, noting that the treaty with the United States of America has been successfully used on several occasions.

### ***Commonwealth countries***

While a number of States parties could, in principle, rely on the Scheme for the Transfer of Convicted Offenders within the Commonwealth, they have not made use of the Scheme to date.<sup>79</sup> The reviewing experts also noted that this Scheme was limited in that it only applies to Commonwealth countries.<sup>80</sup>

### ***Domestic legislation***

In the Federated States of Micronesia, the transfer of sentenced persons is addressed in domestic legislation;<sup>81</sup> a transfer is conditional on the existence of an agreement with the foreign State. The offender must be a national of the foreign State or a national or citizen of the Federated States of Micronesia and must consent to the transfer; moreover, the dual criminality requirement must be satisfied. Palau's domestic legislation also provides for a sentence to be served abroad.<sup>82</sup>

The transfer of sentenced persons is partially addressed in the Solomon Islands' domestic legislation. The legislation provides that prisoners, who are not citizens of the Solomon Islands, are to be transferred to their country of nationality upon the request of the prisoner and agreement of the Government.

Several States parties have not implemented UNCAC article 45. In addition, most States did not record any successful transfers,<sup>83</sup> although one State provided a case example of a transfer of a sentenced person.<sup>84</sup>

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<sup>79</sup> Cook Islands, Kiribati, Solomon Islands and Vanuatu.

<sup>80</sup> Vanuatu's reviewing experts.

<sup>81</sup> Chapter 15, Title 12, Federated States of Micronesia Code.

<sup>82</sup> Section 670, Title 17 Palau National Code.

<sup>83</sup> Federated States of Micronesia.

<sup>84</sup> Vanuatu.

However, as most States do not have the legal frameworks in place for the transfer of sentenced persons;<sup>85</sup> this has led to, on at least one occasion, a request for the transfer of a prisoner sentenced in Fiji to his country being refused, as there was no legal framework in place for this purpose.<sup>86</sup> Of concern to the reviewing experts was the challenge of returning deportees—particularly as without a full sentence completed or any conviction, the deportee remains potentially dangerous without any rehabilitation or effective punishment.<sup>87</sup>

The reviewing experts made a number of different recommendations to States parties to encourage the domestic implementation of the article:

- Consider entering into bilateral or multilateral agreements or arrangements on the transfer of convicted persons for Convention-related offences;<sup>88</sup>
- Consider giving effect, through domestic legislation, to the Scheme for the Transfer of Convicted Offenders within the Commonwealth;<sup>89</sup> and
- Consider entering into agreements or arrangements on the transfer of sentenced persons in order for such persons to complete their sentences in the requested countries.<sup>90</sup>

## ■ CHALLENGES AND TECHNICAL ASSISTANCE

Limited capacity and limited resources for implementation were the most common challenges cited in implementing this provision.

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<sup>85</sup> Fiji has not entered into any bilateral or multilateral agreements with regard to the transfer of sentenced persons; Nauru has no domestic legislation that covers the transfer of sentenced person; Papua New Guinea has no bilateral or multilateral agreements or arrangements on the transfer of sentenced persons.

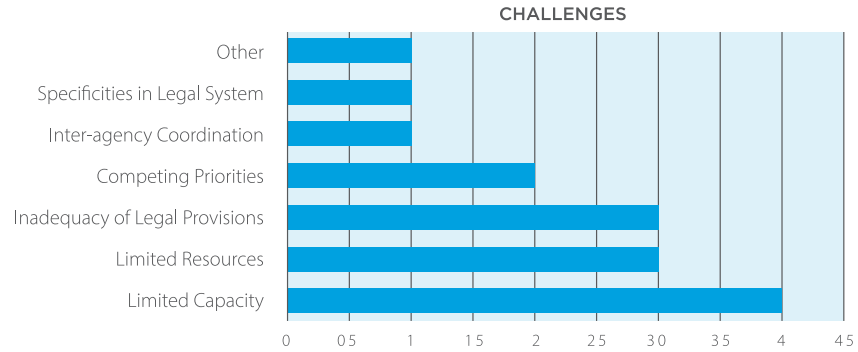
<sup>86</sup> Fiji.

<sup>87</sup> E.g. Fiji.

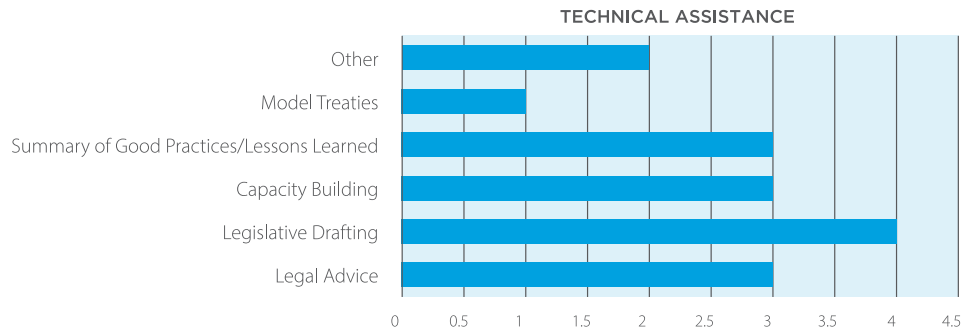
<sup>88</sup> Cook Islands, Kiribati, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>89</sup> Nauru.

<sup>90</sup> Nauru and the Solomon Islands.



Legal advice and a summary of good practices/lessons learned were the most common requests for technical assistance.



No State party has received technical assistance to date in relation to the transfer of sentenced persons.

# MUTUAL LEGAL ASSISTANCE



Mutual legal assistance is an international cooperation process by which States seek and provide assistance in gathering evidence for use in the investigation and prosecution of criminal cases. It is also used to trace, freeze, seize and ultimately confiscate criminally derived wealth. The Convention generally seeks ways to facilitate and enhance mutual legal assistance under article 46. An overview of States' implementation of article 46 is attached as Annex III.

## ■ WHAT IS THE LEGAL BASIS FOR MUTUAL LEGAL ASSISTANCE?

An effective legal basis is the first step to ensuring that countries can effectively give, receive and use mutual legal assistance. The legal basis for mutual legal assistance can be found in bilateral or multilateral treaties, as well as in domestic legislation. Assistance may also be afforded on the basis of the principle of reciprocity. Where reciprocity is the legal basis, then mutual legal assistance may be refused where the promise of reciprocity cannot be made by the requesting country. This is discussed further below under the heading, 'Grounds for Refusal'.

### *Treaties*

The general purpose of a mutual legal assistance treaty is to ensure that evidence collected and transferred between the parties to the treaty is obtained quickly and efficiently, in a form that is admissible in the courts of the requesting country. To this end, a mutual legal assistance treaty should, among other things:

- Identify the channel by which communications regarding mutual legal assistance should be sent;
- Establish the types of offences for which mutual legal assistance is available and the types of assistance available to the parties; and

- Address potential obstacles to mutual legal assistance, such as whether the dual criminality requirement must be met.<sup>91</sup>

Most States cited no,<sup>92</sup> or limited, bilateral or multilateral agreements in relation to mutual legal assistance. Two countries indicated that arrangements or agreements were currently being considered.<sup>93</sup> It was noted that, as Palau can use the principle of reciprocity (i.e. as an approved comity country), there was no need for Palau to consider concluding additional bilateral or multilateral agreements or arrangements.

The reviewing experts noted that States parties may wish to consider concluding bilateral or multilateral agreements or arrangements<sup>94</sup> or to enter into a greater number of bilateral and multilateral agreements in order to further support the provision and receipt of mutual legal assistance.<sup>95</sup> However, the Convention can also be used as a legal basis, which is detailed below.

### ***Commonwealth countries***

In principle, the Scheme relating to Mutual Legal Assistance in Criminal Matters within the Commonwealth could be used by States,<sup>96</sup> but has not been used in practice.<sup>97</sup> In addition, reviewers noted that the Scheme was limited by virtue of the fact that it only applies to Commonwealth countries.

### ***Domestic legislation***

Most States have adopted domestic provisions, setting the general framework for providing or applying for assistance through domestic legislation.<sup>98</sup>

<sup>91</sup> The United Nations has prepared a Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolutions 45/117, and 53/112, which represents a distillation of the international experience gained with the implementation of such mutual legal assistance treaties, in particular between States representing different legal systems. See [www.unodc.org/pdf/model\\_treaty\\_mutual\\_assistance\\_criminal\\_matters.pdf](http://www.unodc.org/pdf/model_treaty_mutual_assistance_criminal_matters.pdf).

<sup>92</sup> Fiji.

<sup>93</sup> E.g. Vanuatu.

<sup>94</sup> Fiji, Papua New Guinea and Vanuatu.

<sup>95</sup> Republic of the Marshall Islands.

<sup>96</sup> Cook Islands, Kiribati, Solomon Islands and Vanuatu.

<sup>97</sup> Cook Islands, Kiribati, Solomon Islands and Vanuatu.

<sup>98</sup> Cook Islands: Mutual Assistance in Criminal Matters Act 2003; Federated States of Micronesia: Chapter 17, Title 12 Federated States of Micronesia Code; Fiji: Mutual Legal Assistance in Criminal Matters Act 1997 and its 2006 amendment, Proceeds of Crime Act; Kiribati: Mutual Assistance in Criminal Matters Act; Nauru: Mutual Assistance in Criminal Matters Act; Palau: Title 18 Palau National Code; Papua New Guinea: Mutual Assistance in Criminal Matters Act. Certain provisions of Proceeds of Crime Act also apply with regard to identifying, tracing and freezing proceeds of crime; Republic of the Marshall Islands: Mutual Assistance in Criminal Matters Act; Solomon Islands: Mutual Assistance in Criminal Matters Act 2002; and Vanuatu: Mutual Assistance in Criminal Matters Act 2005 and Proceeds of Crime Act.

The Republic of the Marshall Islands requires that a foreign State has an arrangement or enters into a reciprocal agreement on assistance in criminal matters with the Republic. However, in practice, such reciprocal agreements were not required.

### **Convention-based**

Article 46 provides a legal basis for mutual legal assistance in relation to all offences covered under the Convention. If two States parties are not bound by a relevant mutual legal assistance treaty, the Convention can operate as a legal basis for affording such assistance. Article 46(9)-(29) of the Convention details the types of assistance that may be requested, as well as the conditions and procedures for requesting and rendering assistance. States parties are encouraged to apply these provisions in a complementary manner to existing mutual legal assistance treaties, as well as to apply these paragraphs if they facilitate cooperation.<sup>99</sup> For example, for States parties whose legal systems permit direct application of treaties, no implementing legislation is required—the paragraphs of the Convention will apply. Among States parties under this review, both Palau and the Republic of the Marshall Islands follow the monist approach, making international treaties and conventions the law of the land after ratification. However, if the legal system of a State party does not permit the direct application of these paragraphs (the majority of States considered under this review), legislation will be required to ensure that in the absence of a mutual legal assistance treaty, the terms of paragraphs 9 to 29 of article 46 apply to requests made under the Convention.

Some States recognize that, in principle, the Convention could be used as a legal basis for mutual legal assistance.<sup>100</sup> For those that did not, the reviewing experts recommended that those countries consider this in respect of Convention-related offences and consequently, ensure that any Convention-related offences not be considered political offences.<sup>101</sup>

## ■ **DESIGNATING A CENTRAL AUTHORITY**

An essential step to establishing an effective institutional framework is the designation of a central authority with the power to secure and execute mutual legal assistance requests or transmit them to the competent domestic authorities for execution, as required in article 46(13). It is also important to ensure that the Secretary-General of the United Nations is notified of the central authority to serve as a channel of communication for mutual legal

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<sup>99</sup> Technical Guide, *op. cit.*, p. 164.

<sup>100</sup> Nauru and Vanuatu.

<sup>101</sup> Federated States of Micronesia and Nauru.

assistance purposes.<sup>102</sup> The UNODC maintains a database of all such notifications. This database can be accessed by any governmental authority at: [www.unodc.org/compath\\_uncac/en/index.html](http://www.unodc.org/compath_uncac/en/index.html).

The central authority for mutual legal assistance among States is generally the same as that for extradition, namely: the Crown Law Office;<sup>103</sup> Ministry of Justice; Ministry of Foreign Affairs and the Attorney General.<sup>104</sup> In some States, requests are normally sent and received through diplomatic channels,<sup>105</sup> while in other States, requests are sent to the competent authority's office and have never come through diplomatic channels.<sup>106</sup>

In one country, the central authority has not been clearly designated.<sup>107</sup> In this State, one agency is responsible for sending and receiving requests, while the actual work on processing the requests is performed by another agency. There is no formal regulation assigning such roles. It was noted that a Cabinet submission had been prepared for the establishment of the central authority.

## ■ **SCOPE OF MUTUAL LEGAL ASSISTANCE**

Article 46(1) calls for the widest measure of mutual legal assistance to be provided as listed in article 46(3) in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. The Convention lists the specific types of mutual legal assistance that a State must be able to provide, including, among other things:

- Taking evidence or statements from persons;
- Effecting service of judicial documents;
- Executing searches and seizures, and freezing;
- Examining objects and sites;
- Providing originals or certified copies of relevant documents and records including government, bank, financial or business records;
- Identifying or tracing the proceeds of crime or property; and
- The recovery of assets.

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<sup>102</sup> The reviewers recommend that Fiji, Nauru, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu notify the Secretary-General of the United Nations of their central authority for the purposes of mutual legal assistance.

<sup>103</sup> Cook Islands.

<sup>104</sup> Fiji, Kiribati, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>105</sup> Kiribati and Cook Islands.

<sup>106</sup> Solomon Islands.

<sup>107</sup> Papua New Guinea.



Most countries indicated that they can afford a requesting State the widest measure of mutual legal assistance,<sup>108</sup> subject to permitted grounds for refusal (addressed below). Papua New Guinea's legislation specifically provides that mutual legal assistance is not to be limited.

For one country, a key limitation identified by reviewing experts was the inability of the competent authority to respond to requests for mutual legal assistance with regard to companies and merchant vessels registered with the Trust Company of the State. It was confirmed that the vast majority of mutual legal assistance requests received related to such companies. Where such a request is received, the competent authority will forward it on to the Trust Company for their action but does not have statutory authority to require the information from the Trust Company. Having forwarded the request for mutual legal assistance to the Trust Company, no further information had been received from the Trust regarding how the request was responded to or what, if any, information was provided to the requesting State by the Trust. The reviewing experts noted that the lack of information sharing between national authorities and the Trust company could serve to undermine the ability of the State to respond effectively to mutual legal assistance requests as required under this provision of the Convention. The reviewers therefore recommended that the State introduce measures to improve transparency, channels of communication and information sharing between the various authorities to allow for more effective responses to mutual legal assistance requests from other States.<sup>109</sup>

### **Purposes**

The purposes for which legal assistance may be requested according to article 46(3) are to a large extent covered by domestic legislation in most States parties.<sup>110</sup> The following exceptions were noted by some countries:

- Provisions do not exist on the recovery of assets in accordance with Chapter V of the Convention;<sup>111</sup> and
- No provision existed to facilitate cooperation in the area of the service of judicial documents.<sup>112</sup>

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<sup>108</sup> Federated States of Micronesia, Solomon Islands and Vanuatu.

<sup>109</sup> Republic of the Marshall Islands.

<sup>110</sup> Fully covered in the Cook Islands, Federated States of Micronesia, Fiji, Nauru, Palau, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>111</sup> Papua New Guinea and Vanuatu.

<sup>112</sup> Nauru.

However, in the event that types of assistance were not directly provided for in legislation, States confirmed that they would be willing to assist and act in a co-operative manner as required by article 46(3)(i) of the Convention.<sup>113</sup>

The actual practice of affording legal assistance varies across countries. Generally, countries have limited experience in mutual legal assistance with one State citing no requests in the last five years.<sup>114</sup> In contrast, five requests were sent and one received in one year by the Federated States of Micronesia. In Papua New Guinea and Nauru, there were no known cases of legal assistance requests relevant to corruption-related offences. Similarly, in Kiribati, in the last five years, no mutual legal assistance requests have been received and none sent. However, Kiribati is in the process of drafting two such corruption-related requests.

In comparison, the Cook Islands has sent and received a number of mutual legal assistance requests. All requests were responded to. In the Solomon Islands, in the last 10 years, two requests (corruption-related) requests have been received (one granted) and none sent. While in Vanuatu, 35 mutual legal assistance requests have been received, but only six responded to.

It was noted by reviewing experts that the absence of case examples affects the analysis of the implementation of the article insofar as it is not possible to reach a determination of the effective implementation of the legislative framework in practice.

## ■ **LEGAL PERSONS**

The Convention extends the provision of mutual legal assistance with respect to investigations, prosecutions and judicial proceedings into the conduct of *legal persons*. Some discretion is granted to States regarding the extent to which assistance is to be provided.<sup>115</sup> Most States parties cover legal persons through their definition of ‘person’ in the relevant States parties’ Interpretation Act or other domestic legislation.<sup>116</sup> In Papua New Guinea, the reviewing experts believed that it was not clear how mutual legal assistance would be processed in cases where requests relevant to the corrupt conduct of legal persons.<sup>117</sup>

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<sup>113</sup> Nauru and Papua New Guinea. Article 46(3)(i) provides that “Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes: ... (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party”.

<sup>114</sup> Kiribati.

<sup>115</sup> Article 46(2).

<sup>116</sup> Cook Islands (Crimes Act); Federated States of Micronesia (sections 104(9) and 903(13) Federated States of Micronesia Code); Fiji (Crimes Decree 2009, Penal Code and Prevention of Bribery Promulgation, read together with the Interpretation Act); Nauru (Interpretation Act); Papua New Guinea (Interpretation Act 1975); Republic of the Marshall Islands (section 1.13(8), Criminal Code); Solomon Islands (Interpretation and General Provisions Act); and Vanuatu (Interpretation Act, Schedule to section 2).

<sup>117</sup> See: section 10(a), Mutual Assistance in Criminal Matters Act.

## ■ SPONTANEOUS TRANSMISSION OF INFORMATION

The Convention encourages the spontaneous transmission of information prior to a mutual legal assistance request. The Convention provides a legal basis for a State party to forward to another State party information or evidence it believes is important for combating the offences covered by the Convention where the other State has not made a request for assistance and may be completely unaware of the existence of the information or evidence. However, there is no obligation to do so in a specific case.<sup>118</sup> The main goal of the spontaneous exchange of information to foreign authorities is to assist foreign counterparts in receiving evidence that could be helpful for conducting inquiries and criminal proceedings in its preliminary stage. It may result in the submission of a formal mutual legal assistance request at a later time. It primarily serves the interests of the State receiving the information.

The possibility of direct contacts between authorities is not a way of circumventing the formal mutual legal assistance procedure; rather, it aims to encourage States parties to exchange information on criminal matters voluntarily and proactively. Direct contacts are important as a way of enquiring about the formal conditions required by the requested State; and on operational information or intelligence, for example.<sup>119</sup> The only general obligation imposed for the receiving State is to keep the information transmitted confidential and to comply with any restrictions on its use, unless the information received is exculpatory to the accused; in this case, the receiving State may freely disclose this information in its domestic proceedings.<sup>120</sup>

The spontaneous transmission of information, as envisaged in UNCAC articles 46(4) and (5), is generally not specifically regulated at the national level among countries.<sup>121</sup> However, in practice, States' competent authorities proactively transmit information through informal networks.<sup>122</sup> Concrete examples were not provided.<sup>123</sup>

The reviewing experts recommended States parties consider granting legal authority to the relevant authority to proactively transmit information to a foreign competent authority in relation to mutual legal assistance, without a prior request, where such information could assist in the investigation and prosecution of Convention-related offences.<sup>124</sup>

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<sup>118</sup> Article 46(4) and (5); Legislative Guide, *op. cit.*, pp. 173-174.

<sup>119</sup> Legislative Guide, *op. cit.*, p. 174.

<sup>120</sup> Technical Guide, *op. cit.*, p. 165.

<sup>121</sup> Federated States of Micronesia, Fiji and Republic of the Marshall Islands.

<sup>122</sup> Cook Islands, Papua New Guinea, Republic of the Marshall Islands and the Solomon Islands.

<sup>123</sup> Papua New Guinea.

<sup>124</sup> Federated States of Micronesia, Nauru, Palau, Solomon Islands and Vanuatu.

## ■ **FORM, LANGUAGE AND CONTENT OF REQUESTS**

The majority of countries require that requests be sent in writing,<sup>125</sup> and noted that oral requests would be accepted, followed by a formal written request.<sup>126</sup>

Several States have specified which languages (usually English)<sup>127</sup> are acceptable for incoming requests, but have not notified the Secretary-General of the United Nations,<sup>128</sup> except for the Federated States of Micronesia. It was further recommended that those who had not notified the Secretary-General of the United Nations of the acceptable language for executing mutual legal assistance requests, do so.<sup>129</sup>

*For one country, the acceptance of urgent mutual legal assistance requests via INTERPOL was commended as a good practice.<sup>130</sup>*

## ■ **SPECIALITY AND CONFIDENTIALITY**

Requesting States are under an obligation not to use any information that was received through mutual legal assistance or protected by bank secrecy for any purpose other than the proceedings for which that information was requested, unless authorized to do so by the requested State.<sup>131</sup> In addition, UNCAC article 46(20) provides that the requesting State may require that the requested State keep the fact and substance of the request confidential, except to the extent necessary to execute the actual request.

In some States, legislation contains confidentiality requirements applicable to the use of information requested in the context of mutual legal assistance.<sup>132</sup> However, there are no exceptions stipulated with regard to the disclosure of details exculpatory to an accused person. Such legislation is used in such a manner as to mean that the State party will not and does not disclose any material unless it notifies the foreign State.<sup>133</sup> Such conditions are reflected in the letters of requests for mutual legal assistance on a reciprocal basis.

<sup>125</sup> Papua New Guinea and Nauru.

<sup>126</sup> E.g. Nauru.

<sup>127</sup> Papua New Guinea, Solomon Islands and Vanuatu.

<sup>128</sup> E.g. Cook Islands, Nauru, Palau, Papua New Guinea and Vanuatu.

<sup>129</sup> Cook Islands, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>130</sup> Papua New Guinea.

<sup>131</sup> Article 46(19); Interpretative Note A/58/422/Add.1, para 43.

<sup>132</sup> Fiji and Papua New Guinea.

<sup>133</sup> Papua New Guinea.

Several States parties noted that evidence and other materials obtained through mutual legal assistance cannot be used for a purpose other than that specified in the request, unless consent is provided after consulting with the foreign State.<sup>134</sup>

## ■ **EXECUTION OF THE REQUEST**

Most countries, in line with UNCAC article 46(17), noted that incoming mutual legal assistance requests would be executed in accordance with the domestic law of the State receiving the request for assistance.<sup>135</sup> However, States also noted that, to the extent feasible, requests could be executed in accordance with the procedures specified in the request, which is also in line with the UNCAC provision.

## ■ **TRANSFER OF DETAINEES**

Most States parties allow for the transfer of detained persons for the purposes of investigations, prosecutions or judicial proceedings in line with the Convention.<sup>136</sup>

Nauru's mutual legal assistance legislation sets out the requirements of consent of the person and conditions of transfer for purposes of giving evidence or testimony. However, the reviewing experts noted that procedures could be further simplified and streamlined to allow for extradition to be dealt with efficiently and effectively, including the transfer and return of a person without delay in accordance with UNCAC article 46(11)(b).

The reviewing experts further recommended that Kiribati address the conditions of prisoners being transferred in its domestic law. While reviewing experts recommended that Vanuatu require that a person (i.e. witness, expert), detained or not, who is transferred overseas, pursuant to a mutual legal assistance request, will not be prosecuted, detained, punished or subjected to any other restrictions of his/her personal liberty.

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<sup>134</sup> Federated States of Micronesia, Nauru and the Solomon Islands.

<sup>135</sup> Federated States of Micronesia, Fiji, Nauru and Papua New Guinea.

<sup>136</sup> E.g. Cook Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands and the Solomon Islands.

## ■ VIDEOCONFERENCING

Another area where enhanced cooperation may be needed relates to the protection of witnesses who may be vulnerable to threats and intimidation. UNCAC article 32 provides for specific measures in this regard. In addition, article 46(18) proposes the use of videoconferencing as a means of providing evidence in cases where it is neither possible nor desirable for the witness to appear in person in the territory of the requesting State to testify.<sup>137</sup>

Legislation provides for the use of videoconferencing in some countries,<sup>138</sup> but not in others.<sup>139</sup> Further, most States indicated that videoconferencing could be used, if such facilities were available;<sup>140</sup> however, in practice, such services are limited. Countries reported that they have used telephone conferencing.<sup>141</sup>

*The reviewing experts highlighted that the extensive use of video links in Fiji, as permitted by section 11(5) of its Mutual Legal Assistance in Criminal Matters Act, is effective.*

## ■ GROUNDINGS FOR REFUSAL

### ***Permitted grounds for refusal***

The Convention recognizes the diversity of legal systems and allows States parties to refuse to provide mutual legal assistance under certain conditions as enumerated in article 46(21) including if:

- The request is not made in conformity with the provisions of article 46;
- The requested State considers that execution of the request is likely to prejudice its sovereignty, security, public order or other essential interests;<sup>142</sup>

<sup>137</sup> Technical Guide, *op. cit.*, p.165.

<sup>138</sup> Fiji, Papua New Guinea and Vanuatu.

<sup>139</sup> Solomon Islands.

<sup>140</sup> Cook Islands, Nauru, Palau, Republic of the Marshall Islands and Solomon Islands.

<sup>141</sup> Cook Islands.

<sup>142</sup> Federated States of Micronesia and Papua New Guinea.

- The authorities of the requested State 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; and
- It would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

Several countries have legislation in place providing for equivalent grounds for refusal to the ones listed in the Convention.<sup>143</sup> States parties provided the following examples. Mutual assistance would be provided:

- To the extent that the request is made through the Secretary of the Department of Justice;<sup>144</sup>
- Where dual criminality is fulfilled, with the approval of the Attorney General and the request falls within the forms of assistance specified in domestic legislation or refers to the nature or extent of such assistance in investigations or proceedings in criminal matters which the State may lawfully give;<sup>145</sup>
- Where such assistance is subject to the approval of the Attorney General;<sup>146</sup> or
- In relation to a serious offence with a penalty threshold of imprisonment for a period of not less than twelve months.<sup>147</sup>

In Kiribati, assistance may also be refused on the ground that the assistance could prejudice a criminal investigation or proceeding in the country. The reviewing experts recommended that Kiribati consider amending its mutual legal assistance legislation to provide that assistance may be postponed, rather than refused, on the ground that assistance could prejudice an ongoing criminal investigation or proceeding.

The reviewing experts encouraged States to clarify certain grounds for refusal, for example, where the ground may create room for arbitrary denial of assistance.

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<sup>143</sup> Federated State of Micronesia, Kiribati and Papua New Guinea.

<sup>144</sup> Federated States of Micronesia.

<sup>145</sup> Solomon Islands.

<sup>146</sup> Vanuatu.

<sup>147</sup> Federated States of Micronesia.

### **Limiting the grounds for refusal of mutual legal assistance**

The Convention also provides grounds upon which a State party may not refuse a request for mutual legal assistance:

- On grounds of bank secrecy;<sup>148</sup> and
- On the sole ground that the offence is also considered to involve fiscal matters.<sup>149</sup>

### **Bank secrecy**

In corruption investigations, access to banking records and related information is crucial. The Convention makes it clear that mutual legal assistance cannot be refused on the ground of bank secrecy. Instead, States parties are obliged to ensure that no such ground for refusal may be invoked under their legal regime, including their Criminal Code, Criminal Procedure Code or the banking laws or regulations.<sup>150</sup>

The majority of countries have implemented this provision,<sup>151</sup> however, not necessarily in their domestic legislation.<sup>152</sup> The Republic of the Marshall Islands' Banking Act provides for bank secrecy to be lifted "in order to comply with the provisions of this Chapter and the provisions of any other written law", while in Palau, bank secrecy may be lifted according to Title 17 of the Palau National Code. In the Cook Islands, a Court (production order) is required to lift bank secrecy. Fiji noted that it had not and would not decline to render mutual legal assistance on the grounds of bank secrecy.

For those States parties that have not implemented the provision, the reviewing experts recommended that they introduce legislative provisions, not declining to render mutual legal assistance on the ground of bank secrecy.<sup>153</sup>

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<sup>148</sup> Article 46(8).

<sup>149</sup> Article 46(22).

<sup>150</sup> Technical Guide, *op. cit.*, p. 164. See also articles 31(7), 55 and 57.

<sup>151</sup> Cook Islands, Fiji, Palau, Papua New Guinea, Republic of the Marshall Islands and Vanuatu.

<sup>152</sup> Papua New Guinea.

<sup>153</sup> Kiribati, Nauru, Papua New Guinea and Vanuatu (noting that this is currently addressed only for money-laundering offences).



*One country noted that there have been complaints made by banks in relation to the application of production orders. For example, there was one case where the bank disputed that the parties were allowed to be included in the application, the Court disagreed and ruled in favour of including the parties. Another example was where a bank argued that a ‘fishing expedition’ could not be conducted, with the Court ruling that the specificities needed to be detailed in the application.*

### ***Fiscal matters***

Some States indicated that a mutual legal assistance request would not be refused on the sole ground that the offence also involved fiscal matters.<sup>154</sup> For those countries that did not, reviewing experts recommended that they, through legislative measures, ensure that mutual legal assistance is not refused on the sole ground that the offence is also considered to involve fiscal matters.<sup>155</sup>

## ■ **DUAL CRIMINALITY**

As noted above, many countries traditionally provide grounds for refusal of mutual legal assistance where, for example, the public interest or the security of the State may be affected, or, more generally, where this would be contrary to domestic laws.

Dual criminality may be a reason to refuse mutual legal assistance altogether or, in some instances, only to refuse access to certain coercive measures.<sup>156</sup> By allowing for a broad interpretation of the dual criminality requirement, countries can greatly facilitate the provision of assistance. Such interpretation should be based on the *conduct* that is being prosecuted, and not the technical terms or definitions of the offence.<sup>157</sup>

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<sup>154</sup> Papua New Guinea.

<sup>155</sup> Cook Islands, Federated States of Micronesia, Kiribati, Nauru and Palau.

<sup>156</sup> The Convention requires States parties, where consistent with the basic concepts of their domestic systems, to render assistance even in the absence of dual criminality, if such assistance does not involve coercive action (article 46(9)(b)).

<sup>157</sup> Article 43(2) of the Convention explicitly provides, in this respect that:

“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.”

UNCAC article 46(9) requires States parties to take into account the purposes and spirit of the Convention<sup>158</sup> as they respond to requests for legal assistance in the absence of dual criminality. States may decline to render assistance in the absence of dual criminality where coercive measures are necessary.<sup>159</sup> However, States are encouraged to exercise their discretion and consider the adoption of measures that would broaden the scope of assistance even in the absence of this requirement.<sup>160</sup> Further, States are required to render assistance involving non-coercive measures (as discussed below).

Several countries require dual criminality in order to grant mutual legal assistance.<sup>161</sup> In other words, the absence of dual criminality is a permissive ground for refusal. For example, in some States, mutual legal assistance is only provided in relation to:

- A serious offence, the definition of which requires dual criminality to be fulfilled, with a penalty threshold of imprisonment or a period of not less than twelve months;<sup>162</sup>
- Where the potential penalty is imprisonment or other deprivation of liberty for a period of not less than 12 months<sup>163</sup> (including purely fiscal offences);<sup>164</sup> and
- Any “serious offence”.<sup>165</sup>

For those countries that require dual criminality, mutual legal assistance is limited to the extent that not all offences established under the Convention have been criminalized.<sup>166</sup> It was therefore recommended that those States parties criminalize all mandatory Convention-related offences and consider criminalizing the optional Convention-related offences, which are currently not established as crimes in the domestic legislation to satisfy the dual criminality requirements.<sup>167</sup>

### **Non-coercive measures**

While States parties may decline to render assistance on the ground of absence of dual criminality, they are required to render assistance involving non-coercive measures (for example, taking voluntary witness statements, sharing intelligence, conducting crime scene analysis, obtaining criminal records or other publicly available material), provided this is consistent with the basic concepts of their legal system and the offence is not of a trivial nature.<sup>168</sup>

<sup>158</sup> Article 1.

<sup>159</sup> Article 46(9)(b).

<sup>160</sup> Technical Guide, *op. cit.*, p. 164.

<sup>161</sup> Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands and Solomon Islands.

<sup>162</sup> Federated States of Micronesia.

<sup>163</sup> Federated States of Micronesia and Solomon Islands.

<sup>164</sup> Solomon Islands.

<sup>165</sup> Republic of the Marshall Islands and Solomon Islands.

<sup>166</sup> Kiribati, Nauru and Papua New Guinea.

<sup>167</sup> Nauru and Papua New Guinea.

<sup>168</sup> Article 46(9)(b).

In the Republic of the Marshall Islands, non-coercive measures may be used in the absence of dual criminality. In such a situation, a court order would not be required to provide assistance. The Republic noted that it provides informal assistance in the absence of dual criminality to the extent possible under domestic legislation. In Kiribati, dual criminality may be dispensed with, at the discretion of the competent authority that would generally exercise this discretion, to provide non-coercive assistance wherever possible.

However, some States parties' legislation does not provide for giving assistance that does not require coercive measures in the absence of dual criminality. The reviewing experts therefore recommended that these States take such legislative measures as may be necessary to ensure that mutual legal assistance involving non-coercive measures is afforded in the absence of dual criminality, in line with article 46(9)(b).<sup>169</sup>

## ■ CONSULTATION PRIOR TO REFUSAL

A further obligation included in the Convention is that the requested State consult with the requesting State to consider whether a request for assistance may be granted subject to terms and conditions before deciding to refuse assistance.<sup>170</sup> Presumably, this obligation enhances the possibility for mutual assistance by encouraging countries to work out ways to alleviate a requested country's concerns.

Most countries had no legal provision providing for consultation, but in practice, consultations do take place.<sup>171</sup> In addition, most States indicated that, in practice, they would provide reasons for refusal<sup>172</sup> and consult prior to refusal.<sup>173</sup>

It was recommended for some States that reasons be given to the requesting State for any mutual legal assistance refusal, and prior to this, consultations taken.<sup>174</sup> The reviewing experts stated that this should preferably be legislatively provided for.

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<sup>169</sup> Federated States of Micronesia, Nauru, Palau and the Solomon Islands.

<sup>170</sup> Article 46(26).

<sup>171</sup> Nauru, Solomon Islands and Vanuatu.

<sup>172</sup> Cook Islands, Fiji, Palau, Papua New Guinea, Republic of the Marshall Islands and Solomon Islands.

<sup>173</sup> Fiji, Nauru and Republic of the Marshall Islands.

<sup>174</sup> Papua New Guinea and Vanuatu.

## ■ TIMEFRAMES

According to UNCAC article 46(24), States parties are obliged to execute requests expeditiously and take as full account, as possible, of eventual deadlines facing the requesting authorities. States explained that they acted in a most cooperative manner while processing assistance requests.<sup>175</sup> One country indicated that the length of time would vary according to the facts of the matter, including the urgency of the request. Kiribati noted that no specific timeframes are specified in legislation, and there is no specified procedure for periodic follow-up.

One country further indicated its intention to develop internal guidelines to formulate their desire to promptly execute requests. These guidelines might include timelines for executing requests and give guidance as to how to handle any problems in executing these requests, including how appropriate follow-up with the requesting State should be handled.

It was recommended by the reviewing experts that countries consider simplifying and streamlining procedures and evidentiary requirements in order to allow for mutual legal assistance requests to be dealt with efficiently and effectively. This may include the adoption of a request management system and internal guidelines.<sup>176</sup> Specifically, it was recommended that Papua New Guinea ensure that relevant legislation contain clear provisions requiring efficient communication of Papua New Guinea with the requesting State, in line with the requirements of this provision.

*Vanuatu was commended on its practice of consulting with the requesting State in relation to mutual legal assistance requests.*

## ■ SAFE CONDUCT OF WITNESSES

The safe conduct of witnesses, as envisaged in article 46(27) of the Convention, was addressed in several States' domestic legislation.<sup>177</sup>

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<sup>175</sup> Papua New Guinea.

<sup>176</sup> Nauru, Palau, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

<sup>177</sup> Cook Islands, Federated States of Micronesia and Nauru.

One recommendation was made for one country to require that a person transferred overseas pursuant to a mutual legal assistance request, not be prosecuted, detained, punished or subjected to any other restrictions of his or her personal liberty in that country in respect of acts, omissions or convictions prior to his or her departure.<sup>178</sup>

## ■ COSTS

Early discussions between countries regarding the allocation of costs for responding to a request might prevent a potential breakdown of the relationship later. In this respect, UNCAC article 46(28) provides:

*“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”.*

Many of the costs arising in connection with compliance with requests made pursuant to articles 46(10), (11) and (18) would generally be considered extraordinary in nature. Developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.<sup>179</sup>

*One country received a number of mutual legal assistance requests requiring production, restraining and forfeiture orders. In one such request, the country was able to return the proceeds of a crime (through a restraining order and then forfeiture order) up to the value of NZ\$20 million. The country only recovered the costs that it had incurred to return the proceeds, which the reviewing experts deemed to be a good practice.*

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<sup>178</sup> Vanuatu.

<sup>179</sup> Interpretative Note A/58/422/Add.1, para 44.

While not legislated,<sup>180</sup> States indicated that they would bear the ordinary costs of executing a mutual legal assistance.<sup>181</sup> However, if expenses were of a substantial or extraordinary nature for a request, the respective Government would consult with the foreign State,<sup>182</sup> or request financial assistance.<sup>183</sup>

It was recommended that Vanuatu take legislative measures or adopt guidelines to ensure a more consistent approach to the determination of the costs associated with executing mutual legal assistance requests.

## ■ PROVISION OF DOCUMENTS

Most States indicated that information requested in a mutual legal assistance request that is not available to the general public could be provided through an official letter or Court order, depending on the nature of the information.<sup>184</sup>

In Papua New Guinea, in principle, general public information could be provided for, but it is limited by section 51 of the Constitution that limits this to citizens of Papua New Guinea. It was therefore recommended that the Government introduce an amendment to its mutual legal assistance legislation by clearly stipulating that publically available information can be shared with a requesting State and set up a corresponding procedure.

The reviewing experts considered that one country may wish to consider providing to the requesting State copies of government records, documents or information that are not available to the general public.<sup>185</sup>

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<sup>180</sup> Federated States of Micronesia, Nauru and Solomon Islands.

<sup>181</sup> Cook Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands and Solomon Islands.

<sup>182</sup> Cook Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea and Solomon Islands.

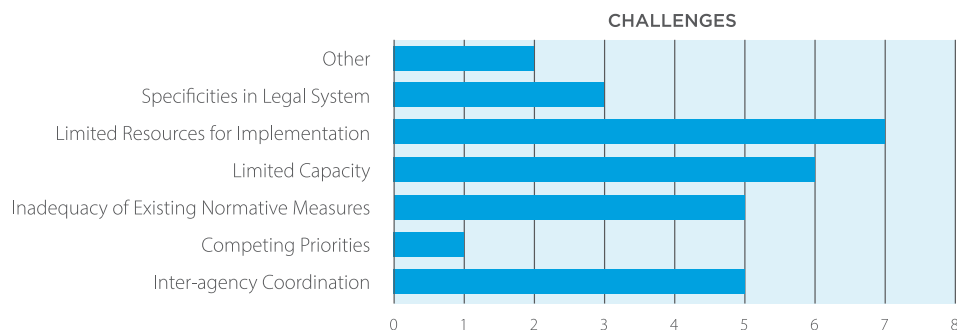
<sup>183</sup> Republic of the Marshall Islands.

<sup>184</sup> Cook Islands, Federated States of Micronesia (through evidence-gathering order or search warrant), Kiribati, Republic of the Marshall Islands and Solomon Islands (court order).

<sup>185</sup> Vanuatu.

## ■ CHALLENGES AND TECHNICAL ASSISTANCE

The most common challenge to implementation of article 46 among States parties was limited resources for implementation, as well as inadequacy of existing normative measures and limited capacity.



Technical assistance was most often requested in terms of capacity-building programmes for authorities responsible for international cooperation in criminal matters, as well as a summary of good practices/lessons learned. Other forms of assistance requested included quite specific examples such as:

- Development of an international cooperation database, including internal guidelines for staff on how to deal with international cooperation requests, and extradition and mutual legal assistance templates that can be sent to States requesting assistance, so that requesting States comply with all the necessary requirements of the domestic State;<sup>186</sup>
- A guidance sheet on what incoming requests should include and a database sheet to assist in the administration of incoming/outgoing requests; suggestion of the development of a webpage for international cooperation focal points;<sup>187</sup>
- Streamlining procedures and evidentiary requirements such as internal guidelines/a request management system;<sup>188</sup>
- Training for local law enforcement and court personnel;<sup>189</sup>
- Consolidation of all the Federal laws in a simple electronic form;<sup>190</sup>

<sup>186</sup> Federated States of Micronesia, Palau and Vanuatu.

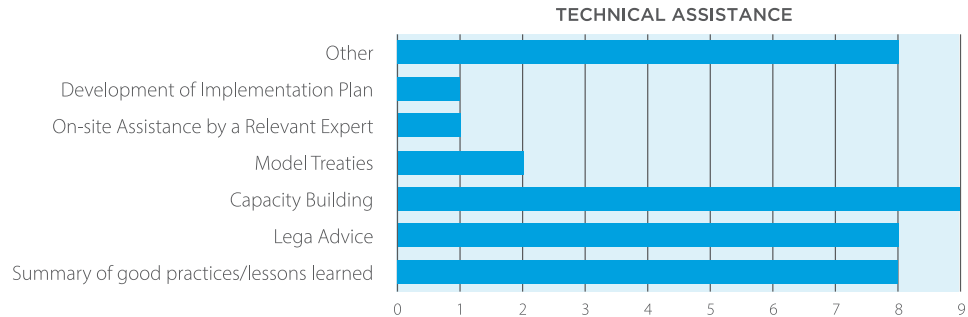
<sup>187</sup> Nauru.

<sup>188</sup> Nauru.

<sup>189</sup> Palau.

<sup>190</sup> Palau.

- International secondments with regional experience, coordination with international bodies, especially INTERPOL and the creation of a case management system (also one that would facilitate tracing, freezing and tracing proceeds of crime);<sup>191</sup> and
- International cooperation record-keeping system of filing incoming/outgoing requests, legal basis, specific request, who is dealing with it (i.e. Police, the Financial Intelligence Unit), timeline, information provided, reasons for refusing assistance, etc.<sup>192</sup>



One country indicated that several forms of technical assistance have already been provided by the Australian Government, the Asian Development Bank/Organisation for Economic Cooperation and Development and the United Nations Development Programme. However, an extension of this assistance would be useful.<sup>193</sup> In the case one State, the reviewing experts noted their willingness to participate in a possible task group under the auspices of UNODC or other similar international body in order to better evaluate the progress of the technical assistance provided.<sup>194</sup>

<sup>191</sup> Papua New Guinea.

<sup>192</sup> Vanuatu.

<sup>193</sup> Papua New Guinea.

<sup>194</sup> One potential method for technical assistance is through the use of the Mutual Legal Assistance Request Writer Tool. The Mutual Legal Assistance Request Writer has been developed by UNODC to assist States to draft requests with a view to facilitate and strengthen international cooperation. See further, <https://www.unodc.org/mla/en/index.html>.



# TRANSFER OF CRIMINAL PROCEEDINGS



UNCAC article 47 invites States parties to consider the transfer to one another of criminal proceedings when this would be in the interest of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution. This is designed to make it more practical, efficient and fairer to all parties concerned to consolidate the case in one place.<sup>195</sup>

In the Solomon Islands, the transfer of criminal proceedings is possible (where the offence was committed outside the Solomon Islands),<sup>196</sup> while Fiji has considered transferring criminal proceedings in appropriate cases.<sup>197</sup>

However, most States have not implemented this provision,<sup>198</sup> while two countries referred to their Compact of Association with the United States of America.<sup>199</sup>

There was a universal recommendation made for these States (except for Nauru) to consider the possibility of transferring criminal proceedings where it is in the interest of the proper administration of justice,<sup>200</sup> in particular where several jurisdictions are involved. <sup>201</sup> One recommendation was more specific, encouraging the State to consider introducing necessary amendments to its legislation to enable the possibility of transferring proceedings to other States, as well as receiving such proceedings from another State for the prosecution of offences established in accordance with the Convention.<sup>202</sup>

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<sup>195</sup> Legislative Guide, *op. cit.*, p.180.

<sup>196</sup> Section 65, Criminal Procedure Code.

<sup>197</sup> An example was provided where it was agreed, following consultations, which the prosecution should occur in Fiji. The prosecution was successfully concluded and the convicted person was serving a lengthy sentence in Fiji.

<sup>198</sup> Cook Islands, Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands and Vanuatu.

<sup>199</sup> Palau and Republic of the Marshall Islands.

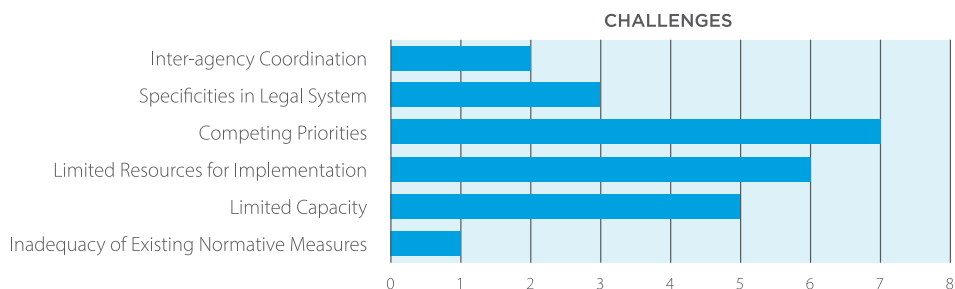
<sup>200</sup> Federated States of Micronesia, Nauru and Vanuatu.

<sup>201</sup> Cook Islands, Kiribati, Palau and Republic of the Marshall Islands.

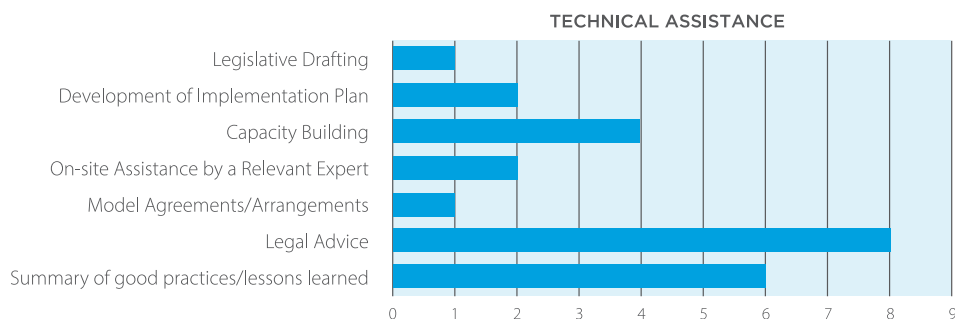
<sup>202</sup> Papua New Guinea.

## ■ CHALLENGES AND TECHNICAL ASSISTANCE

Most States parties cited the inadequacy of normative measures as a challenge to the implementation of this article. Limited capacity and limited resources for implementation were other frequently cited challenges.



Countries requested technical assistance in the form of a summary of good practices/lessons learned, legal advice and capacity-building programmes for authorities responsible for international cooperation in criminal matters.



It was noted that no technical assistance has been provided to any country in relation to UNCAC article 47.

# LAW ENFORCEMENT COOPERATION



Articles 48-50 of the Convention intend to promote the close cooperation between law enforcement authorities of States parties as an important tool for the successful investigation of transnational corruption. More specifically, UNCAC article 48 seeks to enhance the effectiveness of law enforcement cooperation and requires States parties to, among other things, enhance and, where necessary, establish channels of communication with a view to facilitating the secure and rapid exchange of information relating to all aspects of Convention-related offences, including their links with other criminal activities.<sup>203</sup> The Convention further requires States to work closely with one another in terms of law enforcement (police-to-police) cooperation in a number of areas set out in article 48(1). In addition, the Convention calls upon States to:

- Consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies;<sup>204</sup> and
- Endeavour to conduct law enforcement cooperation in order to respond to corruption-related offences committed through the use of modern technology.<sup>205</sup>

## ■ MECHANISM FOR LAW ENFORCEMENT COOPERATION

In principle, States parties could use the Convention as a legal basis for law enforcement cooperation,<sup>206</sup> although there has been no experience in its application.<sup>207</sup> Most countries do not consider UNCAC as the basis for mutual law enforcement cooperation in respect of Convention-related offences,<sup>208</sup> but they were encouraged to consider this by the reviewing experts.<sup>209</sup>

<sup>203</sup> Technical Guide, op. cit., p. 176.

<sup>204</sup> Article 48(2).

<sup>205</sup> Article 48(3).

<sup>206</sup> Vanuatu.

<sup>207</sup> Kiribati and Nauru.

<sup>208</sup> Republic of the Marshall Islands, Papua New Guinea and Solomon Islands.

<sup>209</sup> Federated States of Micronesia and the Solomon Islands.

Generally, States' law enforcement cooperation is carried out through various means:<sup>210</sup>

- Through agreements and arrangements, as well as on an ad hoc basis;<sup>211</sup>
- Through formal and informal channels;<sup>212</sup>
- Through regional and international networks;<sup>213</sup> and
- In specific matters, on a case-by-case basis.<sup>214</sup>

Direct information sharing between agencies such as police to police, Transnational Crime Unit (TCU) to TCU or Financial Intelligence Unit (FIU) to FIU is also common among countries.<sup>215</sup> The reviewing experts for Fiji noted that given that Fijian law enforcement authorities have established a record of collaborating with foreign counterparts, there is no demonstrated need for formal cooperation mechanisms in this area.

### ***Transnational Crime Units***

Those States with a Transnational Crime Unit (TCU), cooperate internationally through the Pacific Transnational Crime Network.<sup>216</sup>

The Pacific Transnational Crime Network, established in July 2002, is an important network that enhances law enforcement cooperation. The Network was initiated by the Pacific Islands Chiefs of Police and is supported by the Australian Federal Police, New Zealand Police Force and United States Joint Interagency Taskforce West. It provides an interconnected, proactive criminal intelligence and investigative capability to combat transnational crime in the Pacific through a multi-agency and regional approach consisting of:

- The Pacific Transnational Crime Network Board of Management;
- The Pacific Transnational Crime Coordination Centre;
- Eighteen TCUs based in thirteen Pacific Islands countries;
- Australian Federal Police Advisors attached to the Pacific Transnational Crime Coordination Centre and co-located with the Samoa TCU;
- Micronesia Region TCU (established in 2008, as an extension of the Federated States of Micronesia TCU in Pohnpei, with Palau, Commonwealth of the Northern Mariana Islands and the Republic of Marshall Islands), and other TCUs in the Cook Islands, Fiji

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<sup>210</sup> Vanuatu.

<sup>211</sup> E.g. Cook Islands and Federated States of Micronesia.

<sup>212</sup> Fiji.

<sup>213</sup> Republic of the Marshall Islands.

<sup>214</sup> Kiribati.

<sup>215</sup> Federated States of Micronesia.

<sup>216</sup> E.g. Cook Islands, Federated States of Micronesia, Kiribati, Nauru, Palau, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

(that also supports Kiribati, Niue and Vanuatu TCUs) Papua New Guinea, Solomon Islands;<sup>217</sup>

- The Pacific Islands Chiefs of Police;
- Linkages to various other Pacific Islands countries (including American Samoa, Nauru, Tuvalu and Guam), Asia (including Thailand and the Republic of Korea) and Europe;
- Linkages to various other forums, including the Pacific Islands Forum Secretariat, Oceania Customs Organisation, Pacific Immigration Directors Conference, Pacific Patrol Boat Program, United States Joint Interagency Taskforce West, Pacific Islands Law Officer's Network, Pacific Association of Supreme Audit Institutions, various other international law enforcement agencies and the private industry (e.g. Fisheries Forum).

States' TCUs also cooperate through other channels including:

- The New Zealand Police Force<sup>218</sup> and Australian Federal Police<sup>219</sup>;
- Guam-based<sup>220</sup> and United States counterparts;<sup>221</sup>
- INTERPOL<sup>222</sup> through the Pacific Transnational Crime Coordination Centre<sup>223</sup>, New Zealand<sup>224</sup> and Homeland Security of the United States;<sup>225</sup> and
- EUROPOL.<sup>226</sup>

Numerous countries have also seconded TCU or police members to the Pacific Transnational Crime Coordination Centre<sup>227</sup> and the Micronesia Regional TCU—sub-regional centre of the Pacific Transnational Crime Coordination Centre.<sup>228</sup>

While most States parties are not members of INTERPOL, they may have access through the Australian Federal Police, INTERPOL Fiji or INTERPOL New Zealand.<sup>229</sup>

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<sup>217</sup> As of 1 October 2014, the Micronesia Region Transnational Crime Unit will be closed and the Pacific Transnational Crime Coordination Center will be the hub of the Pacific.

<sup>218</sup> Cook Islands.

<sup>219</sup> Cook Islands and Kiribati.

<sup>220</sup> Federated States of Micronesia, Palau and Republic of the Marshall Islands.

<sup>221</sup> Federated States of Micronesia, Palau and Republic of the Marshall Islands.

<sup>222</sup> Kiribati.

<sup>223</sup> Cook Islands, Federated States of Micronesia, Nauru, Palau and Republic of the Marshall Islands.

<sup>224</sup> Cook Islands.

<sup>225</sup> Federated States of Micronesia, Palau and Republic of the Marshall Islands.

<sup>226</sup> Palau and Republic of the Marshall Islands.

<sup>227</sup> Cook Islands, Kiribati, Nauru and Solomon Islands.

<sup>228</sup> Palau and Republic of the Marshall Islands.

<sup>229</sup> Vanuatu.

## **Financial Intelligence Unit**

Countries' Financial Intelligence Units have both informal connections<sup>230</sup> and formalized Memoranda of Understanding with other Financial Intelligence Units.<sup>231</sup> In addition, many Financial Intelligence Units are part of the Pacific Association of Financial Intelligence Units.<sup>232</sup> These connections provide for an informal mechanism in which to share information. Several States are also members of EGMONT<sup>233</sup> (with one country noting its intention to join)<sup>234</sup> and the Asia/Pacific Group on Money-Laundering.<sup>235</sup>

## **Police**

Fijian and Papua New Guinean Police Forces are members of INTERPOL.<sup>236</sup> Various police forces among countries engage in direct cooperation with the Australian Federal Police<sup>237</sup> and New Zealand Police Force,<sup>238</sup> and have benefited from Australian Federal Police liaison officers in their national police forces.<sup>239</sup>

Police officers in the Solomon Islands and Vanuatu have benefited from assistance from the Australian Federal Police. In the Solomon Islands, this has been in the form of training, resources and co-located advisory services, through personnel seconded to the Solomon Islands Police Force and other Government departments (through Regional Assistance Mission to the Solomon Islands (RAMSI) and the Australian Federal Police). In Vanuatu, personnel of Australian Federal Police have been located within the Vanuatu Police Force as liaison officers. Vanuatu police officers have also been seconded into the Australian Federal Police and Transnational Crimes Unit in Fiji and Samoa through the Pacific Transnational Crime Network.

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<sup>230</sup> Cook Islands, Federated States of Micronesia, Kiribati, Nauru and Palau.

<sup>231</sup> Fiji has signed four memoranda of understanding and three are pending; Nauru has memoranda of understanding being drafted; Papua New Guinea concluded memoranda of understanding that facilitate the sharing of information with the Financial Intelligence Units of Fiji, Solomon Islands and Vanuatu; Solomon Islands has signed four memoranda of understanding; and Vanuatu has signed seven memoranda of understanding.

<sup>232</sup> Cook Islands, Federated States of Micronesia (informally), Kiribati (an official memorandum of understanding is yet to be signed), Nauru, Palau, Solomon Islands and Vanuatu.

<sup>233</sup> Cook Islands, Fiji, Solomon Islands and Vanuatu.

<sup>234</sup> Papua New Guinea.

<sup>235</sup> Fiji, Solomon Islands and Vanuatu

<sup>236</sup> Fiji and Papua New Guinea.

<sup>237</sup> Cook Islands, Federated States of Micronesia, Papua New Guinea, Solomon Islands and Vanuatu.

<sup>238</sup> Cook Islands.

<sup>239</sup> Nauru and Vanuatu.

## ***Regional Initiatives***

Numerous regional initiatives were also cited as a means for law enforcement cooperation, including:

- The Pacific Islands Chiefs of Police;<sup>240</sup>
- Pacific Islands Forum Secretariat;<sup>241</sup>
- Oceania Customs Organisation;<sup>242</sup>
- Pacific Patrol Boat Program;<sup>243</sup>
- Pacific Islands Law Officer's Network;<sup>244</sup>
- Pacific Island Public Auditors;
- Pacific Association of Supreme Audit Institutions;
- Pacific Ombudsman Alliance and Pacific Commonwealth Ombudsman Alliance;
- Pacific Immigration Directors Conference;
- South Pacific Leaders Forum;
- Multilateral arrangement between Pacific Chiefs of Police;<sup>245</sup> and
- Melanesian Spearhead Group.<sup>246</sup>

Several States parties provided examples of law enforcement cooperation, such as the Regional Assistance Mission to the Solomon Islands.

*Several countries were commended for their international law enforcement cooperation<sup>247</sup> in the region,<sup>248</sup> and especially through their Transnational Crime Units.<sup>249</sup>*

The reviewing experts took note of the Anti-Money Laundering and Countering Financing of Terrorism Mutual Evaluation Report regarding one country's participation in the South Pacific Leaders Form, and as part of this Forum, the 1992 Honiara Declaration on Law Enforcement Cooperation, the 1997 Aitutaki Declaration, and the 2000 Biketawa Declaration and Nsononi Declaration had been endorsed, which contain some important provisions on mutual legal assistance, forfeiture of the proceeds of crime, extradition and policing issues.

<sup>240</sup> E.g. Cook Islands, Federated States of Micronesia, Kiribati, Nauru, Solomon Islands and Vanuatu.

<sup>241</sup> E.g. Cook Islands, Federated States of Micronesia, Kiribati, Nauru and Vanuatu.

<sup>242</sup> E.g. Cook Islands, Kiribati and Nauru.

<sup>243</sup> E.g. Cook Islands, Kiribati and Nauru.

<sup>244</sup> Cook Islands and Kiribati.

<sup>245</sup> Solomon Islands.

<sup>246</sup> Solomon Islands and Vanuatu.

<sup>247</sup> Cook Islands, Federated States of Micronesia, Kiribati, Nauru, Palau, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

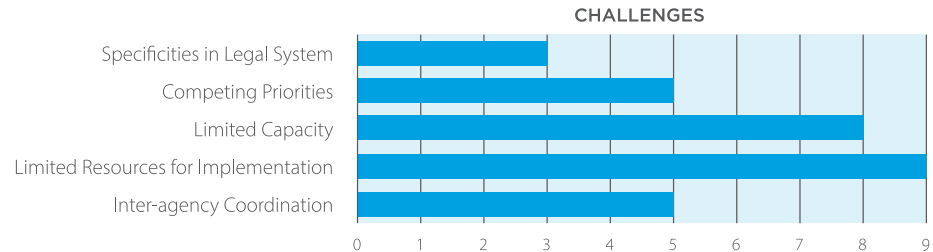
<sup>248</sup> Palau, Kiribati, Republic of the Marshall Islands and Vanuatu.

<sup>249</sup> Federated States of Micronesia, Nauru and Vanuatu.

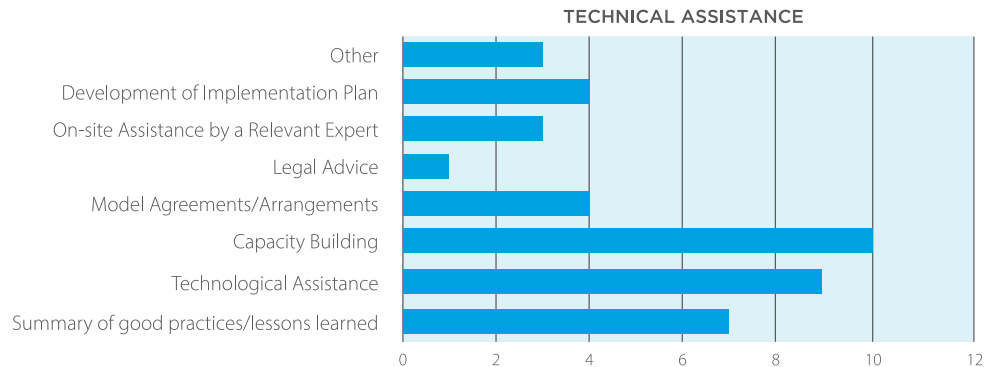
The reviewing experts recommended that Papua New Guinea consider introducing legislative amendments explicitly allowing for the information-sharing with other States' competent authorities, particularly with regard to the proceeds of corruption crimes and the movement of property, equipment or other instrumentalities used or intended for sue in the commission of corruption-related offences. It was also recommended that Papua New Guinea consider continuing to establish effective channels of communication with other competent authorities, also through informal arrangements.

## ■ CHALLENGES AND TECHNICAL ASSISTANCE

The main challenges cited by States parties were limited resources and capacity for their implementation of the UNCAC provision.



Countries further requested: technological assistance (for example, the set-up and management of databases/information-sharing systems); capacity-building programmes for authorities responsible for cross-border law enforcement cooperation; and a summary of good practices/lessons learned.





Several countries indicated that various forms of technical assistance had been provided by the Australian Federal Police, New Zealand Police Force, New Zealand Serious Fraud Office, Pacific Island Forum Secretariat and the Pacific Transnational Crime Coordination Centre.



# JOINT INVESTIGATIONS



Although UNCAC article 49 is non-mandatory in nature, it builds on the requirements set out in article 48. Its intention is to promote closer working relations between States parties. The provision encourages— but does not require— States to consider entering in to arrangements to conduct joint investigations, prosecutions and proceedings in more than one State, where a number of States may have jurisdiction over the offences involved. Article 49 further enables States to undertake joint investigations on a case-by-case basis when relevant arrangements or agreements do not exist.<sup>250</sup> This practice may significantly facilitate investigations and the exchange of information by eliminating the need to send individual requests for assistance between countries.

States parties noted that joint investigations may take place based on:

- An agreements/arrangement;<sup>251</sup>
- A case-by-case basis;<sup>252</sup>
- Domestic legislation;<sup>253</sup>
- Informal arrangements;<sup>254</sup> and
- Where it is not precluded by relevant legislation.<sup>255</sup>

Countries referred to examples, some of which were not corruption-related investigations.<sup>256</sup>

The Cook Islands undertakes joint investigations with foreign States, namely New Zealand, Australia and the United States of America on a case-by-case basis. Joint prosecutions have also taken place.

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<sup>250</sup> Technical Guide, op. cit., p. 180.

<sup>251</sup> Federated States of Micronesia.

<sup>252</sup> Fiji, Kiribati and Nauru.

<sup>253</sup> Sections 131 and 1312 of Title 18, Palau National Code.

<sup>254</sup> Kiribati.

<sup>255</sup> Papua New Guinea.

<sup>256</sup> Federated States of Micronesia, Kiribati, Fiji, Nauru, Palau, Republic of the Marshall Islands and Solomon Islands.

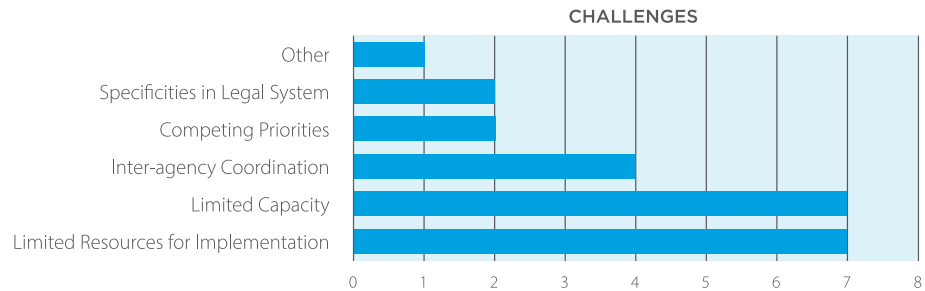
*The Cook Islands was commended on its international joint investigations, in particular with New Zealand.*

The Republic of the Marshall Islands has successfully conducted joint investigations and prosecutions in the past with the assistance of and cooperation with the Office of the Inspector General of the United States Department of the Interior with respect to fraud offences. Nauru also reported one ongoing joint investigation where the offence was committed in Nauru in relation to money laundering, but the person is now located in New Zealand.

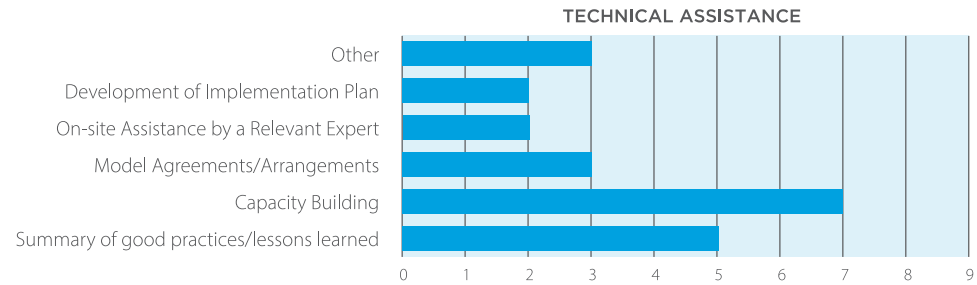
Papua New Guinea currently does not have any agreements with other States regarding the establishment of joint investigative bodies, so the reviewing experts recommended that it consider concluding bilateral or multilateral agreements or arrangements regarding joint investigations.

## ■ CHALLENGES AND TECHNICAL ASSISTANCE

States parties cited limited resources and capacity as two main challenges to implementing article 49.



Countries therefore indicated the need for technical assistance in capacity-building programmes for authorities responsible for cross-border law enforcement cooperation.



Two countries mentioned that several forms of technical assistance had been provided by the Australian Federal Police,<sup>257</sup> through on-the-job training to the police (i.e. investigative techniques), capacity building and other assistance.<sup>258</sup>

<sup>257</sup> E.g. Vanuatu.

<sup>258</sup> Vanuatu.



# SPECIAL INVESTIGATIVE TECHNIQUES



Article 50 of the Convention endorses the use of special investigative techniques—at both the national and the international levels. Such techniques include controlled delivery, electronic or other forms of surveillance and undercover operations.

The term “controlled delivery” is defined in article 2(1), as 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”.*

At the international level, article 50(4) clarifies that controlled delivery may include methods, such as intercepting and allowing goods or funds to continue intact or be removed or replaced, in whole or in part. The Convention also supports the admissibility in court of evidence derived from the use of special investigative techniques. However, the decision on whether to use them in a specific circumstance is determined at the discretion of the State concerned, taking into account the basic principles of its legal system, the conditions prescribed by its law and the resources it has at its disposal.

The use of special investigative techniques often raises sensitive constitutional and human rights issues and calls for particular caution in order to ensure appropriate oversight, accountability and the respect of established principles of international law, such as the presumption of innocence, the principle *nemo tenetur se ipsum prodere/accusare* (no one is bound to accuse himself/herself), and the right to respect one’s private life. For example, the behaviour of an undercover agent employed in the investigation of crimes should be within the limits of the rule of law (e.g. judicial authorization for wiretaps) and confine his or her activities to taking advantage of the opportunities provided or facilities created by an offender that has already decided to commit the crime; this cannot take the form of illicit entrapment, which consists of an agent instigating or abetting an offence in order to entrap an offender.<sup>259</sup>

<sup>259</sup> Conference of the States Parties to UNCAC, *State of Implementation of the United Nations Convention Against Corruption: Criminalization, Law Enforcement and International Cooperation*, CAC/COSP/2013/CRP.7, 2013, p. 132.

## ■ BILATERAL OR MULTILATERAL AGREEMENTS

International agreements or arrangements for special investigative techniques, as mentioned in UNCAC article 50(2), aimed at investigating corruption-related offences were reported in two countries,<sup>260</sup> both with the Australian Federal Police and the Cook Islands also with New Zealand and the United States of America. One country also stated that it uses existing arrangements or agreements for the carrying out of special investigative techniques.<sup>261</sup>

Article 50(3) provides that, in the absence of an agreement or arrangement, decisions to use special investigative techniques at the international level shall be made on a case-by-case basis. This formulation requires a State party to have the ability to cooperate on a case-by-case basis at least with respect to controlled delivery, the establishment of which is mandatory pursuant to article 50(1), where this is not contrary to the basic principles of the legal system of the State concerned.<sup>262</sup>

Most States parties appear not to make use of special investigative techniques and have neither legislated for them domestically,<sup>263</sup> nor have entered into international agreements or arrangements.<sup>264</sup> The Republic of the Marshall Islands noted that under its *Public Safety Act* and *Criminal Code*, law enforcement authorities are authorized to use undercover surveillance. While equipment is available for electronic surveillance including audio recording, national officials indicated that insufficient training had been provided to facilitate its effective use.

In comparison, the Cook Islands has fully implemented this provision. Appropriate bilateral arrangements on the use of special investigative techniques have been used on a number of occasions with New Zealand, Australia and the United States of America. In addition, the Cook Islands' *Police Act* and *Narcotics and Misuse of Drugs Act* provide for wiretapping, but this has not been used in practice in relation to corruption-related offences.

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<sup>260</sup> Cook Islands with New Zealand, Australia and United States of America; Vanuatu with Australia.

<sup>261</sup> Vanuatu.

<sup>262</sup> Legislative Guide, *op. cit.*, p. 183.

<sup>263</sup> Federated States of Micronesia, Kiribati, Nauru, Papua New Guinea, Republic of the Marshall Islands and Vanuatu.

<sup>264</sup> Federated States of Micronesia, Fiji, Nauru, Palau, Papua New Guinea and Republic of the Marshall Islands.



Palau has partially implemented this provision. However, Palau's special investigative techniques are limited to the investigation of money laundering and proceeds of crime. Such methods include: monitoring bank accounts; electronically record acts and behaviour or conversations; place under surveillance or tap telephone lines, facsimile machines or electronic transmissions.<sup>265</sup> Legislation also provides protection for officials conducting undercover operations and controlled delivery.<sup>266</sup>

One country uses existing arrangements and agreements to carry out of special investigative techniques, and is also considering a law on controlled delivery.<sup>267</sup>

Fiji indicated that due to their established record of collaborating with foreign counterparts, experts believe that there is no demonstrated need for formal cooperation mechanisms in this area.<sup>268</sup> While police use surveillance and information techniques in corruption-related cases, when necessary, they are able to use special investigative techniques in cooperating with foreign law enforcement authorities. The Fiji Independent Commission Against Corruption is permitted to conduct telephone tapping upon the prior permission of the President; however, it does not have the equipment or the expertise and experience to use the techniques foreseen in the Convention.

It was recommended that States parties consider introducing special investigative techniques, as may be necessary and within existing resources (beyond money-laundering and proceed of crime offences), and providing the corresponding training to law enforcement personnel.<sup>269</sup>

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<sup>265</sup> Money Laundering and Proceeds of Crime Act 2001 (Palau), section 23.

<sup>266</sup> Money Laundering and Proceeds of Crime Act 2001 (Palau), section 24.

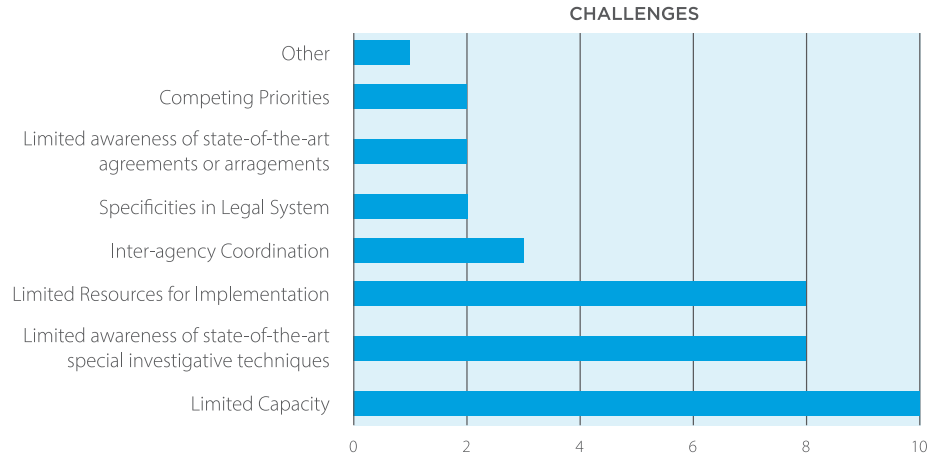
<sup>267</sup> Vanuatu.

<sup>268</sup> Fiji.

<sup>269</sup> Federated States of Micronesia, Kiribati, Nauru, Palau, Papua New Guinea, Republic of the Marshall Islands, Solomon Islands and Vanuatu.

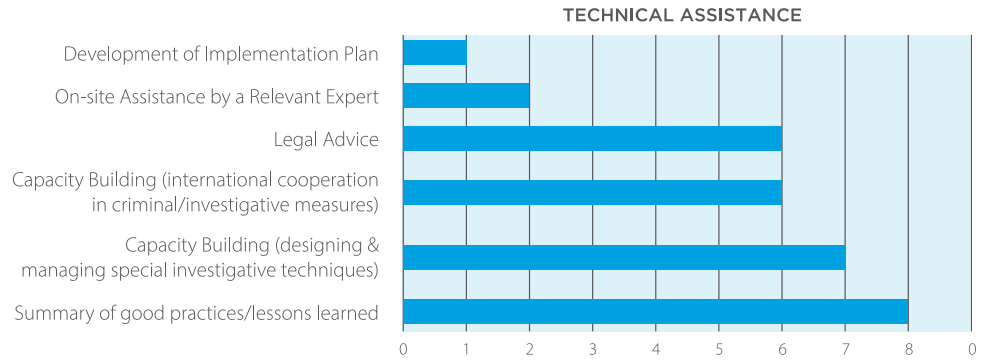
## CHALLENGES AND TECHNICAL ASSISTANCE

Principle challenges cited by States parties were limited capacity and limited awareness of state-of-the-art special investigative techniques. Limited resources for implementation were also an often-cited challenge.



Correspondingly, most countries requested technical assistance in the following areas:

- Summary of good practices/lessons learned; and
- Capacity-building programmes for authorities responsible for:
  - Designing and managing the use of special investigative techniques; and
  - International cooperation in criminal investigative matters.



One country indicated that some technical assistance has been provided.



## CONCLUSION



In general, the States parties in the Pacific region considered under review have legislatively implemented UNCAC articles 44 and 46 on extradition and mutual legal assistance, respectively. However, for the remaining provisions in Chapter IV, implementation was generally lacking especially in relation to the transfer of sentenced persons (UNCAC article 45) and the transfer of criminal proceedings (UNCAC article 47).

Overall, there was a lack of case examples of implementation cited, making it difficult to examine the effectiveness of legislative provisions that have been enacted. States parties also noted the lack of resources and equipment available to implement UNCAC article 50 on special investigative techniques.

A common theme throughout the review process for countries was to ensure that all Convention-related offences are extraditable between States parties, and that mutual legal assistance could be provided in relation to all Convention-related offences. States were also encouraged to consider using the Convention as a legal basis for extradition and mutual legal assistance.

Other common recommendations included that States parties consider the possibility of transferring criminal proceedings to and from a foreign State if it were in the interests of the proper administration of justice and, in particular, where several jurisdictions are involved. Notably, States were commended on their international law enforcement cooperation, particularly in the region.





## ANNEX I: REVIEWING EXPERTS

STATE PARTY	YEAR(S) OF REVIEW	REVIEWING EXPERTS
Cook Islands	2014/15	Belarus and Qatar
Fiji	2011/12	Bangladesh and the United States of America
Federated States of Micronesia	2014	Republic of Korea and Mongolia
Kiribati	2013/14	Côte d'Ivoire and Vanuatu
Palau	2013/14	Cambodia and Malaysia
Papua New Guinea	2012/13	Malawi and Tajikistan
Republic of the Marshall Islands	2014	Papua New Guinea and the Central African Republic
Solomon Islands	2014	Iraq and the Slovak Republic
Nauru	2014	Timor-Leste and Jamaica
Vanuatu	2013	Solomon Islands and India

## ANNEX II: EXTRADITION

	COOK ISLANDS	FEDERATED STATES OF MICRONESIA	FIJI	KIRIBATI
<b>Domestic Law</b>	Extradition Act 2003	Chapter 14 on criminal extradition, Title 12, <i>Federated States of Micronesia Code</i>	<i>Extradition Act 2003</i>	<i>Extradition Act</i>
<b>Treaty required?</b>	No	Yes	No	No
<b>Can UNCAC be basis?</b>	No	Uncertain	Uncertain	Yes, but not in practice
<b>Central Authority</b>	Crown Law Office	Ministry of Foreign Affairs	Attorney General	Minister for Foreign Affairs
<b>Dual Criminality required?</b>	Yes	Yes	Yes	Yes
<b>Extradite own nationals?</b>	Discretion	Yes	Yes	Discretion

## ANNEX III: MUTUAL LEGAL ASSISTANCE

	COOK ISLANDS	FEDERATED STATES OF MICRONESIA	FIJI	KIRIBATI
<b>Domestic Law</b>	<i>Mutual Assistance in Criminal Matters Act 2003</i>	Chapter 17, Title 12, <i>Federated States of Micronesia Code</i>	<i>Mutual Legal Assistance in Criminal Matters Act 1997 and 2006 amendment</i>	<i>Mutual Assistance in Criminal Matters Act</i>
<b>Treaty required?</b>	No			No
<b>Central Authority</b>	Crown Law Office	Secretary of Department of Justice	Attorney General	Attorney General
<b>Dual Criminality required?</b>	Yes	Yes	No	Yes (discretion)
<b>Language</b>	English, in practice	English	English, in practice	English



NAURU	PALAU	PAPUA NEW GUINEA	REPUBLIC OF THE MARSHALL ISLANDS	SOLOMON ISLANDS	VANUATU
Extradition Act 1973	Title 18 <i>Palau National Code and Extradition and Transfer Act 2001</i>	<i>Extradition Act 2005</i>	<i>Criminal Extradition Act</i>	<i>Extradition Act 2010</i>	<i>Extradition Act 2002</i>
No	No	No	Yes	No	No
Yes, but not in practice	No	No	No	Uncertain	Yes, but not in practice
Minister of Justice	Ministry of Justice	Department of Justice and Attorney General	Attorney General	Ministry of Justice	Attorney General
Yes	Yes	Yes	No	Yes	Yes
Yes	Discretion	Discretion	Yes	Discretion	Discretion

NAURU	PALAU	PAPUA NEW GUINEA	REPUBLIC OF THE MARSHALL ISLANDS	SOLOMON ISLANDS	VANUATU
<i>Mutual Assistance in Criminal Matters Act 2004</i>	Chapter 13 of Title 18, <i>Mutual Assistance in Criminal Matters</i>	<i>Mutual Assistance in Criminal Matters Act 2005 and Proceeds of Crime Act 2005</i>	<i>Mutual Assistance in Criminal Matters Act and Criminal Code</i>	<i>Mutual Assistance in Criminal Matters Act 2002</i>	<i>Mutual Assistance in Criminal Matters Act 2005 and Proceeds of Crime Act 2012</i>
Minister of Justice	Ministry of Justice	Department of Justice and Attorney General	Attorney General	Attorney General	Attorney General
Yes	Yes (discretion)	Yes	Yes (a flexible conduct-based test is used)	Yes	Yes applies to Parts 4 (assistance for search and seizure) and 7 (assistance regarding proceeds of crime) of the <i>Mutual Assistance in Criminal Matters Act 2005</i> , but not to other parts of the Act
English, in practice	English, in practice	English	English, in practice	English	English







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